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## SUBJECT INDEX

Sikkim was one of the least industrially developed States in India. 100% exemption of both income tax as well as excise duty is a definite attractive fiscal incentive strategy which would lure investors to set up units in Sikkim without which, considering the under development of industries and the geographical terrain of the region, industrialist may not find feasible to invest in. Having thus declared such attractive incentives and lured the Petitioner to invest in Sikkim any alteration in the incentive package to the detriment of the investor would definitely attract the doctrine of promissory estoppel. The Respondent No. 1 cannot be allowed the unconscionable departure from the subject matter of the assumptions which has, as seen hereinabove, been adopted by the Petitioner as the basis of the course of conduct which would affect the Petitioner adversely.

***Sun Pharma Laboratories Ltd.* v. *The Union of India and Others* 641-B**

**Central Excise Act, 1944 – Public Interest –** The impugned Notification No. 20/2008 was a notification amending the original Notification No. 20/ 2007 issued in public interest granting exemption of payment of excise duty. In such situation it was incumbent upon the Respondent No.1 to have shown larger public interest for curtailing/modifying/withdrawing exemption so granted – In the present cases, as we have seen earlier, a definite scheme of incentives for new industries was put forward vide Industrial Policy, 2007 which held out a promise by the Respondent No.1 for 100% excise duty exemption so that more and more industries could be attracted to State of Sikkim. The Respondent No.1 translated the said promise declared vide Industrial Policy, 2007 into Notification No. 20/2007 for the obvious reason that thereby more and more new industries would be attracted to the North East Region including Sikkim – The Petitioner's subsequent investments were obviously intended to reap the benefit of the said Notification No.20/ 2007. The Petitioner having commenced commercial production on and from 20.04.2009 for the first unit and from 14.04.2014 for the second unit were well within the period notified therein. The policy of the Respondent No.1 was clear and cogent. It was intended to draw investors to Sikkim which was industrially backward. Having acted on the said promise made by the Respondent No.1, the Petitioner made huge investments and altered its position to its detriment. Having issued the said Notification No.20/2007 in public interest it was incumbent upon the Respondent No.1 to place before this Court all materials available to establish a superior public interest which the Respondent No.1 has failed to do. The facts and circumstances of the present writ petitions, therefore, squarely falls within the parameters of the doctrine of promissory estoppel and that it would be unconscionable on the

part of the Respondent No.1 to shy away from it without fulfilling its promise. The relief that must, therefore be granted on the facts of the present case is that for the period declared vide Notification No.20/2007, the Petitioner would be entitled to the excise duty exemption as promised therein. Consequently impugned Notification Nos.20/2008 and 38/2008 are liable to be quashed to the extent they curtail and whittle down the 100% excise duty exemption benefit as promised vide Notification No.20/2007 and is hereby quashed. All impugned orders/ demand notices/show cause notices which are against the aforestated declarations of law are also quashed.

***Sun Pharma Laboratories Ltd.* v. *The Union of India and Others* 641-C**

**Code of Civil Procedure, 1908 – S. 10** – The key words in S. 10 are *"the matter in issue is also directly or substantially in issue in a previous instituted suit"*. The words 'directly or 'substantially' in issue are used in contradiction to the words 'instantly' or 'collaterally' in issue. Therefore, S. 10 would apply only after there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.

***Shri Pawan Kumar Todi* v. *Shri Ankit Sarda* 628-B**

**Code of Civil Procedure, 1908 – S. 115 – Revision –** A petition under S. 115 would be maintainable only if the order in favour of the party applying for revision would have given finality to a suit or other proceeding.

***Md. Shahid and Others* v. *Mrs. Marium Iqbal and Others* 601-A**

**Code of Civil Procedure, 1908 – Order VII Rule 14 –** When a suit is filed, the Plaintiff is required to furnish the list of documents on which he places reliance. It is not necessary that the documents are also to be filed at this stage, a list of such documents will suffice. The documents which are relied on by the parties are to be produced at the first hearing of the suit as required under Order XIII.

***Shri Pawan Kumar Todi* v. *Shri Ankit Sarda* 628-C**

**Code of Civil Procedure, 1908 – Order XVIII Rule 17 –** Previously, the Code had a specific provision in Order XVIII Rule 7 A for production of evidence which was previously unknown or for evidence which could not be produced despite due diligence. The provision enabled the Court to permit a party to produce any evidence even after the conclusion of evidence, if the aforesaid conditions were fulfilled and the Court stood satisfied. This provision was however deleted from 01.07.2002, nevertheless

such an exclusion does not now prevent the Court from receiving evidence or recalling any witness who has been examined, if such requirement exists and the Court thinks fit. Besides the above provision, S. 151 of the CPC which has also been invoked by the petitioners envisages that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This, provision empowers the Court to make orders *ex debito justitiae* – Technicality should not come in the way of meting out even handed justice. Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. In other words, technicalities should not draw a veil on achieving the ends of justice.

***Md. Shahid and Others* v. *Mrs. Marium Iqbal and Others*** ***601-C***

**Code of Criminal Procedure, 1973 – S. 164 – Oaths Act, 1969 – S. 6 –** The confessional statement of the appellant reflects that the ld. Judicial Magistrate had recorded on top of the said document that the statement is recorded on oath under S. 164 of the Code of Civil procedure, 1973 -the schedule of the Oaths Act, 1969 provides for four different forms of administering oath or affirmation- the "confessional statement" does not reflect compliance of Section 6 of the Oaths Act, 1969 read with the schedule – the testimony of the Judicial Magistrate also does not reflect that there was compliance of Section 6 of the Oaths Act, 1969 read with the schedule- Held, it must be taken as a the statement of the Judicial Magistrate while doing a judicial act and therefore true and correct – there is no requirement under Section 164 Cr.P.C to record a "confessional statement" under oath – it is prohibited.

***Sanjay Subba* v. *State of Sikkim*** ***724-G***

**Criminal Trial – Confessional Statement –** Confession has either to be an expressed acknowledgment of guilt of the offence charged or it must admit substantially all the facts which constitute the offence.

***Sanjay Subba* v. *State of Sikkim*** ***724-E***

**Constitution of India – Articles 226 and 227 –** Whether Article 226 and Article 227 of the Constitution can be invoked together to challenge an Order of a Civil Court rejecting a petition for recalling of witness – It needs no reiteration that Article 226 of the Constitution deals with the power of the High Court to issue certain writs, while Article 227 deals with the power of the High Court of superintendence over all Courts within its jurisdiction – It has been clearly laid down by the Supreme Court that an Order of a Civil

Court could be challenged under Article 227 of the Constitution but not under Article 226 of the Constitution – In view of the above stated judicial pronouncement that presently rules, it is evident that while seeking revision of any Orders of the Learned Trial Court, the party if so advised is required to approach the High Court under Article 227 of the Constitution and not under Article 226, as it is now crystal clear that Orders of a Civil Courtare not amenable to a writ jurisdiction under Article 226 of the Constitution of India – Henceforth, all petitions that seek to invoke such a jurisdiction shall be expected to be filed under Article 227 of the Constitution of India, unless the conditions as laid down in S. 115, C.P.C stand fulfilled, in which case the petition would obviously lie under the said provision.
***Md. Shahid and Others* v. *Mrs. Marium Iqbal and Others*** ***601-B***

**Constitution of India – Articles 226 and 227 – Scope and Ambit –** Challenge to judicial orders could lie by way of appeal or revision or under Article 227 of the Constitution but not by way of a Writ under Article 226 – A party can approach this Court under Article 227 of the Constitution to invoke its supervisory jurisdiction.
***Shri Pawan Kumar Todi* v. *Shri Ankit Sarda*** ***628-A***

**Criminal Appeal – Power of First Appellate Court –** Appellate Court while, hearing an appeal against conviction must consider the factual aspects of the case – The power of the Appellate Court while dealing with conviction is the same as power of the Appellate Court while dealing with an appeal against acquittal – The appeal against conviction is as of right – The procedure to deal with appeal against conviction and appeal against acquittal is identical and the power of Appellate Court, in essence is the same.
***Sanjay Subba* v. *State of Sikkim*** ***724-A***

**Criminal Trial – Additional Grounds of Plea –** Appellant had raised the plea of private defence during the hearing of the appeal. Since, the memo of appeal filed by the Appellant did not contain any grounds the Appellant had filed an application urging additional grounds – Held, the Appellant had during the investigation of the case as well as during the trial raised the plea of private defence the application filed by the Appellant to urge the ground of private defence is permitted.
***Sanjay Subba* v. *State of Sikkim*** ***724-I***

**Criminal trial – Burden of Proof –** It is the cardinal principal of criminal jurisprudence that the burden of proof always rests on the prosecution to establish the guilt of the accused beyond all reasonable doubt to enable the

Court to come to a conclusion that it was the accused and the accused alone who was guilty of the crime alleged.
***Sanjay Subba* v. *State of Sikkim*** ***727-D***

**Criminal trial – Proportionality Rule –** If the evidence were to end only in examination-in-chief of the solitary eye witness, the 'Proportionality Rule' would come in the way of the appellant "for every assault it is not reasonable a man should be banged with a cudgel" **–** However, in the cross examination, the eye witness would admit that when the deceased abused the accused, the accused got angry and in the fit of anger the Appellant assaulted the deceased at once. The witness also admitted that during the scuffle the assault on the head of the deceased by the half burnt firewood was accidental and unintentional – Held, considering the evidence of the eye witness in cross examination it would be justifiable agreement that a singular blow with a half burnt firewood weighing just about 500 gms on the body would not violate the 'Proportionality Rule' as embodied in S. 99 IPC. 1860.
***Sanjay Subba* v. *State of Sikkim*** ***724-M***

**Criminal Trial – Prosecution Witness – Declaring Wostile Witness –** When solitary prosecution eye witness admitted to the suggestion of the defense that the assault on the head of the deceased was unintentional and accidental it was incumbent upon the prosecution to declare the witness hostile and cross examine the said witness to extract the truth – The failure of the prosecution to declare the witness hostile will definitely permit the Appellant to rely upon the evidence of the witness in cross examination in his favour.
***Sanjay Subba* v. *State of Sikkim*** ***724-B***

**Criminal trial – Weapon of Offence –** The Doctor who conducted the autopsy, not being shown the half burnt firewood i.e. the alleged weapon of offence, the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused was not fulfilled – The evidence of the sole eye witness clearly proves that the appellant had stuck the deceased on the head but there is no evidence to suggest that the multiple injuries sustained by the deceased was caused by single strike **–** Held, consequently the benefit must accrue in favour of the Appellant.
***Sanjay Subba* v. *State of Sikkim*** ***724-F***

**Indian Evidence Act, 1872 – S. 134 – Sole Testimony of Single Witness-** As a general rule it is no doubt that the court can act on the testimony of a solitary witness provided she is wholly reliable – There cannot be any legal impairment in convicting a person on the sole testimony of a single witness as clear from S. 134 of the Evidence Act, 1872.
***Sanjay Subba* v. *State of Sikkim*** ***724-C***

**Indian Penal Code, 1860 – S. 99 –** The right of private defence is subject to the limitations and exceptions provided in S. 99 IPC, 1860 – The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of private defence of the body – There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.
***Sanjay Subba* v. *State of Sikkim*** ***724-K***

**Indian Penal Code, 1860 – S. 100**

**i)Right of private defence –** It is not an offence if the act is done in the exercise of the right of private defence **–** Every person has a right to defend his own body, and also the body of any other person, against any offence affecting the human body – Every person also has the right, to defend the property; whether moveable or immovable, of himself or any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal tresspass or which is an attempt to commit theft, robbery, mischief or criminal tresspass.

**ii) Defenders right to private defence –** Under S. 98 IPC, 1860 even when an act, which would otherwise be a certain offence, is not an offence, by reason of intoxication of the person doing the act, likewise every person has the same right of private defence against that act which he would have if the act were that offence **–** Even though the aggressor against whom the right of private defence has been exercised is not liable for any punishment by reason of his personal incapacity to commit the crime or because he acts without the necessary *mens rea,* the defenders right to private defence is not affected thereby.

**iii) Extent of right of private defence –** The right of private defence of the body in view of S. 100, IPC, 1860 extends to the voluntary causing of death or of any harm to the assailant, if the offence which occasions the exercise of the right be of any of the description as enumerated in the seven clause of S. 100 IPC, 1860 **–** The apprehension that the assault would

cause grievous hurt would give a legitimate right of private defence of the body would extend to causing death.
***Sanjay Subba* v. *State of Sikkim*** ***724-J***

**Indian Penal Code, 1860 – S. 102 –** S. 102 fixes the time when the right of private defence of the body commences and the time during which it continues – The right of private defence commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.
***Sanjay Subba* v. *State of Sikkim*** ***724-L***

**Indian Penal Code, 1860 – S. 304 – Culpable Homicide not amounting to Murder –** To fall within the definition of S. 304 IPC the accused must be shown to have committed culpable homicide not amounting to murder.
***Sanjay Subba* v. *State of Sikkim*** ***724-H***

**Industrial Policy, 2007** – The crucial question which must necessarily be answered is whether the Petitioner has been able to establish that the Respondents had vide the Industrial Policy, 2007 and Notification No. 20/2007 made a promise, which the Petitioner had acted upon putting itself in a detrimental position which would compel the Respondent No.1 to make good the promise – When the Petitioner thus started its investment in the year 2005 the incentive scenario in Sikkim was that under the previous regime Notification No. 56/2003 by which the Industrial Policy, 2003 was operationalized had been amended vide impugned Notification No.27/2004 by making it clear that only those new industrial units which have commenced commercial production on or after 23.12.2002 but not later than 31.03.2007 would be entitled to the exemption – Petitioner started its commercial production on and from 20.04.2009 for its first unit. However, the intention of the Respondent No.1 to offer central excise duty exemption was unequivocal. Respondent No. 1 had both knowledge and intention that the said promise would be acted upon – Between the periods 09.07.2004 i.e. the date of issuance of impugned Notification No. 27/2004 till 01.04.2007, the date on which the Industrial Policy, 2007 was declared, the policy continued to be as provided in Notification No. 56/2003 and as amended by impugned Notification No. 27/2004 i.e. that of 100% exemptions from excise duty – Petitioner had made substantial investments between the period of issuance of impugned Notification No. 20/2007 and

the issuance of the impugned Notification No. 20/2008 – It is quite evident that the Petitioner had in fact altered its position and made further huge investments to avail of the promise held out by the Respondent No. 1 to its detriment.

***Sun Pharma Laboratories Ltd.* v. *The Union of India and Others*** ***641-A***

**Limitation Act, 1963 – S. 5 – Protection of Women from Domestic Violence Act, 2005 – S. 29 –** An appeal under S. 29 of the DV Act, 2005 could be preferred within a period of 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. The prescribed period of 30 days for preferring Appeal fixes a lifespan for such legal remedy for the redress of the legal injury – The law of limitation is enshrined in the maxim *interest reipulicae up sit finis litium* (it is for the general welfare that a period be put to litigation). On the expiry of the said period of 30 days, a right would enure in favour of the petitioner who had been successful in the Judgment dated 29.10.2016 passed by the learned Judicial Magistrate, East Sikkim at Gangtok in D.A.V case No. 05/2014 preferred by the respondent against the petitioner. This right enured in favour of the petitioner could not have been taken away by the learned Session Judge without first issuing notice and then hearing the petitioner. It was incumbent upon the learned Session Judge to have issued the notice upon the petitioner to show case as to why the appeal shall not be condoned. It was also incumbent upon the learned Session Judge to have heard the petitioner before passing any order adverse to the petitioner in the application for the condonation of delay. It is a fundamental requirement of the principles of natural justice which is inherent in all judicial proceedings.

***Shri Bal Krishna Dhamala* v. *Smt. Mala Rai*** ***625-A***

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**SLR (2017) SIKKIM 601**

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

**W.P(C). No. 47 of 2016**

**Md. Shahid and Others ….. PETITIONERS**

*Versus*

**Mrs. Marium Iqbal and Others ….. RESPONDENTS**

| | |
|---|---|
| **For the Petitioners :** | Mr. A. K. Moulik, Senior Advocate with Mrs. K. D. Bhutia, Mr. Ranjit Prasad, Advocates. |
| **For Respondent No. 1:** | Mr. Rahul Rathi, Advocate. |
| **For Respondent No. 2:** | None. |
| **For Respondent No. 3:** | Mr. S. K. Chettri, Assistant Government Advocate. |

Date of decision: 9th November 2017

**A. Code of Civil Procedure, 1908 – S. 115 – Revision – A petition under S. 115 would be maintainable only if the order in favour of the party applying for revision would have given finality to a suit or other proceeding.**

(Paras 8, 10, 11 and 13)

**B. Constitution of India – Articles 226 and 227 – Whether Article 226 and Article 227 of the Constitution can be invoked together to challenge an Order of a Civil Court rejecting a petition for recalling of witness – It needs no reiteration that Article 226 of the Constitution deals with the power of the High Court to issue certain writs, while Article 227 deals with the power of the High Court of superintendence over all Courts within its jurisdiction – It has been**

**clearly laid down by the Supreme Court that an Order of a Civil Court could be challenged under Article 227 of the Constitution but not under Article 226 of the Constitution – In view of the above stated judicial pronouncement that presently rules, it is evident that while seeking revision of any Orders of the Learned Trial Court, the party if so advised is required to approach the High Court under Article 227 of the Constitution and not under Article 226, as it is now crystal clear that Orders of a Civil Court are not amenable to a writ jurisdiction under Article 226 of the Constitution of India – Henceforth, all petitions that seek to invoke such a jurisdiction shall be expected to be filed under Article 227 of the Constitution of India, unless the conditions as laid down in S. 115, C.P.C stand fulfilled, in which case the petition would obviously lie under the said provision.**

(Paras 14, 17, 18 and 19)

**C. Code of Civil Procedure, 1908 – Order XVIII Rule 17 – Previously, the Code had a specific provision in Order XVIII Rule 7 A for production of evidence which was previously unknown or for evidence which could not be produced despite due diligence. The provision enabled the Court to permit a party to produce any evidence even after the conclusion of evidence, if the aforesaid conditions were fulfilled and the Court stood satisfied. This provision was however deleted from 01.07.2002, nevertheless such an exclusion does not now prevent the Court from receiving evidence or recalling any witness who has been examined, if such requirement exists and the Court thinks fit. Besides the above provision, S. 151 of the CPC which has also been invoked by the petitioners envisages that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This, provision empowers the Court to make orders *ex debito justitiae* – Technicality should not come in the way of meting out even handed justice. Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. In other words, technicalities should not draw a veil on achieving the ends of justice.**

(Paras 20 and 24)

**D. Indian Evidence Act, 1872 – Ss. 137 and 138 – Nowhere in S.**

**137 it is stated that cross-examination has to be limited only to what has been stated by the Prosecution witness in examination-in-chief. But I hasten to add that this reasoning cannot be utilised routinely, circumspection by the Courts is to be exercised – S. 138 categorically provides that cross-examination need not necessarily be confined to the facts to which the witness testified on his examination-in-chief. True, it is, that, both Sections do not speak specifically of a further round of cross-examination, at the same time, there is no provision in the Evidence Act to bar the party from exercising his right to cross-examination afresh, if the statement of the witness of the opposing party is prejudicial. Of course, it is for the Court to decide this aspect, with the ends of justice in sight – Cross-examination is a powerful tool in the hands of a Counsel, which requires a great deal of experience to hit the nail on the head. It is undoubtedly for the purposes of drawing out the truth latent in the witness for the purposes of reaching the bottom, or the crux of the matter and to enable the Court to reach a decision based on justice, equity and good conscience.**

(Para 26)

**Petition allowed.**

**Chronological list of cases cited:**

1. Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430.

2. Municipal Corporation, Gwalior v. Ramcharan (D) by L.Rs. and Others, AIR 2003 SC 2164.

3. Brij Kishore S. Ghosh v. Jayantilal Maneklal Bhatt and Another, AIR 1989 Gujarat 227.

4. U.K. Ghosh v. M/s. Voltas Ltd. and Another, AIR 1994 Orissa 131.

5. C. T. Muniappan v. The State of Madras, AIR 1961 SC 175.

6. K. K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275.

7. S. Yuvaraj v. State, MANU/TN/2062/2013 : Crl. O.P. No.7142 of 2013 of the Madras High Court.

8. Ram Rati v. Mange Ram (D) through LRs and Others, (2016) 3 Scale 219.

9. Om Prakash v. Vinod Kumar, (2014) 2 RCR (Civil) 603.

10. Nagumothu Sriharinath v. Nagumothu Vani, (1997) 5 ALD 237.

11. Vadiraj Naggappa Vernekar (deceased by L.Rs.) v. Sharad Chand Prabhakar Gogate, AIR 2009 SC 1604.

12. M/s. Bagai Construction Thr. its proprietor Mr. Lalit Bagai v. M/s. Gupta Building Material Store, AIR 2013 SC 1849.

13. Allumalla Kannam Naidu v. Smt. Allumalia Simhachalam, AIR 2003 AP 239.

14. Gayathri v. M. Girish, 2016 (3) RCR (Civil) 942.

15. Mrityunjay Sen v. Shrimati Sikha Sen, AIR 2003 Calcutta 165.

16. Prem Bakshi and Others v. Dharam Dev and Others, (2002) 2 SCC 2 : AIR 2002 SC 559.

17. Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Others, (2003) 6 SCC 659.

18. Umaji Keshao Meshram and Others v. Smt. Radhikabai and Another, AIR 1986 SC 1272.

19. Jagannath Ganbaji Chikkale v. Gulabrao Raghobaji Bobde, (1965) 67 Bom LR 609 : 1965 Mh LJ 426.

20. Surya Dev Rai v. Ram Chander Rai and Others, (2003) 6 SCC 675.

21. Radhey Shyam and Another v. Chhabi Nath and Others, AIR 2015 SC 3269.

22. T. C. Basappa v. T. Nagappa and Another, AIR 1954 SC 440.

23. Election Commission, India v. Saka Venkata Subba Rao, AIR 1953 SC 210.

24. Veerappa Pillai v. Raman and Raman Ltd., AIR 1952 SC 192.

25. Smt. Ujjam Bai v. State of Uttar Pradesh and Another, AIR 1962 SC 1621.

26. Naresh Shridhar Mirajkar and Others v. State of Maharashtra, AIR 1967 SC 1.

27. Rupa Ashok Hurra v. Ashok Hurra and Another, (2002) 4 SCC 388.

28. Ganga Saran v. Civil Judge, Hapur, Ghaziabad and Others, AIR 1991 Allahabad 114.

29. Mahadev Govind Gharge and Others v. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 SCC 321.

30. S. Nagaraj and Others v. State of Karnataka and Another, 1993 Supp (4) SCC 595.

**JUDGMENT**

***Meenakshi Madan Rai, J***

The Order of the Learned Civil Judge, East Sikkim, at Gangtok, dated 20-09-2016, rejecting the prayer of the Petitioners under Order XVIII Rule 17, read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC") and Sections 137, 138 and 145 of the Indian Evidence Act, 1872, in Title Suit No.10 of 2013, Mohd. Shahid and Others vs. Mrs. Marium Iqbal and Others, is being questioned herein.

**2.** The Petitioners aggrieved by the rejection of their Petition under Order XVIII Rule 17 read with Section 151 of the CPC and Sections 137, 138 and 145 of the Indian Evidence Act, 1872 (for short "Evidence Act"), have filed this Petition under Articles 226/227 of the Constitution of India, for issuance of a writ of/or in the nature of mandamus/certiorari and/or any other appropriate writ, orders or directions of like nature.

**3.** The grounds advanced herein are that on 16-08-2016, the date fixed for confirmation of the evidence on affidavit and cross-examination of the Defendants witness, Janab Ibrahim Naik, due to a mis-communication between Learned Assisting Junior Counsel, Mr. Manish Kr. Jain and Learned Senior Counsel, Mr. A. Moulik, for the Petitioners/Plaintiffs (hereinafter "Plaintiffs)", the Learned Senior Counsel was given to understand that no case was fixed in any of the Courts in the East District

of Sikkim, at Gangtok. Consequently, the Senior Counsel proceeded to Gyalshing, West Sikkim, to attend to a Bail hearing before the Sessions Court. Once there, he received information from the Junior Counsel that the aforesaid witness was present in the Court and adjournment was declined. Counsel was permitted to inform the Senior Counsel to be present by 5 p.m. for cross-examination of the witness. The Senior Counsel accordingly reached the Court at Gangtok, at 3.45 p.m. by which time the witness had been cross-examined by the Junior Counsel, on the insistence of the opposing Counsel. It is now the case of the Petitioners that, the cross-examination was conducted by a Counsel inexperienced in such matters. That, during the course of the cross-examination, the witness has brought out various facts and voluntary statements which were not revealed in his "evidenceon-affidavit". Moreover, the statements made by the witness are not correct, as he has inserted new facts, inasmuch as on one hand, the witness claims that the concerned property was „gifted, then contradicts this stand by claiming it was „partitioned, leading to anomalies. Confusion prevailed over the date fixed, leading to unpreparedness exacerbated by the lack of instructions and requisite experience of the Junior Counsel. It is vehemently contended that unless Senior Counsel is allowed to re-cross examine the witness in respect of the new facts brought out by the witness, through his voluntary statements, irreparable loss and prejudice will be caused to the Plaintiffs. That, the Learned Trial Court ought to have allowed the Application filed by the Plaintiffs in order to effectively adjudicate the Suit as the Senior Counsel had been conducting the matter. To fortify his submissions, strength was drawn from **Hoffman Andreas vs. Inspector of Customs, Amritsar[1] ; Municipal Corporation, Gwalior vs. Ramcharan (D) by L.Rs. and Others[2] ; Brij Kishore S. Ghosh vs Jayantilal Maneklal Bhatt and Another[3] ; U.K. Ghosh vs. M/s. Voltas Ltd. and Another[4] ; C. T. Muniappan vs. The State of Madras[5] ; K. K. Velusamy vs. N. Palanisamy[6] and S. Yuvaraj vs. State[7].** It is, therefore, prayed that the impugned Order be set aside and quashed and the Petitioner be allowed to re-cross examine the said witness.

**4.** Resisting the arguments advanced for the Petitioners, Learned Counsel for the Respondent No.1 submitted that, the Petitioners have not

[1] (2000) 10 SCC 430
[2] AIR 2003 SC 2164
[3] AIR 1989 Gujarat 227
[4] AIR 1994 Orissa 131
[5] AIR 1961 SC 175
[6] (2011) 11 SCC 275
[7] MANU/TN/2062/2013 : Crl. O.P. No.7142 of 2013 of the Madras High Court

approached this Court with clean hands. Nowhere in the Application filed before the Learned Civil Judge have they stated that the Learned Counsel cross-examining the witness was not instructed sufficiently and neither was it mentioned that confusion emanated about the date fixed. The incompetence of the Learned Junior Counsel found no mention. That, averments to the effect that the Learned Court below had afforded time to the Counsel to inform the Senior Counsel is untrue. In fact, learned Junior Counsel did not pray for any adjournment, neither did he made any prayers for further cross-examination and/or reexamination. The records would reveal that the authorised Junior Counsel was conducting the matter from its inception, i.e., from 26- 02-2010, and on 21-07-2016, undertaking to personally conduct the case in future even in the Seniors absence. That, the record of cross-examination of the witness indicate that the Junior Counsel had indeed put a specific question in cross-examination on the alleged voluntary statements. The reply being found unsuitable, the Plaintiffs now seek to fill the lacuna by raising the ground of inexperience of the Junior Counsel. That, the Evidence Act envisages no right to further cross-examine or re-cross examine a witness on completion of cross-examination. Thus, allowing the Petition would open a Pandoras box, as parties who replace their Counsel, raising the ground of incompetence of their previous Counsel would seek to re-examine the witnesses, against the principles of natural justice and fair play. The Respondent No.1 fortified his arguments with the ratio in **Ram Rati vs. Mange Ram (D) through LRs and Others[8]; Om Prakash vs. Vinod Kumar[9]; Nagumothu Sriharinath vs. Nagumothu Vani[10]; Vadiraj Naggappa Vernekar (deceased by L.Rs.) vs. Sharad Chand Prabhakar Gogate[11]; M/s. Bagai Construction Thr. its proprietor Mr. Lalit Bagai vs. M/s. Gupta Building Material Store[12]; Allumalla Kannam Naidu vs. Smt. Allumalia Simhachalam[13] and Gayathri vs. M. Girish[14].** It is prayed that the Application filed by the Petitioners be dismissed.

**5.** The opposing submissions of Learned Counsel have been heard at

[8] (2016) 3 Scale 219
[9] (2014) 2 RCR (Civil) 603
[10] (1997) 5 ALD 237
[11] AIR 2009 SC 1604
[12] AIR 2013 SC 1849
[13] AIR 2003 AP 239
[14] 2016 (3) RCR (Civil) 942

length. I have also perused the documents relied on by the Counsel, the impugned Order and the decisions cited at the Bar.

**6.** In order to understand the matter in its correct perspective, we may briefly surf through the relevant facts. The Plaintiffs are the sons and daughters of one Late Mohd. Ibrahim. The Respondent/Defendant No.1 (hereinafter "Defendant No.1") is his daughter-in-law, being the wife of Mohd. Iqbal, son of Mohd. Ibrahim. Respondent/Defendant No.2 (hereinafter "Defendant No.2") is the former wife of Mohd. Shahid, son of Late Mohd. Ibrahim. The parties are Sunni Muslims and governed by the Shariat Law. The home of the Plaintiffs and their parents used to be a hotel at M. G. Marg, named "Green Hotel", in the two self-acquired buildings of their father Mohd. Ibrahim, owned by him. After Mohd. Ibrahims death, the property was looked after by Mohd. Iqbal, and in August 2006, was leased out to the Axis Bank but no partition was effected. On 20-09-2009, the Plaintiff No.1 was handed over a document, purportedly a Partition Deed Agreement, dated 10-02- 1989. The document was alleged to have been executed amongst Mohd. Ibrahim, Mohd. Iqbal and the Defendants No.1 and 2, partitioning the Schedule 'A' property, being a six storied RCC building, measuring 30' x 65' and a five storied RCC building, measuring 20' x 30', of which, the Defendants No.1 and 2 were also allegedly allotted property mentioned in Schedule III and IV of the Plaint, while those in Schedule I and II went to Mohd. Ibrahim and Mohd. Iqbal, respectively. The Plaintiffs contend that the signatures of all the executors to the alleged agreement were not found on the reverse page of the document and although the Register reflects the name of Mohd. Ibrahim as the presenter, but the reverse of the document reveals that it was presented by Mohd. Iqbal. The Plaintiffs, therefore, have reason to believe that the Deed of Partition, dated 10-02-1989, is a false and fabricated document, resulting in the Title Suit before the Learned Trial Court with prayers for cancelling the document allegedly a manufactured one.

**7.** Firstly, I deem it appropriate to consider the maintainability of the Petition filed by the Petitioners invoking the provisions of Articles 226/227 of the Constitution of India for issuance of a writ of/or in the nature of mandamus/ certiorari and/or any other appropriate writ, orders or directions of like nature, while assailing the aforesaid Order of the Learned Trial Court in a Title Suit.

**8.** By the Code of Civil Procedure (Amendment Act) Act 1999 (Act 46 of 1999), Section 115 of the CPC was amended w.e.f. 1.7.2002. We may briefly look at the provisions of Section 115 of the Code of Civil Procedure, as they stood before this amendment and after.

| **Section 115 (before amendment)** | **Section 115 (after amendment)** |
|---|---|
| **"**115. (1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—<br><br>(a) to have exercised a jurisdiction not vested in it by law, or<br><br>(b) to have failed to exercise a jurisdiction so vested, or<br><br>(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:<br><br>Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—<br><br>(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or | **"**115. (1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—<br><br>(a) to have exercised a jurisdiction not vested in it by law, or<br><br>(b) to have failed to exercise a jurisdiction so vested, or<br><br>(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:<br><br>Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. |

| | |
|---|---|
| (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.<br><br>(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.<br><br>Explanation.—In this section, the expression „any case which has been decided includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.**"** | (2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.<br><br>(3) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the High Court.<br><br>Explanation.—In this section, the expression „any case which has been decided includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.**"** |

The above would reveal that following the amendment restrictions have been put in place with regard to revision under Section 115 and the consequent powers of the High Court.

**9.** The Calcutta High Court while dealing with this matter in **Mrityunjay Sen vs. Shrimati Sikha Sen**[15] in Paragraph 32, inter alia, observed as follows;

> **"32.** My reading of the present provisions of Section 115 of the Code of Civil Procedure is that with effect from July 1, 2002, when the amended provisions have come into force, the revisional jurisdiction of the High Court has been materially restricted. In order to invoke the revisional jurisdiction of the High Court, the party concerned is not only to satisfy the High Court that by the order impugned subordinate Court exercised a jurisdiction

[15] AIR 2003 Calcutta 165

not vested in it by law or failed to exercise a jurisdiction vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity, but, also, to satisfy the High Court that if the order had been made in his favour that would have finally disposed of the suit or other proceeding. I am not suggesting for a moment that the interlocutory orders or orders passed in supplemental proceedings cannot be challenged under present Section 115 of the Code. The section does not make any differentiation between the classes of orders, which can be challenged. It only provides that for invoking the revisional jurisdiction of the High Court, the petitioner must satisfy the requirements of the proviso to Section 115. The legislature in its wisdom introduced amendments for imposing restrictions on the powers of revision by the High Court. In view of deletion of Clause (b) from the proviso, which was introduced by 1976 Amendment, the revisional power can be exercised by the High Court only when the order impugned, if had been made in favour of the party applying for revision, would have finally disposed of the suit, or other proceeding. Now by the proposed amendment the legislature suggested that no revision would lie against such orders, which do not finally decided the lis. The High Court can, therefore, revise any order of any Court subordinate to it when it appears to the High Court that the said Court has exceeded jurisdiction vested in it by law or refused to exercise a jurisdiction vested in it by law or acted illegally and with material irregularity in the exercise of the jurisdiction, but in invoking the revisional jurisdiction it is incumbent, as required by the proviso, that the impugned order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding. The legislature consciously deleted the power of the High Court to interfere with any kind of order, which, if allowed to stand, would occasion

> a failure of justice of cause irreparable injury to the party against whom it was made.**"**

**10.** It was thus explained that for invoking the revisional jurisdiction of the High Court, the Petitioner must satisfy the requirement of the proviso to Section 115 of the CPC. Reference was made to the decision of the Honble Supreme Court in the case of **Prem Bakshi and Others vs. Dharam Dev and Others** [16] which while considering the power of the High Court under Section 115 of the CPC, as it stood prior to amendment of 1999, observed as under;

> **"34.** Therefore, it can never be suggested that the High Court can interfere with each and every order passed by a Court subordinate to it only if the requirements of sub-section (1) of Section 115 are satisfied or for ends of justice or to prevent abuse of the process of the Court can refused to look into the proviso to said sub-section (1). I hold that amendment was introduced by the amending Act of 1999 to restrict the power of revision only in respect of cases where the order would have finally disposed of the suit or the proceeding if it had been made in favour of the party applying for revision.**"**

**11.** While discussing the meaning of the expression "other proceeding" referred to in the proviso to Sub-Section (1) of Section 115 of the Code, the Calcutta High Court opined that from a reading of the statute it was never the intention of the makers of the law that by inclusion of the expression "other proceeding" they intended to vest the High Court with the power of revision even in respect of order that may be passed in interlocutory or supplementary proceeding to a suit. It was analysed that by insertion of the expression "other proceeding", the Legislature intended to vest the High Court with the power of revision in respect of order passed in the civil proceedings, which are registered other than the suits. It was thus concluded that, now revisional application will only lie against such final or interlocutory order, which if it had been made in favour of the party applying for revision, would have finally disposed of the suit or the proceeding.

I am in respectful agreement with the above ratiocination.

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[16] (2002) 2 SCC 2 : AIR 2002 SC 559

**12.** In **Shiv Shakti Coop. Housing Society, Nagpur vs. Swaraj Developers and Others**[17]**,** the Honble Supreme Court took up the question of law involving the effect of the amendment to Section 115 of the CPC and discussed in Paragraph 32 as follows;

> **"32.** A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject- matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.**"**

**13.** In view of the above extracted pronouncements, it is evident that a Petition under Article 115 would be maintainable only if the order in favour of the party applying for revision would have given finality to a suit or other proceeding. Obviously, an Application under Order XVIII Rule 17 would not fulfil the required condition of Section 115 of the CPC. It is in this eventuality that the provisions of Articles 226/227 of the Constitution have

[17] (2003) 6 SCC 659

been invoked by the Petitioner.

**14.** It needs no reiteration that Article 226 of the Constitution deals the power of the High Court to issue certain writs, while Article 227 of the Constitution of the Constitution deals with the power of the High Court of superintendence over all Courts within its jurisdiction. Therefore, the question now arises as to whether Article 226 and Article 227 of the Constitution can be invoked together, for matters such as the instant one. In this regard the following decisions bear relevance.

**15.** In **Umaji Keshao Meshram and Others vs. Smt. Radhikabai and Another**[18] **,** a two Judge Bench of the Honble Supreme Court while determining a question **"**Whether an appeal lies under Cl. 15 of the Letters Patent of the Bombay High Court to a Division Bench of two Judges of that High Court from the Judgment of a Single Judge of that High Court in a petition filed under Art.226 or 227 of the Constitution of India?**"**, reference was made to the decision in **Jagannath Ganbaji Chikkale vs. Gulabrao Raghobaji Bobde**[19]**,** wherein it was observed, inter alia, as follows;

> **"99.** ..... Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits

[18] AIR 1986 SC 1272
[19] (1965) 67 Bom LR 609 : 1965 Mh LJ 426

> of their authority and according to law (see State of Gujarat v. Vakhatsinghji Vajesinghji Veghela, AIR. 1968 SC 1481, 1487, 1488 and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand, (AIR 1972 SC 1598)). The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these processes are the same.
>
> (Emphasis supplied)

**16.** In **Surya Dev Rai vs. Ram Chander Rai and Others**[20] a two Judge Bench was presented with a matter in which the Appellant had filed a suit for issuance of permanent preventive injunction, based on his title and possession over the suit property, in the Court of the Civil Judge. He also sought for relief by way of ad interim injunction under Order XXXIX Rules 1 and 2 of the CPC. The prayer was rejected by the Trial Court as also by the Appellate Court. Aggrieved the Appellant approached the High Court under Article 226 of the Constitution, which was summarily dismissed with the observation that the Petition was not maintainable as the Appellant was seeking interim injunction against private respondents. The Supreme Court in Paragraph 24 discussed the difference between Articles 226 and 227 of the Constitution as brought out in **Umaji Keshao Meshram**[19] but went on to observe at Paragraph 25 that the distinction between the two jurisdictions stands almost 'obliterated' in practice. In the end result, the said Judgment allowed the Appeal setting aside the Order of the High Court.

[20] (2003) 6 SCC 675

**17.** Later in time however, contrary to the ratiocination above, in **Radhey Shyam and Another vs. Chhabi Nath and Others**[21] a three Judge Bench had to decide a matter placed before them, in pursuance of an Order of two Honble Judges, to consider the correctness of the Law laid down by the Court in **Surya Dev Rai**[21] **,** that an Order of a Civil Court was amenable to writ jurisdiction under Article 226 of the Constitution. The Honble Supreme Court went on to discuss the decisions in **T. C. Basappa vs. T. Nagappa and Another**[22]**; Election Commission, India vs. Saka Venkata Subba Rao**[23]**; Veerappa Pillai vs. Raman & Raman Ltd.**[24]**; Smt. Ujjam Bai vs. State of Uttar Pradesh and Another**[25] **and Naresh Shridhar Mirajkar and Others vs. State of Maharashtra**[26]**; Rupa Ashok Hurra vs. Ashok Hurra and Another**[27] and a plethora of other decisions and observed that while the above Judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that the challenge to judicial orders could lie by way of Appeal or Revision or under Article 227 of the Constitution but not by way of a writ under Article 226 and Article 32. It also discussed the Judgment dated 06-12-1989 in Civil Appeal No. 815 of 1989 : Qamaruddin vs. Rasul Baksh and Another which had been cited in the Allahabad High Court Judgment in **Ganga Saran vs. Civil Judge, Hapur, Ghaziabad and Others**[28]**,** which considered the issue of writ of certiorari and mandamus against interim order of civil court and held;

> *"If the order of injunction is passed by a competent court having jurisdiction in the matter, it is not permissible for the High Court Under Article 226 of the Constitution to quash the same by issuing a writ of certiorari. In the instant case, the Learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public duty. The dispute involved in the*

[21] AIR 2015 SC 3269
[22] AIR 1954 SC 440
[23] AIR 1953 SC 210
[24] AIR 1952 SC 192
[25] AIR 1962 SC 1621
[26] AIR 1967 SC 1
[27] (2002) 4 SCC 388
[28] AIR 1991 Allahabad 114

> *instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus Under Article 226 of the Constitution. The Learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus. The High Court committed serious error of jurisdiction in interfering with the order of the District Judge."*
>
> *(Emphasis supplied)*

That, it had thus been clearly laid down by the Supreme Court that an Order of a Civil Court could be challenged under Article 227 of the Constitution but not under Article 226 of the Constitution. The Supreme Court went on to observe as follows;

> **"22.** The Bench in Surya Dev Rai also observed in Para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction Under Section 115 Code of Civil Procedure by Act 46 of 1999, jurisdiction of the High Court Under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and Anr. v. Amarnath and Anr.: AIR 1954 SC 215 : Ouseph Mathai v. M. Abdul Khadir: 2002 (1) SCC 319, Shalini Shyam Shetty v. Rajendra Shankar Patil: 2010 (8) SCC 329 and Sameer Suresh Gupta v. Rahul Kumar Agarwal: 2013 (9) SCC 374.

.....

> **23.** Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
>
> **25.** Accordingly, we answer the question referred as follows:
>
> "(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution;
>
> (ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226. Contrary view in Surya Dev Rai is overruled." **"**

**18.** In view of the above stated judicial pronouncement that presently rules, it is evident that while seeking revision of any orders of the Learned Trial Court, the party if so advised is required to approach the High Court under Article 227 of the Constitution and not under Article 226 of the Constitution, as it is now crystal clear that orders of a Civil Court are not amenable to a writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, what would be the fate of this Petition under consideration?

**19.** Having carefully perused the contents of the Petition, I find that in pith and substance, it is a Petition invoking the supervisory jurisdiction of the High Court and consequently for this one time is being considered. Henceforth, all Petitions that seek to invoke such a jurisdiction shall be expected to be filed under Article 227 of the Constitution of India, unless the conditions as laid down in Section 115 stand fulfilled, in which case the petition would obviously lie under the said provision.

**20.** The cloud having been cleared on this aspect, I may now attend to the provisions of Order XVIII Rule 17 of the CPC. For the purpose of

convenience, the said provision is extracted hereinbelow;

> **"17. Court may recall and examine witness.**— The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

It may be recapitulated here that previously the Code had a specific provision in Order XVIII Rule 7 A for production of evidence which was previously unknown or for evidence which could not be produced despite due diligence. The provision enabled the Court to permit a party to produce any evidence even after the conclusion of evidence, if the aforesaid conditions were fulfilled and the Court stood satisfied. This provision was however deleted from 1.7.2002, nevertheless such an exclusion does not now prevent the Court from receiving evidence or recalling any witness who has been examined, if such requirement exists and the Court thinks fit. Besides the above provision, Section 151 of the CPC which has also been invoked by the Petitioners envisages that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This, provision empowers the Court to make orders ex debito justitiae.

**21.** In **K. K. Velusamy**[6] while discussing the provision of Section 151 of the CPC, the Supreme Court relying on a catena of decisions pertaining to the scope of Section 151 of the CPC held that, they were unable to accept the submission of the Respondent therein that Section 151 could not be used for reopening evidence or for recalling witnesses. The Court was of the opinion that Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts, it merely recognises the discretionary power inherent in every Court as a necessary corollary for rendering justice in accordance with law, to do what is „right and undo what is „wrong. In other words, to do all things necessary to secure the ends of

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

**22.** On this line of reasoning, in my considered opinion, we may refer to the decision of the Honble Supreme Court in **Mahadev Govind Gharge and Others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka**[29] where the Supreme Court while considering the provision of Order XL1 Rule 22 of the CPC observed as follows;

> **"29.** Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold. We have already noticed that there is no indefeasible divestment of right of the cross-objector in case of a delay and his rights to file cross-objections are protected even at a belated stage by the discretion vested in the courts. But at the same time, the court cannot lose sight of the fact that the meaning of "ends of justice" essentially refers to justice for all the parties involved in the litigation. It will be unfair to give an interpretation to a provision to vest a party with a right at the cost of the other, particularly, when statutory provisions do not so specifically or even impliedly provide for the same."
>
> (Emphasis supplied)

**23.** On the same lines in **S. Nagaraj and Others vs. State of Karnataka and Another**[30]**,** it was held that;

> **"18.** Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. ....."

[29] (2011) 6 SCC 321
[30] 1993 Supp (4) SCC 595

**24.** In **Rupa Ashok Hurra**[28] it was opined as hereunder;

> **69.** True, due regard shall have to be had as regards opinion of the Court in Ranga Swamy [(1990) 1 SCC 288] but the situation presently centres around that in the event of there being any manifest injustice would the doctrine of ex debito justitiae be said to be having a role to play in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. The second alternative seems to be in consonance with time and the present phase of socio-economic conditions of the society. Manifest injustice is curable in nature rather than incurable and this Court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all. <u>There is no manner of doubt that procedural law/ procedural justice cannot overreach the concept of justice and in the event an order stands out to create manifest injustice, would the same be allowed to remain in silentio so as to affect the parties perpetually or the concept of justice ought to activate the Court to find a way out to resolve the erroneous approach to the problem?</u> ..... In the event there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of ex debito justitiae. The oft-quoted statement of law of Lord Hewart, C.J. in R. v. Sussex Justices, ex p McCarthy [(1924) 1 KB 256 : 1923 All ER Rep 233 : 93 LJKB 129] that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seen to be done, had this doctrine underlined and administered therein."
>
> (Emphasis supplied)

The above extracted pronouncements lend succour to the expectation that technicality should not come in the way of meting out even handed justice.

Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. In other words, technicalities should not draw a veil on achieving the ends of justice.

**25.** Addressing the argument of learned Counsel for the Respondent that Sections 137 and 138 of the Evidence Act do not contemplate recalling the witness, we may briefly walk through the provisions of Sections 137 and 138 of the Evidence Act for clarity.

> **"137. Examination-in-chief.**—The examination of a witness by the party who calls him shall be called his examination-in-chief.
>
> **Cross-examination.**—The examination of a witness by the adverse party shall be called his crossexamination.
>
> **Re-examination.**—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.
>
> **138. Order of examinations.**—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> **Direction of re-examination.**—The reexamination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in reexamination, the adverse party may further crossexamine upon that matter.**"**

**26.** On contemplating on the above provisions, nowhere in Section 137 it is stated that cross-examination has to be limited only to what has been stated by the Prosecution witness in examination-in-chief. But I hasten to

add that this reasoning cannot be utilised routinely, circumspection by the Courts is to be exercised. Section 138 categorically provides that cross-examination need not necessarily be confined to the facts to which the witness testified on his examination-in-chief. True, it is, that, both Sections do not speak specifically of a further round of cross-examination, at the same time, there is no provision in the Evidence Act to bar the party from exercising his right to cross-examination afresh, if the statement of the witness of the opposing party is prejudicial. Of course, it is for the Court to decide this aspect, with the ends of justice in sight. That, having been said, in the instant case, it is not disputed that a Senior Counsel had been engaged to conduct the matter. This is obviously with an eye on his experience. Crossexamination is a powerful tool in the hands of a Counsel, which requires a great deal of experience to hit the nail on the head. It is undoubtedly for the purposes of drawing out the truth latent in the witness for the purposes of reaching the bottom, or the crux of the matter and to enable the Court to reach a decision based on justice, equity and good conscience. In the case at hand, the Petitioner did engage a Senior Counsel to have the advantage of his experience and in the absence of an opportunity for the Senior Counsel to cross-examine the witness on the grounds put forth, it flies in the face of the reasons for his appointment. In my considered opinion, the Learned Trial Court ought to have taken into consideration all these circumstances as also the fact that the Senior Counsel reached the Court premises much before the time afforded by it. There was nothing to be gained by the party by keeping the Senior Counsel at bay on a date fixed, neither would it have benefitted the Senior Counsel. No doubt both the learned Counsel ought to have been vigilant but its absence under no circumstance justifies suffering or prejudice to a party. The statements made by the witness indubitably did not appear in his evidence on affidavit and were of a voluntary nature requiring cross-examination, which could not be effectively met on account of the grounds already discussed.

**27.** In view of the spectrum of discussions that have ensued supra, and the reasons as made out therein, the impugned Order of the learned Trial Court deserves to be and is set aside and quashed, accordingly the Petition is allowed.

**28.** The learned Trial Court shall allow re-cross examination of the Defendants witness, Janab Ibrahim Naik, and complete it within a month from today.

**29.** However, the observations in this Judgment are by no means to be construed as expressions on the merits of the case. The fate of the Suit shall be decided by the Learned Trial Court on merits duly analysing the evidence that surfaces in course of the trial.

**30.** The records of the learned Trial Court be remitted forthwith.

**31.** In the circumstances, no order as to costs.

**SLR (2017) SIKKIM 625**

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

**Crl. Rev. P. No. 04 of 2017**

**Shri Bal Krishna Dhamala ….. PETITIONER/ REVISIONIST**

*Versus*

**Smt. Mala Rai ….. RESPONDENT**

**For the Petitioner :** Mr. Zangpo Sherpa, and Ms. Mon Maya Subba, Advocates.

**For Respondent :** Dr. Doma T. Bhutia and Ms. Sudha Sewa, Legal Aid Counsels.

Date of decision: 9th November 2017

**A. Limitation Act, 1963 – S. 5 – Protection of Women from Domestic Violence Act, 2005 – S. 29 – An appeal under S. 29 of the DV Act, 2005 could be preferred within a period of 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. The prescribed period of 30 days for preferring Appeal fixes a lifespan for such legal remedy for the redress of the legal injury – The law of limitation is enshrined in the maxim *interest reipulicae up sit finis litium* (it is for the general welfare that a period be put to litigation). On the expiry of the said period of 30 days, a right would enure in favour of the petitioner who had been successful in the Judgment dated 29.10.2016 passed by the learned Judicial Magistrate, East Sikkim at Gangtok in D.A.V case No. 05/2014 preferred by the respondent against the petitioner. This right enured in favour of the petitioner could not have been taken away by the learned Session Judge without first issuing notice and then hearing the petitioner. It was incumbent upon the learned Session Judge to have issued the notice upon the petitioner to show case as to why**

**the appeal shall not be condoned. It was also incumbent upon the learned Session Judge to have heard the petitioner before passing any order adverse to the petitioner in the application for the condonation of delay. It is a fundamental requirement of the principles of natural justice which is inherent in all judicial proceedings.**

(Para 5)

**Petition allowed.**

**Chronological list of cases cited:**

1. Martin Burn Ltd. v. Corpn. of Calcutta, AIR 1966 SC 529.

## ORDER

***Bhaskar Raj Pradhan, J***

The present Revision Application impugns the order dated 30.03.2017 in Criminal Appeal No. 03/2017 passed by the learned Session Judge, East Sikkim at Gangtok, by which while issuing notice on the Appeal preferred, the learned Session Judge also disposed of an application filed by the respondent herein under Section 5 of the Limitation Act, 1963 for condonation of delay of 110 days in preferring the Appeal.

**2.** Way back in 1966, the Apex Court in re: **Martin Burn Ltd. v. Corpn. of Calcutta**[1] **,** held that a result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not. The laws of limitation is founded on public policy with the aim of securing peace, to suppress fraud and perjury, to quicken diligence and to prevent oppression. When the statutory period of limitation runs out a right enures in favour of the opposite party.

**3.** Admittedly, while allowing the application for condonation of delay, the learned Session Judge did not hear the petitioner against whom the

[1] AIR 1966 SC 529

Appeal had been preferred by the respondent before the learned Session Court. The petitioner had been relieved of the accusation of domestic violence alleged by the respondent in D.A.V Case No. 05/2014.

**4.** Admittedly again, the notice of the filing of the Appeal was issued only on 01.04.2017, pursuant to which the petitioner herein came to know of the passing of the impugned order dated 30.03.2017.

**5.** Under Section 29 of the Protection of Women from Domestic Violence Act, 2005 an Appeal could be preferred within a period of 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. The prescribed period of 30 days for preferring Appeal fixes a lifespan for such legal remedy for the redress of the legal injury. The law of limitation is enshrined in the maxim interest reipulicae up sit finis litium (it is for the general welfare that a period be put to litigation). On the expiry of the said period of 30 days a right would enure in favour of the petitioner who had been successful in the Judgment dated 29.10.2016 passed by the learned Judicial Magistrate, East Sikkim at Gangtok in D.A.V case No. 05/ 2014 preferred by the respondent against the petitioner. This right enured in favour of the petitioner could not have been taken away by the learned Session Judge without first issuing notice and then hearing the petitioner. It was incumbent upon the learned Session Judge to have issued the notice upon the petitioner to show case as to why the appeal shall not be condoned. It was also incumbent upon the learned Session Judge to have heard the petitioner before passing any order adverse to the petitioner in the application for the condonation of delay. It is a fundamental requirement of the principles of natural justice which is inherent in all judicial proceedings.

**6.** On this short point, the impugned order dated 30.03.2017 is set aside.

**7.** The application for condonation of delay filed by the respondent is restored in the file of the learned Session Court.

**8.** The learned Session Judge is directed to hear the said application for condonation of delay after due notice to the petitioner herein and on which date or dates the sufficiency of the explanation to the delay for preferring the appeal would be decided afresh, after hearing the parties.

**9.** The present revision application is disposed of accordingly.

**SLR (2017) SIKKIM 628**

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

**W.P (C) No. 20 of 2017**
**and**
**W.P (C) No. 21 of 2017**

**Shri Pawan Kumar Todi** **….. PETITIONER**

*Versus*

**Shri Ankit Sarda** **….. RESPONDENT**

**For the Petitioner :** Mr. Sudesh Joshi, Mrs. Manita Pradhan and Mr. Sujan Sunwar, Advocates.

**For Respondent :** Mr. Jorgay Namka, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates.

Date of decision: 13th November 2017

**A. Constitution of India – Articles 226 and 227 – Scope and ambit – Challenge to judicial orders could lie by way of appeal or revision or under Article 227 of the Constitution but not by way of a Writ under Article 226 – A party can approach this Court under Article 227 of the Constitution to invoke its supervisory jurisdiction.**

(Paras 7, 8 and 9)

**B. Code of Civil Procedure, 1908 – S. 10 – The key words in S. 10 are "*the matter in issue is also directly or substantially in issue in a previous instituted suit*". The words 'directly or 'substantially' in issue are used in contradiction to the words 'instantly' or 'collaterally' in issue. Therefore, S. 10 would apply only after there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.**

(Paras 10 and 11)

**C. Code of Civil Procedure, 1908 – Order VII Rule 14 – When a suit is filed, the Plaintiff is required to furnish the list of documents on which he places reliance. It is not necessary that the documents are also to be filed at this stage, a list of such documents will suffice. The documents which are relied on by the parties are to be produced at the first hearing of the suit as required under Order XIII.**

(Para 15)

**Petition dismissed.**

**Chronological list of cases cited:**

1. National Institute of Mental Health and Neuro Sciences v. C. Parameshwara, (2005) 2 SCC 256.

2. Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527.

3. Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd., AIR 1998 SC 1952.

4. Aspi Jal and Another v. Khushroo Rustom Dadyburjor, AIR 2003 SC 1712.

5. National Institute of Mental Health and Neuro Sciences v. C. Parameshwara, AIR 2005 SC 242.

6. Radhey Shyam and Another v. Chhabi Nath and Others, AIR 2015 SC 3269.

7. Umaji Keshao Meshram and Others v. Smt. Radhikabai and Another, AIR 1986 SC 1272.

8. Jagannath Ganbaji Chikkale v. Gulabrao Raghobaji Bobde, (1965) 67 Bom LR 609, 1965 Mh LJ 426.

9. Surya Dev Rai v. Ram Chander Rai and Others, (2003) 6 SCC 675.

10. Ganga Saran v. Civil Judge, Hapur, Ghaziabad and Others, AIR 1991 Allahabad 114.

11. Pukhraj D. Jain and Others v. G. Gopalakrishna, AIR 2004 SC 3504.

## JUDGMENT

***Meenakshi Madan Rai, J***

**1.** WP(C) No.20 of 2017 and WP(C) No.21 of 2017 filed under Article 227 of the Constitution of India, are being disposed of by this common Judgment. They arise out of the impugned Orders of the learned District Judge, East Sikkim at Gangtok, dated 05-12- 2016, in Money Suit No.10 of 2015 [Mr. Ankit Sarda vs. Pawan Kumar Todi and Order dated 05-12-2016 passed in Money Suit No.9 of 2015 [Mr. Ankit Sarda vs. Pawan Kumar Todi (HUF)], respectively.

**2.** The Petitioner's case, in WP(C) No.21 of 2017, is that, he had filed a Suit for recovery of money against the Respondent, before the Learned 7 th Bench of the City Civil Court, at Kolkata, on 16-04-2015, being Money Suit No.220 of 2015. The facts enumerated therein were that sometime in November 2012, the Respondent had approached the Petitioner to be a franchisee of the Petitioner's Company, in Siliguri, West Bengal. On the basis of the agreed terms, the Respondent advanced some money to the Petitioner, who in turn supplied some computers, servers and peripherals worth Rs.9,75,000/- (Rupees nine lakhs and seventyfive thousand) only, to the Respondent at the Respondent's Siliguri Office, which however closed down after a few months. Therefore, the Petitioner sought recovery of Rs.1,03,026/- (Rupees one lakh, three thousand and twenty six) only, being the difference in the value of goods supplied and the advance made by the Respondent. Instead, two and half months' later, the Respondent filed a Money Suit against the Petitioner, being Money Suit No.09 of 2015, in the Court of the Learned District Judge, East Sikkim, at Gangtok, on 06-07-2015 seeking recovery of a sum of Rs.10,11,044/- (Rupees ten lakhs, eleven thousand and forty-four) only, from the Petitioner.

**3.** In WP(C) No. 20 of 2017, it was averred that the supply of computers and peripherals by the Petitioner to the Respondent amounted to Rs.20,40,000/- (Rupees twenty lakhs and forty thousand) only, hence the Petitioner sought recovery of an amount of Rs.94,200/- (Rupees ninety-four

thousand and two hundred) only, from the Respondent as the difference between the supplies and the money advanced by the Respondent. The Respondent for this part filed Money Suit No. 10/2015 in the Court of the learned District Judge, East Sikkim, on 6-7-2015, seeking recovery of an amount of Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four thousand, nine-hundred and fourteen) only, from the Petitioner herein alleging that he had advanced loan to the Petitioner.

**4.** In both matters, the Petitioner filed an Application each under Section 10 of the Code of Civil Procedure, 1908 (for short "CPC"), on 04-11-2015 before the learned Court at Gangtok, seeking stay of both the above proceedings, as according to him the Civil Suits filed by him in Kolkata were prior in time to those filed by the Respondent in Gangtok. That, the subject matters in the City Civil Court, at Kolkata and the issues in the suits filed by the Respondent before the Gangtok Court are directly and substantially the same. That, the Learned Trial Court had directed the Petitioner to furnish a certified copy of the Plaint filed by him in Kolkata and fixed 05-12-2016 for orders. However, the required documents were delayed, prompting the Court to reject the Petitioner's Applications, inter alia, with the reasoning that if the parties in the instant case and the case before the VIIth Bench of the City Civil Court, at Kolkata were the same, it did not tantamount to the claim of the parties being in respect of the same transaction. It is contended herein that the provisions of Section 10 of the CPC are mandatory and that if the matter in issue is directly and substantially the same in the previous and latter suit, between the same parties, then the later suit must be stayed. Learned Counsel garnered succour from the decisions in **National Institute of Mental Health and Neuro Sciences v. C. Parameshwara**[1] and **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal**[2]. Being thus aggrieved, the Petitioner is before this Court.

**5.** Rebutting the arguments of the Petitioner, Learned Counsel for the Respondent, contended that merely on the allegation of the Petitioner that he has filed civil suits in the Court in Kolkata, the proceedings in the Court at Gangtok cannot be stayed as the Respondent is yet to receive the summons and to know the cause of action. That, there have to be cogent grounds for such an order which the learned Trial Court can issue after analysing the material before it. That, the Petitioner was unable to furnish any documents

[1] (2005) 2 SCC 256
[2] AIR 1962 SC 527

before the Learned Trial Court within the time stipulated and should not now be heard to cry foul. Moreover, the amount claimed by the Respondent, as the Plaintiffs in Money Suit No.09 of 2015, is Rs.10,11,044/- (Rupees ten lakhs, eleven thousand and forty four), only, whereas the recovery sought by the Petitioner in his Money Suit, is Rs.1,03,026/- (Rupees one lakh and three thousand and twenty-six) only, and in Money Suit No. 10 of 2015, it is Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four thousand, nine hundred and fourteen) only, as against the claim of Rs.94,200/- (Rupees ninety-four thousand and two hundred) only, of the Plaintiff. The disparity in the amounts would adequately indicate that it does not pertain to the same transaction.

In order to buttress his submissions, strength was drawn from the decisions in **Indian Bank vs. Maharashtra State Co-operative Marketing Federation Ltd.[3], Aspi Jal and Anr. vs. Khushroo Rustom Dadyburjor[4], National Institute of Mental Health and Neuro Sciences v. C. Parameshwara[5].** It was further advanced that Orders of a Civil Court are not amenable to a Writ Jurisdiction as clearly held in **Radhey Shyam and Another vs. Chhabi Nath and Others[6]**, hence the instant Petition deserves dismissal on this count alone. That, no illegality arises in the Order of the Learned District Judge and hence, the instant Petition be dismissed.

**6.** Careful and anxious consideration has been given to the submissions made at the Bar, the documents which Learned Counsel have walked this Court through during the hearing have also been carefully perused and considered, so also the citations relied on and the impugned Order.

**7.** Prior to embarking on a discussion on Section 10 of the CPC, I deem it fit to address the argument of learned Counsel for the Respondent, who while relying on the exposition in **Radhey Shyam (supra),** contended that orders of the Civil Court are not amenable to Writ Jurisdiction. I am afraid reliance on this Judgment is entirely misplaced for the reasons enumerated herein. In **Umaji Keshao Meshram and Others vs. Smt. Radhikabai and Another[7]**, while discussing the scope and ambit of Article 226 and Article 227 of the Constitution of India, referring to the decision in

[3] AIR 1998 SC 1952
[4] AIR 2003 SC 1712
[5] AIR 2005 SC 242
[6] AIR 2015 SC 3269
[7] AIR 1986 SC 1272

**Jagannath Ganbaji Chikkale vs. Gulabrao Raghobaji Bobde**[8], the Hon'ble Supreme Court observed as follows;

> **"99.** ..... Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see State of Gujarat v. Vakhatsinghji Vajesinghji Veghela, AIR. 1968 SC 1481, 1487, 1488 and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand, (AIR 1972 SC 1598)). The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to

[8] (1965) 67 Bom LR 609 : 1965 Mh LJ 426

> issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these processes are the same.
>
> (Emphasis supplied)

**8.** On the same point of Law, in **Surya Dev Rai vs. Ram Chander Rai and Others**[9], the Hon'ble Supreme Court, contrary to the observation in Umaji Keshao Meshram, went on to observe at Paragraph 25, that the distinction between Article 226 and Article 227 of the Constitution of India, stands almost – obliterated in practice and allowed the Appeal setting aside the order of the High Court which had summarily rejected the Appeal with the observation that the petition was not maintainable under Article 226 of the Constitution as the appellant was seeking interim injunction against private respondents. Following this, in **Radhey Shyam** (supra), a three Judge Bench had to consider the correctness of the Law laid down in Surya Dev Rai (supra) in pursuance of an order of a two Judge Bench, that an order of a Civil Court was amenable to Writ Jurisdiction under Article 226 of the Constitution. Ruling to the contrary, in **Radhey Shyam** (supra), it was held that the challenge to judicial orders could lie by way of appeal or revision or under Article 227 of the Constitution but not by way of a Writ under Article 226 and Article 32 of the Constitution. It also discussed the Judgment dated 06-12-1989 in Civil Appeal No. 815 of 1989 : Qamaruddin vs. Rasul Baksh and Another which had been cited in the Allahabad High Court Judgment in **Ganga Saran vs. Civil Judge, Hapur, Ghaziabad and Others**[10], which considered the issue of writ of certiorari and mandamus against interim order of civil court and held;

> "If the order of injunction is passed by a competent court having jurisdiction in the matter, it is not permissible for the High Court Under Article 226 of the Constitution to quash the same by issuing a writ of certiorari. In the instant case, the Learned Single

[9] (2003) 6 SCC 675
[10] AIR 1991 Allahabad 114

Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus Under Article 226 of the Constitution. The Learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus. The High Court committed serious error of jurisdiction in interfering with the order of the District Judge."

(Emphasis supplied)

**9.** It was further observed as herein below;

**"22.** The Bench in Surya Dev Rai also observed in Para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction Under Section 115 Code of Civil Procedure by Act 46 of 1999, jurisdiction of the High Court Under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and Anr. v. Amarnath and Anr.: AIR 1954 SC 215 : Ouseph Mathai v. M. Abdul Khadir: 2002 (1) SCC 319, Shalini Shyam Shetty v. Rajendra Shankar Patil: 2010 (8) SCC 329 and Sameer Suresh Gupta v. Rahul

Kumar Agarwal: 2013 (9) SCC 374. .

.....

**23.** Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

.....

**25.** Accordingly, we answer the question referred as follows:

"(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution;

(ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226. Contrary view in Surya Dev Rai is overruled."

Thus, it was for the reasons elucidated, supra that the Judgment of **Radhey Shyam** (supra), held that judgments of Civil Court are not amenable to Writ Jurisdiction under Article 226 of the Constitution. But a party can therefore approach this Court under Article 227 of the Constitution to invoke its supervisory jurisdiction and the Petitions have indeed correctly been filed under this provision.

**10.** I now proceed to address the issue at hand, for which for the sake of convenience Section 10 of the CPC is reproduced below.

**"10. Stay of suit.**—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is

> pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
>
> Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

**11.** Both parties have referred to **National Institute of Mental Health** (supra). The said Judgment lays down that the fundamental test to attract Section 10 is, whether on a final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. That, Section 10 of the CPC applies only in cases where the whole or the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is also directly or substantially in issue in a previous instituted suit". The words 'directly' or 'substantially' in issue are used in contradiction to the words 'instantly' or 'collaterally' in issue. Therefore, Section 10 would apply only after there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.

**12.** In **Pukhraj D. Jain & Ors. Vs. G. Gopalakrishna**[11]**,** relied on by learned Counsel for the Respondent, while discussing the parameters of Section 10, the Hon'ble Supreme Court opined that it is not for a litigant to dictate to the Court as to how the proceedings should be conducted and that it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. That, in a given case, the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassments of parties. In **Aspi Jal and Anr.** (supra), the Plaintiffs and defendants were identical in three civil suits filed thus;

> (1) For eviction of the defendants on grounds of bona fide occupation, (2) Suit between the same parties for eviction on grounds of non user for civil orders before institution of suits and (3) For eviction

[11] AIR 2004 SC 3504

on grounds of non user for a continuous period of not less than 6 months.

The Hon'ble Supreme Court held that many of the matters in issue are common in the suits including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises but for application of Section 10 of the CPC, the entire subject matter of the two suits must be the same. That, the said provisions will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is the same.

**13.** In **Manohar Lal Chopra** (supra), the Hon'ble Supreme Court held that where a party claims interference of the Court to stop another action between the same parties, it lies upon him to show to the Court that the multiplicity of actions is vexatious and the whole burden of proof lies upon him. It was also held that the provisions of the Section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceedings with the trial of a suit in certain specific circumstances.

**14.** On the cornerstone of the aforesaid judicial pronouncements, it would now be relevant for this Court to look into whether the matter in issue filed by the Petitioner and the Respondent in different periods of time are "directly" and "substantially" the same.

**15.** Before proceeding on the aforestated point, we may briefly surf through the provisions of Order VII Rule 14 of the CPC, which are extracted below;

> **"14. Production of document on which plaintiff sues or relies.**—(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.
>
> (2) Where any such document is not in the possession or power of the plaintiff, he shall,

> wherever possible, state in whose possession or power it is.
>
> (3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.
>
> (4) ……"

Thus, this Rule makes it clear that when a suit is filed, the Plaintiff is required to furnish the list of documents on which he places reliance. It is not necessary that the documents are also to be filed at this stage, a list of such documents will suffice. The documents which are relied on by the parties are to be produced at the first hearing of the suit as required under Order XIII. It would be apposite to produce the relevant provision of Order XIII Rule 1 of the CPC.

> **"1. Original documents to be produced at or before the settlement of issues.**—(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.**"**

On reading and understanding the provisions extracted hereinabove the specific requirements of Law pertaining to documents have been made out succinctly and require no further elucidation.

**16.** A meticulous examination of the documents on record would reveal that, firstly no list accompanies the Plaint of the Petitioner filed in Kolkata, nor were such documents pointed out by the Counsel for the Petitioner to establish the similarity of the issues involved in the suits at Kolkata and Gangtok. The suit filed by the Petitioner is for recovery of a sum of Rs.94,200/- (Rupees ninetyfour thousand and two hundred) only, and Rs.1,03,026/- (Rupees one lakh, three thousand and twenty-six) only. To the contrary, the Money Suits of the Respondent before the Learned District Court, at Gangtok, is for recovery of a sum of Rs.10,11,044/- (Rupees ten

lakhs, eleven thousand and forty-four) only, and Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four thousand, nine-hundred and fourteen) only. Thus, clearly there is a disparity in the amounts and as correctly observed by the Learned Trial Court, it does not mean that merely because the parties are the same the cause of action too is identical. Consequently, had the Petitioner filed his list of documents, it would have assisted the Courts to arrive at a finding as to whether the issues were the same in the matters before the aforementioned two Courts, directly and substantially, this is not the case.

**17.** Admittedly, Notice has not been received by the Respondent in connection with the suits filed by the Petitioner in the Court at Kolkata, to gauge the cause of action. In the absence of formal intimation or knowledge of the filing of the suits, can we hold the Suits of the Respondent to be harassive? In my considered opinion the response would undoubtedly be in the negative. Having said that, I reiterate that sans any document furnished for perusal of the learned Trial Court in Gangtok, it is well nigh impossible to arrive at a finding as to whether the issues involved in the Money Suits filed by the Respondent before the District Judge at Gangtok and that filed by the Petitioner in the City Civil Court at Kolkata involve issues directly and substantially identical.

**18.** In conclusion therefore, I find no infirmity in the finding and Order of the Learned District Judge, East Sikkim, at Gangtok, which accordingly sustains.

**19.** Petitions filed by the Petitioner under Article 227 stands dismissed and disposed of.

**20.** Records of the Learned Trial Court be remitted forthwith along with a copy of this Judgment.

**21.** No order as to costs.

**SLR (2017) SIKKIM 641**

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

**W.P. (C) No. 41 of 2015**
**with**
**W.P. (C) No. 08 of 2017**
**with**
**W.P. (C) No. 27 of 2017**
**and**
**W.P. (C) No. 40 of 2017**

**Sun Pharma Laboratories Limited ….. PETITIONER**

*Versus*

**The Union of India and Others ….. RESPONDENTS**

**For the Petitioners :** Mr. Vikram Nankani, Sr. Advocate with Ms. Sangita Pradhan and Mr. Nanda Gopal, Advocates.

**For Respondents :** Mr. Kaushik Chanda, Addl. Solicitor General with Mr. B.K Gupta, Advocate.

Date of decision: 21st November 2017

**A. Central Excise Act, 1944 – Industrial Policy, 2007 – The crucial question which must necessarily be answered is whether the Petitioner has been able to establish that the Respondents had vide the Industrial Policy, 2007 and Notification No. 20/2007 made a promise, which the Petitioner had acted upon putting itself in a detrimental position which would compel the Respondent No.1 to make good the promise – When the Petitioner thus started its investment in the year 2005 the incentive scenario in Sikkim was that under the previous regime Notification No. 56/2003 by which the Industrial Policy, 2003 was operationalized had been amended vide**

**impugned Notification No.27/2004 by making it clear that only those new industrial units which have commenced commercial production on or after 23.12.2002 but not later than 31.03.2007 would be entitled to the exemption – Petitioner started its commercial production on and from 20.04.2009 for its first unit. However, the intention of the Respondent No.1 to offer central excise duty exemption was unequivocal. Respondent No. 1 had both knowledge and intention that the said promise would be acted upon – Between the periods 09.07.2004 i.e. the date of issuance of impugned Notification No. 27/ 2004 till 01.04.2007, the date on which the Industrial Policy, 2007 was declared, the policy continued to be as provided in Notification No. 56/ 2003 and as amended by impugned Notification No. 27/2004 i.e. that of 100% exemptions from excise duty – Petitioner had made substantial investments between the period of issuance of impugned Notification No. 20/2007 and the issuance of the impugned Notification No. 20/2008 – It is quite evident that the Petitioner had in fact altered its position and made further huge investments to avail of the promise held out by the Respondent No. 1 to its detriment.**

(Paras 47 and 57)

**B. Central Excise Act, 1944 – Promissory Estoppel – The second question which also needs to be answered is whether by issuing the impugned Notification No.20/2008, the Respondents has done away or curtailed the benefit granted under Notification No.20/2007 – The declaration of the Industrial Policy, 2003 for the State of Sikkim and thereafter the Industrial Policy, 2007 for the entire North East Region including Sikkim makes it clear that the Respondent No.1 was satisfied that it was necessary in the public interest to exempt inter-alia excise duty on P & P medicaments manufactured by the Petitioner and cleared from the units located in the State of Sikkim initially in the year 2003 and thereafter again in the year 2007 keeping in mind the fact that Sikkim was one of the least industrially developed States in India. 100% exemption of both income tax as well as excise duty is a definite attractive fiscal incentive strategy which would lure investors to set up units in Sikkim without which, considering the under development of industries and the geographical terrain of the region, industrialist may not find feasible to invest in. Having thus declared such attractive incentives and lured the Petitioner to invest in Sikkim any alteration in the incentive package**

**to the detriment of the investor would definitely attract the doctrine of promissory estoppel. The Respondent No. 1 cannot be allowed the unconscionable departure from the subject matter of the assumptions which has, as seen hereinabove, been adopted by the Petitioner as the basis of the course of conduct which would affect the Petitioner adversely.**

(Paras 47 and 63)

**C. Central Excise Act, 1944 – Public Interest – The impugned Notification No. 20/2008 was a notification amending the original Notification No. 20/2007 issued in public interest granting exemption of payment of excise duty. In such situation it was incumbent upon the Respondent No.1 to have shown larger public interest for curtailing/modifying/withdrawing exemption so granted – In the present cases, as we have seen earlier, a definite scheme of incentives for new industries was put forward vide Industrial Policy, 2007 which held out a promise by the Respondent No.1 for 100% excise duty exemption so that more and more industries could be attracted to State of Sikkim. The Respondent No.1 translated the said promise declared vide Industrial Policy, 2007 into Notification No. 20/2007 for the obvious reason that thereby more and more new industries would be attracted to the North East Region including Sikkim – The Petitioner's subsequent investments were obviously intended to reap the benefit of the said Notification No.20/2007. The Petitioner having commenced commercial production on and from 20.04.2009 for the first unit and from 14.04.2014 for the second unit were well within the period notified therein. The policy of the Respondent No.1 was clear and cogent. It was intended to draw investors to Sikkim which was industrially backward. Having acted on the said promise made by the Respondent No.1, the Petitioner made huge investments and altered its position to its detriment. Having issued the said Notification No.20/2007 in public interest it was incumbent upon the Respondent No.1 to place before this Court all materials available to establish a superior public interest which the Respondent No.1 has failed to do. The facts and circumstances of the present writ petitions, therefore, squarely falls within the parameters of the doctrine of promissory estoppel and that it would be unconscionable on the part of the Respondent No.1 to shy away from it without fulfilling its promise. The relief that must, therefore**

**be granted on the facts of the present case is that for the period declared vide Notification No.20/2007, the Petitioner would be entitled to the excise duty exemption as promised therein. Consequently impugned Notification Nos.20/2008 and 38/2008 are liable to be quashed to the extent they curtail and whittle down the 100% excise duty exemption benefit as promised vide Notification No.20/2007 and is hereby quashed. All impugned orders/ demand notices/show cause notices which are against the aforestated declarations of law are also quashed.**

(Para 69, 77 and 87)

**Petitions allowed.**

**Chronological list of cases cited:**

1. Unicorn Industries v. U.O.I, 2013 (289) E.L.T 117 (Sikkim).
2. Reckitt Benckiser v. Union of India, 22011 (269) E.L.T 194.
3. Sal Steel Ltd. v. UOI, 2010 (260) ELT 185 (Guj).
4. Herbo Foundation Pvt. Ltd. v. U.O.I, 2010 (261) ELT 98 (Gau).
5. Manuel Sons Hotel Pvt. Ltd. v. State of Kerala, (2016) SCC 766.
6. State of Jharkhand v. Tata Cummins, (2006) 4 SCC 57.
7. Shiva Shakti Sugars Ltd. v. Shree Renuka Sugar, (2017) SCC 729.
8. Unichem Laboratories v. Collector of CE, 2002 (145) ELT 502 (SC).
9. Share Medical Care v. U.O.I, 2007 (209) ELT 321 (SC).
10. Hero Cycles Ltd. v. U.O.I, 2009 (ELT) 490 (Bom).
11. Modipon Limited and Another v. Union of India and Others, 2002 (146)ELT 45 (Del.).
12. Kothari Industrial Corpn. Ltd. v. T.N. Electricity Board, (2016) 4 SCC 134.
13. DG of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226.

14. R.C. Tobacco (P) Ltd. v. Union of India, (2005) 7 SCC 725.

15. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others, (1979) 2 SCC 409.

16. Pournami Oil Mills and Others v. State of Kerala and Another, (1986) supp. SCC 728.

17. Pawan Alloys & Casting (P) Ltd. v. U.P. SEB, (1997) 7 SCC 251.

## JUDGMENT

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

A classical dispute between the tax collector and the tax payer has led to the filing of four Writ Petitions before this Court whereby the tax payer seeks to invoke against the tax collector, the well settled doctrine of promissory estoppel which is a doctrine evolved by equity (and not estoppel) to prevent injustice. This common Judgment disposes of four Writ Petitions filed by Sun Pharma Laboratory Ltd., the common Petitioner in all the said Writ Petitions, as common issues are raised therein. It is the case of the Petitioner that the promised policy declared by the Central Government (Respondent No. 1) of 100% excise duty exemption which had persuaded the Petitioner to alter its position and invest huge amount of money has now been indiscriminately curtailed giving rise to the present cause of action to challenge the impugned notifications whittling down the exemption benefits and resulting in the passing of a series of impugned show cause notices and impugned orders by the Central Excise Commissionerate confirming demands of Central Excise duties, interest and penalties thereon.

**W.P.(C) No. 41/2015**

**2.** W.P. (C) No. 41/2015 impugns Notification No. 21/2008-C.E. dated 27.03.2008 (impugned Notification No.21/2008) and Notification No. 36/2008-C.E dated 10.06.2008 (impugned Notification No.36/2008) and seeks a prayer for the Petitioner units to be permitted to avail the benefit of exemption of payment of excise duty as provided in terms of Notification No. 56/2003–C.E dated 25.06.2003 (Notification No. 56/2003). The said writ Petitions also impugns Notification No. 20/2008-C.E dated 27.03.2008 (impugned Notification No. 20/2008) and Notification No. 38/2008-C.E

dated 10.06.2008 (impugned Notification No. 38/2008) and seeks a prayer for the Petitioner units to be permitted to avail the benefit of exemption from payment of excise duty as provided in terms of Notification No. 20/2007-C.E dated 25.04.2007 (Notification No. 20/2007).

**W.P. (C) No. 08/2017**

**3.** W.P. (C) No. 08/2017 impugns Order No. M.O/75748-75751/16 & F.O/76277-76280/16 dated 14.12.2016 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal Nos. E/76003/15, 75290/16, 75930/14 and 76004/15 by which the CESTAT came to the view that the constitutional validity of the impugned Notification No. 21/ 2008 being in question pending before this Court the said notification if upheld, the Petitioner would not have any claim before the CESTAT and if set aside, it would. Thus, holding so, liberty was granted to the Petitioner to approach the CESTAT again after the final verdict from this Court.

**4.** The said Writ Petition also impugns:-

(i) OIO No. 10/COMM/CE/SLG/13-14 dated 26.03.2014 issued on 27.03.2014 passed by the Commissioner of Customs, Central Excise and Service Tax, Silliguri Commissionerate (the Commissioner) by which the demand of Central Excise duty amounting to 5,17,43,860/- under Section 11 A of the Central Excise Act, 1944 on the Petitioner, the interest at applicable rate up to the date of payment of duty on the duty amount under Section 11 AB of the Central Excise Act, 1944 as well as the penalty of 5,17,43,860/- under Section 11 AC of the Central Excise Act, 1944 was confirmed and the self credit facility available under Notification No. 56/2003-C.E dated 25.06.2003 (Notification No.56/2003) was withdrawn from the Petitioner.

(ii) OIO No.06-07/COMM/CE-SLG/15-16 dated 17.07.2015 passed by the Commissioner confirming the demands of Central Excise duty (i) amounting to 5,31,41,422.00 pertaining the period December 2012 to June, 2013 and (ii) amounting to 8,45,18,446/- pertaining to the period July, 2013 to January, 2014 on the Petitioner under the provisions of Section 11 A (4) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Rule, 2002 and sub paragraph 2C (g) of the Notification No. 56/2003 as

amended by impugned Notification No. 21/2008 along with appropriate interest on the amounts confirmed in terms of Section 11 AB (now 11 AA) of the Central Excise Act, 1944 and the penalty amount of 13,76,59,868.00 (Rupees thirteen crore seventy six lakhs fifty nine thousand eight hundred sixty eight) (5,31,41,422+ 8,45,18,446) on the Petitioner in terms of Section 11 AC (1) (c) of the Central Excise Act, 1944. However, the Petitioner was given the offer to pay only 25% of such amount as penalty on fulfilment of the conditions as prescribed under Section 11 AC (1) (e) of the Central Excise Act, 1944. By the said order the Commissioner also ordered the forfeiture of self credit facility as available to the Petitioner under the said Notification No. 56/2003 as amended by the impugned Notification No. 21/2008 in terms of the provision of subparagraph 2C (f) of the said notification.

(iii) OIO No.22/COMM/CE/SLG/15-16 dated 08.01.2016 of the Commissioner by which he confirmed the demand of central excise duty (i) amounting to 2,27,27,200.00 pertaining to the month of February 2014 on the Petitioner under the provision of Section 11 A (1) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Rule, 2002 and sub-paragraph 2C (g) of the Notification No. 56/2003 as amended by the impugned Notification No. 21/2008 and the appropriate interest on the said confirmed amount of duty at appropriate rate in terms of Section 11 AA of the Central Excise Act, 1944 and the penalty amounting to 2,27,27,200.00 on the Petitioner in terms of Section 11 AC (1) (c) of the Central Excise Act, 1944. However, the Petitioner was given the offer to pay only 25% of such amount as penalty on fulfilment of the conditions as prescribed under Section 11 AC (1) (e) of the Central Excise Act, 1944. By the said order the Commissioner also ordered the forfeiture of self credit facility as available to the Petitioner under the said Notification No. 56/2003 as amended by impugned Notification No. 21/2008 in terms of the provision of sub-paragraph 2C (f) of the said notification.

**W.P.(C) No. 27/2017**

**5.** W.P. (C) No. 27/2017 sought quashing of four show cause notices issued by the Deputy Commissioner of Central Excise and Service Tax, Gangtok Division, Siliguri (Deputy Commissioner) as well as five notifications

issued by the Respondent No.1. The details of the said show cause notices and Notifications are as under:-

(i) C.No.V(18) 02/Refund/CE/Sun-754/GTK-Divn/16-17/3184 dated 5.08.2016, issued by the Deputy Commissioner directing the Petitioner to show cause as to why the refund of ₹4,62,76,710/-, ₹3,91,50,366/-, ₹5,45,22,707/-, ₹2,94,34,399/- and ₹3,60,37,967/- for the month of February, 2016, March 2016, April 2016, May 2016 and June 2016 respectively claimed by the Petitioner in terms of clause 2B (b) of Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in clause 3 (i) and (ii) of the said notification.

(ii) C.No.V (18)52/Refund/CE/Sun-754/GTK-Divn/16-17/3600 dated 26.08.2016, issued by the Deputy Commissioner directing the Petitioner to show cause as to why the refund of differential amount of 10,54,60,351/- and 6,48,30,249/- for the financial year 2014-15 and 2015-16 respectively as claimed by the Petitioner in terms of clause 2.2(1) & (2) of the said Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in Clause 3 (i) & (ii) of the said notification.

(iii) C.No.V(15)19/ADJ/CE/COMM/SLG/2016/20697 dated 19.10.2016, issued by the office of the Commissioner of Customs, Central Excise & Service Tax, Siliguri directing the Petitioner to show cause as to why the amount of 82,84,25,639/- erroneously refunded in contravention to the condition as laid down in clause 3 (i) and (ii) of the said notification read with clause 2B (b) of the said notification should not be deposited forthwith as undertaken by the Petitioner to do so in the undertaking submitted to the department at the time of submitting its refund claim. The said show cause notice also required the Petitioner to show cause as to why the said amount, erroneously refunded to the Petitioner, if not deposited forthwith as per the undertaking, should not be demanded in terms of Section 11A of the Central Excise Act, 1944. It further required to show cause as to why the interest in terms of Section 11AA of Central Excise Act, 1944, should not be demanded.

(iv) C.No.V(18)58/CE/Refund/Sun-754/GTK-Divn./2016-17/605 dated 20.02.2017, issued by the Deputy Commissioner, directing the

Petitioner to show cause as to why the refund of ₹4,49,82,808/-, ₹5,19,93,070/-, ₹4,85,03,864/-, ₹5,01,55,727/-, ₹1,88,94,680, ₹5,09,23,261/- and ₹4,55,74,646/- for the months of July 2016, August 2016, September 2016, October 2016, November 2016, December 2016 and January 2017 respectively, in total amounting to 31,10,28,056/- claimed by the Petitioner in terms of clause 2B(b) of Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in clause 3(i) & (ii) of the said notification.

(v) Notification No. 27/2004-CE dated 09.07.2004, (impugned Notification No. 27/2004) issued by the Respondent No.1 further amending Notification No.56/2003 amongst others.

(vi) Impugned Notification No. 21/2008 which is also impugned in W.P. (C) No. 41/2015.

(vii) Notification No. 36/2008 C.E dated 10.06.2008, (impugned Notification No.36/2008) which is also impugned in W. P. (C) No. 41/2015.

(viii) Impugned Notification No. 20/2008-CE which is also impugned in W. P. (C) No. 41/2015.

(ix) Impugned Notification No. 38/2008-CE which is also impugned in W. P. (C) No. 41/2015.

**W.P.(C) No. 40/2017**

**6.** W.P.(C) No. 40/2017 impugns two show cause notices issued by the Commissioner and two notifications issued by the Respondent No.1. The details of the said show cause notices and notifications are as under:-

(i) C.No.V(15)20/ADJ/CE/COMM/SLG/2016/24091 dated 02.12.2016, issued by the Commissioner directing the Petitioner to show cause as to why the Verification Certificates issued by the Deputy/Assistant Commissioner, Central Excise & Service Tax, Gangtok Division, bearing No.58 dated 27.11.2015 issued vide C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015- 16/4049-4053 dated 30.11.2015; No.59 dated 27.11.2015 issued by C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015- 16/4044-

4048 dated 30.11.2015; No.60 dated 27.11.2015 issued vide C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015- 16/4255-4258; Verification Certificates issued No.01,02,03,04,05,06/Sun-II/ 2015-16 all dated 27.11.2015 and No.07 and 08/Sun-II/2015-16 both dated 22.12.2015 be considered erroneous and in violation of the provision of Notification No.56/2003 (as amended). The said show cause notice also required the Petitioner to show cause as to why the total re-credit of Rs. 43,98,61,414.00 availed and subsequently utilized during the period January, 2015 to January, 2016 should not be disallowed for being irregular and in violation of the provisions of Notification No.56/2003-CE dt. 25.06.2003, as amended, in as much as, the same should be disallowed for not having fulfilled the condition as stipulated in Clause 3(i) & (ii) of Notification No.56/2003-CE dt. 25.06.2003, as amended. The said show cause notice also required the Petitioner to show cause as to why the irregular re-credit availed and utilised by the Petitioner, amounting to Rs. 43,98,61,414.00 should not be demanded and recovered in terms of Section 11A of the Central Excise Act, 1994, as amended, for violating the provisions of Clause 2C(g) of Notification No.56/2003-CE dt.25.06.2003, as amended, read with Rule 8 (3) of the Central Excise Rules, 2002. The said show cause notice further required the Petitioner to show cause as to why the Interest in terms of Section 11AA of the Central Excise Act, 1944, as amended should not be demanded and recovered till the date of deposit of the said amount and Penalty in terms of Section 11 AC 1(a) of the Central Excise Act, 1944, as amended, should not be imposed on them for having contravened the provisions of the Central Excise Act, 1944 as amended, issued under Section 5A of the Central Excise Act,1944 as amended.

(ii) C.No.V(15)21/ADJ/CE/COMM/SLG/2016/895 dated 13.01.2017, issued by the office of the Commissioner directing the Petitioner to show cause as to why the total re-credit of ₹15,12,61,747/- availed and subsequently utilized during the period February, 2016 and March, 2016 should not be disallowed for being irregular and in violation of the provision of Notification No.56/2003 as amended and disallowed for not having fulfilled the condition as stipulated in clause 3(i) and 3(ii) of Notification No.56/ 2003 as amended. The said show cause notice also required the

Petitioner to show cause as to why the irregular recredit availed and utilized by the Petitioner, amounting to Rs. 15,12,61,747.00 should not be demanded and recovered in terms of Section 11A of the Central Excise Act, 1944 (as amended), for violating the provisions of Clause 2C(g) of Notification No.56/2003-CE, dt.25.06.2003 as amended, read with Rule 8(3) of the Central Excise Rules, 2002. The said show cause notice also required the Petitioner to show cause as to why the interest in terms of Section 11AA of the Central Excise Act, 1944 as amended should not be demanded and recovered till the date of deposit of the said amount. The said show cause notice also required the Petitioner to show cause as to why the penalty in terms of Section 11AC 1(a) of the Central Excise Act, 1944 as amended, should not be imposed on them for having contravened the provisions of the Central Excise Act, 1944, as amended, read with Notification No.56/2003-CE dt.25.06.2003, as amended, issued under Section 5A of the Central Excise Act, 1944, as amended.

(iii) Impugned Notification Nos. 20/2008-CE dated 27.03.2008 which is impugned in W.P. (C) No. 41/2015 and WP (C) No.27/ 2017 also.

(iv) Impugned Notification No. 38/2008-CE which is impugned in W.P.(C) No. 41/2015 and W.P.(C) No.27/2017 also.

**7.** At the hearing, Mr. Vikram Nankani, Senior Advocate would submit that the Petitioner seeks the promotional benefits under the North East Industrial and Investment Promotion Policy (NEIIPP), 2007 (Industrial Policy, 2007) read with Notification No. 20/2007 by which it is submitted, 100% of the excise duty was exempted which has now been reduced to 56% only vide impugned Notifications No. 20/2008 and 21/2008 although the Petitioner had already, in terms of the promise made, invested huge amounts of money between 2005 to 2008 much prior to the commencement of commercial production of Petitioners first unit on 20.04.2009. It is the contention of the Petitioner that this has been done by the Respondents solely on the ground that the Petitioner had not opted for the same. The Petitioner contends that based on the Industrial Policy of 2003 which also exempted from so much of the duty of excise leviable thereon as is

equivalent to the amount of duty paid by the manufacturer of the goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002 for a period of 10 years from the date of commencement of commercial production, the Petitioner in the year 2005 and thereafter commenced the process of establishing a new unit for manufacture of P & P Medicaments, falling under Sl. No. 11 of the schedule to the Notification No. 56/2003 including leasing of the land for establishing the said unit, generating employment in the State etc. It is the contention of the Petitioner, in the meanwhile, Office Memorandum dated 01.04.2007 was issued notifying the Industrial Policy, 2007, which also granted 100% excise duty exemption as provided in the Industrial Policy, 2003. However, the Industrial Policy, 2007 specifically provided that the new industrial units which commenced production within 10 years of the said memorandum would be eligible for the incentive thereunder. In line with the Industrial Policy, 2007, Notification No. 20/2007 was issued whereby the Petitioners goods were exempted from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit. In the year 2008, the earlier notified 100% excise duty exemption was significantly curtailed by issuing two amending impugned Notification Nos. i.e. 21/2008 and 20/2008 by which the benefit of exemption was limited to the certain prescribed percentage of value addition i.e. 56% applicable to pharmaceutical products as mentioned in the respective notifications. Further amendment to Notifications No. 56/2003 and 20/2007 was made vide impugned Notification No. 36/2008-CE (which amends Notification No. 56/2003) and impugned Notification No.38/2008 (which amends Notification No. 20/2007) both dated 10.06.2008 whereby an option for fixation of special rates for representing the actual value addition in respect of any goods manufactured and cleared under the respective original notification was given. The Petitioners first unit commenced commercial production from 20.04.2009 and the second unit from 14.04.2014. The Petitioner submits that although it was eligible to get the benefit of exemption under the Industrial Policy, 2007, inadvertently, after commencing commercial production from 20.04.2009 the Petitioner started claiming excise duty benefit pursuant to the Industrial Policy, 2003 by way of self-credit of excise duty in cash for the period April, 2009 to May, 2012 at the reduced rate of 56% instead of 100% of the amount paid

in cash. No objection has been taken to this credit taken by the Petitioner. Subsequently, however the Petitioner became aware of the decision of this Court in re: **Unicorn Industries v. U.O.I[1],** wherein this Court quashed Notification No. 23/2008 and Notification No. 37/2008 which had similarly, curtailed benefits promised under Industrial Policy, 2003. It is the case of the Petitioner that it further became aware of the decision of the High Court of Jammu & Kashmir in re: **Reckitt Benckiser v. Union of India[2],** wherein the High Court of Jammu and Kashmir had quashed the amending notifications seeking to reduce and restrict the 100% duty exemption provided pursuant to an incentive scheme for Jammu and Kashmir. Thereafter, on 22.10.2011, the Petitioner informed the authorities that it would avail 100% selfcredit of the excise duty paid placing reliance on the aforesaid Judgments of this Court and the High Court of Jammu and Kashmir. For the period June, 2012 to February, 2014 the authorities denied self-credit on monthly basis on the ground that the Petitioner was not eligible to claim the benefit @ 100% of the amount paid in cash but was eligible for refund @ 56% on account of the amendment vide impugned Notification No. 21/2008 which reduced the benefit from 100%. It is the case of the Petitioner that it has invested an amount of ₹186.08 crores up to March 2014 and being a large project investment continued thereafter and an amount of ₹337.51 crores have been invested up to March 2016.

**8.** Mr. Vikram Nankani, learned Senior Advocate for the Petitioner would argue that the Petitioner had acted on the basis of the promise set out in the Industrial Policy, 2003 and 2007 and the original Notification No.20/2007 which was amended by the impugned Notifications No. 20/ 2008 and 21/2008 reducing the 100% excise duty guarantee to 56% by making huge investment and therefore, on the ground of promissory estoppel alone the Writ Petitions were liable to be allowed and the offending notifications and orders of the Commissionerate quashed. He would further submit that merely because power to issue notification is available, the authority cannot, be permitted to equate what is inherently not equal. He would submit that once an exemption notification has been issued in public interest the authority cannot, by simply saying it is in public interest, withdraw or reduce the benefit under the original notification and in such cases, the onus shall be on the authority to establish a superior public

[1] 2013 (289) E.L.T 117 (Sikkim)
[2] 2011 (269) E.L.T 194

interest for curtailing or withdrawing an exemption already granted. Mr. Vikram Nankani, learned Senior Advocate would rely upon the following judgments in support of his submissions on area based exemption, promissory estoppel and on his submission that benefit cannot be denied due to claim under wrong notification: (**1) Sal Steel Ltd. V. UOI[3], (2) Unicorn Industries v. U.O.I (supra), (3) Reckitt Benckiser v. U.O.I, (4) Herbo Foundation Pvt. Ltd. V. U.O.I[4], (5) Manuel Sons Hotel Pvt. Ltd. V. State of Kerala[5], (6) State of Jharkhand v. Tata Cummins[6], (7) Shiva Shakti sugars Ltd. V. Shree Renuka Sugar[7], (8) Unichem Laboratories v. Collector of CE[8], (9) Share Medical Care v. U.O.I[9] and (10) Hero Cycles Ltd. V. U.O.I[10]**

**9.** The Respondents however, defend their action and submit that in fact the impugned notifications does not actually take away the 100% excise duty benefit as sought to be made out by the Petitioner. It is claimed that a different mechanism was devised in public good and that impugned Notification No. 20/2008 does not deviate from the 100% policy. Mr. Kaushik Chanda, learned Additional Solicitor General would submit that in spite of the new mechanism devised, ultimately the benefit to the Petitioner would be 100% exemption. To explain the same the learned Additional Solicitor General for the Respondents would place two separate calculations of re-credit / refund under area based exemption notification as under:-

**"CALCULATION OF RE-CREDIT/REFUND UNDER AREA BASED EXEMPTION NOTIFICATION 100% re-credit/ refund case (Not No. 20/2007):**

| Value of the finished goods | Duty @ 6% | Input cost | Input credit @ 12% | Duty payment from PLA/ account current | 100% re-credit/ refund |
|---|---|---|---|---|---|
| ₹100 | ₹6 | ₹22 | ₹2.64 | ₹6-2.64 = ₹3.36 | ₹3.36 |
| | | | | | |

[3] 2010 (260) ELT 185 (Guj)
[4] 2010 (261) ELT 98 (Gau)
[5] (2016) SCC 766
[6] (2006) 4 SCC 57
[7] (2017) SCC 729
[8]2002 (145) ELT 502 (SC)
[9] 2007 (209) ELT 321 (SC)
[10]2009 (ELT) 490 (Bom)

**Re-credit/Refund as per value addition (Not no. 20/2008):-**

| Value of the finished goods | Duty @ 6% | Input cost | Input credit @ 12% | Duty payment from PLA/ account current | Value addition @ 56% on total duty | 100% re-credit/refund |
|---|---|---|---|---|---|---|
| ₹100 | ₹ 6 | ₹22 | ₹2.64 | ₹6-₹2.64= ₹3.36 | **₹3.36** | **₹3.36** |
| | | | | | | |

"

**10.** The Respondents would admit that the Petitioner started industrial production w.e.f. 20.04.2009 but would contest the assertion of the Petitioner that the new unit of the Petitioner was started within the period 2005-2008. The Respondents submits that the Petitioner fell within category (a) of paragraph 3 of Notification No. 56/2003 because the Petitioner started investment on or after 23rd December, 2002 i.e. from 2005. The Respondents submits that the Petitioner is entitled only to a limited claim from exemption of central excise duty vide impugned Notification No. 21/ 2008 since the Petitioner started commercial production from 20.04.2009. The Respondents asserts that the Petitioner had started availing credit of the amount of duty paid other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2004 @ 56% right from the beginning. It is denied that the Petitioner was granted 100% self credit of the amount of duty paid. It is further stated that the Petitioner started paying central excise duty from personal ledger account w.e.f. August 2009 by which time impugned Notifications No. 21/2008 and 36/2008 were already in existence. The Respondents would submit that the Respondent No.1 was empowered under Section 5A of the Central Excise Act, 1944 to grant exemption from duty of excise if the Government is satisfied that it is necessary and "in public interest so to do by a Notification in official gazette". The Respondents would further submit that the Petitioner was duly entitled to claim the option for fixation of special rate on the basis of impugned Notification No.36/2008.

**11.** The learned Additional Solicitor General would submit that the Respondent No.1 had the power to issue the notifications sought to be assailed and if the said

notifications were stated to be in public interest the onus would lie on the challenger to show how it was not in public interest. The learned Additional Solicitor General would fairly concede that, what was the public interest which compelled the Respondent No.1 to issue the offending notifications has however neither been specified in the offending notifications or explained in the counteraffidavit filed.

**12.** He would rely upon the following Judgments in support of his defence of the impugned notifications:-

> **(1) Modipon Limited & Anr. v. Union of India & Ors.,[11] (2) Kothari Industrial Corpn. Ltd. v. T.N. Electricity Board[12] , (3) DG of Foreign Trade v. Kanak Exports[13]** and **(4) R.C. Tobacco (P) Ltd. v. Union of India[14] .**

**13.** In rejoinder, Mr. Vikram Nankani, learned Senior Advocate for the Petitioner would submit that the chart set out by the learned Additional Solicitor General for the Respondents is flawed because whereas the previous notification provided 100% exemption from Excise Duty the offending notifications sought to curtail the same by limiting the exemption to 56% only to the duty payable on value addition undertaken in the manufacture of the goods and not on the entire excise duty payable as promised. The attention of the Court was drawn to the explanation to clause 3(4) of the impugned Notification No. 20/2008 which provides:

> ".....
>
> *Explanation: For the purpose of this paragraph, the actual value addition in respect of said goods shall be calculated on the basis of the financial records of the preceding financial year, taking into account the following:*
>
> *(i) Sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods;*

[11] 2002 (146)ELT 45 (Del.)
[12](2016) 4 SCC 134
[13](2016) 2 SCC 226
[14](2005) 7 SCC 725

*(ii) Less: Cost of raw materials and packing material consumed in the said goods;*

*(iii) Less: Cost of fuel consumed if eligible for input credit under CENVAT Credit Rules, 2004;*

*(iv) Plus : Value of said goods available as inventory in the unit but not cleared, at the end of the financial year;*

*(v) Less: Value of said goods available as inventory in the unit but not cleared, at the end of the financial year preceding that under consideration.*

*Special rate would be the ratio of actual value addition in the production or manufacture of the said goods to the sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods.*

*(5) The manufacturer shall be entitled to refund at the special rate fixed under sub-paragraph (2) in respect of all clearances of excisable goods manufactured and cleared under this notification with effect from the date on which the application referred to at sub-paragraph (1) was filed with the Commissioner of Central Excise or Commissioner of Central Excise and Customs, as the case may be.*

*(6) Where a special rate is fixed under sub-paragraph (2), the refund payable in a month shall be equivalent to the amount calculated as a percentage of the total duty payable on such excisable goods, at the rate so fixed.*

*Provided that the refund shall not exceed the amount of duty paid on such goods, other than by utilization of CENVAT credit.***"**

## The facts

**14.** The Petitioner was initially a partnership which was subsequently converted into a private Limited Company incorporated under the Companies Act, 1956 and merged with Sun Pharma Laboratories Limited, having its factory at plot no.754, Setipool, P.O. Rangpo, East Sikkim. The Petitioner holds Central Excise Registration No.AARCS9750KEM003 and is, inter alia, engaged in the manufacture of P & P Medicament falling under chapter heading no.3004.

**15.** For the development of industries in Sikkim, the Respondent No.1 notified the "New Industrial Policy and other concessions for the State of Sikkim" (Industrial Policy, 2003) vide Memorandum No.14(2)/2002-SPS notified on 17.02.2003 inter-alia granting 100% exemption from excise duty for a period of 10 years from the date of commencement of commercial production. It was stated, keeping in view the fact that the State of Sikkim lags behind in Industrial development, a need has been felt for structured interventionist strategies to accelerate industrial development of the State and to boost Investor confidence. It was also stated that the new incentives would provide required incentives as well as an enabling environment for industrial development, improve availability of capital and increase market access to provide a fillip to the private investment in the State. The relevant paragraph 3.1 read thus:-

> ***"3.1** Fiscal incentives to new Industrial Units and substantial expansion of existing units:*
>
> ***i. i.)** New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Center, Industrial Infrastructure Development Centers (IIDCs) and other locations like Industrial Estates, Export Processing Zones, Food Parks, IT Parks, etc. as notified by the Central Government are **entitled to 100% (hundred percent) income tax and excise duty exemption for a period of 10 years from the date of commencement of commercial production.** Thrust Sector Industries as mentioned in Annexure–II are entitled to similar concessions in the entire State of Sikkim without area restrictions."*
>
> **[Emphasis supplied]**

**16.** Notification No. 56/2003 was issued by the Respondent No.1 by which the 100% excise duty exemption under Industrial Policy, 2003 was operationalized. The relevant preamble of the said Notification No.56/2003 was as under:-

> *"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the Schedule appended hereto, other than goods specified in Annexure appended hereto, and cleared from a unit located in the State of Sikkim,* ***from so much of the duty of excise leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT Credit Rules, 2002."***
>
> **[Emphasis Supplied]**

**17.** Paragraph 3 and 4 of Notification No. 56/2003 read as under:-

> ***"3.*** *The exemption contained in this notification shall apply only to the following kind of units namely:-*
>
> *(a) new industrial units which have commenced their commercial production on or after the 23rd day of December, 2002.*
>
> *(b) industrial units existing before the 23rd day of December, 2002, but which have undertaken substantial expansion by way*

*of increase in installed capacity by not less than twenty five per cent on or after 23rd day of December, 2002.*

***4. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production whichever is later.***

**[Emphasis Supplied]**

**18.** On 09.07.2004 the Respondent No.1 issued impugned Notification No. 27/2004 by which paragraph 3 of the Notification No. 56/2003 was substituted with the following paragraph:-

***"3.*** *The exemption contained in this notification shall apply only to the following kinds of units, namely:-*

*(i) new industrial units which have commenced commercial production on or after the 23rd day of December, 2002, but not later than the 31st day of March, 2007.*

*(ii) industrial units existing before the 23rd day of December, 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent on or after the 23rd day of December 2002, but have commenced commercial production from such expanded capacity, not later than the 31st day of March, 2007."*

**19.** The Respondent No.1 vide the said Notification No. 27/2004 thus restricted the date of commencement of commercial production which was open ended earlier to the period 23.12.2002 till 31.03.2007.

**20.** On 01.04.2007 vide an office memorandum the Respondent No.1 notified the Industrial Policy, 2007. The Industrial Policy, 2003 was discontinued on and from 01.04.2007. This Industrial Policy, 2007 covered the State of Sikkim as well. In the said Industrial Policy, 2007 it was provided:-

> ***"(ii) Duration:***
>
> *all new units as well as existing units which go in for substantial expansion, unless otherwise specified and which commence commercial production within the 10 year period from the date of notification of NEIIPP, 2007 will be eligible for incentives for a period of ten years from the date of commencement of commercial production.*
>
> .....
>
> .....
>
> *(v)* ***Excise Duty Exemption:***
>
> *100% Excise Duty exemption will be continued, on finished products made in the North Eastern Region, as was available under NEIP, 1997. However, in cases, where the CENVAT paid on the raw materials and intermediate products going into the production of finished products (other than the products which are otherwise exempt or subject to nil rate of duty) is higher than the excise duties payable on the finished products, ways and means to refund such overflow of CENVAT credit will be separately notified by the Ministry of Finance."*

**21.** The Respondent No.1 issued Notification No. 20/2007 giving effect to the Industrial Policy, 2007 by which it was provided :-

> *"In exercise of the powers conferred by sub-section (1) of the section 5A of the Central*

*Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tarrif Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared form a unit located in the States of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or* ***Sikkim****, as the case may be,* ***from so much of the duty of excise leviable thereon under the said Act as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004."***

**[Emphasis Supplied]**

**22.** The exemption contained in Notification No.20/2007 was to be given effect to in the manner provided under paragraph 3 thereof. Under paragraph 5 of the said Notification No.20/2007 the exemption was to apply to:-

***"(a)*** *New Industrial units which commence commercial production on or after the 1st day of April, 2007 but not later than 31st day of March, 2017;*

***(b)*** *Industrial units existing before the 1st day of April, 2007 but which have undertaken substantial expansion by way of increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purposes of expansion of capacity/modernization and diversification and have commenced commercial production from such expanded capacity on or after the 1st day of April, 2007 but not later than 31st day of March, 2017".*

**23.** The Respondent No.1 vide impugned Notification No. 21/2008 in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and sub-section (3) of Section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 made further amendments to Notification No.56/ 2003. The Preamble was amended. In the Preamble, for the words and figures, "to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002", the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit" were substituted. Paragraphs 1A, 2 and 2A of Notification No. 56/2003 was substituted with new paragraphs 2, 2A, 2B, 2C and 2.1.

**24.** The Respondent No.1 vide impugned in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, amended Notification No.20/2007. In the Preamble, for the words and figures, "to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004", the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit" were substituted. Paragraphs 2, 3 and 4 of Notification No. 20/2007 were substituted with new paragraphs 2A, 2B, 2C, 2D and 3. The new paragraph 2A to the said impugned Notification No. 20/2008 read as follows:-

> ***"2A.*** *The duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excisable goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the Chapter of the said First Schedule as are given in the corresponding entry in column (2) of the said Table, at the rates specified in the corresponding entry in column (4) of the said Table:*

| Sl. No. | Chapter of the First Schedule | Description of goods | Rate |
|---|---|---|---|
| (1) | (2) | (3) | (4) |
| 1. | ---- | ---- | ——---- |
| 2. | 30 | All goods | 56 |
| 3. | ---- | ---- | ---- |
| 4. | ---- | ---- | ---- |
| 5. | ---- | ---- | ---- |
| 6. | ---- | ---- | ---- |
| 7. | ---- | ---- | ---- |
| 8. | ---- | ---- | ---- |
| 9. | ---- | ---- | ---- |
| 10. | ---- | ---- | ---- |
| 11. | ---- | ---- | ---- |
| 12. | ---- | ---- | ---- |

*Provided that where the duty payable on value addition exceeds the duty paid by the manufacturer on the said excisable goods, other than the amount paid by utilization of CENVAT credit during the month, the duty payable on value addition, shall be deemed to be equal to the duty so paid other than by CENVAT credit."*

**25.** Paragraph 3 of impugned Notification No. 20/2008 provided:-

> ***"3.*** *(1) Notwithstanding anything contained in paragraph 2A, the manufacturer shall have the option not to avail the rates specified in the said Table and apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under this notification, if the manufacturer finds that four-fifths of the ratio of actual value addition in the production or manufacture of the said goods to the value of the said goods, is more than the rate specified in the said Table expressed as a percentage. For the said purpose, the manufacturer*

*may, within sixty days from the beginning of a financial year, make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, for determination of such special rate, stating all relevant facts including the proportion in which the materials or components are used in the production or manufacture of goods:*

*Provided that the Commissioner of Central Excise or the Commissioner of Customs and Central Excise may, if he is satisfied that the manufacturer was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer to make the application within a further period of thirty days :*

*Provided further that the manufacturer supports his claim for a special rate with a certificate from his statutory auditor containing an estimate of value addition in the case of goods for which a claim is made, based on the audited balance sheet of the unit, for the preceding financial year;*

*(2) On receipt of the application referred to in sub-paragraph (1), the Commissioner of Central Excise or Commissioner of Customs and Central Excise, as the case may be, after making or causing to be made such inquiry as he deems fit, shall fix the special rate within a period of six months of such application;*

*(3) Where the manufacturer desires that he may be granted refund provisionally till the time the special rate is fixed, he may, while making the application, apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, in writing for grant of provisional refund at the rate specified in column (4) of the said Table for the goods of description specified in column (3) of*

*the said Table and falling in Chapter of the First Schedule of the Central Excise Tariff Act, 1985 (5 of 1986) as in corresponding entry in column (2) of the said Table, and on finalization of the special rate, necessary adjustments be made in the subsequent refunds admissible to the manufacturer in the month following the fixation of such special rate.*

*(4) Where the Central Government considers it necessary so to do, it may –*

*(a) revoke the special rate or amount of refund as determined under subparagraph (2) by the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, or*

*(b) direct the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, to withdraw the rate so fixed. Explanation : For the purpose of this paragraph, the actual value addition in respect of said goods shall be calculate on the basis of the financial records of the preceding financial year, taking into account the following :*

*(i) Sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods;*

*(ii) Less : Cost of raw materials and packing material consumed in the said goods;*

*(iii) Less : Cost of fuel consumed if eligible for input credit under CENVAT Credit Rules, 2004;*

*(iv) Plus : Value of said goods available as inventory in the unit but not cleared, at the end of the financial year;*

*(v) Less : Value of said goods available as inventory in the unit but not cleared, at the end of the financial year preceding that under consideration. Special rate would be the ratio of actual value addition in the production or manufacture of the said goods to the sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods.*

*(5) The manufacturer shall be entitled to refund at the special rate fixed under sub-paragraph (2) in respect of all clearances of excisable goods manufactured and cleared under this notification with effect from the date on which the application referred to at sub-paragraph (1) was filed with the Commissioner of Central Excise or Commissioner of Central Excise and Customs, as the case may be.*

*(6) Where a special rate is fixed under sub-paragraph (2), the refund payable in a month shall be equivalent to the amount calculated as a percentage of the total duty payable on such excisable goods, at the rate so fixed:*

*Provided that the refund shall not exceed the amount of duty paid on such goods, other than by utilization of CENVAT credit.*

*2. This notification shall come into force with effect from the 1st day of April, 2008."*

**26.** The Respondent No.1 vide impugned Notification No. 36/2008 in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and sub-section (3) of Section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 made further amendments to Notification No.56/ 2003 and notified further conditions whereby an assessee could apply to the Appropriate Authority for a specific rate for value addition.

**27.** The Respondent No.1 vide impugned Notification No. 38/2008 in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 made further amendments to Notification No.20/ 2007. The impugned Notification No.38/2008 which further amends the new paragraph 2A as inserted by impugned Notification No. 20/2008 provides now that "the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excise goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the chapter of the first schedule as are given in the corresponding entry in column (2) of the said Table **when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory,** at the rates specified in the corresponding entry in column (4) of the said Table". The Table provided in the new paragraph 2A vide impugned Notification No. 20/2008 to Notification No. 20/2007 has also been replaced with a new Table vide impugned Notification No. 38/2008. The said Table is as under:-

| Sl. No. | Chapter of the First Schedule | Description of goods | Rate | Description of inputs for manufacture of goods in column (3) |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| 1. | ..... | ..... | ..... | ..... |
| 2. | 30 | All goods | 56 | Any goods |
| 3. | ..... | ..... | ..... | ..... |
| 4. | ..... | ..... | ..... | ..... |
| 5. | ..... | ..... | ..... | ..... |
| 6. | ..... | ..... | ..... | ..... |
| 7. | ..... | ..... | ..... | ..... |
| 8. | ..... | ..... | ..... | ..... |
| 9. | ..... | ..... | ..... | ..... |
| 10. | ..... | ..... | ..... | ..... |
| 11. | . | ..... | ..... | ..... ..... |
| 12. | ..... | ..... | ..... | ..... |
| 13. | ..... | ..... | ..... | ..... |
| 14. | ..... | ..... | ..... | ..... |

**28.** The impugned Notification No. 38/2008 further amended paragraph 3 of the Notification No. 20/2007 as amended by impugned Notification No.20/2008 and substituted sub-paragraph (1) of the said paragraph 3 with the following:-

> ***"(1)*** *Notwithstanding anything contained in paragraph 2A, the manufacturer shall have the option not to avail the rates specified in the said Table and apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under this notification, if the manufacturer finds that the actual value addition in the production or manufacture of the said goods is at least 115 percent of the rate specified in the said Table and for the said purpose, the manufacturer may make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, not later than the 30th day of September in a financial year for determination of such special rate, stating all relevant facts including the proportion in which the materials or components are used in the production or manufacture of goods :*
>
> *Provided that the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, may, if he is satisfied that the manufacturer was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer to make the application within a further period of thirty days :*
>
> *Provided further that the manufacturer supports his claim for a special rate with a*

*certificate from his statutory auditor containing a calculation of value addition in the case of goods for which a claim is made, based on the audited balance sheet of the unit for the preceding financial year;*

*Provided also that a manufacturer that commences commercial production on or after the 1st day of April, 2008 may file an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, for the fixation of a special rate not later than the 30th day of September of the financial year subsequent to the year in which it commences production.***"**

**29.** Pursuant to the said impugned Notification No. 36/2008, the Department of Central Excise vide letter bearing No.C.No.V(30)01/CE/SPS/GTK/2009/528 dated 14.12.2011 informed the Petitioner that they were not eligible for 100% self credit and requested certain information in this respect. The Petitioner provided the required information vide letter dated 05.07.2012 and also informed that they have started taking 100% self credit from the month of June, 2012 to November, 2012. On the said background show cause notice No.V(15)13/ADJ/CE/COM/SLG/2012/26125 dated 31.03.2013 came to be issued to the Petitioner calling upon them to show cause as to why central excise duty amounting to 5,17,43,860/- being the amount excess re-credited wrongly by the Petitioner and utilised for payment of excise duty should not be collected in terms of Section 11 of the Central Excise Act, 1944 for violating the provisions of Section 11A of the Central Excise Act, 1944 read with Rule 8(3) of the Central Excise Rules, 2002. Further the show cause notice also required the Petitioner to show why the interest as per Section 11AB of the Central Excise Act, 1944 and the penalty under Section 11AC of the Central Excise Act, 1944 for contravening Rule 8(3) of the Central Excise Rules, 2002, with a clear intent to evade payment of duty, should not be imposed. The said show cause notice also required Petitioner to show cause as to why re-credited facility available under Notification No.56/2003 should not be disallowed. Although personal hearing was granted to the Petitioner on three dates the Petitioners consultant having another pre-schedule hearing could

not attend the hearing or submit the defence reply pursuant to which the Commissioner adjudicated the show cause notice dated 31.03.2013 and passed the impugned OIO No.10/COMM/CE/SLG/13-14 dated 26.03.2014 issued on 27.03.2014. Being aggrieved by the said impugned order dated 26.03.2014 the Petitioner preferred an appeal before the CESTAT, along with an miscellaneous application for the waiver of pre-deposit and stay of the operations of the said order. The CESTAT vide order dated 21.11.2014 granted an unconditional stay to the Petitioner against the recovery duty demanded, interest and penalty imposed relying upon the judgment of this Court in the matter of Unicorn Industries (supra). While the appeal was pending final adjudication and notwithstanding the stay granted, the Department of Central Excise issued multiple show cause notices to the Petitioner for different periods and the case of the said Department in those subsequent show cause notices were identical to the case of the said Department which was stayed by the CESTAT by the order dated 21.11.2014. The said show cause notices were (i) SC Notice No.V(15)07/ADJ/CE COMM/SLG/2013/17243 for the period December 2012 to June 2013 (ii) SC Notice No. V(15)09/ADJ/CE/COMM/SLG/14/ 11061 for the period July 2013 to January 2014 and (iii) SC Notice No. V(15)20/ADJ/CE/COMM/SLG/2014/1863 for the period February 2014.

**30.** Thus Writ Petition (C) No. 41 of 2015 was filed challenging the various impugned Notifications as detailed above.

**31.** By an Order dated 28.07.2016 this Court directed the CESTAT to examine (i) Appeal No. E/75930/2014-DB; (ii) Appeal No. E/76003/2015; (iii) Appeal No. E/76004/2016 and (iv) Appeal No. E/75290/2016 filed by the Petitioner and to take decision by reasoned order on his own merit, in accordance with law, at the earliest, preferably within a period of two months. The said Writ Petition was directed to be listed on receipt of the order rendered by the CESTAT.

**32.** On 21.11.2016 this Court granted further period of three months to CESTAT for disposal of the appeals.

**33.** Between the periods 05.08.2016 to 20.02.2017 four show cause notices were issued for the total period March 2014 to January 2017 seeking to demand and recover 100% benefit on the ground that Notification No.56/2003 is not applicable because the first unit of the Petitioner started production on 20.04.2009.

**34.** It is the case of the Petitioner that the benefit at the rate of 56% was granted for the period March 2014–August 2015 without any objection. It is the further case of the Petitioner that for the period September 2015 – January 2016 benefit @ 56% was given under Notification No.20/2007 without objection. No benefit has been extended from February 2016 till date in respect of the first unit of the Petitioner. It is the Petitioners case that although all the four show cause notices admit that the Petitioner is eligible for benefit under Notification No.20/2007 but seek to deny the same on the ground that the Petitioner did not opt for the same. In all refund applications made after August 2016, reference has been made to both Notification No.56/2003 as well as Notification No.20/2007.

**35.** W.P. (C) No. 8 of 2017 was preferred on 20.02.2017 by the Petitioner seeking a writ of certiorari to quash and set aside the impugned order of the CESTAT dated 14.12.2016 as detailed above.

**36.** W.P. (C) No. 27/2017 was preferred on 18.04.2017 by the Petitioner to challenge four show cause notices issued by the Assistant Commissioner seeking to reject their refund claims of the Petitioner for the months of July 2016 to January 2017 pursuant to the order passed by the CESTAT dated 14.12.2016 and the impugned notifications as detailed above.

**37.** On 19.04.2017 the Petitioner wrote a letter to the Assistant Commissioner to keep the adjudication of the four notices in abeyance until the disposal of W.P. (C) No.27 of 2017.

**38.** On 12.05.2017 the Assistant Commissioner confirmed the demand in respect of show cause notice dated 26.08.2016. The Petitioner therefore filed I.A. No. 1 of 2017 in W.P. (C) No. 27 of 2017 on 13.06.2017 seeking to amend and bring on record the order dated 12.05.2017 passed by the Assistant Commissioner.

**39.** On 02.12.2016 and 13.01.2017 two show cause notices were issued for the period January 2015–March 2016 in respect on second unit seeking to deny the 100% benefit.

**40.** It is the case of the Petitioner that notwithstanding these two notices, benefit @ 56% has been granted from January 2015 to March 2017. For the period April 2014 when production commenced until December 2014

no refund application was filed since the Petitioner started paying excise duty in cash only from January 2015. For the period prior thereto, the Petitioner had sufficient CENVAT credit amount for payment of excise duty.

**41.** W.P.(C) No.40/2017 filed on 21.06.2017 challenges the said two show cause notices issued by the Commissioner being (i) C.No.V(15)20/ ADJ/CE/COMM/SLG/2016/24091 dated 02.12.2016 and (ii) C.No.V(15)21/ADJ/CE/COMM/SLG/2016/895 dated 13.01.2017. The said Writ Petition also seeks a writ of Certiorari to quash and set aside impugned Notification No. 20/2008 and Notification No. 38/2008.

**Consideration**

**42.** It is the case of the Petitioner that the Petitioner started investing for setting up its first unit from the year 2005 only. Evidently therefore, the Petitioner had started the investment only after issuance of impugned Notification No. 27/2004 amending Notification No.56/2003 which notification put into operation the Industrial Policy, 2003. The said Notification is cogent and clear. The Petitioner does not fall in any of the two categories of units as mentioned therein. On the date of the said impugned Notification No.27/2004 the Petitioner was aware that the exemption of payment of excise duty as per Notification No.56/2003 as amended would be available to it only on fulfilling the criteria laid down. To enjoy the benefit of the said Notification No.56/2003 as amended by impugned Notification No.27/2004 it was incumbent upon the Petitioner to meet the required criteria of having commenced commercial production on or after 23.12.2002 but not later than 31.03.2007. It is not the case of the Petitioner that in the interregnum between the issuance of Notification No. 56/2003 and impugned Notification No.27/2004 the Petitioner had already started altering its position. It is neither pleaded nor argued.

**43.** As per the Industrial Policy, 2007, the Petitioner having admittedly started its commercial production on and from 20.04.2009 for its first unit i.e., within the 10 years period from the date of issuance of memorandum declaring the Industrial Policy, 2007 i.e., 01.04.2007 was eligible for incentives for a period of 10 years from the date of commencement of commercial production i.e., from 20.04.2009 till 20.04.2019.

**44.** The Industrial Policy, 2007 had declared that 100% excise duty exemption will be continued on finished products made in the North Eastern

Region as was available under the Industrial Policy, 1997. However, in cases, where the CENVAT paid on the new materials and intermediate products going into the production of finished goods (other than the products which are otherwise exempt or subject to nil rate of duty) is higher than the excise duties payable on the finished products, ways and means to refund such overflow of CENVAT credit will be separately notified by the Respondent No.1.

**45.** Notification No. 20/2007 provided for exemption of goods cleared from unit located in the State of Sikkim from so much of the duty of excise leviable thereon under the Central Excise Act, 1944 as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT Credit Rules, 2004.

**46.** It is quite clear that when the Industrial Policy, 2007 was declared on 01.04.2007 which was followed by the issuance of the Notification No. 20/2007, the Petitioner had already started investing, as per the Petitioner, from the year 2005 itself. The exemption provided for in Notification No.20/2007 would be available to new industrial unit which commence commercial production on or after 01.04.2007 but not later than 31.05.2017. It would also apply to those industrial units existing before 01.04.2007 but which have undertaken substantial expansion by way of increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purpose of expansion on capacity/modernization and diversification and have commenced commercial production from such expanded capacity on or after 01.04.2007 but not later than 31.05.2017. The exemption contained in Notification No.20/2007 were to apply to any of the said units for a period not exceeding 10 years from the date of publication of the said notification or from the date of commercial production whichever is later.

**47.** The crucial question which must necessarily be answered is whether the Petitioner has been able to establish that the Respondents had vide the Industrial Policy, 2007 and Notification No. 20/2007 made a promise, which the Petitioner had acted upon putting itself in a detrimental position which would compel the Respondent No.1 to make good the promise. If the answer to the first question is in the affirmative then the second question which also needs to be answered is whether by issuing the impugned Notification No.20/2008 the Respondents has done away or curtailed the

benefit granted under Notification No.20/2007. To answer the first question it is necessary to examine the pleadings in the present proceedings.

**48.** In paragraph 4 and 5 of W.P. (C) No.41 of 2015 it is pleaded by the Petitioner that:-

> ***"4.*** *On the above statutory guarantee for the exemption of the excise duty, the Petitioner invested Rs.39,26,34,897/- during the period from 2005 to 2008 till the date of notification and total investment till 31/3/2014 is of Rs.253,89,64,817/-, their capital and started new units and expanded their existing units in the state of Sikkim.*
>
> *5. The Petitioner started their industrial production w.e.f. 20.04.2009. Since then the Petitioner has been manufacturing P & P Medicaments falling under Sr. No. 11 of the Schedule to Notification 56/2003 dated 25.06.2003."*

**49.** In paragraph 6 and 7 of the counter-affidavit filed by the Respondents to W. P. (C) No. 41 of 2015 it is pleaded:-

> ***"6.*** *That with reference to paragraph 4 of the writ petition, the Respondents state that the facts and figures stated therein are within the exclusive knowledge of the petitioner and the petitioner is put to strict proof thereof. However, the Respondents state that new unit of the petitioner was not started within the period 2005 to 2008 and the Respondents vehemently deny and oppose the said claim of the petitioner. The Respondents further state that the total investment claim of the Petitioner is within the exclusive knowledge of the Petitioner and the Petitioner is put to strict proof thereof.*

***7.*** *That with reference to paragraph 5 & 6 of the writ petition, the Respondent state that the claim of the Petitioner that he started industrial production w.e.f. 20.04.2009 and that the Petitioner is manufacturing P & P medicaments falling under Sr. No. 11 of the schedule to Not No. 56/2003-CE dt. 25.06.2003 is a matter of record which the Petitioner may establish during the course of the hearing of this instant writ petition. The Respondents state that reference to para 3 of the said Notification the petitioner falls within category (a) because the Petitioner started investment on or after 23rd December 2002 i.e. from 2005. However, the production of P & P medicament commenced from the year 20.04.2009 which is as per their paragraph 5 of the writ petition.***"***

**50.** In paragraph 4 of the rejoinder filed by the Petitioner it has been pleaded:-

***"4.*** *That with regard to the statements contained in Para 6 and 7 of the counter affidavit, it is submitted that the effective step of implementation has been taken and proper intimation has been filed with appropriate authorities. It is further submitted that the capital expenditure for establishing new unit has started in the year 2005, and year wise investment is already given in the petition. The deponent craves leave of this Hon'ble Court to rely upon and produce documents to substantiate the above facts at the time of hearing.***"**

**51.** In paragraph 3(iii) of W.P. (C) No.08 of 2017 it is pleaded by the Petitioner that:-

> ***"3(iii)*** *Based on the aforesaid statutory guarantee of 100% excise duty exemption, the process for establishing a Unit for the manufacturing of P & P medicaments falling under Serial No. 11 of the Schedule to the 2003 Notification was commenced as early as in 2005-06. An area of 1.5750 hectares (i.e. location of the present Sikkim Unit) was taken on lease. Right from the project stage, nearly 100 employees / workmen were engaged by the Petitioner for the construction of the Unit. The Petitioner had also been taking the requisite insurance cover for the workmen required to be engaged for the project work. Further, in total, the Petitioner had invested an amount of Rs.20,41,97,593/- between the period from 2005 to 2008 in various Fixed Assets.***"**
>
> ***(iv)*** *While things stood thus, vide an Office Memorandum dated 1.04.2007, the Respondent No. 1 notified the North East Industrial and Investment Promotion Policy ("Industrial Policy,* ***2007"****) whereby the North East Industrial Policy, 1997 covering States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura stood extended to State of Sikkim. Significantly, the 100% excise duty exemption that was provided under the 2003 Notification (i.e. under the Incentive Scheme, 2003) was also provided for under the Industrial Policy, 2007. A copy of the Industrial Policy, 2007 is annexed herewith as* ***Annexure-P7.***
>
> ***(v)*** *In line with the aforesaid Industrial Policy, 2007, the Respondent No. 1 issued Notification 20/2007 dated 25.04.2007 whereby goods*

*specified under the First Schedule to the Central Excise Tariff Act, 1985 other than those mentioned in the annexure to the aforesaid Notification and cleared in the State of Sikkim were exempted from so much of the duty of excise leviable thereon under the said Act as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit. A copy of the Notification No.20/2007 dated 25/4/2007 is annexed herewith as* ***Annexure-P8.***

*(vi) In short, the 100% excise duty exemption provided under Industrial Policy, 2007 read with Notification 20/2007 were the same as that provided under the 2003 Notification.*

*(vii) Given the legislative intent behind the continuation of the 100% excise duty benefits for goods cleared in State of Sikkim (including those manufactured by the Petitioner), the Petitioner continued to make its investments in Sikkim for the setting up of Unit. The Petitioner did everything necessary under law so as to allow it to engage people of Sikkim in employment at their plant. Consequently a large number of people from Sikkim are in employment of the Petitioner working at the Unit for the manufacture of the goods. In total, the investments made by the Petitioner from 2005 to 2014 can be summarized as follows,*

**(Rs in Lakhs)**

| **Financial Year** | **Net Investments in fixed assets & Capital Work in Progress** | **Cumulative Investments in fixed assets & Capital Work in Progress** |
|---|---|---|
| 2005-06 | 50.31 | 50.31 |

| | | |
|---|---|---|
| 2006-07 | 1799.83 | 1850.14 |
| 2007-08 | 191.84 | 2041.98 |
| 2008-09 | 2970.81 | 5012.79 |
| 2009-10 | 3657.79 | 8670.58 |
| 2010-11 | 2523.82 | 11194.40 |
| 2011-12 | 2744.04 | 13938.44 |
| 2012-13 | 3481.78 | 17420.22 |
| 2013-14 | 4012.93 | 21433.15 |
| **Total** | **21433.15** | |

"

**52.** In paragraph 6, 7, 8 and 9 of the counter-affidavit filed by the Respondents to W. P. (C) No. 08 of 2017 it is pleaded:-

> ***"6.*** *That with reference to the statements and allegations made at paragraphs 3 (i,ii,iii and iv) are matter of records.*
>
> ***7.*** *That with reference to the statements and allegations made at paragraphs 3 (v) it is submitted that the Respondent No. 1 (Union of India) issued Notification No. 20/2007-CE dated 25.04.2007 for availing area based exemption with certain conditions and the assessee has to fulfil the conditions stipulated in the notification to avail the exemption benefit. The Petitioner cannot be accorded Suo Motto benefit of an exemption notification because it is decided fact of law that "it is the foundation for availing the benefit under notification, it cannot be said that they are mere procedure requirements with no consequences attached for non-observance. The consequences are denial of benefit under notification for availing benefit under exemption notification the conditions are to be strictly complied with".*

***8.*** *That with reference to the statements and allegations made at paragraphs 3 (vi) it is submitted that the Notification No. 20/ 2007 is different from the Notification No. 56/2003 in respect of period of commencement of commercial production.*

***9.*** *That with reference to the statements made at paragraphs 3 (vii) it is submitted that the respondents have no comment."*

**53.** In paragraph 8 of the W.P. (C) No.27 of 2017 it is pleaded by the Petitioner that:-

***"8.*** *Based on the aforesaid statutory guarantee of 100% excise duty exemption, the process for establishing a Unit for the manufacture of P & P medicaments, falling under Serial No. 11 of the Schedule to the 2003 Notification was commenced. An area of 1.57 50 hectares (i.e. location of the present Sikkim Unit) was taken on lease. Right from the project stage, nearly 100 direct / indirect workmen were engaged by the Petitioner for the construction of the Unit. The Petitioner had also been taking the requisite insurance cover for the workmen required to be engaged for the project work. Further, in total, the Petitioner had invested an amount of Rs.20,41,97,593/- between the period from 2005 to March 2008 in various Fixed Assets for establishing said manufacturing unit."*

**54.** In paragraph 8 of the counter-affidavit filed by the Respondents to W. P. (C) No.27 of 2017 it is pleaded:-

> ***"8.*** *That with reference to the statements made at paragraph 8 no comments."*

**55.** In paragraph 7 of W.P. (C) No.40 of 2017 it is pleaded by the Petitioner that:-

> ***"7.*** *Based on the aforesaid statutory guarantee of 100% excise duty exemption, the Petitioner, in 2005 and thereafter, the process for establishing a New Unit ("Unit-1") for the manufacture of P & P medicaments, falling under Serial No. 11 of the Schedule to the Notification 56/2003 was commenced, including leasing of the land for establishing the said unit, generating employment in the State, etc."*

**56.** In paragraph 8 of the counter-affidavit filed by the Respondents to W. P. (C) No.40 of 2017 it is pleaded:-

> ***"8.*** *That with reference to the statements made at paragraphs 6 to 9 of the Writ Petition, no comment."*

**57.** A conjoint and wholesome reading of the pleadings in the present proceedings and specifically those quoted above makes it unequivocally clear that the Petitioner started its investment only in the year 2005 and thereafter. When the Petitioner thus started its investment in the year 2005 the incentive scenario in Sikkim was that under the previous regime Notification No. 56/2003 by which the Industrial Policy, 2003 was operationalized had been amended vide impugned Notification No.27/2004 by making it clear that only those new industrial units which have commenced commercial production on or after 23.12.2002 but not later than 31.03.2007 would be entitled to the exemption. It is an admitted fact that the Petitioner started its commercial production on and from 20.04.2009 for its first unit. However, the intention of the Respondent No.1 to offer central excise duty exemption was unequivocal. The Respondent No. 1 had both knowledge and intention that the said promise would be acted upon. It is evident that the Petitioner could not avail the benefit of Notification No. 56/2003 as amended by Notification No. 27/2004 as it did

not commence commercial production till 31.03.2007 i.e. the cut of date. It is also evident that the Respondent No.1 had made a promise and pursuant thereto the Petitioner had made substantial investments. Between the periods 09.07.2004 i.e. the date of issuance of impugned Notification No. 27/2004 till 01.04.2007 the date on which the Industrial Policy, 2007 was declared the policy continued to be as provided in Notification No. 56/2003 and as amended by impugned Notification No. 27/2004 i.e. that of 100% exemptions from excise duty. Thus the submission of the Petitioner that the investments were made in establishing its unit due to the clear promise held out by the Respondent No.1 is surely not out of place. A reading of the investment chart adverted to by the Petitioner in paragraph 3(vii) of W.P. (C) No.08 of 2017 to which the Respondent No.1 had no comment to offer in the counter-affidavit, it is seen that the Petitioner had made substantial investments between the period of issuance of impugned Notification No. 20/2007 and the issuance of the impugned Notification No. 20/2008. The Petitioner asserts that "Given the legislative intent behind the continuation of the 100% excise duty benefits for goods cleared in the State of Sikkim (including those manufactured by the petitioner), the petitioner continued to make investment in Sikkim for setting up for unit. The Petitioner did everything necessary under law so as to allow it to engage people of Sikkim in employment at their plant. Consequently a large number of people from Sikkim are in employment of the Petitioner working at the unit for the manufacture of the goods." The Petitioner further asserts that the total net investment in fixed assets and capital work in progress from the year 2005 till the year 2014 is 21433.15 lakhs. The Respondents in its counter affidavit states that they have no comment to make. Thus the investments made by the Petitioner as detailed in the investment chart must be accepted. It is quite evident that the Petitioner had in fact altered its position and made further huge investments to avail of the promise held out by the Respondent No. 1 to its detriment.

**58.** The Appellant in re: **Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Ors**[15] was engaged in the business of manufacture and sale of sugar. The State Government gave an assurance that new vanaspati units in the State which went into commercial production by 30.09.1970 would be given concession in sale tax for a period of 3 years. The Appellant set up the vanaspati unit and went into commercial production on 02.07.1970 and sought exemption. In August 1970, by which

[15] (1979) 2 SCC 409

time the Appellant had already gone into commercial production, the Government rescinded its earlier decision taken in January 1970. A Writ Petition filed in the High Court was rejected and the matter travelled to the Apex Court. After a detailed discussion of its authorities the Apex Court would hold:-

> ***"24.*** *… The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and the rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high standard of rectangular rectitude while dealing with its citizens'? There was a time when the doctrine of executive necessity was regarded as*

*sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in Anglo-Afghan Agencies case [Union of India v. Anglo-Afghan Agencies, AIR 1968 SC 718] and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the court*

*would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in Anglo-Afghan Agencies case [Union of India v. Anglo-Afghan Agencies, AIR 1968 SC 718] , claim to be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or expediency', nor can the Government claim to be the sole Judge of its liability and repudiate it on an ex parte appraisement of the circumstances'. If the Government wants to resist the liability, it will have to disclose to the court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of*

*change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the Government. The court would not act on the mere ipse dixit of the Government, for it is the court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position' provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Ajayi v. R.T. Briscoe (Nigeria) Ltd. [Ajayi v. R.T. Briscoe (Nigeria) Ltd., (1964) 1 WLR 1326 (PC)]"*

**59.** In re: **Pournami Oil Mills & Ors. v. State of Kerala & Anr**[16] under the order dated 11.04.1979 of the Kerala Government, new small scale units were invited to set up their industries in the State of Kerala and with a view of boost industrialisation, exemption from sales tax and purchase tax for a period of 5 years, which was to run from the date of commencement of production, was extended as a concession. By a subsequent notification dated 29.09.2980 the Government withdrew the exemption from sales tax to the limit specified in the proviso of the said notification. The Apex Court would hold thus:-

> ***"7.*** *.....If in response to such an order and in consideration of the concession made available, promoters of any small scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of M.P. Sugar Mills [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] . On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in Bakul Cashew Co. v. STO [(1986) 2 SCC 365 : 1986 SCC (Tax) 385] . In Bakul Cashew Co. case [(1986) 2 SCC 365 : 1986 SCC (Tax) 385] this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no*

[16] (1986) supp. SCC 728

*case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in M.P. Sugar Mills' case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] . In our view, to the facts of the present case, the ratio of M.P. Sugar Mills' case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409: 1979 SCC (Tax) 144] directly applies and the plea of estoppel is unanswerable.*

***8.*** *It is not disputed that the first order namely, the one dated April 11, 1979 gave more of tax exemption than the second one. The second notification withdrew the exemption relating to purchase tax and confined the exemption from sales tax to the limit specified in the proviso of the notification. All parties before us who in response to the order of April 11, 1979 set up their industries prior to October 21, 1980 within the State of Kerala would thus be entitled to the exemption extended and/or promised under that order. Such exemption would continue for the full period of five years from the date they started production. New industries set up after October 21, 1980 obviously would not be entitled to that benefit as they had notice of the curtailment in the exemption before they came to set up their industries.*

**60.** In re: **Manuelsons Hotels Private Limited v. State of Kerala & Ors.** the State Government by a Government Order, on the recommendation of the Respondent No.1, declared tourism as an industry enabling those involved in tourism promotional activities to become eligible for concessions/incentives as applicable. Exemption from building tax levied by the Revenue Department was one such concession. In the said Government Order it was stated that action would be taken to amend the Kerala Building Tax Act, 1975. Persons eligible for such concessions were to be classified starred hotels. A Committee was set up. The Appellants hotel project was approved vide letter dated 25.03.1997 by the Respondent No.1 to be set up in Calicut. Pursuant to the Government Order dated 11.07.1986 and the approval, the construction of the hotel began and was completed in 1991. On receipt of a notice for filing returns under the Kerala Building Tax Act, the Appellant replied that under Government Order dated 11.07.1986 they were under no obligation to furnish any return as they were exempt from payment of building tax. The Kerala Building Tax Amendment Act, 1990 was passed w.e.f. 06.11.1990 adding section 3A giving power to the Government to make exemption from payment of building tax for the purpose of promotion of tourism. By a Writ Petition filed in 1989 the notice issued to the Appellant to file returns was challenged which resulted in the Appellant being relegated to the Committee set up. The exemption promised by the Government Order dated 11.07.1986 was denied to the Appellant on the ground that section 3A had been omitted w.e.f. 01.03.1993 and the power to grant exemption having itself being taken away no such exemption could be granted to the Appellant. Thereafter, the Authority required the Appellant to submit a statutory return which was also challenged and ultimately the High Court allowed the Original Petition and directed the Committee to consider the matter afresh in the light of the judgment of the Apex Court in re: **Motilal Padampat Sugar Mills Co. Ltd.** (supra). The Authorities however once again rejected the application seeking exemption from property tax which led the filing of another Writ Petition in the High Court which, however, rejected it holding that no exemption notification had, in fact, been issued under Section 3A when it was in existence and therefore no claim for exemption from payment of building tax would be allowed. The High Court also held that mere promise to amend the law does not hold out the promise of exemption from payment of building tax and further that since Section 3A itself had been omitted the question of exempting the Appellants from building tax would not arise. After examining its authorities as well as various English authorities, the Apex Court would hold:-

***"14.*** *It is important to notice that the necessary exemption notification in Motilal Padampat case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] had not been issued under Section 4 of the U.P. Sales Tax Act, 1948. Yet, this Court held that sales tax for the period in question could not be recovered. This was done presumably because promissory estoppel is itself an equitable doctrine. One of the maxims of equity is that one must regard as done that which ought to be done. In this view of the matter, it is obvious that the High Court judgment is incorrect when it holds that as no exemption notification was, in fact, issued by the Government under Section 3-A, the petitioner would have to be denied relief. This judgment has been followed repeatedly and has been applied to give the benefit of sales tax exemption in similar circumstances in Pournami Oil Mills v. State of Kerala [Pournami Oil Mills v. State of Kerala, 1986 Supp SCC 728 : 1987 SCC (Tax) 134] , Supp SCC at paras 7 and 8."*

Then again

***"20.*** *The above statement, based on various earlier English authorities, correctly encapsulates the law of promissory estoppel with one difference—under our law, as has been seen hereinabove, promissory estoppel can be the basis of an independent cause of action in which detriment does not need to be proved. It is enough that a party has acted upon the representation made. The importance of the Australian case is only to reiterate two fundamental concepts relating to the doctrine of promissory estoppel—one, that the central principle of the doctrine is that the law will not*

*permit an unconscionable departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of a course of conduct which would affect the other party if the assumption be not adhered to. The assumption may be of fact or law, present or future. And two, that the relief that may be given on the facts of a given case is flexible enough to remedy injustice wherever it is found. And this would include the relief of acting on the basis that a future assumption either as to fact or law will be deemed to have taken place so as to afford relief to the wronged party.*

***21.*** *In the circumstances, the High Court judgment when it holds that no notification was, in fact, issued under Section 3-A of the Kerala Building Tax Act, 1975 (which would be sufficient to deny the appellants relief) is, therefore, clearly incorrect in law.*

Then again

***"36.*** *In the present case, it is clear that no writ of mandamus is being issued to the executive to frame a body of rules or regulations which would be subordinate legislation in the nature of primary legislation (being general rules of conduct which would apply to those bound by them). On the facts of the present case, a discretionary power has to be exercised on facts under Section 3-A of the Kerala Building Tax Act, 1975. The non-exercise of such discretionary power is clearly vitiated on account of the application of the doctrine of promissory estoppel in terms of this Court's judgments in Motilal Padampat [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] and Nestle [State of Punjab v. Nestle*

*India Ltd., (2004) 6 SCC 465] . This is for the reason that non-exercise of such power is itself an arbitrary act which is vitiated by nonapplication of mind to relevant facts, namely, the fact that a G.O. dated 11-7- 1986 specifically provided for exemption from building tax if hotels were to be set up in the State of Kerala pursuant to the representation made in the said G.O. True, no mandamus could issue to the legislature to amend the Kerala Building Tax Act, 1975, for that would necessarily involve the judiciary in transgressing into a forbidden field under the constitutional scheme of separation of powers. However, on facts, we find that Section 3-A was, in fact, enacted by the Kerala Legislature by suitably amending the Kerala Building Tax Act, 1975 on 6-11-1990 in order to give effect to the representation made by the G.O. dated 11-7-1986. We find that the said provision continued on the statute book and was deleted only with effect from 1-3-1993. This would make it clear that from 6-11-1990 to 1-3-1993, the power to grant exemption from building tax was statutorily conferred by Section 3-A on the Government. And we have seen that the Statement of Objects and Reasons for introducing Section 3-A expressly states that the said section was introduced in order to fulfil one of the promises contained in the G.O. dated 11-7-1986. We find that the appellants, having relied on the said G.O. dated 11-7-1986, had, in fact, constructed a hotel building by 1991. It is clear, therefore, that the non-issuance of a notification under Section 3-A was an arbitrary act of the Government which must be remedied by application of the doctrine of promissory estoppel, as has been held by us hereinabove. The ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said*

*doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise. It is also an admitted fact that no other consideration of overwhelming public interest exists in order that the Government be justified in resiling from its promise. The relief that must, therefore, be moulded on the facts of the present case is that for the period that Section 3-A was in force, no building tax is payable by the appellants. However, for the period post-1- 3-1993, no statutory provision for the grant of exemption being available, it is clear that no relief can be given to the appellants as the doctrine of promissory estoppel must yield when it is found that it would be contrary to statute to grant such relief. To the extent indicated above, therefore, we are of the view that no building tax can be levied or collected from the appellants in the facts of the present case. Consequently, we allow the appeal to the extent indicated above and set aside the judgment of the High Court."*

**61.** The Industrial Policy, 2003 of the Respondent No.1 had clearly declared that the State of Sikkim lags behind in industrial development and need had been felt for structured interventionist strategies to accelerate industrial development of the State and boost investor confidence. The new initiatives declared by the Industrial Policy, 200 would provide the required incentives as well as an enabling environment for industrial development, improve availability of capital and increase market access to provide a fillip to the private investment in the State. Fiscal incentives to new industrial units and substantial expansion of existing units was declared to be 100% income tax and excise duty exemption for a period of 10 years from the date of commencement of commercial production. The Industrial Policy, 2003 admitted that Sikkim is one of the least industrially developed States in India, heavily dependent on the Respondent No.1 for grants and there was a need to undertake an all round development effort to be at par with other States of the country. Thus, it was felt necessary to identify the priorities and emphasise the significance of the twin objective of speedy industrial

development and generation of adequate employment opportunities. It was stated that keeping these objectives in mind, the industrial policy attempts to satisfy the aspirations of the people through economic and industrial development of the State. One of the main strategies for the implementation of the policy of the Industrial Policy, 2003 was to announce attractive package and fiscal objectives. The Respondent No.1 described the current scenario and future prospects in the Industrial Policy, 2003 in the following words:-

**"2. <u>THE CURRENT SCENARIO AND FUTURE PROSPECTS.</u>**

1. *1.80 percent of the population lives in rural Sikkim and agriculture plays a dominant role in the State economy. With the total cultivable land of around 70.000 hectares, the per capita availability of land is a meagre 0.18 hectares. The rugged mountainous terrain, fragmentation of land erosion of the hilly tracts, geographical seclusion of Sikkim from mainland India, bottlenecks transportation, dependence on traditional methods of cultivation, etc, have contributed to the low productivity of agricultural crops and difficulties in undertaking large scale farming. Consequently, there has been very limited improvement in the methods of agriculture over the years.*

2. *The main crops produced area rice, wheat, maize, large cardamom and ginger with potential for the commercialization of large cardamom, ginger, fruits, tea, medicinal herbs and exportable flowers. There are large areas of fallow land available, which can be converted into productive farms for cash crops.*

3. *Sikkim produce 80 percent of India's large cardamom, which enjoys a high value export*

*market in Pakistan, Singapore and the Middle-East. The ginger is also of a good quality and has export prospects. The large cardamom and ginger can hence be converted into value added products. Fruits can be processed for value addition. Exotic flowers can be cultured for export. Honey and tea are other agro-based products that have high potential.*

4. *There is a good market for the minor forest produce of the State. The varied altitude is ideal for the cultivation of a variety of herbs which can be used in the manufacture of medicines, cosmetics and aromatic products. The climate is ideal for the development of mulberry trees and hence, the establishment of a sericulture industry.*

5. *The absence of profitable marketing network and the lack of appropriate processing facilities for manufacturing quality finished products has resulted in most of the produce being sold at uncompetitive prices to other states as raw materials, and their true potential has not been exploited. Therefore, due attention needs to be given for the development of agro-based, food processing and forest based units.*

6. *There are good prospects for setting up dairy and animals husbandry units on a commercial basis. The milk production offers opportunities for developing processed food-products like cheese, butter, etc. The population being predominantly non-vegetarian, meat-processing and packaging units offer promise in the State.*

7. *The State has a good resource base of minerals like zinc, lead, copper, dolomite, coal,*

*quartzite, graphite, talc etc. Commercial exploitation of some of these minerals is being carried out by the Sikkim Mining Corporation.*

8. *The traditional, cottage industries and specially handicrafts enjoy a good national and international market but more needs to be done on upgrading quality and design, as well as production and also improvement in the marketing network.*

9. *The abundant natural beauty of Sikkim offers a good potential to attract foreign and domestic tourists, and is conducive to the setting up of tourist spots, holiday resorts leisure camps of trekking and adventure sports activities. However, to develop and sustain the tourism industry, adequate travel and tourism related infrastructure needs to be created, conference tourism can also be promoted.*

10. *The state is dependent only on a network of roadways for transportation. At present, no air or water transport facilities are available. During the monsoon period transportation is hampered due to landslides etc. Therefore there is an urgent case for upgrading the road transportation network to and from Sikkim to other parts of India.*

11. *Accommodation facilities at present only adequate for tourists and must therefore be enhanced. The overall power situation though comfortable must be suitably enhanced to induce more power intensive industries to the State.*

12. *Human resources need to be developed with the ultimate objective of creating the necessary*

*skills commensurate will the future industry and market requirements.*

*13. The current industrial scenario is not very encouraging. As on 31/03/1996 there were 1683 provisionally registered and 313 permanently registered private sector industrial units, most of which are in the tiny or small sector promoted by first generation entrepreneurs. There are 14 State Public Sector Enterprises but no Central Government Public Sector Units in the State.*

*14. Of the registered industrial units only 225 (two hundred & twenty five) units are functioning while most of the other units are sick. Some of the State Public Sector enterprise are also incurring continuous losses and have accumulated heavy debts over the years."*

**62.** It was in this background that the Respondent No.1, satisfied that it was necessary in the public interest to issue Notification No.56/2003 exempted, inter alia, P & P medicaments falling under sl. No. 11 of the schedule to the Notification No. 56/2003 manufactured by the Petitioner and cleared from the units located in the State of Sikkim from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002. This incentive continued even when the Industrial Policy, 2007 was declared by the Respondent No.1 on 01.04.2007 approving a package of fiscal incentives and other concessions for the North East Region naming it advisedly the „North East Industrial and Investment Promotion Policy (NEIIPP), 2007. The coverage of the Industrial Policy, 2007 was declared to be the States of the North East Region of India including Sikkim. In the said Industrial Policy, 2007 all new units as well as existing units which go in for substantial expansion, unless otherwise specified and which commences commercial production within the 10 year period from the date of notification declaring the Industrial Policy, 2007 will be eligible for

incentives for a period of 10 years from the date of commencement of commercial production. As per the said Industrial Policy, 2007 the Petitioner who admittedly commenced commercial production on and from 20.04.2009 for the first unit and 14.04.2014 for the second unit was well within the 10 year period from the date of notification of the declaration of the Industrial Policy, 2007 i.e. 01.04.2007. The said Industrial Policy, 2007 clearly declared that 100% excise duty exemption would be continued, on finished products made in the North Eastern Region, as was available under the North Eastern Industrial Policy (NEIP), 1997 announced on 24.12.1997. It was by this notification declaring the Industrial Policy, 2007 that the NEIP, 1997 and other concessions in the North Eastern Region seized to operate w.e.f. 01.04.2007. The natural corollary to the declaration of the Industrial Policy, 2007 was the issuance of Notification No. 20/2007 on 25.04.2007 which exempted P & P medicaments manufactured by the Petitioner and cleared from the units located in the State of Sikkim from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004. The said Notification No. 20/2007 clearly stated that the said exemption shall apply to new industrial units which commence commercial production on or after 01.04.2007 but not later than 01.03.2017. The Petitioner having commenced commercial production admittedly on 20.04.2009 for the first unit and on 14.04.2014 for the second unit was entitled to seek the benefit under the said Notification No. 20/2007. The exemption contained in the said Notification No. 20/2007 was to apply to any of the said units for a period not exceeding 10 years from the date of publication of the said notification i.e. 25.04.2007 or from the date of commercial production i.e. 20.04.2009 for the first unit and 14.04.2014 for the second unit whichever is later.

**63.** The declaration of the Industrial Policy, 2003 for the State of Sikkim and thereafter the Industrial Policy, 2007 for the entire North East Region including Sikkim makes it clear that the Respondent No.1 was satisfied that it was necessary in the public interest to exempt inter-alia excise duty on P & P medicaments manufactured by the Petitioner and cleared from the units located in the State of Sikkim initially in the year 2003 and thereafter again in the year 2007 keeping in mind the fact that Sikkim was one of the least industrially developed States in India. 100% exemption of both income tax as well as excise duty is a definite attractive fiscal incentive strategy which

would lure investors to set up units in Sikkim without which, considering the under development of industries and the geographical terrain of the region, industrialist may not find feasible to invest in. Having thus declared such attractive incentives and lured the Petitioner to invest in Sikkim any alteration in the incentive package to the detriment of the investor would definitely attract the doctrine of promissory estoppel. The Respondent No. 1 cannot be allowed the unconscionable departure from the subject matter of the assumptions which has, as seen hereinabove, been adopted by the Petitioner as the basis of the course of conduct which would affect the Petitioner adversely.

**64.** As the Petitioner had failed to commence commercial production within the period 23.12.2002 to 31.03.2017 as specified by Notification No. 56/2003 as amended by Notification No.27/2004 it was not entitled to claim exemption under the aforesaid notification as held above. Consequently, we shall refrain from examining the challenge to the impugned Notification Nos. 27/2004, 21/2008 and 36/2008.

**65.** Coming now to the next point canvassed by the Learned Additional Solicitor General that, in fact, the impugned Notification No. 20/2008 does not actually digress from the Industrial Policy, 2007 as put into operation by Notification No. 20/2007 as in actuality, as demonstrated by the chart quoted and adverted to above, the Petitioner would still be entitled to the 100% excise duty exemption. The Notification No.20/2007 was amended by the impugned Notification No. 20/2008. Consequently the preamble to the amended Notification No.20/2007 would read thus:

> *"In exercise of the powers. conferred by sub-section (1) of the section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tarrif Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared form a unit located in the State of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or Sikkim, as the case may be, from so much of the duty of excise leviable thereon under the said Act as is*

*equivalent* ***to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit."*** **(Emphasis supplied).**

**66.** The intention of the Respondent No.1 was made clear. After the amendment to Notification No.20/2007 by impugned Notification No.20/2008 the exemption of excise duty equivalent to the amount of duty paid other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004 was now to be equivalent only to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit.

**67.** Under the amended paragraph 2A of Notification No.20/2007 as amended by impugned Notification No. 20/2008 the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the excisable goods. For the goods i.e. P & P medicaments falling under chapter 30 of the first schedule, the rate prescribed in the table to the amended paragraph 2A was 56%. Reading of the amended paragraph 2A leaves no room for doubt that the total 100% exemption once declared by the Industrial Policy, 2007 and as put into operation by Notification No. 20/2007 was hugely reduced to only 56% that too only on the value addition undertaken in the manufacture of the said goods. Simply put value addition is the amount by which the value of any good is increased at each stage of its production, exclusive of initial cost. Whereas in the original Notification No. 20/2007, the exemption on payment of excise duty was referable to the excise duty payable on the finished goods in the impugned Notification No. 20/2008 the excise duty was restricted to the quantum of value addition only. This surely was something not promised vide the Industrial Policy, 2007 and Notification No. 20/2007.

**68.** The learned Additional Solicitor General relying on the amended paragraph 3 of the Notification No.20/2007 as amended by impugned Notification No.20/2008 would argue that the option given to the manufacturer not to avail the rates specified in paragraph 2A and instant applying to the commissioner for fixation of a special rate would ensure that in genuine cases manufacturers could avail 100% duty exemption. A perusal of paragraph 3 makes it clear that the said fixation of special rate must be representing the actual value addition in respect of any goods if the manufacturer finds that four fifth of the ratio of actual value addition in the

production or manufacture of the said goods to the value of the said goods, is more than the rate specified in the table expressed as a percentage. The impugned notification therefore substantially curtails the 100% exemption from the whole of excise duty other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004. Notification No. 20/2007 provided exemption of full refund of the actual duty paid less CENVAT credit. The impugned Notification No.20/2008 however did away with full refund of the actual duty paid less CENVAT credit and instead the exemption was now to be based on value addition undertaken by the manufacturer made available product wise on varied rates of exemption. The proviso to paragraph 3(6) of the amended Notification No. 20/2007 as amended by impugned Notification No. 20/2008 which reads ¯Provided that the refund shall not exceed the amount of duty paid on such goods, other than by utilisation of CENVAT credit. perhaps makes it clear that in no case can the exemption of duty as envisaged by the impugned Notification No.20/2008 could actually exceed the exemption granted by Notification No.20/2007. The impugned Notification No.38/2008 which further amends the new paragraph 2A as inserted by impugned Notification No. 20/2008 merely provides now that *"the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excise goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the chapter of the first schedule as are given in the corresponding entry in column (2) of the said Table* ***when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory,*** *at the rates specified in the corresponding entry in column (4) of the said Table."* ***[Emphasis supplied].*** The Table provided in the new paragraph 2A vide impugned Notification No. 20/2008 to Notification No. 20/2007 has also been replaced with the new Table as provided in impugned Notification No. 38/2008. This Table however continues the rate of exemption of duty payable on value addition undertaken in the manufacture of the said goods by the said unit to the 56% as was prescribed in the impugned Notification No. 20/2008. Thus the intent and purport of whittling down the 100% exemption of excise duty promised, declared and granted vide Notification No. 20/2007 continued vide the impugned Notification No. 38/2008.

**69.** The learned Additional Solicitor General would also argue that the impugned notification stating clearly that the said notification had been issued in public interest it is for the Court to presume that in fact the impugned notification was issued in public interest and the onus would lie on the Petitioner to show otherwise. The impugned Notification No. 20/2008 was a notification amending the original Notification No. 20/2007 issued in public interest granting exemption of payment of excise duty. In such situation it was incumbent upon the Respondent No.1 to have shown larger public interest for curtailing/modifying/withdrawing exemption so granted.

**70.** In re: **Pawan Alloys & Casting (P) Ltd. v. U.P. SEB**[17] **.**

> ***"10.*** *It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as "State" within the meaning of the said article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.*
>
> ***11.*** *In this connection we may usefully refer to a decision of this Court rendered in the case of State of H.P. v. Ganesh Wood Products [(1995) 6 SCC 363] . B.P. Jeevan Reddy, J. speaking for a Bench of two learned Judges of this Court made the following pertinent observations in this connection in paras 54 and 55 of the Report: (SCC pp. 390-91)*
>
> *"54. The doctrine of promissory estoppel is by now well recognised in this*

[17] (1997) 7 SCC 251

*country. Even so it should be noticed that it is an evolving doctrine, the contours of which are not yet fully and finally demarcated. It would be instructive to bear in mind what Viscount Hailsham said in Woodhouse Ltd. v. Nigerian Produce Ltd. [1972 AC 741 : (1972) 2 All ER 271 : (1972) 2 WLR 1090]* –

*'I desire to add that the time may soon come when the whole sequence of cases based upon promissory estoppel since the war, beginning with Central London Property Trust Ltd. v. High Trees House Ltd. [1947 KB 130 : 62 TLR 537 : 1947 LJR 77] may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent exposition which have never been systematically explored.' 55. Though the above view was expressed as far back as 1972, it is no less valid today. The dissonance in the views expressed by this Court in some of its decisions on the subject emphasises such a need. The views expounded in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] was departed from in certain respects in Jit Ram Shiv Kumar v. State of Haryana [(1981) 1 SCC 11] which was in turn criticised in Union of India v. Godfrey Philips India Ltd. [(1985) 4 SCC 369 : 1986 SCC (Tax) 11] The divergence in approach adopted in Shri Bakul Oil Industries v. State of Gujarat [(1987) 1 SCC 31 : 1987 SCC (Tax) 74] and Pournami Oil Mills v. State of Kerala [1986 Supp SCC 728 : 1987 SCC (Tax) 134] is another instance. The fact that the recent decision in Kasinka Trading v. Union of India [(1995) 1 SCC 274] is being*

*reconsidered by larger Bench is yet another affirmation of the need stressed by Lord Hailsham for enunciating a coherent body of doctrine by the courts'. An aspect needing a clear exposition — and which is of immediate relevance herein — is what is the precise meaning of the words the promisee … alters his position', in the statement of the doctrine. The doctrine has been formulated in the following words in Motilal Padampat Sugar Mills Co. Ltd. [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] : (SCC p. 442, para 24)*

> *'The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution'."*

*We may say at this stage that at the time the aforesaid decision was rendered, judgment of this Court in the case of Kasinka Trading v. Union of India [(1995) 1 SCC 274] was pending scrutiny before a larger Bench. Subsequently the said decision came to be confirmed by the decision of a Bench of three learned Judges of this Court speaking through A.M. Ahmadi, C.J. in the case of Shrijee Sales Corpn. v. Union of India [(1997) 3 SCC 398] . We will refer to these decisions in the latter part of this judgment.*

*Suffice it to say at this stage that if a statutory authority or an executive authority of the State functioning on behalf of the State in exercise of its legally permissible powers has held out any promise to a party, who relying on the same has changed its position not necessarily to its detriment, and if this promise does not offend any provision of law or does not fetter any legislative or quasilegislative power inhering in the promisor, then on the principle of promissory estoppel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the promisee."*

Then again

***"27.*** *Shri Dave, learned Senior Counsel for the Board, next contended that the Board in exercise of its statutory powers had earlier decided to grant rebate of 10% on the bills of electricity consumed by new industries. In the exercise of the same statutory power it was open to the Board to withdraw the said concession or rebate on the ground of public policy and doctrine of promissory estoppel cannot be pressed into service for thwarting such an exercise by the Board. For supporting this contention he vehemently pressed into service two decisions of this Court in the case of Kasinka Trading v. Union of India [(1995) 1 SCC 274] and in the case of Shrijee Sales Corpn. v. Union* of India [(1997) 3 SCC 398]. In fact these two decisions were the sheetanchor of the challenge mounted by Shri Dave for the Board against the *finding of the High Court on Issue No. 1. We, therefore, now proceed to deal with these decisions.*

***28.*** *In the case of Kasinka Trading [(1995) 1 SCC 274] a Bench of two learned*

*Judges of this Court consisting of M.N. Venkatachaliah, C.J. and Dr. A.S. Anand, J., had to consider the question whether a notification issued under Section 25 of the Customs Act, 1962 granting complete exemption from payment of customs duty to PVC resin imported into India by manufacturers of certain products requiring the said resin as one of the raw materials, which was issued in public interest and which had stated that it would remain in force up to and inclusive of 31-3-1981 could be withdrawn before the expiry of the said period by fresh notification issued by the Government in exercise of the very same power under Section 25 of the Customs Act. This Court speaking through Dr Anand, J., took the view that as the said notification was issued in public interest it could be withdrawn even before the time fixed therein for its operation also in public interest and while issuing such a notification no promise can be said to have been held out or any representation made to the importers in general on the basis of which they could insist on the doctrine of promissory estoppel that the customs duty exemption granted earlier by the first notification could not be reduced by the second one. The following pertinent observations are found in paras 11 and 12 of the Report: (SCC pp. 283-84)*

> *"11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by*

*word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.*

*12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make'. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the*

*Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.*

*It may, however, be mentioned that in para 21 of the Report the Court has observed that the notification which was impugned before it was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued by the Central Government "being satisfied that it was necessary in the public interest so to do. Strictly speaking, therefore, the notification could not be said to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It must, therefore, be held that the aforesaid decision had clearly proceeded on the basis that by issuing the earlier notification under Section 25 of the Customs Act no promise was held out to any of*

*the importers that the notification's life will not be curtailed earlier. Nor was the issuance of the notification based on any claim of incentives to be offered to anyone. It was issued in exercise of statutory powers vested in the Government which could be exercised from time to time in public interest. Earlier the public interest might have required issuance of such a notification granting cent per cent exemption from customs duty on import of PVC resin. Under changed circumstances public interest itself required reduction of such an exemption and as no promise was held out that this could not be done at any time the Court on the facts of that case justifiably rejected the plea of promissory estoppel. It is also to be observed that the said notification was issued in exercise of sovereign taxing power and had created no legal relationship between the authority issuing the notification on the one hand and the prospective importers of PVC resin on the other. The said decision is not an authority for the proposition that even if a claim of exemption from import duty was resorted to in public interest by way of an incentive for a class of importers and even though such public interest continued to subsist during the currency of such an exemption notification and that promisees for whose benefit such exemption was granted had changed their position relying on the said exemption notification, it could still be withdrawn before the time mentioned therein even though public interest did not require the said exercise to be undertaken and even though there were subsisting equities in favour of the promisee-importers. As such a situation had not arisen in that case it was not adjudicated upon.*

***29.*** *The said decision, therefore, cannot be of any real assistance to learned Senior Counsel Shri Dave for the respondent-Board on the facts of the present group of matters. In the present cases, as we have seen earlier a clear-cut scheme of incentives for new industries was put forward by the Board presumably at the behest of the U.P. Government so that more and more industries could be attracted to State of U.P. The Board also in its wisdom adopted the said scheme of incentives while fixing schedule of tariff rates as that was also in the interest of the Board for the obvious reason that thereby more and more new industries as consumers of high-power electricity would be attracted to the region and would be paying higher electricity rates/charges to the Board."*

Then again

***"31.*** *In the light of this settled legal position we, therefore, hold that even though the appellants have succeeded in convincing us that the earlier three notifications dated 29-10-1982, 13-7-1984 and 28-1-1986 did contain a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this incentive rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of*

*development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. We, therefore, now proceed to examine these twin aspects of the controversy."*

**71.** In re: **State of Punjab v. Nestle India Ltd. & Anr.**[18] the Chief Minister of Punjab declared in a State level function of dairy farmers that the State Government had abolished purchased tax on milk and milk products in the State which was widely published in newspapers. The Chief Minister reiterated that declaration in his budget speech also and the Finance Minister stated that such exemption would assist the milk producers and milk cooperatives. The circular issued by the Excise and Taxation Commissioner intimated the field officers that the Government had decided to abolish purchase tax on milk. The representatives of the Respondent companies were also informed of the circular. Finally, the Finance Department formally approved the proposal to abolish purchase tax on milk and the council of Ministers gives his formal approval. Consequently, the Respondent milk producers did not pay the purchase tax for the specific period and this point was clearly stated in the returns of that particular year. The tax authorities did not reject the returns. The Respondents claimed the benefit was passed on by them to the dairy farmers. The State Government did not deny these facts. In the end of the year the State Government in fact published advertisements claiming credit for the abolition. Subsequently in the Minutes of the Meeting of the Council of Ministers it was cryptically recorded that the decision to abolish purchase tax on milk was not accepted. Consequently the ETO issued notices to the Respondents requiring them to pay the amount of purchase tax. A number of Writ Petitions were filed before the High Court challenging the demand. The High Court held that the Respondents had acted on the representation made and could not be asked to pay purchase tax w.e.f. 01.04.1996 but would be liable after the decision of the Government for the subsequent period i.e. from 04.06.1997. The State Government then filed appeals before the Apex Court. In the said facts the Apex Court would hold :-

[18] (2004) 6 SCC 465

> ***"47.*** *The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event readjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet."*

**72.** In re: **Sal Steel Limited (supra)** a similar situation had arisen in the State of Gujarat. In the wake of massive earthquake in the Kutch region of Gujarat the Respondent No.1 notified an exemption scheme exempting goods produced by new industrial units from paying duty of excise by issuing the original notification. By the two offending notifications issued subsequently, the basis of the original notification of granting refund of the amount of duty of excise or additional duty of excise leviable on the goods other than the amount of duty paid by utilisation of CENVAT credit was changed. The impugned notifications substituted the previous exemption by the words *"to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit"*, and further provided that the rate of percentage of the total duty payable at which the relief would be available. These notifications impugned therein were challenged before the High Court of Gujarat at Ahmedabad. There was a conflict of opinion in the Division Bench. **D.A. Mehta J.** held in favour of the

Petitioner and set aside the impugned notifications which curtailed/modified/ substituted the basis laid down in the original notification declaring it to be bad in law and holding that new industrial units, which have been set up and commenced commercial production within the specified period and by the specified date under the original notification shall be entitled to the benefit of exemption in the form of refund of excise duty payable/paid on the goods manufactured and cleared from such new units set up in the Kutch district without any restriction by operation of the two notifications impugned therein, provided all other condition stands satisfied. **S.R. Brahmbhatt J.** disagreed with the view expressed by **D. A. Mehta J.** the matter was referred to **Jayant Patel J.** who after recording detailed reasons agreed with the final conclusion recorded by **D. A. Mehta J.**

**73.** In re: **Reckitt Benckiser (supra)** the High Court of Jammu and Kashmir would have an occasion to examine a similar issue. In order to boost Industrial activity in the State, Industrial Policy 1998-2003, 2004 was promulgated which remained in operation till 31st of March 2015. The Respondent No. 1 felt the need for structured intervention strategies to accelerate industrial development and boost investor confidence to strengthen and broadened the infrastructure base of the State and also to minimise unemployment problem. Vide a Notification dated 14.06.2002 the Respondent no. 1 declared new incentives to new industrial units as well as existing units engaged in substantial expansion. The Respondent no. 1 approved conversion of growth centre into total tax free zone for a period of ten years from the date of commencement of commercial production entitling 100% excise duty exemption. Pursuant thereto, Notification no. 56/ 2002 was issued granting such exemption in exercise of the powers under Section 5A of the Central Excise Act, 1944. The said notification exempted goods from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon, as is equivalent to the amount of duty paid by the manufacturer of goods, other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002. The exemption contained in the said notification was to apply to those units who had commenced their commercial production on or after 14.06.2002 as well as those industrial units existing before 14.06.2002, but have undertaken substantial expansion by way of increase installed capacity by not less than 25% on or before the above date. It was also provided that the exemption contained in the said notification shall apply to any of the aforementioned units for a period not exceeding 10 years from the date of publication of the

notification or from the date of commencement of commercial production, whichever is later. The said notification was amended vide Notification No. 05/2003 dated 13.02.2003 by adding a proviso which read: ¯provided that such refund shall not exceed the amount of duty paid less the amount of CENVAT credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification. Vide Notification impugned therein No. 19/2008 dated 27.03.2008 and 34/ 2008 dated 10.06.2008 further amendments were carried out whereby excise duty refund had been restricted to a maximum limit as mention in the tables appended to the said notification in respect of the different goods. The said notifications change the entire scenario by reducing 100% exemption provided by the earlier notifications to a limited percentage in respect of different goods manufactured by the units. Further, the said notifications also restricted the exemption from duty to value addition undertaken in the manufacture of said goods by the units. The said notifications impugned therein also gave liberty to an industrial unit to apply to the Commissioner for determination of actual value addition if the manufacturer does not agree to the rate of excise duty exemption which had been made available under the said notifications. The said notifications amending the original notifications were put to challenge before the High Court of Jammu and Kashmir at Jammu. The High Court held that the concept of value addition is relatable to goods which are actually manufactured in the units from the raw material after excluding the cost of the said raw material. The actual activity carried out in the manufactured of goods and the cost incurred would be the value addition. After having promised a 100% refund of excise duty it was not permissible for the Respondent no. 1 to deviate from the promise held out by the earlier notification as it cannot be said that the impugned notifications continued to extend the same promise as was intended in terms of the earlier notification. It was also held that the concept of special rate displaces the very foundation of the rate fixed in terms of the original notification. It was further held that there was no supervening public interest in withdrawing the exemption by way of the notifications impugned. Consequently, the Writ Petitions were allowed and the notifications impugned therein quashed.

**74.** In re: **Unicorn Industries (supra)** this Court would examine the legality of Notification No.23/2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 withdrawing the exemption granted in the payment of duty for utilisation towards the CENVAT credit/cash conferred

upon the Petitioner therein by Notification No.71/2003 dated 09.09.2003 issued by the Respondent No.1 exercising the powers under Section 5A of the Central Excise Act, 1944. Notification No.71/2003 provided for exempting the goods from so much of the duty of excise or additional duty of excise as was leviable thereon as is equivalent to the amount of duty paid by the manufacturer of the said goods, other than the amount of duty paid by utilisation of CENVAT credit. Both the Industrial Policy, 2003 as well as Industrial Policy, 2007 fell for consideration before this Court. It was not in dispute that based on the statutory guarantee for exemption of excise duty, the Petitioner therein invested and started new units. Notification No. 23/ 2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 were challenged before this Court. Notification No.23/2008 amended the earlier Notification No.71/2003 dated 09.09.2003 by amendments identical to the amendments made in the impugned Notification No.20/2008. The preamble to Notification No. 71/2003 was amended substituting for the words *"to the amount of duty paid by the manufacturer of the said goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002", the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit".* Identically, as in the impugned Notification No.20/ 2008, Notification No.23/2008 also provided a table in which for goods falling under chapter 33 a rate of 56% was prescribed. Similarly Notification No.37/2008 is identical to the impugned Notification No.38/2008. After examining the matter in detail this Court would hold that once it is established that the exemption had been granted in public interest the same cannot at any stretch be withdrawn unless there is a larger public interest. This Court would further hold that once power under Section 5A of the Central Excise Act, 1944 had been exercised and exemption granted, a larger/superior public interest has to be shown for curtailing/modifying/ withdrawing an exemption already granted and in such eventuality, the onus shall be on the Revenue. This Court would further rely upon the full bench decision of the Gujarat High Court in **Sal Steel Ltd. (supra)** holding that withdrawal of exemption without any basis, whatsoever, is arbitrary, unreasonable, illogical and irrational and contrary to the doctrine of promissory estoppel. This Court would also hold that once the Respondent No.1 had taken a policy decision and exercised power under Section 5A of the Central Excise Act, 1944 in public interest, the same cannot be restricted by way of the Notification No.23/2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 impugned therein unless a

greater public interest required so. Thus holding, this Court quashed the notifications impugned therein without prejudice to the rights of the Revenue to deny duty exemptions in appropriate cases, based on material facts and giving cogent reasons after following due process of law.

**75.** We are in agreement with the aforestated views expressed by the High Court of Gujarat in re: **Sal Steel Ltd. (supra),** the High Court of Jammu and Kashmir in re: **Reckit Benckiser (supra)** and this Court in re: **Unicorn Industries (supra)** which follows the principles of law laid down by the Apex Court in re: **M/s. Motilal Padampat Sugar Mills Co. Ltd. (supra)** and in re: **Pawan Alloys & Casting (P) Ltd. (supra).**

**76.** In re: **Modipon Ltd. (supra)** the Delhi High Court would hold that the Courts have consistently taken the view that the public interest is inherent in issuance of the withdrawal of the notifications. The public interest is the dominant factor in issuance and withdrawal of the notifications what is given in public interest can also be taken away in public interest. Every action of the Government is presumed to be in public interest unless contrary is proved. The Petitioner have failed to demonstrate that the notification dated 21.10.1982 was not issued in public interest. Holding thus, the High Court dismissed the Writ Petition preferred. While holding so the Delhi High Court would rely upon **Kasinka Trading & Anr. v. Union of India[19].** The distinction drawn by the Apex Court in re: **Pawan Alloys & Casting (P) Ltd. (supra)** would be squarely applicable to the present case. The said decision, therefore, cannot be of any real assistance to the learned Additional Solicitor General on the facts of the present Writ Petitions. In the present cases, as we have seen earlier, a definite scheme of incentives for new industries was put forward vide Industrial Policy, 2007 which held out a promise by the Respondent No.1 for 100% excise duty exemption so that more and more industries could be attracted to State of Sikkim. The Respondent No.1 translated the said promise declared vide Industrial Policy, 2007 into Notification No. 20/2007 for the obvious reason that thereby more and more new industries would be attracted to the North East Region including Sikkim.

**77.** In re: **Kothari Industrial Corporation Limited (supra)** relied upon by the learned Additional Solicitor General, the Apex Court would hold that a recipient of a concession has no legally enforceable right against the Government to grant or continue to grant concession except to enjoy benefits of concession during the period of its grant.

[19] (1995) 1 SCC 274

**78.** In the present case the Petitioner seeks to enjoy the benefit promised by the Respondent No.1 for the period of 10 years as declared by the Respondent No.1.

**79.** In re: **R.C. Tobacco (P) Ltd. (supra)** relied upon by the learned Additional Solicitor General, the Apex Court would hold that the competence of Parliament and the State Legislature to repeal, amend or supersede an exemption notification is unquestionable. The limitation on this power is that that the legislation must not conflict with other provisions of the Constitution. A law cannot be held to be unreasonable merely because it operates retrospectively. The unreasonability must lie in some other additional factors. The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be so unreasonable as to violate Constitutional norms. The Apex Court would find that the particular context of the section impugned therein was the Industrial Policy formulated by the Central and the State Government of Assam for development of that State. It was held that the obvious intention behind the grant of the package of incentives including an exemption from payment of excise duties was to stimulate further industrial growth in the area with enduring benefits not only to the local populace by way of employment opportunities but also to the economic welfare of the State. It was found that none of the industrial units manufacturing cigarettes were prepared to contribute to that object and their investment in the manufacture of cigarette was co-extensive with the period of the exemption. In the light of the aforesaid facts it was held by the Apex Court that therefore, the Government could contend that the words should have been used in the exemption so as to provide for sufficient safeguards to ensure that the benefit of exemption was granted only to those industries which would in turn permanently invest in the State and by the retrospective enactment that defective expression of the object of the policy, was rectified.

**80.** The facts of the present set of Writ Petitions are entirely different than the facts in re: **R.C. Tobacco (P) Ltd. (supra).** The Petitioner does not question the competence of Parliament and the State Legislature to repeal, amend or supersede an exemption notification nor is it a case of challenge to a law operating retrospectively. It is nobodys case that the Petitioner was not willing to contribute to the object of industrial growth and their investment in the manufacture of P & P medicaments was co-extensive with the period of the exemption.

**81.** In re: **DG of Foreign Trade v. Kanak Exports (supra)** a challenge to a notification issued by the Respondent No.1 making some notes inserted to EXIM Policy, 2002-2007 on the ground that under the guise of the said notes, some

benefits which had already accrued to the exporters under the EXIM policy i.e. their vested rights, had been taken away was repelled by the Apex Court holding that the said notification was only clarificatory in nature and valid and did not amount to amendment. It also held that the incentive scheme under the EXIM Policy is in the nature of concession or incentive which is a privilege of the Respondent No.1 and it is for the Government to take the decision to grant such privilege or not and further where there is withdrawal of such incentive and it is also shown that the same was done in public interest, the Court would not tinker with these policy decision. In the facts of the said case it was held that if the status-holders had achieved 25% incremental growth in exports, they acquired the vested right to receive the benefit under the scheme, which could not be taken away. It was held that the so called targets achieved were only on paper through fraudulent means, and, therefore, it cannot be said that any vested right accrued in favour of the exporters. There was pernicious and blatant misuse of the provisions of the incentive scheme in question. The Supreme Court, or for that matter the High Court in exercise of its writ jurisdiction, cannot come to the aid of such Petitioner exporters who, without making actual exports, play with the provisions of the scheme and try to take undue advantage thereof. In the said case the Apex Court would examine whether the withdrawal notifications were in public interest. It would find that the main objective of the incentive scheme was to achieve the share of 1% of global trade and accelerated growth in exports by India. It would find that immediately after the introduction of the scheme, there was unprecedented sharp rise in the export in gem and jewellery articles and that misuse of the scheme was stated to have come to the notice of the DRI and other intelligence official also and therefore the notifications were issued to curb misuse. On such finding of facts it was held by the Apex Court that the purport behind notification were bonafide which was actuated with the conditions of public interest in mind.

**82.** The facts and circumstances in the present case is distinctly different from the facts and circumstances in re: **Kothari Industrial Corpn. Ltd. (supra).** In the present case no material whatsoever has been placed by the Respondent No.1 to show that the withdrawal was in public interest save stating that the notification itself states that it is in public interest leave alone showing a superior public interest to resile from the promise held out clearly vide Industrial Policy, 2007 and 100% exemption granted pursuant thereto vide Notification No. 20/ 2007.

**83.** Coming now to the point raised by Mr. Vikram Nankani, learned Senior Advocate that the Petitioner having inadvertently sought exemption under

Notification No. 56/2003 whereas the Petitioner was in fact eligible for exemption under the Industrial Policy, 2007 and the Notification No.20/2007 the benefit which the Petitioner was otherwise eligible to avail of could not be prohibited from claiming the same.

**84.** In re: **Unichem Laboratories (supra)** the Apex Court would hold:-

> ***"13.*** *For the aforementioned reasons, we are of the view that denial of benefit of the notification to the appellant was unfair. There can be no doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law - no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonable and fairly."*

**85.** In re: **Share Medical Care (supra),** the Appellant society imported certain medical equipments for the use in its charitable hospital. According to the Appellant, under notification in question, exemption were granted to hospital equipments imported by the specified category of hospitals (charitable) subject to certification by Directorate General of Health Services (DGHS). The table in the notification classified hospitals in four categories. According to the Appellant, it fell under Para No. 3 of the table of the said notification. The Appellant, however, along with several other hospitals, had applied for the benefit of exemption notification not under Para 3 but para 2 of the table. The benefit of exemption was granted. Since the Appellant society was also entitled to exemption under para 3 of the table an application was made to DGHS, highlighting the fact that the Appellant is non-profit organisation and had been permitted to import medical equipments by DGHS by certification. It has been registered as an institution to receive donation in foreign exchange and since the areas of operations of the main hospital at Ghanapur and the Rural Health Hospital are in rural areas, it would be entitled to invoke para 3 of the table of the notification of exemption. The Deputy Director General (Medical), DGHS by an order dated 25.01.2000 rejected the application of Appellant observing therein that initially the request was made by the Appellant for exemption under para 2 of the said notification and accordingly, the institution was granted such exemption. It was, therefore, not open to apply for exemption under para 3

of the table of the exemption notification and the application was liable to be rejected. Being aggrieved, the Appellant Society filed a Writ Petition in the High Court which was dismissed and the matter travelled to the Apex Court. The Apex Court would hold:-

> ***"12.*** *In CCE v. Indian Petro Chemicals [(1997) 11 SCC 318] this Court held that if two exemption notifications are applicable in a given case, the assessee may claim benefit of the more beneficial one. Similarly, in H.C.L. Limited v. Collector of Customs [(2001) 9 SCC 83 : (2001) 130 ELT 405] this Court relying upon Indian Petro Chemicals [(1997) 11 SCC 318] held that where there are two exemption notifications that cover the case in question, the assessee is entitled to the benefit of that exemption notification which may give him greater or larger relief. In Unichem Laboratories Ltd. v. CCE [(2002) 7 SCC 145 : JT (2002) 6 SC 547] the appellant was a manufacturer of bulk drugs. Exemption was granted to him under one item. He, thereafter, filed a revised classification list categorising its bulk drugs under the other head claiming more benefit. The claim was rejected on the ground that the appellant had not claimed the benefit of exemption at the time of filing the classification list and subsequently it could not be done. The appellant approached this Court.*
>
> ***13.*** *Allowing the appeal and setting aside the order, this Court held that if no time is fixed for the purpose of getting benefit under the exemption notification, it could be claimed at any time. If the notification applies, the benefit thereunder must be extended to the appellant. The Court held that the authorities as well as the Tribunal were not right in holding that the appellant ought to have claimed the benefit of the notification at the time of filing of classification lists and not at a subsequent stage. The Court then stated: (SCC p. 150, para 12)*

> *"There can be no doubt that the authorities functioning under the Act must, as are duty-bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law—no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonably and fairly."* **(Emphasis supplied)**

**14.** *In Kerala State Coop. Marketing Federation Ltd. v. CIT [(1998) 5 SCC 48: JT (1998) 4 SC 145], interpreting Section 80-P(2)(a) of the Income Tax Act, 1961, this Court said: (SCC p. 52, para 7)*

> *"7. We may notice that the provision is introduced with a view to encouraging and promoting growth of cooperative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a cooperative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption. The expression marketing' is an expression of wide import. It involves exchange functions such as buying and selling, physical functions such as storage, transportation, processing and other commercial activities such as*

*standardisation, financing, marketing intelligence, etc. Such activities can be carried on by an apex society rather than a primary society."* ***(Emphasis supplied)***

***15.*** *From the above decisions, it is clear that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage."*

**86.** In view of the above, it is held that the Petitioner which was entitled to exemption benefit under Notification no. 20/2007 but sought benefit under Industrial Policy, 2003 and Notification No. 56/2003 would be entitled for the benefit under the Industrial Policy, 2007 as put into operation vide impugned Notification No. 20/2007.

**87.** We find that the Respondent No.1, right from the year 2003, had declared a clear policy of 100% excise duty exemption to those new industrial units who would set up industry in Sikkim as well as to those industries who went in for substantial expansion. This policy was put into operation vide Notification No.56/2003. The Respondent No.1 had vide impugned Notification No. 24/2004 limited the period within which new industrial units were required to commence commercial production. The Petitioner started the process of investment in the year 2005 only and could not start commercial production until 20.04.2009 by which time, by the operation of a subsequent impugned Notification No.27/2004, the Petitioner did not qualify to take the benefit of the said Industrial Policy, 2003. The Petitioner therefore, is not entitled to the benefit of Notification No. 56/2003. The industrial policy however, did not change. In 2007 the Respondent No.1 declared the Industrial Policy, 2007 by which identical 100% excise duty exemption was once again promised. This Industrial Policy, 2007 was put into operation vide Notification No.20/2007. The Petitioners subsequent investments were obviously intended to reap the benefit of the said Notification No.20/2007. The Petitioner having commenced commercial production on and from 20.04.2009 for the first unit and from 14.04.2014 for the second unit were well within the period notified therein. The policy of the Respondent No.1 was clear and cogent. It was intended to draw investors to Sikkim which was industrially backward. Having acted on the said promise made by the Respondent No.1, the Petitioner made huge investments and altered its position to its detriment. Having issued the said Notification No.20/

2007 in public interest it was incumbent upon the Respondent No.1 to place before this Court all materials available to establish a superior public interest which the Respondent No.1 has failed to do. The facts and circumstances of the present writ petitions, therefore, squarely falls within the parameters of the doctrine of promissory estoppel and that it would be unconscionable on the part of the Respondent No.1 to shy away from it without fulfilling its promise. The relief that must, therefore be granted on the facts of the present case is that for the period declared vide Notification No.20/2007 the Petitioner would be entitled to the excise duty exemption as promised therein. Consequently impugned Notification Nos.20/2008 and 38/2008 are liable to be quashed to the extent they curtail and whittle down the 100% excise duty exemption benefit as promised vide Notification No.20/2007 and is hereby quashed. All impugned orders/ demand notices/show cause notices which are against the aforestated declarations of law are also quashed.

**88.** Writ Petition (C) No. 41/2015, Writ Petition (C) No. 08/2017, Writ Petition (C) No. 27/2017 and Writ Petition (C) No. 40/2017 are disposed accordingly in the aforesaid terms. Rule made absolute to the aforesaid extent with no order as to costs.

**SLR (2017) SIKKIM 724**

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

**Crl. A. No. 04 of 2017**

| | | |
|---|---|---|
| **Sanjay Subba** | **…..** | **APPELLANT** |
| | *Versus* | |
| **State of Sikkim** | **…..** | **RESPONDENT** |

**For the Appellant :** Mr. Udai P. Sharma assisted by Mr. Anup Gurung, Advocate.

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

Date of decision: 27th November 2017

**A) Criminal appeal – Power of first Appellate Court – Appellate Court while, hearing an appeal against conviction must consider the factual aspects of the case – The power of the Appellate Court while dealing with conviction is the same as power of the Appellate Court while dealing with an appeal against acquittal – The appeal against conviction is as of right – The procedure to deal with appeal against conviction and appeal against acquittal is identical and the power of Appellate Court, in essence is the same.**

(Para 12)

**B) Criminal Trial – Prosecution witness – Declaring hostile witness – When solitary prosecution eye witness admitted to the suggestion of the defense that the assault on the head of the deceased was unintentional and accidental it was incumbent upon the prosecution to declare the witness hostile and cross examine the said witness to extract the truth – The failure of the prosecution to declare the witness hostile will definitely permit the Appellant to rely upon**

**the evidence of the witness in cross examination in his favour.**

(Para 22)

**C) Indian Evidence Act, 1872 – S. 134 – Sole Testimony of Tingle Witness- As a general rule it is no doubt that the court can act on the testimony of a solitary witness provided she is wholly reliable – There cannot be any legal impairment in convicting a person on the sole testimony of a single witness as clear from S. 134 of the Evidence Act, 1872.**

(Para 22)

**D) Criminal Trial – Burden of Proof – It is the cardinal principal of criminal jurisprudence that the burden of proof always rests on the prosecution to establish the guilt of the accused beyond all reasonable doubt to enable the Court to come to a conclusion that it was the accused and the accused alone who was guilty of the crime alleged.**

(Para 22)

**E) Criminal Trial – Confessional Statement – Confession has either to be an expressed acknowledgment of guilt of the offence charged or it must admit substantially all the facts which constitute the offence.**

(Para 22)

**F) Criminal Trial – Weapon of Offence – The Doctor who conducted the autopsy, not being shown the half burnt firewood i.e. the alleged weapon of offence, the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused was not fulfilled – The evidence of the sole eye witness clearly proves that the appellant had stuck the deceased on the head but there is no evidence to suggest that the multiple injuries sustained by the deceased was caused by single strike – Held, consequently the benefit must accrue in favour of the Appellant.**

(Para 65)

**G) Code of Criminal Procedure, 1973 – S. 164 – Oaths Act, 1969 – S. 6 – The confessional statement of the appellant reflects that the**

**Judicial Magistrate had recorded on top of the said document that the statement is recorded on oath under S. 164 of the Code of Civil procedure, 1973 – The schedule of the Oaths Act, 1969 provides for four different forms of administering oath or affirmation – The "confessional statement" does not reflect compliance of S. 6 of the Oaths Act, 1969 read with the schedule – The testimony of the Judicial Magistrate also does not reflect that there was compliance of S. 6 of the Oaths Act, 1969 read with the schedule – Held, it must be taken as a the statement of the Judicial Magistrate while doing a judicial act and therefore true and correct – There is no requirement under Section 164 Cr.P.C to record a "confessional statement" under oath – It is prohibited.**

(Para 70)

**H) Indian Penal Code, 1860 – S. 304 – Culpable Homicide not amounting to Murder – To fall within the definition of S. 304 IPC the accused must be shown to have committed culpable homicide not amounting to murder.**

(Para 79)

**I) Criminal trial – Additional grounds of plea – Appellant had raised the plea of private defence during the hearing of the appeal. Since, the memo of appeal filed by the Appellant did not contain any grounds the Appellant had filed an application urging additional grounds – Held, the Appellant had during the investigation of the case as well as during the trial raised the plea of private defence the application filed by the Appellant to urge the ground of private defence is permitted.**

(Paras 81 and 85)

**J) Indian Penal Code, 1860 – S. 100**

**(i) Right of private defence – It is not an offence if the act is done in the exercise of the right of private defence – Every person has a right to defend his own body, and also the body of any other person, against any offence affecting the human body – Every person also has the right, to defend the property; whether moveable or immovable, of himself or any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal tresspass or which is an attempt to commit theft, robbery, mischief or criminal tresspass.**

**(ii) Defenders right to private defence – Under S. 98 IPC, 1860 even when an act, which would otherwise be a certain offence, is not an offence, by reason of intoxication of the person doing the act, likewise every person has the same right of private defence against that act which he would have if the act were that offence – Even though the aggressor against whom the right of private defence has been exercised is not liable for any punishment by reason of his personal incapacity to commit the crime or because he acts without the necessary *mens rea,* the defenders right to private defence is not affected thereby.**

**(iii) Extent of right of private defence – The right of private defence of the body in view of S. 100, IPC, 1860 extends to the voluntary causing of death or of any harm to the assailant, if the offence which occasions the exercise of the right be of any of the description as enumerated in the seven clause of S. 100 IPC, 1860 – The apprehension that the assault would cause grievous hurt would give a legitimate right of private defence of the body would extend to causing death.**

**K) Indian Penal Code, 1860 – S. 99 – The right of private defence is subject to the limitations and exceptions provided in S. 99 IPC, 1860 – the right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of private defence of the body – There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.**

(Para 91)

**L) Indian Penal Code, 1860 – S. 102 – S. 102 fixes the time when the right of private defence of the body commences and the time during which it continues – The right of private defence commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.**

**(**Para 91)

**M) Criminal trial – Proportionality Rule – If the evidence were to end only in examination-in-chief of the solitary eye-witness, the**

**'Proportionality Rule' would come in the way of the appellant "for every assault it is not reasonable a man should be banged with a cudgel" – However, in the cross examination, the eye witness would admit that when the deceased abused the accused, the accused got angry and in the fit of anger the Appellant assaulted the deceased at once. The witness also admitted that during the scuffle the assault on the head of the deceased by the half burnt firewood was accidental and unintentional – Held, considering the evidence of the eye witness in cross examination it would be justifiable agreement that a singular blow with a half burnt firewood weighing just about 500 gms on the body would not violate the 'Proportionality Rule' as embodied in S. 99 IPC. 1860.**

(Para 97)

**Appeal Allowed.**

**Chronological list of cases cited:**

1. Munish Ram and Others v. Delhi Administration, AIR 1968 SC 702.
2. Mohinder Pal Jolly v. State of Punjab, (1979) 2 SCC 30.
3. Buta Singh v. State of Punjab, (1991) 2 SCC 612.
4. Sekar Alias Raja Sekharan v. State Represented by Inspector of Police, T.N., (2002) 8 SCC 354.
5. James Martin v. State of Kerala, (2004) 2 SCC 203.
6. Prakash Subba v. State of Sikkim, 2017 Cri L J 2713.
7. Anne Nageshwara Rao v. Public Prosecutor, Andhra Pradesh, (1975) 4 SCC 106.
8. Shivaji Sahabrao Bobade and Another v. State of Maharashtra, (1973) 2 SCC 793.
9. Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808.
10. Mohinder Singh v. State, AIR 1953 SC 415.
11. State of Rajasthan v. Raja Ram, (2003) 8 SCC 180.
12. Sonam Sherpa v. State of Sikkim, 2004 Cri L J 4152.

13. Arjun Rai v. State of Sikkim, Criminal Appeal No. 3/2004.
14. Natvarsingh Bhalsingh Bhabhor v. State of Gujarat, 2008 Cri L J 4074 (Guj).
15. State v. Sanjeev Nanda, (2012) 8 SCC 450.
16. Lakshmichand alias Balbutya v. State of Maharashtra, (2011) 2 SCC 128.
17 K. Pandurangan v. S.S.R. Velusamy, (2003) 8 SCC 625.
18. Banwari Ram v. State of U.P., (1998) 9 SCC 3.
19. Jagan M. Seshadri v. State of T.N., (2002) 9 SCC 639.
20. Raja Ram v. State of Rajasthan, 2005 (5) SCC 272.
21. Mukhtiar Ahmed Ansari v. State (NCT of Delhi), (2005) 5 SCC 258.
22. Javed Masoof and Another v. State of Rajasthan, (2010) 3 SCC 538.
23. Assoo v. State of Madhya Pradesh, (2011) 14 SCC 448.
24. Arjun Rai v. State of Sikkim, 2004 Cri L J 4747 (Sikkim).
25. Mohinder Singh v. The State of Sikkim, AIR 1953 SC 415.
26. Dharam and Others v. State of Haryana, (2007) 15 SCC 241.
27. Gopal and Another v. State of Rajasthan, (2013) 2 SCC 188.
28. Prakash Subba v. State of Sikkim, 2017 Cri L J 2713.
29. Cockcroft v. Smith, (1709) 91 E.R. 541.

## JUDGMENT

***Bhaskar Raj Pradhan, J***

The facts are not much in dispute in the present appeal. The interpretation and the application of the law is however, contested. There is a solitary eye witness to the offence of culpable homicide not amounting to murder, on proof of which, the learned Sessions Judge, has sentenced the Appellant to simple imprisonment for a period of three years and to pay a fine of Rs. 25,000/- for the offence under Section 304 Part II, Indian Penal

Code, 1860 (IPC). In default, a further incarceration of simple imprisonment of six months.

**2.** Heard Mr. Udai P. Sharma, learned Counsel for the Appellant and Mr. S. K. Chettri, learned Assistant Public Prosecutor for the State.

**3.** Mr. Udai P. Sharma, would admit the assault on the deceased but would submit that it was done accidentally and in exercise of his right of private defence. He would draw the attention of this Court to the statement of the solitary eye witness, Chandra Subba, in crossexamination and submit that the said prosecution witness having not been declared hostile, the evidence in cross-examination, as above was binding on it. To counter the objection of the State-Respondent to the Appellants additional plea of private defence not urged in the memorandum of appeal, Mr. Udai P. Sharma, would draw the attention of this Court to the answer to question No. 69 of the statement of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) The Appellant was asked: "do u have any statement to make in your defence?" to which he answered: "I am innocent, I have assaulted the deceased on my private defence under the sudden provocation without any intention to kill him". He would thus argue that private defence plea having been taken by the Appellant himself during the trial, this Court could examine the said plea and in any case additional grounds of private defence has been sought for vide the Appellants application being I.A. No. 2 of 2017. Mr. Udai P. Sharma, would rely upon the following authorities in support of his submissions:- **1. Munshi Ram & Ors. v. Delhi Administration[1] ; 2. Mohinder Pal Jolly v. State of Punjab[2] ; 3. Buta Singh v. State of Punjab[3] ; 4. Sekar Alias Raja Sekharan v. State Represented by Inspector of Police, T.N[4] .; 5. James Martin v. State of Kerala[5] ; 6. Prakash Subba v. State of Sikkim[6] .** He would further submit that the prosecution evidence of Chandra Subba clearly stating that the Appellant had assaulted the deceased only once, the multiple injuries on the head ought to have been explained by the prosecution but instead vide the impugned judgment the onus has been shifted to the accused dehors the settled principles of law. Mr. Udai P. Sharma, would draw the attention of the Court to the evidence of Nirmal

[1] AIR 1968 SC 702
[2] (1979) 3 SCC 30
[3] (1991) 2 SCC 612
[4] (2002) 8 SCC 354
[5] (2004) 2 SCC 203
[6] 2017 CRI. L. J. 2713

Chettri, the brother of the deceased. He testified that his deceased brother had gone to Singring, Lachung to collect ration but did not return. On the following day some Police Personnel from Lachung Police Station along with his employer, Palzor Lama came to the jungle where they were working and his employer told him that "Police had assaulted my brother Mahesh. Mr. Udai P. Sharma would urge that as the prosecution had failed to explain the multiple injuries on the head sustained by the deceased, contrary to the clear and cogent evidence of the sole eye witness, Chandra Subba, that the Appellant had hit the deceased only once, it is quite clear that two views were possible. He further urged that in view of the fact that Nirmal Chettri was also not declared hostile two views were discernible from his evidence too and in such cases it is settled law that the one in favour of the accused must be accepted. **(Anne Nageswara Rao v. Public Prosecutor, Andhra Pradesh[7] ).** He would submit that the learned Sessions Judge had faulted in not appreciating that in criminal trials the standard of guilt of the accused to be established is that the accused 'must be' and not 'may be' guilty. **(Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra[8] ).** He would submit that the impugned judgment has failed to appreciate that there is a presumption of innocence of the accused in criminal trials and that the burden of proving the guilt of the accused is always upon the prosecution. **(Kali Ram v. State of Himachal Pradesh[9] ).** Mr. Udai P. Sharma would urge that the purported confession in the disclosure statement (exhibit-2), in view of the clear provision of Section 27 of the Indian Evidence Act, 1872, cannot be used against the Appellant. Mr. Udai P. Sharma would submit that there is no mention of blood being seen by the Investigating Officer during inquest. However, the property seizure memo (exhibit-1) records the seizure of one blue jeans pant which is recorded to have been sent to CFSL, Kolkata. It is in the evidence that the deceased was not bleeding at the time of the assault and there is no explanation as to how blood stains were alleged to have been seen in the blue jeans pant seized. The prosecution failure to place the forensic report of CFSL, Kolkata further creates grave suspicion on the prosecution version in view of the clear admission of the Investigating Officer that he did not find any injury upon the deceased in his inquest. Mr. Udai P. Sharma, would further state that the half burnt firewood was not shown to Doctor O.T. Lepcha who gave his medical opinion as to the cause of death. He would thus submit that in a

[7] (1975) 4 SCC 106
[8] (1973) 2 SCC 793
[9] (1973) 2 SCC 808

case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. **(Mohinder Singh v. State[10]).**

**4.** Per contra, Mr. S. K. Chettri, learned Assistant Public Prosecutor for the State, defending the impugned judgment would take this Court meticulously to all the evidence recorded as well as exhibited. He would heavily rely upon the evidence of the solitary eye witness, Chandra Subba and draw the attention of the Court to what she had stated in her examination-in-chief. Drawing the attention of the Court to the evidence of Lakpa Sherpa and Suk Maya Rai he would submit that the factum of there being a fight between the Appellant and the deceased stands proved. He would submit that from the testimony of Dr. O.T. Lepcha, it is evident that the deceased had died as a result of the injuries sustained in the skull due to the blunt force of the burnt firewood used to hit the deceased by the Appellant. He would submit that the nature of injury sustained coupled with the admission of the Appellant that he had hit the deceased on the head with the burnt firewood was enough to attribute knowledge that by assaulting the deceased in such manner he would have known that it was likely to cause death. He would submit that the learned Sessions Judge having already considered the aspect of private defence while converting the Appellants conviction from Section 302 IPC, 1860 to that of Section 304 Part II, IPC, 1860 there was no further necessity to interfere with the impugned judgment. In support of his arguments, Mr. S.K. Chettri, would rely upon the following authorities:- **1. State of Rajasthan v. Raja Ram[11]; 2. Sonam Sherpa v. State of Sikkim[12]; 3. Arjun Rai v. State of Sikkim[13]; 4. Natvarsingh Bhalsingh Bhabhor v. State of Gujarat[14]; 5. State v. Sanjeev Nanda[15].**

**5.** In re: **State v. Sanjeev Nanda (supra)** the Apex Court and in re: **Sonam Sherpa (supra) and Arjun Rai (supra)** this Court was not called upon to examine a plea of private defence. All the three cases were cases

[10] AIR 1953 SC 415
[11] (2003) 8 SCC 180
[12] 2004 Cri LJ 4152
[13] Criminal Appeal No.3/2004
[14] 2008 Cri.LJ 4074 (Guj)
[15] (2012) 8 SCC 450

in which the offence of section 304 Part II, IPC, 1860 was clearly established.

**Facts**

**6.** On 27.02.2016 First Information Report (FIR) No.01(02)16 dated 27.02.2016 under Section 302 IPC, 1860 was registered at the Lachung Police Station, North District, Sikkim on an oral information given by the Appellant which read:-

> *"To,*
>
> *The Judicial Magistrate*
> *Mangan, North Sikkim.*
>
> *Sir,*
>
> *That on 27/02/2016 at 1350 hrs one Sanjay Subba came to PS and reported that he has assaulted one person on last night at around 2000 hrs.*
>
> *On the basis of above information self proceded to P.O. for enquiry. On reaching P.O. (Faka Lachung) it was found that the person lying dead, and Lachung PS case No. 01(02)2016 dtd 27/02/2016 U/S 302 IPC was registered against accussed Sanjay Subba Age 25 yrs S/o Suk Raj Subba R/o Lumchung Busty, P.O. Gayzing West Sikkim. Case has been registered on the Suo Motto basis and investigation taken up.*
>
> *Sd.*
> *S.I. Kaziman Pradhan*
> *SHO Lachung CP/P"*

**7.** It is recorded in the said FIR that the Appellant had stated that on the intervening night of 26.02.2016 and 27.02.2016 at around 2000 hrs he had assaulted one person. The Investigation of the case culminated in filing of the final report No.3 dated 07.05.2016 by which the Appellant was chargesheeted under Section 302 IPC, 1860. Permission to file

supplementary charge-sheet on receipt of CFSL report from Kolkata was also sought for. In the said final report the prosecution would also rely upon the disclosure statement pursuant to which property seizure memo was prepared seizing a half burnt firewood. Statement of the accused recorded under Section 164 Cr.P.C. was also placed before the learned Sessions Judge. On 07.06.2016 the learned Sessions Judge framed charges under Section 304 IPC, 1860. On completion of the trial the Appellant was examined under Section 313 Cr.P.C. on 28.09.2016. The trial examined 16 witnesses and exhibited equal number of documents. After having heard the prosecution as well as the Defence and learned Sessions Judge would render his judgment dated 27.10.2016 convicting the Appellant under Section 304 Part II IPC, 1860. Vide an order of sentence rendered on the same date the learned Sessions Judge would sentence the Appellant as detailed above.

**8.** The learned Sessions Judge would find force in the submission of the learned Legal Aid Counsel for the Appellant that the Appellant having struck the deceased only once in order to free himself from the deceased who had caught him by his chest and verbally abusing him the case clearly fell under the fourth exception of Section 300 IPC, 1860. The learned Sessions Judge would find that the Appellant was struggling to free himself and struck the deceased without any premeditation. The learned Sessions Judge would further hold that this was not the case where he had taken undue advantage or acted in a cruel or in an unusual manner. However, the learned Sessions Judge would hold that the Appellant could be attributed with the knowledge that he was likely to cause the death of the deceased as he was striking the deceased on his head a vital part with a firewood and so it cannot be said that he had actual intention to cause death of the deceased or cause such bodily injury as was likely to cause the death of the deceased. On such finding of fact the learned Sessions Judge would hold that the case, thus, squarely falls within the fourth exception to Section 300 IPC and Part II of Section 304 IPC. The learned Sessions Judge would rely upon the judgment of the Apex Court in re: **Laxmichand alias Balbutya v. State of Maharashtra**[16] in support of his finding that death caused due to one blow alone without pre meditation and in a sudden fight/ quarrel the case would fall under Part II of section 304 IPC, 1860. This was a case in which the ingredients of section 304 Part II, IPC, 1860 had been conclusively established by the prosecution. It was not a case in which

[16] (2011) 2 SCC 128

private defence was pleaded, argued or decided.

**Consideration**

**9.** This is an appeal against conviction. The Apex Court in re: **K. Pandurangan v. S.S.R. Velusamy**[17] would hold:-

> ***"8.*** *..... Apart from the fact that right of appeal is statutorily provided by the Code, a Constitution Bench of this Court in the case of A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] has held that deprivation of one's statutory right of appeal would amount to denial of procedure established by law under Article 21, and further, such denial violates the guarantee of equal protection of law under Article 14 of the Constitution. Placing reliance on the said judgment of this Court, we are of the opinion that since the lower appellate court, which was the first court of appeal, has not considered the factual aspect of the case while considering the appeal, we think the appellants have been denied an opportunity of agitating their case on facts against the judgment of the trial court. ....."*

**10.** The Apex Court in re:- **Banwari Ram v. State of U.P.**[18] would hold:-

> ***"5.*** *..... It is now too well settled that under the Criminal Procedure Code there is no difference so far as the power of the appellate court is concerned to deal with an appeal from a conviction and that from an appeal against an order of acquittal excepting that an appeal against a conviction is as of right and lies to courts of different jurisdictions depending on the nature of sentence and kind of trial and the court in which the trial was held, whereas an appeal against an order of acquittal can be made only to*

[17] (2003) 8 SCC 625
18 (1998) 9 SCC 3

*the High Court with the leave of the court. The procedure for dealing with two kinds of appeals is identical and the powers of the appellate court in disposing of the appeals are in essence the same. ....."*

**11.** In re: **State of Rajasthan v. Raja Ram (supra)** the Apex Court would hold that generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden threat which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is caste upon the appellate Court to re-appreciate the evidence in a case where the accused had been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not.

**12.** Thus, it is clear that this Court, as the first Appellate Court, while hearing an appeal against conviction must consider the factual aspects of the case. It is also clear that the power of the Appellate Court dealing with an appeal from conviction is the same as the power of the Appellate Court while dealing with an appeal against acquittal. The appeal against conviction is as of right. The procedure to deal with appeal against conviction and appeal against acquittal is identical and the power of this Court, as the first Appellate Court, in essence is the same.

**13.** Chandra Subba (PW 1), the solitary eye witness would depose that in the cold winter night of February in the year 2016, at Faka, Lachung, North Sikkim, the Appellant was at the kitchen of her residence. It was between 8 to 9 pm. An unknown person came inside the kitchen and started abusing the Appellant in filthy language. The deceased was drunk and he caught hold of the Appellant on his chest. The Appellant then suddenly picked up a half burnt firewood from the oven of Chandra Subba's kitchen and hit the deceased on the head, once. Chandra Subba got afraid and went to the house of Sukh Maya Sherpa (P.W.3), the aunt of the Appellant and called her. Chandra Maya Subba and Sukh Maya Sherpa

went back to the place of occurrence and found the deceased sitting in the courtyard of their house along with the Appellant. Suk Maya Sherpa slapped the Appellant who went towards his room and the deceased his way. Chandra Subba, thereafter, went back to her room. On the next day, while going to work, Chandra Subba saw the deceased lying unconscious on the road side. She informed the Appellant about the condition of the deceased and left for work. When she returned at around 02 pm, Chandra Subba saw that the Police had already arrived at the place of occurrence and were enquiring about the matter. The deceased was lying dead on the courtyard of the house of the Appellant. Chandra Subba during her examination in Court, identified the half burnt firewood which the Appellant had used to assault the deceased the night before as (MO-I). She identified the accused in the dock.

**14.** In cross-examination, Chandra Subba admitted that it was raining on the night of the incident which was a cold month of February at Faka, Lachung, North Sikkim. She admitted, also, that when the deceased abused the Appellant he got angry and in a fit of rage assaulted the deceased at once. Chandra Subba also admitted the suggestion of the Defence that it was true during the scuffle the Appellant did not have the intention to assault the deceased on the head but the half burnt firewood accidently landed on the head of the deceased. She also admitted that when the scuffle was going on, she had gone out to call the aunt of the accused and at the relevant time the deceased and the Appellant were inside the kitchen, conscious and normal. Chandra Subba had never seen the deceased prior to the incident.

**15.** The learned Sessions Judge would hold that the Court had no reason to doubt her evidence. However, with regard to the cross examination the learned Sessions Judge would hold:-

> *"It may be mentioned here that though during her cross examination by the accused P.W. 1 showed the propensity to help the accused by admitting the suggestion put to her by him that M.O. I had accidentally landed on the head of the deceased during this scuffle, the accused has himself categorically stated before this Court that he has assaulted the deceased with M.O.I. Therefore the question of M.O. I accidentally*

*landing on the head of the deceased does not arise."*

**16.** It is seen that although Chandra Subba categorically stated that during the scuffle the Appellant did not have the intention to assault the deceased on the head but the half burnt firewood accidentally landed on the head of the deceased, she was not declared hostile and cross examined by the prosecution.

**17.** In re: **Jagan M. Seshadri v. State of T.N.[19];** the Apex Court would examine the evidentiary value of testimony of a prosecution witness not declared hostile and hold:

> ***"9****.....We are unable to appreciate the submission of learned Counsel for the State, that P.W.31, being the mother-in-law of the appellant who had supported the explanation offered by the appellant regarding receipt of Rs.50,000 and Rs.40,000 by him from her should not be believed. She is a prosecution witness. She was never declared hostile. The prosecution cannot wriggle out of her statement."*

**18.** In re: **Raja Ram v. State of Rajasthan[20]** the Apex Court would hold:

> ***"9.*** *But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any*

[19] (2002) 9 SCC 639
[20] (2005) 5 SCC 272

*good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."*

**19.** In re: **Mukhtiar Ahmed Ansari v. State (NCT of Delhi)**[21] the Apex Court would rely upon the judgment in re: **Raja Ram (supra)** and hold:

> ***"29.*** *The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.*
>
> ***30.*** *A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan [(2005) 5 SCC 272: JT (2000) 7 SC 549]. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution.*
>
> ***31.*** *In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence."*

[21] (2005) 5 SCC 258

**20.** In re: J**aved Masood & Anr. v. State of Rajasthan**[22] the Apex Court would hold:

> ***"13.*** *PW 6 also stated in his evidence that he has not given the names of any individuals to the police inasmuch as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW 5), Noor (PW 13), Saleem (PW 7) and Rayees (PW 14) were not present when the police kept the dead body of Mullaji (the deceased) in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached."*

**21.** In re: **Assoo v. State of Madhya Pradesh**[23] the Apex Court would hold:

> ***"10.*** *We have also perused the evidence of PW 3 None Lal, a neighbour, and one of the first to arrive at the spot. He gave a story which completely dislodges the statements of PWs 1 and 2. He deposed in his cross-examination that Shri Bai, a neighbour of the appellant, had made allegations against the deceased in the presence of Ghaffoor and Ishaq that she was involved in illicit activities while her husband was away and that she would reveal all to her husband when he returned home and that immediately after these remarks the appellant had returned home on which the deceased had gone inside and set herself ablaze. We take it, therefore, as if the prosecution had accepted the statement of PW 3 as true, as the witness had not been declared hostile."*

[22] (2010) 3 SCC 538
[23] (2011) 14 SCC 448

**22.** In view of the clear and cogent pronouncements of the Apex Court in the afore-quoted judgments, it is difficult, nay, impossible to uphold the view taken by the learned Sessions Judge as above. Out of the three persons in the kitchen that night one is dead, the other is the accused i.e. the Appellant and the third - the solitary prosecution eye witness. Chandra Subba was the solitary eye witness and therefore the most crucial witness. When Chandra Subba admitted to the suggestion of the Defence that the assault on the head of the deceased was unintentional and accidental it was incumbent upon the prosecution to declare Chandra Subba hostile and cross examine the said witness to extract the truth. Having failed to do so, it is quite evident that the prosecution has accepted the statement made by Chandra Subba in cross examination. The said statement of Chandra Subba in examination-in-chief thus, stands impeached in the cross examination without any explanation. Furthermore, Chandra Subba in examination-inchief states that on the next day of the incident she had seen the deceased lying unconscious on the road. It is the cardinal principle of criminal jurisprudence that the burden of proof always rest on prosecution to establish the guilt of the accused beyond all reasonable doubt to enable the Court to come to a conclusion that it was the accused and the accused alone who was guilty of the crime alleged. The failure of the prosecution to declare Chandra Subba hostile will definitely permit the Appellant to rely upon the evidence of Chandra Subba in cross examination in his favour. The said evidence of Chandra Subba in cross examination would also be binding on the prosecution and it could not wriggle out of the said statement. While disbelieving the cross examination testimony of Chandra Subba, the learned Sessions Judge has failed to appreciate that Chandra Subba, was a prosecution witness and the burden of proof being on the prosecution it was incumbent upon it to explain the discrepancy in the evidence of Chandra Subba. As a general rule it is no doubt true the Court can act on the testimony of a solitary witness provided she is wholly reliable. There cannot be any legal impairment in convicting a person on the sole testimony of a single witness as clear from Section 134 of the Evidence Act, 1872. However, the learned Sessions Judge himself holds that the said Chandra Subba, the solitary witness, had showed *"the propensity to help the accused by admitting the suggestion put to her by him that MOI had accidentally landed on the head of the deceased during the scuffle, the accused has himself categorically stated before this Court that he had assaulted the deceased with MOI. Therefore the question of MOI accidentally landing on the head of the deceased does not arise."*

Firstly, the very fact that the learned Sessions Judge finds propensity on the part of Chandra Subba to help the Appellant diminishes the authenticity and truthfulness and therefore the evidentiary value of the solitary witness. Secondly, the learned Sessions Judge has failed to reflect as to where the accused had "categorically stated before the learned Sessions Judge that he had assaulted the deceased. A perusal of the records however reveals that the FIR (exhibit-11), records that the Appellant had reported having assaulted one person. However, the FIR is not a substantive piece of evidence. In the statement of the accused recorded under Section 164 Cr.P.C. which was, however, not considered by the learned Sessions Judge on the ground that the said statement was recorded on oath, at the relevant portion, it is recorded thus: *"I do not remember the name of the deceased as I had seen him for the first time in the house of Bhauju. That very evening that deceased had come drunk in Bhauju's place and had started abusing me for no reason and also caught me by my collar and almost hit me. I saw wooden log lying in that place and I picked it to hit him on his body and I did try hitting on his body but instead I hit him right on the middle scalp of the head after that he left the place and I went back home too."* The learned Sessions Judge, relying upon the judgment of this Court in re: **Arjun Rai v. State of Sikkim**[24] would hold that: "In view of oath having been administered the purported confessional statement is clearly inadmissible and cannot be considered by this Court. The StateRespondent has not assailed the said finding of the learned Sessions Judge. Thus the alleged confessional statement of the Appellant also cannot be pressed into service to impose a verdict of guilt upon the Appellant. However, on examining the said statement of the Appellant recorded under Section 164 Cr.P.C. it is quite evident that the said statement is not a confessional statement at all. Confession has either to be an express acknowledgement of guilt of the offence charged or it must admit substantially all the facts which constitute the offence. The statement of the Appellant recorded under Section 164 Cr.P.C. makes it evident that the said statement is exculpatory rather than being inculpatory. The afore-quoted statement clearly implies that the act of hitting the deceased on the head was accidental as the Appellant had tried to hit the body instead. The said statement also indicates a clear plea of self defence. Further, in the statement of the accused recorded under Section 313 Cr.P.C. the Appellant has stated that he had assaulted the deceased in order to escape from him and without any intention to kill him in exercise of

[24] 2004 Crl J 4747 (Sikkim)

his right to private defence. Thus, it is evident that the finding of the learned Sessions Judge that the Appellant has himself "categorically" stated before the learned Sessions Judge that he had assaulted the deceased with MOI is subject to the various qualifications or rather exceptions as enumerated above. Equally, the learned Sessions Judges finding that therefore the question of MOI accidentally landing on the head of the deceased does not arise is also not correct in view of the evidence of the solitary eye witness, Chandra Subba, categorically stating on oath before the learned Sessions Judge that the said act of the Appellant was accidental.

**23.** In view of the nature of evidence that has come on record from the testimony of the solitary eye witness, Chandra Subba it is necessary to challenge the other evidences. Lakpa Sherpa (P.W.2) is a friend of the Appellant. He also identified the accused in the dock. He turned hostile. Permission being granted Lakpa Sherpa was crossed examined by the Prosecution. Lakpa Sherpa admitted that he had given his statement to the police. He also admitted that he had signed on the disclosure statement on the same date. He admitted that the contents of disclosure statement is the statement given by the Appellant in his presence. Lakpa Sherpa also identified the half burnt firewood which was seized by the police as per the disclosure statement. He also identified property seizure memo and his right thumb impression on it as the document prepared while seizing the half burnt firewood in his presence on which he had also signed. He had also stated that he had affixed his thumb impression on a paper which was wrapped with half burnt firewood at the time of seizure. He also stated that he came to know that the Appellant had assaulted the deceased.

**24.** In cross examination by the Defence, Lakpa Sherpa would state that as it was the first time that he was standing as a witness in any Court he was a bit nervous and scared. He admitted that whatever he had stated in his examination-in-chief and the cross examination by the Learned Prosecutor which related as to how the Appellant assaulted the deceased and how the deceased died are all hearsay which he came to know after visiting the place of occurrence. More significantly, Lakpa Sherpa admitted that he was not present when the disclosure statement of the Appellant was recorded by the police. He admitted that he was asked to sign on one paper of which he did not know its contents. He admitted that the police had never read the contents of the disclosure statement nor explained it to him and that his admission about it at the time of cross examination by the

Learned State Prosecutor was only because of the thumb impression appearing on the said exhibit and on assumption. He also admitted that the half burnt firewood was not seized in his presence or that it contained his signature. He admitted that he saw the half burnt firewood first time in Court. He also admitted that he fears police personnel and it is because of that fear that he signed the disclosure statement and the property seizure memo.

**25.** Lakpa Sherpa had turned hostile. The prosecution cross examined and did manage to extract from him that the disclosure statement was made by the Appellant in his presence and he had signed on it. However, in cross-examination by the Defence he stated that he was nervous and scared and that he was not present when the disclosure statement of the Appellant was recorded by the Police. He also admitted that the contents of the disclosure statement was never read to him and that his admission during the cross-examination by the learned State Prosecutor was due to the fact that the said document had his thumb impression. He also stated that he had signed on the disclosure statement because he feared the Police.

**26.** Lakpa Sherpa was also a witness to the seizure of the half burnt firewood which was seized according to the Prosecution as per the disclosure statement. He is also a signatory to the property seizure memo. In cross examination, he admitted that he did not know the contents of the document on which he was asked to sign by the Police. He stated that the half burnt firewood did not contain his signature and that it was not seized in his presence. He also stated that he was seeing the half burnt firewood for the first time in Court on the day of his deposition and that it was due to his fear of the Police that he signed on the property seizure memo.

**27.** Lakpa Sherpa is a friend of the Appellant. He had turned hostile. During the cross-examination by the Defence he resiled from his earlier statement about the disclosure statement made during the cross examination by the Prosecution. He also did not support the Prosecution version regarding the seizure of the half burnt firewood. Lakpa Sherpa cannot be trusted. Lakpa Sherpa is a cited witness to the disclosure statement. His evidence regarding the circumstances in which the disclosure statement was recorded cannot help the Prosecution.

**28.** One Sukmaya Rai (P.W. 3), wife of Ongchen Dukpa Sherpa, the aunt of the Appellant was also examined. She identified the accused in the dock. She states that on 26.02.2016 at around 08 to 09 pm one Chandra

Kala Subba came to her house and told her that the Appellant and one unknown person was fighting with each other in her house. Accordingly, she and Chandra Kala Subba proceeded to the house. On reaching the place of occurrence, Sukmaya Rai saw the Appellant was standing outside the courtyard and the unknown person standing nearby. She then slapped the Appellant twice and rebuked him for fighting. The unknown person went his way towards the road side. Sukmaya Rai wouldnt know why they were fighting with each other. As she was not feeling well she returned to her house and also asked the Appellant to return to his home. On the following day, Sukmaya Rai came to know that the Appellant was arrested.

**29.** In cross-examination, Sukmaya Rai admitted to the suggestion of the Defence that she did not notice any injury on both the Appellant and the unknown person when she reached the place of occurrence. Sukmaya Rai also admitted that the month of February is cold at Lachung where she was residing for more than 15 years. She admitted that on the relevant day of the incident it was raining and it was also time for snowfall. She also admitted to the suggestion of the Defence that on reaching the place of occurrence she saw the unknown person walking out by himself in a normal way.

**30.** Sukmaya Rai's evidence establishes the immediate facts after the alleged assault as per a statement when she reached the place of occurrence the unknown person was standing nearby. She did not notice any injury on the unknown person. She also noticed the unknown person walking by himself in a normal manner. The Prosecution failed to have the deceased identified by Sukmaya Rai who had seen him.

**31.** Passang Sherpa (PW 4) was called to be examined on 23.06.2016. He was not feeling well, the learned Additional Public Prosecutor sought adjournment which was granted. Passang Sherpa was examined the next day. He identified the accused person in Court. Passang Sherpa on reaching the place of occurrence came to know from the police that the Appellant had murdered a person. He would not know the name of the deceased. At the place of occurrence the Police would prepare a document i.e. disclosure statement in his presence and read the contents but he would not remember the contents thereof, on the day of his deposition. Disclosure statement was identified and his signature thereon too.

**32.** Passang Sherpa would also identify another documents i.e. the property seizure memo by which the Police had seized the half burnt

firewood. Passang Sherpa would also identify his signature thereon. He came to know that the half burnt firewood was seized by the Police as the Appellant had used it to assault the deceased, who died, consequently. Passang Sherpa would also sign on a paper used to wrap the half burnt firewood by the Police on the relevant day. He would identify the said paper used to wrap the half burnt firewood by the Police as MO –IV and his signature thereon.

**33.** In cross-examination, Passang Sherpa admitted that he was appointed as 'Gyapon' (head of Nepali Community). As he was the 'Gyapon' of Lachung he was called by the Police to the place of occurrence. Passang Sherpa admitted to the suggestion of the Defence and stated that he did not know from where the disclosure statement was prepared and that it was not prepared before him. He also admitted that the disclosure statement was not read over to him but he was told by the Police that the Appellant was accused of having murdered one person and as he was the 'Gyapon' he was required to sign on a paper marked as disclosure statement. Passang Sherpa also admitted that he does not know how to read or write. He admitted that the property seizure memo was also prepared by the Police on his reaching the Lachung Police Station (PS), on which he signed. Passang Sherpa admitted that he had not been to the Lachung PS on the day of the incident i.e. 27.02.2016 and had gone to Lachung PS only on 28.02.2016. He also admitted to the suggestion that his signature thereon was made only on 28.02.2016. Passang Sherpa admitted that the half burnt firewood was already present at Lachung PS and he did not know from where and by whom it was brought there. He admitted that he has stated that the half burnt firewood was the weapon of offence only because he was told by the Police at the Lachung PS that it was used by the accused.

**34.** Passang Sherpa was also a prosecution witness to the disclosure statement whose evidence regarding preparation of the disclosure statement at the place of occurrence by the Police was completely demolished in cross-examination where he said that he did not know where it was prepared and that it was not prepared before him. He also, in cross examination, admitted that the disclosure statement was not read over to him and the police merely made him sign on it. Passang Sherpa was not declared hostile. His evidence regarding the making of the disclosure statement being completely demolished would not come to the aid of the Prosecution.

**35.** Pasang Sherpa is also witness to the seizure of the half burnt firewood vide the property seizure memo. He identified the property seizure memo. He identified his signature which was used to wrap the half burnt firewood but he did not identify the half burnt firewood. In cross examination by the Defence, Passang Sherpas evidence on the seizure of the half burnt firewood was also demolished. He states that property seizure memo had already been prepared by the police when he reached the Lachung PS on 28.02.2016 and not on the date of the incident i.e. 27.02.2016. Contrary to the oral evidence the property seizure memo shows that half burnt firewood to have been seized at 1800 hrs on 27.02.2016 and signed by the said witness on 27.02.2016 itself. Passang Sherpa states that he signed the property seizure memo only on 28.02.2016 and that the half burnt firewood was already there at the Lachung PS when he reached and he had no idea from where or by whom it was brought to the Lachung PS There is no explanation from the prosecution on these vital contradictory assertions made by Passang Sherpa. His evidence would also not help the Prosecution to prove the seizure of the half burnt firewood vide the property seizure memo.

**36.** Suresh Subba (P.W.15), a distant relative of the Appellant stated that on 27.02.2016 Police personnel came to the house of one Chung Norbu Lama inquiring about the incident and prepared a document at the place of occurrence after which he was asked to sign on it he was not shown any seized article but merely asked to sign on the property seizure memo. In cross-examination Suresh Subba admitted that he did not know the contents of the said property seizure memo and that he was an illiterate person. He also admitted that at the time of the incident he was not present at the place of occurrence. He admitted that the Police Personnel were already present at the place of occurrence when he reached. Suresh Subba stated that he was asked to sign on the property seizure memo on the pretext that he also resided in the same vicinity of the place of occurrence. He also stated that apart from signing on the property seizure memo he did not know anything else.

**37.** Unfortunately even Suresh Subba could not prove the seizure of the half burnt firewood vide the property seizure memo.

**38.** Palzor Lachungpa (P.W.5), a resident of Singring, Lachung, North Sikkim identified the Appellant in the dock. He had identified the deceased at the place of occurrence as a person whose name he did not know but someone who had

worked under him to collect firewood. Palzor Lachungpa was present when the police inspected the dead body at Faka, Lachung. He also saw the dead body of the deceased at the place of occurrence and signed on inquest form (exhibit-4) prepared by the police and identified his signature thereon. He did not notice any injury on the dead body of the deceased on the relevant day as he was not close to it. He then accompanied the police to Gangtok for the post-mortem of the said dead body of the deceased at Gangtok, Government Hospital.

**39.** In cross examination, Palzor Lachungpa (P.W.5) admitted that he was not an eye witness and whatever he stated with regard to the incident was on the basis of what he had heard. He also admitted that February was a cold month at Lachung and at the relevant day of the incident he was at his house at Singring.

**40.** Palzor Lachungpa is not a witness to the alleged assault. He was a witness who knew the deceased and had identified him at the place of occurrence and accompanied the Police with the dead body for Postmortem to Gangtok. He did not notice any injury on the dead body. Palzor Lachungpa however, was not asked to identify the photograph of the deceased in Court. No document except the inquest report (exhibit -4) was put to him. His evidence also would not come to aid of the Prosecution except to the limited extent of corroborating the death of the deceased and proving the making of the inquest report.

**41.** Jigmee Lachungpa (P.W.6) recognised the Appellant as he had seen him in Lachung, North Sikkim. He remembered that sometime in the year 2016 police personnel had come to his house and informed him that a person had died at Faka, Lachung. He had, accordingly gone there and seen a dead body of the person at the place of occurrence but he did not know the name of the deceased. Later he had come to know that the Appellant had assaulted the deceased with the fire wood and he had died. However, he did not notice any injury on the dead body.

**42.** In cross examination, Jigmee Lachungpa admitted that he was not an eye witness and had only heard from the local people that the Appellant had assaulted the deceased with the fire wood. He also admitted that in the month of February, it is very cold at Lachung and on the relevant night it was raining and there was slight snow fall too.

**43.** The evidence of Jigmee Lachungpa is admissible only to the extent that he recognise the Appellant, had seen a dead body of a person at some place of occurrence and that February is very cold month at Lachung and on the relevant

night it was raining and there was snowfall. The rest is hearsay. There is nothing in the evidence of Jigmee Lachunga which would help the Prosecution to establish the guilt of the Appellant.

**44.** Thung Norbu Lachungpa, (P.W.7) identified the Appellant in the dock as he had seen him at Lachung, North Sikkim. About 3–4 months after the incident he had been called by the Officer in-charge of Lachung PS to ascertain whether the place of occurrence belonged to him. Thung Norbu Lachungpa informed the O.C. that the said house belonged to him. He also came to know that there was a fight in the said house between the Appellant and the deceased and the deceased had died.

**45.** In cross examination, Thung Norbu Lachungpa admitted that whatever he had stated with regard to the alleged incident was as narrated to him by the Investigating Officer when he was called to the Thana after 3-4 months of the incident.

**46.** The evidence of Thung Norbu Lachungpa is admissible only to the extent of identification of the place of occurrence as his house. The evidence of Thung Norbu Lachungpa is also of no substantial aid to the Prosecution.

**47.** Chatur Kumari Rai, (P.W. 8) also recognised the Appellant on the dock as her only son. On 28.02.2016 she was informed by the Lachung O.C. that her son, the Appellant, had got involved in a fight with a brother of one Nirmal at Lachung, North Sikkim. Chatur Kumari Rai, came to know that the Appellant and the deceased had a fight on 27.02.2016 and due to the said fight a person had died the following day. She then went to Lachung Police Station on 29.02.2016 and met the Appellant who told her that there was a fight between the Appellant and the deceased and as a result the deceased died. Chatur Kumari Rai, did not know how the deceased had died.

**48.** In cross examination, Chatur Kumari Rai, would admit that she was present at Lachung during the relevant time of the incident. She also admitted that whatever she narrated about the incident was on the basis of what the Investigating Officer had narrated to her. Chatur Kumari Rai, also admitted that according to the Appellant the deceased had walked away after the fight on the relevant night.

**49.** The evidence of Chatur Kumari Rai, the mother of the Appellant, regarding what the Appellant told her on 29.02.2016 at the Lachung Police Station where the Appellant was in custody that there was fight between him and the deceased

and as a result the deceased died is inadmissible in view of Section 26 of the Indian Evidence Act, 1872. Rest of her evidence is hearsay.

**50.** Bhim Bahadur Chettri, (P.W. 9) could not recognise the Appellant standing in the dock. The deceased, Mahesh Chettri, was his third son. In the year 2016, he was informed through telephone by his younger brother, Purna Bahadur Chettri, that the dead body of his son had been brought to STNM Hospital, as the deceased was involved in a fight with an unknown person. Bhim Bahadur Chettri, then went to the STNM Hospital where he saw the dead body of the deceased. The post mortem of the deceased was conducted at the said hospital after which the dead body of his son was handed over vide the handing/ taking memo (exhibit-5) prepared by the police at the hospital wherein he also identified the signature. At the time of cremation he noticed blood on the back side on the head of the deceased.

**51.** In cross examination, Bhim Bahadur Chettri, admitted that he did not know anything about the alleged incident and that his son used to consume alcohol and that, further, whatever he stated in his examinationin-chief with regard to the incident was based on the information received from his brother Purna Bahadur Chettri.

**52.** The evidence of Bhim Bahadur Chettri, the father of the deceased establishes the death of the deceased and the post-mortem being conducted at the STNM hospital and thereafter, the handing over of the dead body of the deceased to him. Bhim Bahadur Chettris evidence would also show that the deceased used to consume alcohol. Bhim Bahadur Chettri noticing the blood on the backside of the head of the deceased during cremation also would not help the Prosecution because it was post the post-mortem.

**53.** Nirmal Chettri, (P.W.10) identified the Appellant standing in the dock, as he had seen him at Faka Lachung during the time of the incident. In the year 2015 he was at Lachung along with his brother Mahesh. He did not remember the date but one day his deceased brother had gone to Singring, Lachung to collect the ration but did not return. On the following day some Police personnel from the Lachung Police Station along with his employer Palzor Lama came to the jungle where they were working and his employer told him that police had assaulted his brother Mahesh. The police then immediately took Nirmal Chettri (P.W. 10) to Faka Lachung. When he reached there he saw the dead body of his deceased brother and he came to know that he was killed by the Appellant who was standing in the dock. He had noticed bleeding from the nose of the deceased brother and a scratch on his forehead. Later on the dead body of his deceased brother was

taken to the STNM Hospital, for post mortem after which the dead body was handed over to them. At the place of occurrence the police prepared a document and asked him to sign on it. The inquest form (exhibit-4) was identified as the said document in which he had put his signature.

**54.** In cross examination, Nirmal Chettri, admitted that the deceased used to consume alcohol. He also admitted that at the relevant time there was snow fall. He further admitted that he was not an eye witness and whatever he stated in his examination-in-chief was based on information received from other persons.

**55.** Nirmal Chettri is the brother of the deceased, his evidence in examination-in-chief that on the day after his deceased brother had gone to Singring, Lachung and had not returned, the Police along with his employer, Palzor Lama, had come to the Jungle where the said Palzor Lama told him that his deceased brother had been assaulted by the Police was left un-assailed. The Prosecution did not deem it fit to declare him hostile and cross examine him. His evidence was accepted by the Prosecution. Although, the truth about what Palzor Lama had told Nirmal Chettri at the jungle regarding the assault by the Police on the deceased is inadmissible as Palzor Lama was not brought to the witness box but what Nirmal Chettri heard, in view of Section 60 of the Evidence Act, 1872 is admissible. The Prosecution has failed to explain the circumstance. Consequently, it would go to the benefit of the Appellant.

**56.** The learned Sessions Judge recorded a finding that the evidence of Nirmal Chettri apart from proving the identity of the deceased proves that the dead body of the deceased was handed over to them by the Police after the autopsy. The learned Sessions Judge has not considered the testimony of Nirmal Chettri to the effect that he was told by Palzor Lama that his brother was assaulted by the Police although the prosecution had failed to declare the said witness hostile. The law regarding evidence of prosecution witness in favour of an accused which remains un-impeached and not declared hostile is clear. The accused can rely on that evidence.

**57.** Dr. O.T. Lepcha, (P.W.11) is the Medico Legal Consultant at the STNM Hospital, Gangtok who conducted the autopsy of the deceased on 27.02.2016 at 10.a.m. which was concluded at 11.30 a.m. On examination it was found that Rigor Mortis, Cyanosis was present, with bleeding and congested face. The ante mortem injuries were noted as under:-

*"Ante mortem injuries:*

1. *Scalp haematoma (4 x 3 cms) over the left frontal bone. The haematoma was distributed over an area of 8 x 4 cms with underline comminuted fracture of the left frontal bone extending upto left side parietal bone measuring 15 cms in length.*

2. *Two linear fracture over the right side of the skull placed over the right fronto temporal bone and extending towards the vertex measuring 18 cms and 16 cms, respectively.*

3. *Extra dural haematoma (6 x 5.4 x 2 cms) placed over the left frontal lobe with diffused subarachnoid haematoma was present".*

**58.** Dr. O.T. Lepcha, found that the stomach was empty and no injury was seen over the chest. The approximate time since death was noted as more than 24 hours and the cause of death as a result of intra cranial haemorrhage with fracture of skull which was as a result of blunt force trauma to the skull.

**59.** Dr. O.T. Lepcha, opined that the injuries mentioned in his medical report in sl. No. 1 to 3 were sufficient to cause death of a person in a ordinary cause of nature. He would identify the autopsy report (exhibit-6) and his signature thereon.

**60.** Dr. O.T. Lepcha, had also verified on the photograph and signature on the blood sample authentication form (exhibit-7) whereby the blood of deceased was obtained and identified his signature thereon.

**61.** In cross examination, Dr. O.T. Lepcha, admitted that such injuries mentioned in his report can be caused as a result of fall, though the pattern of the injury would be different. He also admitted that at the time of conducting autopsy he was not shown the weapon of offence i.e. the half burnt firewood. Dr. O.T. Lepcha, admitted that the autopsy was done on 29.02.2016 and that there was a strong possibility that a drunk person lying in the open would die as a result of hypothermia.

**62.** The evidence of Dr. O.T Lepcha clearly establishes the death of the deceased. It also establishes the nature of injuries sustained by the deceased. It also proves that autopsy report. The only question which requires examination is

the point of law raised by Mr. Udai P. Sharma, that the weapon of offence i.e. the half burnt firewood ought to have been shown to Dr. O.T Lepcha who had conducted the post-mortem to establish whether it was possible that the injuries sustained by the deceased could have been caused by it. Mr. Udai P. Sharma would rely upon the judgment of the Apex Court in re: **Mohinder Singh v. The State**[25] **.** This was a case of conviction of the accused therein under Section 302 and 307 read with Section 34 of the IPC. He would rely upon para 10, 11 and 12 thereof which reads as follows:-

> ***"10****..... it seems to us that the evidence which has been adduced falls short of proof in regard to a very material part of the prosecution case. In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. ....."*

**63.** In the present case, it is alleged that the assault on the head of the deceased by the Appellant was with half burnt firewood. As per the autopsy report and the evidence of Dr. O.T Lepcha, it is clear that there were multiple injuries on the skull of the deceased both on the left and the right side. It was not a case of a single injury. The oral evidence produced by the Prosecution establishes only a singular assault on the head of the deceased with the half burnt firewood. The oral evidence produced by the Prosecution including the evidence of the Investigating Officer also proves that there was no visible injury on the deceased at the time of the incident. Immediately thereafter Dr. O.T Lepcha, opines that the cause of death "is due to intracranial haemorrhage and fracture skull as a result of blunt force trauma to skull. There is no expert evidence as to whether the multiple injuries recorded by Dr. O.T Lepcha in the autopsy report could have been caused by a singular assault on the head by the half burnt firewood, which according to the Investigating Officer weighed about 500 grams. Sans the expert opinion, this Court would not venture its opinion on the possibilities, for it is always for the Prosecution to establish by cogent evidence all the ingredients of the offence alleged and to

[25] AIR 1953 SC 415

prove that it was surely due to the singular blow with the half burnt firewood which resulted in the multiple injuries both on the left as well as the right side of the skull of the deceased leading to the death of the deceased.

**64.** In the impugned judgment the learned Sessions Judge has recorded findings to the following effect:-

> ***"17.*** *..... Pausing here of a moment, it is worthwhile to mention that though on going through the evidence of PW 11 there seem to be multiple injuries on the head/skull of the deceased, it is the claim of PW1 (sole eye-witness) as well as that of the accused that the deceased was struck only once on the head. Strangely, while subjecting PW 11 to cross-examination nothing inthat regard is seen to have been pointed out by the Counsel for the accused. Be that as it may, there is nothing in PW 11's evidence or the case records to even faintly suggest that there could have been more than one strike on the head of the deceased which could have caused the concerned injuries."*
>
> Then again
>
> ***"18.*** *..... On the contrary, the evidence/materials that have come forward clearly establish that the injuries (which later proved fatal) were sustained as a result of the assault by the accused with MOI.*

**65.** The learned Sessions Judge while recording the above findings should have considered that P.W.1 i.e. Chandra Subba was not only the sole eye witness but also a prosecution witness. The learned Sessions Judge has also erred in shifting the burden of proving the guilt of the accused from the prosecution to the Defence putting the onus on them and holding their failure to cross examine P.W.11 i.e. Dr. O.T. Lepcha, against the Appellant. Dr. O. T. Lepcha not being shown the half burnt firewood i.e. the alleged weapon of offence, the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused was not fulfilled. It is true that the evidence of Chandra Subba clearly proves that the Appellant had struck the deceased on the

head but contrary to the finding of the learned Sessions Judge as above there is no evidence to suggest that the multiple injuries sustained by the deceased was caused by the single strike. Consequently the benefit must accrue in favour of the Appellant. More so where one reads this evidence with the evidence of Nirmal Chettri.

**66.** Bebika Chettri (P.W. 12) is the learned Judicial Magistrate, Chungthang Sub-Division, stationed at Mangan. On 02.03.2016 she had received a requisition from the Investigating Officer of the case for examination of the Appellant under Section 164 Cr.P.C. Accordingly she directed the concerned I.O. to produce the accused on 03.03.2016. On 03.03.2016 the I.O. brought the accused and produced him before the learned Judicial Magistrate when the preliminary examination of the Appellant was done. Thereafter ten days reflection time was given to the Appellant. On 14.03.2016 the Appellant was produced before the learned Judicial Magistrate and she recorded the statement of the Appellant under Section 164 Cr.P.C. On 15.03.2016 she prepared the forwarding letter to the learned Sessions Judge, North Sikkim along with the statement of the Appellant recorded under Section 164 Cr.P.C. requisition of the Investigating Officer and the preliminary questionnaires. She identified the statement recorded under Section 164 Cr.P.C. (exhibit-8) produced in Court and her signature thereon, the forwarding letter (exhibit-9) and her signature thereon and the preliminary questions (exhibit-10) and her signature thereon.

**67.** In cross examination, the learned Judicial Magistrate admitted that in the preliminary questionnaires in the answer to question no. 2 where 302 IPC is mentioned was not the language which was used by the Appellant but it was her language. She also admitted that during the confession which the Appellant made before her, he never confessed that the deceased had died on being beaten by him.

**68.** The learned Sessions Judge has held the confessional statement recorded by the learned Judicial Magistrate to be inadmissible in evidence due to the fact that oath has been administered on the accused. A perusal of the said "confessional statement" (exhibit 8) reflects that the learned Judicial Magistrate had recorded on top of the said document the following words:- *"statement recorded on oath under Section 164 of the Code of Criminal Procedure, 1973"*.

**69.** Section 6 of the Oaths Act, 1969 reads thus:-

*"Section 6 : Forms of oaths and affirmations*

*(1) All oaths and affirmations made under section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case:*

*Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst or held binding by persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.*

*(2) All such oaths and affirmations shall, in the case of all courts than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be.*

**70.** The schedule to the Oaths Act, 1969 provides four different forms for administering oath or affirmation. The "confessional statement does not reflect compliance of Section 6 of the Oaths Act, 1969 read with the schedule. The testimony of the learned Judicial Magistrate also does not reflect that there was compliance of Section 6 of the Oaths Act, 1969 read with the schedule. That leaves only the aforequoted statement in the said "confessional statement" which states that the statement was recorded under oath. This however, must be taken as the statement of the learned Judicial Magistrate while doing a judicial act and therefore true and correct. There is no requirement under Section 164 Cr.P.C to record a "confessional statement" under oath. In fact it is prohibited. It is hoped that Judicial Magistrates while recording the confessional statements keep themselves alive to the law and the procedure prescribed for recording such statements. Confession is an admission of guilt. If the Appellant had not confessed that the deceased had died on being beaten by the Appellant, as admitted by the

Learned Judicial Magistrate in her cross examination what was the reason to record the said "confessional statement"?

**71.** Rinzing Wangdi Bhutia (P.W.13) was the Head Constable of Lachung PS who prepared the handing and taking memo (exhibit-5) of the deceased in the presence of two witnesses Purna Bahadur Chettri (P.W.14) and Nirmal Chettri (P.W.10). He handed over the dead body of the deceased to the father of the deceased Bhim Bahadur Chettri. According to Rinzing Wangdi Bhutia, the said handing and taking memo was prepared after the post mortem. He identified the handing and taking memo as well as his signature and the signature of the witnesses thereon.

**72.** Purna Bahadur Chettri (P.W.14) was a witness to the said handing and taking memo (exhibit-5) in which he had also signed.

**73.** Rinzing Wangdi Bhutia, Nirmal Chettri and Purna Bahadur Chettri have proved the preparation of the handing and taking memo of the dead body of the deceased as well as the handing and taking over of the dead body of the deceased.

**74.** Kaziman Pradhan (P.W.16) is the Investigating Officer who registered the FIR (exhibit-11) on 27.02.2016 at around 13:50 hrs. on the basis of a verbal information of assault on one person by the informant i.e. the Appellant as a result of a fight between them. The Investigating Officer visited the place of occurrence and conducted the preliminary inquiry where he saw a person lying in the courtyard of the rented house of the Appellant. Thereafter on returning to the Police Station he registered a suo moto case against the Appellant under Section 302 IPC, 1860 and undertook the investigation. On completion of the investigation the Investigating Officer filed the charge sheet.

**75.** In cross-examination, the Investigating Officer admitted that at the time of seizing the half burnt firewood he did not find any blood stain on it or at the place of occurrence. He admitted that none of the witnesses had stated that the deceased died due to assault by the Appellant with the weapon of offence. He further admitted that during investigation he did not find any blood on the upper wearing apparels of the deceased. He admitted that Lachung is a cold area and on the relevant night of the incident it was drizzling. The Investigating Officer admitted that he had visited the spot where the deceased was lying unconscious, which fact is however, not

mentioned in the charge sheet. He admitted that he did not find any injury on the deceased when he conducted the inquest. He stated that during investigation he did not come across any concrete evidence that due to the assault made by the accused upon the deceased the deceased died. He admitted that the sole reason for charging the Appellant under Section 302 IPC, 1860 was the fact that the Appellant himself had informed that he had hit the deceased on the previous night. The Investigating Officer admitted that he had not measured the half burnt firewood and when asked to weigh the same he stated that it was about 500 gms.

**76.** Sans the testimony of the solitary eye witness account of Chandra Subba, the prosecution has failed to even connect the Appellant to the incident. The disclosure statement and the property seizure memo by which the prosecution seeks to prove the discovery of the half burnt firewood have not been proved. The statement recorded by the learned Judicial Magistrate under Section 164 Cr.P.C. of the Appellant, as seen above was not a confessional statement. In the said statement the Appellant had clearly pleaded private defence as well as the fact that the assault on the head of the deceased was accidental. In any event, the learned Sessions Judge would not rely upon the same as it was admittedly recorded under oath. The Investigating Officer also candidly admits in cross examination that he did not come across any concrete evidence to establish that the assault made by the Appellant caused the death of the deceased and the sole reason for charging the Appellant under Section 302 IPC, 1860 was due to the fact that the Appellant himself had informed the Police that he had assaulted the deceased. The Investigating Officers admission that he did not find any injury on the deceased when he conducted the inquest fails to explain the multiple injuries as reflected in the autopsy report. There is no evidence brought forth by the prosecution as to whether a singular strike with a half burnt firewood weighing about 500 gms could cause multiple injuries on the skull. However the learned Sessions Judge has, relying upon the testimony of the solitary eye witness, Chandra Subba convicted the Appellant under Section 304 Part II, IPC, 1860.

**77.** Section 304 relates to punishment for culpable homicide not amounting to murder. The said Section reads thus:-

> ***"304. Punishment for culpable homicide not amounting to murder.-*** *Whoever commits culpable homicide not amounting to murder shall*

> *be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if* the act by which the death is caus*ed is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,"*
>
> *or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.*

**78.** Section 299, IPC, 1860 defines culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

**79.** To fall within the definition of Section 304 IPC the accused must be shown to have committed culpable homicide not amounting to murder. The learned Sessions judge has attributed knowledge to the Appellant that he was likely by such act to cause death to hold the Appellant guilty of the crime of culpable homicide not amounting to murder punishable under Section 304 Part II of IPC.

**80.** The Appellant had raised the plea of private defence in his statement recorded under Section 164 Cr.P.C. for the first time. Thereafter, the Appellant raised the plea of private defence during the recording of a statement under Section 313 Cr.P.C. whereby in reply to question Nos. 2, 13 and 69 he had clearly stated that he is innocent and he had assaulted the deceased on his private defence under sudden provocation without any intention to kill. The relevant extracts from the statement of the Appellant recorded under Section 313 Cr.P.C. are reproduced herein below:-

> *"Q.No.2. As per her, deceased abused you in a filthy (vulgar) language and the*

*deceased was also drunk at that moment and he caught hold of you on your chest. As per her, you then suddenly picked up a half burnt firewood from the oven of her kitchen and hit the deceased on his head once. What do you have to say?*

*Ans: Yes he had caught hold my chest and used filthy language. I had assaulted him with the said half burnt firewood in order to escape from him and without any intention to kill him."*

*"Q.No.13. As per him, the deceased had come in the house of one Chadra Maya Subba at Faka, Lachung and there was a fight in between you and the deceased. What do you have to say?*

*Ans. It is true but he had abused me with filthy language and caught hold of me that is why in order to escape from him I had assaulted him."*

*"Q.No. 69. Do you have any statement to make in your defence?*

*Ans. I am innocent, I have assaulted the deceased on my private defence under the sudden provocation without any intention to kill him."*

**81.** Mr. Udai P. Sharma, learned Counsel has raised the plea of private defence during the hearing of this appeal. Since the memo of appeal filed did not contain any grounds the Appellant has filed an application for urging additional ground of appeal which is resisted by the State-Respondent.

**82.** In re: **Munshi Ram & Ors. vs. Delhi Administration[26],** the Apex Court would examine whether an accused who had not taken the plea of

[26] AIR 1968 SC 702

private defence but the necessary basis for that plea had been laid in the cross examination of prosecution witness, was entitled to do so. The Apex Court would hold:-

> ***"5.*** *It is true that appellants in their statement under Section 342 CrPC had not taken the plea of private defence, but necessary basis for that plea had been laid in the cross-examination of the prosecution witnesses as well as by adducing defence evidence. It is well settled that even if an accused does not plead self defence, it is open to the court to consider such a plea if the same arises from the material on record — see In re Jogali Bhaigo Naiks [AIR 1927 Mad 97] . The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."*

**83.** In re: **Mohinder Pal Jolly v. State of Punjab**[27] the Apex Court would hold:-

> ***"10.*** *The law regarding the right of private defence of property or person is wellsettled and may be briefly recapitulated here. The onus is on the accused to establish this right not on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability. He might or might not take this plea explicitly or might or might not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act which he committed was justified in exercise of his right of private defence of property or person*

[27] (1979) 3 SCC 30

*or both. But the exercise of this right is subject to the limitations and exceptions provided in Section 99 of the Penal Code — the last one being —"The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. .....***"**

**84.** In re: **Natvarsingh Bhalsingh Bhabhor (supra)** the Apex Court would examine a plea of private defence which was not taken in the statement of the accused under section 313 of Cr.P.C. or in the cross examination of any witness and would hold that therefore at the stage of appeal the accused cannot take such a plea of self defence.

**85.** Since the Appellant had during the investigation of the case as well as during trial raised the plea of private defence the application filed by the Appellant to urge the ground of private defence is permitted.

**86.** Section 96 IPC, 1860 provides:-

***"96. Things done in private defence.*** *– Nothing is an offence which is done in the exercise of the right of private defence.*

**87.** Section 97 IPC, 1860 provides:-

***"97. Right of private defence of the body and of property.****- Every person has a right, subject to the restrictions contained in section 99, to defend-*

*First.- His own body, and the body of any other person, against any offence affecting the human body;*

*Secondly.-The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass".*

**88.** Section 99 IPC, 1860 provides:-

> ***"99. Acts against which there is no right of private defence.-****There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*
>
> *There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.*
>
> *There is not right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Extent to which the right may be exercised.- The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.*
>
> *Explanation 1.- A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, so such, unless he knows or has reason to believe, that the person doing the act is such public servant.*
>
> *Explanation 2.- A person is not deprived of the right or private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded".*

**89.** Section 100 IPC, 1860 provides:-

***"100. When the right of private defence of the body extends to causing death.-****The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—*

*First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;*

*Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;*

*Thirdly.—An assault with the intention of committing rape;*

*Fourthly.—An assault with the intention of gratifying unnatural lust;*

*Fifthly.—An assault with the intention of kidnapping or abducting;*

*Sixthly.— An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.*

*[Seventhly.—An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]'*

**90.** Section 102 IPC, 1860 provides:-

***"102. Commencement and continuance of the right of private defence of the body.-*** *The right of private defence of the body commences as soon as a*

*reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.*

**91.** The right of private defence would find its roots in the law of nature itself as it is the natural instinct in a man to defend himself against unlawful aggression. In fact, it is an animal instinct of self preservation. Self preservation is engrained naturally in both humans as well as other animals. It is a law of necessity. The concept of self defence, over the years, seems to have undergone various changes. Since defence is not limited to self defence only, the words "private defence has been aptly used. The Law relating to private defence falls under Chapter IV under the head "General Exceptions" of the IPC, 1860. Section 96 to 106 IPC, 1860 deals with it. Today, a perusal of the afore-quoted sections makes it evident that it is not an offence if the act is done in the exercise of the right of private defence. Every person has a right to defend his own body, and also the body of any other person, against any offence affecting the human body. Every person also has a right, to defend the property; whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass. Under Section 98 IPC, 1860 even when an act, which would otherwise be a certain offence, is not that offence, by reason of intoxication of the person doing the act, like in the present case, every person has the same right of private defence against that act which he would have if the act were that offence. Even though the aggressor against whom the right of private defence has been exercised is not liable for any punishment by reason of his personal incapacity to commit the crime or because he acts without the necessary mens rea, the defenders right to private defence is not affected thereby. The exercise of the right of private defence is subject to the limitations and exceptions provided in Section 99 IPC, 1860. The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. The right of private defence of the body, thus, in view of Section 100, IPC, 1860 extends to the voluntary causing of death or of

any harm to the assailant, if the offence which occasions the exercise of the right be of any of the description as enumerated in the seven clauses of Section 100 IPC, 1860. The apprehension that the assault would cause grievous hurt would give a legitimate right to the defendant under Section 100 IPC, 1860 and in such circumstances the right of private defence of the body would extend to causing death. Section 102 IPC, 1860 fixes the time when the right of private defence of the body commences and the time during which it continues. The right of private defence of the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

**92.** In the "Principles of Law of Crimes" by Shamsul Huda, the author in "Lecture XII" on the "right of private defence" quotes from instructive passages from Halsbury IX, p.587, judgment of the Madras High Court and Mayne which reads respectively as under:-

> *""A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor before killing; but if the aggressor is captured or is retreating without offering resistance and is then killed, the person killing him is guilty of murder." (Halsbury IX, p. 587). The law is the same in India - "The learned Judge suggests tha the firest accused could have escaped further injury by resorting to less violence or running away. But it is placing a greater restriction on the right of private defence than the law requires." (Alingale v. Emperor 28 Mad, 454).*
>
> *"But a man," says Mayne, "is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in the conflict between them he happens to kill, such killing is justifiable.""*

**93.** In re: **James Martin v. State of Kerala**[28] the Apex Court would hold:-

> ***"13.*** *The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression ¯right of private defence. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not*

[28] (2004) 2 SCC 203

*necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is a reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows: (SCC p. 654, para 9)*

> *"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one*

> *which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.*

*The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.*

***14**. ..... A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by*

*Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.*

Then again

***16.*** *In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar [(1975) 4 SCC 161 : 1975 SCC (Cri) 454 : AIR 1975 SC 87] . (See Wassan Singh v. State of Punjab [(1996) 1 SCC 458 : 1996 SCC (Cri) 119] and Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] .)*

**94.** In re: **Dharam & Ors. v. State of Haryana**[29] the Apex Court would hold:-

***"15.*** *Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression ¯right of private defence is not defined in the section. The section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly, Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to*

[29] (2007) 15 SCC 241

*which rule of self-defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.*

***16.*** *The scope of right of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions the right commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues (see Jai Dev v. State of Punjab [AIR 1963 SC 612 : (1963) 1 Cri LJ 495] ).*

***17.*** *To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of selfcreation. Necessity must be present, real or apparent (see Laxman Sahu v. State of Orissa [1986 Supp SCC 555 : 1987 SCC (Cri) 173 : AIR 1988 SC 83] ).*

***18.*** *Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its*

*legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.*

***19.*** *It is trite that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record (see Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] and Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] ).*

***20.*** *In order to find out whether right of private defence is available or not, the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an abstract proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But*

*mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases (see Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] and V. Subramani v. State of T.N. [(2005) 10 SCC 358 : 2005 SCC (Cri) 1521] ).'*

**95.** In re: **Gopal & Anr. v. State of Rajasthan**[30] the Apex Court would hold:-

> ***"17.*** *Regarding the plea of private defence, it is useful to refer to a decision of this Court in V. Subramani v. State of T.N. [(2005) 10 SCC 358 : 2005 SCC (Cri) 1521] The following principles and conclusion are relevant: (SCC pp. 364-66, para 11)*
>
> > ***"11.*** *The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given*

[30] (2013) 2 SCC 188

*case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Evidence Act, 1872 (in short the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806 :*

*(1968) 2 SCR 455] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568] runs as follows: (SCC p. 654, para 9)*

> ***'9**. … It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.'*

*The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."*

**96.** In re: **Prakash Subba v. State of Sikkim**[31] this Court after analysing various judgments of the Apex Court on the law of private defence, would hold:-

> ***"56.*** *In common thread running through the cases cited hereinabove, the principles of applicability of law to right of private defence as contemplated under Sections 96 to 99 IPC is well settled. The right to private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation. Though it is difficult to expect from a person exercising this right in good faith, to weigh ¯with golden scales what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack. Pleading in so many words is not necessary. No aggressor can claim right to private defence on his life and property on the ground that the life and property is a natural right.*
>
> ***57.*** *A person who is born in the civilized world has to adopt a method to survive and preserve his life and property. Applying this principle to the fact of the case, the appellant/ convict being father did not like certain actions of his son. He asked articles like mattresses and TV, to be removed and placed in the room upstairs, the son, who was, as reported by the witnesses, arrogant, assaulted him and held his neck firstly on the ground floor. On intervention, the father leaves the place and goes to his room upstairs. The deceased followed him and again started squeezing his neck hard with hands leading to strangulation, which may cause death,*

[31] 2017 CRI. L.J. 2713

*in such a situation the appellant/convict has every right to exercise private defence and in such an unexpected situation, he hit the deceased with a weapon which caused fatal injuries. It cannot be held that he exceeded his right of private defence and he ought to have modulated his assault in composed mind.*

***58.*** *It is well settled that in case of strangulation, it is unrealistic to expect of the appellant/convict to modulate his defence step by step with any arithmetical exactitude. The appellant/convict exercised his right to preserve his life and limb and exercised his right to defence, inflicted injuries on the deceased son. It has come on record that the appellant was a doting father and used to take care of his family members and also has a reputation in the society. In such a background, I am of the firm opinion that the assault made by the appellant/convict with a Khukuri on his deceased son was in exercise of his right of private defence and it is within the scope and ambit of Section 96 IPC, and as such the act was no offence.'*

**97.** In view of the aforesaid law of private defence it is important to appreciate the admitted and proved facts which would entitle the Appellant to claim a right of private defence. Chandra Subba, the solitary eye witness testified that at around 8 to 9 pm in the cold winter night of 26.02.2016 the deceased intruded into her house and came inside her kitchen where she and the Appellant were sitting. The deceased was drunk and without any provocation started abusing the Appellant in (filthy) vulgar language. Bhim Bahadur Chettri, the father of the deceased and Nirmal Chettri the brother of the deceased corroborates the fact that the deceased used to consume alcohol. The deceased did not stop there. The deceased caught hold of the chest of the accused and in the fight that ensued the Appellant picked up a half burnt firewood from the oven and hit the deceased on his head. If the evidence were to end only in the examination-in-chief of Chandra Subba,

the „Proportionality Rule would come in the way of the Appellant *"for every assault it is not reasonable a man should be banged with a cudgel.* ***(Holt C.J.)*** in re: **Cockcroft v. Smith**[32]**.** However, in cross examination, Chandra Subba would admit that when the deceased abused the accused, the accused got angry and in a fit of anger the Appellant assaulted the deceased at once. She also admitted that during the scuffle the assault on the head of the deceased by the half burnt firewood was accidental and unintentional. Chandra Subba was a prosecution witness who was not declared hostile. The Investigating Officer, on being asked to weigh the half burnt firewood in Court, did so, and stated that it was about 500 gms. The prosecution evidence leads this court to believe that the Appellant had intended to strike the body of the deceased in his right of private defence with a reasonable apprehension of grievous injury being inflicted by the accused on him. It is impossible to fathom the extent of fear which strikes a mind of a person when confronted with a sudden unprovoked attack by an unknown intruder who criminally trespasses into somebody elses house at night and physically assault the person. Even Sukmaya Rai, aunt of the Appellant testified that the deceased was an unknown person. It is definitely possible, however, to fathom that the said person could have feared grievous injury in such a situation. It is certain that the deceased was the aggressor. In such circumstances it would surely allow the Appellant to defend himself from the inevitable harm on his body. More so, when the solitary act of assault on the head of the deceased by the Appellant was unintentional and the strike was intended for the body in an act of defence. Considering the evidence of Chandra Subba in cross examination it would be a justifiable argument that a singular blow with a half burnt firewood weighing just about 500 gms on the body would not violate the 'Proportionality Rule' as embodied in Section 99 IPC, 1860. The Defence has been able to convincingly demonstrate before this Court through the direct evidence of Chandra Subba, the solitary eye witness to the incident, and the statement of the Appellant given under Section 164 Cr.P.C. as well as before the learned Sessions Judge in the Section 313 Cr.P.C. proceedings that the solitary act of assault on the deceased on the head was

[32] (1709) 91 E.R.541

unintentional and in the exercise of his right to private defence. The cause of death was unintentional. It is quite evident that the entire act transpired at the spur of the moment almost instinctively as soon as reasonable apprehension of danger to the body arose from the aggression of the deceased coupled with the physical attack on the Appellant. In such situation it is difficult to even attribute that the Appellant would have the knowledge that his act is likely to cause death or to cause such bodily injury as is likely to cause death. Admittedly, the deceased criminally trespassed into Chandra Subbas house at night and attacked the Appellant all of a sudden. In such circumstances it is quite evident there would be no time to have recourse to the protection of public authorities. The burden of proof on the accused under Section 105 Evidence Act, 1972 has been discharged by the Appellant on preponderance of probabilities. The necessary basis for that plea has been taken not only in the Appellants statement recorded under Section 164 Cr.P.C. but also at the time of cross examination of prosecution witness i.e. Chandra Subba. It is being an admitted fact that the solitary assault on the head of the deceased with the half burnt firewood weighing around 500 gms being accidental the cause of death cannot be attributed to the Appellant. Thus the Appellant cannot also be set to have inflicted more harm than it is necessary to inflict for the purpose of defence. The prosecution has not led any evidence to establish the Appellants antecedents. The evidence which has been brought on record establishes, however, that the Appellant, during the investigation as well as the trial, right from the time of reporting the incident vide the FIR to the Police, giving his statement under Section 164 Cr.P.C. to the learned Judicial Magistrate and under Section 313 Cr.P.C. to the learned Sessions Judge has been truthful. It is quite evident therefore that this was not a case of culpable homicide not amounting to murder. The prosecution has failed to prove that the Appellant did have the knowledge that he was likely by such act to cause death. The failure of the prosecution to establish the crime against the Appellant is writ large. The Appellant is entitled to the benefit of doubt and consequently an acquittal.

**98.** In the facts and circumstances, this Court is of the view on preponderance of possibility that the Appellants solitary assault on the head

of the deceased was not only accidental and not intended to hit the head but was also an act of private defence within the parameters of section 96 IPC, 1860 and as such not an offence. Resultantly, the impugned judgment as well as the order on sentence both dated 27.10.2016 rendered by the learned Sessions Judge in Sessions Trial Case No. 01 of 2016 is set aside and the Appellant is acquitted of the solitary charge under Section 304 Part II IPC, 1860. The fine of 25,000/- imposed by the learned Sessions Judge, if paid by the Appellant shall be consequently returned.

**99.** The Appeal is allowed. The Appellant be set at liberty forthwith.