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case, the Court must exercise its power under S. 311 with the object of finding out the truth while giving latitude and taking a liberal view in the interest of justice – However, the application under S. 311 cannot be allowed without adequate or sufficient reason. Recall is not matter of course and the discretion given must be exercised judiciously to prevent failure of justice. The plea in such cases must necessarily be *bona fide*. It is only when the Court comes to the conclusion that the intention for invoking the provisions of S. 311 is to fill up the lacunae in the case, would the Court be circumspect in exercising its discretionary power.

Anil Oberoi* v. *Sajan Kumar Agarwal ***565-A***

Code of Criminal Procedure, 1973 – S. 439 – *Prima facie* or reasonable ground to believe that the accused has committed the offence alleged, nature and gravity of the accusation, severity of punishment, danger of accused absconding or fleeing, character, behavior, means, position and standing of accused, likelihood of offence being repeated, reasonable apprehension of witnesses being influenced, danger of justice being thwarted by grant of bail are vital considerations in exercise of the discretionary jurisdiction of the Sessions Court and the High Court under S. 439 which must be exercised judiciously, cautiously and strictly in compliance with the principles provided in S. 439 and in a plethora of decisions of the Apex Court.

Panna Lall Agrawal* v. *State of Sikkim ***499-A***

Code of Criminal Procedure, 1973 – S. 439 – Object – The object of bail is to secure the appearance of the accused persons at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

Panna Lall Agrawal* v. *State of Sikkim ***499-B***

Code of Criminal Procedure, 1973 – S. 439 – Factors to be Considered while Granting Bail – (i) nature of accusation and severity of punishment in cases of conviction and nature of supporting evidence; (ii) reasonable apprehension of tampering with witnesses for apprehension of threat to complainant; and (iii) *prima facie* satisfaction of Court in support of charge

(re: *NeeruYadav* v. *State of Uttar Pradesh, (2016) 15 SCC 422*).
Panna Lall Agrawal* v. *State of Sikkim ***499-C***

Code of Criminal Procedure, 1973 – S. 439 – The allegations in the FIR alleges that the accused had sought to blackmail, intimidate, threaten and use his position of power over the prosecutrix to subjugate her into submission on three occasions – As held in re: *State of Bihar* v. *Rajballav Prasad, (2017) 2 SCC 178*, the prime consideration is to protect the fair trial and ensure that justice is done. This may happen if the witnesses are able to depose without fear, freely and truthfully. It is trite that one of the fundamental considerations for grant of bail is the reasonable apprehension of the accused tampering with evidence. However, it is not necessary to prove the fact of tampering with mathematical certainty or indeed beyond a reasonable doubt. The test to be adopted in such matters is one of "reasonable apprehension".
Panna Lall Agrawal* v. *State of Sikkim ***499-D***

Code of Criminal Procedure, 1973 – S. 439 – While considering bail applications it is incumbent upon the Court to balance liberty of the accused with interest of the society to have a fair trial. Fair trial would be in danger of peril if there is reasonable apprehension of witnesses being intimidated or compromised – Reasonable apprehension can be gauged, in the present case, from the allegation made in the FIR itself.
Panna Lall Agrawal* v. *State of Sikkim ***499-E***

Constitution of India – Article 226 – Alternative relief sought was to issue an order or direction to the CBI to register FIR regular case and prosecute the persons indicted in report dated 12th October 2010 – Held, in view of the order dated 8th August 2011 rendered in WP (C) No. 328 of 2011 by the Hon'ble Supreme Court, wherein specific prayer was made for a direction to the CBI in the same nature as sought for herein, it is not proper to consider and grant alternative prayer at this stage, when in pursuance of S. 63 of the Lokpal and Lokayuktas Act, 2013, the Sikkim Lokayukta Act, 2014 has been notified on 27th February 2014. The Lokayukta, conprising of a Chairperson, a retired Chief Justice of a High Court and two Members, have been properly constituted. Further, the allegations referred in the report dated 12th October 2010 is under examination by the Lokayukta, as observed by the Hon'ble Supreme Court in its order (supra).

***Shri Kunga Nima Lepcha and Others* v.**
State of Sikkim and Others ***523-G***

Constitution of India – Articles 245 and 246 – Article 245 of the Constitution of India empowers Parliament and the Legislature of the States to make laws. Parliament is competent to make laws for the whole or any part of the territory of India. Article 246 contemplates that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule – Entry 80 of the Union List provides for extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, with the consent of the Government of that State – Entry 2 of the State List deals with 'police', as the subject matter of the State. The Delhi Special Police Establishment is a police force belonging to any State from its inception within the meaning of Entry 80 of Union List corresponding to Entry 39 of the federal legislative list of Seventh Schedule to the Government of India Act, 1935.

Shri Kunga Nima Lepcha and Others
v. ***State of Sikkim and Others*** ***523-B***

Constitution of India – Article 246 – Entries in various lists of the Seventh Schedule are not source of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate – The true nature and character of legislation is determined to which Entry it belongs, in its pith and substance.

***Shri Kunga Nima Lepcha and Others* v.**
State of Sikkim and Others ***523-C***

Delhi Special Police Establishment Act, 1946 – Ss. 3, 5 and 6 – DSPE Act, 1946 was enacted to constitute a special police force, to be called the Delhi Special Police Establishment for the investigation, in any Union Territory, of offences notified under S. 3 which deals with the offences to be investigated by special police establishment – S. 5 prescribes for extension of powers and jurisdiction of special police establishment to other areas – S. 6, inserted with effect from 6th March 1952, provides for consent of the State Government to exercise powers and jurisdiction.

***Shri Kunga Nima Lepcha and Others* v.**
State of Sikkim and Others ***523-A***

Delhi Special Police Establishment Act, 1946 – S. 6 – Constitutional

validity – S. 6 of DSPE Act is constitutional and valid as Parliament is competent to enact such a provision under Entry 80 of List I-Union List, prescribing power to grant consent for the concerned State Government, to enable a member of DSPE to exercise powers and jurisdiction in any area in the State. Under the legislative scheme, Parliament has no competence to extend power and jurisdiction of DSPE to any other State without consent of the concerned State – The local police as well as members of DSPE have concurrent jurisdiction to investigate an offence, but in case of members of DSPE, prior consent of the State Government is necessary.
***Shri Kunga Nima Lepcha and Others* v.**
State of Sikkim and Others ***523-D***

Indian Evidence Act, 1872 – S. 35 – Can reliance be placed on a document solely because it bears an official stamp and seal of the Registrar of Births and Deaths, West Sikkim, which is the line of reasoning adopted by the learned Trial Court?- The answer would be in the negative as none of the Prosecution witnesses have been able to vouchsafe for the truth of the contents thereof.
Lall Bahadur Kami* v. *State of Sikkim ***585-B***

Indian Evidence Act, 1872 – S. 35 and S. 74 – The reason why entries made by a public servant in apublic register or record stating a fact in issue or a relevant fact asper S. 35 has been made relevant is that when suchentries are made in the discharge of duties of a public servant, thepresumption is of its correctness – A public documentmust be shown to have been prepared by a public servant in the discharge of his official duty and form the act and records of a public officer. Such documents can be accepted in evidence, subject to the riders that can be culled out from the judicial pronouncements (quoted above).
Lall Bahadur Kami* v. *State of Sikkim ***585-A***

Indian Evidence Act, 1872 – S. 74 – Probative value of a public document – This Court is conscious and aware that Birth Certificate of the victim (Exhibit-4) gains precedence over every other document as proof of age, however, we may beneficially refer to the judgments (quoted) and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the parents or legal guardians. Such a Register is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court

for unexplained reasons – Evidence furnished casts a shadow on the probative value of Exhibit-4, thereby rendering it unfit for consideration.
Lall Bahadur Kami* v. *State of Sikkim ***585-D***

Indian Evidence Act, 1872 – S. 114 (g) –PW-14 (Medical Officer at Dentam Primary Health Centre) identified his signature on Exhibit-4 (Birth Certificate) and claimed to have put his signature therein after due verification of the record. Which record he is referring to have not been revealed. Admittedly, no Births and Deaths Register was furnished before the learned Trial Court by the Prosecution, although such a Register as per the witness, is maintained in their hospital. This ground itself would suffice to draw an adverse inference against the Prosecution under illustration (g) of Section 114 of the Evidence Act. PW-15 (Dealing Assistant at Dentam Primary Health Centre) claims to have prepared Exhibit-4 in his own handwriting on the orders of the Sub-Divisional Magistrate, Gyalshing, West Sikkim. The Sub-Divisional Magistrate has not been examined as a witness to substantiate this statement. No reasons have been put forth as to why the Sub-Divisional Magistrate, Gyalshing, would order preparation of Exhibit-4.
Lall Bahadur Kami* v. *State of Sikkim ***585-C***

Sikkim Government Gazette Notification No. 70/HOME/2010 dated 21.07.2010 – Validity – The General Clauses Act, 1897 – S. 21 – All the consent granted earlier for investigation of various offences under DSPE Act was withdrawn vide Notification dated 7th January 1987, which was upheld by the Hon'ble Supreme Court of India in *KaziLhendupDorji* v. *Central Bureau of Investigation, W.P (C) No. 313 of 1993* – In *KungaNimaLepcha and Others* v. *State of Sikkim and Others W.P (C) No. 353 of 2006*, direction was sought under Article 32 to the CBI to investigate allegations against the founder President of Sikkim Democratic Front, who has been the serving Chief Minister of the State of Sikkim since 12th December 1994. The Hon'ble Supreme Court while dismissing the writ petition vide order dated 25th March 2010 observed that the petitioner may approach the investigating agency directly with the incriminating materials before approaching the Court. Accordingly, the impugned Notification came to be issued on 21st July 2010 in exercise of the powers conferred by S. 6 of the DSPE Act, 1946 which has a proviso that prior consent of the State Government shall be obtained for the investigation of any such offence by the Delhi Special Police Establishment – On receipt of a complaint from the first petitioner, a request was made by the CBI to the State Government for grant of consent to initiate formal investigation into the matters on 12th

October 2010 which was declined on 4th November 2010. The second request of the CBI made on 20th December 2010 was also declined (-) the State Government again declined to give consent on the ground that Justice R.K. Patra Commission has been appointed vide Notification dated 7th January 2011 to examine the allegations – Feeling aggrieved, the first petitioner again preferred a writ petition in the Hon'ble Supreme Court titled *KungaNimaLepcha*v. *State of Sikkim and Others, W.P (C) No. 328 of 2011*, which was dismissed as withdrawn reserving the liberty to the petitioner to file another such petition. In the meantime, one Delay Namgyal Barfungpa and Pema D. Bhutia preferred a writ petition, being *WP (C) No. 16 of 2012* against the State and the present Chief Minister of Sikkim in the Hon'ble Supreme Court assailing the legality and validity of the impugned Notification dated 21st July 2010 and seeking a direction to the Governor of the State of Sikkim to accord necessary sanction and in alternative issue a direction to the CBI to register a regular case and prosecute. The Hon'ble Supreme Court disposed of the writ petition recording that since the Lokayukta for Sikkim has been established, the papers in possession of the Justice R.K. Patra Commission was transmitted to the Lokayukta, it was not necessary to consider the prayer made in the writ petition. The Lokayukta was requested to complete the inquiry as early as possible.

Held: The General Clauses Act, 1897 is applicable to all enactments in all situations unless there is anything repugnant in the subject or context. DSPE Act, 1946 does not exclude applicability of the Act of 1897 in any context. Competence of the State Government to accord consent or withdraw the same cannot be doubted. Under Section 21 of the Act of 1897, the authority which has the power to issue a Notification has the undoubted power to rescind or modify the Notification in the like manner – The State Government has power to give consent under the valid provision of law and also to withdraw the same. Withdrawal of consent to initiate an investigation is not final and it may be granted in any specific offence in future at any point of time or can be withdrawn – The impugned Notification is valid and proper and was exercised within the full competence of the State Government

***Shri Kunga Nima Lepcha and Others* v.**
State of Sikkim and Others ***523-E***

Sikkim Government Gazette Notification No. 70/HOME/2010 dated 21.07.2010 – Issue of *mala fide* against the Council of Ministers chaired by the Chief Minister, who had approved the issuance of impugned

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SLR (2017) SIKKIM 499

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

Bail Appl. No. 05 of 2017

Panna Lall Agarwal ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant : Mr. Jorgay Namka with Ms. Panila Theengh and Ms. Tashi D. Sherpa, Advocates.

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

Date of Order: 4th October 2017

A. Code of Criminal Procedure, 1973 – S. 439 – *Prima facie* or reasonable ground to believe that the accused has committed the offence alleged, nature and gravity of the accusation, severity of punishment, danger of accused absconding or fleeing, character, behavior, means, position and standing of accused, likelihood of offence being repeated, reasonable apprehension of witnesses being influenced, danger of justice being thwarted by grant of bail are vital considerations in exercise of the discretionary jurisdiction of the Sessions Court and the High Court under S. 439 which must be exercised judiciously, cautiously and strictly in compliance with the principles provided in S. 439 and in a plethora of decisions of the Apex Court.

(Para 6)

B. Code of Criminal Procedure, 1973 – S. 439 – Object – The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

(Para 8)

C. Code of Criminal Procedure, 1973 – S. 439 – Factors to be considered while granting bail – (i) nature of accusation and severity of punishment in cases of conviction and nature of supporting evidence; (ii) reasonable apprehension of tampering with witnesses for apprehension of threat to complainant; and (iii) *prima facie* satisfaction of Court in support of charge (re: *Neeru Yadav* v. *State of Uttar Pradesh, (2016) 15 SCC 422*).

(Para 10)

D. Code of Criminal Procedure, 1973 – S. 439 – The allegations in the FIR alleges that the accused had sought to blackmail, intimidate, threaten and use his position of power over the prosecutrix to subjugate her into submission on three occasions – As held in re: *State of Bihar* v. *Rajballav Prasad, (2017) 2 SCC 178*, the prime consideration is to protect the fair trial and ensure that justice is done. This may happen if the witnesses are able to depose without fear, freely and truthfully. It is trite that one of the fundamental considerations for grant of bail is the reasonable apprehension of the accused tampering with evidence. However, it is not necessary to prove the fact of tampering with mathematical certainty or indeed beyond a reasonable doubt. The test to be adopted in such matters is one of "reasonable apprehension".

(Paras 14 and 16)

E. Code of Criminal Procedure, 1973 – S. 439 – While considering bail applications it is incumbent upon the Court to balance liberty of the accused with interest of the society to have a fair trial. Fair trial would be in danger of peril if there is reasonable apprehension of witnesses being intimidated or compromised – Reasonable apprehension can be gauged, in the present case, from the allegation made in the FIR itself.

(Para 18)

Petition dismissed.

Chronological list of cases cited:

1. Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40.
2. Bharatbhai Ranabhai Solanki v. State of Gujarat, Order dated 01.08.2017 in Criminal Misc. Application (For Regular Bail) No. 18948 of 2017.
3. Kamlesh Ahirwar v. The State of Madhya Pradesh, Order dated 24.08.2017 in MCRC-10582-2017.
4. Dharmeshbhai Manabhai v. State of Gujarat, Order dated 28.07.2017 in Criminal Misc. Application (For Regular Bail) No. 10730 of 2017.
5. Neeru Yadav v. State of Uttar Pradesh, (2016) 15 SCC 422.
6. State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178.

ORDER

Bhaskar Raj Pradhan, J

An application for bail under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the accused allegedly involved in Jorethang P.S. FIR No.41/2017 dated 29.07.2017 under Section 363/354/506/34 of the Indian Penal Code, 1860 (IPC) read with Section 8/12/14 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) on the ground that the investigation is nearly complete; the allegation in the FIR does not satisfy the ingredients of the alleged offence; the accused is a business man of repute and the only earning member of the family and suffering from accelerated hypertension is vehemently opposed by the State on the ground that the allegation in the FIR makes it evident that the accused, if released on bail may continue to threaten the victim and tamper with vital evidence.

2. The facts necessary for disposal of the present application is lucid in the FIR lodged on 29.07.2017 at the Jorethang Police Station by the prosecutrix, a girl child of 16 years and 4 months. The allegation in the FIR is to the effect that while walking back home after school the accused stopped his red colour i10 car, asked if she was going home and offered her a lift when she replied that she was in

fact going home. The prosecutrix thus got into the vehicle of the accused. However, when the accused diverted the vehicle towards Namchi instead of Nayabazar the prosecutrix inquired as to where he was going. The accused replied that he would finish his work and quickly take her back to Nayabazar. The prosecutrix believed the accused and they continued till Karfectar when he stopped the vehicle, took out his small knife from the vehicle's document box and asked the prosecutrix to remove her clothes otherwise he would stab her. The prosecutrix did not comply for a while but when the accused brought the knife next to her nose and threatened her that he would kill her she got frightened and removed her PT dress after which he threatened her more and made her remove even her undergarments. Thereafter, the accused started touching her front body which made her cry. The accused, thereafter, threatened her and made her pose with a smile and took photographs of her on his mobile. The accused then told her to wear her clothes and not to tell anybody otherwise he would kill her and upload the photograph on facebook. The accused then took the prosecutrix to Nayabazar after which she went home. Due to the fact that her grandmother had been taken ill and her father had taken her to Siliguri there was much tension at home and the prosecutrix did not relate the story to anybody. Subsequently, the accused once again threatened her by telling her that if she did not get in his car he would upload the photograph on facebook and whatsapp after which the prosecutrix got into the vehicle where again the accused made her undress and took another photograph. Fifteen days prior to the lodging of the FIR, the accused had once again met the prosecutrix in Nayabazar near the shop and asked her to go with him for doing "naramro kam" (dirty act) but she declined and he threatened her that he would circulate the photographs. A day before the lodging of the FIR the prosecutrix's aunt told the prosecutrix's father that she had been shown the prosecutrix's naked photo by a lady who is the coaccused. After that on being asked by the prosecutrix's father, the prosecutrix told him the entire story. Her father had heard that the accused and the co-accused had uploaded her photograph on whatsapp and facebook. Stating all the aforesaid facts in the written complaint dated 29.07.2017, the prosecutrix lodged the aforesaid FIR.

3. The accused thereafter approached the Special Judge, POCSO Act, 2012 at Namchi for bail on three occasions each of which were however, rejected. The last rejection was vide Order dated 15.09.2017.

4. The co-accused, Miss Anjana Sharma, however, was granted bail by the Special Judge vide Order dated 08.09.2017. Mr. Jorgay Namka, the Learned Counsel for the accused thus also seeks bail on the ground of parity with the co-

accused. The Learned Special Judge vide order dated 15.09.2017 rejected the ground of parity holding, inter-alia, that the facts and circumstances of the present case makes it amply clear that the allegation against the case of the accused compared to the co-accused are different and more grievous. This Court sees no justification to differ with the view taken by the Learned Special Judge.

5. On the date of filing of the application for bail, Mr. Jorgay Namka would argue that the accused has already been in custody for more than 52 days.

6. Prima facie or reasonable ground to believe that the accused has committed the offence alleged, nature and gravity of the accusation, severity of punishment, danger of accused absconding or fleeing, character, behavior, means, position and standing of accused, likelihood of offence being repeated, reasonable apprehension of witnesses being influenced, danger of justice being thwarted by grant of bail are vital considerations in exercise of the discretionary jurisdiction of the Sessions Court and the High Court under Section 439 of the Cr.P.C. which must be exercised judiciously, cautiously and strictly in compliance with the principles provided in Section 439 of the Cr.P.C. and in a plethora of decisions of the Apex Court.

7. On a query raised by this Court, Mr. Karma Thinlay Namgyal, Learned Public Prosecutor, on instruction from the Investigating Officer submits that the investigation is complete and the charge-sheet would be filed as soon as the forensic report sought for would be received. On instructions, the Learned Public Prosecutor also submitted that the corpus delicti of the crime have also all been seized.

8. At the hearing Mr. Jorgay Namka would cite **Sanjay Chandra v. Central Bureau of Investigation**[1] . It is trite that the object of bail is to secure the appearance of the accused persons (sic-person) at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. This was a case of economic offences in which the prosecution had contended that there is a possibility of the appellants therein tampering with the witnesses however, without placing any material in support of the allegation. However, the present case is a case in which the allegation is of the commission of heinous offences under the POCSO Act, 2012 in which the FIR itself alleges three occasions on which the accused had intimidated and threatened the prosecutrix.

[1] (2012) 1 SCC 40

9. Mr. Jorgay Namka would also refer to various bail orders passed by different High Courts to contend that even in more serious offences under POCSO Act, 2012 the Courts had granted bail. The order granting bail passed by the Gujarat High Court in re: **Bharatbhai Ranabhai Solanki v. State of Gujarat** [2] was relating to a case in which the allegation in the FIR indicated a love affair with the accused therein and thus distinguishable in the present case. Similarly the order granting bail passed by the Madhya Pradesh High Court in re: **Kamlesh Ahirwar v. The State of Madhya Pradesh**[3] was relating to a case in which it was contended that the prosecutrix went with the applicant on her own will and she was a consenting party and thus also distinguishable. The order granting bail by the Gujarat High Court in re: **Dharmeshbhai Manabhai v. State of Gujarat**[4] was also in the peculiar facts of the said case in which the prosecutrix had on the very next date of lodgment of the FIR stated that no act of sexual intercourse was made by the applicant. However, in her second statement made after four days of the FIR she had made such allegation which the medical certificate did not support. Thus, even this case is distinguishable.

10. The Learned Public Prosecutor would refer to the Apex Court judgment in re: **Neeru Yadav v. State of Uttar Pradesh**[5] in which it was held that the factors to be considered while granting bail are (i) nature of accusation and severity of punishment in cases of conviction and nature of supporting evidence; (ii) reasonable apprehension of tampering with witnesses for apprehension of threat to complainant; and (iii) prima facie satisfaction of court in support of charge. The judgment of the High Court granting bail to the accused therein only on the ground of parity was overturned by the Apex Court as the said accused was a history-sheeter.

11. In re: **State of Bihar v. Rajballav Prasad**[6] the Apex Court would overturn after examining the legality and proprietary of the order granting bail by the High Court after the conclusion of the investigation, in which charge-sheet had been filed and charges framed under Section 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the IPC and Sections 4, 6 ad 8 of POCSO as well as Section 4 to 6 of the Immoral Traffic (Prevention) Act, 1956 by observing that presumption of innocence would continue to run in favour of the accused until the guilt is brought

[2] order dated 01.08.2017 in Criminal Misc. Application (For Regular Bail) No. 18948 of 2017
[3] order dated 24.08.2017 in MCRC-10582-2017
[4] order dated 28.07.2017 in Criminal Misc. Application (For Regular Bail) No. 10730 of 2017
[5] (2016) 15 SCC 422
[6] (2017) 2 SCC 178

home and discussing the merits of the case and holding that there was no material showing that the accused had interfered with the trial by tampering evidence. The Apex Court held:

> **"24.** As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in Panchanan Mishra v. Digambar Mishra [Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143 : 2005 SCC (Cri) 660] while setting aside the order of the High Court granting bail in the following terms: (SCC pp. 147-48, para 13)
>
> > "13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."
>
> 26. We are conscious of the fact that the respondent is only an undertrial and his liberty is also a relevant

consideration. However, equally important consideration is the interest of the society and fair trial of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of the accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice-delivery system. It is this need for larger public interest to ensure that criminal justice-delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses, etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in Masroor v. State of U.P. [Masroor v. State of U.P., (2009) 14 SCC 286 : (2010) 1 SCC (Cri) 1368] in the following words: (SCC p. 290, para 15)

> "15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following

observations of this Court in Shahzad Hasan Khan v. Ishtiaq Hasan Khan [Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684 : 1987 SCC (Cri) 415] are quite apposite: (SCC p. 691, para 6)

'6. … Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution."

12. Keeping the parameters laid down by the Apex Court in mind it is vital to consider the nature of the offences alleged. For the said purpose the following chart would be indicative:-

Sl. No.	Offence	Term of sentence	Cognizable or Non-cognizable	Bailable or non bailable	By what Court triable
1.	363 IPC	May extend to 7 years and also with fine	Cognizable	Bailable	Magistrate of the First Class
2.	345 IPC	May extend to 2 years in addition to any term of imprisonment to which he may be liable under any other section.	Cognizable	Bailable	Magistrate of the First Class
3.	506 IPC	May extend to 2 years, or with fine, or with both.	Non-cognizable	Bailable	Magistrate of the First Class
4.	8 POCSO	Not less than 3 years, may extend to 5 years and also with fine.	Cognizable	Non-bailable	Special Court
5.	12POCSO	May extend to 3 years and with fine.	Cognizable	Non-bailable	Special Court
6.	14 POCSO	May extend to 5 years and with fine.	Cognizable	Non-bailable	Special Court

13. Sections 363, 354 and 506 IPC are all bailable offences and therefore there is no need to examine the nature of the allegations under IPC at this stage.

Section 8, 12 and 14 of the POCSO Act, 2012 are, however, non-bailable offences. The allegation in the FIR does indicate a prima-facie case against the accused under the POCSO Act, 2012.

14. The allegations in the FIR as set out herein above also alleges that the accused had sought to black mail, intimidate, threaten and use his position of power over the prosecutrix to subjugate her into submission on three occasions.

15. As per the Learned Public Prosecutor, although, the investigation is complete the filing of the charge-sheet would be possible only after receipt of forensic opinion which is awaited. On instruction received from the Investigating Officer, the Learned Public Prosecutor indicated that the charge-sheet may be filed within a week or two and all attempts are being made to secure the forensic opinion at the earliest.

16. Trial is yet to begin. As held in re: **Rajballab Prasad (supra)** the prime consideration is to protect the fair trial and ensure that justice is done. This may happen if the witnesses are able to dispose (sic-depose) without fear, freely and truthfully. The victim is a child of 16 years and the accused is, as per his own pleadings, a businessman of repute having a standing in the society. It is trite that one of the fundamental considerations for grant of bail is the reasonable apprehension of the accused tampering with evidence. However, it is not necessary to prove the fact of tampering with mathematical certainty or indeed beyond a reasonable doubt. The test to be adopted in such matters is one of "reasonable apprehension".

17. The offences alleged under POCSO Act, 2012, are heinous offences. Although it is informed that the prosecutrix's statement has been recorded under Section 25 of the POCSO Act, 2012 by the Magistrate, the prosecutrix and material witnesses have not deposed before the Special Court as yet.

18. The accused is an under-trial and his liberty is also relevant. However, while considering bail applications it is incumbent upon the Court to balance this liberty of the accused with interest of the society to have a fair trial. Fair trial would be in danger of peril if there is reasonable apprehension of witnesses being intimidated or compromised. Although there is no cogent evidence brought forth

by the prosecution to establish witness intimidation, post arrest of the accused, the very fact that the FIR alleges three incidents of intimidation by the accused on the prosecutrix is perhaps enough to have a "reasonable apprehension" that the accused may again seek to do so to get away from the clutches of the serious and heinous case where the punishment prescribed is both stringent and deterrent. Reasonable apprehension, as rightly pointed out by the Learned Public Prosecutor, can be gauged in the present case from the allegation made in the FIR itself. In the present case, the accused has been in custody for about two months. The minimum punishment prescribed for the alleged offence under Section 8 of the POCSO Act, 2012 is three years which may extend to five years.

19. In the facts and circumstances of the present case, although conscious of the liberty of the accused in a pre trial case, this Court is of the view that granting bail to the accused at this stage would not serve fair trial. Accordingly, the application for bail is rejected, however, with liberty to the accused to approach the Special Court after material witnesses in the present case are examined, if advised.

20. It is made clear that the observations made herein are solely for the purpose of consideration for grant of bail at this stage. The Special Court, needless to say, shall not be influenced at the trial by any observation made in the present order.

SLR (2017) SIKKIM 510

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

C.R.P. No. 03 of 2017

Smt. Asha Rani Oberoi ….. PETITIONER

Versus

Ashwin Oberoi and Others ….. RESPONDENTS

For the Petitioner :	Mr. S.S Hamal, Advocate.
For Respondent 1 and 4 :	Mr. Udai P. Sharma, and Mr. Anup Gurung, Advocates.
For Respondent 5 :	Mr. S.K Chettri, Asst. Govt. Advocate.

Date of decision: 5th October 2017

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

Blood is obviously thicker than water. A wound, which had just about started due to the litigation, was quickly attended to and has not been allowed to fester between siblings. On a suggestion made by this Court the learned Counsel appearing for the parties on specific instruction of the litigants before this Court agreed to settle their disputes amicably through the process of mediation and accordingly on 29.08.2017 the present CRP 03/ 2017 was referred for mediation.

2. The Sikkim State Legal Services Authority vide a communication bearing Ref. No. 1033/SLSA/02/MC dated 25.09.2017 has submitted a report to this Court stating that the case was amicably settled before the Mediation Centre, East Sikkim at Gangtok and has also forwarded the case

records along with the Deed of Compromise dated 21.09.2017, recording the settlement arrived at between the contesting parties to C.R.P No. 03/ 2017 all blood sister and brothers except Respondent no. 5.

3. The Deed of Compromise is quoted herein below:-

"DEED OF COMPROMISE

This Deed of Compromise is made on this 21st day of September, 2017, between Smt. ***Asha Rani Oberoi,*** *wife of Shri. Sarbajeet Singh, Resident of 11-9-40, Natraj Tower Dasapalla Hills, Vizag-530003, Andhra Pradesh presently camped at Gangtok, hereinafter referred to as the* ***Plaintiff/ First Party,*** *(which means and includes her legal heirs, successors, representatives, assigns, unless repugnant to this deed) on the FIRST PART*

AND

1. Shri Ashwin Oberoi
2. Shri Arun Oberoi
3. Shri Ashok Oberoi
4. Shri Anil Oberoi

All sons of late Tirtha Ram Oberoi, and resident of Oberoi Building, M.G. Marg, Gangtok, East Sikkim hereinafter referred to as the ***Defendants/Second Party,*** *(which means and includes all their legal heirs, successors, representatives, assigns, unless repugnant to this deed) on the* ***SECOND PART.***

WHEREAS, *the First Party and the Second Party are involved in a litigation. The First Party has filed a Title Suit No. 11 of 2014 (Asha Rani Oberoi Vs. Ashwin Oberoi & four Others.) before the Court of Civil Judge, Junior Division, East Sikkim at Gangtok against her own brothers the second party/defendants.*

AND WHEREAS, *the Learned Civil Judge, Junior Division, East Sikkim passed on order dated 15.12.2016, disposing off the Title Suit No. 11 of 2014 on a technical ground allowing the preliminary objection of the defendants.*

AND WHEREAS, *the First Party filed a Civil Revision Petition No. 03 of 2017 (Smt. Asha Rani Oberoi Vs. Shri Ashwin Oberoi & four Others) before the Hon'ble High Court of Sikkim assailing the Order of the Ld. Trial Court dated 15.12.2016 passed in Title Suit No. 11 of 2014.*

AND WHEREAS, *the litigation being amongst the blood sister and brothers, the Hon'ble High Court was of the opinion that this matter can be settled amicably between the said parties.*

AND WHEREAS, *the Parties to this litigation also desired to have this matter settled by a Mediator.*

AND WHEREAS, *vide Order dated 29.08.2017 in Civil Revision Petition No. 03 of 2017 passed by the Hon'ble High Court of Sikkim, the matter was referred for Mediation to the Mediation Centre at Gangtok.*

AND WHEREAS, *the Mediation Centre,/ Legal Service Authority, Gangtok, appointed Shri N. Rai, Sr. Advocate as the Mediator to mediate this matter.*

AND WHEREAS, *on formal notice the Parties appeared at Mediation Hall, ADR Centre, District Court Complex, Gangtok, East Sikkim on 15.09.2017.*

AND WHEREAS, *with the help of Shri*

S.S. Hamal, Ms. Priyanka Chhetri and Ms. Sushma Lepcha, Advocate for the First Party and Shri U.P Sharma, Advocate for Defendant No. 1 and 04 and Respondent No. 01 and 04d the concerned parties. An introduction and preliminary deliberation took place on the first sitting and the issue of settlement was narrowing down, 21.09.2017 was fixed for the second deliberation and discussion.

AND WHEREAS, *today i.e. on 21.09.2017, the respective parties and their Ld. Counsels appeared with very open mind and suggestions and effective deliberation and discussions was initiated. After joint and private cacusses by the Mediator and also the direct deliberations between the contesting parties and their counsels present and also the positive suggestion which came from the parties, the Parties ultimately agreed to settle this matter amicably on the following terms and conditions:-*

1. That the Second Party No. 1 Shri Ashwin Oberoi, who is in occupation of the portions of the building (i.e. the second floor of the building) for which the First Party has her claim agreed to pay the First Party a sum of Rs. 20,000/- (Rupees Twenty Thousand only) per month for final settlement of the claim of the First Party. The money shall be deposited in the savings account of the First Party maintained with Axis Bank, Vishakapatnam.

2. That the Second Party No. 01 shall enhance the present agreed amount of Rs. 20,000/- (Rupees twenty thousand) only proportionately as and when he enhances the house rent from his tenants. The First Party shall not claim the money to be paid by Second Party No. 1 as and

when the premises remains vacant on want of tenancy.

3. That the Second Party No. 01 shall pay the above mentioned amount (original or enhanced) house rent for the lifetime of the First Party. The Second Party No. 01 shall automatically stop the payment in case of the death of the First Party.

4. That in case of the death of the Second Party No. 01, prior to the death of the First Party, his legal heirs and successors shall pay the First Party 50% of the actual amount being paid by Second Party No. 01 to the First Party on the date of his death.

5. That the First Party shall not make any other claim in future in terms of the present litigation, which will be disposed off as compromised.

6. That the Second Party No. 02 to 04 and the Respondent No. 05 shall not have any objections to the above mentioned terms and conditions of this Deed of Compromise.

7. That the Parties shall request the Hon'ble High Court for disposing off the Civil Revision Petition No. 03 of 2017 (Smt. Asha Rani Oberoi Vs. Shri Ashwin Oberoi & 04 Others) making this Deed of Compromise a part of the Order of disposal.

In witness whereof this Deed of Compromise is made on the date hereinabove first mentioned. The Parties put their respective hands on this Deed of Compromise at the mediation Hall, ADR Centre, District Court Complex, Gangtok, East Sikkim.

Witnesses.

1. Signature. *Sd/-*
First Party.

2. Signature. Sd/-
Second Party.

Sd/-
Third Party.

Sd/-
Fourth Party.

Sd/-
Fifth Party."

4. The said Deed of Compromise has been duly signed by all the contesting parties duly attested by the two witnesses except the State Respondent.

5. The learned counsels appearing for the respective parties to the present dispute states and submits that in view of the compromise entered nothing further survives in the present CRP No. 03/2017. The Deed of Compromise dated 25.09.2017 is taken on record and is made part of the judgment. In terms of the said Compromise Deed a decree may be drawn up.

6. It is indeed heartening to note that the contesting parties, all siblings, with the active involvement of their learned counsels have arrived at an amicable settlement of their disputes.

7. This Court records its appreciation of the positiveness of the contesting parties hereto to settle the matter amicably, the efforts of the learned Counsels for the respective parties to assist in the settlement arrived at and of the Mediator, Mr. N. Rai, Senior Advocate who has successfully facilitated the parties to reach a common agreement for the resolution of their disputes.

8. The parties to bear their own costs.

SLR (2017) SIKKIM 516

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

F.A.O No. 01 of 2017

M/s JAL Power Corporation Ltd ….. APPELLANT

Versus

M/s R.S.M Infra Project and Others ….. RESPONDENTS

For the Appellant :	Mr. Jorgay Namka, Ms. Panila Theengh and Ms. Tashi D. Sherpa Advocates.
For Respondents 1 and 2 :	Mr. Sudesh Joshi, Advocate.
For Respondents 3 to 6 :	Mr. S.K Chettri and Ms. Pollin Rai, Asst. Govt. Advocate.

Date of decision: 5th October 2017

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

Amicable settlement of dispute perhaps is the highest benchmark to gauge the evolution of any civilized society involved in adversarial litigation.

2. On the request made by the learned counsel for the parties on 19.06.2017 before this Court, the matter was referred for Mediation.

3. A report has been submitted by the Sikkim State Legal Services Authority vide a communication bearing Reference no. 1032/SLSA/02/MC dated 25.09.2017 stating that the case was amicably settled before the Mediation Centre, East Sikkim at Gangtok and also forwarding the case records along with the Deed of Agreement dated 20.09.2017 entered between the parties to the FAO no. 01/2017 pending before this Court.

The Deed of Agreement has been signed by all the parties to the litigation and in the presence of two witnesses who have also put their signatures in attestation thereof.

4. The Deed of Agreement so executed is reproduced herein below:-

"DEED OF AGREEMENT

This DEED OF AGREEMENT is made on this the 20th Day of September, 2017 between M/s Jal Power Corporation Ltd., through its Deputy Manager (HR), Shri H.B Thapa, S/O Shri P. Thapa, R/O Jorethang, South Sikkim (the plaintiff, hereinafter referred to as the FIRST Party [which term and expression shall unless repugnant to the content be deemed, mean and include its successors, representative, assigns, administrators and executors] of the FIRST PART.

AND

1. M/s RSM Infra Project, through Sunil Kumar Agarwal having its office opposite SBI, Jorethang Bazar, South Sikkim, (Second Party),

2. Shri Erung Tenzing Lepcha, S/o Late Kinchok Tshering Lepcha, R/o Rinchenpong (P.S Kaluk), West Sikkim, (Third Party),

3. The Principal Secretary-cum-PCCF, Department of Forests, Env. & Wildlife Management, Government of Sikkim, Gangtok, (Fourth Party),

4. The District Collectorate, Office of the District Collectorate, Gyalshing, West Sikkim, (fifth Party),

5. The Sub-Divisional Magistrate, Soreng Sub-Division, Soreng, West Sikkim (Sixth Party),

6. The Sub Divisional Magistrate-1, West District, Gyalshing, West Sikkim (Seventh Party).

AND

WHEREAS, the suit land bearing Plot No. 229 and 231 as per the cadastral survey record of 1950-52 and corresponding plot no. 323 and 326 as per the cadastral survey record of 1978-80 is situated at Zeel Revenue Block, Rinchenpong, West Sikkim.

AND

WHEREAS, the First Party has instituted the Title Suit bearing T.S No. 01 of 2017 against the Second Party and Others before the Court of Ld. District Judge, West Sikkim at Gyalshing for Declaration, Recovery of Possession, Mandatory Injunction and other consequential reliefs under Order VII Rule 1 & 3 of the CPC, 1908

AND

WHEREAS, the First Party being aggrieved by the Order rejecting its injunction application filed an Appeal/FAO before the Honble High Court of Sikkim at Gangtok and the same is pending.

AND

WHEREAS, during the pendency of the aforesaid case, a joint Inspection of the suit land situated at Zeel Revenue Block, West Sikkim was conducted on 21.06.2017 in presence of the following persons/Officers.

(a) Revenue Inspector, Sub Division Office, Soreng, West Sikkim.

(b) ACF, Block Officer and Assistant Surveyor, Survey and Demarcation Division, Forest, Env. & Wildlife Management Department.

(c) V.L.O, Rinchenpong Circle, Soreng Sub Division.

(d) Incharge, RSM Infra Project.

(e) The Deputy Manager, (HR), M/s Jal Power Corporation Ltd.

(f) Shri Erung Tenzing Lepcha, S/o Late Kinchok Tashi Tshering Lepcha R/o Rinchenpong, West Sikkim.

(g) B.O (T) Legship, Forest, Env. & Wildlife Management Department.

That during the said joint inspection the following facts were observed which are as follows;

1. As per the land records of 1950-52 the crusher plant constructed by the M/s RSM Infra Project falls within the part of plot no. 229 which is „Sarkar Khasmal and part of plot no. 231 which is „Khasmal Vir.

2. As per the land records of 1950-52 the crusher plant constructed by JPCL falls within the part of plot no. 229 which is „Sarkar Khasmal and part of the plant falls within „River Reserve.

3. Further, the joint Inspection Report which was conducted on 14.06.2017 remains same which was based on the land records of 1978-80.

WHEREAS, during the course of hearing of the FAO, as suggestion for the matter to be referred to a Mediator came out from the parties and with the general consensus of the parties the Honble High Court was pleased to forward the same to the Mediation Centre, East Sikkim at Gangtok for amicable settlement.

AND

WHEREAS, the amicable talk and deliberations took place in the Mediation Centre at Gangtok and gradual progress towards the amciable settlement of the matter was made.

AND

WHEREAS, the parties as well as their counsel including the Forest Department officials made efforts and endeavor to settle the matter amicably. Private caucused and long and through deliberation were made with both the parties. Ultimately, the parties agreed to settle the matter amicably in the terms and conditions as mentioned herein below.

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO:-

1. That Third Party shall allow all the parties, free ingress and egress to reach their respective crusher plants and access to the forest land at any time.

2. That the First Party and the Second Party shall take necessary permissions from the Fourth Party for execution of their respective project works even for temporary use, as required under the relevant Legislations.

3. That the Third Party, Erung Tenzing Lepcha have agreed to lease out whatever portion of his ancestral land required by the First Party and the Second Party at the existing rate.

4. That the First Party and the Second Party shall not disturb and harass each other during the execution of their respective project works.

5. That after the execution of this Deed of Agreement the First Party undertakes all necessary steps for disposal of the matter before the Honble High Court and the Ld. Trial Court.

6. All disagreements and disputes arise with respect to the interpretation of the agreement or the agreements which cannot be mutually decided

upon, shall be referred to and decided by the appropriate Court of law (both Civil & Criminal) having jurisdiction within the State of Sikkim.

IN WITNESS WHEREOF, the parties hereto have set and subscribed their respective hands and seals on the day, months and year first herein above written.

Witnesses;

Sd/-
1. Rinzing Bhutia.
Rincenpong

Sd/-
2. Naren Pradhan.
Gangtok

First Party. Sd/-

Second Party. Sd/-

Third Party. Sd/-

Fourth Party. Sd/-

Fifth Party. Sd/-

Sixth Party. Sd/-

Seventh Party. Sd/-"

5. The Deed of Agreement dated 20.09.2017 is accordingly made a part of present judgment and the present appeal disposed of in terms thereof.

6. The learned Counsel for the parties submits that in view of the compromise and settlement deed nothing survives in the Title Suit no. 01/ 2017 pending before the Court of learned District Judge, West Sikkim. The said Title Suit is also therefore, settled in terms of the Deed of Agreement and disposed of.

7. A copy of this judgment may be transmitted to the Court of learned District Judge, West Sikkim for necessary compliance. A compromise decree in terms of above settlement may be drawn accordingly.

8. It is indeed heartening to note that the adversarial parties with the active involvement of their learned counsels have arrived at an amicable settlement of their disputes.

9. This Court records its appreciation of the positiveness of the parties hereto to settle the matter amicably, the efforts of the learned Counsels for the respective parties to assist in the settlement arrived at and of the Mediator, Ms. Yangchen D. Gyatso, Advocate who has successfully facilitated the parties to reach a common agreement for the resolution of their disputes.

10. The parties to bear their own costs.

SLR (2017) SIKKIM 523

(Before Hon'ble the Chief Justice)

W.P. (C) No. 20 of 2015

Shri Kunga Nima Lepcha and Others ….. PETITIONERS

Versus

The State of Sikkim and Others ….. RESPONDENTS

For the Petitioners :	Mr. Arvind Kumar Gupta, Mr. Kausik Chatterjee and Mr. Ashok Subba, Advocates.
For Respondent 1 :	Mr. A. Mariarputham, Advocate General, Mr. J.B. Pradhan, Addl. Advocate General with Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Government Advocates.
For Respondent 2 :	Mr. Karma Thinlay, Central Govt. Advocate with Mr. D.K. Siwakoti, Advocate.
For Respondents 3, 4 and 5 :	None.

Date of decision: 6th October 2017

A. Delhi Special Police Establishment Act, 1946 – Ss. 3, 5 and 6 – DSPE Act, 1946 was enacted to constitute a special police force, to be called the Delhi Special Police Establishment for the investigation, in any Union Territory, of offences notified under S. 3 which deals with the offences to be investigated by special police establishment – S. 5 prescribes for extension of powers and jurisdiction of special police establishment to other areas – S. 6, inserted with effect from 6th March 1952, provides for consent of the State Government to exercise powers and jurisdiction.

(Paras 17 and 18)

B. Constitution of India – Articles 245 and 246 – Article 245 of the Constitution of India empowers Parliament and the Legislature of the States to make laws. Parliament is competent to make laws for the whole or any part of the territory of India. Article 246 contemplates that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule – Entry 80 of the Union List provides for extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, with the consent of the Government of that State – Entry 2 of the State List deals with 'police', as the subject matter of the State. The Delhi Special Police Establishment is a police force belonging to any State from its inception within the meaning of Entry 80 of Union List corresponding to Entry 39 of the federal legislative list of Seventh Schedule to the Government of India Act, 1935.

(Paras 19, 20, 21)

C. Constitution of India – Article 246 – Entries in various lists of the Seventh Schedule are not source of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate – The true nature and character of legislation is determined to which Entry it belongs, in its pith and substance.

(Paras 22 and 26)

D. Delhi Special Police Establishment Act, 1946 – S. 6 – Constitutional validity – S. 6 of DSPE Act is constitutional and valid as Parliament is competent to enact such a provision under Entry 80 of List I-Union List, prescribing power to grant consent for the concerned State Government, to enable a member of DSPE to exercise powers and jurisdiction in any area in the State. Under the legislative scheme, Parliament has no competence to extend power and jurisdiction of DSPE to any other State without consent of the concerned State – The local police as well as members of DSPE have concurrent jurisdiction to investigate an offence, but in case of members of DSPE, prior consent of the State Government is necessary.

(Paras 29 and 52)

E. Sikkim Government Gazette Notification No. 70/HOME/2010 dated 21.07.2010 – Validity – The General Clauses Act, 1897 – S. 21

– All the consent granted earlier for investigation of various offences under DSPE Act was withdrawn vide Notification dated 7th January 1987, which was upheld by the Hon'ble Supreme Court of India in *Kazi Lhendup Dorji* v. *Central Bureau of Investigation, W.P (C) No. 313 of 1993* – In *Kunga Nima Lepcha and Others* v. *State of Sikkim and Others W.P (C) No. 353 of 2006,* direction was sought under Article 32 to the CBI to investigate allegations against the founder President of Sikkim Democratic Front, who has been the serving Chief Minister of the State of Sikkim since 12th December 1994. The Hon'ble Supreme Court while dismissing the writ petition vide order dated 25th March 2010 observed that the petitioner may approach the investigating agency directly with the incriminating materials before approaching the Court. Accordingly, the impugned Notification came to be issued on 21st July 2010 in exercise of the powers conferred by S. 6 of the DSPE Act, 1946 which has a proviso that prior consent of the State Government shall be obtained for the investigation of any such offence by the Delhi Special Police Establishment – On receipt of a complaint from the first petitioner, a request was made by the CBI to the State Government for grant of consent to initiate formal investigation into the matters on 12th October 2010 which was declined on 4th November 2010. The second request of the CBI made on 20th December 2010 was also declined (-) the State Government again declined to give consent on the ground that Justice R.K. Patra Commission has been appointed vide Notification dated 7th January 2011 to examine the allegations – Feeling aggrieved, the first petitioner again preferred a writ petition in the Hon'ble Supreme Court titled *Kunga Nima Lepcha* v. *State of Sikkim and Others, W.P (C) No. 328 of 2011,* which was dismissed as withdrawn reserving the liberty to the petitioner to file another such petition. In the meantime, one Delay Namgyal Barfungpa and Pema D. Bhutia preferred a writ petition, being *WP (C) No. 16 of 2012* against the State and the present Chief Minister of Sikkim in the Hon'ble Supreme Court assailing the legality and validity of the impugned Notification dated 21st July 2010 and seeking a direction to the Governor of the State of Sikkim to accord necessary sanction and in alternative issue a direction to the CBI to register a regular case and prosecute. The Hon'ble Supreme Court disposed of the writ petition recording that since the Lokayukta for Sikkim has been established, the papers in possession of the Justice R.K. Patra Commission was transmitted to

the Lokayukta, it was not necessary to consider the prayer made in the writ petition. The Lokayukta was requested to complete the inquiry as early as possible.

Held: The General Clauses Act, 1897 is applicable to all enactments in all situations unless there is anything repugnant in the subject or context. DSPE Act, 1946 does not exclude applicability of the Act of 1897 in any context. Competence of the State Government to accord consent or withdraw the same cannot be doubted. Under Section 21 of the Act of 1897, the authority which has the power to issue a Notification has the undoubted power to rescind or modify the Notification in the like manner – The State Government has power to give consent under the valid provision of law and also to withdraw the same. Withdrawal of consent to initiate an investigation is not final and it may be granted in any specific offence in future at any point of time or can be withdrawn – The impugned Notification is valid and proper and was exercised within the full competence of the State Government

(Paras 30, 31, 32, 33, 34, 37, 38 and 40)

F. Sikkim Government Gazette Notification No. 70/HOME/2010 dated 21.07.2010 – Issue of *mala fide* against the Council of Ministers chaired by the Chief Minister, who had approved the issuance of impugned Notification – Held, *mala fide* cannot be attributed to an institution, the members of Council of Ministers without impleading them by name and person. In the case on hand, *mala fide* is attributed without setting out details and without impleading anyone in the case, as party. Thus, the allegation of *mala fide* cannot be countenanced.

(Para 41)

G. Constitution of India – Article 226 – Alternative relief sought was to issue an order or direction to the CBI to register FIR regular case and prosecute the persons indicted in report dated 12th October 2010 – Held, in view of the order dated 8th August 2011 rendered in WP (C) No. 328 of 2011 by the Hon'ble Supreme Court, wherein specific prayer was made for a direction to the CBI in the same nature as sought for herein, it is not proper to consider and grant alternative prayer at this stage, when in pursuance of S. 63 of the Lokpal and Lokayuktas Act, 2013, the Sikkim Lokayukta Act, 2014

has been notified on 27th February 2014. The Lokayukta, comprising of a Chairperson, a retired Chief Justice of a High Court and two Members, have been properly constituted. Further, the allegations referred in the report dated 12th October 2010 is under examination by the Lokayukta, as observed by the Hon'ble Supreme Court in its order (supra).

(Para 47)

Petition dismissed.

Chronological list of cases cited:

1. Kazi Lhendup Dorji v. Central Bureau of Investigation, W.P (C) No. 313 of 1993, (1994) Supp 2 SCC 116.

2. Kunga Nima Lepcha and Others v. State of Sikkim and Others, W.P (C) No. 353 of 2006, (2010) 4 SCC 513.

3. Bangalore Medical Trust v. B.S. Muddappa and Others, (1991) 4 SCC 54.

4. Maharashtra Land Development Corporation and Others v. State of Maharashtra and Another, (2011)15 SCC 616.

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

6. The Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal and Others, 1970 (1) SCC 633.

7. M.P. Special Police Establishment v. State of M.P. and Others, (2004) 8 SCC 788.

8. Kunga Nima Lepcha v. State of Sikkim and Others, W.P (C) No. 328 of 2011.

9. Delay Namgyal Barfungpa and Another v. State of Sikkim and Others, W.P. (C) No. 16 of 2012.

10. Management of the Advance Insurance Co. Ltd. v. Shri Gurudasmal, Superintendent of Police and Others, AIR 1969 Delhi 330.

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

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

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

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

15. A.C. Sharma v. Delhi Administration, (1973) 1 SCC 726.

16. Shri Kunga Nima Lepcha and Others v. The State of Sikkim and Others, WP (C) No. 1036 of 2014.

17. Rasid Javed v. State of Uttar Pradesh, (2010) 7 SCC 781.

18. Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh, (2011) 3 SCC 193.

19. M.P. Special Police Establishment v. State of M.P. and Others, (2004) 8 SCC 788.

20. State of M.P. and Others v. Nandlal Jaiswal and Others, (1986) 4 SCC 566.

21. State of Bihar and Another v. P.P. Sharma, IAS and Another, 1992 Supp (1) SCC 222.

22. J.N. Banavalikar v. Municipal Corporation of Delhi and Another, 1995 Supp (4) SCC 89.

23. Federation of Railway Officers Association and Others v. Union of India, (2003) 4 SCC 289.

JUDGMENT

Satish K. Agnihotri, CJ

Questioning the validity and constitutionality of provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (hereinafter referred

to as "DSPE Act"), as being ultra vires and violative of Article 14 of the Constitution of India, the instant petition is filed. The petitioners have also sought quashment of the notification No. 70/HOME/2010 dated 21st July 2010 (Annexure P-10) whereby and whereunder the general consent granted earlier was withdrawn prescribing that the prior consent in respect of public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim in offences referred thereto, is required for the investigation of any such offence by the Delhi Special Police Establishment (hereinafter referred to as "DSPE"). The petitioners are stated to be the residents of Sikkim and some petitioners are people's representative and Members of Legislative Assembly. During currency of the petition, the original petitioners 2, 3, 4 and 6 have sought withdrawal from the petition, which was accorded by the order dated 02nd June 2017.

2. The relevant facts, as projected by the petitioners, are that after accession of the Kingdom of Sikkim as State of Sikkim to the republic of India in 1975, the State of Sikkim by notification dated 20th October 1976 accorded general consent, as required under Section 6 of DSPE Act to DSPE for the investigation of offences punishable, as referred thereto, of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and also under the Prevention of Corruption Act, 1947. On 10th July 1979 (Annexure P-2), some more offences were included under grant of consent to DSPE for investigation. Subsequently, on 24th December 1983, 28th June 1984, 10th December 1984, more offences were brought under schedule of consent granted to DSPE. Subsequently, vide notification dated 07th January 1987, the State Government withdrew the schedule of consents granted earlier under Section 6 of DSPE Act. This notification came to be challenged in **Kazi Lhendup Dorji v. Central Bureau of Investigation in Writ Petition (C) No. 313 of 1993**[1] . It is averred that the Supreme Court quashed the notification dated 07th January 1987.

3. Consequent thereupon, a notification dated 2nd July 1994 was issued by the Government of Sikkim, wherein it was clarified that consent given by the State Government under Section 6 of DSPE Act for investigation of offences by DSPE stood revived with effect from 7th January 1987, as per

[1] (1994) Supp 2 SCC 116

the schedule of consents given earlier in letters dated 20th October 1976, 10th July 1979, 24th December 1983, 28th June 1984 and 10th December 1984. Offences under the Prevention of Corruption Act, 1988 were further added vide notification dated 2nd July 1994.

4. It appears that the first petitioner along with others filed a writ petition by way of public interest litigation under Article 32 of the Constitution of India in the Supreme Court, being Kunga Nima Lepcha & others v. State of Sikkim & others (Writ Petition (Civil) No. 353 of 2006), seeking a direction to the Central Bureau of Investigation (CBI) against the founder President of the Sikkim Democratic Front (SDF), who have been the Chief Minister of the Government of Sikkim since 12th December 1994. The Supreme Court, while rejecting the prayer of the petitioners vide order dated 25th March 2010[2], observed that it was open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action.

5. General consent accorded to DSPE earlier came to be withdrawn vide notification dated 21st July 2010, which is sought to be impugned in the instant petition. It appears that Justice R.K. Patra Commission was appointed to look into the allegations made by the petitioners. In the meantime, Sikkim Lokayukta Act, 2014 was notified by the State of Sikkim on 27th February 2014. Accordingly, all the allegations made in the petition were transferred to the Lokayukta and the same is under examination.

6. Mr. Arvind Kumar Gupta, learned counsel appearing for the petitioners would contend that the impugned notification dated 21st July 2010 issued in exercise of Section 6 of DSPE Act does not serve any public purpose as it was with sole motive to protect the corrupt persons. Mr. Gupta would further contend that on conjoint reading of Sections 5 and 6 of DSPE Act, there is no contemplation of classification of offences on the basis of offender. Thus, the issuance of notification is colourable exercise, which is illegal, perverse, arbitrary and mala fide. It is further urged that there was no reason to withdraw the notification all of a sudden, when the charges of corruption leveled against the public functionaries came to light. There is no rational and reasonableness in issuance of the said notification and by virtue of this notification, two separate classes have been

[2] (2010) 4 SCC 513

carved out by the State of Sikkim, one is for the offence committed by Central Government servants and another is by the State Government servants. This distinction and discrimination is unreasonable, perverse and improper, as it defeats the object and purpose of the enactment. It is also contended that the Lokayukta has no power to examine the validity of the impugned notification. It is also canvassed that after establishment of Lokayukta on 27th February 2014, how the report dated 05th March of Justice Patra Commission was submitted, when according to the State Government, Justice Patra Commission ceased to exist on creation of Lokayukta establishment on 27th February 2014. This confusion indicates that the respondents are avoiding and scuttling the issue to protect themselves. There is no provision under Section 6 of DSPE Act, empowering the State Government to withdraw the consent already given. Issuance of the notification is bad for the ground the allegations are against Council of Ministers. The State Government has no power to withdraw the consent, even under the provisions of Section 21 of the General Clauses Act, 1897 (hereinafter referred to as "the Act of 1897") as the Act of 1897 is not applicable to DSPE Act, which is a piece of conditional legislation and the exercise made under Section 6 is not reversible. To bolster up the aforestated contention, Mr. Gupta refers to and relies on the observations made by the Supreme Court in **Bangalore Medical Trust v. B.S. Muddappa and others[3], Maharashtra Land Development Corporation and others v. State of Maharashtra and another [4] , and Subramanian Swamy v. Director, Central Bureau of Investigation and another[5].**

7. In oppugnation, Mr. A. Mariarputham, learned Advocate General appearing for the first respondent, would contend that DSPE Act is a preconstitution legislation. Drawing a reference from Entry 39 of the Federal Legislative List of the Seventh Schedule to the Government of India Act, 1935, it is submitted that under Entry 80 of List-I (Union List) of the Seventh Schedule to the Constitution of India, Parliament is competent to frame Section 6 of the DSPE Act, which is legal within the frame work of the Constitutional Scheme. In support, he refers to a decision in **The Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal and others[6]** , wherein it was observed that the investigation by the CBI could be extended to any State only with the consent of the State. It is further

[3] (1991) 4 SCC 54
[4] (2011) 15 SCC 616
[5] (2014) 8 SCC 682
[6] 1970 (1) SCC 633

contended that Sections 5 and 6 have to be read and understood together. In the event, Section 6 is held to be ultra vires, Section 5 cannot be operative and be also held as invalid.

8. "Police" is a State subject and the investigation of allegation of corruption can be done by the local police also. It is further urged that after establishment of Lokayukta, in pursuance of Section 63 of the Lokpal and Lokayukta Act, 2013, the allegation of corruption has to be investigated by the Lokayukta and not by the CBI.

9. It is further submitted that the State Government is fully competent to withdraw the consent, as is done in the present case, vide impugned notification dated 21st July 2010. The impugned notification has been accepted by the Central Government, as is evident from the notification dated 13th April 2011, which is not the subject matter of challenge under this petition.

10. Responding to the plea of unreasonable classification, Mr. Mariarputham would submit that the Central Government employees and State Government employees form two separate classes and as such classification is valid. It is also contended that reliance of the petitioners in Subramaniyam Swamy's case[5] is misplaced as there was sub classification among the Central Government employees, giving a preferential treatment to some employees holding the rank of Joint Secretary and above. The Supreme Court held that the classification was unreasonable.

11. Referring to the observation made by the Supreme Court in **M.P. Special Police Establishment v. State of M.P. and others**[7] , on the question of mala fide, Mr. Mariarputham would submit that the allegation of mala fide is also misplaced as there cannot be an allegation of mala fide against the Council of Ministers as a body.

12. Mr. Mariarputham would further submit that the first petitioner has withdrawn his writ petition being **Writ Petition (Civil) No. 328 of 2011**[8] , on 08th August 2011, wherein liberty was reserved to challenge the order by which the State Government declined to give the consent to the CBI for investigation. The petitioner failed to challenge the decision of the State Government dated 09th February 2011, whereby the State Government

[7] (2004) 8 SCC 788
[8] Kunga Nima Lepcha v. State of Sikkim and others

declined to give consent. The impugned notification was the subject matter of one more petition in **W.P. (C) No. 16 of 2012**[9] , alleging mala fide in issuance of impugned notification. The Supreme Court disposed of the writ petition on 26th August 2014 observing that it was for Lokayukta to deal with the allegations and declined the relief. The petitioner moved the Supreme Court again in a writ petition, which was withdrawn on 18th December 2014 ex-parte without referring the earlier order passed by the Supreme Court on the issue.

13. On the issue of alternative prayer, learned Advocate General would contend that in Writ Petition No. 16 of 2012[9], the relief sought for was to quash the impugned notification and also a direction to the Governor to accord sanction for prosecution and direction to the CBI to register a case and prosecute the second respondent therein. The said writ petition was disposed of on having come to know that the Lokayukta consisting a retired Chief Justice of High Court, a Judicial Member and an Administrative Member has been constituted and as such the Lokayukta was requested to deal with the allegations, declining other reliefs. As such, this Court may not sit over the Judgment of the Supreme Court. Thus, this petition deserves to be dismissed.

14. Supporting the contention put forth by the first respondent, Mr. Karma Thinlay, learned Central Government Counsel appearing for the second respondent (Union of India), submits that the impugned notification is valid in accordance with law and it has duly been accepted by the Union of India by notification dated 13th April 2011 to that effect.

15. The 3rd and 4th respondents (CBI) have categorically stated in their affidavit dated 14th November 2015 that the members of DSPE are not authorized to exercise power and jurisdiction under Section 6 of DSPE Act, in absence of the consent granted by the concerned State. Section 6 is framed in view of the legislative field reserved for Parliament under Entry 80 of List-I and the State Government is competent to exercise power of consent and as such the Section 6 of DSPE Act is neither unconstitutional not invalid or illegal. The State Government is fully empowered to withdraw its consent. The CBI, on receipt of a complaint by the first petitioner in May 2010 processed the complaint and made a request to the State Government on 12th October 2010 to grant sanction/approval for conducting

[9] Delay Namgyal Barfungpa and another v. State of Sikkim and others

investigation under Section 6 of DSPE Act, as the general consent was withdrawn vide impugned notification dated 21st July 2010, which was declined by the State Government vide letter dated 09th February 2011. Thus, no further investigation was conducted. The provisions of the Act are in accordance with the constitution and law, warranting no interference.

16. I have given anxious consideration to the submissions put forth by the learned counsel appearing for the parties, examined the pleadings and documents appended thereto.

17. DSPE Act, 1946 was enacted to constitute a special police force, to be called the Delhi Special Police Establishment for the investigation, in any Union Territory, of offences notified under Section 3. Section 3 deals with the offences to be investigated by special police establishment. Section 5 prescribes for extension of powers and jurisdiction of special police establishment to other areas, which reads as under: -

> "Extension of powers and jurisdiction of special police establishment to other areas.—
>
> (1) The Central Government may by order extend to any area (including Railway areas), 1[in 2[a State, not being a Union territory]] the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3.
>
> (2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject of any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

> (3) where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of subsection (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

18. Section 6, which was inserted with effect from 6th March 1952, provides for consent of the State Government to exercise powers and jurisdiction, reads as under: -

> "6. Consent of State Government to exercise of powers and jurisdiction.— Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union territory or railway area, without the consent of the Government of that State."

19. Constitutionality of Section 6, wherein the State Government has power to grant consent for investigation of offence by DSPE is assailed in this petition. Article 245 of the Constitution of India empowers Parliament and the Legislature of the States to make laws. Parliament is competent to make laws for the whole or any part of the territory of India. Article 246 of the Constitution contemplates that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.

20. Entry 80 of the Union List in the Seventh Schedule provides for extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, with the consent of the Government of that State. Entry 80 of List I – Union List reads as under: -

> "80. Extension of the powers and jurisdiction of members of a police force belonging to any State to

any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

21. Entry 2, List II-State List, deals with police', as the subject matter of the State. The DSPE is a police force belonging to any State from its inception within the meaning of Entry 80 of Union List of the Seventh Schedule, corresponding to Entry 39 of the federal legislative list of Seventh Schedule to the Government of India Act, 1935. The issue came up for consideration in **Management of the Advance Insurance Co. Ltd. v. Shri Gurudasmal, Supdt. of Police and others**[10] before a Division Bench of the Delhi High Court, wherein it was held that DSPE is a Central Government Police Force. The Delhi High Court held as under: -

> "14. ..... We have already stated that the Delhi Special Police Establishment was a Central Government Police Force. It, however, belonged to Delhi inasmuch as it was constituted and functioned in Delhi. In respect of its political or governmental character, it was under the control of the Central Government. In respect of its constitution and functioning, it was located in Delhi. Therefore, the words "for the State of Delhi" or "for the Chief Commissioner's Province of Delhi" which existed in the Act prior to the amendment of 1952 had never meant that the Delhi Special Police Establishment was a police force of the State of Delhi or of the Chief Commissioner's Province of Delhi in the sense that it was under the control of the Chief Commissioner of the Part C State of Delhi or of the Chief Commissioner's Province of Delhi. Therefore, the substitution of the words "in Delhi" for the words "for the State of Delhi" did not in any way change

[10] AIR 1969 Delhi 330

> the constitution and the functioning or the nature of the Delhi Special Police Establishment. They remained the same.

22. It is a trite law that the entries in the various lists of the Seventh Schedule are not source of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate. It is apposite to refer to observations made by the Supreme Court in various cases.

23. In **Harakchand Ratanchand Banthia and others vs. Union of India and others**[11]**,** a Constitution Bench of the Supreme Court held as under:

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

24. In **Union of India vs. Shri Harbhajan Singh Dhillon**[12], the Supreme Court held as under:

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

[11] 1969 (2) SCC 166
[12] 1971 (2) SCC 779

25. Subsequently, in **Synthetics and Chemicals Ltd. and others vs. State of U.P. and others**[13]**,** again a Constitution Bench observed as under:

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

26. The true nature and character of legislation is determined to which Entry it belongs, in its pith and substance. The Supreme Court in **Southern Pharmaceuticals and Chemicals, Trichur and others v. State of Kerala and others**[14] observed as under: -

[13] (1990) 1 SCC 109
[14] (1981) 4 SCC 391

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

27. A Constitution Bench of the Supreme Court examining the scope and jurisdiction of DSPE in The Management of Advance Insurance Co. Ltd.6, held as under:

> "12. This entry speaks of a "police force belonging to any State" and not of a police force belonging to the Union Territory. The adaptation of the Delhi Special Police Establishment Act by the Adaptation of Laws (No. 3) Order, 1956 by substituting "Union Territories" in place of "Part C States", it is said, cut the Act adrift from the entry under which the power could alone be exercised. This power is limited in extent, it is argued, and cannot be used except as specifically conferred and it applies to a police force belonging to a State and not Union Territory. In reply the provisions of the General Clauses Act, as adapted by Adaptation Order (No.1) were brought to our notice. Section 3(58) of the General Clauses Act was adapted to read: "State –
>
> (a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and
>
> (b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."
>
> Previously the definition read:
>
> "State shall mean a Part A State, a Part B State or a Part C State."

> This definition furnishes a complete answer to the difficulty which is raised since Entry 80 must be read so as to include Union Territory. Therefore members of a police force belonging to the Union Territory can have their powers and jurisdiction extended to another State provided the Government of that State consents. ……"
>
> (emphasis supplied)

28. Again in **A.C. Sharma v. Delhi Administration**[15] the extension of power under DSPE Act was examined, wherein the Supreme Court held as under: -

> "13. ……
>
> Section 3 which empowers the Central Government to specify the offences to be investigated by the DSPE. has already been set out. The notification dated November 6, 1956, referred to earlier specifies numerous offences under various enactments including a large number of ordinary offences under IPC clauses (a) to (j) of this notification take within their fold offences under a number of statutes specified therein. Clause (k) extends the sweep of this notification by including in its scope attempts, abatements and conspiracies in relation to or in connection with offences mentioned in clauses (a) to (h) and also any other offence committed in the course of those transactions arising out of the same facts. It may also be stated that after 1956 in a number of further notifications the list of the offences specified under Section 3 has increased manifold. We consider it unnecessary to refer to them in detail. According to Section 4 the superintendence of DSPE vests in the Central Government and Section 5 empowers the Central Government to extend to any area in a State not being a Union Territory the powers and jurisdiction of members of this

[15] (1973) 1 SCC 726

> establishment for the investigation of any offences or classes of offences specified under Section 3. Subject to the orders of the Central Government the members of such Establishment exercising such extended powers and jurisdiction are to be deemed to be members of the Police force of that area for the purpose of powers, functions, privileges and liabilities. But the power and jurisdiction of a member of DSPE in such State is to be exercised only with the consent of the Government of the State concerned. The scheme of this Act does not either expressly or by necessary implication divest the regular police authorities of their jurisdiction, powers and competence to investigate into offences under any other competent law. As a general rule, it would require clear and express language to effectively exclude as a matter of law the power of investigation of all the offences mentioned in this notification from the jurisdiction and competence of the regular police authorities conferred on them by CrPC and other laws and to vest this power exclusively in the DSPE. The DSPE Act seems to be only permissive or empowering, intended merely to enable the DSPE also to investigate into the offences specified as contemplated by Section 3 without imparting any other law empowering the regular police authorities to investigate offences."

29. Section 6 of DSPE Act is constitutional and valid, as Parliament is competent to enact such a provision as stated under Entry 80 of List I-Union List, prescribing power to grant consent for the concerned State Government, to enable a member of DSPE to exercise powers and jurisdiction in any area in the State. Under the legislative scheme, Parliament has no competence to extend power and jurisdiction of DSPE to any other State without consent of the concerned State.

30. The next issue is as to whether the impugned notification dated 21st July 2010 is illegal or invalid. Indisputably, the State Government has granted consent to the extension of powers and jurisdiction to a member of DSPE in the whole of State for investigation of offences punishable under

different provisions of the Penal Code, referred thereto, vide letter dated 20th October 1976, which was further extended to the offences provided under letter dated 10th July 1979 and further by order dated 24th December 1983, consent was accorded for investigation of offences punishable under Section 22, 23 and 25 of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976). Vide order dated 28th June 1984, further offences punishable under Section 4 and 5 of the Anti-Hijacking Act, 1982 (65 of 1982) was brought within the schedule of consent granted by the State Government. Again by order dated 10th December 1984, some more offences were included in the schedule. 31. All the consent granted earlier for investigation of various offences as provided therein was withdrawn vide notification dated 07th January 1987, which came to be assailed in the Supreme Court in Writ Petition (Civil) No. 313 of 1993[1] . The Supreme Court upheld the power of the State to withdraw the consent by notification dated 07th January 1987, clarifying that the notification would operate only prospectively and the same would not apply to the cases wherein consent was available prior thereto. Thereafter, the consent granted earlier vide various letters and orders were revived vide notification dated 2nd July 1994. The first petitioner along with others moved the Supreme Court under Article 32 of the Constitution of India in Writ Petition (Civil) No. 353 of 2006[2] seeking a direction to the CBI to investigate the allegations leveled against the founder President of Sikkim Democratic Front (SDF) who has been the serving Chief Minister of the State of Sikkim since 12th December 1994. The Supreme Court while dismissing the writ petition vide order dated 25th March 2010, observed that the petitioner may approach the investigating agency directly with the incriminating materials before approaching the Court.

32. On the heels of, the impugned notification came to be issued on 21st July 2010, which reads as under:

"SIKKIM
GOVERNMENT GAZETTE
EXTRA ORDINARY
PUBLISHED BY AUTHORITY

GANGTOK WEDNESDAY 21TH JULY 2010 No.355

GOVERNMENT OF SIKKIM
HOME DEPARTMENT
GANGTOK

No. 70/HOME/2010 Date: 21.07.2010

NOTIFICATION

In order to have uniformity with the other States in the matter of investigation of cases by the members of the Delhi Special Police Establishment, the Governor of Sikkim, in exercise of the powers, conferred by Section 6 of the Delhi Special Police Establishment Act, 1946 (Act No. 25 of 1946), and in supersession of all previous notifications on the subject, is pleased to accord his consent to all members of the Delhi Special Police Establishment to exercise powers and jurisdiction under the said Act in the whole of the State of Sikkim in respect of the investigation of the following:

(a) Offences committed by public servants employed in connection with the affairs of the Government of India and persons employed in connection with the affairs of any local authority subject to the control of the Government of India or any corporation, company or bank owned or controlled by the Government of India: -

(i) punishable under Sections 120B, 124-A, 166, 167, 168, 169, 171E, 171F, 182, 193, 196, 197, 198, 199, 200, 201, 204, 211, 218, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 263-A, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 403, 406, 407, 408, 409, 411, 412, 413, 414, 417, 418, 419, 420, 465, 466, 467, 468, 471, 472, 473, 474, 475, 476, 477-A, 489-A, 489-B, 489- C, 489-D, 489-E, 500, 501, 502 and 505 of the Indian Penal Code, 1860 (Act No. 45 of 1860);

(ii) punishable under the Prevention of Corruption Act 1947 (Act No. 2 of 1947) and the Prevention of Corruption Act, 1988 (Act No. 49 of 1988);

(iii) attempts, abetments and conspiracies in relation to, or in connection with, the offences mentioned in clauses (i) and (ii) above.

(b) Offences punishable under the Central Acts specified in the Annexure appended thereto.

Provided that where public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim are concerned in offences referred to in items (a) (i) to (iii) and (b) above, the prior consent of the State Government shall be obtained for the investigation of any such offence by the Delhi Special Police Establishment.

By order of the Governor of Sikkim.

Sd/-
(TT Dorji), IAS
Chief Secretary
F. No. GOS/Home-II/84/18

(C.M. Sharma)
Addl. Secretary (C),
Home department"

33. Needless to state that on receipt of the complaint from the first petitioner, a request was made to the State Government for grant of consent to initiate formal investigation into the matters on 12th October 2010 (Annexure P-11) which was declined on 04th November 2010 (Annexure P-12). One more request was made on 20th December 2010 by the CBI. The State Government again declined to give consent on the ground that

Justice R.K. Patra Commission has been appointed vide notification dated 07th January 2011 to examine the allegations and as such it was not necessary to give consent. It has come on record that feeling aggrieved, the first petitioner again preferred a writ petition being Writ Petition (Civil) No. 328 of 2011[8] , in the Supreme Court, which was dismissed as withdrawn reserving the liberty to the petitioner to file another petition to challenge the order of the Government of Sikkim whereby the consent was declined. It is pertinent to state here that no petition to assail the order of the State Government to decline consent was filed. In the meantime, one Delay Namgyal Barfungpa with Pema D. Bhutia preferred writ petition, being Writ Petition (Civil) No. 16 of 2012[9] against the State and the present Chief Minister of Sikkim in the Supreme Court, assailing the legality and validity of the instant impugned notification dated 21st July 2010. Further seeking a direction to the Governor of the State of Sikkim to accord necessary sanction and in alternative issue a direction to the CBI to register a regular case and prosecute the second respondent therein. The relevant clause in the petition reads as under:

> "a) Issue an appropriate writ order or direction quashing the notification dated 21-7-2010 issued by the State of Sikkim so far as it mandates prior consent of the State Government against the public servant employed with the affairs of the State Government in respect of offences under Prevention of Corruption Act, 1988;
>
> b) Call for the records and quash by a writ in the nature of certiorari or any other appropriate writ order or direction, the undisclosed decision of the Government of Sikkim referring prior consent for investigation to the request of the CBI contained in letter dated 12-10-2010 (i.e. Annexure P-6);
>
> c) Issue an order or direction to the Governor of the State of Sikkim in the nature of mandamus to accord necessary sanction for the prosecution of the respondent No. 2;
>
> d) In the alternative issue an order or direction in the nature of Mandamus directing the respondents

No. 4 and 5 to register regular cases and prosecute the respondent No. 2 and others as mentioned in the CBI report forwarded vide letter dated 12-10-2010;

e) Grant such other relief/reliefs and pass such other order/orders as this Hon'ble court may deem fit and proper in the circumstances of the case.

34. The Supreme Court disposed of the writ petition recording that since the Lokayukta for Sikkim has been established, the papers in possession of the Justice Patra Commission against the second respondent therein was transmitted to the Lokayukta, it was not necessary to consider the prayer made in the writ petition. The Lokayukta was requested to complete the inquiry as early as possible.

35. It is apposite to state that such allegations are pending consideration before the Lokayukta, which is headed by retired Chief Justice of a High Court. In such a situation, whether it is proper for this Court to examine the validity of impugned notification which was the subject matter before the Supreme Court in Writ Petition (Civil) No. 16 of 2012[9] and the Supreme Court declined to examine the same, on account of the fact that the allegations made against the second respondent and others were pending examination by Lokayukta. Subsequently, the petitioner herein filed one more petition, being **Writ Petition (Civil) No. 1036 of 2014[16]** , which was withdrawn ex-parte with liberty to approach the High Court.

36. Learned Advocate General has categorically pointed out that subsequent petition being Writ Petition (Civil) No. 1036[16] of 2014 was withdrawn without disclosing that the earlier challenge before the Supreme Court was rejected as not being necessary in view of the pendency of the allegations before the Lokayukta. On perusal of the writ petition, it appears that it was stated in the writ petition that the earlier writ petition, filed for the same relief, was not considered, however, it is not clear as to whether it was brought into the notice of the Hon'ble Supreme Court or not, when petition was withdrawn, ex-parte.

37. The Act of 1897 is applicable to all enactments in all situations unless there is anything repugnant in the subject or context. DSPE Act does not exclude applicability of the Act of 1897 in any context. Competence of

[16] Shri Kunga Nima Lepcha & others v. The State of Sikkim & others

the State Government to accord consent or withdraw the same cannot be doubted. Section 21 of the Act of 1897 is in the following terms:

> **"21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.-** Where, by any Central Act or Regulations a power to issue notifications orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

38. Under Section 21 of the Act of 1897, the authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. The Supreme Court, examining the ambit and scope of Section 21 of the Act of 1897, in **Rasid Javed v. State of Uttar Pradesh**[17]**,** held as under:-

> "55. The aforesaid provision came up for consideration before the Constitution Bench of this Court in *Kamla Prasad Khetan v. Union of India* [AIR 1957 SC 676] way back in 1957. The majority opinion stated: (AIR p. 685, para 19)
>
> > "19. … It is to be remembered that Section 21 of the General Clauses Act embodies a rule of construction, and that rule must have reference to the context and subject-matter of the particular statute to which it is being applied;"
>
> 56. It seems to be fairly settled that under Section 21 of the General Clauses Act, an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. ……"

[17] (2010) 7 SCC 781

39. Further, it was reiterated in **Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh**[18] , as under: -

> "38. Section 21 is based on the principle that power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst other things, specifically deals with power to add to, amend, vary or rescind the notifications. The power to rescind a notification is inherent in the power to issue the notification without any limitations or conditions. Section 21 embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification, etc. However, there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication.
>
> 39. The principle laid down in Section 21 is of general application. The power to rescind mentioned in Section 21 is without limitations or conditions. It is not a power so limited as to be exercised only once. The power can be exercised from time to time having regard to the exigency of time. When by a Central Act power is given to the State Government to give some relief by way of concession and/or rebate to newly-established industrial units by a notification, the same can be curtailed and/or withdrawn by issuing another notification under the same provision and such exercise of power cannot be faulted on the ground of promissory estoppel.

[18] (2011) 3 SCC 193

40. In the light of the aforestated well-settled principles of law, I have no hesitation to hold that the State Government has power to give consent under the valid provision of law and also to withdraw the same. Withdrawal of consent to initiate an investigation is not final and it may be granted in any specific offence in future at any point of time or can be withdrawn. In the case on hand, request for consent was made after the State Government had withdrawn the general consent given vide earlier notifications. The impugned notification is valid and proper and was exercised within the full competence of the State Government.

41. The petitioners have further raised the issue of mala fide against the Council of Ministers chaired by the Chief Minister, who has approved the issuance of impugned notification. It is a trite law that mala fide cannot be attributed to an institution, the members of Council of Ministers without impleading them by name and person. In the case on hand, mala fide is attributed without setting out details and without impleading any one in the case, as party. Thus, the allegation of mala fide cannot be countenanced.

42. In **M.P. Special Police Establishment v. State of M.P. and others**[19]**,** the Supreme Court held as under: -

> "25. On the same analogy in the absence of any material brought on record, it may not be possible to hold that the action on the part of the Council of Ministers was actuated by any malice. So far as plea of malice is concerned, the same must be attributed personally against the person concerned and not collectively. Even in such a case the persons against whom malice on fact is alleged must be impleaded as parties."

43. In **State of M.P. and others v. Nandlal Jaiswal and others**[20]**,** the Supreme Court held as under:

> "39. ..... It is true that in the writ petitions the petitioners used words such as 'mala fide', 'corruption' and 'corrupt practice' but the use of such words is not enough. What is necessary is to

[19] (2004) 8 SCC 788
[20] (1986) 4 SCC 566

> give gull particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. ……"

44. Again in **State of Bihar and another v. P.P. Sharma, IAS and another**[21], the Supreme Court observed as under:

> "55. It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise, it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. ……"

45. In **J.N. Banavalikar vs. Municipal Corporation of Delhi and another**[22], the Supreme Court held as under:

> "21. …… Further, in the absence of impleadment of the junior doctor who is alleged to have been favoured by the course of action leading to removal of the appellant and the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. 'malice in fact' should not be countenanced by the court. ……"

46. In **Federation of Railway Officers Association and others v. Union of India**[23]**,** the Supreme Court observed as under:

> "20. …… Allegations regarding mala fides cannot be vaguely made and it must be specific and clear. It this context, the Minister concerned who is

[21] 1992 Supp (1) SCC 222
[22] 1995 Supp (4) SCC 89
[23] (2003) 4 SCC 289

> stated to be involved in the formation of the new zone at Hajipur is not made a party who can meet the allegations."

47. An alternative relief to issue an order or direction to the 3rd and 4th respondents (CBI) to register an FIR regular case and prosecute the persons indicted in report dated 12th October 2010, was sought to be made subsequently by amendment application dated 30th May 2017. In view of the order dated 08th August 2011 rendered in Writ Petition (Civil) No. 328 of 2011 8 by the Supreme Court, wherein specific prayer was made for a direction to the CBI in the same nature as sought for herein, it is not proper to consider and grant alternative prayer at this stage, when in pursuance of Section 63 of the Lokpal and Lokayuktas Act, 2013, the Sikkim Lokayukta Act, 2014 has been notified on 27th February 2014. The Lokayukta, comprising of a Chairperson, a retired Chief Justice of a High Court and two Members, have been properly constituted. Further, the allegations, as referred in the report dated 12th October 2010 is under examination by the Lokayukta, as observed by the Supreme Court in its order rendered in Writ Petition (Civil) No. 328 of 2011[8] . The Sikkim Lokayukta Act provides for constitution of an Inquiry Wing as well as Prosecution Wing, fully competent to inquire into the allegations and initiate prosecution, if necessary.

48. In Bangalore Medical Trust[3] cited by Mr. Gupta, interpretation of Section 19 of the Bangalore Development Authority Act, 1976 was involved, wherein power was exercised in absence of jurisdiction, the Supreme Court observed that the authority exercising discretion must not appear to be impervious to legislative directions. In the case on hand, the power was exercised well within the competence, permissible under enactment i.e. DSPE Act. Thus, the ratio is not applicable to the facts involved in the case on hand.

49. In Maharashtra Land Development Corporation case[4] , referred by Mr. Gupta, it was again a case wherein it was held that in the light of the legislative scheme, the disputed lands will vest with the respondent State as a private forest. The claim of the Corporation was denied, the Supreme Court observed that the purpose of the statute and the intention of the legislature in enacting the same must be of paramount consideration while

interpreting its provisions. The facts are distinguishable and the ratio laid down therein is not applicable to the facts of this case.

50. In Subramanian Swamy's case[5] , the issue was as to whether the Central Government is competent to discriminate the employees on the basis of rank held by the officers for whom, sanction was required. Section 6-A of DSPE Act provides for prior approval of the Central Government, where such allegation relates to the employees of the Central Government of the level of Joint Secretary and above, the Supreme Court held as under:-

> "99. In view of our foregoing discussion, we hold that Section 6-A(1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) the employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26(c) of Act 45 of 2003 to that extent is also declared invalid."

declaring the provision as invalid.

51. In the case on hand, there is no such classification between the employees of different cadre, as consent is required for extension of power and jurisdiction of DSPE in case of all the Sikkim Government employees or other public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim. Thus, the ratio laid down by the Supreme Court in the case is not applicable to the facts of this case.

52. The local police as well as members of DSPE have concurrent jurisdiction to investigate an offence, but in case of members of DSPE, prior consent of the State Government is necessary.

53. For the reasons and analysis made hereinabove, the petition is bereft of merit and deserves dismissal.

54. As a sequel, the writ petition is dismissed. Costs made easy.

SLR (2017) SIKKIM 554

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

W.P. (C) No. 02 of 2017

Ashok Kumar Subba ….. PETITIONER

Versus

Smt. Kamal Kumari Subba and Others ….. RESPONDENTS

For the Petitioners :	Mr. R. P. Sharma, Mr. Sajal Sharma and Ms. Janu Tamang, Advocates.
For Respondent 1 :	Md. Mazhar Ali, Advocate.
For Respondent 2 :	Mr. C. K. Kumai and Mr. Vivek Anand, Advocates.
For Respondent No.3 :	Mrs. Pollin Rai, Asstt. Government Advocate.

Date of decision: 13th October 2017

A. Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings – The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999) omitted Rule 17 in order to expedite litigation but due to the controversy generated by this deletion, the Code of Civil Procedure (Amendment) Act, 2002 (Act 22 of 2002) restored the Rule with certain limitations – In terms of the proviso, once the trial has commenced, ordinarily no application for amendment of the pleadings shall be allowed unless the Court concludes that, in spite of due diligence the party could not have raised the matter before the commencement of trial – Whether the party has acted with due diligence or not would depend upon the facts and circumstances of each case – All amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or for correcting any defect thereof – The proposed amendment ought not to cause prejudice to

the other side nor should it change the nature and character of the lis in question.

(Paras 12 and 13)

B. Code of Civil Procedure, 1908 – Order XIV Rule 1(5) – What stage would be commencement of trial – In a Civil Suit, trial commences when issues are framed and the suit is ready for recording of evidence – The first hearing of the suit is on the date on which the issues are settled for determination.

(Para 15)

C. Code of Civil Procedure, 1908 – Order VI Rule 17 – The hands of the Court are not tied and it can permit an amendment or amendments subject to the fact that the party could not have raised the matter in spite of due diligence, before the commencement of trial.

(Para 18)

Petition allowed.

Chronological list of cases cited:

1. Satyendra Kumar and Others v. Raj Nath Dubey and Others, AIR 2016 SC 2231.

2. Vidyabati and Others v. Padmalatha and Another, AIR 2009 SC 1433.

3. Kailash v. Nanhku and Others, (2005) 4 SCC 480.

4. Baldev Singh and Others v. Manohar Singh and Another, (2006) 6 SCC 498.

5. A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation, AIR 1967 SC 96.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner, (Plaintiff before the Learned Trial Court) is before this Court assailing the Order dated 12-12-2016, of the Learned Civil Judge, East Sikkim, at Gangtok, in T.S. Case No.33 of 2014, Shri Ashok

Kumar Subba vs. Smt. Kamal Kumari Subba and Others.

2. By the impugned Order, the Learned Trial Court considered an Application filed by the Defendant No.2 (Respondent No.2 herein) under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC") seeking to amend his Written Statement and duly allowed the amendment.

3. While seeking to amend the Written Statement, the Defendant No.2 submitted that the proposed amendment was not incorporated in the Written Statement due to inadvertent mistake and oversight and sought to incorporate the following statements;

> "4. That Smt. Mim Rani Limboo is legally married wife of Sri Ashok Kumar Subba, the Plaintiff. They were married in the year 1966, according to their custom, rites, rituals and ceremonies in the parent's house of Mim Rani Limboo in the village Tambong, P.O. & P.S. Sombaray, District West Sikkim. Late Dhoj Bir Begha Limboo and Gaurani Limboo were /are father and mother respectfully of Mim Rani Limboo. After the marriage the above spouse lived together as lawfully married husband and wife in the house of Plaintiff at Thurpu, West Sikkim and other places in Sikkim. Out of the said wedlock, three daughters and one son were born to them namely:
>
> I. Amrita Limboo…….....Daughter
> II. Anita Limboo…….Daughter
> III. Sangita Limboo…….....Daughter
> IV. Amar Kumar Subba…….....….Son
>
> The above marriage between the Plaintiff and Mim Rani Limboo has not so far been dissolved by a decree of divorce and same is still subsisting one.
>
> 5. That Kamal Kumari Subba the Defendant No. 1 in above suit is a Mistress/Concubine of the Plaintiff. She is not his legally married wife, since during the subsistence of valid and lawful marriage with Mim

> Rani Limboo, the Plaintiff had contracted a second marriage with Defendant No. 1 in the year 1973 in the parents' house of the Defendant No.1 in village Assam Linge, Surani East Sikkim. Dhoj Bir Subba and Gaumaya Subba are the father and mother of Defendant No.1."

It was also canvassed that the proposed amendment is germane for the full and final adjudication of the matter in dispute between the parties and will not change the nature and character of the suit.

4. Aggrieved by the Order allowing the amendment, the Learned Counsel for the Petitioner contends that, in the first instance, the matter was already fixed for filing of evidence by the Plaintiff and witnesses, issues having been settled for determination by the Court. The provisions of the amended Order VI Rule 17 of the CPC does not envisage amendment of pleadings after the commencement of the trial. Hence, the Learned Trial Court ought not to have allowed the amendment.

5. In the next limb of his argument, it was advanced that the Suit in question is a Declaratory Suit. Thus, the question as to whether the Plaintiff was previously married or not is not essential for the determining the real question in controversy between the parties. That, the intention of the Defendant No.2 in seeking the amendment is to deny justice by making an effort to get the Suit dismissed by bringing it within the ambit of the provisions of the Prohibition of Benami Property Transactions Act, 1988 (for short "Benami Act"). That, the Defendant No.2 has also invoked the provisions of a Notification, being, Notification No.1520/H dated 03- 01-1963 of the Government of Sikkim Home Department, pertaining to "*Rules to provide for Registration and Solemnisation of a Form of Marriage in Sikkim"* (for short "Notification of 1963"). However, the marriage between the parties was not solemnised under this Notification and, therefore, is not relevant for the present purposes. Besides, a plethora of Judgments of the Hon'ble Supreme Court have laid down that, if a man and woman live together for several years as husband and wife, they shall be deemed by the Law to be husband and wife. The Plaintiff and the Defendant No.1 (Respondent No.1 herein) were married in 1973 and from the wedlock, have seven children. Thus, there can be no doubt that they were legally married. The validity of by the marriage between the Plaintiff and the Defendant No.1 cannot be challenged by the Defendant No.2, who has no

locus standi in the matter. Strength on this count was drawn from the decision of the Hon'ble Supreme Court in **Satyendra Kumar and Others vs. Raj Nath Dubey and Others[1].**

6. It was next contended that the pleadings and the documents relied on by the Defendant No.2 would indicate that there is an admission that the Plaintiff and the Defendant No.1 are husband and wife as evident from the admissions made by the Defendant No.2 before the DRT, DRAT, this High Court, Gauhati High Court and Calcutta High Court, he cannot now retract this admission. It was also contended that declaratory reliefs cannot be granted by the Benami Adjudicating Authority and neither is the suit property a benami property in view of the provisions of Section 2(9)(A)(iii) of the Benami Act which clearly states that property purchased in the name of the spouse will not be considered to be a benami transaction, hence, the impugned Order be set aside.

7. The contra arguments put forth by Learned Counsel for the Defendant No.2 were that, under Section 45 of the Benami Act the jurisdiction of the Civil Courts is specifically barred, therefore, the Learned Trial Court has no jurisdiction in the matter. While supporting the Order of the Learned Trial Court, it was contended that the amendment was allowed as the Learned Trial Court considered the amendment essential for determining the real position of the Defendant No.1 as wife of the Plaintiff, which would strike at the real question in controversy in the Suit, therefore, the Order requires no interference.

8. Learned Counsel for the Defendant No.1 submitted that he was in agreement with the aforestated submissions advanced by Learned Counsel for the Defendant No.2.

9. The opposing arguments of Learned Counsel were heard in extenso and carefully considered. I have also carefully perused the records of the Learned Trial Court as well as the impugned Order and given it my anxious consideration.

10. In the first instance, the argument of Learned Counsel for the Petitioner that the Defendant No.2 has garnered strength from the

[1] AIR 2016 SC 2231

Notification of 1963 while seeking to establish the nonmarital status of the Plaintiff and Defendant No.1, has no bearing in the instant matter as it is not the subject-matter of the amendment and is not being addressed.

11. Now, to consider the relevant legal provision; Order VI Rule 17 of the CPC deals with amendment of pleadings. For clarity in the matter, the provision of law is reproduced below;

> **"17. Amendment of pleadings.**–The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

12. The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999), omitted Rule 17 in order to expedite litigation, but due to the controversy generated by this deletion, the Code of Civil Procedure (Amendment) Act, 2002 (Act 22 of 2002), restored the Rule with certain limitations. A proviso, as extracted hereinabove, has been inserted in the Rule.

13. In terms of the proviso, once the trial has commenced ordinarily no application for amendment of the pleadings shall be allowed unless the Court concludes that, in spite of due diligence the party could not have raised the matter before the commencement of trial. Needless to add that whether the party has acted with due diligence or not would depend upon the facts and circumstances of each case. It would be in the correctness of things to mention here that all amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or for correcting any defect thereof. At the same time, the Court has to be alive to the fact that the proposed amendment ought not to cause prejudice to the other side nor should it change the nature and character of the lis in question.

14. In **Vidyabati and Ors. vs. Padmalatha and Anr.** [2] the Hon'ble Supreme Court, while considering the question as to whether the pleadings can be directed to be amended after the hearing of the case begins, discussed the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002) and the proviso thereof. The Hon'ble Supreme Court opined that the proviso is in a mandatory form and the Court's jurisdiction to allow an application for amendment is taken away by the proviso, unless the conditions precedent therefor are satisfied, i.e., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

15. We may now proceed to the next pertinent question viz; what stage would be commencement of trial. In a Civil Suit, trial commences when issues are framed and the Suit is ready for recording of evidence. It would be appropriate to refer to Order XIV Rule 1(5) of the CPC which provides that;

> **"1. Framing of issues.** -(1).....
> .....
>
> (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. .....……."

Thus, it is evident that the first hearing of the Suit is on the date on which the issues are settled for determination.

16. In **Kailash vs. Nanhku and Others**[3] the Hon'ble Supreme Court held as follows;

> "13. At this point the question arises: when does the trial of an election petition commence or what is the meaning to be assigned to the word "trial" in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated

[2] AIR 2009 SC 1433
[3] (2005) 4 SCC 480

> as proceedings preliminary to trial or for making the case ready for trial. ……..”

17. In **Baldev Singh and Others vs. Manohar Singh and Another**[4] the Hon’ble Supreme Court held as follows;

> **“17.** Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings.”

In the said matter, amendment was allowed as documentary evidence was yet to be filed and, therefore, it was held that the trial had not commenced.

18. From a perusal of the records herein, the Petition under Order VI Rule 17 of the CPC was filed after the trial commenced, i.e., after settlement of issues for determination. That, having been said, the hands of the Court are not tied and it can permit an amendment or amendments,

[4] (2006) 6 SCC 498

subject to the fact that the party could not have raised the matter in spite of due diligence, before the commencement of trial. As pointed out by Learned Counsel for the Plaintiff and as the pleadings would reveal, the portion sought to be inserted by way of amendment was not due to the inability of the party to raise the matter before the trial had commenced and in spite of due diligence, but was admittedly an "inadvertent error" as revealed in the pleading of the Defendant No.2.

19. Besides, the pleadings of the Defendant No.2 indicates that he has addressed the Defendant No.1 as the wife of the Plaintiff. Paragraph 2 of the "PARAWISE REPLY" in his Written Statement is as follows;

> "2. That, the contents of para 2 of the plaint are partly denied. The answering Defendant is an acquaintance of the Plaintiff and well known to the Defendant No. 1 sharing relation as "miteri" brother and co-villager prior to her marriage with the Plaintiff herein."

20. Thus, the Defendant No.2 is now attempting, by the amendment sought, to approbate and reprobate as now he seeks to put forth that the Defendant No.1 is the mistress of the Plaintiff which is not permissible.

21. It thus emerges that not only has the amendment been sought after trial commenced, but was admittedly on account of an "inadvertent error" and not due to inability to raise the matter despite due diligence, besides the Defendant No.2 is approbating and reprobating on the marital status of the Defendant No.1.

22. The Learned Trial Court in its impugned Order has erroneously placed reliance on the decision of **A. K. Gupta and Sons Ltd. vs. Damodar Valley Corporation**[5]**,** at which period there was no amendment to Order VI Rule 17 of the CPC as already explained hereinabove and, therefore, would not be relevant for the present purposes.

23. I have also perused the provisions of the Benami Act relied on by the Learned Counsel for the Defendant No.2, but restrain myself from making any observations on this count having limited my Judgment to the provisions of Order VI Rule 17. In any event, it would be pre-mature to

[5] AIR 1967 SC 96

reach a finding on Section 2(9)(A)(iii) and Section 45 of the Benami Act as it would tantamount to delving into the merits of the case.

24. Thus, in conclusion, having considered the facts and circumstances of the matter and in view of the discussions hereinabove, the impugned Order of the Learned Trial Court is set aside.

25. However, it may be noticed that the Plaintiff in Paragraph 1 of the Plaint has pleaded as follows;

> "1. That the Plaintiff is a businessman by profession and had purchased immoveable properties in the Town of Gangtok, more fully detailed in Schedule hereunder and at the relevant time of the purchase of the said suit premises the Plaintiff was carrying on the business of Lottery. The Plaintiff herein is also the absolute owner of the building standing in Plot No. 1104/1676 and 1104/1805 [ANNEXURE 1] and the said land on which the building is super constructed was purchased by the Plaintiff in the benami of his wife above named, viz., Smt. Kamal Kumari Subba, herein the Defendant No.1, which was the prevalent practice at that time."

The Defendant No.2 has repudiated this in his Written Statement "PARAWISE REPLY" as follows;

> "1. That, the contents of para 1 of the plaint are denied."

26. Consequently, in such a situation, for a just decision in the matter, the Learned Trial Court is to frame an appropriate Issue in view of the claim of benami transaction by the Plaintiff and denial thereof by the Defendant No.2. The Learned Trial Court shall take steps accordingly and thereafter, proceed with the trial in terms of the legal provisions.

27. It is clarified that the observations made herein are not to be construed as opinions on the merits of the case, by this Court. 28. The Writ Petition stands disposed of accordingly.

29. No orders as to costs.

30. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance.

31. Records of the Learned Trial Court be remitted forthwith.

SLR (2017) SIKKIM 565

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

Crl. M.C. No. 02 of 2017

Anil Oberoi ….. APPELLANT

Versus

Sajan Kumar Agarwal ….. RESPONDENT

AND

Crl. M.C. No. 03 of 2017

Subash Chaturvedi ….. APPELLANT

Versus

Sajan Kumar Agarwal ….. RESPONDENT

For the Appellant: Mr. K.T Bhutia, Sr. Advocate with Ms. Bandana Pradhan, Ms. Sarita Bhusal and Mr. Saurav Singh, Advocates.

For the Respondent: Mr. Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates.

Date of decision: 25th October 2017

A. Code of Criminal Procedure, 1973 – S. 311 – Object – The search for truth is the solitary goal of any judicial trial. The underlying object of S. 311 is to ensure that the truth is out and there is no failure of justice on account of any reason be it a mistake, error of judgment, inadvertence, failure on the part of the client or lawyer, knowingly or unknowingly to ensure that best evidence is made available to the Court. If the evidence proposed to be adduced appears to the Court to be essential for the just decision

of the case, the Court must exercise its power under S. 311 with the object of finding out the truth while giving latitude and taking a liberal view in the interest of justice – However, the application under S. 311 cannot be allowed without adequate or sufficient reason. Recall is not matter of course and the discretion given must be exercised judiciously to prevent failure of justice. The plea in such cases must necessarily be *bona fide*. It is only when the Court comes to the conclusion that the intention for invoking the provisions of S. 311 is to fill up the lacunae in the case, would the Court be circumspect in exercising its discretionary power.

(Para 10)

Petitions allowed.

Chronological list of cases cited:

1. Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430.
2. Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374.
3. Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461.
4. State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402.

ORDER

Bhaskar Raj Pradhan, J

This common order shall dispose of two petitions under Section 482, Code of Criminal Procedure (Cr.P.C) preferred by two petitioners against two orders, both dated 20.02.2017, rejecting two applications under Section 311, Cr.P.C seeking prayers to recall and re-examine the common Complainant, one Sajan Kumar Agarwal who had initiated Private Complaint Case No. 06/2015 and Private Complaint Case No. 10/2015 against Anil Oberoi and Subash Chaturvedi, the petitioners herein, respectively, as both the petitions raises identical issues.

2. Briefly the relevant facts are:-

(i) The petitioners in both the petitions under Section 482 Cr.P.C are facing trial for alleged commission of offence under Section 138/142 of the

Negotiable Instruments Act, 1881. The records would reveal that in Crl. Misc Case No. 02/2017 the application under Section 311 Cr.P.C was preferred on 16.11.2016 after the examination of the petitioner as accused had been completed under Section 313 Cr.P.C in Private Complaint Case No. 06/2015. In Criminal Misc Case No. 03/2017 the application under Section 311 Cr.P.C was filed by the petitioner when some of the witnesses of the Complainant were yet to be examined in Private Complaint Case No. 10/2015.

(ii) The common grounds taken by both the petitioners in their applications under Section 311, Cr.P.C were that the case was conducted by one learned Counsel, Mr. Dinesh Agarwal, Advocate who due to serious illness retired from the case and in his place the present counsel was engaged by the petitioners. It was further contended that while preparing for the case it was noticed that in cross-examination certain vital questions touching the root of the matter had not been put to the Complainant. It was also contended that the Complainant had not been confronted with a vital document in possession of the petitioner. The petitioners averred that it was the specific case of the petitioners that the cheques in question was handed over as security and vital questions on this aspect had not been put to the complainant nor had the complainant been confronted with documentary evidence on record. It was also averred that the two Private Complaints have been filed on the same set of facts and it was necessary to put common questions on some of the documents relied on by the complainant.

(iii) The said applications under Section 311 Cr.P.C was contested by the complainant. Replies with preliminary objections as well as on merits were filed praying for dismissal of the said applications. It

was contended, inter alia, that sufficient time have been taken by the petitioners for cross-examination of the complainant who was examined at length by the said learned counsel, Mr. Dinesh Agarwal in the presence of the petitioners. It was also contended that relevant documents pertaining to the case was supplied well in advance and that the petitioner were trying to mis-lead the Court on the plea of being laymen and further cross-examine the complainant to fill up the lacunae in the case which is not permissible. In Private Complaint Case No. 06/2015 it was further contended that the application under Section 311 Cr.P.C had been filed at a belated stage, after more than thirteen months after the closing of the witnesses of the complainant and the examination of the accused under Section 313 Cr.P.C.

(iv) On 20.02.2017 both the applications filed by the petitioners under Section 311 Cr.P.C in both the criminal complaints were taken up for hearing by the learned Trial Court. During the hearing a list of questions which the petitioner proposed to put to the complainant was also furnished to the learned Trial Court for its examination with a request, however, not to disclose the same to the complainant to protect the defence of the petitioners.

(v) The learned Trial Court while examining the issues raised, has found that the record of proceedings in both the Private Complaints reveals that an adjournment was sought on 09.11.2015 on the ground that learned Counsel, Mr. Dinesh Agarwal, had suffered brain stroke. In Private Complaint case No. 06/2015 it was contended that on 16.03.2016, 18.04.2016 and 04.07.2016 learned Counsel, Mr. Dinesh Agarwal, was himself present in the Court and continued the further proceedings and it was only on 01.09.2016 the new Counsels put their appearances. The learned Trial Court also found

that on 24.02.2016, 29.03.2016, 21.04.2016, 09.05.2016 and 04.07.2016 learned Counsel, Mr. Dinesh Agarwal, was himself present and continued further proceedings and it was only on 02.09.2016 the new counsels had entered appearance in Private Complaint Case No. 10/2015 . It was thus concluded by the Trial Court that on the day of cross-examination of the complainant, the learned Counsel, Mr. Dinesh Agarwal, was not suffering from illness and the plea of the petitioners about the illness of the learned Counsel, Mr. Dinesh Agarwal, representing the petitioners was discounted. It was held that mere change of Counsel cannot be a ground to allow the application under 311 Cr.P.C.

(vi) The learned Trial Court examined the set of questions placed by the petitioner's counsels and came to the conclusion that 16 questions out of the total 32 questions was such that the answer would be a 'yes' to all of them. Out of the remaining questions it was held by the Trial Court that answer to 8 questions were "undoubtedly already on record when one carefully considers the cross-examination of the complainant when he admits that there are no documents to show that he in fact supplied the material, any further discussion of evidence here more than this would lead to premature discussion of evidence." The rest of the questions were rejected on the ground that they were not required for just decision of the case.

(vii) The learned Trial Court thus held that the case was at the stage of examination of defence witness in Private Complaint case No. 06/2015 and at the stage of examination of complainant witnesses in Private Complaint case No. 10/2015, fair opportunity had been granted to the petitioners for crossexamination, cross-examination does not reveal that it was lame and grant of further cross-examination would in fact be allowing second extra

opportunity to the petitioners which would be unfair. Thus holding, the applications under Section 311 Cr.P.C filed by the petitioners were rejected.

3. At the hearing Mr. K.T Bhutia, learned Senior Advocate, appearing for the petitioner would draw the attention of this Court to Exhibit 3 (Agreement), Exhibit 4 (letter dated 01.08.2014), and Exhibit 5 (cheque no. 134104) in Private Complaint Case No. 06/2015 and Exhibit 3 (Agreement), Exhibit 4 (letter dated 20.08.2014), and Exhibit 5 (cheque no. 238856) in Private Complaint Case No. 10/2015. Mr. K.T Bhutia, would submit that in Exhibit 4 of both the Private Complaints which are letters dated 01.04.2014 and 20.08.2014 alleged to have been signed by the two petitioners he represents in the present proceedings, the type set and the handwriting on the blank space for dates are identical which would clearly reflects that the said letters were in fact letters which were typed from one and the same computer/printer and the handwriting was also of one and the same person. Similarly, the cheques marked Exhibit 5 in both the cases for different amounts payable to the same entity by the petitioners are not only of the same date but in the same handwriting of one and the same person. It is submitted by Mr. K.T Bhutia that certain vital question pertaining to this was not put in cross-examination of the Complainant which would go to the root of the matter during the cross-examination of the Complainant by the learned Counsel Mr. Dinesh Agarwal and as such, it would highly prejudice the defence if the application under Section 311 Cr.P.C are not allowed. Mr. K.T Bhutia would also argue that certain relevant questions pertaining to Exhibit 3 in both Criminal Complaints i.e. Agreement dated 30.05.2014 between Anmol Enterpirses and Anil Oberoi (accused in Private Complaint Case No 06/2015) and Agreement dated 30.05.2014 between Anmol Enterprises and M/s S. Chaturvedi & Co. (S. Chaturvedi being accused in Private Complaint Case No. 10/2015) to show the falsity of the Private Complaints based on the terms of the said Agreements were not put to the complaint by the said learned counsel, Mr. Dinesh Agarwal, while cross-examining the Complainant. Mr. K.T Bhutia would also produced a photocopy of a receipt purportedly under the signature of the proprietor of Anmol Enterprises, the Complainant in the present proceedings and submit that it was just and necessary to confront the complainant with the said document and if not permitted best evidence in this regard would be withheld from the Court.

4. *Per Contra,* Mr. Rahul Rathi, learned Counsel appearing for the Complainant would argue that there are no compelling reasons for setting aside the impugned orders dated 20.02.2017 as it does not suffer from any infirmity. The learned Counsel would also submit that the said applications under Section 311 Cr.P.C were filed after considerable delay and that the said applications were for the sole purpose of covering of the lapses, lacunae or negligence in the crossexamination which has already been completed. The learned Counsel would also submit that the said applications would, if allowed, encourage litigants to change counsels and filed applications under Section 311 Cr.P.C to cover up the lacunae, which certainly is not the object of the Section.

5. The Complainant was cross-examined on 03.10.2015 in both the cases. On 09.11.2015, on an application moved, the learned Trial Court granted an adjournment on the ground that the conducting Counsel, Mr. Dinesh Agarwal, is unable to appear and proceed with the case due to brain stroke. This unfortunate event was just a month after the cross-examination. It is also evident from record that after the new Counsels put in their appearances, Mr. Dinesh Agarwal has not conducted the case. In such circumstances, it was incumbent upon the Trial Court to examine whether the prayer for recall of the Complainant and further cross-examination of the Complainant was essential for the just decision of the case.

6. In re: **Hoffman Andreas v. Inspector of Customs, Amritsar[1],** was a case in which during trial three witnesses were examined by the prosecution and cross-examined by the Counsel for the accused. After the stage of cross-examination of the three witnesses the said counsel passed away and the accused engaged another who filed a petition under Section 311 Cr.P.C for recalling the three witnesses for the purpose of further cross-examination. It was urged that the previous counsel had died during the pendency of the trial and that it had now transpired that the said counsel had not been keeping well and was under some mental pressure and could not concentrate during the proceeding and fail to cross-examine the prosecution witnesses on material points. The Trial Court dismissed the said application holding that there was nothing on record to show that the previous counsel was under mental pressure or that he was not keeping well or he could not concentrate during the proceedings of the case or that he failed to cross-examine the prosecution witnesses effectively. Setting aside

[1] (2000) 10 SCC 430

the conviction of the accused by the Trial Court and confirmed by the High Court, the Apex Court would hold:-

> *"6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had crossexamined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."*

7. In re: **Zahira Habibullah Sheikh (5) v. State of Gujarat[2],** the Apex Court would hold:-

> *"26. In this context, reference may be made to Section 311 of the Criminal Procedure Code which reads as follows:*
>
> > "3*11. Power to summon material witness, or examine person present.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or*

[2] (2006) 3 SCC 374

> *examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not

prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. 28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered

under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to crossexamine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in Jamatraj Kewalji Govani v. State of Maharashtra [(1967) 3 SCR 415 : AIR 1968 SC 178 : 1968 Cri LJ 231] .

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences."

8. The Apex Court in re: **Rajaram Prasad Yadav v. State of Bihar[3],** would hold:-

"14. *A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311*

[3] (2013) 14 SCC 461

CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and reexamined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

Then again:

***"17.** From a conspectus consideration of the*

above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. *Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

17.2. *The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

17.3. *If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

17.4. *The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7. *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8. *The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

17.9. *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.*

17.11. *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

> ***17.12.*** *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*
>
> ***17.13.*** *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*
>
> ***17.14.*** *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."*

9. In re: **State (NCT of Delhi) v. Shiv Kumar Yadav**[4] while answering the question whether recall of witnesses, at the stage when statement of accused under Section 313 Cr.P.C has been recorded, could be allowed on the plea that the defence Counsel was not competent and had not effectively cross-examined the witnesses, the Apex Court would, after examining various judgments, hold:-

> *"27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons*

[4] (2016) 2 SCC 402

pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

10. The search for truth is the solitary goal of any judicial trial. The scope and ambit of Section 311 Cr.P.C is well defined by the law itself and coherently articulated by judicial pronouncements of the Apex Court. The

extracted paragraphs of the judgments of the Apex Court need no reiteration. The underlying object of Section 311 Cr.P.C is to ensure that the truth is out and there is no failure of justice on account of any reason be it a mistake, error of judgment, inadvertence, failure on the part of the client or lawyer, knowingly or unknowingly to ensure that best evidence is made available to the Court. If the evidence proposed to be adduced appears to the Court to be essential for the just decision of the case, the Court must exercise its power under Section 311 Cr.P.C with the object of finding out the truth while giving latitude and taking a liberal view in the interest of justice. The application under Section 311 Cr.P.C cannot be allowed without adequate or sufficient reason. Recall is not matter of course and the discretion given must be exercised judiciously to prevent failure of justice. The plea in such cases must necessarily be bonafide. It is only when the Court comes to the conclusion that the intention for invoking the provisions of Section 311 Cr.P.C is to fill up the lacunae in the case, would the Court be circumspect in exercising its discretionary power.

11. The Trial Court while examining the applications under Section 311 Cr.P.C filed by the petitioner has erred in failing to examine whether the evidence sought to be adduced was essential for the just decision of the case save some questions which were rejected by stating so. The Trial Court has come to the conclusion that the answer to 16 out of 32 questions proposed by the petitioners would be 'yes' and out of the remaining the answer to 8 questions were already on record. However, the Trial Court has not rendered any finding as to whether those questions were essential for the just decision of the case. Further, if the answer to those 16 questions were likely to be 'yes' and if the questions had a vital bearing to the issues involved, the answers would definitely be crucial for the just decision of the case.

12. It is seen that both the Private Complaint Cases are still pending trial. In Private Complaint Case No. 06/2015 the petitioner had been examined under Section 313 Cr.P.C and defence witnesses was yet to be examined when the application under Section 311, Cr.P.C was filed. In Private Complaint Case No. 10/2015 some of the Complainant witnesses were yet to be examined when the application under Section 311 Cr.P.C was filed.

13. On examination of the letter dated 01.08.2014 (Exhibit 4) in Private Complaint Case No. 06/2015 and letter dated 20.08.2014 (Exhibit 4) in Private Complaint Case No. 10/2015, it is quite evident that in the previous cross-examination no questions have been put to the Complainant regarding the similarity in the handwriting of the dates scribed therein or of the similarity in the type set of the two documents exhibited by the Complainant. Similarly, on examination of the cheque number 134104 (Exhibit 5) in Private Complaint Case No. 06/2015 and cheque no. 238856 (Exhibit 5) in Private Complaint Case No. 10/2015 it is also evident that in the previous cross-examination no questions have been put to the Complainant regarding the similarity in the handwriting. The answer to the similarity and commonality of the said two letters, both exhibit 4, as well as the two cheques, both exhibit 5, in the two Private Complaint cases and who was the scribe of the handwriting in all the aforesaid documents exhibited by the Complainant in the two cases filed against two different persons, the petitioners herein would definitely assist the Court in search of the truth. The said documents being exhibited by the Complainant in the Private Complaint Cases, it is quite evident that the ambiguity regarding the same if left unanswered, the only casualty would be the truth. The answers thereof would therefore be essential for the just decision of the case. This Court has also perused the photocopy of the receipt dated 12.07.2014 produced by the learned Senior Counsel for the petitioners during the hearing of the present cases which were adverted to in the applications under Section 311 Cr.P.C filed in Private Complaint Case No. 10/2015 and on the face of it, it is quite evident that the said document relates to the transaction in issue and therefore, relevant for the just decision of the case. No question had been put to the complainant during his cross examination. Resultantly the answers regarding the said receipt would necessarily elucidate the truth which would have a direct bearing to the case. This would definitely help in clearing the ambiguity which would not amount to filling up the lacunae.

14. In view of the aforesaid the impugned orders both dated 20.02.2017 in Private Complaint Case Nos. 06/2015 and 10/2015 are set aside. The evidence already brought on record shall necessarily continue as part of the evidence in the respective Private Complaint Cases. The learned Trial Court is directed to recall the Complainant in both the cases on common dates as per the calendar of the Trial Court and permit the cross-examination of the said Complainant on the aforesaid documents restricted, however, to elucidating the truth regarding the commonality and similarity of

the two letters, both numbered exhibit 4 and the two cheques, both numbered exhibit 5, in the said Private Complaint Cases and questions directly connected therewith. The Trial Court shall also permit the petitioner to confront the Complainant with the receipt dated 12.07.2014. While doing so, the learned Trial Court shall keep in mind the contours of Section 311 Cr.P.C and the guidelines laid down by the Apex Court and quoted hereinabove. The learned Trial Court shall be free to examine and determine the relevancy of the questions proposed to be put by the petitioners to the Complainant and conduct and regulate the trial as per law keeping in mind that the sole purpose of allowing the present petitions preferred by the petitioners is to ensure that the truth is out. While doing so, the learned Trial Court shall ensure no attempt is made to fill up any lacunae in the two Private Complaint Cases. After the defence Counsel further cross-examines the Complainant, if the Complainant desires to adduce further evidence, it is open to the Trial Court to grant such permission. Needless to say, the Trial Court shall not be trammelled by any finding or observation made in this Order while finally deciding on the merits of the case.

15. In view of the aforesaid, Crl. M.C No. 02/2017 and Crl. M.C No. 03/2017 are both allowed accordingly.

16. The Trial Court records in Private Complaint Case Nos. 06/2015 and 10/2015 shall be remitted to the Trial Court forthwith.

SLR (2017) SIKKIM 585

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

Crl. A. No. 08 of 2017

Lall Bahadur Kami ….. **APPELLANT**

Versus

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

For the Appellant : Mr. R.C. Sharma, Legal Aid Counsel.

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

Date of decision: 25th October 2017

A. Indian Evidence Act, 1872 – S. 35 and S. 74 – The reason why entries made by a public servant in a public register or record stating a fact in issue or a relevant fact as per S. 35 has been made relevant is that when such entries are made in the discharge of duties of a public servant, the presumption is of its correctness – A public document must be shown to have been prepared by a public servant in the discharge of his official duty and form the act and records of a public officer. Such documents can be accepted in evidence, subject to the riders that can be culled out from the judicial pronouncements.

(Paras 15, 16 and 17)

B. Indian Evidence Act, 1872 – S. 35 – Can reliance be placed on a document solely because it bears an official stamp and seal of the Registrar of Births and Deaths, West Sikkim, which is the line of reasoning adopted by the learned Trial Court?- The answer would be in the negative as none of the Prosecution witnesses have been able to vouchsafe for the truth of the contents thereof.

(Para 18)

C. Indian Evidence Act, 1872 – S. 114 (g) – PW-14 (Medical Officer at Dentam Primary Health Centre) identified his signature on Exhibit-4 (Birth Certificate) and claimed to have put his signature therein after due verification of the record. Which record he is referring to have not been revealed. Admittedly, no Births and Deaths Register was furnished before the learned Trial Court by the Prosecution, although such a Register as per the witness, is maintained in their hospital. This ground itself would suffice to draw an adverse inference against the Prosecution under illustration (g) of S. 114 of the Evidence Act. PW-15 (Dealing Assistant at Dentam Primary Health Centre) claims to have prepared Exhibit-4 in his own handwriting on the orders of the Sub-Divisional Magistrate, Gyalshing, West Sikkim. The Sub-Divisional Magistrate has not been examined as a witness to substantiate this statement. No reasons have been put forth as to why the Sub-Divisional Magistrate, Gyalshing, would order preparation of Exhibit-4.

(Para 19)

D. Indian Evidence Act, 1872 – S. 74 – Probative value of a public document – This Court is conscious and aware that Birth Certificate of the victim (Exhibit-4) gains precedence over every other document as proof of age, however, we may beneficially refer to the judgments (quoted) and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the parents or legal guardians. Such a Register is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court for unexplained reasons – Evidence furnished casts a shadow on the probative value of Exhibit-4, thereby rendering it unfit for consideration.

(Para 20)

Appeal allowed.

Chronological list of cases cited:

1. Krishan v. State of Haryana, (2014) 13 SCC 574.
2. Mahadeo S/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
3. State of H.P. v. Asha Ram, (2005) 13 SCC 766.
4. State of Himachal Pradesh v. Suresh Kumar alias DC, (2009) 16 SCC 697.
5. Murugan alias Settu vs. State of Tamil Nadu, (2011) 6 SCC 111.
6. Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 1796.
7. Alamelu and Another vs. State represented by Inspector of Police, (2011) 2 SCC 385.
8. CIDCO vs. Vasudha Gorakhnath Mandevlekar, (2009) 7 SCC 283.
9. Delhi Police, Through Commissioner of Police and Others v. Sat Narayan Kaushik, (2016) 6 SCC 303.
10. Chairman, Life Insurance Corporation of India and Others v. A. Masilamani, (2013) 6 SCC 530.
11. C.B.I. Anti-Corruption Branch, Mumbai v. Narayan Diwakar, (1999) 4 SCC 656.
12. National Textile Corpn. Ltd. and Others v. Haribox Swalram and Others, (2004) 9 SCC 786.
13. Alchemist Ltd. and Another v. State Bank of Sikkim and Others, (2007) 11 SCC 335.
14. Kusum Ingots and Alloys Ltd. v. Union of India and Another, (2004) 6 SCC 254.
15. Nawal Kishore Sharma v. Union of India and Others, (2014) 9 SCC 329.
16. State of Uttar Pradesh and Another v. Man Mohan Nath Sinha and Another, (2009) 8 SCC 310.

JUDGMENT

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

1. This Appeal assails the Judgment and Order on Sentence of the Court of the Special Judge, (POCSO), West Sikkim at Gyalshing, in S.T. (POCSO) Case No. 03 of 2016, dated 9.12.2016, in which the learned Trial Court convicted the Appellant of the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter „POCSO Act), and sentenced him to undergo rigorous imprisonment for a term of 12 years and fine, with a default clause of imprisonment. The Appellant was also convicted under Section 376(2)(j), Section 376(2)(l) and Section 376(2)(n) of the Indian Penal Code, 1860 (hereinafter "the IPC"), and sentenced to undergo rigorous imprisonment for a term of 12 years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, with default stipulations, for each of these offences. The sentences were ordered to run concurrently, duly setting off the period of imprisonment already undergone by the Appellant.

2. The Prosecution alleges that the Appellant (aged about 23 years), a driver by profession, induced the allegedly disabled Victim, P.W.-1 (aged about 17 years 8 months), on 5.2.2016, at around 1700 hours when she was attending a marriage ceremony near Dentam Bazaar, to accompany him to a hotel. He gave her liquor and asked her to spend the night with him in the hotel. On her refusal, they set off for her home but en route, he sexually abused her on a footpath and then inside a deserted house. P.W.-4, her mother, made efforts to trace her that night, in vain. On 6.2.2016, at around 5 a.m., the Appellant left the place of occurrence while the Victim returned home. On enquiry by her mother, she revealed the incident to her, which led to the lodging of the First Information Report (hereinafter "FIR") Exhibit-6 on 6.2.2016, with the assistance of P.W.-3, P.W.-5 and P.W.-6. The FIR was registered on the same day against the Appellant under Section 376 of the IPC read with Section 4 of the POCSO Act, investigation initiated and the Appellant arrested on 6.2.2016. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376/419 of the IPC read with Sections 5/5 (k), (l) and Section 6 of the POCSO Act. The learned Trial Court framed charges against the Appellant under Sections 5(k) and 5(l) of the POCSO Act, punishable under Section 6 of the POCSO Act and under Section 376(2)(j), Section 376(2)(l) and Section 376(2)(n) of the IPC. On a plea of "not guilty" by the Appellant, the Prosecution furnished and

examined 15 witnesses, in a bid to establish its case beyond a reasonable doubt. After examining the Appellant under Section 313 of the Code of Criminal Procedure, 1973, hearing the arguments of the parties and considering the entire evidence on record, the learned Trial Court convicted and sentenced the Appellant as aforestated. Aggrieved, the Appellant is before this Court.

3. In Appeal, it is contended that contradictory evidence was adduced by the Prosecution witnesses, since it is the admission of P.W.-1 in her cross-examination that she did not relate the alleged incident to her mother, who on the contrary stated that when she enquired about the matter, her daughter told her that the Appellant forced her to accompany him and thereafter, committed the offence. Consequently, she lodged the FIR. That, an adverse inference can also be drawn against the Prosecution, as according to P.W.-4, who was also at the venue informed her that P.W.-1 had received a phone call there but P.W.-4 was not made a Prosecution witness, neither was the hotel owner, where the accused allegedly took the Victim. According to the Victim, after leaving the hotel she used the 'Bhir Bato' 'Bhir' being the Nepali word for cliff), a concrete footpath and the Appellant started following her. Admittedly, people of the locality frequented the footpath while the deserted house is also located near the said footpath. Meaning thereby that had hue and cry been raised, it could easily have been heard, thus leading to the safe assumption that the Victim raised no cries for help. The Investigating Officer (for short 'I.O.') P.W-13, admitted that there are houses and a market between the alleged road and Dentam Bazaar but none had seen the Victim and the Appellant together. That, the evidence of the I.O. relied on by the Convicting Court, to the effect that the Appellant lured the Victim by continuously meeting her, buying her sweets and snacks, recharging her Cell Phone, lacks substantiation by evidence of other Prosecution witnesses or the Victim. The alleged overall disability of the Victim is disproved by the evidence of P.W.-6, as well as the Victim herself, making Exhibit-5, the, Certificate for persons with disabilities, a suspect document. It was also advanced that if Exhibit-5, issued on 8.7.2014, is to be taken into consideration, the age of the Victim depicted therein is 18 years, in contradiction to Exhibit-4, the Birth Certificate of the Victim, which records her date of birth as 13.6.1998. That, P.W.-7, the Doctor who

examined the Victim, has testified that redness in the fourchette could be the result of infection or itching and the hymenal tear due to stretching and rigorous exercise. The Doctor also admitted that the blunt injury as mentioned in her Report, Exhibit-8, may occur by a fall from a height but the learned Trial Court failed to consider these aspects.

4. The next argument canvassed was concerning the authenticity of Exhibit-4, as P.W.-14, the person who issued Exhibit4, has admitted that there is no document in the Court records to indicate the basis on which Exhibit-4 was issued to the Victim. Further, no Births and Deaths Register/ Extract copy of Births and Deaths Register were maintained in the hospital where P.W.-14 was working and although, the Victim was allegedly born on 13.06.1998, P.W.-14 could proffer no explanation as to why her birth was registered only in 2004. P.W.-15, the person who prepared Exhibit4, admitted that there was no document on the basis of which Exhibit-4 was issued in the name of the Victim, nor did he know the reason for its late issuance. The identity of the accused is not established with clarity, as the I.O. has deposed that the Victim had told everyone that she had a sexual relationship with a person named Santosh Chhetri dada, thereby making it nebulous as to whether the Accused is the same person who sexually violated the Victim.

5. That, in view of the aforesaid infirmities, the Judgment of the learned Trial Court is unsustainable in law, not only due to the contradictions in the Prosecution evidence but for the reason that the learned Trial Court failed to comply with the well settled principle of Law, that if two views are possible, the one in favour of the accused must be preferred. Hence, the impugned Judgment of Conviction and the Order on Sentence of the learned Trial Court, be set aside and quashed.

6. Per contra, it was the contention of learned Public Prosecutor that it is no longer res integra that injuries are necessary on a victim of rape to establish that the offence had occurred. In support thereof, he drew the attention of this **Court to Krishan vs. State of Haryana[1].** That, the redness in the fourchette as stated by P.W.-7, in fact suffices to establish that the offence had indeed occurred. Countering the argument pertaining

[1] (2014) 13 SCC 574

to the age of the Victim, it was submitted that the learned Trial Court while discussing Exhibit-4 has correctly relied on **Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another**[2]**.** That, Exhibit-4, the Birth Certificate of the Victim, was duly scrutinized by the learned Trial Court, who concluded that it was neither fabricated nor manufactured and that the delayed registration could be the result of the ignorance of the village dwelling parents. In any event, the Birth Certificate of the Victim was not contested at the time of evidence before the learned Trial Court and cannot be raised at this stage. That, the statement of the victim pertaining to the incident requires no corroboration. On this count, reliance was placed on **State of H.P. vs. Asha Ram**[3] **and State of Himachal Pradesh vs. Suresh Kumar alias DC**[4] **.**

7. The learned Public Prosecutor would further contend that there are no contradictions in the evidence of the Victim and P.W.-4, as would be evident if the testimony of P.W-4 and P.W.-5 are read in consonance with each other. So far as the disability of the Victim is concerned, the learned Trial Court has found that Exhibit-5 was duly issued by the State Medical Board and bears the signatures and seals of three Members of the Board as well as the seal of the Social Welfare Division, Social Justice Empowerment & Welfare Department, Government of Sikkim and the Victim was found to have 70% overall disability. This was confirmed by the evidence of P.W.-7, the Doctor who examined the Victim and found her to be mentally challenged. However, in view of the age of the Victim indicated on Exhibit-5, being inconsistent with Exhibit-4, which is the appropriate document, it was submitted that the Prosecution does not seek to rely on Exhibit-5. Hence, the Appeal be dismissed.

8. The opposing arguments were heard at length, records of the learned Trial Court perused as also the impugned Judgment.

9. The questions that arise for consideration are;

(1) Whether the Prosecution has been successful in establishing that the age of the Victim was 17 years 8 months at the time of the incident, i.e. on 5.2.2016?

[2] (2013) 14 SCC 637
[3] (2005) 13 SCC 766
[4] (2009) 16 SCC 697

(2) Whether the learned Trial Court was correct in convicting the Appellant as charged?

10. The Prosecution, in order to establish the Victims age, has placed reliance on Exhibit-4, which is the Birth Certificate issued by the Chief Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim. The learned Trial Court while discussing this document, has placed reliance on **Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another** (supra), wherein reference was made to the statutory provisions contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12 the procedure to be followed in determining the age of the juvenile have been set out. Rule 12(3) of the said Rules states that;

> "12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining-
>
> (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat."

The Hon'ble Supreme Court observed that in the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of the Victim as well.

11. In **Murugan *alias* Settu vs. State of Tamil Nadu**[5]**,** the Honble Supreme Court held as follows;

> **"25.** This Court in Madan Mohan Singh & Ors. v. Rajni Kant & Anr. [AIR 2010 SC 2933], considered

[5] (2011) 6 SCC 111

a large number of judgments including Brij Mojan Singh v. Priya Brat Narain Sinha [AIR 1965 SC 282], Birad Mal Singhvi v. Anand Purohit [AIR 1988 SC 1796], Updesh Kumar v. Prithvi Singh [AIR 2001 SC 703], State of Punjab v. Mohinder Singh [AIR 2005 SC 1868], Vishnu v. State of Maharashtra [AIR 2006 SC 508], Satpal Singh v. State of Haryana [(2010) 8 SCC 714], **and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases."**

12. In **Birad Mal Singhvi v. Anand Purohit**[6]**,** the Hon'ble Supreme Court observed as follows;

> **"15.** The High Court held that in view of the entries contained in the Exs. 8, 9, 10, 11 and 12 proved by Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5, the date of birth of Hukmichand and Suraj Prakash Joshi was proved and on the assumption it held that two candidates had attained more than 25 years of age on the date of their nomination. In our opinion the High Court committed serious error. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and

[6] AIR 1988 SC 1796

thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. In Raja Janaki Nath Roy v. Jyotish Chandra Acharya Chowdhury, AIR 1941 Cal 41 a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country see Jagan Nath v. Moti Ram, AIR 1951 Punjab 377, Sakhi Ram v. Presiding Officer, Labour Court, North Bihar, Muzzafarpur, AIR 1966 Patna 459, Ghanchi Vora Samsuddin Isabhai v. State of Gujarat, AIR 1970 Guj 178 and Radha Kishan Tickoo v. Bhushan Lal Tickoo, AIR 1971 J & K 62. In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in the scholar's register on in (sic) school certificate in election cases. The Courts have consistently held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined, see Jagdamba Prasad v. Sri Jagannath Prasad, (1969) 42 ELR 465 (All), K. Paramalai v. L. M. Alangaram, (1967) 31 ELR 401 (Mad), Krishna Rao Maharu Patil v. Onkar Narayan Wagh, (1958) 14 ELR 386 (Bom)." [emphasis supplied]

13. In **Alamelu and Another vs. State represented by Inspector of Police**[7]**,** the Hon'ble Supreme Court held as follows;

> **"43.** The same proposition of law is reiterated by this Court in Narbada Devi Gupta v. Birendra Kumar Jaiswal [(2003) 8 SCC 745] where this Court observed as follows: (SCC p. 751, para 16)
>
> "16. … The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouch safe for the truth of the facts in issue."

14. In **CIDCO vs. Vasudha Gorakhnath Mandevlekar**[8]**,** it was held that

> "18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent."

Reliance was also placed on **Birad Mal Singhvi v. Anand Purohits** Judgment (supra).

15. The above ratiocinations have clarified the stand pertaining to entries in public documents, leaving the Courts the prerogative of testing the authenticity of an entry regarding the date of birth of a person in a public document. We may now usefully refer to the provisions of Sections 35 and Section 74 of the Indian Evidence Act, 1872, which reads as follows;

> **"35. Relevancy of entry in public record or an electronic record made in performance of duty. -** Any entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public

[7] (2011) 2 SCC 385
[8] (2009) 7 SCC 283

servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact."

16. And Section 74 of the Indian Evidence Act, 1872, defines public documents as follows;

> **"74. Public documents.**—The following documents are public documents:-
>
> (1) Documents forming the acts, or records of the acts—
>
> (i) of the sovereign authority,
>
> (ii) of official bodies and tribunals, and
>
> (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
>
> (2) Public records kept in any State of private documents."

The provisions are self explanatory.

17. The reason why entries made by a public servant in a public register or record stating a fact in issue or a relevant fact as per Section 35 supra, has been made relevant is that when such entries are made in the discharge of duties of a public servant, the presumption is of its correctness. Consequently, a public document must be shown to have been prepared by a public servant in the discharge of his official duty and form the act and records of a public officer. Such documents can be accepted in evidence, subject to the riders that can be culled out from the afore quoted judicial pronouncements.

18. Traversing the evidence furnished with regard to the age of the Victim, Exhibit-4, the Birth Certificate, records her date of birth as

13.6.1998. On the date of the alleged offence viz; 5.2.2016, the Victim would be 17 years 8 months. Although, it was contended by the State-Respondent that this document was unquestioned during trial, the evidence on record divulges otherwise. As per the evidence of P.W.-3, P.W.-4 and P.W.-5, Exhibit-4 was seized from the possession of P.W.-4, the Victims mother. However, neither the School Admission Register nor the Register of Births and Deaths or the Class-X Marks Statement of the Victim was seized by the I.O. Thus, Exhibit-4 was seized in isolation. That, having been said, can reliance be placed on this document solely because it bears an official stamp and seal of the Registrar of Births and Deaths, West Sikkim, which is the line of reasoning adopted by the learned Trial Court. In our considered opinion, the answer would be in the negative as none of the Prosecution witnesses have been able to vouchsafe for the truth of the contents thereof.

19. P.W.-14, who was the Medical Officer at Dentam Primary Health Centre, identified his signature on Exhibit-4 and claimed to have put his signature therein after due verification of the record. Which record he is referring to has not been revealed. Admittedly, no Births and Deaths Register was furnished before the learned Trial Court by the Prosecution, although such a Register as per the witness, is maintained in their hospital. This ground itself would suffice to draw an adverse inference against the Prosecution under illustration (g) of Section 114 of the Evidence Act. Needless, therefore, to remark that his evidence sheds no light on the preparation of Exhibit-4. P.W.-15, the Dealing Assistant at Dentam Primary Health Centre at the relevant time, claims to have prepared Exhibit-4 in his own handwriting on the orders of the Sub-Divisional Magistrate, Gyalshing, West Sikkim. The Sub-Divisional Magistrate has not been examined as a witness to substantiate this statement. No reasons have been put forth as to why the Sub-Divisional Magistrate, Gyalshing, would order preparation of Exhibit-4. P.W.-15 admits to the lack of any document in the Court, to establish the basis for preparation of Exhibit-4. P.W.-4 has not deposed that Exhibit-4 was prepared as per her instructions or that of her late husband. As per P.W.-4, the Victim is studying in Class-X at Gyalshing, duly corroborated by P.W.-1, the Victim, who claims to have taken her Class-X exams from an Open School at Gyalshing and that she was in possession of her Class-X Marks Statement. But the existence of this document can only be assumed, in the absence of its seizure. Learned Public Prosecutor sought

to wash his hands off Exhibit-5, the "Certificate for persons with disabilities", issued by the STNM hospital, Gangtok on 8.7.2014, where the age of the Victim has been recorded as 18 years, considering the anomaly in the age of the Victim in the document with that recorded in Exhibit4. This is indeed an incongruous stand, as the Prosecution cannot rely on a document in the Trial Court and seek to fend it off, if the contents appear inconvenient and realization dawns at the Appellate stage. All the same, we hasten to add that Exhibit-5 is disregarded by this Court for reasons enumerated later.

20. This Court is conscious and aware that the Birth Certificate of the Victim gains precedence over every other document as proof of age, however, we may beneficially refer to the Judgments hereinabove and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the parents or legal guardians. Such a Register is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court for unexplained reasons. We are, thus, constrained to hold that the evidence furnished casts a shadow on the probative value of Exhibit4, thereby rendering it unfit for consideration.

21. While dealing with Exhibit-5, although the learned Public Prosecutor sought to disregard this document for the aforesaid reasons, in doing so he would also be disregarding the fact that the document certifies the Victim to be 70% overall disabled. When we proceed to examine the evidence of P.W.-4, although she has correctly identified Exhibit-5, she has totally neglected and failed to establish that her daughter was disabled, for that matter neither has P.W.-5. The Victims Aunt, P.W.-6, under cross-examination, negatives any speech, hearing or general behavioural disabilities of P.W.-1. The Doctor, P.W.-7, who examined the Victim stated that she found the Victim to be "mentally challenged" but failed to elucidate the point. More importantly, when the Victim was examined as per the provisions of Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872, prior to recording her evidence, the learned Judge recorded that "Having examined the witness, I find that she is not prevented from understanding the questions put to her despite her age. She has given rational answers to the questions put to her and is, therefore, found

competent to testify". This indicates that the Victim apparently showed no signs of being challenged in any manner. The Prosecution for its part, on examining the Victim, did not draw out any evidence as proof of the Victims mental or physical disability. The elephant in the room of course is the fact that, Exhibit-5 has not been proved as per the provisions of the Indian Evidence Act, 1872. Although, three doctors have signed on it, none was produced as a Prosecution witness, neither was the concerned Register or a certified copy of the relevant entry furnished before the learned Trial Court, negating the document of any probative value and undeserving of consideration.

22. From a summation of the Prosecution evidence and the discussions above, it is clear that the age of the Victim has not been established as 17 years 8 months. It would be trite to point out that the Prosecution is required to prove its case beyond a reasonable doubt, which has not been adhered to for the purposes of Exhibit-4.

23. What calls for consideration next is whether the Victim was forcefully sexually assaulted by the accused? From the evidence of P.W.-1, it emerges that she was in the house of one Santosh Daju at Ganger Busty, when the appellant called her on her Mobile phone and asked her to come to the road. She went to meet him at the said location, leaving behind one "Antaray Baje" whom she had accompanied to the wedding. Pausing here for a moment, we may mull on the fact that after the phone call, P.W.-1 has voluntarily gone to the Appellant, alone, leaving behind the senior citizen she had accompanied. Thereafter, according to her, the Appellant took her to a hotel, forced her to drink alcohol and asked her to sleep with him in the hotel to which she disagreed and she left the hotel. She did not raise an alarm at the hotel despite the disagreeable suggestion made to her by the Appellant. No person from the hotel, wended their way into the Prosecution list of witnesses. As per her, he followed her and then sexually assaulted her. It is not denied that she had a Mobile phone in her possession but she did not resort to its use to seek help. It is not her case that the Appellant physically confined or constrained her at any point of time. According to the I.O., the Appellant called the Victim at around 5 p.m., which is in contradiction to 9 p.m., as testified by the P.W.-1. As per P.W.4, the Victim returned home around 5 a.m., the next morning, i.e. 6.2.2016, but she did not deem it worthwhile to inform P.W.-4 of any harrowing incident nor did

P.W.-4 find P.W.-1 traumatized. It is also in the evidence of P.W.-4 that after returning home, P.W.-1 went to sleep and woke up around 7 a.m. and started studying, thereby displaying no untoward behaviour or indicating that she had indeed been sexually assaulted against her will. Assuming from the evidence of P.W.-1 that the offence occurred between 9 p.m. to 10 p.m. on 5.2.2016, the Prosecution has failed in its duty to establish the whereabouts of the Victim thereafter till 5 a.m. of 6.2.2016. The Victim has not claimed that the Appellant held her physically captive during the intervening hours, leading to the inevitable conclusion that she remained voluntarily with the Appellant.

24. The incident allegedly occurred on 5.2.2016, the Appellant was apparently arrested on 6.2.2016, the Victim was medically examined on 7.2.2016, on the third day of the incident. The Doctor found redness in the fourchette but opined that it may also be caused due to infection/itching. Although, the undergarments of the Victim and the Accused, MO-I and MO-II respectively, were forwarded for forensic examination, no blood, semen or other body fluid was detected in the said Exhibits, as revealed in Exhibit-15. It is no ones case that the Appellant absconded after the incident, this is a mitigating circumstance. In view of the foregoing discussions, there appears to be no forceful sexual assault on the Victim.

25. In consideration of the entirety of the facts and circumstances, evidence on record and the ensuing discussions, we find that the learned Trial Court erred in convicting the Appellant. Consequently, the impugned Judgment and Order on Sentence of the learned Trial Court is set aside.

26. The Appellant is acquitted of all the offences charged with. He be set at liberty forthwith, if not involved in any other matter.

27. Appeal allowed.

28. Fine, if any deposited by the Appellant in terms of the impugned Order on Sentence be reimbursed to him by the concerned authorities within a month from today.

29. Copy of this Judgment be sent to the Court of the Special Judge (POCSO), West Sikkim at Gyalshing, for information and compliance.

30. Records of the learned Trial Court be remitted forthwith.

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