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SUBJECT INDEX

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Code of Criminal procedure, 1973 – S. 164 – Evidence under Section 164 Cr.P.C. is not substantial evidence, it can only be used for the purposes of corroboration.
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Code of Criminal Procedure, 1973 – S. 482 – Offence under Section 498A of the I.P.C is not a compoundable offence – Whether this Court in exercise of its power under S. 482 can quash a criminal proceeding in a non-compoundable offence – Petitioner No. 1 and Respondent No. 1 (husband and wife) first arrived at a compromise and a deed of compromise was drawn by them. As per the compromise, they filed a Divorce Petition under Section 13 (B) of Hindu Marriage Act and obtained a decree of divorce. They are living separately and Respondent No. 1, after her remarriage is living with her husband at Cuttack – Considering all these facts, if the trial is permitted to proceed against the petitioners, the ultimate fate of trial shall result in acquittal – No useful purpose shall be served if the trial is permitted to proceed further. By permitting the trial to proceed further, the ends of justice shall not be achieved and same will be a futile exercise. In such situation, continuation of the criminal proceeding would tantamount to abuse of process of law – Consequently, proceedings quashed.
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Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 – Rules 3, 4 and 5 – Rule 3 provides for steps to be initiated by a Magistrate when a person subject to military, naval or air

force or any other law relating to the Armed Forces is brought before him and charged with an offence for which he is also liable to be tried by a Court-Martial. The Rule enjoins upon the Magistrate not to proceed to try such person or even to commit the case to the Court of Sessions unless he is moved thereto by a competent military, naval or air force authority or if the Magistrate is of the opinion that he should proceed or commit the case without being moved by such authority, he is to record reasons for his action – If the Magistrate decides to proceed under Rule 3(b), Rule 4 lays down that before taking such steps the Magistrate shall give a written notice to the concerned authority of the accused and stay his hands until the expiry of fifteen days from the date of service of notice – Till the expiry of fifteen days, the Magistrate is not to convict or acquit the accused, frame charge against the accused, commit the accused for trial to the Court of Sessions or make over the case for inquiry or trial. Rule 5 lays down that where the competent authority pertaining to the accused takes steps before the Magistrate under clause (a) of Rule 3 and subsequently gives notice to the Magistrate that such officer or authority is of the opinion that the accused should be tried by Court-Martial, the Magistrate if he has not taken action or made any order referred to in clause (a), (b), (c) or (d) of Rule 4, before receiving the notice, shall stay the proceedings. If the accused is under the control of the Magistrate, the Magistrate shall then deliver him together with the statement of offence of which he is accused.
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Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 – Photocopy of the "Minute Sheet" produced before this Court rather belatedly where the GOC has allegedly accepted the recommendation put forth by one '(Jiten Joshi), Lt. Col., Offg Col A' that "murder case be tried by the civ Court (sic) under relevant Section of the IPC &CrPC" – This document was never furnished before the Learned Trial Court – It is only a photocopy of the document, apparently not a certified copy and not even admissible in terms of the Indian Evidence Act, 1872 thus beyond the scope of consideration. Even if this document was to be considered, there is no proof that any letter pursuant to the alleged recommendation was dispatched to the Magistrate expressing the opinion of the concerned Army authority – Luculent that the prescribed procedure as elucidated in the Cr.P.C. and the Rules were not adhered to by the Learned Magistrate – Settled law that where the statute mandates a procedure no discretion is left with the Court but to draw the statutory conclusion.
State of Sikkim* v. *Jasbir Singh ***91-C***

Constitution of India – Article 226 – It is now well-settled that every executive action which operates to the prejudice of any person must have the sanction of law. Although Article 14 of the Constitution of India does not guarantee identical treatment it envisages similarity of treatment. There cannot be distinction between persons who are substantially in similar circumstances.

M/s. Kripa Indane and Others* v. *The Chief Secretary, Government of Sikkim and Others ***148-A***

Constitution of India – Article 226 – Distribution of State largesse should not be marred by any arbitrariness and public interest should be paramount in the matter of award of contracts. All participants in a tender process should be treated alike and similarly circumstanced individuals cannot be treated as pariahs, apart from which larger participation will invite more attractive bids.

M/s. Kripa Indane and Others* v. *The Chief Secretary, Government of Sikkim and Others ***148-C***

Indian Evidence Act, 1872 –S. 106 – Burden of Proving Fact Especially Within Knowledge – This provision is not intended to relieve any person of the duty or burden cast on them under S. 101 of the Evidence Act. S. 106 cannot be used to shift the onus. This Section applies only when the defence of the accused depends on his proving the fact established within his knowledge and of nobody else. The Prosecution has to prove its case beyond a reasonable doubt before they can take shelter under the provisions of S. 106.

State of Sikkim* v. *Kamal Subba ***140-B***

The Government of Sikkim (Allocation of Business) Rules, 1994 – Rules XIII and XXXI – Allocation of Business to Various Departments of the Government – Respondent No.7 controls essential commodities as delineated in the Schedule to Section 2A of the Essential Commodities Act, 1955, of which indubitably LPG forms a part – On the other hand, the Respondent No.2 is in-charge of controlling and transporting of all goods on the nationalized routes within the State and also to and from outside the Stateunder Inter-State Agreement – Respondent No.7 is to procure distribute and fix prices for essential commodities. Distribution is done by the Respondent No.7 by way of public distribution system approved by the State Government. Evidently, the SNT is only to ensure

control and transportation of goods it does not deal with either the procurement or distribution which is within the ambit of the Respondent No.7.

M/s. Kripa Indane and Others* v. *The Chief Secretary, Government of Sikkim and Others ***148-B***

Motor Accidents Claims – Future Prospects – Computation – Where the deceased was on a fixed salary and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects – *Re. Pranay Sethi's* case.

The Branch Manager, Shriram General Insurance Co. Ltd.* v. *Mrs. Krishna Kumari Limboo and Others ***219-B***

Motor Accidents Claims – Standard of Proof – In a criminal trial the matter is to be proved beyond a reasonable doubt, however this is not the standard required while considering a matter before the Motor Accidents Claims Tribunal – It is a settled position of law that a conviction recorded by a Criminal Court is enough to hold that the driver had driven the vehicle rashly and negligently but his acquittal on the other hand would be no ground to dismiss the claim petition.

The Branch Manager, Reliance General Insurance Co. Ltd.* v. *Sa-Ngor Chotshog Centre and Another ***126-A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – It is clear from the second proviso that the High Court may entertain the Appeal after expiry of the period of ninety days if it is satisfied that the Appellant was prevented by "sufficient cause" from preferring the Appeal in time. Thus, the Appellant is required to prove "sufficient cause" for the delay – When delay is occasioned at the behest of the Government, it would be difficult to explain the delay on a day-to-day basis as transaction of business in the Government is done leisurely by Officers who evince no personal interest at different levels – It is true that adoption of strict standards of proof leads to grave miscarriage of public justice and the approach of the Court thus should be pragmatic but not pedantic. It is also true that the expression "sufficient cause" should be considered with pragmatism in a justice-oriented approach rather than technical detection of sufficient cause for explaining every day's delay – Apparent that the Appellant has grossly failed to put forth even a semblance of the grounds which could tantamount to "sufficient cause" for condonation of delay. Merely pressing the argument that it is a Government Company and stating

that the File went from one Office to the next without a semblance of an explanation does not suffice to explain the delay. The grounds are completely bereft of any bona fides and reeks of a completely lackadaisical and negligent attitude besides reflecting a cavalier attitude to the circumstance of the Respondents.

The Branch Manager, National Insurance Co. Ltd.* v. *Suk Dhoj Basnett and Others **209-A**

Motor Vehicles Act, 1988 – Beneficent Legislation– Object – The Respondents have lost an earning member of their family thereby cutting into their income and means of livelihood. The object of the Act has to be afforded due consideration, which in the instant matter appears to be lacking on the part of the Appellant.

The Branch Manager, National Insurance Co. Ltd.* v. *Suk Dhoj Basnett and Others ***209-B***

Motor Vehicles Act, 1988 – Income of the Deceased – Determination – The evidence of Respondent No. 1 that the deceased was working as an Accountant of a Government Contractor Class IA and earning a monthly income of Rs. 20,000/- was not demolished in cross-examination. Exhibit 12, the original Salary Certificate furnished before the Tribunal. The employer of the deceased has also substantiated the evidence and his cross-examination does not demolish the fact of income of the deceased as Rs. 20,000/- per month. No document on record to contradict the evidence of the income of the deceased. In view of the evidence on record, the income of the deceased is accepted as Rs. 20,000/- per month.

The Branch Manager, Shriram General Insurance Co. Ltd* v. *Mrs. Krishna Kumari Limboo and Others ***219-A***

Motor Accidents Claims – Future Prospects – Computation – Where the deceased was on a fixed salary and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects – *Re. Pranay Sethi's* case.

The Branch Manager, Shriram General Insurance Co. Ltd* v. *Mrs. Krishna Kumari Limboo and Others ***219-B***

Motor Vehicles Act, 1988 – Income of the Deceased – Determination – Income Certificate of the deceased (Exhibit 14) was issued by the Block Development Officer – Block Development Officer is indeed the concerned authority at the Block Administrative Level to issue such a Certificate. In the

absence of any document to the contrary, Exhibit 14 is accepted as the correct information pertaining to the income of the deceased.
***The Branch Manager, National Insurance Co. Ltd.* v.**
Mrs. Kavita Rai and Others ***227-A***

Motor Accidents Claims – Future Prospects – Computation – Where the deceased was on a fixed income and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects – *Re. Pranay Sethi's* case.
***The Branch Manager, National Insurance Co. Ltd.* v.**
Mrs. Kavita Rai and Others ***227-B***

Protection of Children from Sexual Offences Act, 2012 – S. 9 (m) – Aggravated Sexual Assault – Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual assault – The crucial question is whether forcibly kissing the minor victim, a girl child of 11 years of age and hugging her amounts to "aggravated sexual assault" as defined in S. 9(m) – Sexual assault is defined in S. 7 – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault.
Krishna Bahadur Chettri* v. *State of Sikkim ***73-A***

Sikkim Record Writing and Attestation Rules, 1988 – The *Kotha Purnu* or *Dru Deb* and Attestation Rules, 1951 repealed by the Sikkim Record Writing and Attestation Rules, 1988 which came into force on 09.09.1988 – Made in exercise of the powers conferred by S. 36 (2) (1), (j) and (m) of the Sikkim Agricultural Land Ceiling and Reforms Act, 1977.
Shri Jangpu Sherpa @ Jampu Sherpa* v. *Smt. Phurba Lhamu Sherpa and Others ***183-A***

Sikkim Record Writing and Attestation Rules, 1988 – Respondent

No. 2 after taking cognizance of the complaint seem to have taken evidence and thereafter come to the conclusion that the said plots had in fact been gifted to Respondent No.1 by one Norbu Sherpa – Respondent No.2 has recorded in the order that Respondent No.1 was entitled to correction in the record of rights of the said plots as it was wrongly mutated in the name of the Petitioner – Respondent No.2 has neither adverted to the said 0rules nor drawn power from it or from any other law while passing the order dated 14.05.2015 – Respondent No.2 has acted as a Court and passed orders as a Court. The records, however, reveal that Respondent No.2 was totally unaware of the source of his power. If the Respondent No.2 was aware of the said rules he ought to have known the limitations prescribed therein and followed the prescribed procedure, if applicable – Impugned order and notice set aside.

Shri Jangpu Sherpa @ Jampu Sherpa* v. *Smt. Phurba Lhamu Sherpa and Others ***183-B***

Transfer of Property Act, 1882 – S. 25 (1) – Sikkim Record Writing and Attestation Rules, 1988 – Rule 5 – Transfer of property is regulated by the Transfer of Property Act, 1882 which is enforced and applicable in Sikkim. The preparation of the record of rights is mainly for the purpose of ascertaining the ownership of the agricultural lands and quantum of revenue payable by the owner for the purposes of the said Act. S. 25 (1) of the said Act provides that every person shall be liable to pay revenue to the State Government for the lands allowed to be retained by him within the ceiling limit – While preparing the *"khasra"* under Rule 5 of the said Rules the surveyor is required to establish the ownership of the claimant. It is only after establishing the ownership that the surveyor shall cause entry in the relevant column of the *"khasra"*. For the limited purpose, the surveyor can examine the issue of ownership – The finding of the surveyor or the other authorities under the said rules regarding the ownership of the agricultural land for the purpose of preparation of the *"khasra"* however, cannot be considered the final determination of title of immovable property. For the determination of title of immovable property, the parties must approach the Civil Court of appropriate jurisdiction.

Shri Jangpu Sherpa @ Jampu Sherpa* v. *Smt. Phurba Lhamu Sherpa and Others ***183-C***

SLR (2019) SIKKIM 73

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

Crl. A. No. 32 of 2018

Krishna Bahadur Chettri ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Navtara Sarda, Legal Aid Counsel.

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

Date of decision: 1st April 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 9 (m) – Aggravated Sexual Assault – Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual assault – The crucial question is whether forcibly kissing the minor victim, a girl child of 11 years of age and hugging her amounts to "aggravated sexual assault" as defined in S. 9(m) – Sexual assault is defined in S. 7 – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault.

(Para 19)

Appeal dismissed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This is my time to sing, dance and play. This is my time to be happy. This is my time. Give it back to me.

2. The conviction of the Appellant by the learned Special Judge for commission of aggravated sexual assault under Section 9(l), 9(m) and 9(n) punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) narrate an unfortunate, distressing and alarming tale of a broken home in rural Sikkim.

3. The minor victim (P.W.1) is a hapless child of 7 years. The Appellant is her uncle, a 49 year old male who held the position of trust. The mother of the victim had left the father (P.W.2) and their three minor children several years ago. Unable to look after the three minor children on his own he brought the Appellant, his brother-in-law, to their house to look after them. The Appellant stayed with them for a few months. He used to do all the household work including cooking and bathing the children. During this period the elder minor daughter (P.W.3) was sexually assaulted by two juvenile relatives. A case was instituted under the POCSO Act, 2012 in the year 2016 against them. During the proceedings the Learned Judge told the father (P.W.2) that the elder minor daughter (P.W.3) had disclosed about the sexual assault on the minor victim by the Appellant. Pursuant thereto a written complaint (exhibit-5) dated 08.10.2016 was lodged by the father at the Temi Police Station. The formal First Information Report (FIR) (exhibit-6) was lodged on the same day. The investigation resulted in the charge-sheet against the Appellant for commission of sexual assaults on the minor victim.

4. Three charges were framed under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012, Section 354 of the Indian Penal Code, 1860 (IPC, 1860) and Section 354B of the IPC, 1860 by the learned Special Judge on 11.04.2017. 11 prosecution witnesses were examined. The Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C., 1973) on 14.06.2018. He desired to lead defence witnesses. Two defence witnesses were also examined by the learned Special Judge.

5. Ms. Navtara Sarda the learned Legal Aid Counsel for the Appellant submits that the impugned judgement and order on sentence ought to be set aside on the grounds hereinafter considered. Mr. Thinlay Dorjee Bhutia, learned Additional Public Prosecutor for the State-Respondent on the other hand submits that the prosecution has been able to prove all the ingredients of the alleged aggravated sexual offences with the evidence of the minor victim and her two siblings. It is submitted that the identification of the Appellant as well the minority of minor victim has also been adequately proved by the prosecution witnesses.

6. The minority and the age of the 7 year old victim are not in question. It is not contested at this stage. The father has deposed that the date of birth of the minor victim was 16.08.2009 and identified the copy of the birth certificate which had been seized. The Registrar, Birth & Deaths STNM Hospital, Gangtok (P.W.10) deposed that he had verified the copy of said birth certificate from the Birth & Death register maintained in STNM Hospital and found the contents to be correct. He thereafter endorsed on the body of the application dated 03.11.2016 made by the Investigating Officer to the Chief Registrar, Birth & Death, STNM Hospital (exhibit-18) that the copy was genuine.

7. The identification of the Appellant and his presence in the rented house of the family of the minor victim has been cogently established by the prosecution. The 7 year old minor victim has vividly described the sexual assault committed by the Appellant, her uncle. She identified him both during the Test Identification Parade as well as in Court. She did not remember the date, month and the year of the incident but she was certain that it transpired when she was residing at her residence and studying in UKG. She testified that one night the Appellant removed his pants and did *"chaara"* to her. The word *"chaara"* is a commonly used Nepali word. Translated it quite clearly describes the act of sexual assault. In fact the minor victim also deposed that the Appellant had put his penis in her vagina. Therefore no advantage can be taken by the defence, as was sought to, on the confusion created in the mind of the minor victim's minor elder sister (P.W.3) about the meaning of the word *"chaara"*. Although she was subjected to cross-examination the 7 year old minor victim's version could not be demolished. In fact she deposed that the Appellant did *"chaara"* to her several times.

8. Her minor elder sister (P.W.3), a 10 year old child, was also examined. She had seen the Appellant sexually assaulting her sister when she peeped through a window. She testified that after the sexual assaults the Appellant used to take her sister to the market. The defence could not demolish the evidence of this child witness too.

9. The third sibling, a 13 year old boy (P.W.7) deposed that when he was returning after fishing from the river he had noticed the Appellant giving sweets to the minor victim. He also testified that on the following day he had seen the Appellant sexually assaulting the minor victim inside their house. His cross-examination yielded no evidence in favour of the defence.

10. The father (P.W.2) is not an eye witness to the sexual assault. He lodged the FIR pursuant to the information received about the sexual assault by the Appellant on the minor victim.

11. In cross-examination the father (P.W.2) deposed that due to the statement made by the minor victim against him he was presently lodged in prison. The father (P.W.2) also deposed that the minor victim had falsely implicated him as well as the Appellant after she was tutored by the villagers, persons from the Non Governmental Organization (NGO) and the police. The defence did not even suggest about the alleged false implication while cross examining the Investigating Officer. Therefore, not much credence could be given to this statement of the father in favour of the accused. More so when he himself has been implicated. The minor victim has clearly denied that she was tutored by the police to implicate the father (P.W.2) and the Appellant. She has also denied being tutored by others. The suggestion of the defence to the social worker working in the NGO (P.W.8) was that the minor victim was tutored by the police. It was not that he or anyone from the NGO had tutored her. This suggestion too was denied by the minor victim.

12. The ingredients of Section 9(l) of the POCSO Act, 2012 has been proved beyond all reasonable doubt by the evidence of the minor victim and her two minor siblings. Their evidence convincingly proves sexual assault on the minor victim more than once.

13. The act of sexual assault committed on the minor victim is proved by the minor victim and her siblings. The date of birth of the minor victim

has been testified by the father (P.W.2). He was clear that the date of birth of the minor victim was 16.08.2009. This establishes that the sexual assault was perpetrated upon the minor victim who was below the age of 12 years. The date of birth of a child would be known to the father (P.W.2). The date of birth given by the father (P.W.2) is the same date of birth as seen in the copy of the Birth Certificate which was verified by the Registrar of Birth and Death (P.W.10) from the Register maintained. This clear evidence of the father (P.W.2) of the minor victim would be material evidence to ascertain her age as being below 12 years at the time of the alleged sexual assault. There is no certainty about the date of the sexual assaults. However, the evidence of the father (P.W.2) read with the evidence of the minor victim and her two siblings as well as the evidence of P.W.4 in whose house the Appellant was residing in the year 2016 makes it certain that the incident of sexual assaults were committed by the Appellant in the year 2016. Thus, it could be concluded definitely that the minor victim was below the age of 12 years at the time of the commission of sexual assaults by the Appellant. These facts satisfy the ingredient of Section 9(m) the POCSO Act, 2012.

14. The ingredients of the offence under Section 9(n) of the POCSO Act, 2012 are satisfied by the evidence of the victim, her two minor siblings as well as their father (P.W.2). All the said minor witnesses have clearly identified the Appellant as their uncle and the perpetrator of the sexual assault. Their father (P.W.2) has without hesitation deposed that the Appellant is his brother-in-law. P.W.4, an independent witness, in whose house the Appellant was residing during the year 2016 also confirms that the Appellant was the minor victim's uncle. He testified that the Appellant used to reside with the father (P.W.2) and his family. The father (P.W.2) has also very clearly deposed that after his wife had eloped he had brought the Appellant to his rented house to look after the minor children and the Appellant had stayed with them for a period of three-four months. The father's (P.W.2) evidence is corroborated by the evidence of the minor victim who deposed that during the relevant time she was residing with her father, her two siblings and the Appellant. Both the siblings of the minor victim have also confirmed that at the relevant time the Appellant was in fact staying with them. The feeble plea of alibi sought to be introduced, as an afterthought, through the evidence of two defence witnesses has been correctly rejected by the learned Special Judge. In cross-examination, at the instance of the defence, the father (P.W.2) has clearly testified that it was only after the Appellant left their house that he had constructed his own

house. This evidence further clarifies the doubt sought to be introduced with the depositions of the defence witnesses. The deposition of minor victim and her two minor siblings proves that the sexual assaults were committed by the Appellant when he was residing with them in their rented house.

15. The principal submission of Ms. Navtara Sarda was that there was contradiction between the statement of the minor victim and the medical evidence. She submitted that the medical evidence does not support the version of sexual assaults on the minor victim. On 09.10.2016 the minor victim was brought to the STNM Hospital for medical examination with a history of sexual assault during the early part of 2016. On local examination her hymen was intact and no fresh injuries were seen. Genital wash was not taken as the incident had occurred 10 months ago. The Gynaecologist (P.W.5) finally opined that clinical and local examination did not suggest forceful penetration in the past or in the recent period. The learned Counsel for the Appellant thus relies upon this deposition of the Gynaecologist (P.W.5) as well as his medical report (exhibit-9) to plead that the medical evidence did not support the ocular evidence of the minor victim. The facts, as is evident, reflect that the minor victim was medically examined after a fairly long gap of several months after the sexual assault. The ocular evidence does not reflect aggressive sexual assault. In such circumstances the Gynaecologist's (P.W.5) finding that no fresh injuries were seen cannot be termed as a contradiction which would shake the very foundation of the prosecution case to permit the Court to discard the ocular evidence of the minor victim and her two siblings who had eye witnessed the sexual assault. These evidences are the best evidences that could be adduced. The Gynaecologist (P.W.5) had also opined that clinical and local examination did not suggest forceful penetration in the past or in the recent period and that minor victim's hymen was intact. Injury to the hymen is directly proportional to the violence perpetuated. Merely because the hymen was intact does not necessarily mean that sexual assault did not taken place. This is not a case where the Appellant was charged for penetrative sexual assault. Even in cases of penetrative sexual assault in small children, it is opined and also found in many instances that the hymen may not be ruptured. The Gynaecologist's (P.W.5) finding is an opinion of a medical expert and had it been obtained immediately after the sexual assault it would have compelling weight. However, the evidence which reflects that the medical examination of the victim of sexual assaults was conducted after

several months impels this Court not to be moved by the opinion to such an extent so as to discard the ocular evidence of the minor victim and the eye witness account of her two minor siblings. This Court is thus of the firm view that primacy has to be given to the ocular evidences.

16. The second submission of the learned Counsel for the Appellant does not find mention in the grounds of appeal. Nevertheless this Court shall examine it as it raises an important aspect of sensitivity towards the girl child who is a victim of sexual crime. She submits that as required by Section 27(2) of the POCSO Act, 2012 in case the victim is a girl child, the medical examination shall be conducted by a woman Doctor and since, in the present case, the Gynaecologist (P.W.5) who examined the minor victim, a girl child, was a male Doctor the conviction of the Appellant must be set aside. It is correct that the mandate of Section 27(2) of the POCSO Act, 2012 requires that in case the victim is a girl child, the medical examination shall be conducted by a woman Doctor. This is vital in the best interest of the girl child. Section 27(2) of the POCSO Act, 2012 is designed to protect the girl child from secondary victimization, embarrassment and to protect her privacy. The State must ensure that a woman doctor is readily available in all State medical facilities to examine such victims. However, this Court is certain that the Appellant, who is an accused alleged to have committed the sexual assault on the girl child, cannot be allowed to take advantage of this failure to seek an acquittal on this ground.

17. The final assault on the impugned judgment of the learned Special Judge by the learned Counsel for the Appellant was on the delay in lodging the FIR. The learned Special Judge has examined this aspect in fairly great detail. The father (P.W.2) has provided cogent reasons explaining the delay. He came to learn about the sexual assault on the minor victim when he was summoned as a witness in the case under the POCSO Act, 2012 instituted against two juvenile relatives for sexually assaulting his eldest minor daughter (P.W.3). It was then that he was informed by the Learned Judge about his minor elder daughter (P.W.3) having disclosed about the Appellant sexually assaulting the minor victim. It was only after this incident that he lodged the FIR on 08.10.2016. Considering that the family life of the minor victim had been in disarray after her mother had left them it is perfectly understandable that she had not disclosed about the sexual assault to her father. Moreover,

the father himself was accused of commission of sexual assault upon the minor victim in another proceeding. The minor victim would have no one to disclose about her being subjected to aggravated sexual assault by her own uncle. In such circumstances the delay in lodging the FIR cannot be a ground to throw out the prosecution which is otherwise based on direct evidence of the injured minor victim (which stands on a stronger pedestal) and the eye witness account of her two minor siblings.

18. The learned Special Judge has examined the evidence of the prosecution witnesses and held that there was no reason to disbelieve their testimony in the absence of any positive material in favour of the defence. The learned Special Judge found the evidence of the minor victim duly corroborated by the evidence of her minor siblings who had deposed that they had seen the Appellant committing sexual assault on the minor victim. The learned Special Judge has also examined the provisions of the POCSO Act, 2012. She has correctly come to the conclusion that the Appellant was guilty of having committed the offence of aggravated sexual offence under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012 in view of the evidence produced by the prosecution and convicted him for the said offences.

19. The learned Special Judge has sentenced the Appellant to undergo simple imprisonment for a period of 5 years and to pay a fine of Rs.1,000/- for each of the offences under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012. The learned Special Judge has directed that in default of the payment of the fine for each of the offences the Appellant shall undergo further imprisonment for one month each under the said provisions. Section 10 of the POCSO Act, 2012 provides that whoever commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. The learned Special Judge has imposed the minimum sentence of five year as prescribed for each of the offences. This Court finds no reason to disturb the sentences imposed which has been directed to run concurrently.

20. The learned Special Judge has directed that the amount of fine, if recovered, shall be made over to the victim as compensation. The learned

Special Judge has also directed the payment of Rs.1,00,000/- as compensation to the minor victim under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. The award of fine and compensation as directed shall remain undisturbed. The learned Special Judge has directed that the fine, if recovered, and the compensation amount granted be paid to the minor victim without setting out the modality. The evidence on record reflects that the mother of the minor victim had left them some years ago. The father (P.W.2) is himself accused of sexual assault on the minor victim and is said to have been convicted for the same. The minor victim is said to be residing in a home run by an NGO. Her siblings are lodged in yet another home. In the circumstances, the amount of fine if recovered and the compensation directed to be paid to the minor victim, if not already paid, shall be put in a fixed deposit in the name of the minor victim payable to her on attaining majority.

21. However, several disturbing questions remain unanswered. Home is usually the safest place for a child. However, when the home becomes the place where one's own relatives become predators and indulge in sexual abuse upon minor children have no other place to go and feel safe. It is quite obvious that the minor victim and her two minor siblings are all lodged in different homes run by NGO's. No relatives seem to have come forward to take care of them. The father (P.W.2) stands convicted. The mother is nowhere around the children when they need her the most. How long do these children remain in such homes? Are these homes best equipped to take care of the *"best interest"* of these children? Do these children have any choice of a better alternative? What is the role and responsibility of the State towards these children - all victims of crime who have been subjected to such cruelty? Is grant of monetary compensation enough in such circumstances? Is enough being done? How do we better this unhappy situation?

22. This is my time to be happy weeps the child. Give my happiness back to me.

23. It is these thoughts which disturb the judicial mind and persuades this Court to direct the learned Registrar General of this Court to place this judgment as well as the records of this case before the Hon'ble Chief Justice to consider taking up these issues on the judicial side.

24. The appeal is dismissed. The impugned judgement and the order on sentence are upheld. The disbursement of the fine if realised and the compensation awarded shall be done in the manner as directed above.

25. Certified copies of this Judgement shall be sent to the Special Judge, the Sikkim State Legal Services Authority and the learned Registrar General of this Court for necessary action.

SLR (2019) SIKKIM 83

(Before Hon'ble the Chief Justice)

Crl. M.C. No. 01 of 2018

Shri Ashish Asawa and Another ….. PETITIONERS

Versus

Ms. Kalyani Sarda and Another ….. RESPONDENTS

For the Petitioners: Mr. A.K. Upadhyaya, Sr. Advocate with Mr. Sonam R. Lepcha, Advocate.

For Respondent No.1: Mr. Sudesh Joshi, Advocate.

For Respondent No. 2: Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor.

Date of order: 2nd April 2019

A. Code of Criminal Procedure, 1973 – S. 482 – Offence under Section 498A of the I.P.C is not a compoundable offence – Whether this Court in exercise of its power under S. 482 can quash a criminal proceeding in a non-compoundable offence – Petitioner No. 1 and Respondent No. 1 (husband and wife) first arrived at a compromise and a deed of compromise was drawn by them. As per the compromise, they filed a Divorce Petition under Section 13 (B) of Hindu Marriage Act and obtained a decree of divorce. They are living separately and Respondent No. 1, after her remarriage is living with her husband at Cuttack – Considering all these facts, if the trial is permitted to proceed against the petitioners, the ultimate fate of trial shall result in acquittal – No useful purpose shall be served if the trial is permitted to proceed further. By permitting the trial to proceed further, the ends of justice shall not be achieved and same will be a futile exercise. In such situation, continuation of the criminal proceeding would tantamount to abuse of process of law – Consequently, proceedings quashed.

(Paras 6, 8 and 9)

Petition allowed.

Chronological list of cases cited:

1. B.S. Joshi and Others v. State of Haryana, (2003) 4 SCC 675.
2. Nikhil Merchant v. CBI, (2008) 9 SCC 677.
3. Manoj Sharma v. State, (2008) 16 SCC 1.
4. Gyan Singh v. State of Punjab, (2012) 10 SCC 303.

ORDER

Vijay Kumar Bist, CJ

Present petition has been filed under section 482 of the Code of Criminal Procedure, 1973 for quashing the proceedings of G.R. Case No. 192 of 2016 (State of Sikkim vs. Asish Asawa & Anr.), pending disposal before the Court of Judicial Magistrate, Chungthang Sub-Division, stationed at Gangtok, under Section 4 of the Dowry Prohibition Act, 1961 and under sections 498(A), 420, 468, 471, 34 of the Indian Penal Code, 1860 (for short 'IPC').

2. Marriage of petitioner no. 1 was solemnized with respondent no. 1 on 12.07.2013 at Siliguri, West Bengal, according to Hindu rituals and customs. After marriage, they lived together in Delhi and later in Rajnagar, Rajsamand, Rajashthan. However, within few months of their marriage, differences between the petitioner no.1 and the respondent no.1, came to the fore. In the month of August 2014, the respondent no.1 left the house of the petitioner and started living in the house of her father at Singtam, East Sikkim. Thereafter, on 30.08.2014, she lodged an FIR against the petitioners at Singtam Police Station, East Sikkim under Section 498-A IPC and Section 4 of Dowry Prohibition Act, 1961. Investigating Officer, after investigating the matter filed charge-sheet against the petitioners. Now they are facing trial before the Judicial Magistrate, Chungthang Sub-Division, stationed at Gangtok.

3. Heard learned counsel for the parties.

4. Learned counsel for the respondent no.1 stated that respondent no. 1 does not want to proceed with the matter as she wants to lead a peaceful life. Hence, she has no objection in case criminal proceedings against the petitioners are quashed.

5. During the pendency of the present petition, the parties arrived at a compromise and mutually agreed that their marriage be dissolved by mutual consent. Thereafter a petition was filed by the petitioner no. 1 and respondent no. 1 for mutual divorce under section 13(B) of the Hindu Marriage Act, 1955. Said petition was allowed on 05.05.2018. It is informed by the counsel for respondent no. 1 that the respondent no.1 has remarried on 18.01.2019 and is living with her husband in Cuttack, Odisha.

6. Offence under section 498A of the IPC is not a compoundable offence. The question that arises before this Court is whether this Court in exercise of its power under Section 498A of IPC can quash a criminal proceeding in a non-compoundable offence. This question came up for hearing before the Honble Supreme Court in the matter of ***B.S. Joshi & Others vs. State of Haryana : (2003) 4 SCC 675***, ***Nikhil Merchant vs. CBI : (2008) 9 SCC 677***, ***Manoj Sharma vs. State : (2008) 16 SCC 1.*** The Honble Supreme Court in all these matters permitted compounding of all non-compoundable offences. Later on, this controversy was referred to a larger Bench in the matter of ***Gyan Singh vs. State of Punjab : (2012) 10 SCC 303***, for examining and reconsidering the matter, the Honble Supreme Court, *inter alia*, dealt with its earlier three judgments and discussed the matter in the following manner:

> "**53.** Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code" which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court necessary to prevent abuse of the process of any court or to secure the ends of justice.

It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (*i*) to prevent abuse of the process of any court, or (*ii*) to secure the ends of justice, is a sine qua non.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim *quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest*. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a

straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid

compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

7. In the matter of ***Gyan Singh*** (supra), the Honble Apex Court has, in clear terms, spoke about the cases in which High Court should or should not interfere. Paragraph 61 of the judgment is being quoted below:

"**61.** The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under

Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would

be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

8. In the present case, the petitioner no. 1 and respondent no. 1 (husband and wife) first arrived at a compromise and a Deed of Compromise was drawn by them. As per compromise, they filed a Divorce Petition under Section 13 (B) of Hindu Marriage Act and got a degree of divorce. They are living separately and the respondent no. 1, after her marriage is living with her husband at Cuttack. Considering all these facts, I have no doubt that if the trial is permitted to proceed against the accused/applicant, the ultimate fate of trial shall result in the acquittal of the petitioners. In fact, no useful purpose shall be served if the trial is permitted to proceed further. By permitting the trial to proceed further, the ends of justice shall not be achieved and same will be a futile exercise. In such situation, continuation of the criminal proceeding would tantamount to abuse of process of law.

9. Consequently, proceedings of G.R. Case No. 192 of 2016 (State of Sikkim vs. Asish Asawa & Anr.) under section 4 of the Dowry Prohibition Act, 1961 and under sections 498(A), 420, 468, 471, 34 of the Indian Penal Code, 1860, pending in the Court of the Judicial Magistrate, Chungthang Sub-Division, stationed at Gangtok, are hereby quashed.

10. Crl. M. C. No. 01 of 2019 stands disposed of.

11. Copy of this Order be sent to the Court of the concerned Judicial Magistrate, forthwith.

SLR (2019) SIKKIM 91

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

Crl. Rev. P. No. 02 of 2017

State of Sikkim ….. PETITIONER/ REVISIONIST

Versus

Jasbir Singh ….. RESPONDENT

For the Petitioner: Mr. Karma Thinlay Namgyal and Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor with Mr. S. K. Chettri, Asstt. Public Prosecutor.

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

Date of decision: 6th April 2019

A. Army Act, 1950 – Ss. 69 and 70 – If civil offences are committed by a person subject to the Army Act at any place in or beyond India but deemed to be offences committed under the Act, when such a person is charged under S. 69 of the Act, it is triable by Court-Martial. So far as S. 70 is concerned, when a person subject to the Army Act commits an offence of murder and culpable homicide not amounting to murder or rape, against a person not subject to the military law, subject to a few exceptions they are not triable by Court-Martial but are triable only by ordinary Criminal Courts – S. 70 therefore deals specifically with offences committed by a person subject to the Army Act against a person not subject to Army Act. The exceptions to S. 70 however provides that if the offence is committed while the accused is in active service or at any place outside India, or at a frontier post specified by the Central Government, in such circumstances he shall be tried by Court-Martial.

(Para 16)

B. Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 – Rules 3, 4 and 5 – Rule 3 provides for

steps to be initiated by a Magistrate when a person subject to military, naval or air force or any other law relating to the Armed Forces is brought before him and charged with an offence for which he is also liable to be tried by a Court-Martial. The Rule enjoins upon the Magistrate not to proceed to try such person or even to commit the case to the Court of Sessions unless he is moved thereto by a competent military, naval or air force authority or if the Magistrate is of the opinion that he should proceed or commit the case without being moved by such authority, he is to record reasons for his action – If the Magistrate decides to proceed under Rule 3(b), Rule 4 lays down that before taking such steps the Magistrate shall give a written notice to the concerned authority of the accused and stay his hands until the expiry of fifteen days from the date of service of notice – Till the expiry of fifteen days, the Magistrate is not to convict or acquit the accused, frame charge against the accused, commit the accused for trial to the Court of Sessions or make over the case for inquiry or trial. Rule 5 lays down that where the competent authority pertaining to the accused takes steps before the Magistrate under clause (a) of Rule 3 and subsequently gives notice to the Magistrate that such officer or authority is of the opinion that the accused should be tried by Court-Martial, the Magistrate if he has not taken action or made any order referred to in clause (a), (b), (c) or (d) of Rule 4, before receiving the notice, shall stay the proceedings. If the accused is under the control of the Magistrate, the Magistrate shall then deliver him together with the statement of offence of which he is accused.

(Para 21)

C. Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 – Photocopy of the "Minute Sheet" produced before this Court rather belatedly where the GOC has allegedly accepted the recommendation put forth by one '(Jiten Joshi), Lt. Col., Offg Col A' that "murder case be tried by the civ Court (sic) under relevant Section of the IPC & CrPC" – This document was never furnished before the Learned Trial Court – It is only a photocopy of the document, apparently not a certified copy and not even admissible in terms of the Indian Evidence Act, 1872 thus beyond the scope of consideration. Even if this document was to be considered, there is no proof that any letter pursuant to the alleged recommendation was dispatched to the Magistrate expressing the opinion of the concerned Army authority – Luculent that the prescribed procedure as

elucidated in the Cr.P.C. and the Rules were not adhered to by the Learned Magistrate – Settled law that where the statute mandates a procedure no discretion is left with the Court but to draw the statutory conclusion.

(Paras 25 and 26)

Petition dismissed.

Chronological list of cases cited:

1. Som Datt Datta v. Union of India and Others, AIR 1969 SC 414.
2. Joginder Singh v. State of Himachal Pradesh, (1971) 3 SCC 86.
3. Major E.G. Barsay v. The State of Bombay, AIR 1961 SC 1762.
4. Balbir Singh and Another v. State of Punjab, (1995) 1 SCC 90.
5. Delhi Special Police Establishment v. Lt. Col. S. K. Loraiya, (1972) 2 SCC 692.
6. Superintendent and Remembrancer of Legal Affairs, West Bengal v. Usha Ranjan Roy Chowdhury, 1986 (3) Crimes 11 (SC).
7. Sepoy (Lance Naik) Devender Nath Rai v. Union of India, 2000 (4) RCR (Criminal) 136 : Civil Misc. Writ Petition No.35206 of 1991 of the Allahabad High Court.
8. Extra-Judicial Execution Victim Families Association and v. Union of India and Another, (2016) 14 SCC 578(2).
9. B. Premanand and Others v. Mohan Koikal and Others, (2011) 4 SCC 266.

JUDGMENT

Meenakshi Madan Rai, J

1. The Revisionist being aggrieved, assails the Order dated 09-03-2017, passed in Sessions Trial Case No.03 of 2015, of the Learned Sessions Judge, Special Division–II, Sikkim, at Gangtok, in which the Learned Trial Court, after framing Charge against the Respondent/Accused *(hereinafter the "accused")* under Sections 302 and 380 of the Indian Penal Code, 1860 (for short IPC), Section 25(1B)(a) of the Arms Act, 1959 (for short Arms Act), examining 20 witnesses for the Prosecution and

hearing final arguments of both the parties, on the date fixed for Judgment concluded that, the Sessions Court had no jurisdiction to try the accused for the said offences. With this observation, the matter was remitted to the Court of the Learned Chief Judicial Magistrate, East Sikkim, with a direction to issue a written notice to the Commanding Officer of the Unit of the accused or a competent Military Authority in order to deliver him to such authority for trial by Court-Martial. Hence, the Revision Petition.

2. In order to appreciate the matter in its correct perspective it is essential to take stock of the events which have led to the instant Revision Petition. On 14-12-2014, at around 19:40 hours, Lance Naik Rajesh Kumar of 17 Mountain Division lodged an FIR before the Station House Officer, Sadar Police Station, Gangtok informing *inter alia* that on the relevant day at around 6 p.m. when he returned to his barracks he struck up a conversation with two Riflemen for a short while. After they parted company, he was freshening up when at around 6.30 p.m. to 6.45 p.m. he heard sound of gunshots inside the barracks. He immediately rushed to the barracks whereupon he witnessed L/Nk Jasbir Singh, the accused, opening fire on one Rifleman, Balbir Singh, with an INSAS Rifle. He pulled the accused out of the barracks along with the rifle and simultaneously raised an alarm for help, on which Signalman Ujjal Sinha and C.H.Anil arrived at the spot. The accused, in the meanwhile, escaped from the clutches of the Complainant. The Complainant then immediately rang up the Medical Room and returned to check on the injured Rifleman by which time he suspected that he was already dead.

3. The Police Station registered a case against the accused under Section 302 of the IPC and endorsed it to the Investigating Officer for investigation. It transpired that on the relevant day, i.e., 14-12-2014, the accused was detailed for Pilot duty of the GOC, 17 Mountain Division and also at the residence of the GOC with effect from 18:00 to 20:00 hours along with two other personnel. After attending to the Pilot duties, the Pilot party deposited their weapons at the Armoury around 15:30 hours. The accused stayed at the MP Depot for his next duty shift at the GOC‘s residence. While at the Depot, he met one Havaldar, together they went in the Pilot vehicle to purchase liquor from the Canteen and thereafter to the Signal barracks. Inside the barracks, the accused and the deceased engaged in light banter which however turned into a heated argument on which the deceased slapped the accused and pulled him by the belt of his uniform. On

the intervention of another Head Constable, matters regained normality after which the accused left for the MP Depot evidently seething from the incident. Around 17:30 hours when a JCO came to the MP Depot for some work, he unwittingly dropped the key of the Armoury on the floor, retrieved it and put it inside a drawer in the table, which the accused caught sight of. After the JCO left the room, the accused took the key, went to the Armoury and took two INSAS rifles, two magazines with twenty live ammunitions in each magazine. He concealed one of the rifles under an army truck and took the second one with him duly loaded and ready for firing, to the barracks where the deceased was and fired at him from point blank range, causing his instantaneous death. By the time the Complainant arrived at the scene, the accused had already fired about twenty rounds out of which twelve bullets pierced the deceased Rifleman. The accused escaped from the clutches of the Complainant and went towards the Signal Gate. Meanwhile, on the failure of the accused to respond to his calls one Niwas Kumar who was to have relieved the accused made phone calls to the JCO. After some time however the accused called him and mentioned that he had killed someone. The said Niwas Kumar then informed the JCO. After completion of investigation Charge-Sheet was filed before the Court of the Learned Chief Judicial Magistrate against the accused under Sections 302/380 IPC, with the information that supplementary Charge-Sheet would be submitted on receipt of Forensic Report from the Central Forensic Science Laboratory.

4. On 28.02.2015, the accused was produced before the Learned Chief Judicial Magistrate (East and North Sikkim), who vide his Order of the same date took cognizance of the offence and finding that the Sections involved were exclusively triable by the Court of Sessions, committed the matter to the said Court.

5. The Learned Court of Sessions framed Charge against the accused on 15-07-2015 under Sections 302/380 of the IPC and Section 25(1B)(a) of the Arms Act. On the plea of not guilty by the accused, twenty witnesses for the Prosecution were examined and concluded, the accused examined under Section 313 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.) and on 25-02-2017 the final arguments of the parties were heard. On the date fixed for pronouncement of Judgment, i.e., 09-03-2018 the Learned Sessions Judge took the aforestated view, culminating thereby in the instant revision petition.

6. Learned Additional Public Prosecutor for the Revisionist submitted that on conclusion of trial and on the date fixed for Judgment instead of pronouncing judgment, the impugned Order was pronounced. That, the Learned Trial Court failed to consider that Section 125 of the Army Act, 1950 (for short Army Act) presupposes that both a Criminal Court and a Court-Martial have concurrent jurisdiction to try a civil offence, and by the impugned Order left it to the discretion of the Commanding Officer to take a decision regarding the Forum. That, in the instant matter, the Army Authorities had handed over the accused to the Civil Police, thereby exercising their discretion and indicating their decision to have the accused tried by a Criminal Court. That the Minute Sheet AG's Branch Case No. 2513/58/A1(PC) filed in I.A. No. 2 of 2017 reveals that the Army authorities had recommended that the trial be conducted by the Sessions Court. The absence of the Army Authorities during the entire proceedings is consistent with their decision that the matter be tried by the Learned Trial Court. The non-filing of an application by the Commanding Officer for handing over the accused for Court-Martial is also proof of the fact that the Army had no objection to trial by a Criminal Court.

7. Walking this Court through Section 69 of the Army Act it was urged that the provision clearly lays down that, any person who has committed any civil offence, which means, an offence triable by a Criminal Court as per Section 3(ii) of the Army Act, can be tried by a Criminal Court. Relying on the decision of ***Som Datt Datta*** vs. ***Union of India and Others***[1], it was contended that the said Judgment clearly lays down that when an Order is issued by the concerned Authority of the Army under Section 125 of the Army Act, then no further argument need arise on this point. The Minute Sheet *supra* dated 14-01-2015 and 16-01-2015, was invoked to convince this Court that the recommendation had been duly signed by one Jiten Joshi who was the Lieutenant Colonel and Commanding Officer of the accused. A draft of the aforestated recommendation was placed before the Deputy GOC, who in turn placed it before the GOC, who, duly approved the recommendation. In order to buttress his submissions, Learned Additional Public Prosecutor elicited strength from the ratio in ***Som Datt Datta*** *(supra).* Reliance was also placed on ***Joginder Singh*** vs. ***State of Himachal Pradesh***[2], ***Major E.G. Barsay*** vs. ***The State of Bombay***[3] and

[1] AIR 1969 SC 414
[2] (1971) 3 SCC 86
[3] (AIR 1961 SC 1762

Balbir Singh and Another vs. ***State of Punjab***[4]. That in view of the facts and circumstances, the Learned Trial Court be directed to pronounce Judgment on the merits of the case.

8. *Per contra*, Learned Counsel advancing his contentions for the accused drew the attention of this Court to the provisions of Sections 69 and 70 of the Army Act canvassing the point that Section 69 commences with a caveat, i.e., Subject to the provisions of Section 70, categorically laying down that the provisions of Section 70 are to be considered, while interpreting Section 69. That, both the accused and deceased were Army personnel triable in terms of Section 69 by Court-Martial. That, a careful reading of Section 70 would also reveal that, a person would not be triable by Court-Martial, if the offender is subject to the military, naval or air force law, but the victim is not, unless the offence is committed within the exceptions carved out in Section 70. That, Active Service which finds place in Section 70(a) of the Army Act has been elucidated in a Notification of the Ministry of Defence 1977 which provides that active service within the meaning of the Army Act, would mean, service in the State of (a) Jammu and Kashmir, (b) Manipur, (c) Nagaland, (d) Tripura and (e) Sikkim. In view of the aforestated provisions of law, the accused is to be tried by Court-Martial and not otherwise. Besides, the Charge-Sheet was placed before the Learned Chief Judicial Magistrate on 28-02-2015 who committed the matter on the same day to the Court of the Learned Sessions Judge at Gangtok after taking cognizance of the offences under Sections 302/380 of the IPC without complying with the provisions of Section 125 of the Army Act and Rule 3 of the Army Rules, 1954. That, the Learned Court of Sessions after altering the Charge on 05-11-2015 and inserting Section 25(1B)(a) of the Arms Act sans sanction, issued no notice in terms of Section 475 of the Cr.P.C. to the accused. It was further contended that the contents of the Minute Sheet relied on by the Revisionist was never tested by way of cross-examination and hence filing of the document at the revisional stage cannot be permitted which in any event is of no assistance to the Revisionist.

9. While relying on the ratiocination of the Hon'ble Supreme Court in ***Delhi Special Police Establishment*** vs. ***Lt. Col. S. K. Loraiya***[5] it was posited that the mandatory provisions of Section 475 Cr.P.C. of issuing

[4] (1995) 1 SCC 90
[5] (1972) 2 SCC 692

notice to the Commanding Officer of the accused to enable him to exercise the option of trial by Court-Martial or a Civil Court, was sidestepped by the Magisterial Court as also the provisions of Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. That, in ***Superintendent and Remembrancer of Legal Affairs, West Bengal*** vs. ***Usha Ranjan Roy Chowdhury***[6] it was held that the ordinary Civil Court would have no jurisdiction to take cognizance of the case and to try the accused in a manner where the procedure prescribed by the Rules has not been complied with. That, when there was conflict as to whether the accused should be tried by a Criminal Court or by Court-Martial, the matter should have been referred to the Central Government. Hence, the decision arrived at by the Learned Trial Court placing reliance on ***Sepoy (Lance Naik) Devender Nath Rai*** vs. ***Union of India***[7] requires no interference.

10. I have heard the rival contentions placed by Learned Counsel *in extenso* and given it careful consideration. I have also carefully perused all documents appended and the impugned Order. The decisions relied on by both Learned Counsel have also been perused by me.

11. Section 2 of the Army Act delineates at length the categories of persons who are subject to the Act. Section 3 deals with definitions and the relevant provisions for the instant purpose are extracted below;

> **"3. In this Act, unless the context otherwise requires.- "Active service"**, as applied to a person subject to this Act, means the time during which such person
>
> (a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or
>
> (b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or
>
> (c) is attached to or forms part of a force which is in military occupation of a foreign country;

[6] 1986 (3) Crimes 11 (SC)
[7] 2000 (4) RCR (Criminal) 136 : Civil Misc. Writ Petition No.35206 of 1991 of the Allahabad High Court

(ii) "**civil offence**" means an offence which is triable by a criminal court;

.....

(vii) "**court-martial**" means a court-martial held under this Act;

(viii) "**criminal court**" means a court of ordinary criminal justice in any part of India,

.....

(xi) **the Forces** means the regular Army, Navy and Air Force or any part of any one or more of them.

.....

(xvii) "**offence**" means any act or omission punishable under this Act and includes a civil offence as hereinbefore defined; …**"**

The aforesaid provisions thus explain the terms in relation to the Act.

12. Chapter VI of the Act deals with offences and details the forum which can try the offences mentioned in the various Sections. Sections 34 to 68 are triable by Court-Martial. We may now look at the provisions of Sections 69 and 70 of the Army Act. Section 69 reads as follows;

"69. Civil offences.—Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.**"**

13. The definition of civil offence as provided in Section 3(ii) of the Army Act extracted *supra* means an offence which is triable by a Criminal Court. Section 70 provides for civil offences not triable by Court-Martial and reads as follows;

"70. Civil offences not triable by court-martial.—
A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences—

(a) while on active service, or
(b) at any place outside India, or
(c) at a frontier post specified by the Central Government by notification in this behalf.**"**

14. In ***Som Datt Datta*** (*supra*) the facts *inter alia* pertained to the death of an army personnel having been stabbed by another army personnel. Both were subject to the Army Act as in the instant case. While considering the provisions of Chapter VI therein, the Hon'ble Supreme Court observed *inter alia* as follows;

"4. .....
Chapter VI is comprised of Sections 34 to 70. The heading of the chapter is Offences. As we have already noticed, the word offence is defined to mean

not only any act or omission punishable under the Army Act, but also a civil offence. Sections 34 to 68 define the offences against the Act triable by Court Martial and also indicate the punishments for the said offences.

……

Shortly stated, under this Chapter there are three categories of offences, namely, (*1*) offences committed by a person subject to the Act triable by a Court Martial in respect whereof specific punishments have been assigned; ***(2)*** **civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court Martial**; and (*3*) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. **Subject to a few exceptions, they are not triable by Court Martial, but are triable only by ordinary criminal courts**. The legal position therefore is that when an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court Martial; **but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary Criminal Court as well as a Court Martial would have jurisdiction to try the person committing the offence**. Such a situation is visualized and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act ……

……"

(Emphasis supplied)

15. On these lines, we may now look at the provisions of Sections 125 and 126 of the Army Act, which are extracted hereinbelow for easy reference;

125. Choice between criminal court and courtmartial. When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

126. Power of criminal court to require delivery of offender.(1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith defer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."

16. The observation *supra* in the case of ***Som Datt Datta*** clearly explains the position of offences committed under Sections 69 and 70 of the Army Act. It is clearly laid down therein *inter alia* at *(2)* that if civil offences are committed by a person subject to the Army Act at any place in or beyond India but deemed to be offences committed under the Act, when such a person is charged under Section 69 of the Act, it is triable by Court-Martial. So far as Section 70 is concerned the observation at *(3)* in the same ratio clarifies that when a person subject to the Army Act commits an offence of murder and culpable homicide not amounting to murder or rape, against a person not subject to the military law, subject to a few

exceptions they are not triable by Court-Martial but are triable only by ordinary Criminal Courts. Section 70 therefore deals specifically with offences committed by a person subject to the Army Act against a person not subject to Army Act. The exceptions to Section 70 of the Army Act however provides that if the offence is committed while the accused is in active service or at any place outside India, or at a frontier post specified by the Central Government, in such circumstances he shall be tried by Court-Martial.

17. The Hon'ble Supreme Court while discussing Sections 69 and 70 of the Act in the ratio *ibid* observed as follows;

> **"4.** ……..... Section 125 presupposes that in respect of an offence both a Criminal Court as well as a Court Martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. **It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in Section 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court Martial, the accused person is to be detained in military custody; but if a Criminal Court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under Section 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government**. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory

machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case.**"**

(Emphasis supplied)

18. On the touchstone of the settled law, the question then is whether the Learned Sessions Judge erred in issuing the Order directing that the accused be tried by Court-Martial.

19. It is now apposite to refer to the provisions of Section 475 of the Cr.P.C. which provides for delivery to Commanding Officer or persons liable to be tried by a Court-martial and reads as follows;

> **"475. Delivery to commanding officers of persons liable to be tried by Court-martial.—** The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, navel or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, **such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest** military, naval or airforce station, as the case may be, for purpose of being tried by a Court-martial.
>
> *Explanation*.—In this section—
>
> (a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-martial" includes any tribunal with the powers similar to those of a Courtmartial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purposes by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Courtmartial."

(Emphasis supplied)

20. On the heels of the above provisions it is indeed imperative to discuss the relevant Rules which were notified by the Central Government. The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 (for short Rules of 1952) were notified by the Central Government in exercise of powers conferred under this Section and published in the Gazette of India dated 26-04-1952. This Rule was superseded in 1978 by the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 (for short Rules of 1978). For convenience the relevant provisions of the Rules of 1978 are extracted hereinbelow;

"3. Where a person subject to military, naval, or air force law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court-martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless—

(a) he is moved thereto by a competent military, naval or air force authority; or

(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority

4. Before proceeding under clause (b) of rule 3, the Magistrate shall give a written notice to the Commanding Officer or the competent military, naval or air force authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of service of the notice he shall not—

(a) convict or acquit the accused under section 252, subsections (1) and (2) of section 255 subsection (1) of section 256 or section 257 of the Code of Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under section 254 of the said Code; or

(b) frame in writing a charge against the accused under section 240 or sub-section (1) of section 246 of the said Code; or

(c) make an order committing the accused for trial to the Court of Session under section 209 of the said Code;
or

(d) make over the case for inquiry or trial under section 192 of the said Code.

5. **Where a Magistrate has been moved by the competent military, naval or air force authority**, as the case may be, under clause (a) of rule 3, and the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such officer or authority, the accused should be tried by a Court-martial, such Magistrate if he has not taken

any action or made any order referred to in clauses (a), (b), (c) or (d) of rule 4, **before receiving the notice shall stay the proceedings and, if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475** of the said Code to the officer specified in the said subsection.

6. Where within the period of fifteen days mentioned in rule 4, or at any time thereafter but **before the Magistrate takes any action or makes any order referred to in that rule**, the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, gives notice to the Magistrate that in the opinion of such officer or authority, the accused should be tried by a Court-martial, the Magistrate shall stay the proceedings, and if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section.**"**

(Emphasis supplied)

21. Rule 3 *supra* therefore provides for steps to be initiated by a Magistrate when a person subject to military, naval or air force or any other law relating to the Armed Forces is brought before him and charged with an offence for which he is also liable to be tried by a Court-Martial. The Rule enjoins upon the Magistrate not to proceed to try such person or even to commit the case to the Court of Sessions unless he is moved thereto by a competent military, naval or air force authority or if the Magistrate is of the opinion that he should proceed or commit the case without being moved by such authority, he is to record reasons for his action. Even if the Magistrate decides to proceed under Rule 3(b), Rule 4 lays down that before taking such steps the Magistrate shall give a written notice to the concerned authority of the accused and stay his hands until the expiry of fifteen days from the date of service of notice. In other words, till the expiry of fifteen days the Magistrate is not to convict or acquit the accused, frame charge against the accused, commit the accused for trial to the Court of Sessions

or make over the case for inquiry or trial. Rule 5 lays down that where the competent authority pertaining to the accused takes steps before the Magistrate under Clause (a) of Rule 3 and subsequently gives notice to the Magistrate that such officer or authority is of the opinion that the accused should be tried by Court-Martial, the Magistrate if he has not taken action or made any order referred to in Clause (a), (b), (c) or (d) of Rule 4, before receiving the notice, shall stay the proceedings. If the accused is under the control of the Magistrate, the Magistrate shall then deliver him together with the statement of offence of which he is accused.

22. Indubitably both the accused and deceased were subject to the Army Act. From a careful perusal of the records, it is evident that the steps prescribed by law were not adhered to by the concerned Magistrate. The persuasion of the Revisionist that the Army authorities had exercised their discretion to try the accused in the criminal court bears no weight as no documentary evidence exists thereof. Mere handing over of the accused to the civil authority is no proof of exercise of option. This is settled in the ratio of ***Som Datt Datta*** (*supra*) wherein it was held that merely because the Police Officer conducted the inquest of the dead body or because he seized certain exhibits and sent them to the State Laboratory for chemical examination, it could not be reasonably argued that there was a decision of the competent military authority under Section 125 of the Army Act for handing over the inquiry to the Criminal Court. In the instant matter, after the FIR was lodged on 14-12-2014, investigation commenced on completion of which Charge-Sheet was submitted before the Court of the Learned Sessions Judge. The Learned Chief Judicial Magistrate proceeded to commit the matter to the Court of the Learned Sessions Judge on the same day *inter alia* ordering as follows;

> "……
>
> Seen the challan filed against the above named accused under Section 302/380 of the IPC, 1860.
>
> Cognizance taken of the concerned offence against the accused person.
>
> Since the section involved is exclusively triable by the Court of Session, the case is accordingly, committed to the Court of the Ld. Principal Sessions Judge, East Sikkim at Gangtok.
>
> ……."

Evidently, the Magistrate sidestepped the procedure prescribed by law *viz.* Sections 125 and 126 of the Army Act, Section 475 Cr.P.C., and Rules 3, 4 and 5 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978.

23. In ***Extra-Judicial Execution Victim Families Association and Another*** vs. ***Union of India and Another***[8] Order dated 08-07-2016 of the Hon'ble Supreme Court before a Bench comprising of Hon'ble Justices Madan B. Lokur and Uday U. Lalit, while referring to the decision in ***Som Datt Datta*** (*supra*) concluded *inter alia* as follows;

> **"188**. Section 125 and Section 126 of the Army Act are of considerable importance in this context and as far as this case is concerned. These Sections ought to be read in conjunction with Section 4 and Section 5 of the Code of Criminal Procedure. These Sections provide that when both a criminal court and a Court Martial have jurisdiction in respect of an offence, the first option would be with the Army to decide whether the accused person should be proceeded against in a criminal court or before a Court Martial. However, if the criminal court is of opinion that the proceedings should be instituted before itself, it may require the Army to send the alleged offender to the nearest Magistrate to be proceeded against or to postpone the proceedings pending a reference to the Central Government. In other words, in the event of a conflict of jurisdiction, whether an alleged offender should be tried by a criminal court constituted under the Code of Criminal Procedure or by a Court Martial constituted under the Army Act, that conflict shall be referred to the Central Government for passing an appropriate order.
>
> **189**. In this context, it is necessary to refer to the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978. These Rules provide, inter alia, that when a person subject to the Army Act is brought before a Magistrate and is

[8] (2016) 14 SCC 578(2)

> charged with an offence also triable by a Court Martial, then such Magistrate shall not proceed to try that person or commit the case to the Court of Session unless he is moved thereto by a competent Army authority or the Magistrate records his opinion in writing that he should so proceed without being so moved. In the latter event, the Magistrate shall give a written notice of fifteen days to the Commanding Officer of that person and shall until then effectively stay his hands.
>
> .....
>
> **246.** The result of the interplay between Section 4 and 5 of the CrPC and Section 125 and 126 of the Army Act makes it quite clear that the decision to try a person who has committed an offence punishable under the Army Act and who is subject to the provisions of the Army Act does not always or necessarily lie only with the Army – the criminal court under CrPC could also try the alleged offender in certain circumstances in accordance with the procedure laid down by CrPC.**"**

24. The ratio thereby explains the procedure to be adopted by the Magistrate when a person subject to the Army Act is brought before a Magistrate and is charged with an offence also triable by a Court-Martial.

25. It has been the persistent endeavour of the Revisionist to convince this Court that at the stage of the pronouncement of the Judgment the matter cannot be found to be triable by Court-Martial. Photocopy of the Minute Sheet was produced before this Court rather belatedly where the GOC has allegedly accepted the recommendation put forth by one (Jiten Joshi), Lt. Col., Offg Col A' that **"***murder case be tried by the civ Court* (sic) *under relevant Section of the IPC & CrPC***"**. In the first instance, it may be stated that this document was never furnished before the Learned Trial Court. Secondly, it is only a photocopy of the document, apparently not a certified copy and not even admissible in terms of the Indian Evidence Act, 1872 thus beyond the scope of consideration. Even if this document was to be considered, there is no proof that any letter pursuant to the alleged recommendation was despatched to the Magistrate expressing the

opinion of the concerned Army authority. It is indeed luculent that the prescribed procedure as elucidated in the Cr.P.C. and the Rules both of which are extracted hereinabove were not adhered to by the Learned Magistrate. The Learned Magistrate committed the case to the Court of Sessions before being moved thereto by any competent authority pertaining to the accused.

26. That having been said it is now settled law that where the statute mandates a procedure no discretion is left with the Court but to draw the statutory conclusion. This has been succinctly laid down in ***B. Premanand and others vs. Mohan Koikal and others***[9] as follows;

> **"11**. As stated by Justice Frankfurter of the U.S. Supreme Court (see 'Of Law & Men: Papers and Addresses of Felix Frankfurter'):
>
> Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. **As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature**. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. **A judge must not rewrite a statute, neither to enlarge nor to contract it.**
>
> **Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration**. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.

[9] (2011) 4 SCC 266

12. As observed by Lord Granworth in Grundy v. Pinniger (1852) 1 LJ Ch 405:

"..... to adhere as closely as possible to the literal meaning of the words used, is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom.

13. **In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection**.

14. As the Privy Council observed (per Viscount Simonds, L.C.):

"..... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. (see Emperor v. Benoarilal Sarma AIR 1945 PC 48, pg. 53).

15. As observed by this Court in CIT v. Keshab Chandra Mandal:

"..... Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute…"

16. Where the words are unequivocal, there is no scope **for importing any rule of interpretation vide Pandian Chemicals Ltd. v.**

C.I.T. It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction (vide Narsiruddin v. Sita Ram Agarwal). Where the words of a statute are plain and unambiguous effect must be given to them (vide Bhaiji v. SDO).

.....

19. In Shiv Shakti Co-operative Housing Society v. Swaraj Developers this Court observed (SCC p 669, para 19): 19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. …

(Emphasis supplied)

27. In ***Delhi Special Police Establishment*** vs. ***Lt. Col. S. K. Loraiya*** *(supra),* the Hon'ble Supreme Court held as follows;

"5. The Central Government has framed under Section 549(1) Cr.P.C., rules which are known as the Criminal Courts and Courts Martial (Adjustment of Jurisdiction) Rules, 1952. The relevant rule for our purpose is Rule 3. It requires that when a person subject to military, naval or air force law is brought before a Magistrate on accusation of an offence for which he is liable to be tried by a court-martial also, the Magistrate shall not proceed with the case unless he is requested to do so by the appropriate military authority. He may, however, proceed with the case if he is of opinion that he should so proceed with the case without being requested by the said authority. Even in such a case, the Magistrate has to give notice to the

Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of seven days from the service of notice. The Commanding Officer may inform the Magistrate that in his opinion the accused should be tried by the Court-martial. Subsequent rules prescribe the procedure which is to be followed where the Commanding Officer has given or omitted to give such information to the magistrate.

6. It is an admitted fact in this case that the procedure specified in Rule 3 was not followed by the Special Judge, Gauhati before framing of charges against the respondent. Section 549(1), Cr.P.C., and Rule 3 under which charges were framed are mandatory. Accordingly the charges framed by the Special Judge against the respondent cannot survive. But counsel for the appellant has urged before us that in the particular circumstances of this case the respondent is not 'liable to be tried' by a Court-martial.

7. Section 122(1) of the Army Act, 1950, provides that no trial by court-martial of any person subject to the Army Act for any offence shall be commenced after the expiry of the period of three years from the date of the offence. The offences are alleged to have been committed by the respondent in November-December, 1962. So more than three years have expired from the alleged commission of the offence. It is claimed that having regard to Section 122(1), the respondent is not liable to be tried by court-martial.

28. To conclude, from the discussions which have ensued hereinabove, the procedure as envisaged by law not having been complied with, no error obtains in the impugned Order of the Learned Sessions Judge.

29. A tangential argument could arise with regard to Section 122 of the Army Act which deals with the period of limitation for trial. In ***Delhi Special Police Establishment*** vs. ***Lt. Col. S. K. Loraiya*** *(supra)* at paragraph 10, it was held as follows;

> "10. Again, sub-section (3) of Section 122 of the Army Act provides that while computing the period of three years specified in sub-section (1), any time spent by the accused as a prisoner of war or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded. On a conjoint reading of sub-sections (1) and (3) of Section 122, it is evident that the court-martial and not the ordinary criminal court has got jurisdiction to decide the issue of limitation. There is nothing on record before us to indicate that the respondent had not been evading arrest after commission of the offence. As the court-martial has initial jurisdiction to enter upon the enquiry in the case, it alone is competent to decide whether it retains jurisdiction to try the respondent in spite of sub-section(1) of Section 122. The issue of limitation is a part of the trial before it. **If the court-martial finds that the respondent cannot be tried on account of the expiry of three years from the date of the commission of the offence, he cannot go scot free. Section 127 of the Army Act provides that**

> **when a person is convicted or acquitted by a court-martial, he may, with the previous sanction of the Central Government, be tried again by an ordinary criminal court for the same offence or on the same facts. So it would be open to the Central Government to proceed against the respondent after the court-martial has recorded a finding that it cannot try him on account of the expiry of three years from the date of the commission of the offence**.
>
> **(Emphasis supplied)**

This decision should clear the air on the question of limitation.

30. This Revision Petition fails and is accordingly dismissed.

31. Copy of this Judgment along with records be sent forthwith to the Court of the Learned Chief Judicial Magistrate, East Sikkim at Gangtok, for information and requisite steps.

32. Copy of this Judgment also be forwarded to the Court of the Learned Sessions Judge, Special Division-II, for information.

SLR (2019) SIKKIM 117

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

CRP No. 01 of 2018

Shri Nar Bahadur Subba ….. PETITIONER

Versus

Shri Dhan Bahadur Rai and Another ….. RESPONDENTS

For the Petitioner: Ms. Gita Bista , Advocate (Legal Aid Counsel) with Ms. Anusha Basnet, Advocate.

For the Respondents: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri, Advocate (Legal Aid Counsel) and Ms. Malati Sharma, Advocate.

Date of decision: 8th April 2019

A. Code of Civil Procedure, 1908 – Order VII Rule 11 – Rejection of Plaint – The language of Rule 11 of the CPC, 1908 is clear and unequivocal once the Court finds that the case falls under one or more of the categories specified therein, it has no power to entertain the suit and the plaint has to be rejected.

(Para 8)

B. Code of Civil Procedure, 1908 – Order VIII Rule 6A – Counter Claim by Defendant – A Counter Claim has to be treated as a plaint and is governed by Rules applicable to plaints – Counter Claim shall have the same effect as a cross suit to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the Counter Claim – Counter Claim is substantially a cross-action not merely a defence to the Plaintiff's claim however it must be of such a nature that the Court would have jurisdiction to entertain it as a separate action.

(Para 9)

Petition dismissed.

Chronological list of cases cited:

1. I.T.C. Ltd. v. Shri Krishna Moktan and Others, AIR 1992 Sikkim 1.
2. Jag Mohan Chawla and Another v. Dera Radha Swami Satsang and Others, AIR 2006 SC 1828.
3. Mayar (H.K.) Ltd. and Others v. Owners & Parties, Vessel M.V. Fortune Express and Others, (1996) 4 SCC 699.
4. Mohan Lal and Others v. Bhawani Shanker and Another, AIR 2002 Rajasthan 144.
5. Datta Bandu Sadale and Others v. Sridhar Payagonda Patil and Others, AIR 1992 Bombay 422.
6. The Church of Christ Charitable Trust & Educational Charitable Society, Represented by its Chairman v. M/s Ponniamman Educational Trust, Represented by its Chairperson/Managing Trustee, (2012) SCCR 700.
7. P.V. Guru Raj Reddy and Another v. P. Neeradha Reddy and Others, AIR 2015 SC 2485.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner, the Plaintiff before the learned trial Court, (hereinafter "Petitioner"), filed an application under Order VII Rule 11(a) read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC, 1908"), before the said Court praying that the Counter Claim of the Respondents No. 1 and 2, the Defendants No. 1 and 2 before the learned trial Court (hereinafter "Respondents No. 1 and 2"), be rejected as it did not disclose a cause of action. The learned trial Court, on hearing submissions on both sides, passed the impugned Order dated 12.05.2017 rejecting the prayer of the Petitioner, who is consequently before this Court praying that the impugned Order be set aside.

2. The facts of the case may briefly be traversed for clarity on the issue.

3. The Petitioner filed a suit for declaration of title, eviction, recovery of possession and other consequential reliefs against the Respondents No. 1

and 2. The Petitioner's case *inter alia* is that, he is the absolute owner of the landed property at Sirwani Block, East Sikkim being Plot No.143, 145, 146 and 147 as per the Survey Operations of 1950-52 and renumbered as Plot No.220, 225, 226 and 228 respectively, as per the Survey Operations of 1979-80. The Respondent No. 2 is the Petitioner's blood sister and the Respondent No. 1 is his brother-in-law, having married the Respondent No. 2 in the year 1957-58. They were residing on a plot of land gifted to her by her father. The Petitioner's parents having passed away early in his life, his paternal uncle raised him till the year 1971-72. The same year i.e. 1971-72, the Respondent No. 2 sold out the plot of land gifted to her, to the Forest Department, Government of Sikkim and received compensation. Both Respondents then returned to the house of the Petitioner on Plot No.220. The Petitioner got married in 1998 and in 2003, shifted with his family to a house constructed by him on Plot No.225 and 226. The Respondents continued to remain on Plot No.220. Before shifting house from Plot No.220, an Agreement *"Bandobast Kagaz"* Annexure P-3 was drawn between the Petitioner and the Respondents in the presence of witnesses by which it was agreed that the Respondent No. 1 would construct a house for the Petitioner on the Petitioner's land. The Respondent No. 1 failed to do so. On such failure, the Petitioner perforce had to sell a piece of land from Plot No.225 to one Phigu Bhutia and utilize the money for constructing his house. Vide the same *"Bandobast Kagaz"* Annexure P-3 the Petitioner had also agreed to gift a "piece" of land from Plot No.220 to the Respondent No. 1. Taking advantage of this document, the Respondent No. 1 transferred the entire Plot No.220 in his name which the Petitioner came to learn of only in January, 2013 when the Respondents No. 1 and 2 started constructing an RCC building over Plot No.220. The transfer allegedly had been effected in the year 2001 itself. The Petitioner therefore prayed for the reliefs reflected in Paragraph 19 of the Plaint.

4. The Respondents No. 1 and 2 filed their Written Statement denying and disputing the averments made in the plaint along with a Counter Claim avering that Plot No.225 was given to the Respondent No. 2 as *"daijo"* (dowry), vide *"Daijo ko Kagaz"* Annexure P-9, dated 24.01.1998 by the Petitioner in lieu of Plot No.282, which had earlier been given to her by her father as *"daijo"* (dowry) but was destroyed by a landslide in the year 1986. After the death of their father, on agreement with the Petitioner and Respondent No. 2, the plot was taken away by the Public Works Department, Government of Sikkim. The Respondents further claim that the

Petitioner is required to hand over possession of Plot No.225 or in the event of the land having been sold by him, consideration money received for the said land.

5. Ms. Gita Bista forwarding her arguments for the Petitioner contended that the question of handing over Plot No.225 in lieu of Plot No.282 does not arise. That the document Annexure P-9 allegedly prepared on 24.01.1998 between the Petitioner and the Respondents pertains to Plot No.220 and not Plot No.225. That Section 123 of the Transfer of Property Act requires that where a gift of immovable property is made, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses and delivered which is absent in the said document. That, further the Petitioner has been injuncted from selling land from Plot No.225 on the objection of the Respondents and their sons with the caveat that the land should not be sold out till the Petitioner's son attains the age of thirty years. Although the Petitioner had sold more than twelve pieces of land from Plot No.225 and 226 prior to the instant suit, no objection till then had been raised. It was further contended that by allowing the Counter Claim without there being any cause of action, the Petitioner has been deprived of his right to property guaranteed under Article 300A of the Constitution. Hence, the impugned Order be set aside. To buttress her submissions learned Counsel relied on ***I.T.C. Ltd., vs. Shri Krishna Moktan and others***[1].

6. Learned Senior Advocate for the Respondents No. 1 and 2 contended that the *"Daijo ko Kagaz"* dated 24.01.1998 (Annexure P-9) delineates the boundaries of the property which is in fact plot No.225 and was given to the Respondent No. 2 as *"daijo"* (dowry) in lieu of land given to her by her late father. That nothing prevents him from filing the Counter Claim in the nature of a cross-suit since the Petitioner is required to hand over the property to the Respondent No. 2. To support his contentions, learned Counsel relied on ***Jag Mohan Chawla and Another vs. Dera Radha Swami Satsang and Other***[s2] and ***Mayar (H.K.) Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors.***[3].

7. I have heard the contentions of learned Counsel at length and I have also perused the impugned order.

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[1] AIR 1992 Sikkim 1
[2] (1996) 4 Supreme Court Cases 699
[3] AIR 2006 Supreme Court 1828

8. Firstly, it must be pointed out that, whether a gift of immovable property is to be effected by a registered instrument and whether an injunction was granted by the learned trial Court from selling land from Plot No.225, raised by learned Counsel for the Petitioner in the instant petition, are to be tested on merits. The prayers of the Petitioner at "b" in the instant petition extracted hereinbelow also clearly reveals as follows;

> *".....*
> *b. after hearing the parties and upon perusal of the records to kindly set aside the order dated 12.05.2017. ....."*

Consequently, this Court is only concerned with the limited issue as to whether the Counter Claim ought to have been rejected by the learned trial Court. In this context, we may pertinently refer to Order VII Rule 11 of the CPC, 1908 which deals with rejection of plaint and reads as follows;

> "**11. Rejection of plaint.** – The plaint shall be rejected in the following cases:-
> (a) where it does not disclose a cause of action;
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
> (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
> (d) where the suit appears from the statement in the plaint to be barred by any law;
> (e) where it is not filed in duplicate;
> (f) where the plaintiff fails to comply with the provisions of rule 9:
> [Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied

that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

The relevant provision relied on by learned Counsel for the Petitioner is Order VII Rule 11(a) of the CPC, 1908. The language of Rule 11 of the CPC, 1908 is clear and unequivocal once the Court finds that the case falls under one or more of the categories specified therein, it has no power to entertain the suit and the plaint has to be rejected.

9. Counter Claim is elucidated in Order VIII Rule 6A of the CPC, 1908 which reads as follows;

"**6A**. **Counter-claim by defendant.-** (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter- claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

> (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

A Counter Claim has to be treated as a plaint and is governed by Rules applicable to plaints. The provision extracted hereinabove clearly lays down that the Counter Claim shall have the same effect as a cross suit to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the Counter Claim. Thus, a Counter Claim is substantially a cross-action not merely a defence to the Plaintiff's claim however it must be of such a nature that the Court would have jurisdiction to entertain it as a separate action. There is no challenge to the jurisdiction in the instant petition.

10. In ***Mohan Lal and others vs. Bhawani Shanker and another***[4] it was held that the rights granted to the Defendants to set up Counter Claim are not only limited to the claim put forth by the Plaintiff in a suit itself and even the cause of action need not be the same, there is nothing in Order VIII Rule 6 or Rule 6A of the CPC, 1908 restricting the nature of relief which the Defendants might seek in the Counter Claim. A Counter Claim is thus, on pain of repetition, to be treated as a plaint as is clearly elucidated in this provision and is governed by the Rules applicable to plaints. The essence of a Counter Claim is that the Defendant should have an independent cause of action in the nature of a cross-action and not merely a defence to the Plaintiff's claim. The restriction however is that the cause of action must have arisen before the Defendant delivers his defence or before the time limited for delivering his defence has expired. Further, in ***Datta Bandu Sadale and others vs. Sridhar Payagonda Patil and others***[5], it was held that there is no requirement that the Counter Claim must be of the same nature as the claim of the Plaintiff or that it must be arising out of the same transaction. I am in respectful agreement with the observations in the two ratio *supra.*

11. Merely because the Respondents No. 1 and 2 have made a claim for Plot No.225 the question of the Petitioner being deprived of his right to property as guaranteed under Article 300A of the Constitution does not arise. The parties are at liberty to furnish their respective documents as

[4] AIR 2002 Rajasthan 144
[5] AIR 1992 Bombay 422

evidence and documents are to be tested in terms of the Indian Evidence Act, 1872 as proof of the ownership or otherwise of either of the parties. It is only thereafter that the Court will reach a finding.

12. It would indeed be relevant to discuss what cause of action is. In ***The Church of Christ Charitable Trust & Educational Charitable Society, Represented by its Chairman vs. M/s Ponniamman Educational Trust, Represented by its Chairperson/Managing Trustee***[6]**,** it was held *inter alia* as follows;

> "8……..…….The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such act no cause of action could possibly accrue.
>
> 9. In A.B.C. Laminart Pvt. Ltd. and another vs. A.P. Agencies, Salem, (1989) 2 SCC 163, this Court explained the meaning of "cause of action" as follows:
>
> "12. A cause of action means every fact, which if traversed, it would be necessary for the CRP No. 7 of 2016 5 Shri Rinzing Wangyal Bhutia & Another vs. Shri Wangchuk Bhutia & Others plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable

[6] (2012) SCCR 700

> him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

On the anvil of the aforestated decision and in view of the facts set forth in the Counter Claim, the question of the pleadings being devoid of cause of action is uncalled for.

13. In ***P.V. Guru Raj Reddy & Another vs. P. Neeradha Reddy and others***[7] it was held that the rejection of a plaint under Order VII Rule 11 of the CPC, 1908 is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11, therefore, are stringent and have been consistently held to be so by the Hon'ble Apex Court. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims have to be adjudicated.

14. In view of the foregoing discussions and the provisions of law extracted hereinabove, I am of the considered opinion that the Respondents No. 1 and 2 have not erred by filing a Counter Claim with the averments made therein. They are well within their rights as laid down in Order VIII Rule 6A of the CPC, 1908. The finding of the learned trial Court in the impugned order warrants no interference.

15. No observations have been made on the merits of the case which shall be decided at the time of trial, needless to add uninfluenced by the observations made herein.

16. Accordingly the Revision Petition is rejected and dismissed.

17. Copy of this order be sent to the learned trial Court and records be remitted forthwith.

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[7] AIR 2015 Supreme Court 2485

SLR (2019) SIKKIM 126
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

MAC App. No. 01 of 2018

The Branch Manager,
Reliance General Insurance Co. Ltd. ….. APPELLANT

Versus

Sa-Ngor Chotshog Centre and Another ….. RESPONDENTS

For the Appellant: Mr. Manish Kumar Jain, Advocate.

For Respondent No.1: Mr. Ajay Rathi, Mr. Deepu Prasad and Ms. Phurba Diki Sherpa, Advocates.

For Respondent No.2: None

Date of decision: 10th April 2019

A. Motor Accidents Claims – Standard of Proof – In a criminal trial the matter is to be proved beyond a reasonable doubt, however this is not the standard required while considering a matter before the Motor Accidents Claims Tribunal – It is a settled position of law that a conviction recorded by a Criminal Court is enough to hold that the driver had driven the vehicle rashly and negligently but his acquittal on the other hand would be no ground to dismiss the claim petition.

(Para 10)

Appeal partially allowed.

Chronological list of cases cited:

1. Montford Brothers of St. Gabriel and Another v. United India Insurance and Another, (2014) 3 SCC 394.
2. N.K.V. Bros. (P) Ltd. v. M. Karumai Ammal and Others, (1980) 3 SCC 457.

3. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.

4. National Insurance Company Limited vs. Pranay Sethi and Others, AIR 2017 SC 5157.

JUDGMENT

Meenakshi Madan Rai, J

1. Assailing the award granted by the learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok (for short 'learned Tribunal') in MACT Case No. 14 of 2016 (Sa-Ngor Chotshog Centre vs. Mrs. Karuna Chettri & Anr.), the instant Appeal has been preferred. The learned Tribunal awarded compensation amounting to Rs.15,02,500/- (Rupees fifteen lakhs, two thousand and five hundred) only, to the Respondent No. 1, on account of the death of Tamding Wangchuk (hereinafter 'deceased'), having reached a finding that the cause of accident was due to the rash and negligent act of the driver one Nirmal Chettri, and that the Respondent No. 1 was the legal representative of the deceased.

2. The Respondent No. 1 herein was the Claimant (hereinafter 'Respondent No. 1 Centre') and Respondent No. 2 was the Opposite Party No. 1 before the learned Tribunal. The Appellant herein was the Opposite Party No. 2 before the learned Tribunal. Parties shall be referred to in their order of appearance before this Court.

3. The facts which have led to the instant Appeal are that the deceased aged about 32 years, was a permanent resident of the Respondent No. 1 Centre, a monastic institution and a study centre under the Shakya clan of Buddhism in Gangtok, East Sikkim. He had renounced the world having severed all ties with his family since the age of nine, was working as a Teacher at the Respondent No. 1 Centre and earning a monthly salary of Rs.10,000/- (Rupees ten thousand) only. On 20.08.2012, the deceased was travelling in vehicle bearing Registration No. WB-76-4625 (Tata Spacio), driven by one Nirmal Chettri, which met with an accident at Hanuman Jhora under the jurisdiction of Kalimpong Police Station, District Darjeeling, West Bengal, at around 20:00 Hrs. On 21.08.2012, the deceased succumbed to his injuries in a Hospital in Kalimpong. One Jiten Chettri lodged the First

Information Report pertaining to the accident on 21.08.2012 at 7.15 Hrs at Reang Police Post, under Kalimpong Police Station where a case under Sections 279, 337, 338, 304A of the Indian Penal Code, 1860 (for short 'IPC, 180') was registered against the driver of the vehicle. The body of the deceased, on completion of inquest and post mortem examination was handed over to the Manager of the Claimant Centre for the last rites. The cause of accident was, as per witnesses, due to the rash and negligent driving of the driver Nirmal Chettri. The Respondent No. 1 Centre thus sought compensation of Rs.21,42,500/- (Rupees twenty one lakhs, forty two thousand and five hundred) only, claiming to have suffered a major setback by losing an eminent scholar.

4. The Appellant denied and disputed the claim of the Respondent No. 1 Centre on grounds that the deceased had no relation with the Respondent No. 1 Centre and was not dependent on his alleged income of Rs.10,000/- (Rupees ten thousand) only, per month. Besides his needs were provided by the Respondent No. 1 Centre of which he was a spiritual head but never a Teacher. That, the parents of the deceased were not impleaded as parties, hence the claim petition suffers from mis-joinder and non-joinder of parties over and above which the rash and negligent driving could not be established as apparent from the Judgment of acquittal rendered by the Court of the learned Additional Chief Judicial Magistrate, Kalimpong in G.R. Case No. 126 of 2012 (State vs. Nirmal Chettri). That the documents are manufactured and fabricated for the purposes of the case, hence, the claim petition was liable to be dismissed.

5. The Respondent No. 2 the owner of the vehicle, in her Written Objection before the learned trial Court averred that although the cause of accident has been shown to be due to the rash and negligent act of the driver, however the driver was in fact acquitted in the criminal case registered against him, therefore rash and negligent driving has remained unproved. That, at the time of the accident, the documents pertaining to the vehicle were valid as also the Insurance Certificate, the terms of which were not violated, hence the Opposite Party No. 1 had no liability.

6. The learned Tribunal framed a single issue which is extracted as follows;

> "Whether the Claimant is entitled to the compensation claimed? If so, who is liable to compensate him?"

The learned Tribunal then pronounced the impugned Judgment based on the evidence and documents furnished before it.

7. Learned Counsel for the Appellant before this Court, reiterated the argument pertaining to non-joinder of necessary parties as the legal representatives of the deceased being his parents, were not added as parties. That, rash and negligent act of the driver is unestablished, besides the Respondent No. 1 Centre failed to show dependency on the deceased. That, the compensation awarded was exorbitant without application of mind by the learned Tribunal and hence on these grounds alone, the claim petition deserved to be dismissed.

8. *Per contra,* learned Counsel Mr. Ajay Rathi for the Respondent No. 1 Centre, while relying on the decision of ***Montford Brothers of St. Gabriel and Another vs. United India Insurance and Another***[1], contended that the Hon'ble Supreme Court has clarified who a „legal representative is. That, in terms thereof the Respondent No. 1 Centre is well within the ambit of 'legal representative' hence the question of impleading the parents as parties did not arise as the deceased had severed all ties with his family. That, no error arises in the calculation of compensation, therefore the impugned Judgment warrants no interference.

9. I have heard *in extenso* and considered the rival submissions of learned Counsel for the parties. I have also perused the impugned Judgment including the documents and evidence on record.

10. Taking up the first question with regard to rash and negligent driving, it was the contention of both the Appellant and the Respondent No. 2 that the criminal case registered against the driver had resulted in an acquittal, hence the question of rash and negligent driving did not arise. It would be appropriate to state here that in a criminal trial the matter is to be proved beyond a reasonable doubt, however this is not the standard required while considering a matter before the Motor Accidents Claims Tribunal. On this

[1] (2014) 3 SCC 394

question, we may refer to the decision of the Honble Supreme Court in ***N.K.V. Bros. (P) Ltd. vs. M. Karumai Ammal and Others***[2], wherein it was held as follows;

> **"2.** *The Facts:* A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an overhanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal, which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly: several lost their limbs likewise. The High Court, after examining the materials, concluded:
>
> We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of RW 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant.
>
> The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirement of culpable rashness under Section 304-A IPC is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to reopen the holdings on culpability and compensation.

[2] (1980) 3 SCC 457

Thus it is a settled position of law that a conviction recorded by a Criminal Court is enough to hold that the driver had driven the vehicle rashly and negligently but his acquittal on the other hand would be no ground to dismiss the claim petition.

11. The witness for the Respondent No. 1 Centre, Jamyang Sangpo Bhutia, as pointed out by the learned Tribunal at Paragraph 6 of his Evidence-on-Affidavit Exhibit 10, stated that the *cause of accident was the rash and negligent act of the accused driver, Mr. Nirmal Chettri as he was driving the vehicle rashly and negligently.* No cross-examination despite opportunity given was conducted on this point. Therefore, there is no reason for this Court to differ with the finding of the learned Tribunal.

12. So far as the question of "legal representative" is concerned, it is evident that nothing emerged in crossexamination to demolish the claim of the witness for the Respondent No. 1 Centre that they were the legal representatives of the deceased. In ***Montford Brothers of St. Gabriel and Another*** *(supra),* the Appellant No. 1 i.e. the Montford Brothers of St. Gabriel was a charitable society registered under the Societies Registration Act, 1960 and its members after joining the Appellant Society renounce the world and are known as "Brother." That, such a "Brother" severs all his relations with the natural family and is bound by the constitution of the Society. The constitution of the Society provides that whatever the "Brother" receives by way of salary, subsidies, gifts, pension or from insurance or other such benefits belongs to the community as by right and goes into the common purse. The Honble Supreme Court while discussing what a "legal representative" means also held that before the learned Motor Accidents Claims Tribunal there was no evidence in support of such pleading that the Claimant is not a legal representative and therefore the claim petition be dismissed as not maintainable. The Appellant No. 1 Society, through its duly authorized agent Appellant No. 2 claimed compensation under the Motor Vehicles Act, 1988 in relation to the death of the said member of the Society in the accident. The Motor Accidents Claims Tribunal awarded compensation to the Claimant. In a Writ Petition under Article 227 of the Constitution of India, the Honble High Court set aside the order of the learned Tribunal. The Honble Supreme Court, while upholding the order of the Motor Accidents Claims Tribunal discussed what a "legal representative" would mean as follows;

"9. The Act does not define the term "legal representative" but the Tribunal has noted in its judgment and order that clause (*c*) of Rule 2 of the Mizoram Motor Accidents Claims Tribunal Rules, 1988, defines the term "legal representative" as having the same meaning as assigned to it in clause (11) of Section 2 of the Code of Civil Procedure, 1908, which is as follows:

"**2. (11) 'legal representative'** means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"

10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue.

11. The learned counsel for the Insurance Company tried to persuade us that since the term "legal representative" has not been defined under the Act, the provisions of Section 1-A of the Fatal Accidents Act, 1855, should be taken as guiding principle and the claim should be confined only for

the benefit of wife, husband, parent and child, if any, of the person whose death has been caused by the accident. In this context, he cited the judgment of this Court in *Gujarat SRTC v. Ramanbhai Prabhatbhai* [AIR 1987 SC 1690]. In that case, covered by the Motor Vehicles Act, 1939, the claimant was a brother of a deceased killed in a motor vehicle accident. The Court rejected the contention of the appellant that since the term "legal representative" is not defined under the Motor Vehicles Act, the right of filing the claim should be controlled by the provisions of the Fatal Accidents Act. It was specifically held that the Motor Vehicles Act creates new and enlarged right for filing an application for compensation and such right cannot be hedged in by the limitations on an action under the Fatal Accidents Act.

12. Para 13 of the Report of *Gujarat SRTC case* reflects the correct philosophy which should guide the courts interpreting the legal provisions of beneficial legislations providing for compensation to those who had suffered loss: (SCC p. 250)

"*13*. We feel that the view taken by the Gujarat High Court is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society. Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Sections 110-A to 110-F of the Act. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in Section 110-B of the Act and to specify the person or persons to whom compensation shall be paid. The determination of the compensation

payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers' children and some times foster children live together and they are dependent upon the breadwinner of the family and if the breadwinner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in *Megjibhai Khimji Vira* v. *Chaturbhai Taljabhai* [2 AIR 1977 Guj 195] and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

13. From the aforesaid quoted extract it is evident that only if there is a justification in consonance with principles of justice, equity and good conscience, a dependant of the deceased may be denied right to claim compensation. Hence, we find no merit in the submission advanced on behalf of the respondent Insurance Company that the claim petition is not maintainable because of the provisions of the Fatal Accidents Act."

(Emphasis supplied)

The ratio *supra* puts to rest any doubts raised on „legal representative. On careful perusal of the pleadings before the learned Tribunal all that the Appellant has stated is that;

> "3. ... The claimants being a institution *(sic)* is not dependent upon the income of the deceased, further the deceased was a earning *(sic)* member but a spiritual head at the institution. That as there is no dependency upon the income the claim petition cannot sustain on its present form and as such there is no loss of dependency.
>
> .
>
> .....
>
> 27. ... The statement that the deceased had renounced the world and severed all the relationship with his parents since the age of 9 years and was staying with the petitioner, a monastic institution and a study center for Buddhist scholars of shakya clan in Gangtok is totally false and hence denied in total. The statement and averments are contrary to the legal representative as defined in the motor vehicles act. ..."

Besides the Appellant was not able to establish that the parents had any links with the deceased or were dependent upon him. The Appellant also failed to lead any evidence to disprove the contention of the Respondent No. 1 Centre that the deceased had renounced all ties with his family and consequently they were the legal representatives of the deceased. Hence, in consideration of the facts *supra* the finding of the learned Tribunal on this count cannot be faulted.

13. Coming to the question of compensation, the deceased was aged about 32 years, therefore the Multiplier of "16" was rightly adopted in consonance with the decision in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[3].

14. The learned Tribunal has granted 50% of monthly income while computing future prospects, on this point, in ***National Insurance Company Limited vs. Pranay Sethi & Ors.***[4], it was held as follows;

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[3] (2009) 6 SCC 121
[4] AIR 2017 SC 5157

"59.1. The two-Judge Bench in *Santosh Devi* [*Santosh Devi* v. *National Insurance Co. Ltd.*, (2012) 6 SCC 421] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in *Sarla Verma* [*Sarla Verma* v. *DTC*, (2009) 6 SCC 121] , a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.2. As *Rajesh* [*Rajesh* v. *Rajbir Singh*, (2013) 9 SCC 54] has not taken note of the decision in *Reshma Kumari* [*Reshma Kumari* v. *Madan Mohan*, (2013) 9 SCC 65] , which was delivered at earlier point of time, the decision in *Rajesh* [*Rajesh* v. *Rajbir Singh*, (2013) 9 SCC 54] is not a binding precedent.

59.4. In case the deceased was selfemployed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the

> necessary method of computation. The established income means the income minus the tax component."
>
> (Emphasis supplied)

Hence, in view of the ratio of the Honble Supreme Court in ***Pranay Sethi's*** case *supra*, it is evident that where the deceased was on a fixed salary and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects. Exhibit 4 relied on by the Respondent No. 1 Centre reveals that the deceased was on a consolidated pay of Rs.10,000/- (Rupees ten thousand) only, per month. Thus, 40% shall be calculated as future prospects instead of 50% as calculated by the learned Tribunal.

15. So far as loss of estate and funeral expenses are concerned, the Honble Supreme Court in ***Pranay Sethi*** *(supra)* at Paragraph 59.8, *inter alia* held as follows;

> **"59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively.** ..."
>
> (Emphasis supplied)

In view of the aforecited Judgment, Rs.15,000/- (Rupees fifteen thousand) only, is granted towards funeral expenses and a sum of Rs.15,000/- (Rupees fifteen thousand) only, granted towards loss of estate.

16. With regard to the amount of Rs.10,000/- (Rupees ten thousand) only, having been granted towards "Cost of transportation of the victim to the Hospital and the body of the victim from Central Referral Hospital, Manipal to Zitlang, Rangpo, East Sikkim" is concerned, apart from the statement made by witness for the Respondent No. 1 Centre Jamyang Sangpo Bhutia at Paragraph 9 of his Evidence-on-Affidavit Exhibit 10 to the effect that the *dead body of the deceased was then handed over to me for last rites and subsequently the Sub-Registrar of Births and Deaths, Executive Assistant, Teesta Gram Panchayat issued the Death Certificate of the deceased to me*, no documents have been furnished to

support the claim of the witness towards payment of transportation. Therefore, the Respondent No. 1 Centre is not entitled to compensation towards "cost of transportation."

17. The question of compensation on account of loss of love and affection as granted by the learned Tribunal, in view of the circumstance is superfluous, hence the Respondent No. 1 Centre is not entitled to compensation towards loss of love and affection.

18. In conclusion, in light of the above discussions and findings, the compensation stands re-calculated and modified, as follows;

Monthly Income of the deceased	Rs.10,000.00
Annual Income of the deceased (Rs.10,000x12)	Rs.1,20,000.00
Add 40% of Rs.1,20,000.00 as future prospects	Rs.48,000.00
Yearly income of the deceased	Rs.1,68,000.00
Less 1/2 of Rs.1,68,000.00 [deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	Rs.84,000.00
Net yearly income	Rs.84,000.00
Multiplier of **'16'** adopted in terms of ***Sarla Verma's case (supra)*** (Rs.84,000 x 16)	Rs.13,44,000.00
Add Funeral expenses	Rs.15,000.00
Add Loss of estate	Rs.15,000.00
Total	**Rs.13,74,000.00**

(Rupees thirteen lakhs and seventy four thousand) only.

19. The Respondent No. 1 Centre shall be entitled to simple interest @ 9% per annum on the above amount, with effect from the date of filing of the Claim Petition before the learned Tribunal, until its full realisation.

20. The Appellant is directed to pay the awarded amount to the Respondent No. 1 Centre within one month from today, failing which, the

Appellant shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition till realisation, duly deducting the amounts, if any, already paid by the Appellant to the Respondent No. 1 Centre.

21. Appeal allowed to the extent above.

22. No order as to costs.

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

24. Records of the learned Tribunal be remitted forthwith.

SLR (2019) SIKKIM 140

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

Crl. A. No. 16 of 2018

State of Sikkim ….. **APPELLANT**

Versus

Kamal Subba ….. **RESPONDENT**

For the Appellant: Mr. J.B. Pradhan, Public Prosecutor, Mr. Karma Thinlay Namgyal with Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors and Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

For the Respondent: Mr. Tashi R. Barfungpa, Advocate (Legal Aid Counsel) with Mr. Ugang Lepcha, Advocate.

Date of decision: 10th April 2019

A. Code of Criminal Procedure, 1973 – S. 164 – Evidence under Section 164 Cr.P.C. is not substantial evidence, it can only be used for the purposes of corroboration.

(Para 9)

B. Indian Evidence Act, 1872 – S. 106 – Burden of proving fact especially within knowledge – This provision is not intended to relieve any person of the duty or burden cast on them under S. 101 of the Evidence Act. S. 106 cannot be used to shift the onus. This Section applies only when the defence of the accused depends on his proving the fact established within his knowledge and of nobody else. The Prosecution has to prove its case beyond a reasonable doubt before they can take shelter under the provisions of S. 106.

(Para 11)

Appeal dismissed.

Case cited:

1. R. Shaji vs. State of Kerala, (2013) 14 SCC 266

JUDGMENT

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

1. Dissatisfied with the Judgment of acquittal, the State/Appellant *(hereinafter the "Appellant")* is before this Court praying that the impugned Judgment dated 30.06.2017 of the learned Sessions Judge, East at Gangtok in Sessions Trial Case No. 28 of 2015 (State vs. Kamal Subba), be set aside. The learned trial Court had acquitted the Respondent/ Accused *(hereinafter the "accused")* of the charge under Section 304 of the Indian Penal Code, 1860 *(hereinafter the "IPC").*

2. Forwarding his arguments for the State, Learned Additional Public Prosecutor would submit that the evidence of P.W.1 Dhan Kumari Rai, wife of the deceased Bhakta Bahadur Rai, reveals that the accused had in fact two days prior to the date of the incident gone to the house of the deceased and threatened to kill him. It was also in her evidence that the accused used to quarrel and fight with her husband often. That, the investigation of P.W.14, S.I. Tshering D. Bhutia, the Investigating Officer *(for short "I.O.")* clearly indicates that a scuffle had ensued between the accused and the deceased en route to their house on which the accused had pushed the deceased off the road into the culvert below resulting in his death. That, the evidence of P.W.9, Police Inspector, Sonam Wangdi Bhutia, was duly supported by the evidence of P.W.8, Assistant Sub Inspector, C.D. Subba and P.W.14, I.O. concluding that the accused was responsible for the death of the deceased. That, the evidence of P.W.12, Raj Bahadur Subba and P.W.13, Dhan Maya Subba, who are husband and wife, reveals that the accused had helped them plough their field for paddy cultivation on the relevant day. That, in the evening the deceased and accused came to the residence of P.W.12 where they shared food and some alcohol. Thereafter both the deceased and the accused left his residence together on the relevant night. P.W.13 has supported the evidence of P.W.12. The next morning the body of the deceased was discovered at the *"kholcha"* (culvert). That, the "last seen theory" comes into play here as P.W.12 and P.W.13 have both deposed that the accused and the deceased left their house together. That, the Statement of the accused under Section 164 of the

Code of Criminal Procedure, 1973 *(for short "Cr.P.C.")* reveals that he was responsible for the death of the deceased. Relying on the provisions of Section 106 of the Indian Evidence Act, 1872 *(for short "Evidence Act")* it was contended that the burden of proving his whereabouts at the relevant time as per this provision lies on the accused which he has failed to discharge, hence the matter ought not to have ended in an acquittal. That, in view of the arguments put forth, the Judgment of acquittal be set aside.

3. Learned Counsel for the accused would submit that the Appellant in the first instance has failed to prove its case beyond a reasonable doubt. No proof whatsoever emanates from the evidence of the Prosecution Witnesses that the accused was responsible for the death of the deceased. That, reliance on the evidence of P.W.8 serves no purpose as it is his conclusion based on investigation done by him after the U.D. Case was endorsed to him but the conclusion has been arrived at without any proof whatsoever. That, invoking Section 106 of the Evidence Act is of no assistance to the Appellant as in the first instance the Prosecution is required to prove its case beyond a reasonable doubt. That, Statement recorded under Section 164 Cr.P.C. can only be utilized for the purpose of corroboration and the evidence of none of the witnesses throws light on the Prosecution case. It concludes that the Judgment of the learned trial Court warrants no interference as there can be no moral conviction and suspicion cannot take the place of proof, besides which no motive has been imputed on the accused.

4. We have carefully heard the rival contentions placed by Learned Counsel *in extenso* and given it due consideration. We have also carefully perused all documents on record and the impugned Judgment.

5. In order to gauge the correct circumstances it would be essential to briefly advert to the facts of the case.

6. On 14.07.2015, P.W.8 lodged FIR Exhibit 11, to the effect that during the investigation of Singtam P.S. U.D. Case No. 18 of 2015, dated 12.07.2015, under Section 174 of the Cr.P.C. pertaining to the death of one Bhakta Bahadur Rai, it was revealed that the deceased had been ploughing the field of Raj Bahadur Subba (P.W.12) on 11.07.2015 and 12.07.2015. After completing the day's work he went to the house of P.W.12 along with the accused and drank locally brewed alcohol. Thereafter

at around 21:30 Hrs, both the deceased and the accused left together for their respective houses in a drunken state. On the way back a scuffle ensued between the two of them where the accused pushed the deceased from the edge of the road to the culvert below resulting in the death of Bhakta Bahadur Rai. Based on this complaint, Singtam P.S. Case No. 51 of 2015, dated 14.07.2015, under Section 304 of the IPC was registered and endorsed to the I.O. P.W.14 for investigation. The I.O. during investigation reached the same conclusion as P.W.8 upon which Charge-Sheet came to be filed against the accused under Section 304 IPC read with Section 14 of the Foreigner's Act, 1946. The learned trial Court framed charge against the accused under Section 304 IPC to which he entered a plea of "not guilty," consequent upon which fourteen Prosecution Witnesses were examined. The accused was afforded an opportunity to explain the circumstances appearing against him in the evidence as provided by Section 313 Cr.P.C. to which he responded that he was unaware of the incident and that he was innocent. The learned trial Court considered all evidence on record and reached the finding of innocence of the accused and acquitted him of the offence charged with, which is thus being assailed herein.

7. On careful perusal of the evidence of the Prosecution Witnesses it is evident that only P.W.1, the wife of the deceased, has tried to implicate the accused in the incident. Her statement is to the effect that, *"At that time, I saw the accused proceeding towards the paddy field of his brother carrying a kodali (agricultural equipment) with him. I confronted the accused with the information given to me by Kunti Babu regarding my husband having returned back from his house along with him and enquired from him about the whereabouts of my husband. The accused left the place abruptly and proceeded towards the residence of our landlord Narayan Sardar."* It is the Prosecution case that this witness had specifically stated that "*The accused had come near my house about two days before the incident in a drunken state. He was swearing that he would kill my husband. We had finished planting the paddy on that day. Two days later, the incident occurred. The accused used to quarrel and fight with my husband often."* In the first instance, it would also be relevant to notice that P.W.1 has not stated as to why her husband and the accused had recurrent quarrels and why he would threaten to kill her husband. It is apparent that she has made this allegation only because "Kunti Babu" had told her that her husband had returned on the previous evening from his house along with the accused. Merely because the accused

chose not to communicate with her when she approached him with a query does not mean that he was guilty of the offence or that the offence can be foisted on him. That apart, none of the other Prosecution Witnesses have supported the Prosecution case.

8. P.W.2, Passang Lepcha, could shed no light on the incident and he also could not identify who the deceased was. P.W.3, Mitrawati Bhattarai, the wife of P.W.4, Narayan Prasad Bhattarai, has stated that she and P.W.4 came to know about the death of the deceased from P.W.12, the elder brother of the accused, on the day following the evening that the deceased had gone missing from his residence. This witness was also unable to shed light on which date exactly the deceased was missing from his house. That, the accused also had in fact come to their house i.e. of P.W.3 and P.W.4 and told them that the deceased was found lying in the *"kholcha"* (culvert) below the road at Samdong. That, upon such information, P.W.4 went to the place of occurrence to verify the matter. P.W.4 also stated that on 14.07.2015 the accused came to his residence at around 8.30 a.m. to 9 a.m. and informed him that the deceased had been missing since the previous evening. At the same time the elder brother of the accused arrived at the house of P.W.4 and reported that the dead body of the deceased was found at *"Guay Kholcha"* not far from the house of P.W.4. Thereafter he informed P.W.5, Dheraj Bhattarai, member of the Panchayat of Samdung- Kambal GPU. This evidence was duly substantiated by P.W.5 who, for his part informed the Makha Out Post about the sighting of the body at *"Guay Kholcha"* and then he went to the place of occurrence. P.W.6, Dr. Sandhya Rai, who conducted the post mortem examination of the deceased found the following injuries;

> "Post mortem examination of the deceased revealed the following:
>
> 1. There was cut injury on the scalp-Occipitoparietal region of the skull. The underlying skull was fractured. Length and depth of the cut was 2x1 inches.
>
> 2. Fracture of right humerus-upper 1/3 with displacement.
>
> 3. Fracture of left lower 1/3 femur.
>
> 4. Cut injury over right forehead measuring around 1x2 inches just above right eyebrow.

5. Cut injury 1 inch long along the line of left eyebrow."

In her opinion, the cause of death was *due to head injury (massive intra cranial haemorrhage) with multiple long bone fractures. That, such injuries could occur when a person is assaulted by a group of men, by a fall from a height and in a motor accident.* The accused was also examined by P.W.6 whereupon she found no recent or fresh injury visible externally on the person of the accused, thereby in our considered opinion this rules out a scuffle between the accused and the deceased. As is well established, the evidence of a Doctor is an opinion and from what P.W.6 has stated nothing emerges to establish that the death of the deceased was the result of a scuffle.

9. Although the Prosecution sought to rely on Section 164 Cr.P.C. Statement of the accused, it may be reiterated that while explaining the object of recording Statements under Section 164 of the Cr.P.C., the Hon'ble Supreme Court in ***R. Shaji vs. State of Kerala***[1] observed as follows;

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

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As

[1] (2013) 14 SCC 266

the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence." Evidence under Section 164 Cr.P.C. is not substantial evidence, it can only be used for the purposes of corroboration.

10. P.W.8 the In-Charge, Makha Out Post sought to insert a new twist in the Prosecution case by stating under cross-examination that the accused and the deceased had entered into a scuffle over an argument of the accused having extra marital relations with the wife of the deceased. This is indeed a bolt from the blue as the I.O., P.W.14 has nowhere in her investigation corroborated the statement or indicated that her investigation also revealed such a fact. The evidence of the other Prosecution Witnesses are of no assistance for the Prosecution case.

11. So far as Section 106 of the Evidence Act is concerned, this provision is not intended to relieve any person of the duty or burden cast on them under Section 101 of the Evidence Act. Section 106 of the Evidence Act cannot be used to shift the onus. This Section applies only when the defence of the accused depends on his proving the fact established within his knowledge and of nobody else. The Prosecution has to prove its case beyond a reasonable doubt before they can take shelter under the provisions of Section 106 of the Evidence Act. In this regard, if we are to revert to the evidence of P.W.12 and P.W.13 all that they have stated is both the deceased and the accused left their residence together on the relevant evening. In the absence of investigation to prove that the deceased and accused were headed for a particular place together and this was in the knowledge of P.W.12 and P.W.13, the only possible interpretation is that they stepped out of the house together. It was stated by P.W.1, the wife of the deceased, that the accused was residing with the landlord who is referred to as "Narayan Sardar" in the village. P.W.4 is the said "Narayan Sardar," he resides in Lower Samdong and has stated that the accused used to reside with his brother in the adjoining village at Kambal, while the deceased used to reside in the land of the witness along with his family. P.W.3 has specifically stated that the deceased who was cultivating their field was residing at Lower Samdong, while the accused was residing with his brother at Kambal. P.W.10, Yesh Raj Bhattarai, has stated that the deceased was his neighbor in the village i.e. Samdong, and the

accused was also a resident of their village, under cross-examination however this evidence stood demolished as the witness has clarified that the accused was not a permanent resident of their village and he had seen him occasionally in the house of his neighbours. Although the evidence of P.W.1. that the accused was residing with "Narayan Sardar" was supported by the evidence of P.W.12, Raj Bahadur Subba and P.W.13, Dhan Maya Subba, who have stated that during the period relating to the incident the accused was residing in the house of P.W.4, P.W.4 for his part has stated otherwise as discussed *supra*. According to the I.O., P.W.14, the accused was residing at Lower Samdong one month prior to the incident. She has not clarified as to whether he was living at the same place during the time of the incident. There is thus contradictory evidence with regard to the lodgings of the accused. The investigation has not thrown any light on the distance between village Kambal and Lower Samdong or whether the two villages fall in the same route which would prompt the accused and the deceased to return home together from the house of P.W.12.

12. It is not the Prosecution case that P.W.12 and P.W.13 were aware that they continued their journey together to their respective houses together. This was for the Prosecution to have established. The "last seen theory" cannot be invoked to establish that the offence was committed by the accused since no one has witnessed them continuing their walk together. It is not denied that both were inebriated when they left the house of P.W.12 and P.W.13. In consideration of the evidence on record and the fact that the Prosecution has failed to discharge the burden cast on it, we find that the Judgment of the learned trial Court brooks no interference.

13. Appeal fails and is accordingly dismissed.

14. Accused be released from custody forthwith and discharged from his bail bonds.

15. Copy of this Judgment be sent to the learned trial Court, for information.

16. Lower Court records be remitted forthwith.

SLR (2019) SIKKIM 148

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

W.P (C) No. 37 of 2018

M/s. Kripa Indane and Others ….. PETITIONERS

Versus

The Chief Secretary,
Government of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. A. Moulik, Senior Advocate with Ms. K.D. Bhutia, Mr. Manish Kumar Jain and Mr. Ranjit Prasad, Advocates.

For Respondent 1, 2, 7: Mr. Thinlay Dorjee Bhutia, Addl. Government Advocate and Mr. S.K. Chettri, Asst. Government Advocate.

For Respondents 4-6: Mr. Tashi Rapten Barfungpa, Advocate with Mr. Ugang Lepcha, Advocate.

For Respondents 8-10: Mr. Sudesh Joshi, Advocate.

Date of decision: 15th April 2019

A. Constitution of India – Article 226 – It is now well-settled that every executive action which operates to the prejudice of any person must have the sanction of law. Although Article 14 of the Constitution of India does not guarantee identical treatment it envisages similarity of treatment. There cannot be distinction between persons who are substantially in similar circumstances.

(Para 28)

B. The Government of Sikkim (Allocation of Business) Rules, 1994 – – Rules XIII and XXXI – Allocation of Business to Various Departments of the Government – Respondent No.7 controls essential commodities as delineated in the Schedule to Section 2A of the Essential

Commodities Act, 1955, of which indubitably LPG forms a part – On the other hand, the Respondent No.2 is in-charge of controlling and transporting of all goods on the nationalized routes within the State and also to and from outside the State under Inter-State Agreement – Respondent No.7 is to procure distribute and fix prices for essential commodities. Distribution is done by the Respondent No.7 by way of public distribution system approved by the State Government. Evidently, the SNT is only to ensure control and transportation of goods it does not deal with either the procurement or distribution which is within the ambit of the Respondent No.7.

(Paras 41 and 42)

C. Constitution of India – Article 226 – Distribution of State largesse should not be marred by any arbitrariness and public interest should be paramount in the matter of award of contracts. All participants in a tender process should be treated alike and similarly circumstanced individuals cannot be treated as pariahs, apart from which larger participation will invite more attractive bids.

(Para 46)

Petition allowed.

Chronological list of cases cited:

1. Prem Goyal v. Union of India and Others, W.P (PIL) No. 06 of 2017.
2. Indian oil Corporation Limited and Others v. Shashi Prabha Shukla and Another, (2018) 12 SCC 85.
3. Sachidanand Pandey and Another v. State of West Bengal and Others, (1987) 2 SCC 295.
4. Miss Tshering Diki Bhutia v. State of Sikkim and Others, AIR 1999 Sikkim 1.
5. Ajar Enterprises Private Limited v. Satyanarayan Somani and Others, (2018) 12 SCC 756.
6. Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh and Others, (2011) 5 SCC 29

7. Natural Resources allocation, In Re, Special Reference No.1 of 2012, (2012) 10 SCC 1.

8. Chhattisgarh State Industrial Development Corporation Limited and Another v. Amar Infrastructure Limited and Others, (2017) 5 SCC 387.

9. Nadia Distt. Primary School and Another v. Sristidhar Biswas and Others, (2007) 12 SCC 779.

10. Shiv Dass v. Union of India and Others, (2007) 9 SCC 274.

11. Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and Others, (2016) 8 SCC 446.

12. Pooran Mal v. The Director of Inspection (Investigation), New Delhi and Others, (1974) 1 SCC 345.

13. Yashwant Sinha and Others v. Bureau of Investigation through its Director and Another, Review Petition (Criminal) No.46 of 2019 in Writ Petition (Criminal) No.298 of 2018 dated 10.04.2019.

14. M. P. Oil Extraction and Another v. State of M.P. and Others, (1997) 7 SCC 592.

15. City Industrial Development Corporation through its Managing Director v. Platinum Entertainment and Others, (2015) 1 SCC 558.

16. Common Cause, A Registered Society v. Union of India and Others, (1996) 6 SCC 530.

17. Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Others, (2000) 5 SCC 287.

18. Netai Bag and Others v. State of W.B. and Others, (2000) 8 SCC 262.

JUDGMENT

Meenakshi Madan Rai, J

1. The dealings of the State have to be fair, objective, transparent, non-arbitrary and non-discriminatory, State largesse cannot be distributed at the whims of the State Government. On the bedrock of these principles, the Petitioners are decrying the State action in appointing Respondents No.8, 9

and 10 as transporters, by an Agreement, to carry Liquid Petroleum Gas (LPG) Cylinders from the LPG Bottling Plant at Bagheykhola, Rangpo, East Sikkim, to the godown of the distributors, within the State of Sikkim, sans open tenders.

2. The facts as can be culled out from the Petition are that, the Petitioners herein are distributors of LPG Cylinders in Sikkim appointed variously from the years 1997 to 2008 by the Indian Oil Corporation Limited (hereinafter, IOCL), a Government of India Undertaking, which operates an LPG Bottling Plant at Bagheykhola, Rangpo, East Sikkim. They transport LPG Cylinders from their godowns located in different places in the State to earmarked distribution points for collection by consumers.

3. Respondents No.8 to 10 deliver LPG Cylinders from the Bottling Plant to the distributors godowns within the State. This arrangement emanated vide an Agreement, dated 07-12-1998 (Annexure R2), between the Secretary of the then Motor Vehicles Department, Government of Sikkim and the Respondents No.8 to 10, along with one M/s. Agarwal Carriers, who later on 31-10-2013 (Annexure R4), opted out of the arrangement. As per the terms of the said Agreement Respondents No.8 to 10 were to transport LPG Cylinders (bulk, packed and empty), within the State of Sikkim for a period of 15 years w.e.f. 01-01-1999 to 31-12-2013 and to pay a total sum of Rs.25,000/- (Rupees twenty five thousand) only, per annum, to the Sikkim Nationalised Transport (hereinafter, SNT) towards "Administrative and other cost charges", liable to increase @ 15% every five years. Before expiry of the first term of 15 years on 31-12-2013, Respondents No.8 to 10 vide separate letters, all dated 05-09-2013, [Annexure R3 (collectively)], requested renewal of the Agreement. The Respondent No.2 in consideration of the renewal Clause, being Clause 1 of the Agreement, renewed the Agreement (Annexure P3), on 23-12-2013 and required the Respondents No.8 to 10 to pay an enhanced total sum of Rs.50,000/- (Rupees fifty thousand) only, per annum, from such renewal. The contract was thus entrusted as before to the Respondents No.8 to 10 for another period of 15 years w.e.f. 01-01-2014 to 31-12-2029. The Agreement stipulated that the Respondents No.8 to 10 would carry LPG (bulk, packed and empty) Cylinders "*into and within the State of Sikkim*". The Respondent No.6 for its part allots contract works for transportation of LPG Cylinders within the State on Unit rate basis, Ex Rangpo Bottling Plant on tender floated by them to the successful party.

However, in view of Clause 7 of the Agreement which provided that the Secretary, Motor Vehicles Department would not allow any other party to carry LPG in the State during the validity of the Agreement, the IOCL on the directions of the State Government has awarded such contract to the Respondents No.8 to 10. The Respondent No.6 consequently requires authorization from the Respondent No.2 to permit parties to participate in the tender process, without which, even the successful bidder will not be permitted to transport LPG Cylinders for the aforestated reason.

4. In this prevailing situation, Respondent No.6, vide letter dated 05-03-2018 (Annexure P2), sought the assistance of the Respondent No.2 in preparation of departmental estimate for packed LPG transportation contract Ex Rangpo Bottling Plant as the existing contracts with the Respondents No.8 to 10 were to expire on 31-08-2018. Respondent No.6 also sounded the Respondent No.2 that presently only Respondents No.8 to 10 were allowed to participate in the tenders invited by the Respondent No.4 and sought a clarification as to whether other parties could also participate in the tender process if all norms of the Sikkim Government were followed. That, all over the country distributors are given priority for transporting LPG as they ensure smooth supply being owners of the trucks which they directly control.

5. In response, vide letter dated 10-05-2018 (Annexure P5), the Respondent No.2 informed the Respondent No.6, that, all local LPG distributors were permitted to participate in the said tender process and Respondent No.6 should permit only local distributors/transporters as per the States norms, to the exclusion of transporters from outside the State. However, this permission stood withdrawn by the Respondent No.2 vide letter dated 05-07-2018 (Annexure P6), on grounds that the State Government was bound by the Agreement dated 23-12-2013 with the Respondents No.8 to 10 from 01-01-2014. Therefore, during the validity of the Agreement Respondent No.2 would disallow any other party to carry LPG Cylinders in the State. Aggrieved by the decision, the Petitioners submitted a representation to the Respondent No.2, dated 07-07-2018 (Annexure P7), while protesting the grant of contract to the Respondents No.8 to 10 sans auction/tender *inter alia* and stated that in view of the earlier stand of the Transport Department as communicated vide letter dated 10-05-2018, the Petitioners had availed loan, placed orders for trucks and were consequently prejudiced. They also brought to the notice of the

Respondent No.2 that a Public Interest Litigation (PIL) being ***WP(PIL) No.06 of 2017*** : ***Prem Goyal*** vs. ***Union of India and Others*** was filed by Prem Goyal pertaining to inordinate delay in supply of LPG to consumers and is pending adjudication before this Court.

6. Following this correspondence, a letter dated 09-07-2018 (Annexure P4) was addressed by the Respondent No.5 to the Respondent No.7 (referring to the letter dated 10-05-2018 of the Respondent No.2) and informing that as a standard protocol followed by the IOCL, irrespective of locations, the job of transportation is outsourced through public tender with preference accorded to LPG distributors who own trucks to ensure seamless and better services to customers. In view of difficulties faced by them in procuring LPG Cylinders from the Bottling Plant, the Sikkim based distributors had shown interest in the job. Further, field visits to propagate Central Government Schemes by the Respondent No.5 revealed that services of the Respondents No.8 to 10 was deficient on account of aging vehicles and frequent breakdowns thereof.

7. In view of the non-action by the Respondent No.2 to their representation, the Petitioners issued a lawyer s notice dated 20-07-2018 (Annexure P8) to the Respondents No.1, 2, 4, 5, 7, 8, 9 and 10 which was responded to only by the Respondent No.7.

8. The Respondent No.7 in his reply dated 27-07-2018 (Annexure P9) to the lawyers notice communicated that the matter required thorough examination hence the Respondent No.5 was requested by the Respondent No.7 to extend the last date of submission of tender by one month which was duly complied. Vide another letter dated 03-08-2018 (Annexure P10) the Respondent No.7 informed Respondent No.5 that two proposals placed before the State Government, viz., (i) seeking permission to allow the existing transporters to participate in the tender process from Raninagar Jalpaiguri to Depot at Bagheykhola, Sikkim and (ii) within Sikkim to allow local transporters to participate in the present tender process, were approved by the State Government.

9. However, over and above this communication and approval of the Government, Respondent No.3 vide letter dated 07-08-2018 (Annexure P11) informed the Respondent No.5 that in view of the existing contract with the Respondents No.8 to 10, the Transport Department would not

entertain any no objection certificate from other Government Department in connection with carriage of LPG Cylinders as it would lead to a breach of contract. That, only Respondents No.8 to 10 are authorized to carry LPG Cylinders in Sikkim and advised the Respondent No.6 to finalise the transport contract with them. Hence, the instant Petition with prayers *inter alia* seeking quashing and cancellation of the Agreement dated 23-12-2013, to allow the local distributors to participate in the tender process and to stay the tender process until Petitioners are allowed to participate.

10. In response to the Petition, Respondents No.1 and 2 jointly filed Counter-Affidavit and *inter alia* averred that the reason for the grant of the contract for another 15 years to the Respondents No.8 to 10 was the renewal Clause in the previous Agreement dated 07-12-1998 which was considered binding. Resultant, no new contract could be entered into with others.

11. Respondent No.3 filed no Counter-Affidavit.

12. Respondents No.4, 5 and 6 jointly filed their Counter-Affidavit, in sum and substance reiterating facts *inter alia* as averred in the Writ Petition. That, customers are faced with shortage of LPG Cylinders on account of the monopoly and inefficiency of the Respondents No.8 to 10, consequent to their Agreement with the Government. The Respondents No.4 to 6 as a result are unable to induct additional trucks to deal with increase in the sales volume and maintain ease in distribution apart from which competitiveness would ensure better services.

13. The Respondent No.7 also filed her Counter-Affidavit and averred *inter alia* that as per the Government of Sikkim (Allocation of Business) Rules, 1994, the Department is the Nodal Department to supervise the procurement, distribution, fixation of prices and control of essential commodities and civil supplies through the public distribution system in the State as prescribed under the Second Schedule Serial No.XIII of the said Rules. That, efforts were made by the Respondent to allow the Petitioners to enter their bids also by requesting the Respondent No.6 to extend the date of the bid scheduled on 31-07-2018 to 31-08-2018.

14. Respondents No.8, 9 and 10 each filed their separate Counter-Affidavit *inter alia* assailing the *locus standi* of the Petitioners to file the Writ Petition as they had not participated in the tender in question, hence no cause of action had arisen. That, the Petition suffers from delay and laches

as the contract was renewed in 2013, thus the Petition filed now is belated. That, there is no requirement for the participants to produce letter authorizing them to participate in the tender since it is only after the bids are received that the successful bidder is to produce such letter of authorization. As the Petitioners chose not to participate in the tender process they cannot now assail it. That, in the year 1998 on account of dearth of experienced transporters with necessary specifications for transportation of LPG Cylinders in Sikkim, the State Government requested them to take up such works. The Agreement dated 07-12-1998 was thus entered into towards which the Petitioners raised no objection. That, huge expenditure was incurred by them for carrying out the works and thereafter providing untiring and seamless services. On account of their efficient services the contract was renewed on 23-12-2013 in terms of the renewal Clause in the Agreement of 1998. Hence, the Writ Petition deserves to be dismissed.

15. In the aforestated backdrop, Learned Senior Counsel for the Petitioners would contend that Clause 7 of the Agreement is advantageous for the Respondents No.2, 3 and Respondents No.8 to 10 but is detrimental to the interest of the Petitioners who despite fulfilling all eligibility conditions are excluded from participating in the tender process. Consequently, in every tender invited by the IOCL only Respondents No.8 to 10 have participated and monopolized the work by quoting their own rates rendering losses to the exchequer. Despite profits earned by them from the aforestated contract works, a sum of Rs.50,000/- (Rupees fifty thousand) only, per annum, in totality is paid to the Respondent No.2. Scant attention is paid to the requirements of the consumers with delayed distribution of LPG Cylinders in vehicles which are old and unfit for transporting the Cylinders. The letter of the Respondent No.2 in no uncertain terms clarifies that the State Government will not entertain the request of any party for transportation of LPG Cylinders during the subsistence of the Agreement with Respondents No.8 to 10, which thereby violates the mandate of Articles 14, 19, 21 and 300A of the Constitution of India as State largesse cannot be distributed at the whims and pleasure of the Officials of the Government in an arbitrary manner. Strength was garnered on this aspect from ***Indian oil Corporation Limited and Others*** vs. ***Shashi Prabha Shukla and Another***[1] and ***Sachidanand Pandey and Another*** vs**.** ***State of West Bengal and Others***[2]. That,

[1] (2018) 12 SCC 85
[2] (1987) 2 SCC 295

contracts ought to be awarded through open public tender by wide publicity as laid down by this Court in ***Miss Tshering Diki Bhutia*** vs. ***State of Sikkim and Others***[3]. That, the Agreement between the State Government and Respondents No.8 to 10 is averse to public good, public policy and public interest and exploitation of State revenue by blocking the Petitioners and other eligible bidders from participating in the tender process. The Agreement dated 23-12-2013 is liable to be cancelled on account of lack of transparency and illegalities. That, every legitimate citizen has a fundamental and legal right to tender for allotment of State largesse but the arbitrary terms of the Agreement have deprived the Petitioners of their rights, when their participation would increase State revenue by fair competition and transparency. That, the Respondent No.2 and Respondent No.7 despite being two wings of the State Government are in conflict with each other as apparent from the correspondence exchanged contrary to the interest of the Petitioners and public good. Contending that the Agreement ought to be set aside, Learned Senior Counsel placed reliance on ***Ajar Enterprises Private Limited*** vs. ***Satyanarayan Somani and Others***[4]. That, when State largesse is granted there has to be transparency. On this count, reliance was placed on ***Akhil Bhartiya Upbhokta Congress*** vs. ***State of Madhya Pradesh and Others***[5]. Hence, the prayers in the Writ Petition be granted.

16. Learned Government Advocate for the Respondents No.1 and 2 while drawing the attention of this Court to the averments made in the Counter-Affidavit submitted that consequent upon the renewal of the Agreement on the request of the Respondents No.8 to 10, the administrative and other charges were enhanced by 100% thereby raising it to Rs.50,000/- (Rupees fifty thousand) only, per annum, as against Rs.25,000/- (Rupees twenty five thousand) only, per annum, payable previously. That, infact the letter permitting participation in the tender by the Respondent No.2 was erroneously issued losing sight of the existing Agreement between the Respondent No.2 and Respondents No.8 to 10 and stood withdrawn on such realization. While putting forth the reasons for granting the contract to the Respondents No.8 to 10, it was submitted that this was on account of a dearth of transporters to transport LPG in specifically constructed goods carriers at the relevant time and the

[3] AIR 1999 Sikkim
[4] (2018) 12 SCC 756
[5] (2011) 5 SCC 29

wherewithal being with Respondents No.8 to 10. As they fulfilled the conditions required for carriage of such hazardous consignment the Respondents No.4 to 6 granted them authorisation. The IOCL awarded the contract work to the transporters in the year 1996 on the recommendation of the Secretary, SNT. Following this, in the year 1998, the transporters applied for long term authorization in continuation of that of 1996. As the SNT was primarily engaged in the business of transportation of goods and passengers and purchasing new trucks would require fresh investment they entered into the Agreement. Thus, the question of granting State largesse bypassing the Rules of the Government would not arise as the contract work was given on account of the peculiar circumstances at the relevant time. That, the grounds set out in the Writ Petition are not tenable in the eyes of law and liable to be rejected.

17. None appeared for the Respondent No.3.

18. Learned Counsel for the Respondents No.4, 5 and 6 contended that on the clarification given by the Respondent No.2 and the go ahead by the Respondent No.7, the date for submission of tender was also extended till 31-08-2018, but the participation of the Petitioners was withdrawn by the Respondent No.2. It is the contention of the Learned Counsel for the Respondents that since the Petitioners have also evinced interest in participating in the tender, this would indeed mitigate the difficulties pertaining to the LPG Cylinders including delay in delivery at the godowns which has a cascading effect on distribution to consumers. The Agreement between the Respondents No.8 to 10 and the Government Department excludes participation of equally placed parties and affects the supply of essential commodities to the customers which have increased in numbers. Moreover as the Petitioners are owners of trucks there could be more control in the supply of replenished LPG Cylinders to consumers. Hence, the Respondents are in agreement with the grievances of the Petitioners. It was also clarified by Learned Counsel that although in the concluding Paragraph of the Counter-Affidavit, it has been averred that the Writ Petition is mis-conceived, devoid of merit and deserves to be dismissed, this is a typographical error and requires to be ignored.

19. Learned Counsel for the Respondent No.7 would in sum and substance agree with the submissions made by Learned Counsel for the Respondents No.4 to 6 and reiterated that the Respondent as the Nodal

Department who controls essential commodities had made necessary efforts to include participation of the Petitioners in the tender process.

20. Learned Counsel for the Respondents No.8, 9 and 10 in the first instance challenged the locus of the Petitioners in view of their non-participation in the tender. That, the contract was given to them in the year 1998 when the Government was at sea with regard to the transportation of LPG Cylinders. Relying on the decision in ***Natural Resources allocation, In Re, Special Reference No.1 of 2012***[6] Learned Counsel put forth that the Hon ble Supreme Court has not shut out contracts by negotiation. It was also urged that the Respondents No.8 to 10 have legitimate expectations as they were the only persons to mitigate the Government circumstance in 1998 and to make investments and assist the State Government to bring in the requisites to the IOCL Bottling Plant. Considering these factors and the efficient working of the Respondents No.8 to 10 the Agreement was entered into and also renewed with the assurance that their investment would be safeguarded by a long term contract. It is also the contention of Learned Counsel that the distributors were appointed much later, between the years 2005 to 2008, apart from one distributor who was appointed in 1997, thus, they cannot endeavour to belatedly challenge the Agreement. Moreover, there is substantial delay in approaching the Court as 1/3rd of the period covered by the second Agreement has already lapsed since the Petitioners were presumably aware of the Agreement and its renewal. In this context, reliance was placed on ***Chhattisgarh State Industrial Development Corporation Limited and Another*** vs. ***Amar Infrastructure Limited and Others***[7] and ***Nadia Distt. Primary School Council and Another*** vs. ***Sristidhar Biswas and Others***[8]. Reliance was also placed on ***Shiv Dass*** vs. ***Union of India and Others***[9]. While inviting the attention of this Court to the ratio in ***Bakshi Security and Personnel Services Private Limited*** vs. ***Devkishan Computed Private Limited and Others***[10], Learned Counsel would submit that judicial review is to check whether decision or choice was made lawfully and not to check as to whether the choice or decision is sound. Hence, this Court must be circumspect when interfering in decisions made by the Government. That, the power of judicial review cannot be invoked to

[6] (2012) 10 SCC 1
[7] (2017) 5 SCC 387
[8] (2007) 12 SCC 779
[9] (2007) 9 SCC 274
[10] (2016) 8 SCC 446

protect private interest over public interest or to decide contractual disputes. That, Respondents No.8 to 10 are depositing at least a sum of Rs.50,000/- (Rupees fifty thousand) only, to the State Government which cease if the Petitioners are selected as the contract would be between the IOCL and the Petitioners. That, although it is the allegation of the Respondents No.4 to 6 that the lorries used by the Respondents No.8 to 10 are old, the documents on record clearly indicate to the contrary. The IOCL at no stage complained to the Government that the Respondents No.8 to 10 were unable to deliver the goods, neither was notice of any shortcoming issued to them. That, the tender process was to be completed by 31-08-2018 and on the Petitioners failure to participate they cannot raise the issue that they were not allowed to participate. Hence, the Petition deserves to be dismissed.

21. Learned Senior Counsel for the Petitioners in response would submit that the Agreements of 1998 and 2013 clearly indicate that it was the Respondents No.8 to 10 who had approached the Government and not vice-versa and the Agreements *per se* are illegal.

22. The rival assertions of Learned Counsel were heard *in extenso* and given careful consideration. I have also perused the pleadings, all documents on record and decisions cited at the Bar.

23. The question before this Court is whether the process adopted by the State-Respondents in entering into an Agreement with the Respondents No.8 to 10 is arbitrary and irrational, creating a monopoly right in their favour?

24. The question of delay and laches raised by Learned Counsel for Respondents No.8 to 10 is taken up in the first instance, for which reliance was *inter alia* placed on ***Shiv Dass*** (*supra*). In the said matter, the Appellant was out of service since 1982 being 80% disabled. In 1983, he claimed disability pension, this was rejected by the concerned Authority. It was only in the year 2005 he chose to file the Writ Petition for grant of disability. The High Court dismissed the Writ Petition on grounds that it was highly belated. The Supreme Court while being in agreement with the High Court that if the Petition is filed beyond a reasonable period, say three years, normally the Court would reject the same or restrict the relief. In the peculiar circumstances the matter was remitted to the High Court to hear the Writ Petition on merits and to mould the relief, but in no event was any

relief to be granted for a period exceeding 3 years from the date of presentation of the Writ Petition. The Supreme Court in Paragraph 7 held as follows;

> **"7.** What was stated in this regard by Sir Barnes Peacock in *Lindsay Petroleum Co.*v. *Prosper Armstrong Hurd* [(1874) 5 PC 221 : 22 WR 492], PC at p. 239 was approved by this Court in *Moon Mills Ltd.* v. *M. R. Meher* [AIR 1967 SC 1450] and *Maharashtra STRC* v. *Balwant Regular Motor Service* [AIR 1969 SC 329]. Sir Barnes had stated:
>
> > "Now the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, if founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." **"**

25. Thus, the said matter can be distinguished from the instant one. The former was clearly a case of negligence as the Appeal was dismissed in 1985 with due intimation to the Appellant about the rejection of the Appeal. In the matter at hand, the Respondents No.8 to 10 have not been able to show by any proof whatsoever that the Petitioners were aware of the Agreement between the Respondent No.2 and the Respondents No.8 to 10. Learned Counsel for the Respondents No.8 to 10 admitted that it was 'presumed' that they were aware of the Agreement since LPG was being transported only by the said Respondents. Evidently the Petitioners came to learn of the Agreement only on account of the tender having been floated and the Respondent No.2 having issued vacillating correspondence already discussed *supra*. In any event the contention of the Respondents No.8 to 10 that it was presumed that the Petitioners were seized of the Agreement is untenable in the absence of proof thereof. Hence, the argument of Learned Counsel of the Respondents No.8 to 10 with regard to delay and laches has no legs to stand.

26. The next argument was with regard to the *locus standi* of the Petitioners on grounds that in view of their non-participation in the tender no cause of action arose. This apparently is an unreasonable argument. To address this, it would be essential to firstly examine the relevant terms of the Agreement entered into between the State-Respondent and the Respondents No.8 to 10 and one M/s. Agarwal Carriers. The first Deed of Agreement was made on 07-12-1998. Clauses 1 to 7 of the Agreement are extracted hereinbelow for easy reference;

> **"**.....
>
> This deed of agreement made on this 7th day of December one thousand nine hundred ninety eight between the Governor of Sikkim through the Commissioner-cum-Secretary, Motor Vehicles Department, Government of Sikkim (hereinafter referred to as the first Party) which expression shall, unless excluded by or repugnant to the context mean and include his successor in Office, representative or assigns of the one part and the following parties,
>
> (1) M/S Agarwal Carriers, Govt. Carrying Contractors and Order Supplier, H.O. Namchi Bazar, South Sikkim represented by Shri Baijanath Agarwal;

(2) M/S Om Prakash Goyal, Agent : Indian Oil Corporation Limited, H.O./Sukhia Pokhri, Darjeeling, B.O. P.O. Rangpo, East Sikkim represented by Shri Om Prakash Goyal;

(3) M/S Liladhar Goyal and Bros; Transporters and Order Suppliers, H.O. Sukhia Pokhri, Darjeeling, B.O. P.O. Rangpo, East Sikkim represented by Shri Liladhar Goyal;

(4) M/S Hill Top Carriers, H.O. Burdwan Road, Siliguri 734 401, B.O. 31A National Highway, Gangtok, East Sikkim represented by Shri Nirmal Kumar Agarwal Proprietor/Partner/Managing Director of the said firm/(s) (herein) matter referred to as the Second Party/ies) which expression shall, unless excluded by or repugnant to the context mean and include his/their successor in office, heir, representative, assignees or agent of the other.

Whereas the first party has desired to authorize the second party/(ies) referred to hereinabove under Serial No.1 (one) to 4 (four) for the carriage of Liquid Petroleum Gas (hereinafter referred to as the LPG(Bulk, packed and empty cylinders) in the State of Sikkim;

And whereas, the Second Party/(ies) has agreed to carry LPG (bulk, packed and empty cylinders) in the State of Sikkim;

Now, therefore, it is hereby agreed by and between the parties as follows:-

1. This deed of agreement shall commence from the 1st day of January 1999 and shall subject to the terms and conditions hereinafter contained, continue for a period of 15 (fifteen) years. Thereafter, the deed of agreement may be WP(C) No.37 of 2018 20 M/s. Kripa Indane and Others vs. **The Chief Secretary, Government of Sikkim and Others renewed for such period as may be agreed upon by both the parties.**

2. The second party/(ies) shall carry the LPG (bulk, packed and empty cylinders) in the State of Sikkim and ensure uninterrupted supply.

3. The second party/(ies) shall pay Rs.25,000/- (Rupees twenty five thousand) per annum to the Sikkim Nationalised Transport within first month of the every calendar year in the form of 'Administrative and other cost charges' irrespective of whether the trucks operate or not.

4. The Second party/(ies) shall pay on an interval of five years an increased fee at the rate of 15% on Rs.25,000/- (Rupees twenty five thousand).

5. The Second Party/(ies) shall pay all the fees and taxes levied by the Government of Sikkim from time to time under the provisions of the Motor Vehicles Act, 1988, Central Motor Vehicles Rules, 1989, The Sikkim Motor Vehicles Rules, 1991 and The Sikkim Motor Vehicles Taxation Act, 1982.

6. The first party reserve the right to withdraw this agreement after inviting one months notice to the second party/(ies) if the conditions agreed herein above is violated.

7. The first party shall not allow authorization to carry LPG to any other party/ (ies) except the four parties referred to herein above in the State of Sikkim during the currency or validity of these presents.

……."

27. The Agreement dated 07-12-1998 was valid for a period of 15 years. On expiry thereto the second Agreement was entered into on 23-12-2013, also for a period of 15 years. The Clauses of the Deed of Agreement *supra* are lucid and need no further explanation. Although Learned Counsel for the Respondents No.8 to 10 would emphasise that the Agreement was entered into by the State Government in view of the fact that the Respondents No.8 to 10 had helped the State Government when it had no wherewithal, nothing of this nature is reflected in the Agreement.

Neither was it established that discretion was vested on the Authority. Even if such discretion was vested it cannot be unregulated and arbitrary. It was next contended by the Respondents No.8 to 10 that the State Government offered to make an Agreement, nothing obtains in this regard on the face of the Agreement. The Respondents No.4 to 6 who are the agency which the Respondents No.8 to 10 have to deal with are aggrieved with the services of the Respondents No.8 to 10 pointing out that it leaves much to be desired. Clause 7 of the first Agreement was reiterated in the second Agreement as well. It is in this background that the Respondent No.6 had sought a clarification from the Government vide its letter dated 05-03-2018 whether distributors of Sikkim could also participate in the tender process which was invited by the Respondent No.4 on 03-07-2018 with last date of submission on 31-08-2018. The vacillating correspondence of the Respondent No.2 firstly allowing and then again disallowing participation by the Petitioners in the tender process aggrieved them. Admittedly the IOCL is not a party to the Agreement between the Commissioner-Cum-Secretary, Motor Vehicles Department, Government of Sikkim and the Respondents No.8 to 10, but it is evident that the IOCL is also bound by the Agreement in view of the Clause 7 which in no uncertain terms indicates that no other party except the Respondents No.8 to 10 would be authorized to carry LPG in the State during the validity of the Agreement. On the face of such a Clause it was but apposite for the Respondents No.4 to 6 to seek a clarification pertaining to participation of other transporters. It was pointed by the Respondents No.8 to 10 that the Petitioners had delayed in submitting their bids to the tender and nothing or no one had debarred their participation. That, the decision to participate was arrived at belatedly when the last date of tender fixed on 31-08-2018 had expired. In this context, it may be remarked that the exercise of participation by the Petitioners would indeed be one in futility, considering that even if they succeeded in the competitive bid, Clause 7 of the Agreement stands sentinel for the Respondents No.8 to 10, debarring transportation of LPG by any other party except the said Respondents in the State of Sikkim during the validity of the Agreement, viz., for 15 years from the date of Agreement. It is precisely for this reason that the earlier permission issued by the Respondent No.2 allowing participation of the Petitioners was withdrawn by them subsequently.

28. It is now well-settled that every executive action which operates to the prejudice of any person must have the sanction of law. Although Article 14 of the Constitution of India does not guarantee identical treatment it

envisages similarity of treatment. There cannot be distinction between persons who are substantially in similar circumstances. Thus the question of the *locus standi* of the Petitioners being non-existent is not tenable.

29. Learned Counsel for the Respondents No.8 to 10 would tangentially contend that it is unfathomable as to how the Petitioners are privy to the correspondence between the State Government and the IOCL and how they have relied on it in the instant matter. In this regard, it would appropriate to refer to the decision in ***Pooran Mal*** vs. ***The Director of Inspection (Investigation), New Delhi and Others***[11]. More recently, the Hon ble Supreme Court in ***Yashwant Sinha and Others*** vs. ***Central Bureau of Investigation through its Director and Another***[12], cited with approval ***Pooran Mal*** (*supra*), authored by Ranjan Gogoi, CJI, in a Bench consisting of Ranjan Gogoi, CJI, Sanjay Kishan Kaul, J. and K. M. Joseph, J. The concurring Order authored by K. M. Joseph, J., also reflected the decision in ***Pooran Mal*** (*supra*) and it was held respectively as follows;

> **Ranjan Gogoi, CJI**
>
> **"**.....
>
> **7.** An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before this Court. In this regard, as already noticed, the documents have been published in „The Hindu newspaper on different dates. That apart, even assuming that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court? In ***Pooran Mal vs. Director of Inspection (Investigation) of Income Tax, New Delhi*** [AIR 1974 SC 348] this Court has taken the view that the "test of admissibility of evidence lies in its relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.
>
> .....**"**

[11] (1974) 1 SCC 345

[12] Review Petition (Criminal) No.46 of 2019 in Writ Petition (Criminal) No.298 of 2018 dated 10-04-2019

K. M. Joseph, J.

"……

26. I may also notice another aspect. Under the common law both in England and in India the context for material being considered by the court is relevancy. There can be no dispute that the manner in which evidence is got namely that it was procured in an illegal manner would not ordinarily be very significant in itself in regard to the courts decision to act upon the same (see in this context judgment of this Court in *Pooran Mal v. Director of Inspection (Investigation) of Income Tax* AIR 1974 SC 348). Therein I notice the following statements:

> "25. So far as India is concerned its law of evidence is modeled on the rules of evidence, which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. In Barindra Kumar Ghose and others v. Emperor (1910) ILR 37 Cal 467 the learned Chief Justice Sir Lawrence Jenkins says at page, 500 :
>
> "Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those

> provisions were disregarded. As Jimutavahana with his shrewd common-sense observes-"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks : "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed. by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized.
>
> ….…. …… ……
>
> It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."
>
> *(Emphasis supplied)*
>
> ….…."

Consequently, in view of the above authority there is nothing in law which debars the Petitioners from relying on correspondence between the State Governments and the IOCL.

30. That having been said, I now turn to address the question of dissemination of State largesse by concerned authority. The Supreme Court while dealing with the grant of dealership of Petrol Pump in ***Shashi Prabha Shukla*** (*supra*) observed that the dealership of the Respondent had been cancelled being vitiated by favouritism due to exercise of fanciful discretion of the departmental Minister. The Indian Oil Corporation (IOC) did not act in terms of the Judgment and Order of the Delhi High Court in initiating the fresh process for auction and the Respondent was permitted to continue with the dealership. In a subsequent proceeding, it was noticed that the proposed auction had not taken place and the Respondent had been permitted to run the retail outlet since 1998. The Allahabad High Court directed IOC in view of its new policy dated 12-02-2004 to award fresh dealership to the Respondent thereunder. The Supreme Court held that the award of new dealership to the Respondent would wholly undermine the

purpose of cancelling her earlier dealership and annihilate the very objective of securing transparency, fairness and non-arbitrariness in the matter of distribution of public contract. Therefore, the order of the High Court so far as it entitled the Respondent to a new dealership at her locations under the new policy was set aside. While deciding the matter the Supreme Court held that -

> **"23.** It is no longer res integra that a public authority, be a person or an administrative body is entrusted with the role to perform for the benefit of the public and not for private profit and when a prima facie case of misuse of power is made out, it is open to a court to draw the inference that unauthorised purposes have been pursued, if the competent authority fails to adduce any ground supporting the validity of its conduct.**"**

31. In ***Natural Resources Allocation*** (*supra*) the Supreme Court observed that -

> **"80.** Dealing with Questions (*iii*) and (*iv*) in paras 94 to 96 of the judgment, this Court opined as follows: (*2G case* [(2012) 3 SCC 1], SCC pp.59-60)
>
> *"94.* **There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely**

to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim.

95. **This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible WP(C) No.37 of 2018 27 M/s. Kripa Indane and Others** vs. **The Chief Secretary, Government of Sikkim and Others persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/ public interest.**

96. **In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."**

[emphasis supplied]

32. In ***Sachidanand Pandey*** (supra) the Supreme Court held as follows;

> **"40.** On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.**"**

33. Undoubtedly as stated by Learned Counsel for the Respondents No.8 to 10 the Supreme Court has not shut out distribution of State largesse by negotiation as held *supra* and in ***M. P. Oil Extraction and Another*** vs. ***State of M.P. and Others***[13] but the latter Judgment can be distinguished from the instant one as can be gauged from the extract below. The Supreme Court at Paragraph 45 held as follows;

> **"45.** Although to ensure fair play and transparency in State action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case, as a policy decision protective measure by entering into agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the Government. The rate of royalty has

[13] (1997) 7 SCC 592

> also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seeds at the determined royalty to the respondents and other units covered by the agreements cannot be assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations.**"**
>
> **[Emphasis supplied]**

34. It is trite to reiterate that the circumstances in the instant matter differ from those at *supra*. Moreover the rate of award in the said matter had been fixed on some accepted principle of pricing formula, hence it was observed that distribution by public policy or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements, on being selected on valid and objective consideration. In the matter at hand, the Agreement reflected no such consideration or the rationale behind the Agreement. In the absence of any reasons for entering into the impugned Agreement herein, it can well be presumed that unauthorized purposes were pursued to grant the agreement.

35. In ***City Industrial Development Corporation through its Managing Director*** vs. ***Platinum Entertainment and Others***[14] while the Supreme Court was considering the allotment of properties by the State/ Development Authority it would hold as follows;

> **"49.** State and its agencies and instrumentalities cannot give largesse to any person at sweet will and whims of the political entities or officers of the State. However, decisions and action of the State must be founded on a sound, transparent and well-defined policy which shall be made known to the public. The disposal of the government land by adopting a discriminatory and arbitrary method shall

[14] (2015) 1 SCC 558

always be avoided and it should be done in a fair and equitable manner as the allotment on favouritism or nepotism influences the exercises of discretion. Even assuming that if the rule or regulation prescribes the mode of allotment by entertaining individual application or by tenders or competitive bidding, the rule of law requires publicity to be given before such allotment is made. CIDCO authorities should not adopt a pick and choose method while allotting government land.**"**

36. In ***Akhil Bhartiya Upbhokta Congress*** (*supra*) the Supreme Court was considering the allotment of land, grant of quotas, permits, etc. While holding that the policy should be made known to the public by publication in Official Gazette and other recognized modes of publicity it emphasized on necessity of fairness and non-discrimination and non-arbitrariness in policy impletion/ execution. It was held that;

> **"65** What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/ executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/ instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/ instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

67. This, however, does not mean that the State can never allot land to the institutions/ organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/ organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

68. The allotment of land by the State or its agencies/instrumentalities to a body/organisation/

institution which carry the tag of caste, community or religion is not only contrary to the idea of secular democratic republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/ organisations/institutions on political considerations or by way of favouritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible.**"**

[Ed.: Paras 65, 66 and 68 corrected vide Official Corrigendum No. F.3/Ed.B.J./23/ 2011 dated 3-5-2011 and para 67 corrected vide Official Corrigendum No. F.3/Ed.B.J./28/2011 dated 7-5-2011.]

37. In ***Common Cause, A Registered Society*** vs. ***Union of India and Others***[15] the Honble Supreme Court again dealt with the distribution of State largesse and held as follows;

"24. The orders of the Minister reproduced above read: "the applicant has no regular income to support herself and her family", "the applicant is an educated lady and belongs to Scheduled Tribe community", "the applicant is unemployed and has no regular source of income", "the applicant is an uneducated, unemployed Scheduled Tribe youth without regular source of livelihood", "the applicant is a housewife whose family is facing difficult financial circumstances" etc. etc. There would be literally millions of people in the country having these circumstances or worse. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on mala fide considerations. None of these cases fall within the categories placed before this Court in *Centre for Public Interest Litigation* v. *Union of India* [1995 Supp (3) SCC 382] *but even* if we assume for argument sake that these cases fall in some of those or similar guidelines the exercise of

[15] (1996) 6 SCC 530

discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article 14 of the Constitution of India. …….

25. This Court in *Centre for Public Interest Litigation case* [1995 Supp (3) SCC 382] has endorsed the guidelines submitted by the Attorney General for allotment of petrol pumps, gas agencies etc. The Court in that case did not have before it the actual manner of exercise of discretion by the Minister in the allotment of pumps/agencies. The allotment orders which are now before the Court clearly indicate that leaving the authorities to enjoy absolute discretion even within the guidelines would inevitably lead to gross violation of the constitutional norms when the persons for allotment are picked up arbitrarily and discriminatorily.

26. This Court as back as in 1979 in *Ramana Shetty case* [(1979) 3 SCC 489] held "it must, therefore, be taken to be the law…" that even in the matter of grant of largesses including award of jobs, contracts, quotas and licences, the Government must act in fair and just manner and any arbitrary distribution of wealth would violate the law of the land. ……**"**

The plethora of ratiocination of the Honble Supreme Court extracted hereinbefore reveals that the method of distribution of State largesse is no more *res integra*.

38. In the instant case while perusing the Agreement as already pointed out nothing emerges to indicate as to what considerations emanated for distribution of largesse to the Respondents No.8 to 10 by the Respondent No.2. There is no rate of royalty or pricing formula that was adhered to by the Respondent No.2. A random amount of Rs.25,000/- (Rupees twenty five thousand) only, was required to be paid in the year 1998 which continued for a period of 15 years and on completion of 15 years and renewal of Agreement again the State Government put forth an amount of

Rs.50,000/- (Rupees fifty thousand) only, payable for providing the services. No logic has been attributed to the calculations so made. Neither is there any specific contention that only Respondents No.8 to 10 were found to be eligible for the task. It was pointed out that in 1998 there was no one competent for the task, however, the Petitioners contend that Petitioner No.3 was awarded distributorship as far back as in 1997. Nothing obtains to reason as to why this Petitioner was also not afforded the same consideration by the Respondent No.2 when the first Agreement was entered into. Although the Petitioners now are similarly circumstanced as the Respondents No.8 to 10 the Agreement was entered into for the second time without opportunity extended to them, without publication of the same and there is no classification on the basis of reasonable distinctions.

39. Although a perusal of the e-tender (Annexure P1) indicates no bar upon any person in participating in the tender process and it is only the successful bidder who is issued the Letter of Intent (LoI) by the IOCL who is required to produce such authorization from the Transport Department within a stipulated time, in my considered opinion, herein lies the essence of the objection of the Petitioners as it is clear from the Agreement at Clause 7 that regardless of who the successful bidder is the Transport Department will not issue authorization during the validity of the existing Agreement, i.e., up to 31-12-2029.

40. In this context, it is relevant to examine "The Government of Sikkim (Allocation of Business) Rules, 1994". Before delving into that aspect it may be noticed that vide Notification bearing No.55/HOME/2000, dated 06-06-2000, the Sikkim Nationalised Transport Department and the Motor Vehicles Department, were amalgamated into one Department known as the "Transport Department", the Respondent No.2 herein.

41. The Government of Sikkim (Allocation of Business) Rules, 1994 (as amended up to 30-06-2000), 18-07-1994, in Second Schedule, at Rule XIII and XXXI, allocates business to various Departments of the Government *inter alia* as follows;

> **"**XIII. **FOOD & CIVIL SUPPLIES AND CONSUMERS' AFFAIRS DEPARTMENT.**

1. Procurement, distribution, fixation of prices and control of essential commodities and civil supplies through the Public Distribution System in the State.

……."

XXXI. **SIKKIM NATIONALISED TRANSPORT DEPARTMENT**

1. Control and Transportation of all goods on nationalised routes within the State and also to and from outside the State under Inter-State agreement.

……."

42. Respondent No.7 controls essential commodities as delineated in the Schedule to Section 2A of the Essential Commodities Act, 1955, of which indubitably LPG forms a part. On the other hand, the Respondent No.2 is in-charge of controlling and transporting of all goods on the nationalized routes within the State and also to and from outside the State under Inter-State Agreement. It is not the case of the Transport Department that LPG is not an essential commodity. Respondent No.7 is to procure distribute and fix prices for essential commodities. Distribution is done by the Respondent No.7 by way of public distribution system approved by the State Government. Evidently the SNT is only to ensure control and transportation of goods it does not deal with either the procurement or distribution which is within the ambit of the Respondent No.7.

43. Sections 77, 78 and 79 of the Motor Vehicles Act, 1988, may also beneficially be adverted to which provides as follows;

"77. Application for goods carriage permit.—An application for a permit to use a motor vehicle for the carriage of goods for hire or reward or for the carriage of goods for or in connection with

a trade or business carried on by the applicant (in this Chapter referred to as a goods carriage permit) shall, as far as may be, contain the following particulars, namely:—

(a) the area or the route or routes to which the application relates;

(b) the type and capacity of the vehicle;

(c) the nature of the goods it is proposed to carry;

(d) the arrangements intended to be made for the housing, maintenance and repair of the vehicle and for the storage and safe custody of the goods;

(e) such particulars as the Regional Transport Authority may require with respect to any business as a carrier of goods for hire or reward carried on by the applicant at any time before the making of the application, and of the rates charged by the applicant;

(f) particulars of any agreement, or arrangement, affecting in any material respect the provision within the region of the Regional Transport Authority of facilities for the transport of goods for hire or reward, entered into by the applicant with any other person by whom such facilities are provided, whether within or without the region;

(g) any other particulars which may be prescribed.

78. Consideration of application for goods carriage permit.—A Regional Transport Authority shall, in considering an application for a goods carriage permit, have regard to the following matters, namely:—

(a) the nature of the goods to be carried with special reference to their dangerous or hazardous nature to human life;

(b) the nature of the chemicals or explosives to be carried with special reference to the safety to human life.

79. Grant of goods carriage permit.—(1) A Regional Transport Authority may, on an application made to it under section 77, grant a goods carriage permit to be valid throughout the State or in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit:

Provided that no such permit shall be granted in respect of any area or route not specified in the application.

(2) The Regional Transport Authority, if it decides to grant a goods carriage permit, may grant the permit and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:—

(i) that the vehicle shall be used only in a specified area, or on a specified route or routes;

(ii) that the gross vehicle weight of any vehicle used shall not exceed a specified maximum;

(iii) that goods of a specified nature shall not be carried;

(iv) that goods shall be carried at specified rates;

(v) that specified arrangement shall be made for the housing, maintenance and repair of the vehicle and the

storage and safe custody of the goods carried;

(vi) that the holder of the permit shall furnish to the Regional Transport Authority such periodical returns, statistics and other information as the State Government may, from time to time, prescribe;

(vii) that the Regional Transport Authority may, after giving notice of not less than one month,—

(a) vary the conditions of the permit;

(b) attach to the permit further conditions;

(viii) that the conditions of the permit shall not be departed from, save with the approval of the Regional Transport Authority;

(ix) any other conditions which may be prescribed.

(3) The conditions referred to in sub-section (2) may include conditions relating to the packaging and carriage of goods of dangerous or hazardous nature to human life."

The extent and parameters prescribed in these provisions are to be adhered to by the Respondent No.2 for their functioning and to exercise the powers vested on it rationally, devoid of discriminatory decisions which are unsubstantiated by reason. They are ofcourse not debarred from collecting revenue in terms of the mandate of law and not over and above such provision.

44. In ***Monarch Infrastructure (P) Ltd.*** vs. ***Commissioner, Ulhasnagar Municipal Corporation and Others***[16] it was held that (*i*) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest. (*ii*) The Government cannot arbitrarily choose any person it likes for entering into

such a relationship or to discriminate between persons similarly situate. (*iii*) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons. It was further held that broadly stated the Courts would not interfere with the matter of administrative action or changes made therein, unless the Governments action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*. The Supreme Court would further hold that if these principles are to be borne in mind, the High Court was justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice.

45. Reverting to ***Natural Resources Allocation*** (*supra*) it was *inter alia* stated therein that the State is duty bound to adopt the method of auction by giving wide publicity and a transparent and fair method must be adopted. I hasten to add that the same Judgment also lays down that there can be exceptions from auction, but the ultimate test is only that of fairness of the decision-making process and compliance with Article 14 of the Constitution of India. The Supreme Court in this context referred to the ratio in ***M. P. Oil Extraction*** (*supra*) and ***Netai Bag and Others*** vs. ***State of W.B. and Others***[17].

46. From the catena of decisions extracted hereinabove, it is evident that distribution of State largesse should not be marred by any arbitrariness and public interest should be paramount in the matter of award of contracts. All participants in a tender process should be treated alike and similarly circumstanced individuals cannot be treated as pariahs, apart from which larger participation will invite more attractive bids.

47. Hence, on the touchstone of the aforestated principles and the discussions *supra*, it is quite evident that the process adopted by the Respondent No.2 is arbitrary and irrational denuded of any manifestation of fairness.

48. Consequently, (i) The Agreement dated 23-12-2013 (Annexure P3) is hereby quashed and set aside; (ii) Notice Inviting E-Tender floated by the

[16] (2000) 5 SCC 287
[17] (2000) 8 SCC 262

Respondent No.4, dated 03-07-2018 (Annexure P1) is also set aside, as also any bids submitted in consequence to the said e-tender.

iii) Fairness and equal treatment require that the process of tender should be carried out afresh. The IOCL is at liberty to invite a fresh e-tender for the purpose of *"Transportation of Indane LPG Cylinders in vertical position on unit rate basis Ex Rangpo LPG Bottling Plant"* as set out in the tender dated 03-07-2018. The Petitioners shall be permitted to participate and submit their bids, if they so desire.

(iv) The entire process should be completed within a period of eight weeks from today.

(v) In the interregnum, the IOCL shall permit the Respondents No.8 to 10 to continue carrying LPG Cylinders within the State as before, sans the Agreement or enter into any other suitable arrangement.

(vi) The amount payable to the Respondent No.2 by the Respondents No.8 to 10 in terms of the impugned Agreement be calculated and paid as shall be determined between the said parties.

49. The Writ Petition stands disposed of with the above directions.

50. No order as to costs.

SLR (2019) SIKKIM 183

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

W.P (C) No. 01 of 2018

Shri Jangpu Sherpa @ Jampu Sherpa ….. PETITIONER

Versus

Smt. Phurba Lhamu Sherpa and Others ….. RESPONDENTS

For the Petitioner: Mr. Zangpo Sherpa and Mr. Jushan Lepcha, Advocates.

For Respondent No. 1: Mr. William Tamang, Legal Aid Counsel.

For Respondent 2-3: Mr. Karma Thinlay, Sr. Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate.

Date of decision: 16th April 2019

A. Sikkim Record Writing and Attestation Rules, 1988 – The *Kotha Purnu* or *Dru Deb* and Attestation Rules, 1951 repealed by the Sikkim Record Writing and Attestation Rules, 1988 which came into force on 09.09.1988 – Made in exercise of the powers conferred by S. 36 (2) (1), (j) and (m) of the Sikkim Agricultural Land Ceiling and Reforms Act, 1977.

(Paras 10, 11 and 12)

B. Sikkim Record Writing and Attestation Rules, 1988 – Respondent No.2 after taking cognizance of the complaint seem to have taken evidence and thereafter come to the conclusion that the said plots had in fact been gifted to Respondent No.1 by one Norbu Sherpa – Respondent No.2 has recorded in the order that Respondent No.1 was entitled to correction in the record of rights of the said plots as it was wrongly mutated in the name of the Petitioner – Respondent No.2 has neither adverted to the said rules nor drawn power from it or from any other law while passing the order dated 14.05.2015 – Respondent No.2

has acted as a Court and passed orders as a Court. The records, however, reveal that Respondent No.2 was totally unaware of the source of his power. If the Respondent No.2 was aware of the said rules he ought to have known the limitations prescribed therein and followed the prescribed procedure, if applicable – Impugned order and notice set aside.

(Paras 27, 30, 31 and 36)

C. Transfer of Property Act, 1882 – S. 25 (1) – Sikkim Record Writing and Attestation Rules, 1988 – Rule 5 – Transfer of property is regulated by the Transfer of Property Act, 1882 which is enforced and applicable in Sikkim. The preparation of the record of rights is mainly for the purpose of ascertaining the ownership of the agricultural lands and quantum of revenue payable by the owner for the purposes of the said Act. S. 25 (1) of the said Act provides that every person shall be liable to pay revenue to the State Government for the lands allowed to be retained by him within the ceiling limit – While preparing the *"khasra"* under Rule 5 of the said Rules the surveyor is required to establish the ownership of the claimant. It is only after establishing the ownership that the surveyor shall cause entry in the relevant column of the *"khasra"*. For the limited purpose, the surveyor can examine the issue of ownership – The finding of the surveyor or the other authorities under the said rules regarding the ownership of the agricultural land for the purpose of preparation of the *"khasra"* however, cannot be considered the final determination of title of immovable property. For the determination of title of immovable property, the parties must approach the Civil Court of appropriate jurisdiction.

(Para 32)

Petition allowed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The present Writ Petition assails the order dated 14.05.2015 passed by the Additional District Collector/Magistrate (Respondent No.2) directing the record of rights for plot no. 233/234 at Damthang Block (the said plots) to be corrected in the name of the Respondent No.1 after the expiry of three months from the date of the order. The Petitioner was granted the said three months to approach the appropriate forum for relief against the said

order. Thereafter, a notice dated 18.03.2016 was issued to the Petitioner by the Respondent No.2. The notice stated that the Respondent No.1 had by a petition dated 02.03.2016 requested for mutation of the said plots in her name. Respondent No.2 issued the notice to the Petitioner requiring him to submit order from appropriate forum or else it was proposed that mutation process would be started from 31.03.2016 for the said plots. This notice dated 18.03.2016 is also impugned. Aggrieved thereby the Petitioner filed Title Suit No. 1 of 2016 before the Court of the Civil Judge, South Sikkim at Namchi. A counter-claim praying for declaration that the Respondent No.1 was the owner of the said plots had also been filed. However, on 31.08.2017 the suit was withdrawn with liberty to the parties to file afresh. Thereafter the present Writ Petition was filed by the Petitioner on the ground that question of title has to be decided by Civil Courts and not by Executive Magistrates. The Petitioner therefore prays for setting aside the impugned order dated 14.05.2015 and notice dated 18.03.2016. The above factual matrix is asserted in the Writ Petition.

2. The Respondent No.2 and the District Collector of the South District at Namchi (Respondent No.3) have jointly filed a counter-affidavit. The said counter-affidavit narrates the factual details of the passing of the order dated 14.05.2015 and notice dated 18.03.2016. It is stated that the Respondent No.1 filed a complaint to the Panchayat President and Member of 38-Damthang Gram Panchayat Unit (GPU), South Sikkim stating that the said plots were gifted to her as *"Daijo"* by one Norbu Sherpa on 07.05.1980 but the said *"Daijo"* land was subsequently registered in the name of the Petitioner. The Panchayat President and Members of 38 Damthang GPU vide letter dated 10.09.2013 forwarded the matter to the Sub-Divisional Magistrate, South Sikkim stating that the dispute between the parties could not be settled. On 12.09.2013 the complaint was registered as Misc Case No.5/13. The Respondent No.2 thereafter, directed the concerned Revenue Officer/Supervisor to verify the records of the said plots and submit a report as to how the said plots were mutated in the name of the Petitioner. On 25.10.2013 the Respondent No.2 received a report from the Revenue Inspector/Revenue Supervisor stating that the mutation records/ file in favour of the Petitioner was not traceable. On verification it was found that the mutation of the said plots were carried out from Norbu Sherpa to Dawa Tshering Sherpa vide O.O. No. 373/AD(S) dated 11.03.1985 and thereafter it was mutated in favour of the Petitioner from Dawa Tshering Sherpa vide O.O. No.128/DC(S) dated 05.07.1993.

However, the name of the Respondent No.1 was found recorded in the remarks column as having got *"Daijo"* in the computerised land record of the said plots. The Respondent No.2 thereafter issued summons to the Petitioner as well as the Respondent No.1 directing them to appear before him on 21.11.2013. During the proceedings it was found that the said plots were found mutated in the name of the Petitioner without the consent of the Respondent No.1. The counter-affidavit filed by the Respondent Nos.2 and 3 further states that the said plots *"belong to Respondent No.1 since the same was received by her as "Daijo" from Norbu Sherpa in the year 1980 and it was wrongly mutated in the name of the Petitioner."* It is averred that in order to ascertain the facts of the case two witnesses *viz.* Pema Ongchu Sherpa, resident of Damthang-W1 and Sriman Chettri, resident of Damthang-W2 were also examined. Pema Ongchu Sherpa stated on affidavit that in the year 1977 late Norbu Sherpa had gifted the said plots measuring approximately 5 acres to her adopted granddaughter i.e. the Respondent No.1. The said witness also deposed that in the year 1978 Dawa Tshering Sherpa made the Respondent No.1 her sister and gifted the said plots to her. Thereafter, she had settled in Dew, Namchi, South Sikkim. Sriman Chettri stated that she knew the Respondent No.1 who once resided in the land of Norbu Sherpa (Darey Bajey) and she had left the place twenty years ago.

3. The counter-affidavit of the Respondent Nos.2 and 3 also states that on 14.5.2015 three issues were framed as under:

> ***"****(i) was the land in question i.e. plot no.233/234 under Damthang block, South Sikkim given as "Daijo" to the FIRST party?*
>
> *(ii) whether with the mere abandonment of land the right of the FIRST party is extinguished?*
>
> *(iii) whether FIRST party is entitled to correction in records of rights of plot no.233/234 under Damthang block, South Sikkim?****"***

4. The counter-affidavit of the Respondent Nos.2 and 3 further avers that with regard to issue no.(iii) it was found that the mutation order transferring the said plots to the Petitioner should not have been executed without the No Objection Certificate from the Respondent No.1 as it was

given as *"Daijo"* to the Respondent No.1 by late Norbu Sherpa and therefore the record of rights was liable to be rectified in favour of the Respondent No.1. It is stated that the Respondent No.2 heard the matter in the presence of the Petitioner as well as the Respondent No.1 and the order dated 14.05.2015 was passed after considering the facts, statements and affidavits of the witnesses. It is also stated that it was only after a lapse of ten months thereafter that the Respondent No.2 issued the notice dated 18.03.2016 for mutation of the said plots.

5. The Petitioner has filed a rejoinder to the counter-affidavit filed by the Respondent No.2. It is submitted therein that the order dated 14.05.2015 and notice dated 18.03.2016 are illegal and without jurisdiction.

6. The Respondent No.1 has also filed a counter-affidavit. It is stated that Dawa Tshering Sherpa, father of the Petitioner left his native place Dharey Jaubari, Damthang, South Sikkim and started living along with his wife in Nepal where the Petitioner was born. The Petitioner' father expired in Nepal. After the demise of her parents' Respondent No.1 started living with late Norbu Sherpa (grandfather of the Petitioner) until his death in the year 1983. Respondent No.1 took care of Norbu Sherpa until his demise as she would have her own parents. She made every effort to keep Norbu Sherpa happy during his last moments. Due to her untiring love, care and support Norbu Sherpa gifted the said plots as *"Daijo"* to the Respondent No.1 in the presence of witnesses. The document granting *"Daijo"* was submitted at the office of the Respondent No.2 and 3. She had constructed a *"kacha"* house on the said plots. Norbu Sherpa lived there till his demise in the year 1983. However, since the said plots were not suitable for cultivation the Respondent No.1 temporarily shifted her residence to Dew, Damthang, South Sikkim in the year 1992 where she started working as a labourer at Public Works Department, Government of Sikkim due to her poverty. Taking advantage of this the Petitioner in her absence transferred and mutated the entire landed property of late Norbu Sherpa in his name without following due procedure. When she came to learn about the illegal transfer in the year 2013 she made a complaint before the Respondent Nos.2 and 3. This complaint was entertained.

7. The Petitioner filed a rejoinder to the counter-affidavit filed by the Respondent No.1 in which the assertion that Norbu Sherpa had given *"Daijo"* of the said plots to Respondent No.1 has been denied. It is also

denied that the Respondent No.1 has constructed the house therein. It is averred by the Petitioner that the property was duly mutated in the name of the Petitioner and that the order dated 14.05.2015 and notice dated 18.03.2016 are wholly without jurisdiction, null and void.

8. Heard Mr. Zangpo Sherpa, learned Counsel for the Petitioner, Mr. Karma Thinley Namgyal, learned Senior Government Advocate for the Respondent No.2 and 3 and Mr. William Tamang, learned Legal Aid Counsel for the Respondent No.1.

9. On 25.01.2018 this Court issued notice upon the Respondents and stayed the order dated 14.05.2015 passed by the Respondent No.2. On 27.08.2018 this Court directed the Respondent No.3 to file a detail affidavit pointing out the law as well as the procedure followed while examining issues pertaining to issuance of *"parcha"* or correction/rectification or cancellation thereof applicable in Sikkim.

10. Pursuant thereto the Respondent No.3 has filed an affidavit. It is stated that the procedure as envisaged under the Registration of Document Rule, 1930 are followed for registration of landed property in Sikkim. Once registered necessary rectification is carried out in the *"khasra"* (sale from one individual to another individual) and thereafter a *"parcha"* is issued. *"Parcha"* is issued after registration of the landed property is complete and mutation is carried out in favour of the buyer. Prior to such registration a spot verification is carried out by the concerned amin and a report thereof is submitted to the revenue section of the District Collector. No Objection Certificate from the immediate neighbours is also obtained followed by the No Objection Certificate from the families of the seller. As far as correction of record of rights is concerned, no separate law or rules are presently in force which authorises the Additional District Collector/Sub-Divisional Magistrate to rectify/correct the land records. The Kotha Purnu or Dru Deb and Attestation Rules, 1951published in the Sikkim Darbar Gazette dated October, 1951 has been repealed by the Sikkim Record Writing and Attestation Rules, 1988 which came into force on 09.09.1988. A copy of the said rules has been annexed to the said affidavit. It is stated that the cadastral survey operation of 1978-82 was conducted under the Kotha Purnu or Dru Deb and Attestation Rules, 1951 as the land record has been prepared in accordance with the provisions contained therein.

11. The Sikkim Agricultural Land Ceiling and Reforms Act, 1977 (14 of 1978) (the said Act) came into force on 22.06.1978 on the issuance of Notification No.3/LR dated 22.06.1978 published in the Sikkim Government Gazette No.86 on the same date in exercise of the powers conferred by Section 1 (3) of the said Act.

12. The Sikkim Record Writing and Attestation Rules, 1988 (the said rules) has been made in exercise of the powers conferred by clauses (1), (j) and (m) of sub-section (2) of Section 36 of the said Act.

13. The said rules came into force on 09.09.1988. The said rules deals with preparation and revision of record of rights **(rule 3 (1) to rule 3 (5))**; carrying out of survey and preparation of survey maps **(rule 4(1) to rule 4(9))**; preparation of *"khasra"* **(rule 5(1) to rule 5(28))**; preparation of *"khatian"* **(rule 6(1) to rule 6(12))**; attestation **(rule 7(1) to rule 7(10))**; appeal and correction of record of rights **(rule 8(1) to rule 8(5))**; assessment of land rent **(rule 9(1) and rule 9(2))**; completion of survey operation and repeal of the Record Writing or Kotha Purnu or Dru-deb and Attestation Rules, 1951 **(rule 11)**.

14. Under the scheme of the said rules the preparation and revision of record of rights is undertaken as detailed in rule 3(1) to rule 3(9). The process of preparation of *"khasra"* (or index register to the block maps) is undertaken as provided under rule 5. The *"khasra"* is required to be prepared in a form containing various particulars i.e. the name of the block, elakha, district, year of survey (in Christian as well as in Vikrama era), the name of the surveyor, head surveyor, survey inspector and the date of commencement and completion of the survey; plot number corresponding to the map; name of the locality; approximate altitude of the plot in meters; numbers of terraces or *"Garas"* comprising the plot; name, parentage, cast and address of the *"Bustiwala"*.

15. While preparing the *"khasra"* under rule 5 of the said rules, rule 5(2) provides that *"on establishing the ownership of the claimant, the surveyor shall cause entry in the relevant column of the khasra"*.

16. Rule 5(3) to rule 5(5) deals with disputes at the time of preparation of the *"khasra"*. While preparing the *"khasra"* if any dispute arises the procedure to be followed is provided in rule 5 of the said rules.

17. Rule 5(6) of the said rules provide that *"in case of entry of sale or gift, a valid registered deed shall be demanded and entry shall be made accordingly and registration number thereof shall be shown in the remarks column against the plot number under sale or gift."*

18. Rule 6 of the said rules provide the method for preparation of the *"khatian"* (record of rights). Rule 6(1) deals with the particulars required while preparing the *"khatian"*. Rule 6(3) provides that *"a parcha in respect of an individual land holder shall be issued after having checked by the head surveyor and the inspector respectively."*

19. Rule 6(4) provides that *"on completion of preparation of land record of rights, the surveyor shall issue the parcha to the concerned Bustiwala in presence of the members of the Panchayat after duly obtaining the receipt in that behalf from Bustiwala concerned."*

20. Rule 8 provides for appeal and correction of record of rights. Under Rule 8(1) of the said rules *"if any person is aggrieved by any decision of the Revenue Officer, he may prefer an appeal to the tribunal constituted under Section 13 of the Act within thirty days from the date of such decision."*

21. The order dated 14.05.2015 records that the said plots were found recorded in the name of the Petitioner in the *"record of rights"*. It is further recorded that as per the office records the said plots were mutated in favour of DawaTshering Sherpa from late Norbu Sherpa in the year 1985 and thereafter in favour of the Petitioner in the year 1993.

22. The Respondent Nos.2 and 3 has also filed copies of the *"parcha khatians"* regarding the said plots. The first *"parcha khatian"* filed records the name of Norbu Sherpa son of Rinzing Sherpa in the column of the name of the *"Bustiwala"*. In the remarks column there is an entry in Nepali which translated records *"house-Daijo Phurba Lhamu Sherpani wife of Lhakpa Temba Sherpa"*. The said *"parcha khatian"* bears signature of the surveyor dated 07.05.1980. It seems that this *"parcha khatian"* was prepared under the Kotha Purnu or Dru-deb and Attestation Rules, 1951 which was in existence till 09.09.1988 when the said rules were enforced.

23. The second *"parcha khatian"* (computerised record of rights) records the Petitioner as the owner. Amongst the various plots shown owned by him against the said plots in the remarks column the same endorsement showing the house as *"Daijo"* to the Respondent No.1 is recorded. The second *"parcha khatian"* is dated 22.10.2013. However, it is unclear as to whether the *"parcha khatian"* was prepared or the computerised record of rights was obtained on the said date.

24. The third *"parcha khatian"* is in the name of the Petitioner which relates to plots number 237, 238, 243 and 244. The third *"parcha khatian"* does not have the plot numbers 233 and 234 in it. However, against plot number 243 once again in the remarks column there is mention of *"Daijo"* of the house in favour of the Respondent No.1. There is no clarification regarding this.

25. The counter-affidavit filed by the Respondent Nos.2 and 3 makes it clear that the complaint by the Respondent No.1 was entertained by the Respondent No.2 in the year 2013. The Respondent No.1 enquired from the Panchayat President as to how the said plots had been mutated in the name of the Petitioner although they were gifted to her by her uncle on 07.05.1980. As the Panchayat could not answer this question it was forwarded to the Sub-Divisional Magistrate on 10.09.2013 pursuant to which a case was registered and summons issued to the parties. When the complaint was thus taken cognizance of by the Respondent No.2 the said rules were in force. At that time, it is quite clear, the *"parcha khatian"* in favour of the Petitioner had already been prepared. Under the said rules the *"parcha khatian"* in favour of the Petitioner had to be prepared under rule 6 on the basis of the *"khasra"* prepared under rule 5 thereof. Under the scheme of the said rules once the record of rights has been prepared and issued under rule 6(3) and 6(4) if any person is aggrieved by any decision of the Revenue Officer he may prefer an appeal to the tribunal constituted under Section 13 of the said Act within thirty days from the date of such decision under rule 8. The term *"Revenue Officer"* has been defined in rule 2(p) to mean any officer appointed by the Government under sub-section (3) of Section 19 of the said Act. Section 19 of the said Act falls under chapter III relating to preparation of record of rights. In exercise of the powers conferred by sub-section (1) of Section 13 read with sub-section (2) of Section 13 of the said Act the State Government issued Notification No.15/LRD (S) dated 16.08.95 constituting the tribunal for

hearing appeals under section 13 of the said Act and appointed the Joint Secretary to the Government of Sikkim in the Land Revenue Department as the sole member of the tribunal. Admittedly and it is also evident that the Respondent No.1 has not resorted to rule 8 of the said rules.

26. The Respondent No.1 had however, approached the Panchayat who endorsed the complaint to the Sub-Divisional Magistrate which was taken cognizance of by the Respondent No.2.

27. The Respondent No.2 after taking cognizance of the said complaint seem to have taken evidence and thereafter come to the conclusion that the said plots had in fact been gifted to the Respondent No.1 by one Norbu Sherpa. The Respondent No.2 has recorded in the order that the Respondent No.1 has prayed to the Court that the land in question be transferred to her as she has received the same from Norbu Sherpa in the year 1980 and it was wrongly mutated in the name of the Petitioner.

28. The Respondent No.2 after a detailed examination of the witnesses decided the first issue in the following manner:-

> **"***It is clear to me from the statement of both the parties and witness that the land was indeed gifted to the First Party by one Norbu Sherpa. The Second party has not denied the anything in this regard. The second party has stated that it was gifted but the First Party has abandoned the land in year 1992 and thus due to this act by abandonment, the right of the First party over the land is extinguished. It is also amply clear from the records of right that the land was indeed given a "Daijo"to the First Party by Norbu Sherpa.***"**

29. The second issue was decided by holding that the Petitioner having failed to produce the No Objection Certificate from the first party before the mutation there were few shortcomings in the office procedure adopted. It was also held that mutation in favour of the Petitioner could not have been done without the consent of the Respondent No.1 in view of the entry *"Daijo"* in the remarks column of the *"parcha khatian"*.

30. The third issue related to a pertinent question as to whether the Respondent No.1 was entitled to correction in the record of rights of the said plots. The Respondent No.2 decided the said issue holding:-

> ***"****In deciding Issue No.3, it appears to me that clearly the mutation order transferring the land to the Second Party with respect to the above land should not have been executed without the NOC from the First Party. Since the land was given as Daijo to the First Party by Late Norbu Sherpa and since Norbu Sherpa has long expired, the land is to be mutated in the name of the First Party after his death since it is clear that the said land was given to the First Party by Norbu Sherpa. Therefore records of rights are to be corrected in favour of the First Party.****"***

31. The Respondent No.2 has neither adverted to the said rules nor drawn power from it or from any other law while passing the order dated 14.05.2015. Neither the counter-affidavit filed by the Respondent Nos.2 and 3 nor the affidavit dated 05.03.2019 filed by the Respondent No.3 reveal as to whether the said rules were at all followed by the Respondent No.2. The Respondent No.2 has acted as a Court and passed orders as a Court. The records, however, reveal that the Respondent No.2 was totally unaware of the source of his power. If the Respondent No.2 was aware of the said rules he ought to have known the limitations prescribed therein and followed the prescribed procedure, if applicable. The counter-affidavit filed by the Respondent No.2 is completely silent on what procedure was followed. The Respondent No.2 was definitely not exercising its limited powers under the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.). The said rule does not reflect any role of the Respondent No.2 in its scheme unless he was acting as a Revenue Officer. However, no notification has been placed by the Respondent No.2 and 3 bringing on record any appointment order by the Government under the said Act. The Respondent No.2 and 3 have not pleaded that the Respondent No.2 was exercising powers of a Revenue Officer as appointed by the Government under sub-section (3) of Section 19 of the said Act.

32. Transfer of property is regulated by the Transfer of Property Act, 1882 which is enforced and applicable in Sikkim. The preparation of the record of rights is mainly for the purpose of ascertaining the ownership of the agricultural lands and quantum of revenue payable by the owner for the purposes of the said Act. Section 25 (1) of the said Act provides that every person shall be liable to pay revenue to the State Government for the lands allowed to be retained by him within the ceiling limit. While preparing the *"khasra"* under rule 5 of the said rules the surveyor is required to establish the ownership of the claimant. It is only after establishing the ownership that the surveyor shall cause entry in the relevant column of the *"khasra"* as required by rule 5(2). For the limited purpose the surveyor can examine the issue of ownership. The finding of the surveyor or the other authorities under the said rules regarding the ownership of the agricultural land for the purpose of preparation of the *"khasra"* however, cannot be considered the final determination of title of immovable property. For the determination of title of immovable property the parties must approach the civil Court of appropriate jurisdiction.

33. A perusal of the records placed reveal conflicting claims of title between the Petitioner and the Respondent No.1. The only document relied upon are the *"parcha khatians"*. The Respondent No.1 has claimed that the said plots were gifted to her as *"Daijo"* and that the said document was submitted at the office of the Respondent No.2 and 3. However, neither the copy nor the original was placed before this Court by the Respondents. Contrary thereto in the remarks column of the *"parcha khatian"* there is mention of only a house being given as *"Daijo"* to the Respondent No.1. With these uncertain facts and serious disputes regarding the title of the said plots it was incumbent upon the Respondent No.2 to have directed the parties to the civil Court for the determination of the title of the said plots.

34. The order dated 14.05.2015 passed by the Respondent No.2 also suffers from non application of mind for not having even bothered to consider what was the applicable law and whether he had the power and jurisdiction to decide the issue before him.

35. The Petitioner as well as the Respondent No.1 is at liberty to approach the right forum for appropriate relief if advised. The opinion expressed by this Court regarding the facts and documents placed before

this Court in this judgment is only for the purposes of determining whether the order dated 14.05.2015 and notice dated 18.03.2016 passed by the Respondent No.2 were liable to be set aside. This Court makes it clear that the *prima facie* opinion so expressed regarding the materials available shall not in any circumstance be used in any proceeding instituted for determination of the title of the said plots.

36. The Writ Petition is allowed. The order dated 14.05.2015 as well as the notice dated 18.03.2016 passed by the Respondent No.2 are therefore set aside. No order as to costs.

SLR (2019) SIKKIM 196

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

CRP No. 09 of 2017

Golden Tobacco Limited ….. PETITIONER

Versus

Sikkim Tobacco Limited ….. RESPONDENT

For the Petitioner: Mr. Sudesh Joshi and Ms. Sujatha Shirolker, Advocates.

For the Respondent: Mr. Manish Kumar Srivastava, Mr. Udai P. Sharma, Mr. Passang Tshering Bhutia and Mr. Kusan Limboo, Advocates.

Date of decision: 23rd April 2019

A. Code of Civil Procedure, 1908 – S. 115 – Civil Revisional Jurisdiction – The prayers of the D.H. in I.A. No. 4 of 2008 were dismissed by the Order of the Hon'ble Supreme Court dated 02.02.2010 in Transfer Case (Civil) Nos. 12-14 of 1985. In the face of the specific decision of the Hon'ble Supreme Court, the D.H. cannot reagitate the matter before the learned Trial Court and proceed to approach this Court in revision seeking valuation of the machines by technically qualified persons.

(Para 19)

B. Code of Civil Procedure, 1908 – Order XXI – Attachment – The argument that the *Nazir* had not taken possession of the machines is incongruous as the *Nazir* could not have moved the machines and brought it along with him. It is sufficient that he complied with the procedure prescribed.

(Para 20)

Petition dismissed.

JUDGMENT

Meenakshi Madan Rai, J

1. Assailing the Order dated 18.09.2017, in Civil Execution Case No. 1 of 2014, the Petitioner is before this Court *inter alia* praying that the impugned Order be set aside and the learned District Judge, East Sikkim, at Gangtok, be directed to appoint a Commissioner to find out the market and the present value of the machines to enable execution of the Order of this Court in CRP No. 03 of 2015 dated 09.03.2017. Further, the learned District Judge be directed to ascertain whether seals on the machines as per the Order of the Honble Supreme Court are still in place or whether the machines had been tampered with or damaged by the Respondent. A direction was also sought to make the Respondent pay the market value of the machines to the Petitioner, the Respondent having violated the Order of the Honble Supreme Court by removing the seals and tampering with the machines.

2. Before the learned trial Court, the Petitioner herein was the Decree Holder and the Respondent was the Judgment Debtor and shall hereinafter be referred to as D.H. and J.D. respectively.

3. The learned trial Court on 18.09.2017 pronounced the impugned Order rejecting the application filed by the J.D. under Order XXI, Rule 58, read with Section 151 of the Code of Civil Procedure, 1908 *(hereinafter the "CPC")*. The J.D. vide the application had *inter alia* brought to the notice of the learned trial Court that vide its Order of 07.08.2017, a Warrant of Attachment had been issued for the machines of the D.H., lying in the factory premises of the J.D. at Majhitar, Rangpo, East Sikkim. Vide the same Order (07.08.2017), the learned trial Court had also ordered the D.H. to deposit a sum of Rs. 2,92,86,700/- (Rupees two crores, ninety two lakhs, eighty six thousand and seven hundred) only, along with interest at the rate of 15% per annum on the aforestated amount, from the date of Award till the date of payment i.e. 11.09.2017, as per the Award of the learned Arbitrator. The D.H. failed to comply with the Order of the learned trial Court and make the deposit. Consequently, in view of this failure, the J.D. by filing the petition under Order XXI, Rule 58, read with Section 151 of the CPC prayed that the Order of attachment passed by the Court on 07.08.2017 be recalled and the J.D. be permitted to partly realize its dues from the D.H., through public auction of the machines.

4. In response to the said application filed by the J.D., the D.H. had contended that as per the Arbitration Award dated 28.12.2007 and the Decree of the Honble Supreme Court, dated 02.02.2010, there was a clear cut direction to return the twenty one machines to the D.H. This had been violated by the J.D. by non-compliance. That, the J.D. had no right to seek permission to auction the machines instead of returning them to the D.H. That, it "appeared" from the Report (evidently reference is being made to the Nazirs Report, dated 11.09.2017) that the J.D. had tampered with the machines and did not want it to be inspected by the D.H. to prevent them from enjoying the fruits of the Decree. That the J.D. had filed a Company Petition for executing the Arbitration Award before the Honble High Court of Bombay in a Winding Up Case, i.e. Company Petition No. 03 of 2011, wherein the Honble High Court had passed orders and directed the D.H. to deposit the amount in twelve weeks. In view of this Order, the question of auctioning the machines of the D.H. does not arise, hence the petition be dismissed.

5. The learned trial Court on consideration of the submissions rejected the petition vide the impugned Order dated 18.09.2017. The learned trial Court in the same Order referred to its Order dated 07.08.2017 which had been passed after the D.H. had filed an execution petition, seeking execution of the Decree. The Order also reflected that the Nazir of the Court had executed the Warrant on 11.09.2017 and filed the Report of Attachment before the learned trial Court.

6. Pursuant to this Report of the Nazir, the records of the learned trial Court reveal that a "Written Statement" was filed by the D.H. on 14.09.2017, to the Nazirs Report in addition to his reply to the petition of the J.D. under Order XXI Rule 58 read with Section 151 of the CPC. The learned trial Court in the impugned Order besides considering the petition *supra* also took into consideration the 'Written Statement' against the Report of the Nazir and while agreeing with the D.H. that the Nazir of the Court is not a Technical person, however observed that the specifications of the machines had been mentioned at Serial Nos. 1 to 9 in the Order dated 07.08.2017, in accordance with which the Nazir had attached the twenty one machines. The learned Trial Court while addressing the issues raised in the "Written Statement" of the D.H. to the Nazirs Report, in the impugned Order dated 18.09.2017, has *inter alia* further observed as follows;

> "Hence, there is no question of examination of the machine *(sic)* by a technical person.
>
> It is averred that the commercial life of the concerned machines was 10 years from March 1983. The machines are very old as recorded in the Arbitration Award dated 28.12.2007 as such there is no question of the examination of the working condition of the machines. Hence, prayer of the Decree holder is hereby rejected."

The learned trial Court in the impugned Order would also observe that, the "Written Statement" of the D.H. to the Report of the Nazir was in fact an indirect prayer for issuance of a Commissioner, for inspection of the twenty one machines lying in the factory premises of the J.D. Referring to the decision of the Honble Supreme Court, dated 02.02.2010 and the Order of this Court dated 09.03.2017, the plea of the D.H. for sending a technical person to verify the machines was rejected.

7. Aggrieved by this aspect of the Order, the instant Revision has been filed where the D.H. has delved into the facts of the case at great length and what transpired between the parties. The attention of this Court was drawn to the Arbitration Award dated 28.12.2007, the order of the Supreme Court dated 02.02.2010, the proceedings before the learned trial Court and also the Order of this Court dated 09.03.2017. It is apposite to state here that this Court is seized of the facts, the Order of this Court in CRP No. 3 of 2015 would be sentinel to this circumstance.

8. Before this Court, learned Counsel Mr. Sudesh Joshi for the D.H. submitted that the seals of the machines had been broken indicating that they had been tampered with and thereby damaged instead of being returned untampered to them by the J.D. That, when the Nazir went to the place where the machines were kept it was lying in the open and not protected. That, the Report reflects that the Nazir had attached all the properties with the assistance of the Manager of the J.D. Company with the assurance that he would not sell or use it without prior permission of the Court but had failed to take custody of the machines. He had in fact handed it over to the Manager of the J.D. Company to keep it in his custody, thereby defeating the purpose of the attachment order. Hence, it was urged that a technical person ought to be appointed to assess the

condition of the machines as the Nazirs Report does not state which machines were attached, the types of machines, the conditions they were in or identification thereof. That, the learned trial Court be directed to take necessary steps, as reflected in the prayers.

9. Learned Counsel for the J.D. submitted that it is apparent from the records of the matter that the D.H. came to know that the machines were scrap in the year 1995 itself. That, in the Arbitration Award dated 28.12.2007 they did not ask for restoration of the machines, neither did the Arbitration Award or the Order of the Honble Supreme Court require the J.D. to return the machines in working order. It is clear that the machines were of the year 1983 and were to be in working condition for up to ten years, that period having lapsed, it is no longer in working condition. That, the Arbitration Award also clearly indicates that the machines were not in working order. That, it serves no purpose to appoint a technical person to assess the condition of the machines which were already scrap, hence the order of the learned trial Court requires no interference.

10. I have carefully heard and considered the rival arguments forwarded by both learned Counsel and I have also perused the impugned Order and all records pertaining to the matter.

11. What emanates from the records furnished before this Court is that, the Honble Supreme Court vide its Order dated 27.11.1984 in Special Leave Petition (Civil) No. 11286 of 1984 and Transfer Petition No. 439 of 1984, transferred *Suit No. 51 of 1983 (Sikkim Tobacco Co. Ltd. Vs. Golden Tobacco Co. Ltd. and others), Suit No. 3 of 1984 (Himal Enterprises Pvt. Ltd. Vs. Golden Tobaco Co. Ltd. and others), and Suit No. 36 of 1984 (Golden Himal Investment Pvt. Ltd. Vs. Sikkim Tobacco Co. Ltd. and others), all pending before the District Judge, Gangtok, Sikkim* to the Honble Supreme Court. The matter between the parties herein was referred to arbitration and Mr. Justice A.C. Gupta, retired Judge of the Honble Supreme Court appointed as the Sole Arbitrator. During the arbitration proceedings, Mr. Justice A.C. Gupta expressed his inability to proceed in the matter, whereupon, the Honble Supreme Court vide its Order dated 07.12.2001, in I.A. No. 1 in Transfer Case (Civil) No. 12-14/1985, appointed Mr. S.C. Agarwal, former Judge of the Honble Supreme Court as the Sole Arbitrator. Mr. Justice S.C. Agarwal passed the Arbitration Award on 28.12.2007 which *inter alia* is as follows;

> "1) STL is entitled to retain 3 machines mentioned at Sr. Nos. 1, 3 and 5 of Annexure 'A' to the Statement of Claim.
>
> 2) GTC is entitled to return of 21 machines mentioned at Sr. Nos. 1 to 6, 8, 9, 11 to 14, 16 to 20 and 22 to 25 of Annexure 'A' to the Counter Claim.
>
> 3) GTC shall pay to the Claimants towards their claim an amount of Rs.2,92,36,700=00 within a period of one month from the date of award. In case GTC fails to pay the said amount of Rs.2,92,86,700=00 within a period of one month it would pay interest @ 15% per annum on the aforesaid amount of Rs.2,92,86,700=00 from the date of award till the date of payment.
>
> 4) The parties will bear their own costs in the proceedings."

12. Being aggrieved and dissatisfied with the Award, the D.H. was before the Hon ble Supreme Court, who vide its Order, dated 02.02.2010, in *"Transferred Case (Civil) Nos. 12-14 of 1985"* dismissed the objections filed by the D.H. and the Award dated 28.12.2007 became a Rule of the Court. The Order of the Honble Supreme Court dated 02.02.2010 is as follows;

> " … Objections to the Award dated 28th December, 2007 given by Honble Mr. Justice S.C. Agarwal, former Judge of this Court are rejected. Decree be prepared in terms of the Award.
>
> I.A. Nos. 2-5 are accordingly, dismissed.
>
> ..."

The D.H. being aggrieved by the Order dated 02.02.2010 *supra*, preferred a Review Petition bearing No. 2101-2104 and a Curative Petition bearing No. 21-24 of 2012, both of which were disposed of by the Honble Supreme Court on 13.01.2011 and 22.03.2012, respectively.

13. So far as the seals on the machines are concerned, the Arbitration Award reflects that under the Order of the District Magistrate, East Sikkim at Gangtok, dated 02.11.1983, the machines were put in possession of the

S.P., East for safe custody till 10.11.1983 and the machines were put under seal in the factory building. The learned District Judge issued an interim injunction restraining removal of machines and maintenance of status quo. The D.H. moved an application for modification of the said Order to permit removal of the machines and the J.D. moved an application for clarification of the Order dated 07.11.1983 to permit removal of the seals. Both these applications were dismissed by the learned District Judge by Order dated 11.05.1984.

14. No specific Order of the Hon ble Supreme Court pertaining to sealing of machines was pointed out to this Court by the D.H. It is thus apparent from the records available before this Court that the Honble Supreme Court has made no orders for sealing of the machines. Evidently the twenty one machines were put under a common seal in the factory building on the orders of the District Magistrate, East, Gangtok, Sikkim. That apart, the Arbitration Award reflects as follows;

> "… The learned Sole Arbitrator, on April 4, 1984, passed an order appointing Mr. Mukul Mudgal, Advocate, **as Commissioner to remove the seals affixed on the factory building of STL as also the seals on the three machines stated to be lying outside the factory building and to see that they are taken inside the factory building**. It was also directed that two technically qualified persons, each side to select one, would inspect the 21 machines lying in the STL premises, prepare an inventory of the same and also make an assessment of their present condition."
>
> **(Emphasis supplied)**

15. Thus, from the extract of the Arbitration Award *supra,* it is clear that if at all, three machines which were said to be outside the factory building were sealed but the twenty one machines were in the factory building of the J.D., and the building was sealed. Besides, it is evident from the Arbitration Award that an inspection of the machines were carried out and the Technical Expert Mr. Krishnamurthy of the D.H. Company reported that the twenty one machines were no longer in working condition. The Award reflects as follows;

"… By order dated November 26, 1986, the learned Sole Arbitrator appointed Mr. Mukul Mudgal, Advocate as Commissioner for inspection of the machines and to make a report whether machines were in order. Mr. Mudgal was authorized to engage an engineer to assist him and accompany him during inspection. Since an inspection had not been carried out in pursuance of the said order, the learned Sole Arbitrator, by order dated December 17, 1994, again gave a direction regarding inspection of the machines at Rangpo. In pursuance of the said direction, the Advocate-Commissioner, Mr. Mukal Mudgal inspected the machines on June 1, 1995. The machines were also examined by Mr. Krishnamurthy, a Technical Expert of GTC, and the report of the Advocate-Commissioner along with the Technical Report of Mr. Krishnamurthy were submitted before the learned Sole Arbitrator. **As per the inspection report dated June 5, 1995 of Mr. Krishnamurthy, 21 machines are no longer in working condition and would require extensive repair at a very high cost to restore them to a working condition and even this might not be possible as the machines might have in fact been reduced to scrap**.

…

……

The total number of machines lying at the factory premises of STL at Rangpo in Sikkim is 24 as mentioned by the Honble Supreme Court in the Order dated November 27, 1984. The learned Sole Arbitrator Mr. Justice A.C. Gupta also in Order dated April 4, 1985 whereby Mr. Mukul Mudgal, Advocate was appointed as Commissioner, **has mentioned that 3 machines were stated to be lying outside the factory building and 21 machines were lying in the factory premises of STL**. …"

(Emphasis supplied)

16. In this context it is relevant to refer to page No. 82 of the Arbitration Award which at "Claim No. 5" and "Claim No. 10" has addressed the claim of the J.D. with regard to the machines but bears no reference to seals on any machine. This is reflected in the following pages of the Arbitration Award as extracted hereinbelow;

> **[Page No. 24]**
>
> "…On October 13, 1983, a First Information Report [FIR No.800/83] was registered at Police Station, Connaught Place, New Delhi on the basis of a complaint dated October 10, 1983 made against Mr. B.K. Sreshtha under Sections 406 and 420 IPC for misappropriation of machines and on October 26, 1987 warrant was issued by Metropolitan Magistrate, New Delhi on the basis of the said FIR authorizing search of the machines and requiring their production before the Court. On October 30, 1983, a police party reached the factory premises of STL in Sikkim, and seized the machines. Under order of the District Magistrate, East, Gangtok, Sikkim dated November 2, 1983 the machines were put in possession of S.P.[East], Sikkim for safe custody till November 10, 1983 **and the machines were put under seal in the factory**. …"
>
> **[Page No. 115]**
>
> "… **In pursuance of the said direction, seals were placed by the Police to secure safe custody of the machines which were lying in the factory premises of STL in Sikkim**. …"
>
> **[Page No. 117]**
>
> …It is, thus, evident that the machines were initially placed under seal on the directions of the District Magistrate (East), Sikkim dated November 2, 1983 which order was operative till November 10, 1983 but in the meanwhile Mr. B.K. Shreshta of STL had obtained an order from the District Judge, Sikkim, Gangtok, in Suit No. 51 of 1983 on

> November 7, 1983, restraining removal of the machines and for maintaining status quo and the said order continued till September 25 1984 when it was set aside by Sikkim High Court in but *(sic)* that order of the Sikkim High Court was not implemented during the pendency of the Special Leave Petition filed by STL in the Supreme Court. **This would show that sealing of the machines has continued on the basis of the interim order which was obtained by STL in Civil Suit No.51 of 1983 which continued to be operative till the reference of the dispute to Arbitration and during the pendancy of the arbitration proceedings also the machines have remained under seal because no Interim Award could be made in favour of either of the parties. GTC cannot, therefore, be held responsible for the machines being placed under seal. The situation that resulted in machines being placed under seal arose on account of the refusal on the part of the STL to return the machines. STL cannot, therefore, raise objection against the claim of GTC for damages for wrongful retention of the machines on the ground that STL cannot be held responsible for such damages since the machines were under seal and they were not utilized by STL**. In the circumstances non-utilisation of he *(sic)* machines by STL on account of the machines having been put under seal cannot be a justification for denying the claim of GTC for damages since GTC was deprived of the use of the machines on account of wrongful retention of the machines by STL. …"
>
> **(Emphasis supplied)**

The above extracts clearly shed light on the affixation of seals.

17. As far as assessing the present value and market value of the machines are concerned, the Arbitration Award at page No. 119 reflects

that the expected commercial life of the machines is ten years, the relevant portion is extracted below for easy reference;

> "... The Replacement Value for each machine, **as on March 1983**, has been shown and the total Replacement Value for the 21 machines is placed at Rs.218.14 lakhs. **The expected commercial life of the machines is placed as 10 years and Rs.21.814 lakhs has been taken as depreciation @ 10% for one year.** Rs.39.265 lakhs has been computed as interest on the capital amount of Rs.218.14 lakhs @ 18% per annum. Entrepreneurs risk based on 5 years pay back period has been calculated @ Rs.43.6328 lakh for one year. The total amount towards hiring charges has been worked out at Rs. 104.707 lakhs for one year i.e. Rs.8,72,558=00 per month. ..."
>
> **(Emphasis supplied)**

18. Hence, the commercial life and value of the machines require no further elucidation. The Arbitration Award nowhere mentions that the twenty one machines were to be returned to the D.H. in working condition neither does it lay down that the status and value of the machines were to be ascertained before handing over. The Order of this Court dated 09.03.2017 in C.R.P. No. 03 of 2015 mentions no such direction either. It is a misconception and erroneous assumption of the D.H. which reflects, that the D.H. has failed to understand the intent and purport of the Arbitration Award or the substance of the Orders of this Court. It is unfathomable as to why the D.H. should aver that *"It means the Respondent has violated Supreme Court order by illegally opening the seals and tampered the machines of Petitioner and used for their benefits thereby damaged the very valuable imported machines of petitioner thereby cheated the petitioner as well as Hon'ble Supreme Court and disobeyed the order."* As already discussed hereinabove no order of the Honble Supreme Court issues with regard to the sealing of the machines, consequently the question of disobedience does not arise.

19. We may also relevantly refer to I.A. No. 4 of 2008 in Transfer Case (Civil) No. 12-14 of 1985 before the Honble Supreme Court wherein the D.H. had averred *inter alia* as follows;

> "…9. It is submitted that in view of the above mentioned facts the claimant has suffered additional loss quantification whereof will have a vital bearing on the hearing and disposal of the Objections filed by the Applicant under Section 30 of the Arbitration Award, 1940. **It is consequently essential in the interest of justice that present value of the machines as on date be assessed in order that a fair and reasonable disposal of the respective claims can be arrived at**. …"
>
> **(Emphasis supplied)**

The following prayers had been made by the D.H.;

> "**a) Appoint a Court Commissioner to inspect the machines belonging to the Applicant lying in the premises of Messrs Sikkim Tobacco Limited and assess of the present value thereof; and**
>
> **b) direct the Court Commissioner to take the help of technically qualified persons as necessary; and**
>
> **c) Pass such order or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case**."
>
> **(Emphasis supplied)**

The prayers of the D.H. in I.A. No. 4 of 2008 were dismissed by the Order of the Honble Supreme Court, dated 02.02.2010, in *"Transferred Case (Civil) Nos. 12-14 of 1985" supra.* In the face of the specific decision of the Honble Supreme Court, the D.H. cannot reagitate the matter before the learned trial Court and proceed to approach this Court in revision seeking valuation of the machines by technically qualified persons.

20. The argument that the Nazir had not taken possession of the machines is incongruous and banal as the Nazir could not have moved the machines and brought it along with him. It is sufficient that he complied with the procedure prescribed. The grievance of the D.H. that "it appeared" from

the Report of the Nazir, that, the J.D. had tampered with the machines has no legs to stand as the Report of the Nazir dated 11.09.2017 makes no such statement as evident on its careful perusal neither does the Report reflect that the machines were in the open as alleged by the D.H.

21. From the facts and circumstances reflected above, it is indeed unequivocally apparent that the instant petition is devoid of merit and has been filed only to delay compliance with the Award of the Arbitrator. In the aforestated circumstances, no reason whatsoever emanates to interfere with the findings of the learned trial Court.

22. Accordingly, the Revision Petition is rejected and dismissed with costs of Rs.25,000/- (Rupees twenty five thousand) only, to be paid by the D.H. to the J.D. within fifteen days from today, failing which the D.H. will be entitled to interest at the rate of 9% per annum till payment of the cost imposed.

23. Copy of this Order be sent to the learned trial Court.

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

SLR (2019) SIKKIM 209

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

I.A No. 01 of 2018
in
MAC App. No. 11 of 2018

The Branch Manager,
National Insurance Co. Ltd. ….. PETITIONER/APPELLANT

Versus

Suk Dhoj Basnett and Others ….. RESPONDENTS

For the Petitioner: Mr. Sushant Subba and Mr. Madan Kumar Sundas, Advocates.

For Respondents 1-6: Mr. Ajay Rathi and Ms. Phurba Diki Sherpa, Advocates.

For Respondent No.7: None

Date of order: 26rd April 2019

A. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – It is clear from the second proviso that the High Court may entertain the Appeal after expiry of the period of ninety days if it is satisfied that the Appellant was prevented by "sufficient cause" from preferring the Appeal in time. Thus, the Appellant is required to prove "sufficient cause" for the delay – When delay is occasioned at the behest of the Government, it would be difficult to explain the delay on a day-to-day basis as transaction of business in the Government is done leisurely by Officers who evince no personal interest at different levels – It is true that adoption of strict standards of proof leads to grave miscarriage of public justice and the approach of the Court thus should be pragmatic but not pedantic. It is also true that the expression "sufficient cause" should be considered with pragmatism in a justice-oriented approach rather than technical detection of

sufficient cause for explaining every day's delay – Apparent that the Appellant has grossly failed to put forth even a semblance of the grounds which could tantamount to "sufficient cause" for condonation of delay. Merely pressing the argument that it is a Government Company and stating that the File went from one Office to the next without a semblance of an explanation does not suffice to explain the delay. The grounds are completely bereft of any bona fides and reeks of a completely lackadaisical and negligent attitude besides reflecting a cavalier attitude to the circumstance of the Respondents.

(Paras 6 and 10)

B. Motor Vehicles Act, 1988 – Beneficent Legislation – Object – The Respondents have lost an earning member of their family thereby cutting into their income and means of livelihood. The object of the Act has to be afforded due consideration, which in the instant matter appears to be lacking on the part of the Appellant.

(Para 8)

Petition and appeal dismissed.

Chronological list of cases cited:

1. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.
2. Basawaraj v. Land Acquisition Officer, MFA No.10766 of 2007, decided on 10.06.2011 (KAR).
3. Syed Mehaboob v. New India Assurance Company Limited, (2011) 11 SCC 625.
4. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.
5. Special Tehsildar, Land Acquisition, Kerala v. K. V. Ayisumma, (1996) 10 SCC 634.

ORDER

Meenakshi Madan Rai, J

1. By filing this Petition under Section 173(1) of the Motor Vehicles Act, 1988 (hereinafter, MV Act), the Appellant Company seeks condonation of 379 days delay in filing the Appeal. The grounds put forth for the delay are as follows;

> **"**a. That the Impugned award was passed by the Learned Member, Motor Accidents Claims Tribunal, East Sikkim at Gangtok in M.A.C.T. Case No.53 of 2015 on 19.06.2017.
>
> b. That the Impugned Award was received by the Branch Office at Gangtok. The true copy of the Impugned award was send (sic) to Siliguri Division Office.
>
> c. That the Division Office after receiving the true copy award/ judgment forwarded the same to the Kolkata Regional Office for opinion as well as instruction.
>
> d. That as per the internal procedure the Regional Office sent back the file to Siliguri Division Office for appointing an advocate for preferring Appeal in the instant case.
>
> e. That finally the appellant had appointed the undersigned counsel on 20.08.2018 for filling (sic) appeal in the instant case.
>
> f. That after completion of all official formalities, the Memorandum of Appeal was send (sic) by the applicant counsel to Regional Office for verification.
>
> g. That the same was taken (sic) few days to verify.**"**

2. It was further contended that due to the aforestated unavoidable circumstances and delay in receiving the approval from the concerned Authorities, the Appeal came to be filed belatedly. Learned Counsel would while reiterating the above grounds further urge that it is a settled position of law that Government and Government Undertakings have been permitted some flexibility when delay is occasioned as it takes time for transaction of official business. That, should the delay not be condoned the Appellant

Company will suffer irreparable loss as the impugned Award suffers from serious defects and is against the law laid down by the various Courts. Hence, in consideration of the grounds put forth the delay be condoned and the Appeal admitted.

3. Learned Counsel for the Respondents-Claimants on the other hand would contend that Government Undertakings may be afforded some flexibility, but this cannot be interpreted so widely as to include within its ambit those matters where grounds for delay are not explained at all. That, the grounds given by the Appellant Company clearly do not reveal any dates for the delay. There is no reference as to when the certified copy of the Judgment was applied for, obtained and when the official process was initiated for approval from the concerned Siliguri Division Office and the Kolkata Regional Office. The Appellant Company is duty bound to explain the delay in detail in the interest of justice and should there be failure to do so the delay ought not to be condoned. That, in the instant matter, the delay is for more than a year while the Respondents herein who suffered the death of their loved one have had to wait to even receive the compensation granted to them on account of the loss of their bread winner. Hence, in view of the unsatisfactory grounds put forth the Petition deserves no consideration and ought to be dismissed.

4. The rival contentions of Learned Counsel were heard at length and the impugned Judgment and Award perused.

5. Section 173 of the MV Act deals with Appeals which lays down as follows;

> **"173. Appeals**.—(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:
>
> Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees

> or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:
>
> **Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.**
>
> (2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees.**"**
>
> **[emphasis supplied]**

6. It is clear from the second proviso *supra* that the High Court may entertain the Appeal after expiry of the period of ninety days if it is satisfied that the Appellant was prevented by "sufficient cause" from preferring the Appeal in time. Thus, the Appellant is required to prove "sufficient cause" for the delay. While explaining what "sufficient cause" entails, the Hon'ble Supreme Court in ***Basawaraj and Another*** vs. ***Special Land Acquisition Officer***[1] held as follows;

> **"9.** Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or

[1] (2013) 14 SCC 81

"remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See *Manindra Land and Building Corpn. Ltd.* v. *Bhutnath Banerjee* [AIR 1964 SC 1336], *Mata Din*v. *A. Narayanan* [(1969) 2 SCC 770 : AIR 1970 SC 1953], *Parimal* v. *Veena* [(2011) 3 SCC 545 : (2011) 2 SCC (Civ) 1 : AIR 2011 SC 1150] and *Maniben Devraj Shah*v. *Municipal Corpn. of Brihan Mumbai* [(2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24 : AIR 2012 SC 1629].)

10. In *Arjun Singh* v. *Mohindra Kumar* [AIR 1964 SC 993] this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned*, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide *Madanlal* v. *Shyamlal*

[(2002) 1 SCC 535 : AIR 2002 SC 100] and *Ram Nath Sao* v. *Gobardhan Sao* [(2002) 3 SCC 195 : AIR 2002 SC 1201].)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to *Halsbury's Laws of England*, Vol. 28, p. 266: "605. *Policy of the Limitation Acts*.—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (*1*) that long dormant claims have more of cruelty than justice in them, (*2*) that a defendant might have lost the evidence to disprove a stale claim, and (*3*) that persons with good causes of actions should pursue them with reasonable

> diligence." An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. (See *Popat and Kotecha Property* v. *SBI Staff Assn.* [(2005) 7 SCC 510], *Rajender Singh* v. *Santa Singh* [(1973) 2 SCC 705 : AIR 1973 SC 2537] and *Pundlik Jalam Patil* v. *Jalgaon Medium Project* [(2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907].)**"**
>
> **[emphasis supplied]**

7. In the said matter, the Supreme Court was considering Appeals preferred against the Judgment passed by the High Court of Karnataka in ***Basawaraj*** vs. ***Land Acquisition Officer***[2] by which the Appeals of the Appellants under Section 54 of the Land Acquisition Act, 1894, had been dismissed on the grounds of limitation. The parameters discussed in the ratio of ***Basawaraj and Another*** (*supra*) in the context of "sufficient cause" is obviously not fulfilled in the instant matter as obtains from the grounds put forth by the Appellant Company, which have been extracted *supra*.

8. We may also beneficially advert to the ratio in ***Syed Mehaboob*** vs. ***New India Assurance Company Limited***[3] wherein it is clarified that **"***The Motor Vehicle Act of 1988 is a beneficent legislation intended to place the claimant in the same position that he was before the accident and to compensate him for his loss. Thus, it should be interpreted liberally so as to achieve the maximum benefit.***"**. The Respondents have lost an earning member of their family thereby cutting into their income and means of livelihood. The object of the MV Act has to be afforded due consideration, which in the instant matter appears to be lacking on the part of the Appellant.

9. In ***Esha Bhattacharjee*** vs. ***Managing Committee of Raghunathpur Nafar Academy and Others***[4] the Hon'ble Supreme Court while enunciating the principles applicable to an application for condonation of delay would *inter alia* hold as hereinbelow extracted;

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[2] MFA No.10766 of 2007, decided on 10-6-2011 (KAR)
[3] (2011) 11 SCC 625
[4] (2013) 12 SCC 649

"21. From the aforesaid authorities the principles that can broadly be culled out are:

.....

21.4. (*iv*) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (*v*) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

.....

21.7. (*vii*) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

.....

21.9. (*ix*) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach. 21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

.....

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

> **22.1.** (*a*) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.
>
> ……."

The principles are to be adhered to by parties as also the Court who is vested with discretion, which obviously has to be exercised judiciously.

10. This Court is conscious that when delay is occasioned at the behest of the Government, it would be difficult to explain the delay on a day-to-day basis as transaction of business in the Government is done leisurely by Officers who evince no personal interest at different levels [*see* ***Special Tehsildar, Land Acquisition, Kerala*** vs. ***K. V. Ayisumma***[5]]. It is true that adoption of strict standards of proof leads to grave miscarriage of public justice and the approach of the Court thus should be pragmatic but not pedantic. It is also true that the expression "sufficient cause" should be considered with pragmatism in a justice-oriented approach rather than technical detection of sufficient cause for explaining every day's delay. Nevertheless even on the anvil of the aforecited ratiocination in the matter, it is apparent that the Appellant has grossly failed to put forth even a semblance of the grounds which could tantamount to "sufficient cause" for condonation of delay. Merely pressing the argument that it is a Government Company and stating that the File went from one Office to the next without a semblance of an explanation does not suffice to explain the delay. The grounds are completely bereft of any *bona fides* and reeks of a completely lackadaisical and negligent attitude besides reflecting a cavalier attitude to the circumstance of the Respondents herein.

11. Consequently, I am not inclined to exercise discretion to condone the delay. The Petition deserves no consideration and is dismissed and disposed of as also the Appeal.

12. No order as to costs.

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[5] (1996) 10 SCC 634

SLR (2019) SIKKIM 219

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

MAC App. No. 03 of 2017

**The Branch Manager,
Shriram General Insurance Co. Ltd. ….. APPELLANT**

Versus

Mrs. Krishna Kumari Limboo and Others ….. RESPONDENTS

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

For Respondents 1-3: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Mr. K.B. Chettri, Advocates.

For Respondent No.4: Mr. Yogesh Gurung, Advocate.

Date of decision: 26rd April 2019

A. Motor Vehicles Act, 1988 – Income of the Deceased – Determination – The evidence of Respondent No. 1 that the deceased was working as an Accountant of a Government Contractor Class IA and earning a monthly income of Rs. 20,000/- was not demolished in cross-examination. Exhibit 12, the original Salary Certificate furnished before the Tribunal. The employer of the deceased has also substantiated the evidence and his cross-examination does not demolish the fact of income of the deceased as Rs. 20,000/- per month. No document on record to contradict the evidence of the income of the deceased. In view of the evidence on record, the income of the deceased is accepted as Rs. 20,000/- per month.

(Paras 7 and 9)

B. Motor Accidents Claims – Future Prospects – Computation – Where the deceased was on a fixed salary and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects – *Re. Pranay Sethi's* case.

(Para 12)

Appeal partly allowed.

Chronological list of cases cited:

1. Sutinder Pal Singh Arora and Others v. Ashok Kumar Jain and Others, 2004 ACJ 782.
2. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.
3. National Insurance Company Limited v. Pranay Sethi and Others, AIR 2017 SC 5157.

JUDGMENT

Meenakshi Madan Rai, J

1. Assailing the quantification of compensation placed at Rs.40,80,000/- (Rupees forty lakhs and eighty thousand) only, by the learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok (hereinafter 'learned Tribunal'), in MACT Case No. 47 of 2015 (Mrs. Krishna Kumari Limboo and Others vs. Mr. Moni Prasad Gurung and Others), vide Judgment dated 21.09.2016, the Appellant is before this Court.

2. The Respondents No. 1, 2 and 3 herein were the Claimants No. 1, 2 and 3 and Respondent No. 4 was the Opposite Party No. 1 before the learned Tribunal. The Appellant herein was the Opposite Party No. 3 before the learned Tribunal. The parties shall be referred to in their order of appearance before this Court.

3. Placing his arguments for the Appellant, learned Counsel would submit that before the learned Tribunal the Respondent No. 1 has admitted in her cross-examination that she had not filed "qualification details" of her late husband along with the Claim Petition. That, nothing emanated in her evidence to establish the educational level of the deceased qualifying him to work as an Accountant under the Contractor, P.W.2 Keshab Kumar Rai. That, apart from the Salary Certificate, Exhibit 12, issued by the said Contractor showing the income of the deceased as Rs.20,000/- (Rupees twenty thousand) only, per month, there were no documents to prove that her deceased husband was working as an Accountant or drawing salary of the said amount. That, Exhibit 12 was issued by P.W.2 after the accident had occurred and is in all probability a false document reflecting an

enhanced income for the purposes of obtaining higher compensation. That, no transaction pertaining to the deceased were shown by the Respondent No. 1 in support of his income. In support of this contention, learned Counsel sought to draw strength from the ratio in ***Sutinder Pal Singh Arora and others vs. Ashok Kumar Jain and others***[1]. Hence, the impugned Judgment and Award deserves to be set aside.

4. Learned Counsel for the Respondents No. 1 to 3 would on the other hand contend that the victim was working as an Accountant under a Class I A, Government Contractor and earning an amount of Rs.20,000/- (Rupees twenty thousand) only, per month and hence when the Salary Certificate was issued by the employer, the question of doubting the document as a manufactured one is not tenable. That, the vehicle was insured with the Appellant Company and the Insurance Policy was valid from 19.04.2015 to the midnight of 18.04.2016. That no error obtains in calculation made in the impugned Judgment and Award of the learned Tribunal, hence the Appeal be dismissed.

5. I have heard *in extenso* and considered the rival submissions of learned Counsel for the parties. I have also carefully perused the impugned Judgment including the documents and evidence on record.

6. Briefly the facts of the case are that the deceased, husband of the Respondent No. 1 and father of Respondents No. 2 and 3, aged about 33 years, was allegedly employed as an Accountant by one Keshab Kumar Rai, a Class IA Government Contractor, Dentam, West Sikkim and earning Rs.20,000/- (Rupees twenty thousand) only, per month. On 15.09.2015 he was travelling in the vehicle bearing registration No. SK-02J/1030 to Gangtok, East Sikkim from Dentam, West Sikkim, which met with an accident at "Kapuray Bhir," Ranipool, East Sikkim. He sustained head and chest injuries to which he succumbed on the same day at Central Referral Hospital, Tadong, East Sikkim, where he had been evacuated for treatment. Before the learned Tribunal, the Respondents No. 1 to 3 sought compensation of Rs.41,72,500/- (Rupees forty one lakhs, seventy two thousand and five hundred) only, on account of his death in a motor accident. This claim was denied and disputed by the Appellant *inter alia* on grounds as already reflected hereinabove.

[1] 2004 ACJ 782

7. The evidence of Respondent No. 1 to the effect that the deceased was working as an Accountant of Shri Keshab Kumar Rai (Government Contractor Class IA) and earning a monthly income of Rs.20,000/- (Rupees twenty thousand) only, was not demolished in cross-examination. Exhibit 12, the original Salary Certificate issued by the said Keshab Kumar Rai was furnished by her before the learned Tribunal. She has also established that the employer was a Class IA Government Contractor with sufficient work at hand by furnishing Exhibit 19, the attested copy of his Contractor Enlistment Form, Exhibit 20 being a Work Order dated 04.03.2014 issued by the Tourism and Civil Aviation Department, Government of Sikkim amounting to Rs.22,23,01,419/- (Rupees twenty two crores, twenty three lakhs, one thousand, four hundred and nineteen) only, and Exhibit 21 another Work Order for Rs.1952.45 lakhs issued in the name of P.W.2.

8. Although it was stated by learned Counsel for the 2Appellant that under cross-examination, Respondent No. 1 has stated there are no "transaction details" to prove that her deceased husband was drawing a salary of Rs.20,000/- (Rupees twenty thousand) only, it is but apposite to state here that the cross-examination does not specify which "transaction" reference is being made to. The Counsel for the Appellant cannot expect the Court to draw insinuations that the transaction details pertained to Bank Accounts in the absence of specific cross-examination in this context.

9. Witness No. 2 for the Respondents No. 1 to 3, (Keshab Kumar Rai), the employer of the deceased has also substantiated the evidence of the victim's wife and his crossexamination does not demolish the fact of income of the deceased as Rs.20,000/- (Rupees twenty thousand) only, per month. There is no document on record to contradict the evidence of the income of the deceased. Consequently although the Appellant asserts that the income of the deceased has not been established, yet, the Appellant itself has failed to furnish any document to establish to the contrary. Therefore in view of the evidence on record, the income of the deceased is accepted as Rs.20,000/- (Rupees twenty thousand) only, per month.

10. So far as the question of compensation is concerned, while computing the loss of income, the learned Tribunal rightly adopted the Multiplier of "16" in terms of the approved table laid down in ***Sarla Verma***

(Smt.) and Others vs. Delhi Transport Corporation and Another[2] as the age of the deceased was 33, as per Exhibit 8, which document remained undecimated.

11. The learned Tribunal has granted 50% of monthly income while computing future prospects, on this point, in ***National Insurance Company Limited vs. Pranay Sethi & Ors.***[3], it was held as follows;

> **"61.** ...
>
> **(i)** The two-Judge Bench in *Santosh Devi* should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in *Sarla Verma*, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> **(ii)** As *Rajesh* has not taken note of the decision in *Reshma Kumari*, which was delivered at earlier point of time, the decision in *Rajesh* is not a binding precedent.
>
> **(iii)** While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> **(iv) In case the deceased was selfemployed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years**. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age

[2] (2009) 6 SCC 121
[3] AIR 2017 SC 5157

> of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."
>
> **(Emphasis supplied)**

12. Hence, in view of the ratio *supra* of the Hon'ble Supreme Court, it is evident that where the deceased was on a fixed salary and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects. Thus, 40% shall be calculated as future prospects instead of 50% as calculated by the learned Tribunal.

13. So far as loss of estate, loss of consortium and funeral expenses are concerned, the Hon'ble Supreme Court in ***Pranay Sethi*** *(supra), inter alia* held as follows;

> **"(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be 15,000/-, 40,000/- and 15,000/- respectively.**"
>
> **(Emphasis supplied)**

Consequently Rs.15,000/- (Rupees fifteen thousand) only, is granted towards funeral expenses, Rs.40,000/- (Rupees forty thousand) only, granted towards loss of consortium and a sum of Rs.15,000/- (Rupees fifteen thousand) only, granted towards loss of estate, instead of Rs.25,000/- (Rupees twenty five thousand) only, Rs.1,00,000/- (Rupees one lakh) only, and Rs.10,000/- (Rupees ten thousand) only, respectively, granted by the learned Tribunal under the aforestated heads.

14. With regard to the amount of Rs.5,000/- (Rupees five thousand) only, having been granted towards "Transport from hospital" is concerned, no documentary evidence has been furnished by the Respondents No. 1 to 3, to support this claim. Therefore, the Respondents No. 1 to 3 are not entitled to compensation towards "Transport from hospital."

15. The question of compensation on account of loss of love and affection granted by the learned Tribunal, in view of the ratio *supra* is superfluous and is deducted from the compensation amount.

16. In conclusion, in light of the above discussions and findings, the compensation stands re-calculated and modified and is found to be just, as follows;

Monthly Income of the deceased	Rs.20,000.00
Annual Income of the deceased (Rs.20,000x12)	Rs.2,40,000.00
Add 40% of Rs.2,40,000.00 as future prospects	Rs.96,000.00
Yearly income of the deceased	Rs.3,36,000.00
Less 1/3 of Rs.3,36,000.00 [deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	Rs.1,12,000.00
Net yearly income	Rs.2,24,000.00
Multiplier of **'16'** adopted in terms of ***Sarla Verma's case (supra)*** (Rs.2,24,000 x 16)	Rs.35,84,000.00
Add Funeral expenses	Rs.15,000.00
Add Loss of consortium	Rs.40,000.00
Add Loss of estate	Rs.15,000.00
Total	**Rs.36,54,000.00**

(Rupees thirty six lakhs and fifty four thousand) only.

17. The Respondents No. 1, 2 and 3 shall be entitled to simple interest @ 9% per annum on the above amount, with effect from the date of filing of the Claim Petition before the learned Tribunal, until its full realisation.

18. The Appellant is directed to pay the awarded amount to the Respondents No. 1, 2 and 3 within one month from today, failing which, the Appellant shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition till realisation, duly deducting the amounts, if any, already paid by the Appellant to the Respondents No. 1, 2 and 3.

19. Appeal allowed to the extent above.

20. No order as to costs.

21. Copy of this Judgment be sent to the learned Tribunal for information.

22. Records of the learned Tribunal be remitted forthwith.

SLR (2019) SIKKIM 227

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

MAC App. No. 04 of 2017

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

Versus

Mrs. Kavita Rai and Others ….. RESPONDENTS

For the Appellant: Mr. Yadev Sharma, Advocate.

For Respondents 1-3: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri, Ms. Malati Sharma and Ms. Sudha Sewa, Advocates.

For Respondent No.4: Mr. Yogesh Gurung, Advocate.

Date of decision: 26rd April 2019

A. Motor Vehicles Act, 1988 – Income of the Deceased – Determination – Income Certificate of the deceased (Exhibit 14) was issued by the Block Development Officer – Block Development Officer is indeed the concerned authority at the Block Administrative Level to issue such a Certificate. In the absence of any document to the contrary, Exhibit 14 is accepted as the correct information pertaining to the income of the deceased.

(Para 10)

B. Motor Accidents Claims – Future Prospects – Computation – Where the deceased was on a fixed income and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects – *Re. Pranay Sethi's* case.

(Para 15)

Appeal partly allowed.

Chronological list of cases cited:

1. Sutinder Pal Singh Arora and Others v. Ashok Kumar Jain and Others, 2004 ACJ 782.
2. The Branch Manager, Oriental Insurance Company Ltd. v. Smt. Meena Bania and Others, (2012) 1 TAC 444.
3. Smt. Anita Sunam and Others v. Shri Hom Nath Timshina and Another, 2013 SCC OnLine Sikk 67.
4. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.
5. National Insurance Company Limited v. Pranay Sethi and Others, AIR 2017 SC 5157.

JUDGMENT

Meenakshi Madan Rai, J

1. Quantification of the compensation of Rs.79,20,000/- (Rupees seventy nine lakhs and twenty thousand) only, payable by the Appellant to the Respondents No. 1 to 3, is being assailed in this Appeal. The learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok (hereinafter 'learned Tribunal') in MACT Case No. 09 of 2016 (Mrs. Kavita Rai and Others vs. Mr. Moni Prasad Gurung and Others), granted the aforestated amount on account of the death of the husband of Respondent No. 1 and father of Respondents No. 2 and 3, in a motor vehicle accident, on 15.09.2015. The claim petition was filed by the Respondents No. 1 to 3 under Section 166 of the Motor Vehicles Act, 1988 (hereinafter "M.V. Act").

2. The Respondents No. 1, 2 and 3 herein were the Claimants No. 1, 2 and 3 and Respondent No. 4 was the Opposite Party No. 1, while the Appellant herein was the Opposite Party No. 3 before the learned Tribunal. The parties shall be referred to in their order of appearance before this Court.

3. The case of the Respondents No. 1 to 3 before the learned Tribunal was that on 15.09.2015, the victim was travelling to Gangtok, East Sikkim

from Dentam, West Sikkim in the vehicle bearing Registration No. SK-02J/ 1030 (Tata Sumo Gold) when it met with an accident at "Kapuray Bhir," Ranipool, East Sikkim and the deceased succumbed to his injuries at Central Referral Hospital, Tadong, East Sikkim. That, the cause of death was due to the rash and negligent act of the driver. That, compensation claimed was Rs.65,75,500/- (Rupees sixty five lakhs, seventy five thousand and five hundred) only, with interest at the rate of 10% per annum from the date of filing of the claim petition.

4. The Appellant denied and disputed the claims of the Respondents No. 1 to 3 before the learned Tribunal *inter alia* on grounds that the income of the deceased was not proved. It was also agitated that Exhibit 12 the "Panchayat Recommendation", Exhibit 13 the letter addressed to the Block Development Officer by Gram Panchayat, 20 Dentam GPU, West Sikkim and Exhibit 14 the income certificate issued by the Block Development Officer, Dentam, showing the income of the deceased as Rs.40,000/- (Rupees forty thousand) only, were issued after the death of the deceased. That, the documents were thus unreliable.

5. The points pressed before this Court was that the aforestated documents were procured after the death of the deceased with the motive of acquiring enhanced compensation. That, the income of the deceased has remained unestablished, hence the quantum of compensation granted by the learned Tribunal is exorbitant and the impugned Judgment and Award deserves to be set aside. In support of his contention, learned Counsel placed reliance on ***Sutinder Pal Singh Arora and others vs. Ashok Kumar Jain and others***[1].

6. Learned Senior Counsel for the Respondents No. 1 to 3 for his part contended that the Block Development Officer who is a Government Officer has certified the income of the deceased as Rs.40,000/- (Rupees forty thousand) only, per month. That, he is the concerned authority who is empowered to issue the Income Certificate, hence there is no reason to doubt the document Exhibit 14. On this count, the ratio of this Court in ***The Branch Manager, Oriental Insurance Company Ltd. vs. Smt. Meena Bania and Others***[2] was relied on. That, the vehicle was insured

[1] 2004 ACJ 782
[2] (2012) 1 TAC 444

with the Appellant Company and the Insurance Policy valid from 19.04.2015 to midnight of 18.04.2016.

7. I have heard *in extenso* and considered the rival submissions of learned Counsel for the parties. I have also carefully perused the impugned Judgment including the documents and evidence on record.

8. It is reiterated that the only grievance in this Appeal is the quantum of compensation of Rs.79,20,000/- (Rupees seventy nine lakhs and twenty thousand) only, computed by the learned Tribunal, which according to the Appellant is exorbitant. We may usefully refer to Exhibit 14 in this context, which is a Certificate issued by the Block Development Officer, Office of the Block Administrative Center, Dentam, duly certifying that the deceased, a *resident of Begha, Dentam passed away on 15/10/2015 in the vehicle accident at 32 mile near Singtam* (sic). *Further the existing income of victim was around Rupees 40,000 per month as per his personal properties and other sources of income. He was a Class IIA Government Contractor and resourceful person.*

9. In ***Meena Bania's*** case *supra*, this Court while considering the Income Certificate issued by the Block Development Officer had held as follows;

> "17.1 Income certificate issued by the BDO on agricultural income is a valid and accepted document in the State of Sikkim and the position is the same as regards validity while being presented to other authorities also. The BDO or the Block Development Officer in a State is a revenue authority and is competent under the State Government Rules to issue such certificates, a fact which this Court takes judicial notice of.
>
> In view of the above, the objection raised on this account is clearly sustainable *(sic)* and, therefore, stands rejected accordingly."

The finding of this Court in ***Meena Bania's*** case *supra* was also cited with approval in ***Smt. Anita Sunam and others vs. Shri Hom Nath Timshina and Another***[3].

[3] 2013 SCC OnLine Sikk 67

10. The evidence of Respondent No. 1 before the learned Tribunal indicates that Exhibit 12 is the "Panchayat Recommendation" regarding the profession and income of the deceased and Exhibit 13 is the letter issued by the Gram Panchayat, 20-Dentam GPU, West Sikkim to the Block Development Officer, Dentam, which indicates that the income of the deceased was Rs.40,000/- (Rupees forty thousand) only, per month. Exhibit 14 already extracted hereinabove was issued by the Block Development Officer. The crossexamination of the Respondent No. 1 indicates that the fact of the earnings of her husband could not be demolished. Although it was argued that these documents were obtained after the death of the deceased, it may be remarked that prior to that there was indeed no necessity for such documents. It was only on account of the tragic mishap that the requirement arose. It is not the case of the Appellant that the Block Development Officer is not empowered to issue the Income Certificate of the deceased. He is indeed the concerned authority at the Block Administrative Level to issue such a Certificate. The ratiocinations of this Court referred to *supra* lend credence to this stand. In the absence of any document to the contrary, Exhibit 14 is accepted as the correct information pertaining to the income of the deceased.

11. Witness No. 2 for the Respondents, Keshab Kumar Rai, the brother of the deceased has also stated in crossexamination that *It is true that my brother used to earn Rs:40,000/- per month.* This evidence remained undecimated in cross-examination. That, the deceased was working as a Contractor by profession and used to do contract works with the witness and that his monthly income was Rs.40,000/- (Rupees forty thousand) only, from the contract works.

12. Exhibit 15 is the Contractor Enlistment Form of the deceased which records that he was a Grade II 'A' Contractor under the Sikkim Public Works Department, Government of Sikkim, Roads and Bridges Department, Gangtok, Sikkim. The Respondent No. 1 in her evidence has also stated that the deceased had a financial partnership with his brother Keshab Kumar Rai. P.W.2 Keshab Kumar Rai for his part has stated that the

deceased also used to do contract works with him in partnership. Exhibit 24 is the Contractor Enlistment Form of P.W.2 Keshab Kumar Rai, indicating that the witness was a Grade I 'A' Contractor while Exhibit 25 reveals that he was issued certain contract works by the Divisional Engineer, Rural Management and Development Department, Government of Sikkim to the tune of Rs.1952.45 lakhs. Exhibit 26 is a contract for another work estimated at Rs.22,33,01,419/- (Rupees twenty two crores, thirty three lakhs, one thousand, four hundred and nineteen) only. Consequently, in the absence of any other document to contradict the documents on record, I am of the considered opinion that the Appellant has not been able to establish a case contrary to that of the Respondents No. 1 to 3.

13. So far as the question of compensation is concerned, while computing the loss of income, the learned Tribunal rightly adopted the Multiplier of "16" in terms of the approved table laid down in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[4] as the age of the deceased was 34, as per Exhibit 9, the Secondary School Examination Certificate of the deceased which document is not assailed herein.

14. The learned Tribunal has granted 50% of monthly income while computing future prospects, on this point, in ***National Insurance Company Limited vs. Pranay Sethi & Ors.***[5], it was held as follows;

> **"61.** ...
>
> **(i)** The two-Judge Bench in *Santosh Devi* should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in *Sarla Verma*, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

[4] (2009) 6 SCC 121
[5] AIR 2017 SC 5157

> **(ii)** As *Rajesh* has not taken note of the decision in *Reshma Kumari,* which was delivered at earlier point of time, the decision in *Rajesh* is not a binding precedent.
>
> **(iii)** While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> **(iv) In case the deceased was selfemployed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years**. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."
>
> **(Emphasis supplied)**

15. No arguments were forthcoming from the Respondents No. 1 to 3 as to the expected rise in the income of the deceased in future. Consequently his income is deemed to be a fixed monthly income of Rs.40,000/- (Rupees forty thousand) only. Hence, in view of the ratio *supra* of the Hon'ble Supreme Court, it is evident that where the deceased was on a fixed income and below the age of 40 years, an addition of 40% of the established income should be made towards future prospects. Thus, 40% shall be calculated as future prospects instead of 50% as calculated by the learned Tribunal.

16. So far as loss of estate, loss of consortium and funeral expenses are concerned, the Hon'ble Supreme Court in ***Pranay Sethi*** *(supra), inter alia* held as follows;

> **"(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be 15,000/-, 40,000/- and 15,000/- respectively.**"
>
> **(Emphasis supplied)**

Consequently Rs.15,000/- (Rupees fifteen thousand) only, is granted towards funeral expenses, Rs.40,000/- (Rupees forty thousand) only, granted towards loss of consortium and a sum of Rs.15,000/- (Rupees fifteen thousand) only, granted towards loss of estate instead of Rs.25,000/-, Rs.1,00,000/- and Rs.10,000/- only, respectively, granted by the learned Tribunal under the aforestated heads.

17. With regard to the amount of Rs.5,000/- (Rupees five thousand) only, having been granted towards "Transport from hospital," apart from the statement made by Respondent No. 1 at Paragraph 9 of her Evidence-on-Affidavit Exhibit 10 to the effect that *after the post mortem examination of the dead body of the deceased the dead body was handed over to Shri madan rai brother of deceased Suddha Kumar Rai* and filing of Exhibit 7 i.e. the Dead Body Handing and Taking Memo, no evidence has been furnished by the Respondents No. 1 to 3 to support the claim towards payment of transportation. Therefore, the Respondents No. 1 to 3 are not entitled to compensation towards "Transport from hospital."

18. The question of compensation on account of loss of love and affection as granted by the learned Tribunal, in view of the ratio *supra* is superfluous and is deducted from the compensation amount.

19. In conclusion, in light of the above discussions and findings, the compensation stands re-calculated and modified, and is found to be just as follows;

Monthly Income of the deceased	Rs.40,000.00
Annual Income of the deceased (Rs.40,000x12)	Rs.4,80,000.00
Add 40% of Rs.4,80,000.00 as future prospects	Rs.1,92,000.00
Yearly income of the deceased	Rs.6,72,000.00
Less 1/3 of Rs.6,72,000.00 [deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	Rs.2,24,000.00
Net yearly income	Rs.4,48,000.00
Multiplier of **'16'** adopted in terms of ***Sarla Verma's case (supra)*** (Rs.4,48,000 x 16)	Rs.71,68,000.00
Add Funeral expenses	Rs.15,000.00
Add Loss of consortium	Rs.40,000.00
Add Loss of estate	Rs.15,000.00
Total	**Rs.72,38,000.00**

(Rupees seventy two lakhs and thirty eight thousand) only.

20. The Respondents No. 1, 2 and 3 shall be entitled to simple interest @ 9% per annum on the above amount, with effect from the date of filing of the Claim Petition before the learned Tribunal, until its full realisation.

21. The Appellant is directed to pay the awarded amount to the Respondents No. 1, 2 and 3 within one month from today, failing which, the Appellant shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition till realisation, duly deducting the amounts, if any, already paid by the Appellant to the Respondents No. 1, 2 and 3.

22. Appeal allowed to the extent above.

23. No order as to costs.

24. Copy of this Judgment be sent to the learned Tribunal for information.

25. Records of the learned Tribunal be remitted forthwith.

HIGH COURT OF SIKKIM
GANGTOK
(Order Form)

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   b) Registered Post : Rs. 1050/- + Rs. 1,120/- (Postal Charge)
   = Rs. 2,170/- .....

   c) Book Post : Rs. 1,050/- + Rs. 210/- (Postal Charge)
   = Rs. 1,260/- .....

4. Number of copies (Please mention No. of copies here) .....

5. *Bank Receipt No. ..... Date ...../...../.....
   Amount Rs. .....In words (Rupees .....
   .....)

6. Name of subscriber/ Institute : .....
.....

7. Postal Address : .....
.....
..... Pin .....
Phone : ..... Mobile : ..... Fax : .....
E-mail: .....

Place :

Date : Signature

*Note : Bank Receipt should be drawn as per the mode of subscription and number of copies under the Head : **0070-01-501 OAS** from the State Bank of Sikkim and attached with this Form.