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SUBJECT INDEX

Code of Criminal Procedure, 1973 – S. 154 – F.I.R– The first information of the commission of a cognizable offence is sufficient to constitute the first information report. The object of F.I.R is to set the criminal law in motion and it nowhere envisages a narration of the entire details of the offence

Phurba Tenzing Bhutia* v. *State of Sikkim ***953-A***

Code of Criminal Procedure, 1973 – S. 154 – F.I.R– Does not envisage that a particular person is to lodge the F.I.R. All that the Section requires is that information relating to commission of a cognizable offence must be reported to the concerned Officer-in-Charge of a Police Station, the primary object of such a step being to set the criminal law in motion.

Tanam Limboo* v. *State of Sikkim ***972-A***

Code of Criminal Procedure, 1973 – S. 161 – Under this Section, the police investigating the matter can examine witnesses acquainted with the facts of the case and reduce them to writing without oath or affirmation. However, merely because a particular statement made by the witness before the Court does not find place in the statement recorded under S. 161, does not merit the evidence being thrown out.

Phurba Tenzing Bhutia* v. *State of Sikkim ***953-B***

Code of Criminal Procedure, 1973 – Ss. 161 and 164 – Statements made under Ss. 161 and 164 are not substantive evidence. The statement under S. 161 of the Cr.P.C. can be utilised for the limited purpose of contradicting a witness in the manner prescribed in the proviso to S. 162(1) of the Cr.P.C – A statement recorded under S. 164 of the Cr.P.C. can be used for the purposes of either contradiction or corroboration.

Tanam Limboo* v. *State of Sikkim ***972-B***

Code of Criminal Procedure, 1973 – S. 451 – Order for Custody and Disposal of Property Pending Trial – S. 451 Cr.P.C. provides for an order for "proper custody and disposal of property" pending trial and not determination of title after a civil trial. The Criminal Court only provides for "proper custody" having regard to the nature of such property. The entrustment of the property to rival claimants does not amount to adjudication of any competing rights of the claimants. S. 451 Cr.P.C. provides for interim custody of the property produced before the Court during the trial. An order passed under this provision is temporary and intended to protect the property pending the trial. The person who is

entrusted with the property even if he be the actual owner acts as a representative of the Court.

***NHPC Ltd. Rangit Power Station, South Sikkim* v.**
State of Sikkim ***1082-A***

Code of Criminal Procedure, 1973 – S. 451 – The rejection of the release petition admittedly preferred by the Complainant has not been challenged – The pendency of the investigation may not be a ground to fulfil the mandate of S. 451 Cr.P.C. Failure to determine the ownership of the machine has led to the learned Judicial Magistrate declining the release petition filed by the Petitioner Corporation as well as the Complainant. Failure of the Petitioner Corporation to make the Complainant a party should not have deterred the learned Judicial Magistrate to issue summons upon the Complainant and hear him for the just determination of the case. The machine is not a small item which can be safely kept in a Bank for safe custody. If the machine is not regularly started, used and maintained the machine may become useless before the determination of the present investigation. Admittedly neither the Complainant nor the Petitioner Corporation has approached any Court for adjudication upon the title of the machine. Both insist that the machine belongs to them. The Registration Certificate if any of the machine has not been produced by anyone. However, the Complainant has admitted that he came to learn that the machine has been registered in the name of the Petitioner Corporation. In spite of summons being issued to the Complainant who is represented by learned Counsel no steps were taken to challenge the rejection of the release petition – The Complainant in fact would submit that he had no objection to the release of the machine to the Petitioner Corporation if it assured that the said machine would not be used by them. The very purpose of release of the machine would be lost if such a condition is imposed. The object of S. 451 Cr.P.C. appears to be that where the property which is the subject matter of the offence alleged is seized by the police it ought not to be retained in the custody of the Court or of the police for anytime longer than what is absolutely necessary. Damage due to failure to maintain it or keep it properly during investigation can lead to loss of valuable property.

***NHPC Ltd. Rangit Power Station, South Sikkim* v.**
State of Sikkim ***1082-B***

Constitution of India – Writ Jurisdiction – The fact that Section 34(3) of the said Act prohibited the Court to condone delay beyond the

prescribed period as well as the judgment of the Supreme Court in re: ***Western Builders*** would be known to the Appellant at least on receipt of the impugned order passed by the learned District Judge. The act of the Appellant thereafter does not reflect its *bona fides*. The withdrawal of the Appeal filed under S. 37 of the said Act, the filing of the Writ Petition without even attempting to explain the apparent delay in approaching the District Court under S. 34 of the said Act and completely skirting the issue, the failure to do so even in the present Writ Appeal and in fact not even attempting to explain the delay beyond prescribed period does not reflect that the Appellant had approached this Court under Article 226/227 of the Constitution of India with clean hands and had put forward all the facts before the Court without concealing or suppressing anything and sought appropriate relief. The impugned judgment records that an application was filed for condonation of delay before the learned District Judge along with an application under S. 34 of the said Act. The fact was that an application for condonation of delay was not preferred before the learned District Judge and it was only on the objection raised by the Respondent that the Court examined the delay. This fact was categorically confirmed by the learned Counsel for the Appellant when a specific query was raised by this Court during the hearing. In fact even at the Writ Appeal stage this Court is unable to fathom the reasons for the delay in approaching the District Court under S. 34 of the said Act.

The Principal Secretary, Department of Commerce & Industries* v. *M/s Snowlion Automobile Pvt. Ltd. ***1005-F***

Constitution of India – Article 226 – Arbitration and Conciliation Act, 1996 – S. 34 – The ostensible reason as stated in the Writ Petition is the illegality of the said order and arbitral award. The real hurdle the Appellant seeks to get over by filing the Writ Petition was the mandatory provision contained in S. 34(3) of the said Act which does not permit the Court to condone the delay beyond the prescribed period. The question is whether the Appellant could do so by merely filing a Writ Petition on the merits without even an attempt to explain the delay and skirting the procedure prescribed under the said Act? The answer, we are certain, is a definite no. The extraordinary and discretionary relief cannot be obtained in this manner. The impugned judgment which holds that there is no gross failure of justice or grave injustice warranting the exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India, even while appreciating that the scope of jurisdiction of the High Court in exercise of power under Article 226 of the Constitution, is not affected in spite of

alternative statutory remedies cannot be faulted.
The Principal Secretary, Department of Commerce & Industries* v. *M/s Snowlion Automobile Pvt. Ltd. ***1005-G***

Constitution of India – Article 227 – Article 227 of the Constitution of India relates to the power of superintendence over all Courts by the High Court in relation to which it exercised jurisdiction. As quoted in paragraph 20 of the impugned judgment of the learned Single Judge the scope of Article 227 of the Constitution of India has been succinctly enunciated by the Supreme Court in re: ***Surya DevRai v. Ram ChanderRai&Ors.*** It has been held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Court within the bounds of their jurisdiction. When the Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasion thereby, the High Court may step in to exercise its supervisory jurisdiction.
The Principal Secretary, Department of Commerce & Industries* v. *M/s Snowlion Automobile Pvt. Ltd. ***1005-B***

Evidence – Merely because the Prosecution witnesses belong to one political party does not relegate their evidence to unreliability neither can the truth be attenuated – The Court is vested with the task of separating the chaff from the grain and only on such exercise can the evidence be considered trustworthy or otherwise.
Phurba Tenzing Bhutia* v. *State of Sikkim ***953-C***

Evidence – The evidence of the victim being cogent and consistent, minor anomaly should not be made a ground on which the evidence can be rejected in its entirety – *A. Shankar* v. *State of Karnataka, (2011) 6 SCC 279* referred.
Ram Krishna Jana* v. *State of Sikkim ***983-B***

Indian Medical Council Act, 1956 – S. 11 – Postgraduate Medical Education Regulations, 2000 – Regulation 6(2) – Recognition of Medical Qualifications granted by University or Medical Institution – Oversight Committee – The question before the Court waswhether the impugned Corrigendum dated 06.06.2017 is to be set aside and the Gazette Notification dated 25.04.2017 restored thereby granting recognition to the degrees awarded by the Petitioner-University from 2014 onwards for the

courses in MD (Paediatrics), MD (General Medicine) and MS (ENT) and for MD (Psychiatry) Course from 2015 onwards? – Hon'ble Supreme Court vide order dated 02.05.2016 in *Modern Dental College and Research Centre and Others* v. *State of Madhya Pradesh and Others* directed constitution of an Oversight Committee to oversee the functioning of the MCI and all other matters considered by the Parliamentary Committee till the Central Government acted upon the Expert Committee report – Oversight Committee reconstituted vide order dated 18.07.2017 in *AmmaChandravati Educationaland Charitable Trust and Others* v. *Union of India and Another* – Petitioners have no objection if the matter is referred to the newly constituted Oversight Committee – Held, the Central Government shall afford reasonable opportunity to the Petitioners to be heard with regard to the communication dated 22.06.2017. Thereafter, necessary steps shall be taken before the Oversight Committee in terms of the functions assigned to it in *AmmaChandravati Educational and Charitable Trust* (supra). All necessary steps before the concerned Authority(s) shall be completed within two months.

Sikkim Manipal University and Another* v. *Union of India and Others ***1036-A***

Indian Penal Code, 1860 – S. 300 – Murder – The act was committed indubitably without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the appellant having taken undue advantage or acted in a cruel or an unusual manner – This assumption arises from the circumstance that he struck the victim only once on his head and did not repeat the act – The offence would fall under *Exception-4* of S. 300, I.P.C – Trial Court has failed to explain in detail the reasons for arriving at a conclusion that the offence fell under S. 304-Part I of the I.P.C – Appellant is guilty of the offence under S. 304-Part II of the I.P.C.

Phurba Tenzing Bhutia* v. *State of Sikkim ***953-D***

Negotiable Instruments Act, 1881 – S. 138 – Dishonour of Cheque – Ingredients – A complaint under S. 138 of the NI Act must necessarily reflect the ingredients as laid down by the Section:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability.

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Purna Kumar Gurung* v. *Ankit Sarda ***1065-A***

Negotiable Instruments Act, 1881 – S. 138 – For the Discharge of any Debt or other Liability – The term "debt" according to Black's Law Dictionary, 10th edition is "Liability on a claim; a specific sum of money due by agreement or otherwise." The explanation to S. 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract – The term "liability" as per Black's Law Dictionary, 10th edition is "The quality, state or condition of being legally obligated or accountable." "Liability" otherwise has also been defined to mean all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.

Purna Kumar Gurung* v. *Ankit Sarda ***1065-B***

Negotiable Instruments Act, 1881 – S. 138 – The stand taken by the Appellant in his examination under S. 313 of the Cr.P.C. was that the cheque was issued by way of security only and not for encashment. On this aspect, we may look into the meaning of "security". As per the Oxford Dictionary "security" *inter alia*, means "a thing deposited or hypothecated

as pledge for fulfilment of undertaking or payment of loan to be forfeited in case of failure". The circumstances of the matter at hand in no way fulfill the ingredients of security as defined *supra* neither was an attempt made to furnish evidence on this aspect by the Respondent – This Court is aware that the proof so demanded in offences under S. 138 of the NI Act is not to be beyond a reasonable doubt but only extending to a preponderance of probability. This too, was not established by the Respondent.
Purna Kumar Gurung* v. *Ankit Sarda ***1065-E***

Negotiable Instruments Act, 1881 – S. 138 – Plea of Fraud – It is irrelevant for the purposes of S. 138 of the NI Act to put forth a plea of fraud in the transaction, the only consideration is of the cheque being dishonoured.
Purna Kumar Gurung* v. *Ankit Sarda ***1065-F***

Negotiable Instruments Act, 1881 – S. 139 – Presumption in Favour of the Holder – Unless the contrary is proved, the Court shall presume that the holder of a cheque received the cheque of the nature referred to in S. 139 for the discharge, in whole or in part of any debt or other liability. It would appear that the presumption under S. 139 of the NI Act is an extension of the presumption under S. 118 (a) of the NI Act which provides that the Court shall presume a negotiable instrument to be one for consideration – If the negotiable instrument happens to be a cheque, S. 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. S. 118 of the NI Act uses the phrase "until the contrary is proved" while S. 139 of the NI Act provides "unless the contrary is proved". S. 4 of the Indian Evidence Act, 1872 which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under both the aforesaid provisions are rebuttable.
Purna Kumar Gurung* v. *Ankit Sarda ***1065-C***

Negotiable Instruments Act, 1881 – S. 139 – Presumption in Favour of the Holder – If the Respondent did not consider the amount as a liability, if not a debt, towards the Appellant then what was the purpose of issuing the cheque to the Appellant. The moment the cheque was issued, it provides evidence of the acceptance of his liability and the presumption under S. 139 of the NI Act kicks into place. Inasmuch as the Section provides that it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque, of the nature referred to in S. 138

of the NI Act or the discharge in whole or in part of any debt or other liability.

Purna Kumar Gurung* v. *Ankit Sarda ***1065-D***

Protection of Children from Sexual Offences Act, 2012 – Determination of Age – It is settled law that parents would give the best evidence of their child's age – It is not the appellant's case that the victim was an adolescent thereby warranting a suspicion about her actual age. She is undoubtedly a child, aged about 5 years, a student of Upper Kindergarten and clearly falls within the ambit of S. 2 of the POCSO Act.

Ram Krishna Jana* v. *State of Sikkim ***983-A***

Protection of Children from Sexual Offences Act, 2012 – S. 10 – Ingredients – The victim was 14 years old and depended on her father who instead of offering her protection and being an anchor to all her emotional needs perpetrated continuous sexual assault on her in the presence of her 11 year old brother. One cannot even imagine the trauma that the child suffered and the indelible adverse imprint and scar that the incestuous act has left in her psyche – Held, in view of the facts and circumstances sentence enhanced.

State of Sikkim* v. *Ram Nath Choudhary ***1100-A***

Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 of the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved – Where the victim is a child below the age of 16 years, the Special Court shall presume that the accused has committed the offence unless the contrary is proved – The statute provides that the statement of the victim has to be given the sanctity it deserves when an accused is prosecuted for any of the offences detailed thereunder.

Tanam Limboo* v. *State of Sikkim ***972-C***

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 148 – Letter Patent Appeals – An Appeal would lie to the Division Bench from the judgment of a Judge of the High Court sitting singly – The impugned judgment passed by the learned Single Judge is not a judgment passed in exercise of Appellate Jurisdiction in respect of a decree or order

made by a Court subject to the superintendence of the High Court – The contention raised that the exceptions to those judgments appealable under Rule 148 would include a judgment passed by the High Court in exercise of the Article 227 of the Constitution of India emphasizing only on the words "superintendence of the High Court" therein must be straightaway rejected. The said words cannot be read in isolation and must necessarily be read in the context of the sentence it is used in. It is also not a sentence or order made in exercise of Criminal Jurisdiction. An order made in the exercise of revisional jurisdiction also falls within the exception of Rule 148 of the said Rules and therefore, no Appeal would lie from such orders – It is quite clear that the Appellant while preferring the Writ Petition sought to invoke both Article 226 as well as Article 227 of the Constitution of India. However, the learned Single Judge did not exercise the power of superintendence under Article 227 of the Constitution of India while passing the impugned judgment. The learned Single Judge examined the law relating to exercise of the extraordinary jurisdiction of the High Court and in the facts and circumstances of the case declined to exercise its writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, it is quite evident that the impugned judgment does not fall within the exception carved out for the exercise of Letter Patent Appeals under Rule 148 of the said Rules as it is not an order made in exercise of revisional jurisdiction also.

The Principal Secretary, Department of Commerce & Industries **v.** ***M/s Snowlion Automobile Pvt. Ltd*****.** ***1005-A***

Sikkim State Rules, Registration of Document Rules, 1930 – Rule 20 – If the document was not produced within four months from the date of execution for its registration thereof, it is not for the appellant to raise the issue but it was for the concerned authorities to have declined to accept the document or to register the said property or demand payment of fine.

Chetan Sharma **v.** ***Januki Pradhan and Another*** ***993-B***

SLR (2018) SIKKIM 953

(Before Hon'ble the Acting Chief Justice)

Crl. A. No. 24 of 2016

Phurba Tenzing Bhutia ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mrs. Laxmi Chakraborty, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Karma Thinlay, and Mr. Thinlay Dorjee, Additional Public Prosecutors.

Date of decision: 1st August 2018

A. Code of Criminal Procedure, 1973 – S. 154 – F.I.R – The first information of the commission of a cognizable offence is sufficient to constitute the first information report. The object of F.I.R is to set the criminal law in motion and it nowhere envisages a narration of the entire details of the offence

(Para 12)

B. Code of Criminal Procedure, 1973 – S. 161 – Under this Section, the police investigating the matter can examine witnesses acquainted with the facts of the case and reduce them to writing without oath or affirmation. However, merely because a particular statement made by the witness before the Court does not find place in the statement recorded under S. 161, does not merit the evidence being thrown out.

(Para 13)

C. Evidence – Merely because the Prosecution witnesses belong to one political party does not relegate their evidence to unreliability neither can the truth be attenuated – The Court is vested with the task of separating the chaff from the grain and only on such exercise can the evidence be considered trustworthy or otherwise.

(Para 18)

D. Indian Penal Code, 1860 – S. 300 – Murder – The act was committed indubitably without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the appellant having taken undue advantage or acted in a cruel or an unusual manner – This assumption arises from the circumstance that he struck the victim only once on his head and did not repeat the act – The offence would fall under *Exception-4* of S. 300, I.P.C – Trial Court has failed to explain in detail the reasons for arriving at a conclusion that the offence fell under S. 304-Part I of the I.P.C – Appellant is guilty of the offence under S. 304-Part II of the I.P.C.

(Para 27)

Appeal dismissed.

Chronological list of cases cited:

1. Gurmeet Singh v. State of U.P., (2005) 12 SCC 107.
2. State of Haryana v. Shakuntla and Others, (2012)5 SCC 171.
3. Govindaraju *alias* Govinda v. State by Srirampuram Police Station and Another, (2012) 4 SCC 722.
4. Mahesh and Another v. State of Madhya Pradesh, (2011) 9 SCC 626.
5. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
6. Alamgir v. State (NCT, Delhi), AIR 2003 SC 282.
7. A. Shankar v. State of Karnataka, AIR 2011 SC 2302.
8. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
9. Mano Dutt v. State of U.P., (2012) 4SCC 79.
10. Balraje v. State of Maharashtra, (2010) 6 SCC 673.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. Dissatisfied with the impugned Judgment dated 26.05.2016 in Sessions Trial Case No. 12 of 2014 of the Sessions Judge, West Sikkim, at Gyalshing, and the Order on Sentence dated 30.05.2016, the Appellant has preferred this Appeal.

2. On Conviction under Section 304-Part I, Section 324 and Section 323 of the Indian Penal Code, 1860 (for short 'the IPC'), the impugned Sentence was as follows;

(i) Rigorous imprisonment of 10(ten) years and fine of Rs.30,000/- (Rupees thirty thousand) only, under Section 304 Part-I of the IPC, with a default stipulation.

(ii) Simple imprisonment of 2(two) years under Section 324 of the IPC.

(iii) Simple imprisonment of 6(six) months under Section 323 of the IPC.

The Sentences were ordered to run concurrently setting off the period of detention already undergone. The fine amount if recovered was to be handed over to the family members of the deceased as compensation under Section 357 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.').

3. Learned Counsel for the Appellant, before this Court contended that the impugned Judgment and Order on Sentence were flawed as no materials existed for convicting the Appellant, a supporter of the opposition political party Sikkim Krantikari Morcha (for short 'SKM party') under any of the Sections charged. Raising contradictory arguments, learned Counsel then submitted on the one hand that there were no independent witnesses as PW-1 to PW-14 were interested witnesses being supporters of the ruling Sikkim Democratic Front political party (for short 'SDF party'), while PW-17 is the sister of the deceased and PW-18 his Uncle, their evidence therefore ought to be considered with circumspection. In the same breath, it was expostulated that despite the availability of independent witnesses at the place of occurrence, viz; the local residents and one Duryo Dhan Pradhan, Head Constable, they remained unexamined as Prosecution witnesses. That Pema Choda Lepcha PW-30, a Constable of the Indian Reserve Battalion, was declared hostile as he testified that neither could he witness the incident due to darkness nor he did see any one picking up any person lying on the ground or hear any man or woman crying out that a person had been killed. It is also the next contention of learned Counsel that the assigning of the case to the Criminal Investigation Department police (for short 'CID') from the Kaluk Police Station for investigation, reveals the unwarranted interest of the State in the matter, leading to a bias against the Appellant.

4. In the second leg of her arguments, learned Counsel for the Appellant contended that there are serious discrepancies in the medical reports of the victim/deceased, as PW-22, Dr. A.S. Subba, found only a single haematoma of 4 x 4 inches over occipital region, while Exhibit-21, the report from Dr. Chhang's Super Speciality Hospital Pvt. Ltd. prepared by Dr. S. Bol PW-26, indicated that the patient was admitted with multiple injuries due to physical assault. PW-29 Dr. Rumi Maitra, who conducted the autopsy, also found several injuries on the deceased, while PW-28, the Sub-Inspector of Police who conducted inquest on the dead body, found an injury on the right side of the head but not on the left side. The anomalies raise serious reservations about the Prosecution case. That, one of the weapons of offence allegedly a 'khukuri' was never recovered, while MO-II, the wooden beam alleged to have been used for assaulting the Victim, was not forwarded for forensic evaluation. That in fact, the case is one of medical negligence on the part of PW-22 Dr. A.S. Subba, Medical Officer at Rinchenpong Primary Health Centre, who first attended to and examined the deceased. It was strenuously contended that despite learning that the patient was in a critical condition, he advised the patient to be moved for higher medical facilities in a private vehicle leading to contributory negligence.

5. In the third leg of her arguments, it was canvassed that the Appellant neither had the intention nor the knowledge that the injury inflicted would cause death. In fact, even assuming but not admitting that the Appellant had struck the deceased, it was in a sudden fight in the heat of passion and at the spur of the moment to save himself from being assaulted by a mob consisting of more than 18(eighteen) people. The act of the Appellant was merely a rash and negligent act falling within Exception 4 of Section 300 and thereby under Section 304A of the IPC, which was overlooked by the learned Trial Court.

6. The final argument raised was that contradictions existed in the FIR lodged by PW-1 Sangay Chopel Bhutia with his Statement under Section 161 Cr.P.C. as well as his testimony in the Court. As per his Section 161 Cr.P.C. Statement, he had gone to Jorethang to attend the SDF Foundation Day programme, contrary to which in his evidence before the Court he has stated that in fact he had gone for medical treatment and stayed on at Jorethang to hear the Chief Minister s speech. Exhibit-1 too does not reveal that he had gone for medical treatment. The Court should thus be

circumspect while accepting the evidence of this witness. That, the evidence of PW-17 the sister of the deceased, is contrary to the evidence of PW-30, *inasmuch* as according to PW-17, when the Appellant came from behind the victim and hit him on the head with the wooden beam, she cried out that her brother was killed but PW-30 present at the place of occurrence heard no such cry. That in fact, even the Appellant was subjected to assaults as evident from Exhibit-12, his medical report. The evidence on records fail to inspire confidence and the Judgment of the learned Trial Court is based on surmises and hypothesis which deserves to be set aside.

7. Repelling the arguments of learned Counsel for the Appellant, learned Additional Public Prosecutor would canvass that the evidence of PW-20 and PW-21 establishes the seizure of MO-II (wooden beam) by the Investigating Officer (for short 'the I.O.'). That, in fact, nine Prosecution witnesses have deposed that when the deceased turned his back to the Appellant he was assaulted on his head by the Appellant with MO-II, which is duly substantiated by the medical evidence of PW-22, PW-26 and PW-29, who on examining the Victim opined that the cause of death was the injuries found on the deceased. That, although the Prosecution opted not to examine Duryo Dhan Pradhan, Head Constable, on account of the witness being unreliable, departmental proceedings having been initiated against him, the Appellant too failed to examine him despite citing him as a witness which thereby leads to an adverse inference. Although, the Appellant has contended that according to PW-30 there was no light at the place of occurrence, the evidence of PW-2, PW-3 and PW-13 would indicate that the street lights at the spot sufficiently lit the area and the Appellant having been identified was rightly convicted. Attention of this Court on this count was drawn to ***Gurmeet Singh vs. State of U.P.***[1]. Refuting the arguments of learned Counsel for the Appellant, it was contended that merely because the witnesses comprised of SDF supporters and kin of the deceased, would not make them unreliable witnesses. This argument was fortified with reliance on ***State of Haryana vs. Shakuntla and Others***[2] and ***Govindaraju alias Govinda vs. State by Srirampuram Police Station and Another***[3],

8. Rebutting the contention that the statement of PW-1 Sangay Chopel Bhutia, in the FIR Exhibit-1 is contrary to his deposition in Court, it was

[1] (2005) 12 SCC 107
[2] (2012) 5 SCC 171
[3] (2012) 4 SCC 722

pointed out that FIR cannot be deemed to be an encyclopaedia, duly buttressing his argument with the ratio in ***Mahesh and Another vs. State of Madhya Pradesh***[4]. Further, while submitting that evidence before the Court being substantive evidence is to be considered and not the statement under Section 161 Cr.P.C., attention was drawn to the decision in ***R. Shaji vs. State of Kerala***[5]. That, the Prosecution evidence being cogent and consistent clearly establishes that the Appellant had chosen an opportune moment to assault the Victim from behind, on his head intentionally to cause death. The question of the incident arising out of the heat of passion and the spur of the moment is devoid of merit. Thus, no infirmity accrues in the impugned Judgment and Order on Sentence of the learned Trial Court and a dismissal befits the Appeal.

9. The rival submissions made at the Bar were heard at length and given careful consideration. The evidence and documents on record have been meticulously examined by me. Would the impugned Conviction and Order on Sentence warrant any interference, is the question that falls for consideration herein.

10. To gauge this, it would be appropriate to briefly walk through the facts of the case. On 04.03.2014 at around 2100 hours, PW-1 lodged Exhibit-1, the FIR, at the Kaluk Police Station informing therein that the Complainant along with party workers of the SDF party arrived at Sribadam (West Sikkim) at 8 p.m. after attending the party meeting at Jorethang (South Sikkim). When they were parting company to return home, a discussion ensued between the Appellant, a supporter of the SKM party and one Dawa Gyatso Bhutia, SDF supporter, during which the Appellants younger brother, Jigmee Dorjee Bhutia, interfered and started attacking the SDF supporters. On the advice of the Victim/deceased, Narendra Kumar Gurung, who was the Vice-President, Constituency Level Committee (CLC) of the SDF party, not to quarrel, they started dispersing when suddenly the Appellant struck the deceased on his head from behind and injured him. Pursuant thereto, the deceased was evacuated to the Rinchenpong Primary Health Centre, on his condition being serious, he was referred to Siliguri thereafter. Hence, strict legal action was sought against the Appellant and his younger brother, Jigmee Dorjee Bhutia. The FIR was duly registered as Kaluk Police Station Case being FIR No. 06/2014 dated 04.03.2014,

[4] (2011) 9 SCC 626
[5] (2013) 14 SCC 266

under Section 307/34 of the IPC, against the duo and endorsed for investigation to PW-31, Police Inspector Kesang D. Bhutia. On receiving information that the patient had succumbed to his injuries at Siliguri, the case was converted to one under Section 302/34 IPC. After investigation commenced, the matter was transferred to the CID, Gangtok, on 11.03.2014 and endorsed to PW-32, Dy.S.P. K.B. Gadaily, for investigation. The formalities of investigation, such as arrest, interrogation and medical examination were carried out, the weapons of offence were recovered from the place of occurrence and seized, all relevant witnesses examined and their statements recorded. The inquest and post mortem report of the deceased were also obtained from the concerned police station at Siliguri. It transpired on investigation that on 04.03.2014 at around 7:30 p.m. about 20(twenty) people, including the deceased, returned to Sribadam via Soreng after observing the SDF Foundation Day at Jorethang. *En route*, they were obstructed by SKM party activists at Singling where the Soreng Police however intervened. On arriving at Sribadam, the SDF supporters reprimanded the Appellant who was loitering there, regarding the said obstruction. The Appellant retaliated leading to a scuffle between him, one Dawa Gyatso Bhutia and Phurba Bhutia. On the intervention of police patrolling party, the Appellant was sent home but soon returned to the spot swinging a 'khukuri' threatening to kill everyone and was joined by his younger brother. On being over powered by the police, the „khukuri was disengaged from the Appellant. As the crowd started dispersing, the Appellant picked up a wooden beam from a pile of building materials lying nearby and attacked the Victim fatally on his head from behind, causing him to fall on the ground. He was evacuated to the Rinchenpong Primary Health Centre and thereafter to Dr. Chhangs Super Speciality Hospital, Matigara, Siliguri, where he was declared "brought dead". Hence, Charge-Sheet was submitted under Section 302/324 IPC against the Appellant while his brother, Jigmee Dorjee Bhutia and another suspect, Kharga Bahadur Gurung, were discharged on account of insufficient evidence. Later the Court would implead them as accused but vide the impugned Judgment acquit them on evidence lacking of their involvement.

11. The learned Trial Court framed Charge against the Appellant under Sections 302/34, 307 and 323 of the IPC and against Jigmee Dorjee Bhutia and Kharga Bahadur Gurung under Section 302/24 of the IPC. On their plea of "not guilty", the Prosecution examined 32 witnesses. The Appellant was examined under Section 313 of the Cr.P.C. thereafter and on his plea

afforded an opportunity to examine one Duryo Dhan Pradhan, who he however failed to produce before the Court. On arguments being heard and the evidence being considered, the impugned Judgment and Order on Sentence were pronounced.

12. While addressing the argument of learned Counsel for the Appellant that the FIR, the Section 161 Cr.P.C. statement of PW-1 and his evidence before the Court were inconsistent, we may briefly consider the provisions of Section 154 of the Cr.P.C. which deals with information in cognizable cases. The first information of the commission of a cognizable offence is sufficient to constitute the first information report. The object of the FIR is to set the criminal law in motion and it nowhere envisages a narration of the entire details of the offence. In ***Mahesh and another*** (*supra*), while considering the arguments of the Appellant therein, that, when the first information report which was filed by PW-1 after the incident, the role attributed to the Appellants was not mentioned at all, the Honble Supreme Court observed that

> "**10.** ..... Besides, it is an established law that so far as the first information report is concerned, it is only a report submitted informing the police about the commission of the crime. It is not required that the said first information report should contain a detailed and vivid description of the entire incident. Further, it cannot be expected from the informant, especially, when the informant is a relative of the injured/deceased to give each and every minute detail of the incident in the first information report.
> ....."
> [emphasis supplied]

It emanates therefore that the FIR is for the purpose of promptly reporting an incident to set into motion the criminal justice system, it does not necessarily have to be an encyclopaedia of the events that unfolded.

13. That having been said, we may now consider what Section 161 Cr.P.C. statement pertains to. Under this Section, the police investigating the matter can examine witnesses acquainted with the facts of the case and reduce them to writing without oath or affirmation. However, merely because

a particular statement made by the witness before the Court does not find place in the statement recorded under Section 161 Cr.P.C., does not merit the evidence being thrown out. [See ***Alamgir vs. State (NCT, Delhi)***[6]***].*** Later in time, the Honble Supreme Court in ***A. Shankar vs. State of Karnataka***[7], held that;

> "**17.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. ....."

[6] AIR 2003 SC 282
[7] AIR 2011 SC 2302

14. In ***R. Shaji vs. State of Kerala***[8]**,** the Honble Supreme Court would hold that;

> "**61.** ..... when the statement is recorded in Court and the witness speaks under oath after he understands the sanctity of the oath taken by him either in the name of God or religion, it is thus left to the Court to appreciate the evidence under Section 3 of the Evidence Act, 1872. The Judge must consider whether a prudent man would appreciate evidence and not appreciate the same in accordance with his own perception. ....."
>
> [emphasis supplied]

15. On careful perusal of Exhibit-1, it is seen that PW-1 has given information with regard to what transpired between the SDF party workers, the Appellant and his brother at Sribadam Bazaar leading to the assault on the deceased by the Appellant. Thereafter, on meticulous examination of Section 161 Cr.P.C. Statement of PW-1 as well as his deposition before the Court, admittedly he has not witnessed the assault on the Victim. Merely because he has not elaborated his activities in Exhibit 1 and his Section 161 Cr.P.C. Statement, viz; that he had gone for medical treatment and on not meeting the concerned doctor, attended the Foundation Day programme of the SDF party, does not render the evidence given by him unreliable. In any event, these facts are not intrinsic or germane to the matter at hand and do not cause any prejudice to the Prosecution case. There are no major contradictions in the FIR, the Section 161 Cr.P.C. Statement and the statement of PW-1 before the Court to raise any suspicion about the witness or the Prosecution case. Hence, the above discussions answers the doubts raised by learned Counsel for the Appellant.

16. So far as the credibility of the testimony of the witnesses furnished by the Prosecution goes merely because they owe allegiance to a particular party while the Appellant belongs to another party would not render the evidence unreliable. The Honble Supreme Court while dealing with this issue in ***Mano Dutt vs. State of U.P.***[9]**,** held as follows;

> "**24.** Another contention raised on behalf of the appellant-accused is that only family members of

[8] (2013) 14 SCC 266
[9] (2012) 4 SCC 79

the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the court to reject such evidence merely on the ground that witness was a family member or an interested witness or a person known to the affected party."

[emphasis supplied]

17. In ***Balraje vs. State of Maharashtra***[10], the Honble Supreme Court stated that;

"**30.** ..... When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of

[10] (2010) 6 SCC 673

> their evidence, the version given by the witnesses appear to be clear, cogent and credible there is no reason to discard the same. ....."
>
> [emphasis supplied]

18. On the bed rock of the principles so enunciated, the testimony of the Prosecution witnesses may be examined to test their credibility or otherwise. PW-2 to PW-7, PW-9, PW- 11, PW-13, PW-14 and PW-17 were privy to the incident which unfolded before them at the relevant time. PW-8, PW-10, PW- 12, PW-15 and PW-16 were tendered by the Prosecution being repetitive witnesses. PW-19 to PW-32 was witnesses who were not present at the spot, comprising of police personnel, doctors and I.Os. PW-1 who lodged Exhibit-1, the FIR, did not witness the incident as on being attacked by Jigmee Dorjee Bhutia, he fled to his house and stayed inside until the Police Inspector of Kaluk Police Station came and took him to the Police Station. Further, it is his evidence that from inside his house he heard people shouting that Narendra Kumar Gurung was killed. The statements of PW-3, PW-4, PW-5, PW-6, PW-7, PW-9, PW-11, PW-13, PW-14 and PW-17, is categorical that they witnessed the Appellant striking the deceased from behind. It also emerges unequivocally from the evidence of these witnesses that in fact, the deceased was trying to pacify the disputing factions and advising them to disperse. At that very moment, PW-17 called out to the deceased who turned to go home from the place of occurrence. Evidently, finding the moment to be propitious, the Appellant took the wooden beam when the deceased turned his back and struck him on the head leading him to falling on the ground. The evidence of PW-17, that she was calling out to her brother, the deceased, who then made to return home is firstly supported by the evidence of PW-5 Suk Man Subba, according to whom PW-17 came from the other side calling out to her brother. His evidence also finds support in the evidence of PW-6 Suren Subba, who also deposed that the deceased was trying to pacify the accused persons and requesting them to restrain from such activities. He then saw PW-17 coming from the opposite side calling out to the deceased. This fact was also witnessed by PW-7 Dew Bahadur Subba. The fact that PW-17 was present at the spot is also substantiated by the evidence of PW-9, PW-11 and PW-13. Evidence establishes the fact of a fight between the supporters of SDF and SKM parties during which time PW-1 was assaulted by Jigmee Dorjee Bhutia, the brother of the Appellant leading to PW-1 hiding in the safety of his home. PW-2 went to the house of PW-1

and telephoned the police, on returning to the spot, he saw the Appellant and the others shouting therein. According to PW-7, when PW-17 was calling out to her brother, he directed her to where the deceased was. PW-17 also witnessed the Victim pacifying the crowd. The deceased evidently was not an assailant. The evidence so furnished and discussed *supra* was not decimated under cross-examination. Merely because the Prosecution witnesses belong to one political party does not relegate their evidence to unreliability neither can the truth be attenuated. Furthermore, the Court is vested with the task of separating the chaff from the grain and only on such exercise can the evidence be considered trustworthy or otherwise. The evidence furnished is cohesive, consistent, inspires confidence and is therefore reliable and trustworthy.

19. So far as anomalies on the examination of the Victim by the doctors is concerned, in the first instance the argument that the death of the deceased due to the medical negligence of PW-22 and not on account of the act of the Appellant is to say the least appalling and incongruous and merits no consideration. It is clear that PW-22, the Medical Officer at Rinchenpong Primary Health Centre, examined the deceased at around 8:40 p.m. After such examination, he found a single hematoma about size 4 x 4 inches over the occipital region. The finding of this doctor is supported by the evidence of PW-29 Dr. Rumi Maitra. She has found the following injuries on the person of the deceased;

> "1. Two liner abrasions 1" each, placed parallel to each other separately by 1.25 cm, over dorsum(back) of right hand.
>
> 2. Abrasion 1 cm x 1cm over lateral surface (side part) of right forearm 4" below the elbow joint.
>
> 3. Abrasion 1cm x 1cm over lateral side of left knee.
>
> 4. Bruise 1" x 1" at the inner aspect of left arm near axilla.
>
> The said injuries are bright red in colour and looked fresh and ante mortem in nature.

> In the Cranium and spinal region, the following injuries were found;-
>
> Hematoma over both parietal and left occipital region region. U-shaped depressed fractures 2" x 1" over left side of occipital bone just above the left occipital condyle.
>
> Subdural hematoma found over both occipital lobe and base of brain. The brain and Spinal Cord were found – Congested.
> .....
>
> All injuries noted above are bright red in colour, fresh and ante mortem in nature. No other injuries could be detected over body after careful examination and dissection.
>
> On examination of the dead body I found that the dead (*sic* „death) was due to the effects above noted head injury which is anti-mortem (*sic* 'ante')and homicidal in nature. Exhibit-24 already marked is the post-mortem report prepared by me and Exhibit- 24(a) is my signature on it.
>
> On being shown MO-II, I can say that the type of injury found on the occipital region of the deceased could be caused by MO-II."

20. PW-22 and PW-29, both doctors have found injuries over the occipital region. Minor variance in the measurement of the injuries or the number of injuries detected or undetected cannot be said to be fatal to the Prosecution case. Contrary to the submission of learned Counsel for the Appellant that Exhibit-21 shows several injuries, the document records no details of injuries save a head injury. PW-29 has opined that the death was due to the effects of the head injury. Hence, the collated evidence of the doctors points to the fact of death due to the head injury on the Victim. The argument that locus criminus was not sufficiently lit is belied by the evidence of PW-2, PW-3 and PW-13. In ***Gurmit Singh vs. State of U.P.***

(*supra*), the Honble Supreme Court while upholding the conviction of the appellant observed that it was a moonlit night and the accused were known persons being family members, their identification was upheld. Similarly, the parties herein belonged to the same village and were familiar with each other. The evidence undoubtedly leads one to the conclusion that the street lights provided sufficient illumination to identify the assailant and the Victim. Even if the evidence of PW-30 is disregarded, the corroborative evidence of the other PWs with regard to the adequacy of illumination cannot be wished away.

21. On the question of the material objects, it is evident that PW-20 and PW-21 were seizure witnesses to MO-I and MO-II, iron rods seized from the place of occurrence and the wooden beam, respectively. It is also evident that these objects were used at the time of the incident since the seizures were made by the I.O. at around 10 p.m., the same evening from the place of occurrence i.e. in front of the house of PW-1 by PW-31, the first I.O. of the case. The fact of seizure has not been contradicted. It is no ones case that the deceased was struck repeatedly at the same spot on his head in which event it could be likely that the wooden beam would contain hair and blood of the deceased but the assault was a single assault. In the said circumstance, it is possible that no blood would be found on MO-II, in any event the ocular evidence has withstood the cross-examination and the witnesses have in unfailing terms and corroborative evidence stated that the assailant used the wooden beam. In this context, we may beneficially turn to ***R. Shaji vs. State of Kerala*** (*supra*);

> "**30** It has been argued by the Learned Counsel for the Appellant, that as the blood group of the blood stains found on the chopper could not be ascertained, the recovery of the said chopper cannot be relied upon.
>
> **31.** A failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe could not have been human blood at all. Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail

> to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard.
> ....."
>
> [emphasis supplied]

It would conclude that forensic evidence would not necessarily be the penultimate to reach a conclusion of the offence. Even if MO-II was forwarded for forensic analysis, it cannot be ruled out that the expert could have failed to detect blood due to several intervening factors.

22. The argument that the Appellant was unarmed does not appear to be truthful as PW-1 has stated that he was armed, firstly with a „khukuri and divested of it by the police at the spot. Although, a din was raised about the failure of the Prosecution to examine Duryo Dhan Pradhan, Head Constable, thereby leading to adverse inference, Section 114(g) of the Evidence Act, 1872, would apply with equal rigour to the Appellant. Having sought to examine Duryo Dhan Pradhan as his defence witness, he failed to furnish him before the Court in support of his case with no reason furnished for nonexamination.

23. The argument that the State Government exhibited an exceptional interest while allocating the investigation to the CID is bereft of merit as undisputedly a precious young life has been lost and the State is duty bound to ensure that the best investigative efforts are made to bring the culprits to book.

24. The next argument that needs to be addressed is that the matter at hand would fall under Section 304A of the IPC. It would be essential at this juncture to refer to Section 300 of the IPC.

25. Section 300 of the IPC reads as follows;

> **"300. Murder. -** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

26. Five Exceptions are provided in the Section which provides that culpable homicide would not be murder if the offence is committed under the following;

"**Exception 1.** – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

.....

First. ....
Secondly. ....
Thirdly. ....

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and cause the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm that is necessary for the purpose of such defence.

> ***Exception 3.*** – Culpable homicide is not murder if the offender being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.
>
> ***Exception 4.*** – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> *Explanation.* – It is immaterial in such cases which party offers the provocation or commits the first assault.
>
> ***Exception 5.*** – Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

27. In the instant case, it is evident that the Appellant was in the midst of a crowd of persons where the altercation was ensuing. Although, the Victim was pacifying the crowd the perception of the Appellant evidently was that the Victim was also an aggressor. It is not denied that he had been waylaid by the SDF supporters with regard to the obstruction at Singling. It is in these circumstances and the ensuing fracas that the Appellant has raised MO-II and assaulted the Victim. The act was committed indubitably without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the Appellant having taken undue advantage or acted in a cruel or an unusual manner. This assumption arises from the circumstance that he struck the Victim only once on his head and did not repeat the act. It cannot be denied that the act of the Appellant was an instinct for self preservation. Clearly, the offence would fall under Exception-4 of Section 300 of the IPC. The learned Trial Court in the impugned Judgment has

failed to explain in detail her reasons for arriving at the conclusion that the offence fell under Section 304-Part I of the IPC, however from the circumstances discussed hereinabove, it is clear that the offence falls under Exception 4 of Section 300 of the IPC. The Appellant is guilty of the offence under Section 304-Part II of the IPC as against the finding of the learned Trial Court that it was under Section 304-Part I. It surely does not fall under Section 304A of the IPC as learned counsel for the Appellant would have this Court believe. The impugned Judgment thus stands modified to the above extent.

28. Considering the entirety of the foregoing discussions, this Court is of the considered opinion that no infirmity arises in the conclusion of the learned Trial Court save to the extent mentioned hereinabove.

29. The impugned Judgment and Order on Sentence thereby brooks no interference.

30. Accordingly, Appeal is dismissed.

31. Copy of this Judgment be transmitted to the learned Trial Court for information.

32. Records be remitted forthwith.

33. No order as to costs.

SLR (2018) SIKKIM 972

(Before Hon'ble the Acting Chief Justice)

Crl. A. No. 16 of 2017

Tanam Limboo ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. N. B. Khatiwada, Senior Advocate with Mrs. Gita Bista, Advocate.

For the Respondent: Mr. Karma Thinlay, and Mr. Thinlay Dorjee, Additional Public Prosecutors with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 2nd August 2018

A. Code of Criminal Procedure, 1973 – S. 154 – F.I.R – Does not envisage that a particular person is to lodge the F.I.R. All that the Section requires is that information relating to commission of a cognizable offence must be reported to the concerned Officer-in-Charge of a Police Station, the primary object of such a step being to set the criminal law in motion.

(Para 11)

B. Code of Criminal Procedure, 1973 – Ss. 161 and 164 – Statements made under Ss. 161 and 164 are not substantive evidence. The statement under S. 161 of the Cr.P.C. can be utilised for the limited purpose of contradicting a witness in the manner prescribed in the proviso to S. 162(1) of the Cr.P.C – A statement recorded under S. 164 of the Cr.P.C. can be used for the purposes of either contradiction or corroboration.

(Para 13)

C. Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 of the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved – Where the victim is a child below the age of 16 years, the Special Court shall presume that the accused has committed the offence unless the contrary is proved – The statute provides that the statement of the victim has to be given the sanctity it deserves when an accused is prosecuted for any of the offences detailed thereunder.

(Para 15)

Appeal dismissed.

Case cited:

1. A. Shankar v. State of Karnataka, (2011) 6 SCC 279.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. Seeking a reversal of the Judgment of Conviction dated 05-04-2017 in Sessions Trial (POCSO) Case No.07 of 2016 in the Court of the Special Judge (POCSO), West Sikkim, at Gyalshing, and the consequent sentence dated 11-04-2017, by which the Appellant was sentenced to undergo simple imprisonment for a period of nine years and to pay a fine of Rs.20,000/- (Rupees twenty thousand) only, under Section 4 of the the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act), with a default clause of imprisonment, the Appellant is before this Court. The period of detention already undergone by the Appellant during investigation and trial were duly set off against the incarceration imposed.

2. Assailing the Judgment and the Order on Sentence, it is submitted that according to the victim, the Appellant used a condom while committing the act, if this be true, then the Appellant would have taken sometime to wear it during which time the victim could have escaped. However, no evidence accrues from the Prosecution to suggest that the victim made any effort to decamp from the place of occurrence. It was also urged that there

is no medical evidence to support the allegation that the victim sustained injury by the alleged use of force by the Appellant. The victim herself has stated that on the relevant day she was cutting grass when her grandfather sent her to cut grass in an adjoining area, hence although a material witness the grandfather of the victim has been excluded from the list of Prosecution Witnesses. That, there are contradictions in the statement of the victim under Section 161 and Section 164 of the Code of Criminal Procedure, 1973 (for short Cr.P.C). Besides, the victim claims that she asked for the mobile phone of one of the ladies and called up her *Tumma* (Aunt) P.W.4, informing her that the Appellant had raped her which evidence P.W.4 failed to corroborate. P.W.3 and P.W.5 would testify that when they saw the alleged victim she was normal and properly dressed. It is also the victim's statement that she cried for help during the sexual assault. Although the alleged place of occurrence is located only 70 meters from her house and 30 meters from the road strangely no one heard her cries. That there are anomalies in the evidence of P.W.6, P.W.13 and P.W.4 as according to P.W.6 he lodged the First Information Report (FIR) based on information allegedly received by him from P.W.13 his son, who in turn alleges that such information was given to him by his mother, P.W.4 telephonically. P.W.4 does not corroborate this statement and has specifically admitted under cross-examination that the alleged victim did not convey anything to her about the incident, hence the Prosecution has failed to prove the circumstances under which P.W.6 received information about the alleged incident. P.W.13 mentions the father of the victim who however was not made a Prosecution Witness and no explanation is forthcoming for the reason as to why the FIR was lodged by the uncle of the victim and not her father. That, P.W.9 the Doctor who examined the victim has not given any conclusive opinion pertaining to the alleged rape of the victim, while P.W.10 who examined the Appellant found no injuries on the private part of the Appellant or on any other part of the Appellant's body. The Appellant for his part when examined under Section 313 of the Cr.P.C. has claimed his innocence, to establish which he even produced his wife, Mrs. Neelam Sherpa as D.W.1, according to whom, the Appellant was working with her in the fields for the entire day on 10-04-2016 when all of a sudden the Police came to their house and took the Appellant with them. The finding of guilt of the Appellant as per the impugned Judgment is based on the testimony of the victim supported by the medical evidence, but there is no iota of evidence in the testimony of the Doctor who examined the victim to lead to such a conclusion, hence this is a fit case where the Appellant is to be acquitted.

3. Learned Additional Public Prosecutor while strongly refuting the arguments of Learned Counsel for the Appellant invited the attention of this Court to the conduct of the Prosecutrix and contended that had the victim consented to the offence neither would she have cried for help nor would she have rushed to the house of P.W.3 and informed her aunt P.W.4 from the mobile phone of P.W.2. It is also evident that her uncle P.W.5 came and took her home along with him. The evidence of P.W.2 and P.W.3 support the evidence of the victim P.W.1 with regard to her reporting the matter to her aunt. P.W.4 the victim's aunt has also stated that she received a mobile call from the victim requesting her to come immediately on which she sent her uncle P.W.5 to fetch her. P.W.5 has corroborated the fact that P.W.4, the wife of P.W.6, had told him to go to the house of one Sancha Raj Limboo to pick up the victim. Exhibit 5 is the Birth Certificate of the minor victim revealing her date of birth as 05-05-2000 the incident having taken place on 10-04-2016 would make the victim a month less than 16 years of age and, therefore, a minor in terms of the POCSO Act. That as the Birth Certificate remained unchallenged before the Learned Trial Court it cannot be questioned at the appellate stage to disprove the age of the victim. P.W.9 the Doctor who examined the victim has mentioned in Exhibit 8 that local examination indicated injury on the genital of the victim which was suggestive of blunt injury. The Appellant evidently had made a disclosure statement under Section 27 of the Indian Evidence Act, 1872 (for short Evidence Act), Exhibit 12 on the basis of which the condom, M.O.I used by him was seized by the Police after it was pointed out by the Appellant in the presence of two witnesses P.W.14 and P.W.15. Hence, the Appeal deserves a dismissal.

4. The rival contentions of Learned Counsel were heard at length. The evidence and documents on record have also been examined carefully. The question that falls for determination is whether the Appellant is guilty of the offence as charged.

5. The facts of the case are briefly being traversed herein. On 10-04-2016, at 2220 hours, an FIR Exhibit 3 was lodged by P.W.6 to the effect that the victim aged about 15 years, living in his house since 2009 and a student of Class IX had been raped by the Appellant the same day at around 1500 hours, while she was in the complainant's cardamom field collecting fodder for cattle. Pursuant thereto, Gyalshing P.S. Case No.19/ 2016, dated 10-04-2016 was registered under Sections 376/341 of the

Indian Penal Code, 1860 (for short IPC) read with Section 4 of the POCSO Act, 2012 against the Appellant, Tanam Subba and taken up for investigation. The necessary formalities pertaining to investigation, viz.; recording the statement of witnesses including Section 164 of the Cr.P.C. statement of the victim, forwarding the victim and the Appellant for medical examination, visiting the place of occurrence and thereafter arresting the Appellant were completed. Exhibits of the case including the victim's Birth Certificate, Exhibit 5 were seized. The victim was forwarded to Manjusha Home, South Sikkim in consultation with the concerned Officers of the Social Welfare Department, Government of Sikkim duly obtaining the consent of her guardians. Investigation carried out revealed that the victim a school student was living with her uncle P.W.6 since 2009, her mother having remarried, while her father had left her with P.W.6 and migrated to Namchi. On the relevant day when the victim was collecting fodder about 100 meters away from her home at about 1500 hours the Appellant came to the spot. On enquiry by her as to why he was there he answered that he was going to cut grass, but suddenly closed her mouth, pushed her to the ground, wore a condom that was in his pocket, raped her and left the place thereafter. The traumatised victim for her part went in search of one her school teachers who was unavailable but instead found P.W.2 and P.W.3 working in the fields and narrated the incident to them. She borrowed the cell phone of P.W.2 and informed P.W.4 her aunt. After sometime P.W.5 arrived at the place and took her home to P.W.6. The Medical Report of the victim would indicate that she had a bright red bruise over the labia minora, tenderness, discharge and hymen deficit at 9 o'clock and 3 o'clock positions, but laboratory reports indicated absence of spermatozoa. That the RFSL Report would indicate that human semen was detected in a used condom, which tested positive for the presence of blood group O', the blood group of the Appellant. On conclusion of investigation finding a *prima facie* offence, Charge-sheet was submitted against the Appellant under Sections 376/341 of the IPC read with Section 4 of the POCSO Act.

6. The Learned Trial Court considering the materials on record framed Charge against the Appellant under Section 3(a) of the POCSO Act punishable under Section 4. On his plea of not guilty, trial commenced wherein the Prosecution examined sixteen witnesses including the I.O. of the case. On closure of the Prosecution evidence the Appellant was afforded an opportunity to explain the incriminating circumstances appearing in the evidence against him by examination under Section 313 of the Cr.P.C. He

claimed that the allegations against him were false, he sought to and was permitted to examine his wife Neelam Sherpa as D.W.1. On closure of the defence evidence the final arguments of the parties were heard, pursuant to which on appreciation of the evidence on record, the impugned Judgment and Order on Sentence came to be pronounced.

7. While adverting to the submissions of Learned Counsel for the parties, so far as the age of the victim is concerned, this aspect has not been raised by Learned Counsel for the Appellant. As a concomitant it can be assumed that the Appellant had no quarrel with the age of the victim as furnished by the Prosecution, in the form of Exhibit 5 and hence requires no further discussion. The offence allegedly was committed close to the road, but incongruity has been expressed by Counsel for the Appellant that her cries seeking help were not heard by anyone. In the first instance, it must be borne in mind that the incident occurred inside a cardamom field. Secondly, the place of occurrence being a village, evidently few people would be using the road and in all probability no one was in the vicinity when the offence was being committed. The argument that the victim had sufficient time to escape as the Appellant had to wear the condom also finds no force as necessary consideration has to be extended to the fact that she is a mere child of 15 years, brought up in a village and would obviously not have the same reactions as a child brought up in an urban area. Her limited exposure to the outside world as well as her level of education are to be considered with sensitivity. The Prosecution would argue that the condom, M.O.I, was seized on the disclosure made by the Appellant before the Police and two independent witnesses under the provisions of Section 27 of the Evidence Act. In this context, the Prosecution has furnished the two witnesses in an effort to establish this aspect of their case. However, on careful consideration of the evidence of P.W.15 and P.W.14 inconsistencies emanate therefrom. The Learned Trial Court has discarded the evidence of these two witnesses on grounds that on scrutinising Exhibit 12 the statement appears to have been given by the Appellant in the presence of P.W.14 and P.W.15 on 11-04-2016 at 10:00 hours. However, both these witnesses have testified that they had gone to the Police Station on 10-04-2016 and not on 11-04-2016. A careful perusal of Exhibit 12 would indicate that the date and time of arrest of the Appellant is mentioned herein as 10-04-2016 and 22:45 hours respectively while the disclosure statement is purported to be recorded on 11-04-2016. As pointed out by the Learned Trial Court both witnesses are categorical in their depositions that they had gone to the

Police Station on 10-04-2016, hence the veracity of Exhibit 12 becomes suspect. Apart from which there are inconsistencies in the statement of P.W.15 who states that he is unaware of the contents and purpose of preparation of Exhibit 12 and Exhibit 14 which is evidently a continuation of Exhibit 12. In such circumstances, the Learned Trial Court was correct in not relying on the said Exhibits and is also being discarded by this Court.

8. That, having been said no presumption of innocence of the Appellant arise merely because the child did not look dishevelled when she went to the residence of her teacher. P.W.2 has categorically testified that she noticed that the victim was crying and it is her indubitable testimony that the victim told her that she was raped by the Appellant. P.W.3 on this count has also corroborated the evidence of P.W.2. It is apparent that the victim narrated the fact that she was raped by the Appellant to the first persons, viz.; P.W.2 and P.W.3 when she met them although she did not encounter her teacher. The victim has also stated that she called up P.W.4 from the mobile phone of one of the ladies which fact has been corroborated both by P.W.2 and P.W.3. Although P.W.4 failed to shed light on the fact that the victim had informed her of the incident, but she has not denied the fact that the victim called her from the phone and asked her to come immediately to fetch her. The urgency indicates the occurrence of an untoward incident. Both P.W.1 and P.W.4 have said that her uncle, *Tumba* came to pick up her from the house of P.W.3. P.W.5 has substantiated the evidence of P.W.1 and P.W.4 that he picked up the victim up from the house of the husband of P.W.3.

9. The evidence of P.W.9, the Gynaecologist at the District Hospital, Gyalshing, West Sikkim, who examined the victim lends credence to the fact of sexual assault as narrated by P.W.1. According to P.W.9, the victim gave a history of being sexually assaulted by the Appellant at around 2 p.m. of the same day, while she was cutting grass in the nearby cardamom field and that the Appellant had used a condom. The medical examination of the victim took place on the date of offence, i.e., 10-04-2016, at around 11.45 p.m. The Gynaecologist found the following;

> **"**O/E - Pt. Conscious, co-operative
> Vitals - Stable Gait (N), Passed urine
> Chest & CVS – NAD
>
> P.A. – Soft, NAD
> Multiple abrasions over the back.

Local examination –
Hymen deficit at 9‘ o clock & 3‘ o‘ clock position.
Bruise (P) – bright red over the (L) labia minora.
Tenderness (P)
Discharge (P)

* 3 vaginal swabs taken & handed over to Police
* Undergarment handed over to Police

Opinion withheld till reports are available

FINAL OPINION – The above history & clinical findings are suggestive of blunt injury. However, lab. Reports shows absence of spermatozoa.**”**

10. Exhibit 8 was identified as the report prepared by P.W.9. The fact that there was multiple abrasions or excoriation on the victim‘s back was evidently the result of applied friction, a probable consequence of the sexual assault. That apart, it is clear that her hymen was deficit at the 9 o‘clock and 3 o‘clock position. The injury to the labia minora being bright red was evidently fresh with tenderness and discharge present. The Doctor opined that the injury was suggestive of a blunt injury. The evidence of P.W.1 and P.W.2 considered cumulatively leads to no other conclusion but that of penetrative sexual assault by the Appellant on P.W.1.

11. P.W.6 received information of the sexual assault on the victim from P.W.13, his son, who in turn stated that he received a phone call from his mother informing him that the Appellant has sexually assaulted the victim. It is categorical that P.W.6 on receiving the information returned to his home along with the victim‘s uncle. The guardian of P.W.1 as also the village Panchayat and ladies were present at the home of P.W.6. Thereafter Exhibit 3 came to be lodged by him. Addressing the argument of Learned Counsel for the Appellant that the FIR ought to have been lodged by the father of the victim and not P.W.6, it would be relevant to touch upon Section 154 of the Cr.P.C. which deals with information in cognizable cases. The information relating to the commission of a cognizable offence is given to the Officer-in-Charge of a Police Station under this Section. The Section does not envisage that a particular person is to lodge the FIR. All that the Section requires is that information relating to commission of a cognizable

offence must be reported to the concerned Officer-in-Charge of a Police Station, the primary object of such a step being to set the criminal law in motion. Since P.W.6 was seized of the matter he lodged Exhibit 3 before the Police Station, nothing debars him from doing so. The evidence of P.W.11, the Junior Scientific Officer to the effect that human semen could be detected in M.O.I which gave a positive test for the presence of blood group O' which was the blood group of the Appellant becomes irrelevant in view of the evidence of P.W.14 and 15 being disregarded.

12. From a careful appreciation of the evidence on record, it emanates that the victim reported the incident to P.W.2, P.W.3 and P.W.4 as soon as she was able to flee after the harrowing incident was committed on her. It has been contended that the victim's grandfather was not listed as a Prosecution Witness, I find no merit in this submission as all that he would prove is that he was cutting grass in the adjoining area. He was not a witness to the incident and is therefore of no relevance to the Prosecution case. Attention may be drawn to the fact that nothing furnished in the evidence of the Prosecution Witnesses points to any inimical relations either between the victim and the Appellant or their respective families prior to the incident which could have been a motive for the victim, if at all, to falsely implicate the Appellant in the case. Merely because the Appellant's body was devoid of injuries does not negate the fact of the penetrative sexual assault in the face of the evidence of P.W.1 duly substantiated by Exhibit 8.

13. The question of contradictions in the statement of the victim under Sections 161 and 164 of the Cr.P.C. was also raised by Learned Counsel for the Appellant. It needs no reiteration that the statements made under the above Sections are not substantive evidence. The statement under Section 161 of the Cr.P.C. can be utilised for the limited purpose of contradicting a witness in the manner prescribed in the proviso to Section 162(1) of the Cr.P.C. Similarly a statement recorded under Section 164 of the Cr.P.C. can be used for the purposes of either contradiction or corroboration. The Appellant is afforded sufficient opportunity during cross-examination at the stage of trial to take advantage of the legal provisions and on failure to do so cannot raise this point at the appellate stage.

14. Minor contradictions with regard to the evidence of P.W.1 and P.W.4 bear no relevance to the Prosecution case. In ***A. Shankar*** vs. ***State***

of Karnataka[1] the Hon'ble Supreme Court would hold as follows;

> **"22.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.**"**

The fact that the incident occurred withstood the cross-examination and although P.W.4 may have been remiss in her deposition pertaining to the incident, sufficient corroborative evidence prevails to establish the Prosecution case.

15. It is also apposite in this context to consider the provisions of Section 29 of the POCSO Act. Section 29 of the POCSO Act specifically provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The commentary which appears thereafter based on notes on clauses of the Bill provides inter alia that where the victim is a child below the age of 16 years, the Special Court shall presume that the accused has committed the offence unless the contrary is proved. Hence, the statute provides that the statement of the victim has to be given the sanctity it deserves when an accused is prosecuted for any of the offences detailed thereunder. This brings us to Section 30 of the POCSO Act which reads as follows;

> **"30. Presumption of culpable mental state**.—(1) In any prosecution for any offence under

[1] (2011) 6 SCC 279

this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.In this section, culpable mental state includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.**"**

The Appellant has failed to avail of the opportunity extended to him under Section 30 of the POCSO Act for rebutting the presumption set out in Section 29 of the POCSO Act to disprove the fact of culpable mental state.

16. Consequently, the evidence on record being cogent and consistent is undisputedly indicative of the fact that the Appellant had committed the offence of penetrative sexual assault on the victim. The impugned Judgment and Order on Sentence of the Learned Trial Court suffers from no infirmity to warrant interference therein.

17. Appeal fails and is accordingly dismissed.

18. No order as to costs.

19. Copy of this Judgment along with Records be sent forthwith to the Learned Trial Court.

SLR (2018) SIKKIM 983

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

Crl. A. No. 38 of 2017

Ram Krishna Jana ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

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

For the Respondent: Mr. Thinlay Dorjee, Additional Public Prosecutor with Mr. S.K Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 9th August 2018

A. Protection of Children from Sexual Offences Act, 2012 – Determination of Age – It is settled law that parents would give the best evidence of their child's age – It is not the appellant's case that the victim was an adolescent thereby warranting a suspicion about her actual age. She is undoubtedly a child, aged about 5 years, a student of Upper Kindergarten and clearly falls within the ambit of S. 2 of the POCSO Act.

(Paras 8 and 10)

B. Evidence – The evidence of the victim being cogent and consistent, minor anomaly should not be made a ground on which the evidence can be rejected in its entirety – *A. Shankar* v. *State of Karnataka, (2011) 6 SCC 279* referred.

(Para 12)

Appeal dismissed.

Chronological list of cases cited:

1. Vishnu v. State of Maharashtra, 2006 Cri. L.J. 303.
2. Sham Lal *alias* Kuldip v. Sanjeev Kumar and Others, (2009) 12 SCC 454.
3. A. Shankar v. State of Karnataka, (2011) 6 SCC 279.

JUDGMENT

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

1. The Appellant is before this Court assailing the Judgment dated 30.10.2018, of the Court of learned Special Judge, Protection of Children from Sexual Offences (POCSO) Act, 2012, East Sikkim at Gangtok, in S.T. (POCSO) Case No. 19 of 2016. The Appellant having been convicted under Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short „the POCSO Act) was sentenced to undergo rigorous imprisonment for a period of 10(ten) years and to pay a fine of Rs.5000/- (Rupees five thousand) only, with a default clause of imprisonment vide the impugned Order on Sentence dated 31.10.2017.

2. The grounds raised before this Court are that the learned Trial Court failed to appreciate that "Sanu" uncle whose phone the Victim was playing with was in the same room where the offence was committed, despite which the Prosecution failed to cite him as a witness. Apparently, "Sanu" uncle did not wake up during the commission of the alleged incident or hear the cry of the prosecutrix, thereby lending suspicion to the veracity of the offence. Challenging the age of the Victim, it was contended that the birth certificate of the Victim was not furnished to establish that she was a child as defined under Section 2 of the POCSO Act. The Prosecution also failed to seize the School Admission register or other relevant records for this purpose. That apart, no certificate was produced from any corporation or municipal authority or for that matter no ossification test was conducted on the child. That, the medical report of the Victim reveals absence of spermatozoa in the vaginal wash sample finding corroboration in the evidence of PW-16, the Junior Scientific Officer of the Regional Forensic Science Laboratory, Saramsa, East Sikkim. In such circumstances, it is clear that the Prosecution has failed to prove its case beyond a reasonable doubt and hence, the Appellant ought to be acquitted of all charges.

3. The contra arguments raised by learned Counsel for the State-Respondent was that the evidence of the minor Victim suffices to establish the Prosecution case as is settled law. That, in the first instance, the Appellant has been identified as the assailant by the Victim who she referred to as 'lambu bhaiya'. The Victim unequivocally stated that the Appellant had on the relevant day inserted his finger into her vagina in the room of one "Sanu" uncle following which she screamed and cried. PW-2, the Victims father, has stated that he and PW-3, the Victims mother, were informed by PW-4 his brother-in-law that the Victim was bleeding from her private part. Later, the Victim confided to her mother about the incident which was duly corroborated by the evidence of PW-3, thereby clearly establishing that the Appellant had committed the sexual assault which led to the injury on the Victim. Laying emphasis on the evidence of PW-10, the Gynaecologist and Obstetrician who examined the Victim, it was contended that the injury on the Victim and the clinical findings of PW-10, reveal that the Victim was sexually assaulted by the Appellant. That, the evidence of PW-1 finds corroboration also in the evidence of PW-13, whom the Victim had confided to about the incident. PW-14, the Victim s elder brother also a minor, deposed that the Victim had told him that "lambu bhaiya" had inserted his finger into her vagina. The evidence of PW-16 confirmed that on examination of the Exhibits forwarded to him, *inter alia*, being MO-IV and MO-I, the half pants of the Appellant and the underwear of the Victim, respectively, human blood of the blood group „AB was detected, which was found to be the blood group of the Victim. Hence, the Prosecution has by cogent evidence established that the Appellant was the perpetrator of the offence, therefore, no error obtains in the impugned Judgment and Order on Sentence.

4. The rival submissions made at the Bar were heard at length and anxiously considered. The evidence and documents on record have been meticulously examined by us. What this Court is required to consider is whether the Conviction and Sentence handed out by the learned Trial Court is in accordance with law. In order to gauge this, we may briefly, for clarity, allude to the facts of the case.

5. PW-2, the Victim's father, on 17.07.2016 at 2200 hours lodged a written Complaint, being Exhibit-3, before the Pakyong Police Station, informing therein that during the day when he and his wife, PW-3, were not at home, the Appellant sexually assaulted the Victim aged about 5 years by

inserting his finger into her vagina. Pursuant to Exhibit-3, Pakyong Police Station Case No. 15 of 2016 dated 17.07.2016 came to be registered against the Appellant, Ram Krishna Jana, under Section 376 of the Indian Penal Code, 1860 read with Section 4 of the POCSO Act. Investigation was taken up on the matter being endorsed to the Investigating Officer.

6. Investigation so conducted revealed that the Appellant aged about 23 years, a permanent resident of 24 Parganas, West Bengal, was working under the Simplex Infrastructures at Bhasmay, East Sikkim, and residing in a rented room in the house of PW-2, the Victims father. On the relevant day, PW-2 and his wife PW-3, parents of the Victim, left their children at home, viz; the Victim and her two elder brothers and went to Rangpo. PW-4, the maternal uncle of the Victim, aged about 17 years who resided with the Victim's family also left the house to attend to his own chores. At around 1210 hours, two more children, PW-13 and PW-19, joined the children at their house. Left on their own, the children watched television and after a while PW-19 returned to her own home upon which PW-1 followed her with the intention of buying sweets. However, on reaching the first floor of her house she continued to play there alone. Finding the Victim alone, the Appellant who was also in the same floor of the building took her inside his room and sexually assaulted her by putting his finger into her vagina, thereby causing blunt trauma to the vulva and bleeding therefrom. The child went to urinate and on seeing blood coming out of her vagina informed her elder brother PW-12, that "lambu bhaiya" had inserted his finger into her vagina. PW-4, who in the meanwhile had returned home, telephonically informed PW-2 about the injury and bleeding. On reaching home and on enquiry by PW-3, the Victim told her mother that "lambu bhaiya" had inserted his finger into her vagina, hence chargesheet was filed against the Appellant under Section 376 of the Indian Penal Code, 1860, read with Section 4 of the POCSO Act.

7. On consideration of the materials furnished before it, the learned Trial Court proceeded to frame charge against the Appellant under Section 5(m) of the POCSO Act, viz; commission of penetrative sexual assault on a child below twelve years of age, to which the Appellant pleaded "not guilty". The Prosecution in an effort to establish its case beyond a reasonable doubt examined twenty witnesses, following which the Appellant was afforded an opportunity to explain the incriminating circumstances appearing in the evidence against him, by examination under Section 313 of

the Code of Criminal Procedure, 1973, to which he claimed innocence. The learned Trial Court pronounced the impugned Judgment and Order on Sentence on consideration and appreciation of the evidence on record, hence this Appeal.

8. Turning our attention first to the question of the age of the Victim, admittedly the birth certificate or any other document pertaining to the age of the prosecutrix finds no place in the records of the case and admittedly, it was never seized by the police. However, it is the specific evidence of PW-2 and PW-3, the parents of the Victim that PW-1, their daughter, was aged five years old and was studying in a private school in UKG in Rangpo. On this, we may appropriately refer to ***Vishnu vs. State of Maharashtra***[1], wherein the Honble Supreme Court held as follows;

> "**24.** In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother – PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor„s opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. ....."
>
> [emphasis supplied]

[1] 2006 Cri. L.J. 303

It is, thus, settled law that parents would give the best evidence of their childs age.

9. Besides, on a meticulous examination of the evidence on record, it is seen that during cross-examination no questions were put to the parents to test the veracity of their evidence pertaining to the age of PW-1. The Appellant cannot now question their evidence before this Court. On this count, reliance can be placed in the decision in ***Sham Lal alias Kuldip vs. Sanjeev Kumar and Others***[2] below;

> "**21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:
>
> "On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by
> Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."
>
> The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.
>
> **22.** It has been held in *Dasondha Singh v. Zalam Singh* [(1997) 1 PLR 735 (P&H)] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit."
>
> [emphasis supplied]

[2] (2009) 12 SCC 454

10. It is not the Appellants case that the Victim was an adolescent thereby warranting a suspicion about her actual age. She is undoubtedly a child, aged about 5 years, a student of Upper Kindergarten and clearly falls within the ambit of Section 2 of the POCSO Act. The above discussions soundly quell any doubts regarding the age of the Victim.

11. So far as the identification of the Appellant as the assailant is concerned, the Victim has without vacillation identified him not only during the test identification parade held on 31.08.2016, vide Exhibit-16, but also proceeded to identify him in the Court Room and referred to him as "lambu bhaiya". PW-2 has testified that the Victim pointed out to the person as the assailant when he had called some people from the locality to ascertain the identity of the Appellant. The evidence of PW-3, PW-4, PW-12 and PW-14, also lend support to the fact that the Victim unerringly identified the Appellant as the person who had perpetrated the offence on her.

12. Turning to address the question raised by the Appellant that "Sanu" uncle was in the room when the act was committed, it would be essential to once again delve into the evidence of PW-1, the only person who can shed light on what happened at the relevant time. The witness has stated that on the relevant day the Accused came to the place where she was playing and took her to the room of one "Sanu" uncle and inserted his finger into her vagina. It is also her specific statement that she screamed and cried after which the Accused left the place. She went to the toilet to check her vagina and found that she was bleeding therefrom. She thus informed PW-4, her uncle (mama), and PW-12, her brother (bubu), about the incident. On being questioned by the Court, she would confirm that at the relevant point of time, the said "Sanu" uncle and "dariwala" uncle who used to reside there were not present in the room. The evidence of the Victim being cogent and consistent sets to rest the speculation that "Sanu" uncle was in the room. The only minor anomaly that arises in the Prosecution case is that PW-3 has stated that PW-1 informed her that one "Sanu" uncle was sleeping in his room when the Accused came and committed the offence. However, this statement does not vanquish the Prosecution case as the fact of assault has remained undisturbed. In any event, the incident occurred in July 2016 while the evidence was recorded in December, the same year. In this context, the Honble Supreme Court held in ***A. Shankar vs. State of Karnataka***[3], as follows;

[3] (2011) 6 SCC 279

> "**22.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety."
>
> [emphasis supplied]

13. The fact of the sexual assault by the Appellant has been asserted by the Victim. PW-3, the Victims mother, came to learn of the incident from the Victim when she took her for a bath and noticed that a cloth had been placed on her private part which had blood. On enquiry from the Victim girl, the Victim was initially reticent about disclosing the cause of the bleeding but after sometime when she bled again and on being firmly questioned by PW-3, she narrated the incident to PW-3. There are no contradictions or exaggerations in the evidence of PW-1 with regard to the incident and the evidence of PW-1 and PW-3 are corroborative.

14. PW-12 and PW-14, the brothers of the Victim, while supporting the Prosecution case deposed that on the relevant day they remained at home watching television, while PW-1 left the house to play with PW-13 in the locality. After sometime, she returned crying saying that she was bleeding from her vagina. Both witnessed their Victim sister s bleeding upon which both of them along with PW-4 applied talcum powder to the bleeding portion which however did not stop. Consequently, PW-4 telephonically informed PW-2 of the said bleeding. According to PW-14, when their parents returned from Rangpo Bazaar, the Victim told them about the bleeding from her vagina, the cause being "lambu bhaiya" having inserted his finger therein. According to PW-19, the Victims neighbour who is also a friend, on the relevant day after playing for sometime the Victim girl left for

the nearby shop and returned after some time. She heard the screaming of the Victim girl from above her house and went to the house of the Victim to check the cause where she saw PW-1 bleeding from her vagina. As per PW-4, the Victims Uncle, he returned home at around 1:30 p.m. to 2:00 p.m. and the Victim went to him crying and told him that she had been assaulted. She was bleeding from her private part after which he wiped the blood, changed her clothes and informed PW-2 of the injury and bleeding. The witness would further testify that the Victim informed PW-12, her elder brother, of the reason of the bleeding. PW-13, aged about 9 years, had on the relevant day gone to the Victims house to watch television. The Victim who was not there then, returned after sometime crying. On enquiry as to why she was crying, PW-1 told her that she was bleeding from her private part and that „lambu bhaiya" had inserted his finger therein. This evidence remained unruffled under cross-examination.

15. It would also be in the appropriateness of things to look into the evidence of PW-10, Gynaecologist and Obstetrician, who examined the Victim on 18.07.2016 the incident having occurred on 17.07.2016. The Victim had given the doctor the history of the Accused having inserted his finger into her vagina when she was alone at home. On examination, he found her underwear was soiled with blood which he handed over to the police. No injuries were detected by him on the body surface of the Victim. He would further note as follows;

> "Fresh abrasions were noted on the inner aspect of the vulva on both sides. On the right side, the abrasion extended from 7 oclock position to 11 oclock position and on the left side, it extended from 1 oclock to 4 oclock position. Fresh bleeding was noted from the abrasions. Her hymen was intact, there were no injuries over thigh, groin and anal region.
>
> .....
>
> ..... clinical findings suggestive of blunt trauma to the vulva resulting in bleeding from the area."

He would also depose that blunt trauma to the vulva can be caused due to external manipulation but considering the age of the Victim, the injury

on her vulva could not be self inflicted. On the basis of his medical examination, Exhibit-5, his report was prepared. Although, efforts were made under cross-examination to render the evidence unreliable and to disprove that the abrasions in the inner aspect of the vulva were fresh, his evidence withstood the said cross-examination.

16. PW-9, the Medico Legal Consultant at STNM Hospital, Gangtok, who examined the Appellant on 18.07.2016 at about 2:30 a.m., would identify MO-IV as the same half pant - dark green in colour with star patterns which belonged to the Appellant and which the doctor handed over to the police along with his penile swab, thereby establishing that MO-IV belonged to the Appellant.

17. PW-16, the Junior Scientific Officer, examined the material objects forwarded to him from the office of the Sub Divisional Police Officer, Pakyong. On examining MO-VII, which was the blood sample of the Victim, he found her blood group to be „AB. MO-VIII, the blood sample of the Accused, was found to be of the blood group „B. On examining MO-I, the underwear of the Victim and MO-IV, the underwear of the Accused, he found that both garments tested positive for the blood group 'AB'. The evidence of this witness establishes that the Appellant had indeed violated the Victim by inserting his finger into her vagina. The argument of learned Counsel for the Appellant that no spermatozoa were found in the vaginal wash of the Victim is devoid of merit, as it is no ones case that the injury was caused due to penile penetration.

18. In the teeth of the evidence of the Prosecution witnesses discussed hereinabove and the consistency that emanates therefrom, no error obtains in the findings and conclusion of the learned Trial Court vide the impugned Judgment. Hence, the Judgment and Order on Sentence is upheld.

19. Appeal fails and is accordingly dismissed.

20. No order as to costs.

21. Copy of this Judgment be transmitted to the learned Trial Court for information.

22. Records be remitted forthwith.

SLR (2018) SIKKIM 993

(Before Hon'ble the Acting Chief Justice)

R.F.A. No. 01 of 2017

Shri Chetan Sharma ….. APPELLANT

Versus

Mrs. Januki Pradhan and Another ….. RESPONDENTS

For the Appellant: Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Ms. Tamanna Chhetri, Advocate.

For Respondent No.1: Mr. S.S. Hamal, Advocate with Ms Priyanka Chhetri, Advocate.

For Respondent No.2: Mr. B.K. Rai, Advocate with Ms Yozna Shankar, Advocate.

Date of decision: 13th August 2018

A. Code of Civil Procedure, 1908 – Order I Rule 10 – Impleadment of necessary party – Every person who had or has an interest in the suit property is not a necessary party. The question of adding a party would only arise if the rights of a party are likely to be affected if he is not added as a party.

(Para 18)

B. Sikkim State Rules, Registration of Document Rules, 1930 – Rule 20 – If the document was not produced within four months from the date of execution for its registration thereof, it is not for the appellant to raise the issue but it was for the concerned authorities to have declined to accept the document or to register the said property or demand payment of fine.

(Para 19)

Appeal dismissed.

Chronological list of cases cited:

1. Razia Begum v. Sahebzadi Anwar and Others, AIR 1958 SC 886 (V 45 C 122).
2. Shri Kuldip Singh v. Smt. Balwant Kaur (deceased) represented by her L.R. (i) Smt. Surinder Kaur and Others, AIR 1991 Punjab and Haryana 291.
3. Chuba Temsu Ao and Others v. Nangponger and Others, AIR 1994 Gauhati 110.
4. Terai Tea Co. Ltd. v. Kumkum Mittal and Others, AIR 1994 Calcutta 191.
5. Kameshwar Choudhary and etc. v. State of Bihar and Others, AIR 1998 Patna 141.
6. Poonam v. State of Uttar Pradesh and Others, (2016) 2 SCC 779.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. Questioning the legality and validity of the impugned Judgment dated 28.04.2017 of the learned District Judge, Special Division-I, Sikkim at Gangtok, in Title Suit No. 21 of 2013 [*Januki Pradhan vs. Chetan Sharma and Sikkim Industrial Development & Investment Corporation (SIDICO)*], the Appellant (*Defendant No. 1 before the learned Trial Court*) is before this Court.

2. Urging this Court to set aside the impugned Judgment, learned Senior Counsel for the Appellant advanced the arguments that the learned Trial Court failed to consider that the Respondent No.1 (*the Plaintiff before the learned Trial Court*) could not have purchased the area of 5960 sq.ft. from the owners of the land since it had been leased out to M/s Agarwal Wire Industries Pvt. Ltd. (for brevity 'Agarwal Industries') in 1984 for a period of 25 (twenty-five) years and the lease period extended thereafter. That, clause (iv) of the Lease Deed between the Lessors i.e. Majhi brothers and the Lessee i.e. Agarwal Industries, specifically debarred the lessor from selling, mortgaging, transferring or assigning in any manner to

any other person, whatsoever any part or the nwhole of the land, without the express consent of the lessee. However, the Sale Deed, Exhibit-1, between the six Majhi brothers and the Respondent No.1 was executed on 07.08.2006, during the subsistence of the lease, thereby making it an invalid sale. Placing further reliance on Exhibit-1, it was contended that Rule 20 of *Sikkim State Rules, Registration of Document, 1930,* provides that registration of documents ought to be completed within four month of its execution. Exhibit-1 would reveal that the sale was executed on 07.08.2006 but registration was completed only on 15.11.2010, thereby rendering the document and its execution invalid. The thrust of the argument of learned Senior Counsel for the Appellant was that the Appellant herein is the Caretaker-cum-Chowkidar of Agarwal Industries with no rights over the suit property, hence it was the bounden duty of the learned Trial Court to implead Agarwal Industries and the Majhi brothers as necessary parties to the suit in view of the afore stated circumstances. Since, the suit suffers from non-joinder of necessary parties and other grounds put forth, the impugned Judgment be set aside. To buttress his arguments, reliance was placed on ***Razia Begum vs. Sahebzadi Anwar and others***[1], ***Shri Kuldip Singh vs. Smt. Balwant Kaur (deceased) represented by her L.R. (i) Smt. Surinder Kaur and others***[2], ***Chuba Temsu Ao and others vs. Nangponger and others***[3], ***Terai Tea Co. Ltd. vs. Kumkum Mittal and others***[4], ***Kameshwar Choudhary and etc. vs. State of Bihar and others***[5] and ***Poonam vs State of Uttar Pradesh and Others***[6].

3. In contra, the arguments canvassed by learned Counsel for the Respondent No.1 was that in the first instance, it is evident from "Schedule-A" to the Plaint that the suit property is confined to the factory-shed on the plot of land and does not concern the land purchased by her, hence the Appeal deserves a dismissal on this ground alone. That, the suit property is described as follows;

> "All that part and parcel of one big room and two small room (*sic*) with total plinth area of 1100 Sq.ft. (approax) (*sic*) in the factory-shed of total plinth area

[1] AIR 1958 SC 886 (V 45 C 122)
[2] AIR 1991 Punjab and Haryana 291
[3] AIR 1994 Gauhati 110
[4] AIR 1994 Calcutta 191
[5] AIR 1998 Patna 141
[6] (2016) 2 SCC 779

of 5960 Sq.ft. purchased by Smt. Januki Pradhan (plaintiff supra) from SIDICO on auction on 31st August, 2006 and standing on a plot of land of plaintiff measuring .0540 hectares situated at Majhitar under West-Pandam Block Khatian, Duga Elaka, Gangtok Sub-division of Sikkim State."

4. That, even if the plot of land described in "Schedule A" is to be considered, the Appellant has no *locus standi* to raise the issue as admittedly he is only the Caretaker of Agarwal Industries. Learned Counsel would further contend that in fact, the suit property was auctioned by Respondent No.2 and purchased by the Respondent No.1, which is admitted by Respondent No.2 and the Appellant in their evidence before the learned Trial Court. Further, when the suit is confined to the factory-shed, no reason arises for the Appellant to persistently harp on the point of purchase of landby the Appellant or the lease deed. The attention of this Court was drawn to Paragraphs 41 and 42 of the impugned Judgment, wherein the learned Trial Court on the issue of nonjoinder of parties has concluded that the suit pertains to the three rooms in the concerned factory-shed in occupation of the Appellant on the pretext of being the Caretaker of the premises for Agarwal Industries. To the contrary, the evidence would reveal that the Respondent No.2 had put the property on auction and was later duly purchased by Respondent No.1. Hence, Agarwal Industries is not a necessary party as correctly held by the learned Trial Court. In the said circumstances, the points raised by the Appellant are nonissues lacking in merit thereby requiring the Appeal to be dismissed.

5. Learned Counsel for the Respondent No.2, for his part would contend that Exhibit-3 which is a Sale Certificate issued by the Managing Director of Sikkim Industrial Development and Investment Corporation (for short 'SIDICO'), clarifies that they had sold the factory-shed for a consideration value of Rs.4.00 lakhs (Rupees four lakhs) only, and therefore, no further confusion arises in this context. Pointing to Exhibit-4, it was contended that pursuant to Exhibit-3 this document was executed which reveals that the factory-shed was handed over by them and taken over by the Respondent No.1. A letter subsequently was issued to the Appellant informing him of the transaction requiring him to vacate the suit premises. In view of the above documents no further role of the Respondent No.2 arises. Reference was also made to the Order of the learned Trial Court

dated 12.12.2016, wherein the Appellant had sought to examine Mahesh Agarwal, the owner of Agarwal Industries as his witness but had subsequently voluntarily dropped the witness on his inability to produce him. The question of their nonjoinder does not arise as Agarwal Industries had no role to play after the auction of the factory-shed. That, the reluctance of Mahesh Agarwal to appear as witness, is indicative of the fact that Agarwal Industries had no interest in being a party to the proceedings in any capacity. In view of the submissions, the Appeal deserves a dismissal.

6. The arguments of learned Counsel for opposing parties have been heard *in extenso* and given due consideration. The impugned Judgment, the pleadings and documents on records have also been carefully perused by me.

7. The Respondent No.1, as the Plaintiff before the learned Trial Court, averred that she is the owner of a plot ofland measuring .0540 hectares situated at Majhitar, having purchased it from its previous joint owners. That, a factoryshed with a total plinth area of 5960 sq.ft. existed on the land but was duly purchased by her on auction from SIDICO, the Respondent No.2, for Rs.4,00,000/- (Rupees four lakhs) only, on 31.08.2006, vide Sale Certificate dated 02.09.2006. She took possession of the said factory-shed in terms of the "handing over and taking over" dated 04.09.2006, executed between her and the Respondent No.2. The Respondent No.2 informed her that the Appellant was the temporary Caretaker of the factory-shed and would vacate the said premises towards which a Notice had been issued to him requiring him to vacate the property on or before 30.09.2006. On his refusal to comply with the Notice, Plaintiff took necessary steps before the District Collector, East Sikkim at Gangtok, who directed the parties to move the competent Civil Court for redressal of their grievances. Her contention is that the Appellant is in illegal occupation of the suit property denying her ownership. Hence, she sought for declaration of title, khas possession and permanent injunction and other consequential reliefs before the Court of the learned Principal District Judge, East and North Sikkim at Gangtok, in Title Suit No. 21 of 2013.

8. The Appellant filed his written statement as Defendant No.1, denying and disputing the averments made in the Plaint and contended that the suit land had been leased out to Agarwal Industries for a period of 25(twenty-five) years from 1984 with an option for extending of the same for another

period of 25(twenty-five) years. The initial period of lease expired on which Agarwal Industries exercised its option of extension and the Appellant is their Caretaker-cum-Chowkidar. That, in fact, the Respondent No.1 could not have purchased the suit property as the lease was subsisting at the relevant time and a clause in the Lease Deed dated 22.04.1986 (*sic* „1984) prohibited sale of the suit property during the subsistence of the lease. That, after Agarwal Industries was unable to make good the loan taken by them from the Respondent No.2, the plant and machinery were put on sale. During such time, the Respondent No.2 gave him additional charge as Caretaker of the factory-shed for a few years and he worked for the Respondent No.2, which relieved him in the year 2006. That in fact, he does not have right, title and interest over the suit property and Mahesh Agarwal of Agarwal Industries is still the Lessee of the entire leasehold land in question. Therefore, the Plaintiff ought to seek reliefs against the Lessee of the suit land of whom the Appellant is an employee.

9. The Respondent No.2 for its part averred that Agarwal Industries had taken a loan from them for the purpose of setting up a factory, in default of payment the upset value of the property was fixed and the property put up for auction. As none came forward for the bidding at the public auction, the Respondent No.2 after due permission from the Certificate Officer bid for the auction and took possession of the property. Later, the same property was put up for sale, in response to which the Respondent No.1 offered the highest bid of Rs.4,00,000/- (Rupees four lakhs) only, which was accepted and Sale Certificate issued on 02.09.2006 in her favour. This was followed by physical handing and taking over of the property with information to the Appellant who had been temporarily placed as their Caretaker, to vacate the premises on or before 30.09.2006. Hence, the Respondent No.2 had no right, title and interest over the suit property.

10. The learned Trial Court framed the following issues for adjudication.

(i) Whether the Suit suffers from mis-joinder and nonjoinder of necessary parties as Agarwal Wire Industries Pvt. Ltd. has not been made a party to the suit?

(ii) Whether the suit property is the lease hold property of Agarwal Wire Industries Pvt. Ltd. of which Defendant No. 1 is only a caretaker?

(iii) Whether the suit is undervalued?

(iv) Whether the Plaintiff acquired the property from its previous joint owners through a registered Sale Deed document 15.11.2010?

(v) Whether the Plaintiff purchased one factory shed with a total plinth area of 5960 sq. ft. on auction/sale from the SIDICO i.e., the Defendant No.2, for a sum of Rs.4 lacs on 31.08.2006 vide a Sale Certificate No. SIDICO/2006-07/ 395 dated 02.09.2006?

(vi) Any other reliefs?

11. The parties put forth their evidence in Court, on closure of which final arguments were heard. Issue No. (v) was taken up first for decision where the learned Trial Court after examining and appreciating the evidence on record, concluded that the Respondent No.1 had purchased the concerned factory-shed on 31.08.2006. Issue No. (iv) and (ii) were taken up together wherein the learned Trial Court found that the Plaintiff had acquired the concerned land on which the factory-shed stands, from its previous owners. That, neither the suit property nor the concerned factory-shed or the land under it can be regarded as the leasehold property of Agarwal Industries nor can the Defendant No.1 be regarded as their Caretaker. In Issue No.(i), it was held that the Defendant No.1 (the Appellant herein) was the only necessary party to the present suit. That, Agarwal Industries has no direct interest or other interest and no reliefs were sought for by the Plaintiff (Respondent No.1) from Agarwal Industries which is therefore not a necessary or a proper party to the suit. While deciding Issue No.(iii), the learned Trial Court observed that the valuation put forward by the Plaintiff at the time of institution of the suit in 2013 was reasonable and issue No. (vi) was decided accordingly. Hence, the suit was decreed in favour of the Plaintiff (Respondent No.1).

12. The pivotal question for consideration is whether Agarwal Industries is a necessary party to the instant matter. It is indeed a unique case where an alleged Caretaker is taking up cudgels on behalf of his alleged owners who have rightly not shown any interest in pursuing the matter or being

impleaded as a party having washed their hands off the entire issue after the decision of this Court in Civil Writ Petition No. 21 of 1996 on 03.08.1996.

13. While bearing in mind the facts of the case, it is but apposite to refer to the decision of this Court *supra*, being Exhibit-C. The six Majhi brothers, being joint owners of landed property at Majhitar, West Pendam, had entered into a lease agreement on 22.04.1984 with Agarwal Industries and leased out .0840 hectares of land to them in four different plots of land for activities as mentioned in the Lease Deed. In terms of the lease agreement, which was for a period of 25 (twentyfive) years, commencing from 1st April, 1984 to 31st March, 2009, the lease could be renewed at the option of the Lessee, for a maximum period of another 25 (twenty-five) years on the same terms and conditions agreed upon by the parties. Condition No.(iv) reads as hereunder;

> "That the lessor shall not sell, mortgage, or transfer or assign in any manner to any other person whatsoever any part or the whole of the land, without the express consent of the lessee."

14. Pursuant to this lease agreement, Agarwal Industries set up a factory-shed comprising of one big room and two small rooms with a total plinth area of 1100 sq.ft. having obtained loan from the Respondent No.2 for establishment and running of a wire industry. Some part of the loan thus obtained was repaid while the rest remained unpaid with interest accruing. The Respondent No. 2 initiated proceedings being Civil Suit No. 57 of 94 before the Certificate Officer for issuance of a certificate for Rs.43,10,636/- (Rupees forty-three lakhs, ten thousand, six hundred and thirty-six) only, being the outstanding amount. After necessary inquiry under the Sikkim Public Demand Recovery Act, 1988, a Certificate was sought for and issued to the Respondent No.2. The Certificate was put to execution, *inter alia*, by the Respondent No.2, and the matter registered as Execution Case No. 3 of 95. The factory-shed belonging to Agarwal Industries stood attached and the upset price of the property was fixed at Rs.6,54,670/- (Rupees six lakhs, fifty-four thousand, six hundred and seventy) only. A public Notice was issued in the local newspaper on 22.06.1996 towards this purpose. Mahesh Agarwal, being one of the Directors of the Company, preferred the petition (*supra*) under Article 226 of the Constitution before this Court along with an Application for stay of the Order and the date

fixed for such auction. He admitted to the debt owed to the Respondent No.2 before this Court and conceded his inability to repay the certificate dues and therefore had no objection to the process of execution. Objection however was raised on the upset price being grossly inadequate and unjust. The High Court while disposing of the Civil Writ Petition *supra*, observed that there was no reason to interfere with the Order of the Certificate Officer or the auction as scheduled. The Court, however, observed that the Certificate Officer should make all efforts to finalise sale of the plant machinery and other fixtures before making the sale of the structure absolute to prevent exposure to the elements thereby diminishing its value. That, this should be brought to the knowledge of the bidders before the auction commenced.

15. Following the above facts and circumstances, the property was put to auction, however, none came forward for bidding thereof leading to the Respondent No.1 to seek permission from the Certificate Officer to bid for the auction and take possession of the property as its auction purchaser against the upset price. This was followed by the Respondent No.2 publishing a Sale Notice in the local Newspaper seeking sealed quotations from intending purchasers for the sale of the property in question. In response thereto, the Respondent No.1 offered the highest bid of Rs.4,00,000/- (Rupees four lakhs) only, which was accepted and Sale Certificate issued on 02.09.2006 in her favour. This was followed by physical handing over and taking over of the property by the Respondent No.2 to the Respondent No. 1 on 04.09.2006, with information to the Appellant on 19.09.2006 of the said circumstance, requiring him to vacate the premises on or before 30.09.2006. The Appellant having failed to comply with the direction, the Respondent No. 1 filed Title Suit No. 21 of 2013 [*Januki Pradhan vs. Chetan Sharma and Sikkim Industrial Development & Investment Corporation (SIDICO)*] before the Court of the learned Principal District Judge, East and North and Gangtok, as elucidated hereinabove.

16. It is the constant reiteration of the Appellant that he is the Caretaker of Agarwal Industries but when the concerned property on the leased land has already been purchased by the Respondent No.1, there is no question of the Appellant remaining as the Caretaker of Agarwal Industries who have laid no further claim to it. In fact, a careful perusal of the cross-examination of the Appellant would indicate that he is aware that the Respondent No.1

had on 31.08.2006 purchased the factory-shed from SIDICO on auction and that he was appointed as Caretaker of the factory-shed by the SIDICO till 30.09.2006 but he had not vacated the portion of the factory shed under his possession. He has also admitted that the suit land was purchased by the Respondent No.1 through a registered Sale Deed dated 15.11.2010, from the Majhi brothers. According to him, as per Exhibit-B, Mahesh Agarwal had asked him to stay in the concerned portion of the factory-shed and as such till date he has not vacated the portion of the factory-shed under his occupation. A perusal of Exhibit-B would indicate that it is a letter issued by Mahesh Agarwal to the Appellant asking him to remain at the premises from October 1st, 2006 as Caretaker. As already discussed hereinabove, the property was sold as per Exhibit-3, consequently, Mahesh Agarwal had no authority to issue such a letter. That apart, the contents of the said document has not been proved as per the provisions of law thereby rendering it devoid of probative value. It is relevant to note that Mahesh Agarwal listed as one of the Appellants witnesses was dropped by him from the array as evident from the Order dated 12.12.2016, extracted herein below;

> "**12.12.2016**
>
> .....
>
> Date is fixed for authentication/confirmation of his evidence-on-affidavit by witness Mahesh Agarwal/his cross-examination.
>
> The witness is absent.
> Ld. Senior Advocate Shri N. Rai submits that the Defendant No.1 does not wish to examine the above witness in support of his case. It is, accordingly, prayed that the Defendant be allowed to drop the said witness.
>
> Not opposed.
>
> Heard considered (*sic*).
>
> In view of the above submissions, the Defendant

> No.1 is allowed to drop the witness Mahesh Agarwal.
> …….....……"
> [emphasis supplied]

17. It stands to reason that the said Mahesh Agarwal was unwilling to appear as a witness. If he was still the Lessee of the property then he would undoubtedly have appeared before the Court to clarify his position by testifying as a witness of the Appellant. In addition to the above, nothing precluded the Defendant No. 1 or Mahesh Agarwal from filing a petition under Order I Rule 10 of the Code of Civil Procedure, 1908, seeking impleadment of Agarwal Industries as a party to the Title Suit.

18. The facts and circumstances of the case as discussed herein above and the documents on record clearly indicate that Agarwal Industries had no further interest in the property pursuant to the auction held and the sale thereafter to the Respondent No.1. No reliefs have been claimed against the Agarwal Industries either. It is necessary to mention here that every person who had or has an interest in the suit property is not a necessary party. The question of adding a party would only arise if the rights of a party are likely to be affected if he is not added as a party. When Agarwal Industries has no rights whatsoever on the property nor is there apprehension of their rights being affected, the question of them being impleaded as a party does not arise.

19. The contention that the Sale Deed document was invalid in view of the *Sikkim State Rules, Registration of Document Rules, 1930* of the is now to be addressed. Rule 20 of the said Rule reads as follows;

> "***20.*** All instruments required to be registered (Excepting a will) shall be produced within four months from the date of execution thereof, but if any instrument owing to unavoidable delay has not been presented within the time prescribed above, it would be lawful for the Registrar in cases where the delay in presentation has not exceeded ten times the amount of the proper registration fee such instrument may be accepted for registration."

If the document was not produced within four months from the date of execution for its registration thereof, it is not for the appellant to raise the issue but it was for the concerned authorities to have declined to accept the document or to register the said property or demand payment of fine. This was not resorted to. Therefore, this circumstance not being in the domain of the Appellant, the argument is devoid of merit and consequently discarded.

20. In view of the above discussed facts and circumstances, it concludes that Agarwal Industries is not a necessary party to the Title Suit. The finding of the learned Trial Court in each of the issues suffers from no infirmity and thus, warrants no interference.

21. Lacking in merit, the Appeal is dismissed and disposed of.

22. Stay granted by this Court vide Order dated 05.06.2017, stands vacated.

23. Copy of this Judgment be transmitted to the learned Trial Court for information.

24. Records be remitted forthwith.

25. No order as to costs.

SLR (2018) SIKKIM 1005

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

W.A. No. 01 of 2018

**The Principal Secretary,
Department of Commerce & Industries,
Government of Sikkim. ….. APPELLANT**

Versus

M/s Snowlion Automobile Pvt. Ltd. ….. RESPONDENT

For the Appellant: Mr. Tarun Johri, Additional Advocate General with Mr. Ankur Gupta, Ms. Sabina Chettri and Ms. Sachina P. Y. Subba, Advocates.

For Respondent: Mr. Pabitra Pal Chowdhury and Mr. B. K. Gupta, Advocates.

Date of decision: 28th August 2018

A. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 148 – Letter Patent Appeals – An Appeal would lie to the Division Bench from the judgment of a Judge of the High Court sitting singly – The impugned judgment passed by the learned Single Judge is not a judgment passed in exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court – The contention raised that the exceptions to those judgments appealable under Rule 148 would include a judgment passed by the High Court in exercise of the Article 227 of the Constitution of India emphasizing only on the words "superintendence of the High Court" therein must be straightaway rejected. The said words cannot be read in isolation and must necessarily be read in the context of the sentence it is used in. It is also not a sentence or order made in exercise of Criminal Jurisdiction. An order made in the exercise of

revisional jurisdiction also falls within the exception of Rule 148 of the said Rules and therefore, no Appeal would lie from such orders – It is quite clear that the Appellant while preferring the Writ Petition sought to invoke both Article 226 as well as Article 227 of the Constitution of India. However, the learned Single Judge did not exercise the power of superintendence under Article 227 of the Constitution of India while passing the impugned judgment. The learned Single Judge examined the law relating to exercise of the extraordinary jurisdiction of the High Court and in the facts and circumstances of the case declined to exercise its writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, it is quite evident that the impugned judgment does not fall within the exception carved out for the exercise of Letter Patent Appeals under Rule 148 of the said Rules as it is not an order made in exercise of revisional jurisdiction also.

(Paras 8, 9 and 12)

B. Constitution of India – Article 227 – Article 227 of the Constitution of India relates to the power of superintendence over all Courts by the High Court in relation to which it exercised jurisdiction. As quoted in paragraph 20 of the impugned judgment of the learned Single Judge the scope of Article 227 of the Constitution of India has been succinctly enunciated by the Supreme Court in re: ***Surya Dev Rai v. Ram Chander Rai & Ors.*** It has been held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Court within the bounds of their jurisdiction. When the Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasion thereby, the High Court may step in to exercise its supervisory jurisdiction.

(Para 10)

C. Arbitration and Conciliation Act, 1996 – S. 34 – Limitation Act, 1963 – S. 14 – Sufficient Cause – The Appellant received a certified copy of the arbitral award dated 12.06.2015 on 13.06.2015. S. 34(3) of the said Act permits the making of an application for setting aside an arbitral award within three months from the date on which the party making the application had received the arbitral award. The proviso to

S. 34(3) of the said Act allows the Court to condone the delay beyond the three months if it is satisfied that the Applicant was prevented by "sufficient cause" from making the application within the said period of three months. However, the said proviso also mandates that this power cannot be used to condone the delay thereafter. The judgments of the Supreme Court in re: ***Western Builders and Popular Construction Co.*** would settle the issue. The records reveal that the Appellant had initially approached this Court under S. 34 of the said Act on 27.11.2015 only after expiry of 166 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The application before the learned District Judge for setting aside the arbitral award under S. 34 of the said Act was made on 04.12.2015 after expiry of 173 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The maximum time condonable by the Court as per the provision of S. 34(3) of the said Act is 120 days. In such circumstances, the learned District Judge had rightly rejected the application under S. 34 of the said Act as being barred by limitation. The Supreme Court has held that S. 14 but not S. 5 of the Limitation Act, 1963 would apply in proceedings under the said Act. Although it is neither pleaded nor argued even if we were to exclude the time during which the Appellant had sought to prosecute another proceeding it is quite evident that the Appellant had approached this Court under S. 34 of the said Act beyond the period of 120 days as prescribed by S. 34(3) of the said Act and thus even S. 14 of the Limitation Act, 1963 would not come to the Appellant's rescue.

(Para 26)

F. Constitution of India – Writ Jurisdiction – The fact that Section 34(3) of the said Act prohibited the Court to condone delay beyond the prescribed period as well as the judgment of the Supreme Court in re: ***Western Builders*** would be known to the Appellant at least on receipt of the impugned order passed by the learned District Judge. The act of the Appellant thereafter does not reflect its *bona fides*. The withdrawal of the Appeal filed under S. 37 of the said Act, the filing of the Writ Petition without even attempting to explain the apparent delay in approaching the District Court under S. 34 of the said Act and completely skirting the issue, the failure to do so even in the present Writ Appeal and in fact not even attempting to explain the delay beyond prescribed period does not reflect that the Appellant had approached this Court under Article 226/227 of the Constitution of India with clean hands and had put forward all the facts

before the Court without concealing or suppressing anything and sought appropriate relief. The impugned judgment records that an application was filed for condonation of delay before the learned District Judge along with an application under S. 34 of the said Act. The fact was that an application for condonation of delay was not preferred before the learned District Judge and it was only on the objection raised by the Respondent that the Court examined the delay. This fact was categorically confirmed by the learned Counsel for the Appellant when a specific query was raised by this Court during the hearing. In fact even at the Writ Appeal stage this Court is unable to fathom the reasons for the delay in approaching the District Court under S. 34 of the said Act.

(Para 28)

G. Constitution of India – Article 226 – Arbitration and Conciliation Act, 1996 – S. 34 – The ostensible reason as stated in the Writ Petition is the illegality of the said order and arbitral award. The real hurdle the Appellant seeks to get over by filing the Writ Petition was the mandatory provision contained in S. 34(3) of the said Act which does not permit the Court to condone the delay beyond the prescribed period. The question is whether the Appellant could do so by merely filing a Writ Petition on the merits without even an attempt to explain the delay and skirting the procedure prescribed under the said Act? The answer, we are certain, is a definite no. The extraordinary and discretionary relief cannot be obtained in this manner. The impugned judgment which holds that there is no gross failure of justice or grave injustice warranting the exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India, even while appreciating that the scope of jurisdiction of the High Court in exercise of power under Article 226 of the Constitution, is not affected in spite of alternative statutory remedies cannot be faulted.

(Para 29)

Appeal dismissed.

Chronological list of cases cited:

1. Surya Dev Rai v. Ram Chander Rai and Others, (2003) 6 SCC 675.
2. Rohtas Industries Staff and Anoher v. Rohtas Industries Staff Union and Others, (1976) 2 SCC 82.

3. Union of India v. Popular Construction Co., (2001) 8 SCC 470.

4. State of Goa v. Western Builders, (2006) 6 SCC 239.

5. State of West Bengal v. Afcons Infrastructure Limited, AIR 2008 Cal 6.

6. Chief Engineer of BPDP/REO, Ranchi v. Scoot Wilson Kirpatrick India (P) Ltd., (2006) 13 SCC 622.

7. Essar Constructions v. N.P. Rama Krishna Reddy, (2000) 6 SCC 94.

8. Union of India v. Manager Jain and Associates, (2001) 3 SCC 277.

9. K.D. Sharma v. Steel Authority of India Limited and Others, (2008) 12 SCC 481.

10. Prabhakar Raghunath Patil and Others v. State of Maharashtra, (2010) 13 SCC 107.

11. Dr. K.C. Nambiar v. Rent Controller, Madras and Others, 1962 (2) SCC 465.

12. Commissioner of Income Tax, Ajmer v. Sunita Mansingha, (2018) 12 SCC 296.

JUDGMENT

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

1. This is a Writ Appeal preferred by the Appellant under Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011 (the said Rules) against the judgment dated 26.02.2018 (the impugned judgment) passed by the learned Single Judge in W.P. (C) No. 69 of 2016 (the Writ Petition). The impugned judgment dismissed the Writ Petition filed by the Petitioner under Article 226/227 of the Constitution of India wherein the Appellant had *inter-alia* prayed for setting aside the order dated 10.06.2016 passed by the learned District Judge in Petition bearing No.01 of 2015 in Arbitration Case No. 01 of 2015 (the said order) as well as the award dated 12.05.2015 passed by the learned Arbitrator (the arbitral award).

2. Mr. Pabitra Pal Chowdhury, learned Advocate for the Respondent would raise a preliminary objection on the maintainability of the present Writ

Appeal and thus we propose to deal with it before examining its merits. It is his contention that the present Writ Appeal does not fall within the boundaries of Rule 148 of the said Rules.

3. Rule 148 of the said Rules prescribes:

> ***"148. Letter Patent Appeals****: (1) An appeal shall lie to the Division Bench from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court, and not being an order made in the exercise of revisional jurisdiction, and not being sentence or order passed or made in exercise of Criminal jurisdiction) of a Judge of the High Court sitting singly.*
>
> *(2) The period of limitation for an appeal under this rule shall be thirty days from the date of the Judgment, decree or final order, as the case may be."*

4. Mr. Pabitra Pal Chowdhury, would submit that the Appellant had preferred the Writ Petition invoking Article 226 as well as Article 227 of the Constitution of India. It is submitted that Article 227 of the Constitution of India is the power of superintendence of the High Court. The Writ Petition having been preferred under Article 227 of the Constitution of India and dismissed as not maintainable vide the impugned judgment it is submitted that the present Writ Appeal falls within the exception to the Rule 148 of the said Rules. It is also submitted that the perusal of the record of orders passed in the Writ Petition would reflect that the said Writ Petition was not even admitted and therefore the rejection of the Writ Petition as not maintainable would take the impugned judgment beyond the purview of Rule 148 of the said Rules.

5. A perusal of the order dated 23.02.2017 passed by the learned Single Judge in the Writ Petition reflects that the learned Single Judge had framed a singular question to be answered in this manner:

> ***"5.*** *Mr. J. B. Pradhan, learned Additional Advocate General appearing for the petitioner canvassed that this Court is competent to entertain a petition under Article 226 of the Constitution of India, if there is miscarriage of justice or erroneous application of law while passing the award. Thus, the question which arise for consideration is as to whether the High Court is competent to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, when the alternate statutory remedy as provide is availed by the party, however, belatedly and the case could not be considered on merit.***"**

6. Thereafter, on 06.07.2017 the learned Single Judge directed the matter to be listed for final hearing. On 22.09.2017 the learned Single Judge recorded that the matter was listed for admission. On a request made, 11.10.2017 was fixed for admission hearing. On 11.10.2017 the learned Counsel appearing for the Respondent was given two weeks time to file a reply and two weeks thereafter to the Petitioner to file rejoinder if any after recording that this Court had framed the afore-quoted question of law while taking cognizance of the matter. On 23.02.2018 the matter was heard and judgment reserved. On 26.02.2018 the impugned judgment was pronounced by which the Writ Petition was dismissed as not maintainable.

7. The aforesaid orders make it evident that the learned Single Judge had decided to examine whether the Writ Petition was maintainable before delving upon its merits. Ultimately vide the impugned judgment the learned Single Judge held the Writ Petition as not maintainable.

8. A perusal of Rule 148 of the said Rules makes it clear that an Appeal would lie to the Division Bench from the judgment of a Judge of the High Court sitting singly. The exception to this Rules are:

(i) Judgments not being judgment passed in the exercise of Appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court.

(ii) Not being an order made in the exercise of revisional jurisdiction.

(iii) Not being sentence or order made in exercise of criminal jurisdiction

9. The impugned judgment passed by the learned Single Judge is not a judgment passed in exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court. The contention raised by Mr. Pabitra Pal Chowdhury that the exceptions to those judgments appealable under Rule 148 would include a judgment passed by the High Court in exercise of the Article 227 of the Constitution of India emphasizing only on the words "*superintendence of the High Court*" therein must be straightaway rejected. The said words cannot be read in isolation and must necessarily be read in the context of the sentence it is used in. It is also not a sentence or order made in exercise of Criminal Jurisdiction. An order made in the exercise of revisional jurisdiction also falls within the exception of Rule 148 of the said Rules and therefore, no Appeal would lie from such orders.

10. Article 226 of the Constitution of India relates to the power of High Court to issue certain writs. Article 227 of the Constitution of India however, relates to the power of superintendence over all Courts by the High Court in relation to which it exercised jurisdiction. As quoted in paragraph 20 of the impugned judgment of the learned Single Judge the scope of Article 227 of the Constitution of India has been succinctly enunciated by the Supreme Court in re: ***Surya Dev Rai v. Ram Chander Rai & Ors.***[1]**.** It has been held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Court within the bounds of their jurisdiction. When the Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasion thereby, the High Court may step in to exercise its supervisory jurisdiction.

11. Section 115 of the Code of Civil Procedure, 1908 provides for revisional jurisdiction of the High Court in Civil matters. Section 397 of the

[1] (2003) 6 SCC 675

Code of Criminal Procedure, 1973 on the other hand deals with the revisional jurisdiction of the High Court in criminal matters. The Writ Petition sought to challenge the arbitral award passed by the learned Arbitrator as well as the said order passed by the learned District Judge. The arbitral award determined the dispute between the Appellant and the Respondent referred by this Court vide order dated 25.02.2014 appointing the Sole Arbitrator with consent of the parties in terms of Arbitration clause 8 of the Lease Agreement dated 15.02.1989 on the question of valuation of the development made on the leasehold land by the Respondent. Against the arbitral award the Appellant preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the said Act). A preliminary objection was taken by the Respondent that the said application was barred by time. The said order passed by the learned District Judge without going into the merits of the case would hold that time cannot be extended beyond the permissible limit provided under Section 34(3) of the said Act and consequently the Court would not have jurisdiction to entertain the application preferred by the Appellant as it had been filed beyond the period of limitation.

12. It is quite clear that the Appellant while preferring the Writ Petition sought to invoke both Article 226 as well as Article 227 of the Constitution of India. However, the learned Single Judge did not exercise the power of superintendence under Article 227 of the Constitution of India while passing the impugned judgment. The learned Single Judge examined the law relating to exercise of the extraordinary jurisdiction of the High Court and in the facts and circumstances of the case declined to exercise its writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, it is quite evident that the impugned judgment does not fall within the exception carved out for the exercise of Letter Patent Appeals under Rule 148 of the said Rules as it is not an order made in exercise of revisional jurisdiction also.

13. In view of the aforesaid the preliminary objection raised by Mr. Pabitra Pal Chowdhury on behalf of the Respondent is rejected. Consequently the Writ Appeal is being considered on merits.

14. Heard Mr. Tarun Johri, learned Additional Advocate General for the Appellant and Mr. Pabitra Paul Chowdhury for the Respondent.

15. Mr. Tarun Johri would submit that the arbitral award of the learned Arbitrator is patently erroneous and ought to be set aside. As such the said order of the learned District Judge which was also impugned in the Writ Petition filed before this Court was liable to be set aside along with the arbitral award. Mr .Tarun Johri would submit that arbitral award suffered from patent illegality as there was no proof produced evidencing the cost incurred. He would submit that the order dated 25.02.2014 passed by this Court in the Review Petition would make it evident that the learned Arbitrator was directed to decide the question and differences between the parties on the valuation of the development on the land and that would mean that the question as whether the Respondent was entitled to receive any compensation at all for the development. He would submit that there was patent irregularity in the arbitral award in as much as the learned Arbitrator had awarded a sum of 3,34,43,444/- (Rupees three crore thirty four lakhs forty three thousand four hundred forty four) to the Respondent without even appreciating the fact that the Respondent had paid only 2,10,119.15/- (Rupees two lakhs ten thousand one hundred nineteen and fifteen paisa) as rent for the entire period of 30 years to the Appellant and further that as per the valuation of the Junior Engineer of the Building & Housing Department of the Government of Sikkim the valuation of the lease property raised by the Respondent in the demised premises was only 71,87,891/- (Rupees seventy one lakhs eighty seven thousand eight hundred ninety one) which after deduction worked out to 71,87,891/-. He would thus submit that the impugned judgment passed by the learned Single Judge has resulted in huge financial losses to the State. He would seek to rely upon the judgment of the Supreme Court in re: ***Rohtas Industries Staff & Anr. v. Rohtas Industries Staff Union and Ors.***[2] and submit that the arbitral award made by the learned Arbitrator is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory body's decision and that such an award can be upset if an apparent error of law stains its face. Mr. Tarun Johri would take us to the letter of allotment, the lease deed and its various clauses, the award dated 12.06.2015 and its various paragraphs and findings on various issues as well as the order dated 10.06.2016 passed by the learned District Judge dismissing the application filed by the Appellant under Section 34 of the said Act. He would submit that the learned Arbitrator while coming to the conclusion that both the valuation reports filed by the parties were not

[2] (1976) 2 SCC 82

acceptable had grossly erred in applying the principles embodied in Section 28(2) of the said Act and thereafter toning down the rates applied by the Appellant by not less than 30 to 40 percent and arriving at a figure on his understanding of what is reasonable which however did not have any legal basis.

16. *Per contra* Mr. Pabitra Pal Chowdhury while reiterating the points taken in the counter-affidavit would submit that the application for setting aside the arbitral award was preferred by the Appellant after a lapse of more than 45 days from the prescribed date, on 27.11.2015 before this Court and later withdrawn. The Respondent further states that the Appellant thereafter on 04.12.2015, after a lapse of 54 days beyond the prescribed period of limitation filed an application for setting aside the arbitral award under Section 34 of the said Act before the learned District Judge. It is also stated that on 19.09.2016 an Appeal under Section 37 of the said Act along with an application under Section 5 of the Limitation Act, 1963 was preferred by the Appellant before this Court. On 25.10.2016 this Court condoned the delay in preferring the Appeal on consent. On 13.12.2016 the Appellant, on instructions, withdrew the Appeal with liberty to take proper recourse and thereafter on 21.12.2016 the Writ Petition was filed. The Respondent would submit that in the circumstances the Learned Single Judge had rightly framed the afore-quoted question of law while taking cognizance of the Writ Petition regarding its maintainability. It was submitted that the Appellant had filed an Appeal on 19.09.2016 as efficacious alternative remedy as per the statutory provisions of Section 37 of the said Act but however, choose to withdraw the same and file the Writ Petition instead which is not maintainable. It is also submitted that the said Act is a special law and that Section 34 thereof provides for a period of limitation different from that prescribed under the Limitation Act, 1963. The use of the words "*but not thereafter*" in the proviso to sub-section 3 of Section 34 of the said Act would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963. The Respondent would rely upon the judgment of the Supreme Court in re: ***Union of India v. Popular Construction Co.***[3] which would hold:

> ***"7.*** *There is no dispute that the 1996 Act is a "special law" and that Section 34 provides for a period of limitation different from that prescribed under the Limitation Act. The question then is — is such exclusion expressed in Section*

[3] (2001) 8 SCC 470

34 of the 1996 Act? The relevant extract of Section 34 reads:

*"34. Application for setting aside arbitral award.—(1)-(2)****

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

8. *Had the proviso to Section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5" [Mangu Ram v. Municipal Corpn. of Delhi, (1976) 1 SCC 392 at p. 397, para 7 : 1976 SCC (Cri) 10].*

9. *That was precisely why in construing Section 116-A of the Representation of the People Act, 1951, the Constitution Bench in Vidyacharan Shukla v. Khubchand Baghel [AIR 1964 SC 1099] rejected the argument that Section 5 of the Limitation Act had been excluded: (AIR p. 1112, para 27)*

"27. It was then said that Section 116-A of the Act provided an exhaustive and exclusive code of limitation for the purpose of appeals against orders of tribunals and reliance is placed on the proviso to sub-section (3) of that section, which reads:

'Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under Section 98 or Section 99.

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.'

The contention is that sub-section (3) of Section 116-A of the Act not only provides a period of limitation for such an appeal, but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this argument. Firstly, Section 29(2)(a) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-section (3) of Section 116-A of the Act; secondly, the proviso from which an implied exclusion is sought to be drawn does not lead to any such necessary implication."

10. *This decision recognises that it is not essential for the special or local law to, in terms,*

exclude the provisions of the Limitation Act. It is sufficient if on a consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied. As has been said in Hukumdev Narain Yadav v. Lalit Narain Mishra [(1974) 2 SCC 133] : (SCC p. 146, para 17)

> *"If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act."*

11. *Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded [Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai, (1992) 4 SCC 264].*

12. *As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render*

the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

13. *Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:*

> *"[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation." [(1974) 2 SCC 133] (SCC p. 146, para 17)*
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> *xxxxxxxxxxxx*

16. *Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that*

"where the time for making an application to set aside the arbitral award under Section 34 has expired … the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court".

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

[Emphasis supplied]

17. Section 34 of the said Act provides:-

"34. Application for setting aside arbitral award.—*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or
(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this

Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral

tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

*(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]***"**

18. Mr. Pabitra Pal Chowdhury would also submit that the admitted facts reveal that it was on the consent of the parties that the matter was referred to Arbitration by this Court. He would further submit that the mode of valuation adopted by the learned Arbitrator was also on consent of the parties. He would counter the submissions made on behalf of the Appellant that the direction of this Court to the learned Arbitrator to decide the questions and differences between the parties on the valuation of the development on the land would mean that the question as to whether the Respondent was entitled to receive any compensation at all was also open. He would submit that a bare perusal of the lease agreement would reflect that the construction of the building thereon made by the Respondent was acknowledged by the Appellant in the recital to the lease agreement and therefore there was no question that the learned Arbitrator could decide not to grant any compensation at all for admitted development.

19. The said order passed by the learned District Judge would decide the fate of the application under Section 34 of the said Act filed by the Appellant herein on the preliminary point of limitation raised by the Respondent herein. The learned District Judge would record a finding that the arbitral award was dated 12.06.2015 which was signed and pronounced in the presence of the learned Counsel for both the parties. It was also

recorded that the matter was listed on 13.06.2015 for making over signed copies of the arbitral award to them on the plea of the learned Counsel for the parties that the parties could not be present on 12.06.2015 because of their preoccupation. The learned District Judge has further extracted the record of proceedings dated 13.06.2015 of the learned Arbitrator in which the presence of the respective Counsels along with the respective representatives of the parties would be shown. In view of the aforesaid the learned District Judge would come to a categorical finding that the signed copy of the award was received by the Appellant on 13.06.2015. There is no quarrel with regard to this fact. The learned District Judge would hold that since the arbitral award was received by the Appellant on 13.06.2015 the application under Section 34 of the said Act ought to have been filed within 13.09.2015 and that even considering the extended period of 30 days thereafter the Appellant was required to file the application within 13.10.2015. The learned District Judge would further hold that even presuming that the Appellant had been contesting the case in the wrong forum the filing of the application on 04.12.2015 was beyond the stipulated period provided under Section 34(3) of the said Act. Accordingly the application under Section 34 of the said Act would be rejected by the learned District Judge as being filed beyond the period of limitation. In doing so the learned District Judge would rely upon the ratio in ***State of Goa v. Western Builders***[4], ***State of West Bengal v. Afcons Infrastructure Limited***[5]. In re: ***Western Builders (supra)*** the Supreme Court would hold:

> ***"10.*** *We are primarily concerned with sub-section (3) of Section 34 read with the proviso. Reading of sub-section (3) along with the proviso of Section 34, it clearly transpires that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 should be made within 3 months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter that means so far as application for making or setting aside the award is concerned the period of limitation has been prescribed in sub-section (3) i.e. 3 months but it can be extended for another period of 30 days on sufficient cause being shown*

[4] (2006) 6 SCC 239
[5] AIR 2008 Cal 6

to the satisfaction of the court. Therefore, the applicability of Section 5 of the Limitation Act stands excluded and the application for condonation of delay up to a period of 30 days can be made by the court and not beyond that. Therefore, it was submitted that there is no scope for applicability of Section 14 of the Limitation Act in these proceedings by virtue of sub-section (2) of Section 29 of the Limitation Act.

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15. *Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the Limitation Act, 1963 applies to the Act of 1996 but by virtue of sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay i.e. 30 days in the proviso.*

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17. *Therefore, by virtue of sub-section (2) of Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and under Section 3 read with the Schedule which prescribes the period for moving application.*

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19. *There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act of 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act should not be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice. Our attention was invited to various decisions of this*

Court but we shall refer to a few of them which have some relevance.

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25. *Therefore, in the present context also it is very clear to us that there are no two opinions in the matter that the Arbitration and Conciliation Act, 1996 does not expressly exclude the applicability of Section 14 of the Limitation Act. The prohibitory provision has to be construed strictly. It is true that the Arbitration and Conciliation Act, 1996 intended to expedite commercial issues expeditiously. It is also clear in the Statement of Objects and Reasons that in order to recognise economic reforms the settlement of both domestic and international commercial disputes should be disposed of quickly so that the country's economic progress be expedited. The Statement of Objects and Reasons also nowhere indicates that Section 14 of the Limitation Act shall be excluded. But on the contrary, intendment of the legislature is apparent in the present case as Section 43 of the Arbitration and Conciliation Act, 1996 applies the Limitation Act, 1963 as a whole. It is only by virtue of sub-section (2) of Section 29 of the Limitation Act that its operation is excluded to that extent of the area which is covered under the Arbitration and Conciliation Act, 1996. Our attention was also invited to the various decisions of this Court interpreting sub-section (2) of Section 29 of the Limitation Act with reference to other Acts like the Representation of the People Act or the provisions of the Criminal Procedure Code where separate period of limitation has been prescribed. We need not overburden the judgment with reference to those cases because it*

is very clear to us by virtue of sub-section (2) of Section 29 of the Limitation Act that the provisions of the Limitation Act shall stand excluded in the Act of 1996 to the extent of area which is covered by the Act of 1996. In the present case under Section 34 by virtue of sub-section (3) only the application for filing and setting aside the award a period has been prescribed as 3 months and delay can be condoned to the extent of 30 days. To this extent the applicability of Section 5 of the Limitation Act will stand excluded but there is no provision in the Act of 1996 which excludes operation of Section 14 of the Limitation Act. If two Acts can be read harmoniously without doing violation to the words used therein, then there is no prohibition in doing so.

26. *As a result of the above discussion we are of the opinion that the view taken by the court below excluding the applicability of Section 14 in this proceeding is not correct. We hold that Section 14 of the Limitation Act, 1963 is applicable in (sic to) the Arbitration and Conciliation Act, 1996. We set aside all the judgments/orders and remand all these cases back to the trial court/District Court for deciding the application under Section 14 of the Limitation Act on merit after hearing both the parties and in case the delay is condoned then the case should be decided on merits after hearing all the parties concerned. All the appeals are allowed. No order as to costs.***"**

[Emphasis supplied]

20. The Appellant preferred the Writ Petition before this Court on 15.12.2016. The Writ Petition sought to challenge the arbitral award as well

as the said order passed by the learned District Judge on merits of the matter without even a solitary explanation on the evident delay in filing the application before the learned District Judge under Section 34 of the said Act. The said Writ Petition was contested by the Respondent by filing a counter-affidavit taking various pleas as enumerated above.

21. The pleading in the Writ Petition however, discloses that being aggrieved by the said order of the learned District Judge the Appellant had filed an appeal under Section 37 of the said Act before this Court.

22. Section 37 of the said Act provides:

> ***"37. Appealable orders***.*—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*
>
> > *(a) refusing to refer the parties to arbitration under section 8;*
> > *(b) granting or refusing to grant any measure under section 9;*
> > *(c) setting aside or refusing to set aside an arbitral award under section 34.]*
>
> *(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—*
>
> > *(a) accepting the plea referred in sub-section (2) or sub-section*
> > *(3) of section 16; or*
> > *(b) granting or refusing to grant an interim measure under*
> > *section 17.*
>
> *(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.***"**

23. Section 37 of the said Act thus makes it evident that an appeal shall lie from an order setting aside or refusing to set aside an arbitral award under Section 34 of the said Act. The said order passed by the learned District Judge had in effect refused to set aside the arbitral award passed by the learned Arbitrator. However, the Appeal was subsequently withdrawn on 13.12.2016 with liberty to take recourse to an appropriate forum, if so advised. In re: ***Chief Engineer of BPDP/REO, Ranchi v. Scoot Wilson Kirpatrick India (P) Ltd.***[6] the Supreme Court relying upon its judgment in re: ***Essar Constructions v. N.P. Rama Krishna Reddy***[7]; ***Union of India v. Manager Jain and Associates***[8] would hold that an Appeal under Section 37 of the said Act from an order refusing to condone delay is maintainable.

24. The impugned judgment passed by the learned Single Judge dated 26.02.2018 examined the contours of Article 226 of the Constitution of India and dismissed the Writ Petition as not maintainable.

25. A perusal of the impugned judgment in the Writ Petition makes it evident that the Appellant did not even seek to justify the apparent delay in approaching the Court of the learned District Judge against the award of the learned Arbitrator and instead sought to cleverly focus on the merits of the matter which had not been examined by the learned District Judge. The present Writ Appeal also seeks to focus entirely on the merits of the matter without a semblance of explanation on the delay.

26. Apparently and admittedly the Appellant received a certified copy of the arbitral award dated 12.06.2015 on 13.06.2015. Section 34(3) of the said Act permits the making of an application for setting aside an arbitral award within three months from the date on which the party making the application had received the arbitral award. The proviso to Section 34(3) of the said Act allows the Court to condone the delay beyond the three months if it is satisfied that the Applicant was prevented by *"sufficient cause"* from making the application within the said period of three months. However, the said proviso also mandates that this power cannot be used to condone the delay thereafter. The judgments of the Supreme Court in re:

[6] (2006) 13 SCC 622
[7] (2000) 6 SCC 94
[8] (2001) 3 SCC 277

Western Builders (supra) and ***Popular Construction Co. (supra)*** would settle the issue. The records reveal that the Appellant had initially approached this Court under Section 34 of the said Act on 27.11.2015 only after expiry of 166 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The application before the learned District Judge for setting aside the arbitral award under Section 34 of the said Act was made on 04.12.2015 after expiry of 173 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The maximum time condonable by the Court as per the provision of Section 34(3) of the said Act is 120 days. In such circumstances, the learned District Judge had rightly rejected the application under Section 34 of the said Act as being barred by limitation. The Supreme Court has held that Section 14 but not Section 5 of the Limitation Act, 1963 would apply in proceedings under the said Act. Although it is neither pleaded nor argued even if we were to exclude the time during which the Appellant had sought to prosecute another proceeding it is quite evident that the Appellant had approached this Court under Section 34 of the said Act beyond the period of 120 days as prescribed by Section 34(3) of the said Act and thus even Section 14 of the Limitation Act, 1963 would not come to the Appellant's rescue.

27. The power of the High Court under Article 226 of the Constitution of India is extraordinary, equitable and discretionary. The Supreme Court in re: ***K.D. Sharma v. Steel Authority of India Limited & Ors.***[9] would examine the scope of Article 32 and 226 of the Constitution of India and hold:

> ***"34.*** *The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the*

[9] (2008) 12 SCC 481

threshold without considering the merits of the claim.

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***"36.** A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court.*

*If the applicant makes a false statement or suppresses material fact or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, "We will not listen to your application because of what you have done." The rule has been evolved in the larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it.***"**

28. The fact that Section 34(3) of the said Act prohibited the Court to condone delay beyond the prescribed period as well as the judgment of the Supreme Court in re: ***Western Builders (supra)*** would be known to the Appellant at least on receipt of the impugned order passed by the learned District Judge. The act of the Appellant thereafter does not reflect its bonafides. The withdrawal of the Appeal filed under Section 37 of the said Act, the filing of the Writ Petition without even attempting to explain the apparent delay in approaching the District Court under Section 34 of the said Act and completely skirting the issue, the failure to do so even in the present Writ Appeal and in fact not even attempting to explain the delay beyond prescribed period does not reflect that the Appellant had approached this Court under Article 226/227 of the Constitution of India with clean hands and had put forward all the facts before the Court without concealing or suppressing anything and sought appropriate relief. The impugned judgment records that an application was filed for condonation of delay before the learned District Judge along with the application under Section 34 of the said Act. The fact was that an application for condonation

of delay was not preferred before the learned District Judge and it was only on the objection raised by the Respondent that the Court examined the delay. This fact was categorically confirmed by the learned Counsel for the Appellant when a specific query was raised by this Court during the hearing. In fact even at the Writ Appeal stage this Court is unable to fathom the reasons for the delay in approaching the District Court under Section 34 of the said Act. Nevertheless since the Appellant sought to press the judgment of the Supreme Court in re: ***Rohtas Industries Staff (supra)*** this Court sought to know from the Appellant as to what was the apparent error of law which stained the face of the impugned award. The learned Counsel would submit that the valuation done by the learned Arbitrator was erroneous. He would rely upon three judgments of the Supreme Court in support of his submission. In re: ***Prabhakar Raghunath Patil & Ors. v. State of Maharashtra***[10] was a case under the Land Acquisition Act, 1894 regarding determination of compensation under Section 23 thereof. Evidence of an expert witness was sought to relied upon which had been considered unreliable by the reference Court. As the Counsel appearing for the Appellant's therein sought to justify the increase as sought for by the Appellant's therein, the Supreme Court looked into the evidence of the expert as also a notification and gave its reasons as to why the expert opinion was not reliable. In re: ***Dr. K. C. Nambiar v. Rent Controller, Madras & Ors.***[11] was a case in which the Supreme Court would interpret the word *"cost of construction"* and *"market value"* in sub-section (3) (b) (i) and sub-section (3) (b) (2) of the Madras Building (Lease and Rent Control) Act, 1960 in the paragraph sought to be relied upon. In re: ***Commissioner of Income Tax, Ajmer v. Sunita Mansingha***[12] the Supreme Court would examine a judgment passed by the High Court and the Income Tax Appellate Tribunal and hold that in view of the finding recorded by the Tribunal that the local Public Works Department rates are to be applied in place of Central Public Works Department rates there was no good ground to interfere. We are unable to appreciate as to how the aforesaid three judgments would assist the Appellant in their submission that the valuation arrived at by the learned Arbitrator was an error of law which stained the face of the arbitral award to compel this Court to exercise its extraordinary and discretionary powers in the facts of the present case. Admittedly, it was with the consent of the parties that this Court in an

[11] 1962 (2) SCC 465
[12] (2018) 12 SCC 296

earlier proceeding referred the matter for arbitration. The order of this Court passed in the earlier Writ Petition is recorded in the arbitral award. The said order clearly recorded that the Appellant in their counter-affidavit had not denied that the Petitioner was entitled to a reasonable compensation. This order was not assailed by the Appellant. The order dated 25.02.2014 passed by this Court in Review Petition No.01 of 2014 by which the matter was referred to arbitration with the further direction to the learned Arbitrator to draw up an inventory of the developments that had been made by the Respondent on the leasehold property by making a visit personally has also not been assailed by the Appellant. The arbitral award clearly records that the learned Arbitrator examined the valuation put forth by both the parties and found both wanting. The arbitral award clearly records that faced with the situation the learned Arbitrator put the question to the learned Counsel for the parties as to what should be the way out in such an event and both the learned Counsels of the parties submitted that in such an eventuality, it shall be open for the tribunal to decide according to what is just and fair. The arbitral award reveal that the method of valuation thus arrived at by the learned Arbitrator was also on the consent of the parties.

29. The ostensible reason as stated in the Writ Petition is the illegality of the said order and arbitral award. The real hurdle the Appellant seeks to get over by filing the Writ Petition was the mandatory provision contained in Section 34(3) of the said Act which does not permit the Court to condone the delay beyond the prescribed period. The question is whether the Appellant could do so by merely filing a Writ Petition on the merits without even an attempt to explain the delay and skirting the procedure prescribed under the said Act? The answer, we are certain, is a definite no. The extraordinary and discretionary relief cannot be obtained in this manner. The impugned judgment which holds that there is no gross failure of justice or grave injustice warranting the exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India, even while appreciating that the scope of jurisdiction of the High Court in exercise of power under Article 226 of the Constitution, is not affected in spite of alternative statutory remedies cannot be faulted.

30. The Writ Appeal is dismissed. No order as to costs.

SLR (2018) SIKKIM 1036

(Before Hon'ble the Acting Chief Justice)

W.P. (C) No. 42 of 2017

with

W.P. (C) No. 43 of 2017
W.P. (C) No. 44 of 2017
W.P. (C) No. 51 of 2017

Sikkim Manipal University and Another ….. PETITIONERS

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioners: Mr. Nikhil Nayar, Mr. Aman Ahluwalia, Mr. T. R. Barfungpa and Mr. Ugang Lepcha, Advocates

For Respondent No.1: Mr. Karma Thinlay, Central Government Counsel.

For Respondent No.2: Mr. Thupden Youngda, Advocate.

For Respondent No.3: Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Government Advocates.

Date of decision: 30th August 2018

A. Indian Medical Council Act, 1956 – S. 11 – Postgraduate Medical Education Regulations, 2000 – Regulation 6(2) – Recognition of Medical Qualifications granted by University or Medical Institution – Oversight Committee – The question before the Court was whether the impugned Corrigendum dated 06.06.2017 is to be set aside and the Gazette Notification dated 25.04.2017 restored thereby granting recognition to the degrees awarded by the Petitioner-University from 2014

onwards for the courses in MD (Paediatrics), MD (General Medicine) and MS (ENT) and for MD (Psychiatry) Course from 2015 onwards? – Hon'ble Supreme Court vide order dated 02.05.2016 in *Modern Dental College and Research Centre and Others* v. *State of Madhya Pradesh and Others* directed constitution of an Oversight Committee to oversee the functioning of the MCI and all other matters considered by the Parliamentary Committee till the Central Government acted upon the Expert Committee report – Oversight Committee reconstituted vide order dated 18.07.2017 in *Amma Chandravati Educational and Charitable Trust and Others* v. *Union of India and Another* – Petitioners have no objection if the matter is referred to the newly constituted Oversight Committee – Held, the Central Government shall afford reasonable opportunity to the Petitioners to be heard with regard to the communication dated 22.06.2017. Thereafter, necessary steps shall be taken before the Oversight Committee in terms of the functions assigned to it in *Amma Chandravati Educational and Charitable Trust* (supra). All necessary steps before the concerned Authority(s) shall be completed within two months.

(Paras 36, 37, 44, 45, 48 and 52)

Petitions disposed of accordingly.

Chronological list of cases cited:

1. Royal Medical Trust (Registered) and Another v. Union of India and Another, (2015) 10 SCC 19.
2. Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others, (2016) 7 SCC 353.
3. Amma Chandravati Educational and Charitable Trust and Others v. Union of India and Another, (2017) 16 SCC 265.
4. Glocal Medical College and Super Specialty Hospital and Research Centre v. Union of India and Another, (2017) 15 SCC 690.
5. Krishna Mohan Medical College and Hospital and Another v. Union of India and Another, (2017) 15 SCC 719.
6. Shree Narayan Foundation Trust v. Union of India and Another, Writ Petition (Civil) No.695 of 2017.

7. Chintpurni Medical College and Hospital and Another v. Union of India and Another, Writ Petition (Civil) No.423 of 2017.

JUDGMENT

Meenkashi Madan Rai, ACJ

1. The Petitioners herein are before this Court with a slew of Petitions seeking recognition for the MD qualification awarded by the Petitioner No.2 to students in the streams of Paediatrics, General Medicine and ENT on or after 2014 and for Psychiatry on or after 2015, in terms of the Gazette Notification dated 25-04-2017, since withdrawn vide Corrigendum dated 06-06-2017. Except for MD (Psychiatry) which has three seats, the other streams have two seats each.

2. The Writ Petitions for each of the streams mentioned hereinabove are being disposed of by this common Judgment, the reliefs sought for therein being similar which *inter alia* are as under;

(a) Pass an order in the nature of certiorari quashing and setting aside the impugned Corrigendum dated 06-06-2017 and impugned communication dated 22-06-2017 and to restore the Gazette Notification dated 25-04-2017 which accords recognition to MD (Paediatrics), MD (General Medicine) and MS (ENT) qualification offered by the Petitioner-College in respect of degrees granted on or after 2014 and for MD (Psychiatry) on or after 2015; or

(b) In the alternative, pass an order in the nature of certiorari quashing and setting aside the impugned communication dated 22-06-2017 and further issuing a writ in the nature of mandamus directing the Respondent No.1, Union of India, to grant recognition to the degree of MD (Paediatrics), MD (General Medicine) and MS (ENT) offered by the Petitioner-College for all degrees granted on or after 2014 and for MD (Psychiatry) on or after 2015; and

(c) Pass such other further orders as this Hon'ble Court, in the facts and circumstances, may consider necessary.

3. We may briefly refer to the factual aspects and background for clarity and convenience. The Petitioner No.1 was established by an Act of the Legislature of the State of Sikkim, while the Petitioner No.2 is a Medical College of the Petitioner No.1 established in 1999, offering MBBS Degrees since 2001 and MS/MD Degrees since 2011 in various streams. The Courses in MD (Paediatrics), MD (General Medicine) and MS (ENT) commenced in the year 2011, while MD (Psychiatry) commenced a year later, emanating from a Letter of Permission (LoP) issued by the Respondent No.2 dated 21-03-2011 for the three Courses and the LoP dated 20-04-2012 for the Psychiatry Course. The LoP provided that the permission for starting/increase of seats in the said Courses and admission of students would be **"**..... *till such time the first batch of students admitted against the above course appears for the final examination in the subject***"**.

4. The STNM Hospital (STNM) is a Government Hospital whose facilities, faculty and clinical materials are permitted to be considered along with the Petitioner-College pursuant to a Memorandum of Understanding (MoU) entered into with the State of Sikkim. This circumstance was reiterated by the Judgments of this Court in WP(C) No.37 of 2011, WP(C) No.24 of 2015 and affirmed by the Hon'ble Supreme Court, for the purposes of assessment at the time of inspection.

5. The Petitioners aver that the MD and MS Courses being for a duration of three years each and the first batch having been admitted in 2011, the Petitioner-College applied for recognition of Degrees awarded in such Courses in terms of Section 11 of the Indian Medical Council Act, 1956 (hereinafter "MCI Act, 1956"), read with Regulation 6(2) of the Postgraduate Medical Education Regulations, 2000 (hereinafter "PG Regulation, 2000") well before April, 2014, when the first batch was due to appear for its final examination. Although inspections were carried out as required and the alleged deficiencies pointed out by Respondent No.2 remedied, the Respondent No.2 refused to recommend granting of recognition to the Postgraduate Courses being dealt with in these Petitions, insisting that deficiencies persisted.

6. Consequently, the Petitioners filed WP(C) No.24 of 2015 seeking the following reliefs;

> **"**[A] Direct and hold that the deficiencies specified in communications dated 09-07-2015, 14-07-2015, 26-08-2015, 27-08-2015 and 11-09-2015 (as specified in paragraph 35I) are either non-existent or stand complied with, and direct that recognition be accorded in terms of Section 11 of the Indian Medical Council Act, to the following courses: MD (General Medicine), MD (Paediatric), MS (ENT) and MD (Psychiatry);
>
> [B] In the alternative to [A] above, direct that a fresh time bound inspection be conducted either by an independent expert committee, or by the MCI designated assessors along with eminent independent observers, and such inspection be limited to the deficiencies already pointed out and enlisted and in respect of which compliance has been forwarded by the Petitioner vide letters dated 06-08-2015 (in respect of MS – ENT), 05-10-2015 (in respect of MD – Paediatrics) [sic], 05-10-2015 (in respect of MD – Paediatrics), 05-10-2015 (in respect of MD – Psychiatry) and that pursuant to such inspection a final decision be taken by the Respondent No.2 in a time bound manner;
>
> [C] Confirm the admissions made in the above-said courses in the academic year 2015-16; and [
>
> D] Pass any order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case as well as in the interest of justice.**"**

7. This Court vide its Judgment dated 25-05-2016 in the said Writ Petition, granted the following reliefs and issued directions as hereinbelow;

> **"**54. In such a situation, although the impugned communications do deserve to be set aside, nevertheless this Court has to refrain from venturing into the arena of the experts. Since it is undisputed

that the Respondent No.3 has to discharge the duty of maintaining the highest standards of medical education and to regulate their observance and supervise minimum standards of medical education, being an expert body, the following directions are being issued;

(i) As the Petitioner has asserted that no deficiency exists after compliance has been made by them, post the impugned communications in all the Post-Graduate Courses, this circumstance has to be gauged by a Compliance Verification. The Respondent No.2 shall carry out fresh inspection of the Petitioner's Institution within two months from today. The Inspection team of the Respondent No.2 shall comprise of two eminent independent observers, apart from the Assessors of Respondent No.2. Needless to add that the inspection shall be carried out in terms of Paragraph 65(v) and (vi) of the Judgment of this Court in WP(C) No.37 of 2011 dated 27-04-2012;

(ii) Pending such verification, the Petitioners shall deposit a sum of Rs.25,00,000/- (Rupees twenty five lakhs) only, with the MCI, Respondent No.2. The Petitioner shall file an undertaking through its Registrar, within two weeks from today, to the effect that no deficiencies exist in the Petitioner's Institution for the purposes of the Post-Graduate Courses, for which permission had been granted. Copy of undertaking be furnished to Respondent No.1 also. If at the time of inspection the undertaking is found to be incorrect, the deposit shall stand forfeited;

(iii) Deficiencies, if any, reported by the Assessment Team shall be brought to the

notice of the Petitioner extending the opportunity to the Petitioner to rectify it within a time frame deemed fit, of course, for which the amount deposited as already stated, would stand forfeited to the MCI;

(iv) For students who were admitted in the four Post- Graduate Courses in 2011 and have completed their Courses in 2014, qualifying them for the award to recognised medical qualification, the Respondent No.1 shall grant recognition to their Degrees within three months from today;

(v) Students pursuing their Post-Graduate Courses in the Academic year 2015-16, vide Orders of this Court dated 29-05-2015 and 07-04-2016, be allowed to continue their education without hindrance; and

(vi) I have also considered I.A. No.01 of 2016 wherein the Petitioners have sought for an Order of this Court permitting admission to be made to two seats each in **MD (General Medicine)**, **MD (Paediatrics)**, **MS (ENT)** and **MD (Psychiatry)** for the Academic Year 2016-17. Keeping in mind the welfare of the students and with the concern that they should not be kept at sea as in the instant matter, it is hereby ordered that admissions shall take place for the said Academic Year 2016-17 only after all requisites are found in place by the Respondent No.2, irrespective of the fact that during such exercise the seats may go vacant this Academic Year.**"**

8. By filing an SLP (Civil) No.19119 of 2016, on 25-07-2016 before the Hon'ble Supreme Court, the Respondent No.2 assailed this Judgment. The Supreme Court while disposing of the SLP substantially affirmed the

Judgment of this Court and the directions passed therein with some minor modifications specifying that independent Assessors must be from All India Institute of Medical Sciences (AIIMS) and P.G.I., Chandigarh and extending the period for carrying out the inspection. Pursuant thereto, an inspection was conducted on 29-08-2016.

9. Prior in time to the Order of the Hon'ble Supreme Court (*supra*), I.A. No.03 of 2016 came to be filed before this Court in WP(C) No.24 of 2015 on 27-05-2016 seeking modification of the Judgment and Order of this Court as follows;

> **"**(i) Direct that the two independent eminent persons to be part of the inspection team for compliance verification be nominated by the Justice Lodha Committee, appointed by the Hon'ble Supreme Court vide its judgment dated 2.5.2016 in *Modern Dental College & Research Centre & Ors.* Vs. *State of Madhya Pradesh & Ors.* in C.A. No.4060/2009*;*
>
> (ii) Direct that paragraph 54 (iv) of this Hon'ble Court's judgment in this case will also be applicable to the students who were granted admission in the years 2012 and 2013 in MD (General Medicine), MD (Paediatric), MS (ENT) and MD (Psychiatry) and who have graduated in 2015 and 2016 respectively;
>
> (iii) Direct that the Petitioners be permitted to admit students to MD (General Medicine), MD (Paediatric), MS (ENT) and MD (Psychiatry) provisionally for 2016-17 pending the final inspection and assessment report to be filed by the Respondent No.2;
>
> (iv) Pass such other order/s as may be deemed fit and proper in the facts and circumstances of the case.**"**

10. After hearing the parties, this Court found no compelling circumstances to allow the interim application and disposed of the

application with the following observations;

> **"7.** (a) With regard to prayer (i), in my considered opinion the Order requires no interference.
>
> (b) On Prayer (ii) of the I.A., it is admitted that no pleadings on the basis of the submissions made today existed nor were amendments incorporated in the Writ Petition. It goes without saying that new pleas cannot be brought before the Court in the garb of a prayer for modification of the Judgment, when averments in this regard find no place in the Writ Petition. This prayer thus requires no consideration.
>
> (c) So far as prayer (iii) is concerned, in Paragraph 54(vi) of the Judgment, it has clearly been ordered as follows;
>
> **"**(vi) I have also considered I.A. No.01 of 2016 wherein the Petitioners have sought for an Order of this Court permitting admission to be made to two seats each in **MD (General Medicine)**, **MD (Paediatrics), MS (ENT)** and **MD (Psychiatry)** for the Academic Year 2016-17. Keeping in mind the welfare of the students and with the concern that they should not be kept at sea as in the instant matter, it is hereby ordered that admissions shall take place for the said Academic Year 2016-17 only after all requisites are found in place by the Respondent No.2, irrespective of the fact that during such exercise the seats may go vacant this Academic Year.**"**
>
> This is a speaking Order and no modification can be made to suit the stance of the Petitioners.**"**

11. This was followed by WP(C) No.25 of 2016 filed by one Dr. Miland Jha who was admitted to the MD (General Medicine) in the year 2012-13, while the Petitioner-Institute filed WP(C) No.27 of 2016. In

WP(C) No.25 of 2016 the Petitioner sought a direction to the Respondent No.1 (UOI) and Respondent No.2 (MCI) to recognise the Degree awarded to him by the Respondent No.4 (SMIMS) and Respondent No.5 (SMU), in a manner consistent with the directions in Paragraph 54(iv) of the Judgment *supra*. The Petitioner-Institute in its Petition sought a direction to the Respondent No.1 (UOI), to grant recognition to the Degrees awarded to the students admitted in the Academic years 2012-13, 2013-14 and those who completed their Courses in the year 2015-16 respectively in the disciplines of MD (General Medicine), MD (Paediatrics) and MS (ENT) and for students in MD (Psychiatry) admitted in the Academic Year 2012-13, 2013-14 and 2014-15 in terms of the Judgment of this Court in WP(C) No.24 of 2015.

12. This Court disposed of the two Writ Petitions by a common Judgment dated 12-04-2017 *inter alia* as follows;

> **"**(a) For students who were admitted in the three Courses being, MD (General Medicine), MD (Paediatrics) and MS (ENT) vide Letters of Permission dated 21-03-2011 in the academic years 2012-13 and 2013-14, the same protection as granted vide the Judgment of this Court in WP(C) No.24 of 2015 in Paragraph 54(iv) is extended to them.
>
> (b) Considering the documents placed on record in **I.A. No.04 of 2016** (pending disposal before this Court) arising out of WP(C) No.24 of 2015, for students who were admitted in MD (Psychiatry) Course in the academic years 2013-14 and 2014-15 in pursuance of the Letter of Permission dated 20-04-2012, the same protection as granted vide the Judgment of this Court in WP(C) No.24 of 2015 in Paragraph 54(iv) is extended to them.
>
> (c) The Respondents No.1 and 2 shall take steps accordingly within three months from today.**"**

Against this Judgment a Special Leave Petition has reportedly been preferred by the Respondent No.2-MCI on 08-07-2017, vide Diary No.20203/2017, which, according to the Petitioner, is lying under defects with the Registry of the Hon'ble Supreme Court. ***13.*** The Petitioner University in the said I.A. No.04 of 2016 (subsequently re-numbered as I.A. No.09 of 2016 in the new Court Information System and hereinafter referred to as "I.A. No.09 of 2016), in WP(C) No.24 of 2015 submitted an application on 09-12-2016 (taken up on 12-12-2016) seeking directions to the Respondent No.2-MCI to process the case for recognition of the aforementioned four Courses awarded by the Petitioner, based on the Assessors Reports on inspection conducted on 29-08-2016, strictly from the stand point of compliance verification and deficiencies alleged earlier in communications dated 09-03-2016, 11-05-2016 and 30-03-2016, in terms of the Judgment in WP(C) No.24 *supra.*

14. It may be mentioned here that the reliefs sought for by the Petitioner in WP(C) No.24 of 2015 have been reflected at Paragraph 6 hereinabove.

15. On 16-02-2017, on appearance being put in by MCI, it was submitted by their Learned Counsel that the Respondent No.2 had decided to recommend to the Central Government recognition to the Degrees in the four streams awarded by the Petitioner University to the students admitted in the Postgraduate Courses in the specialities of MD (General Medicine), MD (Paediatrics) and MS (ENT) for the Academic Year 2011-12 and for MD (Psychiatry) for the Academic Year 2012-13. That the issue of recognition of subsequent batches thereafter is under consideration as the Postgraduate Medical Education Committee (PGMEC) has decided to place the decision before the General Body of the Council for information. Counsel sought three months' time to take necessary steps. On consideration of the submissions made by both the parties, this Court on the same date ordered *inter alia* as follows;

> **"**On consideration of the submissions, I find that the Assessors have already submitted their Inspection Report conducted on 29-08-2016 and on this basis the MCI/Respondent No.2 has granted recognition to MD (General Medicine), MD (Paediatrics) and MS (ENT) against the sanctioned

> intake capacity for the academic year 2011-12 and for MD (Psychiatry) against the sanctioned intake capacity for the academic year 2012-13. Consequently, there ought to be no impediment for granting recognition to the subsequent batches based on the same Assessment Report which finds no deficiencies in the Petitioner-University. In view of the submission that admissions for the Academic Year 2017-18 can be taken up as the NEET has already been held in the month of November, 2016, it would be in the interest of justice if the matter for recognition of the qualifications for the subsequent years are expedited.
>
> In the aforesaid circumstances, Learned Counsel for the MCI/Respondent No.2 is granted a week's time to seek instructions in this regard.**"**

16. The matter was listed on 23-02-2017. On the said date the MCI reiterated its earlier position that the issue of recognition of students admitted in the subsequent batches is still under consideration. The Court ordered *inter alia* as hereunder;

> **"6.** Having considered submissions and in view of the fact that the compliance verification was completed in August 2016, it is expected that the MCI/Respondent No.2, would reach a decision with regard to the issue of recognition of subsequent batches at least a week prior to 4th April 2017, by which date counselling for Postgraduate courses are likely to commence as submitted by the Petitioners.**"**
>
> **[emphasis supplied]**

17. Assailing the said direction *supra* the MCI filed SLP (C) No.11943 of 2017 before the Hon'ble Supreme Court on 20-03-2017. This matter came up before the Hon'ble Supreme Court on 04-05-2017 wherein the following directions issued;

> **"**Let the matter be listed on 9th May, 2017, to enable the Medical Council of India to file the report before this Court. Be it stated, the report that is required to be filed is with regard to the recommendation made by the Assessors' team, as has been mentioned in the order dated 25th July, 2016.**"**

On 09-05-2017 the Hon'ble Supreme Court would further order as follows;

> **"**Let the matter be listed on Monday, 17th July, 2017.
>
> The pendency of this special leave petition will not be an obstruction or impediment for the High Court to proceed with the writ petition(s) if the same has not yet been dealt with.**"**

18. Consequently I.A. No.9 of 2016 in WP(C) No.24 of 2015 came to be taken up on 22-05-2017 wherein the Counsel for the Petitioners informed this Court that the MCI website showed on 12-05-2017 that the Degrees in MD (General Medicine), MD (Paediatrics), MS (ENT) and MD (Psychiatry) had been granted recognition from the dates mentioned in WP(C) No.24 of 2015 (Annexure 10). Counsel for the MCI sought sometime to clarify the matter.

19. The matter was listed on 05-06-2017 on which date Counsel for the Petitioner submitted that they had received a copy of the Notification dated 25-04-2017 on 24-05-2017 issued by the Ministry of Health and Family Welfare (Department of Health and Family Welfare), Government of India, under Section 11(2) of the Indian Medical Council Act after consulting the Medical Council of India. By the Notification further amendments were made in the First Schedule of the Act recognizing the Degrees for the three Courses, i.e., MD (General Medicine), MD (Paediatrics) and MS (ENT) from 2014, while for MD (Psychiatry), recognition was from 2015. In consideration of the said Notification, I.A. No.9 of 2016 was disposed of.

20. It may be recapitulated here that in view of the Order of this Court in WP(C) No.24 of 2015 no admissions were made to any of the Courses in the academic year 2016-17.

21. For the year 2017 the second counselling for admissions to the Postgraduate seats commenced on 11-05-2017. On 12-05-2017 during counselling, the Petitioner noticed the Gazette Notification of 24-04-2017 granting recognition to the Courses as detailed *supra*. The Petitioners thus assumed that the Respondent No.2 having considered the Assessors Reports dated 29-08-2016 was satisfied that the earlier identified deficiencies had been remedied, hence the Notification. The Petitioner thereby wrote to the Respondent No.2 vide letter dated 15-05-2017 informing that admissions of students for the year 2017 would be proceeded with and accordingly admitted students to the said Courses on 20-05-2017. However, on 06-06-2017 a Corrigendum was issued to the Notification dated 25-04-2017 *supra*, wherein further amendments were made to the First Schedule to the Act granting recognition only for the first batch of students admitted to the said Courses.

22. Aggrieved by the action of the Respondent No.2 and asserting that no deficiencies as alleged in their communication dated 22-06-2017 exist, the Petitioners are once again before this Court seeking the aforementioned reliefs.

23. Respondent No.1 did not file any written response.

24. Respondent No.2 in its "reply affidavit" averred that in view of the Judgment dated 25-05-2016 of this Court in WP(C) No.24 of 2015 and Order dated 25-07-2016 of the Hon'ble Supreme Court in SLP(C) No.19119 of 2016, recommendation was made to the Central Government, Respondent No.1 vide its letters dated 14-02-2017 [Annexure R-31 in WP(C) Nos.42, 43 and 51 of 2017 for MD (General Medicine), MD (Paediatrics) and MS (ENT) respectively and Annexure R-29 in WP(C) No.44 of 2017 for MD (Psychiatry)], to grant recognition to the Degrees awarded by the Petitioner-University to the first batch in the four Postgraduate specialities. However, the Government of India vide its Notification, dated 25-04-2017, erroneously granted recognition to three Postgraduate Degrees on or after 2014 and for MD (Psychiatry) on or after 2015, instead of restricting the same to the first batch. After the Respondent

No.2 pointed out the error, the Government of India vide the impugned Corrigendum dated 06-06-2017 granted recognition in respect of the first batch of students admitted in the said specialities. That, neither the IMC Act, 1956, nor the Regulations made thereunder debar the Respondent No.2 from pointing out new deficiencies during the subsequent round of physical inspection which were not found in the previous round. That, the Petitioner-College despite fifteen years of its establishment has failed to create the requisite infrastructure, employ requisite teaching faculty or have the required clinical material as provided under the IMC Act, 1956 and as per the MCI norms. The relaxation granted once for establishment of a new Medical College in view of the backward/hilly area cannot be continued in perpetuity.

25. Referring to its role, Respondent No.2 emphasised that it is a body constituted under the provisions of the Indian Medical Council Act, 1956 and has been given the responsibility of discharging the duty of maintenance of the highest standards of medical education throughout the country for which it has been empowered with the prior approval of the Central Government to frame Regulations for laying down minimum standards of infrastructure, teaching and other requirement for conducting Medicine Courses. The Regulations so framed are statutory in character and therefore binding and mandatory on all concerned Universities, Colleges conducting Medicine Courses. Merely because the College has been called upon to submit a compliance report does not confer upon the Petitioner any cause of action to approach this Court. Thus, the Writ Petition is not maintainable being pre-mature as no final decision has been arrived at by the Central Government with regard to the subsequent batches in the aforementioned Postgraduate Courses and the Respondent No.2 vide its communication has requested the Petitioner-College to furnish their compliance for deficiencies pointed out during physical inspection of 29-08-2017 within one month vide communication dated 22-06-2017 for further processing of their case. Hence, the Petition be dismissed.

26. In Rejoinder, the Petitioner-College *inter alia* contended that the Respondent No.2 has failed to place any communication made with the Respondent No.1 intimating it of the alleged error in the Notification. That, the action on the part of the Respondent No.2 jeopardises and prejudices the students who have taken admissions to the Courses. That, the Respondent No.2 did not intimate or communicate the recommendation of

the Committee to the Petitioner nor did it apprise either this Court or the Hon'ble Supreme Court about the status as regards the recommendation. In any event, the Central Government could always in the exercise of its powers disagree with the recommendation of the Respondent No.2 either on considering the facts itself or upon placing the matter before the Oversight Committee constituted under Orders of the Hon'ble Supreme Court, but records do not reflect whether such recommendation was ever placed before the Oversight Committee. That the report of the assessors after conducting inspection on 29-08-2016 is largely favourable and the Respondent ought to have recommended recognition in favour of the said Courses, hence the prayers in the Writ Petitions be granted.

27. In an effort to establish that no deficiencies exist in the Petitioner-College and Hospital, Learned Counsel for the Petitioners would contend that that presently there are three Units for General Medicine at the Central Referral Hospital (CRH) owned and managed by the Petitioner-College itself while one General Medicine Unit functions at the STNM. That, one Paediatrics Unit exists at the CRH and another Unit at the STNM. For the ENT and Psychiatry there is one Unit each at the CRH.

28. While advancing his arguments on **MD (Paediatrics)** Course, Learned Counsel emphasized that vide the previous communication dated 09-03-2016 two deficiencies were identified which stood fully remedied as evident from the Assessors Report dated 29-08-2016. Even the earlier Inspection Reports contained very few deficiencies all of which now stand complied while deficiencies now alleged in the communication dated 22-06-2017 was never put to the Petitioner-College in September, 2016, when the Dean appeared before the MCI for a personal hearing. The requirement as per the MCI norms to start a Postgraduate MD (Paediatrics) Course is one Unit, thereby making the CRH fully compliant with the stipulated requirement, and assuming that there are 100 students in the Undergraduate MBBS Course the College has two Units, one at the CRH and the other at STNM. This Court in WP(C) No.37 of 2011 delivered on 27-04-2012 has directed that for the purposes of inspection facilities at the STNM and the CRH be considered together as detailed in Paragraph 65 therein.

29. To further substantiate the Petitioners' stance that no deficiencies existed it was contended that objections raised with regard to the MRI workload at CRH, on the date of assessment are frivolous and *mala fide*

as the MRI facility is available and functional as apparent from Assessors' figures and no deficiencies on this count exist in the STNM Hospital. Relying on the ratio of ***Royal Medical Trust (Registered) & Another*** vs. ***Union of India and Another***[1] it was contended that even this deficiency is liable to be rejected. Further, Parenteral Nutrition Services are provided and equipment in the Hospital are being upgraded, thus the device for laminar flow shall also be made available. The Postgraduate Medical Education Committee (PGMEC) has recorded non-availability of Departmental Library contrary to the Assessors Report. Facilities such as Blood Component Separation Facility, Speciality Clinic and other equipment said to be lacking at the STNM are all available at the CRH and are not required to be duplicated at the STNM. PICU and NICU are available at the CRH while NICU also exists in the STNM, as also Dialysis and there is no shortfall in bed occupancy. Admittedly publications from the faculty at STNM are lacking however the report of the Assessors is that in addition to the workload in the Hospital the faculty are able to engage in Journal Clubs and Group Discussions, etc. Besides there is an absence of norms for minimum number of journals. The Assessors have correctly recorded that there are ten Speciality Clinics of which three are run at the STNM and the other seven have been deleted because these are conducted at the CRH.

30. Moving on to **MD (General Medicine)** it was contended that from the minutes of the meeting dated 16-09-2016 of the Respondent No.2, it is apparent that no deficiencies were identified in the Course and recommendation for recognition ought to have been promptly made. The Respondent No.2 however in order to delay the matter resorted to the untenable act of taking a decision to refer the correctness of the Judgment of this Court for legal opinion from the Learned Solicitor General/Additional Solicitor General when the SLP filed against the Judgment has been dismissed. That, deficiencies communicated vide correspondence dated 22-06-2017, pertained to promotion of two Doctors as Professors in the Department. Their promotion was objected to on grounds that the publication requirements were not met which alleged deficiency was earlier not pointed out. Infact the Regulations existing at that particular period required only two publications which were fully met and they were validly promoted on 01-02-2014. The other deficiencies pertained to the teaching experience of another Doctor who infact has more than fifteen years of

[1] (2015) 10 SCC 19

teaching experience. The MRI at the STNM is operationalised and functional. The number of patients at the CRH during the comparable period have increased and even if there is a marginal drop in number of OPD patient load this by itself does not constitute a deficiency. That infact facilities such as Blood Component Separation Facility, Speciality Clinics, MICU, Equipment like Holter, investigative facility, Central Library, Central Research Laboratory, Medical ICU are all available at the CRH. The other deficiencies pertaining to faculty in Unit –I and publications are non-existent. Hence, the Petitioners are now compliant and deficiencies pointed out are only for harassment.

31. Dealing with the five deficiencies pointed out in the **MD (Psychiatry)** vide communication dated 11-05-2016, it was put forth that although Chronic Psychiatric Care does not exist at CRH and STNM, however the Assessors Report dated 29-08-2016 would indicate that such facility exists with the Sikkim Rehabilitation Centre, Nimtar, East Sikkim, with which the Petitioner-College has entered into a MoU. This permits the students of the Petitioner-College use of clinical material, and provides that for teaching purposes the patients occupying the beds would be under the administrative control of the Dean of the Petitioner-College. Moreover, no such deficiency had been communicated in the earlier inspections and communications made. The inexperience of the Senior Resident is non-existent as he is infact a Consultant Psychiatrist at the STNM for ten years. That the requirement for starting MD (Psychiatry) is of one Unit comprising of thirty beds which is available at the CRH, while OPD attendance is adequate. That MRI is functional at the STNM and sufficient faculty exists who engage in Journal Clubs and Group Discussions. Hence, no deficiencies exist and those pointed out are *mala fide*.

32. It was next canvassed that the report of the Assessors on the deficiencies vide letter dated 30-03-2016 are largely favourable pursuant to the inspection on 29-08-2016 for the **MS (ENT)** Course. However vide minutes of meeting dated 16-09-2016 a new set of deficiencies were identified and communicated vide letter dated 22-06-2017 which had not been put to the Petitioner-College in September, 2016, when the Dean appeared before the MCI for a personal hearing. While urging that MS (ENT) ought to be granted recognition, each of the deficiencies pointed out by the Respondent No.2 were discussed at length. It was then contended

that faculty are adequate inclusive of those from the STNM Hospital since the year 2003. Bed occupancy being 70% was adequate sufficient as per norms for North Eastern and hilly States as also major operations carried out and investigations pertaining to BERA and speech therapies. That both CRH and STNM have sufficient number of OPD, IPD operations and students are engaged in Journal Clubs. From the Assessors Report dated 29-08-2016 it is clear, as per the Petitioner, that even the earlier inspection reports which contained few deficiencies now stand remedied and the allegation of deficiencies are wholly baseless.

33. That the impugned Corrigendum dated 06-06-2017 is illegal and void as it seeks to waive recognition granted to the qualifications in Postgraduate studies and the communication dated 22-06-2017 is wholly illegal, arbitrary, tainted by *mala fide* intent and liable to be quashed and set aside.

34. Learned Counsel for the Respondent No.1 submitted that he would adopt the submissions of Learned Counsel for the Respondent No.2, who for his part canvassed that he reiterates the averments made in his pleadings with emphasis on the point that the Petition is premature as no final decision has been taken by the Central Government with regard to the recognition or otherwise of the Courses for the years specified.

35. Submissions made by Learned Counsel for the Petitioner *in extenso* were given careful consideration as also the contention of Learned Counsel for the Respondent No.2 who made a brief submission as reflected hereinabove. The pleadings and documents on record have been perused by me and afforded anxious consideration.

36. This Court is now to determine as to whether the impugned Corrigendum dated 06-06-2017 is to be set aside and the Gazette Notification dated 25-04-2017 restored thereby granting recognition to the Degrees awarded by the Petitioner-University from 2014 onwards for the Courses in MD (Paediatrics), MD (General Medicine) and MS (ENT) and for MD (Psychiatry) Course from 2015 onwards.

37. For convenience, it is reiterated here that Gazette Notification of 25-04-2017 had accorded recognition to MD (Paediatrics), MD (General Medicine), MD (ENT) offered by the Petitioner-College in respect of

Degrees granted on or after 2014 and for MD (Psychiatry) on or after 2015. The Corrigendum dated 06-06-2017 takes away the recognition granted by the aforestated Notification and limits the recognition in each of the streams for the academic year 2011-12 only.

38. The impugned communication dated 22-06-2017 for each of the streams addressed to the Dean/Principal of the Petitioner-College by the PGMEC, has decided to recommend to the Central Government not to recognise MD (Paediatrics), MD (General Medicine), MD (ENT) and MD (Psychiatry) qualifications. The relevant extract of the communication is as under:

> "……
>
> 18. Accordingly, the Postgraduate Committee medical Education Committee decides as under:-
>
> (i) To recommend to the Central Government not to recognise MD (Paediatrics) qualification granted by Sikkim Manipal University of Health, Medical & Tech. Sciences in repect of students being trained at Sikkim Manipal Institute of Medical Sciences, Gangtok admitted in the course from academic year 2012-13 onwards;
>
> (ii) To communicate the deficiencies as found in the assessment report dated 29-08-2016 to the college authorities granting them one month's time to rectify the same and submit a compliance within one month from the date of communication; and
>
> (iii) to debar the Sikkim Manipal Institute of Medical Sciences, Gangtok from making any fresh admissions in the **MD (Paediatrics)** course as the Institute has failed to rectify these deficiencies in terms of its undertaking tendered by it.

> In view of above, you are requested to rectify the above deficiencies within 01 month from the date of dispatch of this letter and submit the compliance in hard copy as well as soft copy (in editable formal prefebly (sic) in MS Word) along with demand draft of Rs. 1.00 Lakh in favour of Secretary, Medical Council of India, payable at New Delhi within stipulated time for further consideration in the matter. In case, no compliance is received within this period or compliance is found unsatisfactory, it will result in stoppage of admission.
>
> ……."
>
> **Note** : The communication dated 22-06-2017 also pertained to the other streams under discussion herein.

39. Having perused the pleadings and documents meticulously, it emerges that so far as **MD (Paediatrics)** is concerned vide communication dated 09-03-2016, addressed to the Dean/Principal of the Petitioner-College by the Respondent No.2 [Annexure P-12 of Paper-Book of WP(C) No.43 of 2017], it was pointed out as follows;

> **"**Compliance is not satisfactory.
>
> 1. No proper explanation has been given for low occupancy in PICU.
> 2. Shortage of Senior Resident in the Unit in own hospital remains as it is.
> 3. Other deficiencies as pointed out in the Assessment Report.**"**

On walking through the Assessors Report dated 29-08-2016 [Annexure P-15 of Paper-Book of WP(C) No.43 of 2017], the bed occupancy in PICU was recorded as 80% and that available equipment was adequate. That there were three Senior Residents. Nevertheless in the teeth of such a report the Respondent No.2 found nineteen deficiencies as communicated in the correspondence dated 22-06-2017, as against

deficiencies which were not pointed out in the communication dated 09-03-2016.

40. For the **MD (General Medicine)**, the deficiencies pointed by the Respondent No.2, vide communication dated 09-03-2016 [Annexure P-13 of Paper-Book of WP(C) No.42 of 2017], were as follows;

> **"**Compliance is not satisfactory.
>
> 1. Unit III has only 2 faculty & it cannot be considered as Pg Unit. Contention of institute that Unit III is complete cannot be accepted as PG Unit requires 3 faculty.
> 2. Other deficiencies as pointed out in the Assessment Report.**"**

The Assessors Report dated 29-08-2016 [Annexure P-16 of Paper-Book of WP(C) No.42 of 2017] indicates presence of three Full Time Faculty Members, hence the deficiency stand complied, contrary to which the Respondent No.2 vide letter dated 22-06-2017 has communicated twenty-one deficiencies.

41. For **MD (Psychiatry)**, the deficiencies communicated by the Respondent No.2 vide letter dated 11-05-016 [Annexure P-7 of Paper-Book of WP(C) No.44 of 2017] were as follows;

> **"**1. Dr. C. L. Pradhan, Asso. Prof. is an Honorary faculty & cannot be considered.
> 2. Out of 3 Senior Residents, 2 are Honorary & cannot be considered.
> 3. OPD attendance on day of assessment was 43 which is inadequate.
> 4. bed occupancy was only 26.67% on day of assessment.
> 5. Last ECT was given on 08/08/2015. There is no Pre ECT, Post ECT Resuscitation facility.
> 6. Other deficiencies as pointed out in the Assessment Report.**"**

The observation made in the Assessors Report dated 29-08-2016 [Annexure P-11 of Paper-Book of WP(C) No.44 of 2017] indicates compliance of the shortfalls. However, the Respondent No.2 vide its letter dated 22-06-2017 (Annexure P-26) pointed out thirteen deficiencies.

42. For **MS (ENT)**, nine shortfalls were communicated by the MCI vide its letter dated 30-03-2016 [Annexure P-14 of Paper-Book of WP(C) No.51 of 2017]. The Assessors Report dated 29-08-2016 [Annexure P-18 of Paper-Book of WP(C) No.51 of 2017] reveals no adverse remarks neither has deficiency been indicated, despite which the Respondent No.2 vide its communication dated 22-06-2017 [Annexure P-35 of Paper-Book of WP(C) No.51 of 2017] would enumerate fourteen deficiencies.

43. As per the Petitioners necessary clarifications were made to the Respondent No.2 and each of the deficiencies have been complied with for each of the streams. It was the specific argument of the Petitioners that the Respondent No.2 cannot bring out a new set of deficiencies after each inspection report.

44. We may now appropriately refer to the decision of the Hon'ble Supreme Court dated **02-05-2016** in ***Modern Dental College and Research Centre and Others*** vs. ***State of Madhya Pradesh and Others***[2]. Vide the said Order the Hon'ble Supreme Court directed constitution of an Oversight Committee to oversee the functioning of the MCI and all other matters considered by the Parliamentary Committee till the Central Government acted upon the Expert Committee report. It was ordered *inter alia* as follows;

> **"110.** ..... At the same time, we do feel that pending consideration at appropriate executive or legislature level, an Oversight Committee needs to be set in place in exercise of powers of this Court under Article 142 of the Constitution to oversee the functioning of MCI and all other matters considered by the Parliamentary Committee.
>
> **111.** In view of the above, while we do not find any error in the view taken by the High Court

[2] (2016) 7 SCC 353

and dismiss these appeals, we direct the constitution of an Oversight Committee consisting of the following members: *1.* Justice R.M. Lodha (former Chief Justice of India) *2.* Prof. (Dr) Shiv Sareen (Director, Institute of Liver and Biliary Sciences) *3.* Shri Vinod Rai (former Comptroller and Auditor General of India)

112. A notification with respect to constitution of the said Committee be issued within two weeks from today. The Committee be given all facilities to function. The remuneration of the Members of the Committee may be fixed in consultation with them.

113. The said Committee will have the authority to oversee all statutory functions under the MCI Act. All policy decisions of MCI will require approval of the Oversight Committee. The Committee will be free to issue appropriate remedial directions. The Committee will function till the Central Government puts in place any other appropriate mechanism after due consideration of the Expert Committee Report. **Initially the Committee will function for a period of one year**, unless suitable mechanism is brought in place earlier which will substitute the said Committee. We do hope that within the said period the Central Government will come out with an appropriate mechanism.

114. List the matter after one year for such further directions as may become necessary.**"**

[emphasis supplied]

45. Later, on **18-07-2017** in ***Amma Chandravati Educational and Charitable Trust and Others*** vs. ***Union of India and Another***[3] the Hon'ble Supreme Court upon the expiry of the term of the erstwhile Oversight Committee re-constituted the said Committee, comprising of five

[3] (2017) 16 SCC 265

Doctors as detailed in the Order. The directions which followed were as hereunder;

> **"2.** ..... We would like to record the functions, which are assigned to the Oversight Committee, which included the following:
>
> (*a*) The Oversight Committee will have the authority to oversee the functioning of the Medical Council of India.
>
> (*b*) All decisions/recommendations of the MCI will require approval of the Oversight Committee before they are communicated to the Central Government.
>
> (*c*) The Oversight Committee will be free to issue appropriate remedial directions for improvement in the functioning of MCI.
>
> (*d*) The Oversight Committee will function till the Central Government puts in place any other appropriate mechanism, or until further orders.**"**

46. In ***Glocal Medical College and Super Speciality Hospital and Research Centre*** vs. ***Union of India and Another***[4] decided on **01-08-2017**, the Hon'ble Supreme Court referring to the Oversight Committee held as follows;

> **"24.** Having regard to the fact that the Oversight Committee has been constituted [*Modern Dental College and Research Centre* v. *State of M.P.*, (2016) 7 SCC 353 : 7 SCEC 1] by this Court and is also empowered to oversee all statutory functions under the Act, and further all policy decisions of MCI would require its approval, its recommendations, to state the least, on the issue of establishment of a medical college, as in this case,

[4] (2017) 15 SCC 690

can by no means be disregarded or left out of consideration. Noticeably, this Court did also empower the Oversight Committee to issue appropriate remedial directions. In our view, in the overall perspective, the materials on record bearing on the claim of the petitioner institutions/colleges for confirmation of the conditional letters of permission granted to them require a fresh consideration to obviate the possibility of any injustice in the process.

25. In the above persuasive premise, the Central Government is hereby ordered to consider afresh the materials on record pertaining to the issue of confirmation or otherwise of the letter of permission granted to the petitioner Colleges/ Institutions. We make it clear that in undertaking this exercise, the Central Government would re-evaluate the recommendations/views of MCI, Hearing Committee, DGHS and the Oversight Committee, as available on records. It would also afford an opportunity of hearing to the petitioner Colleges/ Institutions to the extent necessary. The process of hearing and final reasoned decision thereon, as ordered, would be completed peremptorily within a period of 10 days from today. The parties would unfailingly cooperate in compliance with this direction to meet the time-frame fixed.**"**

[emphasis supplied]

47. This observation made in ***Glocal Medical College and Super Speciality Hospital and Research Centre*** (*supra*) was reiterated in ***Krishna Mohan Medical College and Hospital and Another*** vs. ***Union of India and Another***[5] decided on **01-09-2017**. In ***Shree Narayan Foundation Trust*** vs. ***Union of India and Another***[6] decided on **04-09-2017**, which pertained to issuance of LoP by the MCI, the Hon'ble Supreme Court *inter alia* ordered as follows;

"…….. Before any final decision is taken the Central Government shall

[5] (2017) 15 SCC 719

consider the Oversight Committee that has been constituted as per the Constitution Bench decision in W.P.(C) No.408 of 2017 titled as *"Amma Chandravati Educational and Charitable Trust & Ors.* vs. *Union of India & Anr.* rendered on 18th July, 2017.**"**

[emphasis supplied]

In ***Chintpurni Medical College and Hospital & Another*** vs. ***Union of India & Another***[7] decided on **10-05-2018**, the Supreme Court ratio would underline the indispensability of the Oversight Committee. ***48.*** Although the instant matter was heard on 28-06-2018 and 29-06-2018, on a clarification sought from both parties on 20-08-2018 pertaining to the Oversight Committee, it was submitted by Learned Counsel for the Petitioners that the order in ***Modern Dental College and Research Centre*** (*supra*) was dated 02-05-2016. The Committee was constituted effectively for a period of one year which completed on 01-05-2017. The impugned letter of the Respondent No.2 dated 22-06-2017 was issued in the interregnum when no Oversight Committee was in existence as the new Oversight Committee was reconstituted on 18-07-2017 in the ***Amma Chandravati Educational and Charitable Trust*** (*supra*). Hence, for the instant purposes, i.e., the impugned communication dated 22-06-2017 the said directions would not be applicable. However, it was also submitted that the Petitioners have no objection if the matter is referred to the newly constituted Oversight Committee. The Respondent No.1 in the absence of instructions would make no submissions, while the Respondent No.2 would submit that no final decision had been taken by the Respondent No.1 in regard to the impugned communication.

49. The role of the Oversight Committee is indeed clear and can by no means be overlooked. The technical argument raised by Learned Counsel for the Petitioner that when the communication dated 22-06-2017 was issued the Oversight Committee was not existent is outweighed by the fact that the Committee was to function for a period of one year initially to be substituted by a suitable mechanism to be brought into place by the Central Government. The fact that the Committee had to be reconstituted is indicative of the fact that no such substitution took place. In such

[6] Writ Petition (Civil) No.695 of 2017
[7] Writ Petition (Civil) No.423 of 2017

circumstances, the intention of the Hon'ble Supreme court while constituting the Committee is apparent and hence it cannot be said that the Committee was non-functional during the interregnum. Copies of the communication dated 22-06-2017 issued by the Respondent No.2 recommending not to recognise the qualifications in MD (Paediatrics), MD (General Medicine), MD (Psychiatry) and MS (ENT) granted by the Petitioner-College has already been furnished to the Respondent No.1. It is admitted by the Respondent No.2 that till date no steps have been taken with regard to the recommendations made in the communication dated 22-06-2017.

50. In ***Krishna Mohan Medical College and Hospital*** (*supra*) it was observed as follows;

> **"20.** In the predominant factual setting, noted hereinabove, the approach of the respondents is markedly incompatible with the essence and import of the proviso to Section 10-A(4) mandating against disapproval by the Central Government of any scheme for establishment of a college except after giving the person or the college concerned a reasonable opportunity of being heard. Reasonable opportunity of hearing which is synonymous to "fair hearing", it is no longer res integra, is an important ingredient of audi alteram partem rule and embraces almost every facet of fair procedure. The rule of "fair hearing" requires that the affected party should be given an opportunity to meet the case against him effectively and the right to fair hearing takes within its fold a just decision supplemented by reasons and rationale. Reasonable opportunity of hearing or right to "fair hearing" casts a steadfast and sacrosanct obligation on the adjudicator to ensure fairness in procedure and action, so much so that any remiss or dereliction in connection therewith would be at the pain of invalidation of the decision eventually taken. Every executive authority empowered to take an administrative action having the potential of visiting any person with civil consequences must take care to ensure that justice is not only done but also manifestly appears to have been done.**"**

51. On the anvil of the above ratio and of ***Glocal Medical College and Super Speciality Hospital and Research Centre*** (*supra*) and ***Amma Chandravati Educational and Charitable Trust*** (*supra*) the Central Government shall afford reasonable opportunity to the Petitioners to be heard with regard to the communication dated 22-06-2017. Thereafter, necessary steps shall be taken before the Oversight Committee in terms of the functions assigned to it in ***Amma Chandravati Educational and Charitable Trust*** (*supra*). All necessary steps before the concerned Authority(s) shall be completed within two months from today.

52. Meanwhile, in the ensuing tumult between the parties the students ought not to face the backlash. Hence so far as the admissions made on the basis of the Notification of 25-04-2017 is concerned, students so admitted on account of the alleged error of the Respondent No.1 should not be allowed to suffer and shall continue their Courses, if desired by them.

53. In view of the aforesaid circumstances, no order need issue with regard to the stay of the impugned communication dated 22-06-2017 and the impugned corrigendum dated 06-06-2017 to the extent it modifies the Gazette Notification dated 25-04-2017, issued by this Court on 16-08-2017.

54. Under the facts and circumstances, the Writ Petitions stand disposed of with the above directions.

55. No order as to costs.

SLR (2018) SIKKIM 1065

(Before Hon'ble the Acting Chief Justice)

Crl. A. No. 29 of 2017

Purna Kumar Gurung ….. **APPELLANT**

Versus

Ankit Sarda ….. **RESPONDENT**

For the Appellant: Mr. Sudhir Prasad, Advocate.

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

Date of decision: 30th August 2018

A. Negotiable Instruments Act, 1881 – S. 138 – Dishonour of Cheque – Ingredients – A complaint under S. 138 of the NI Act must necessarily reflect the ingredients as laid down by the Section:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability.

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

(Para 9)

B. Negotiable Instruments Act, 1881 – S. 138 – For the Discharge of any Debt or other Liability – The term "debt" according to Black's Law Dictionary, 10th edition is "Liability on a claim; a specific sum of money due by agreement or otherwise." The explanation to S. 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract – The term "liability" as per Black's Law Dictionary, 10th edition is "The quality, state or condition of being legally obligated or accountable." "Liability" otherwise has also been defined to mean all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.

(Para 10)

C. Negotiable Instruments Act, 1881 – S. 139 – Presumption in Favour of the Holder – Unless the contrary is proved, the Court shall presume that the holder of a cheque received the cheque of the nature referred to in S. 139 for the discharge, in whole or in part of any debt or other liability. It would appear that the presumption under S. 139 of the NI Act is an extension of the presumption under S. 118 (a) of the NI Act which provides that the Court shall presume a negotiable instrument to be one for consideration – If the negotiable instrument happens to be a cheque, S. 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. S. 118 of the NI Act uses the phrase "until the contrary is proved" while S. 139 of the NI Act provides "unless the contrary is proved". S. 4 of the Indian Evidence Act, 1872 which defines "may presume" and "shall

presume" makes it clear that presumptions to be raised under both the aforesaid provisions are rebuttable.

(Para 11)

D. Negotiable Instruments Act, 1881 – S. 139 – Presumption in Favour of the Holder – If the Respondent did not consider the amount as a liability, if not a debt, towards the Appellant then what was the purpose of issuing the cheque to the Appellant. The moment the cheque was issued, it provides evidence of the acceptance of his liability and the presumption under S. 139 of the NI Act kicks into place. Inasmuch as the Section provides that it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque, of the nature referred to in S. 138 of the NI Act or the discharge in whole or in part of any debt or other liability.

(Para 15)

E. Negotiable Instruments Act, 1881 – S. 138 – The stand taken by the Appellant in his examination under S. 313 of the Cr.P.C. was that the cheque was issued by way of security only and not for encashment. On this aspect, we may look into the meaning of "security". As per the Oxford Dictionary "security" *inter alia*, means "a thing deposited or hypothecated as pledge for fulfilment of undertaking or payment of loan to be forfeited in case of failure". The circumstances of the matter at hand in no way fulfill the ingredients of security as defined *supra* neither was an attempt made to furnish evidence on this aspect by the Respondent – This Court is aware that the proof so demanded in offences under S. 138 of the NI Act is not to be beyond a reasonable doubt but only extending to a preponderance of probability. This too, was not established by the Respondent.

(Para 16)

F. Negotiable Instruments Act, 1881 – S. 138 – Plea of Fraud – It is irrelevant for the purposes of S. 138 of the NI Act to put forth a plea of fraud in the transaction, the only consideration is of the cheque being dishonoured.

(Para 17)

Appeal allowed.

Chronological list of cases cited:

1. Don Ayengia v. State of Assam and Another, (2016) 3 SCC 1.
2. Hiten P. Dalal v. Bratindranath Banerjee, 2001 SCC (Cri) 960.
3. T. Vasanthakumar v. Vijayakumari, (2015) 8 SCC 378.
4. C.C. Alavi Haji v. Palapetty Muhammed and Another, (2007) 6 SCC 555.
5. M.D. Thomas v. P.S. Jaleel and Another, (2009) 14 SCC 398.
6. D. Vinod Shivappa v. Nanda Belliappa, (2006) 6 SCC 456.
7. Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal, AIR 1999 SC 1008.
8. M.S. Narayana Menon *alias* Mani v. State of Kerala and Another, AIR 2006 SC 3366.
9. Tribhuwan Prasad Singh v. State of Jharkhand through C.B.I. 2008 Cri. L.J. 1170.
10. Sudhir Kumar Bhalla v. Jagdish Chand and etc. AIR 2008 SC 2407.
11. Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513.
12. Kamala S. v. Vidhyadharan M.J. and Another, (2007) 5 SCC 264.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. By the impugned Judgment dated 25.03.2017, in Private Complaint Case No. 79 of 2014, the learned Chief Judicial Magistrate acquitted the Respondent of the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity 'the NI Act') having reached a finding that the Appellant (Complainant before the learned Trial Court) had failed to bring home proof of the existence of a legally recoverable debt or other liability for which the cheque was issued by the Respondent/Accused.

2. The Appellant is before this Court assailing the impugned Judgment.

3. For convenience, a brief factual reference is essential. The Respondent is said to be a share broker, running a business of stocks and

shares at M.G. Marg, Gangtok. On the asking of the Respondent, the Appellant invested a sum of Rs.3,00,000/- (Rupees three lakhs) only, in the said business. After a few months he requested the Respondent to return his money, the investment being devoid of profit. In response thereto, the Respondent issued a cheque for Rs.3,00,000/- (Rupees three lakhs) only, to the Appellant on 09.09.2014, drawn on the ICICI Bank, New Market Branch, Gangtok. The Appellant on the same day with the consent of the Respondent deposited the cheque for realisation at the State Bank of India, Gangtok Main Branch, which however was dishonoured by the Banker of the Respondent/Accused and returned to the Appellants Banker with the remark - "insufficient funds", by their Memo dated 10.09.2014. The Appellant was informed of the said circumstance. On 01.10.2014, the Appellant issued a legal Notice to the Respondent through his Advocate requiring him to pay the amount of the dishonoured cheque within the statutory period of 15 (fifteen) days from the date of service of Notice. The Notice was sent to the place of business of the Respondent but was returned with the remark – "addressee out of station". Thereafter, on the Respondent having failed to take steps within the statutory period, the Appellant filed a Complaint before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, who on examining the Complainant found prima facie materials against the Respondent under Section 138 of the NI Act. On completion of trial, the impugned Judgment of acquittal was pronounced.

4. Advancing his arguments for the Appellant, Learned Counsel would canvass that the learned Trial Court while acquitting the Respondent had failed to appreciate that the Respondent had not denied the fact of delivery of the cheque or his signature on the cheque raising the presumption under Section 118 and Section 139 of the NI Act. That, the learned Trial Court erred in holding that the Respondent who is a share broker is not liable to refund the invested amount neither did the Court take into consideration that the Appellant had made part payment of Rs.1,00,000/- (Rupees one lakh) only, on 31.10.2014, as discharge of his debt and liability to the Appellant subsequent to the filing of the Complaint. That, the books of accounts for the shares were never revealed to the Appellant to indicate the investments made by the Respondent with the Appellants money. Merely stating that losses incurred without accounts of investment is not justified. It was further contended that the Respondent in his Statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') stated that

Exhibit-1 was issued for security only and not for encashment while concealing the fact of payment of Rs.1,00,000/- (Rupees one lakh) only, already made by him pursuant to the Complaint lodged by the Appellant. Reliance was placed on ***Don Ayengia vs. State of Assam and another***[1] to buttress his contention that a cheque issued for security purpose would also be covered by the provisions of Section 138 of the NI Act. That, although the account and password thereof is allegedly with the Respondent, he has refused to divulge it to the Appellant. To fortify his submissions strength was drawn from the ratio in ***Hiten P. Dalal vs. Bratindranath Banerjee***[2] *and* ***T. Vasanthakumar vs. Vijayakumari***[3]. That, refusal to accept the Notice posted in the correct address indicates that the Respondent was in fact avoiding the legal Notice but the Notice is deemed to beserved. On this count, reliance was placed on ***C.C. Alavi Haji vs Palapetty Muhammed and Another***[4].

5. The Respondent for his part would contend that the Appellant did not plead or bring on record any documentary proof to show that they had a meeting in which they had reached an agreement whereby the Respondent issued Exhibit-1. The Appellant also failed to file any books of accounts to reveal that the Respondent owed any legally enforceable debt or liability. Pleadings and cross-examination of the Appellant would clearly reveal that he had voluntarily invested his money in the share market and not with the Respondent. That, Section 138 of the NI Act makes it clear that the dishonoured cheque by itself does not give rise to a cause of action as the payment can be made on receipt of the legal notice as contemplated in Section 138(b) of the NI Act. Cause of action emanates on failure thereof to make payment within 15(fifteen) days. Further, the legislative mandate is that the Respondent ought to be given an opportunity to rectify or remedy his mistake. It was argued that based on the evidence adduced by the Appellant, it can safely be assumed that he has failed to establish his case and hence the reliefs prayed for may not be granted in favour of the Appellant. To substantiate his submissions, reliance was placed on ***M.D. Thomas vs. P.S. Jaleel and Another***[5], ***D. Vinod Shivappa vs. Nanda Belliappa***[6], ***Bharat Barrel and Drum Manufacturing Company vs.***

[1] (2016) 3 SCC 1
[2] 2001 SCC (Cri) 960
[3] (2015) 8 SCC 378
[4] (2007) 6 SCC 555
[5] (2009) 14 SCC 398
[6] (2006) 6 SCC 456

Amin Chand Payrelal[7]***, M.S. Narayana Menon alias Mani vs. State of Kerala & Anr.***[8]***, Tribhuwan Prasad Singh vs. State of Jharkhand, through C.B.I.***[9] and ***Sudhir Kumar Bhalla vs. Jagdish Chand & etc. etc.***[10].

6. The arguments of learned Counsel for opposing parties have been heard *in extenso* and given due consideration. The impugned Judgment, the pleadings, the evidence and documents on record have also been carefully perused by me.

7. The question that requires determination by this Court is whether the learned Trial Court was correct in concluding that the Complainant has failed to establish the existence of a legally recoverable debt for which the cheque was issued by the Accused and thereby acquitted the Respondent.

8. Since the issue of service of notice has not been contested herein by the Respondent, no discussions need ensue on this point. Suffice it to say that the learned Trial Court duly applying the provisions of Section 27 of the General Clauses Act, 1897, and concluding that Notice was served cannot be said to be erroneous.

9. Coming to the crux of the case, Section 138 of the NI Act deals with dishonour of cheque for insufficiency of funds in the account. A complaint under Section 138 of the NI Act must necessarily reflect the ingredients as laid down by the Section which is elucidated herein below;

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability.

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to

[7] AIR 1999 SC 1008
[8] AIR 2006 SC 3366
[9] 2008 Cri. L.J. 1170
[10] AIR 2008 SC 2407

honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) he payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

The Section provides that for a dishonoured cheque the drawer shall be liable for conviction if the demand is not met within 15(fifteen) days of the receipt of notice. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability under Section 138 of the NI Act, ceases. It was argued by the Respondent that the dishonoured cheque by itself does not give rise to cause of action and the Respondent ought to be afforded an opportunity to remedy his error. Perusal of the records nowhere indicates any such effort on the part of the Respondent to have acted in compliance of this provision to prevent prosecution. Despite opportunity afforded to the Respondent during the cross-examination of the Appellant to disprove the Appellants case, no contrary evidence whatsoever emerged to that effect nor did he testify despite opportunity afforded to him. It is not denied that the Respondent issued the cheque, Exhibit-1, in the name of the Appellant on an account maintained by the Respondent, for a sum of Rs.3,00,000/- (Rupees three lakhs) only. The signatures appearing on Exhibit-1, being Exhibit-1(a) and Exhibit-1(b), and identified by the Appellant as the signatures of the Respondent have not been denied. That, Exhibit-1 was issued on 09.09.2014 and presented to the Bank on the same date by the Appellant and was returned on 10.09.2014 for want of sufficient fund, is also not denied. In the face of such evidence, the only question that now survives is whether the cheque was made over to the

Appellant on account of debt or other liability owed to him by the Respondent.

10. The learned Trial Court was of the considered opinion that the cheque was for neither, therefore, it is to be examined as to whether this finding is correct. Towards this, we may briefly examine what "debt" and "liability" entails. The term "debt" according to Blacks Law Dictionary, 10th edition, is;

> *"Liability on a claim; a specific sum of money due by agreement or otherwise.*

The explanation to Section 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract. On the other hand, the term "liability" as per Blacks Law Dictionary, 10th edition is;

> *"The quality, state or condition of being legally obligated oraccountable."*

"Liability" otherwise has also been defined to mean *all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.*

11. That having been stated, at this juncture, we may appropriately consider the provisions of Section 139 of the NI Act. The said Section provides that unless the contrary is proved, the Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 139 for the discharge, in whole or in part of any debt or other liability. It would appear that the presumption under Section 139 of the NI Act is an extension of the presumption underSection 118(a) of the NI Act which provides that the Court shall presume a negotiable instrument to be one for consideration. If the negotiable instrument happens to be a cheque, Section 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. Section 118 of the NI Act uses the phrase "until the contrary is proved" while

Section 139 of the NI Act provides "unless the contrary is proved". Section 4 of the Indian Evidence Act, 1872 which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under both the aforesaid provisions are rebuttable.

12. While discussing what a rebuttable presumption is, in ***Kumar Exports vs Sharma Carpets***[11], the Honble Supreme Court would hold that;

> ***19.*** *When a presumption is rebuttable, it only points that the party on whom lies the duty of going forward with evidence on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."*

13. In ***Hiten P. Dalal*** (*supra*) relied on by the Appellant, the Honble Supreme Court would hold as follows;

> *"**20.** That the four cheques were executed by the appellant in favour of Standard Chartered Bank (hereinafter referred to as "the Bank") has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the appellant's account with the drawee viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration. The presumption which arises under*

[11] (2009) 2 SCC 513

Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non-payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case.

21. *The appellant's submission that the cheques were not drawn for the "discharge in whole or in part of any debt or other liability" is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that:*

*"**139.** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."*

The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

22. *Because both Sections 138 and 139 require that the court "shall presume" the liability*

of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidhyanatha Iyer [AIR 1958 SC 61] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the nonexistence of the presumed fact."

14. In ***Kamala S. vs. Vidhyadharan M.J. and Another***[12]**,** it was held as follows;

> ***"16.*** The nature and extent of such presumption came up for consideration before this Court in *M.S. Narayana Menon Alias Mani v. State of Kerala and Anr.* [(2006) 6 SCC 39] wherein it was held:
>
> > "*30.* Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter

[12] (2007) 5 SCC 264

> before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

> **17.** This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held;
>
> "*33.* Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

15. On the anvil of the aforesaid ratiocination, while drawing an analogy with the instant case, the issuance of the cheque and other facts has not been denied as already discussed hereinabove and for brevity is not being reiterated. The Complainant in his evidence has deposed that the accused asked him to invest some money in the stocks and shares which was the trade of the Respondent. This evidence has not been decimated, thereby establishing investment of Rs.3,00,000/- (Rupees three lakhs) only, by the Appellant on the asking of the Respondent. What we are presently concerned with is if the Respondent did not consider the amount as a liability, if not a debt, towards the Appellant then what was the purpose of issuing Exhibit-1, the cheque to the Appellant. The moment the cheque was

issued, it provides evidence of the acceptance of his liability and the presumption under Section 139 of the NI Act kicks into place. *Inasmuch* as the Section provides that it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque, of the nature referred to in Section 138 of the NI Act or the discharge in whole or in part of any debt or other liability.

16. The stand taken by the Appellant in his examination under Section 313 of the Cr.P.C. was that the cheque was issued by way of security only and not for encashment. On this aspect, we may look into the meaning of "security". As per the Oxford Dictionary "security" *inter alia*, means "*a thing deposited or hypothecated as pledge for fulfilment of undertaking or payment of loan to be forfeited in case of failure"*. The circumstances of the matter at hand in no way fulfil the ingredients of security as defined *supra* neither was an attempt made to furnish evidence on this aspect by the Respondent. I hasten to add that this Court is aware that the proof so demanded in offences under Section 138 of the NI Act is not to be beyond a reasonable doubt but only extending to a preponderance of probability. This too, was not established by the Respondent.

17. The learned Trial Court in the impugned Judgment opined that the Complainant himself wilfully invested a sum of Rs.3,00,000/- (Rupees three lakhs) only, in stocks and shares through the Accused and no fraud was pleaded to have been played by the Accused in the transaction. The evidence of the Appellant would indicate that it was on the asking of the Respondent that the investment was made. Pausing here for a moment, it is worth mentioning that it is irrelevant for the purposes of Section 138 of the NI Act to put forth a plea of fraud in the transaction, the only consideration is of the cheque being dishonoured. According to the learned Trial Court, a voluntary investment cannot be construed as debt or any other liability. This may be true if evidence exists to rebut the presumption once a cheque is issued. In Paragraph 19 of the impugned Judgment, the learned Trial Court opined as follows;

> *"**19.** Next the complaint and evidence of CW1 is that a settlement was reached through oral agreement to refund the principal invested amount and thus accused issued Exhibit 1 for a sum of 3,00,000/- which got dishonoured on presentation.*

First there is no evidence as to the terms of oral agreement. Secondly careful examination of the evidence of CW1 merely states an oral agreement to refund the principal amount for which Exhibit 1 was issued. This agreement is void as there is no consideration from CV1 but merely a unilateral payment from the accused which even if this agreement is taken into account per se it shows no existence of debt or other liability attracting the offence under section 138 of NI Act. No doubt there is an existence of presumption under section 118(a) of NI Act for consideration for negotiable instruments but the presumption can berebutted. That the facts pleaded by the complainant and his evidence itself has no foundational facts upon which the presumptions under Section 139 and 118 (a) could be raised as there existed no legally recoverable debt or liability or consideration for the oral agreement. The argument of Ld Counsel for complainant that the accused repayed ₹ 1,00,000/- is sufficient to show that there exists the debt and liability cannot also be considered. The repayment of ₹ 1,00,000/- by accused during the pendency of trial can amount to a evidence of conduct but for forgoing discussions that there was no consideration at all in the oral agreement, it would not be sufficient to provide the fact upon which presumption under section 139 could be raised."

18. Having perused the observations of the learned Trial Court, it may be reasoned that obviously there would be no evidence of an oral agreement by simple virtue of the fact that it was an oral agreement. Despite opportunity afforded to the Respondent, the fact of such oral agreement between the parties was not decimated during cross examination. The reasoning that the agreement is void for allegedly being devoid of consideration from the Complainant but was merely a unilateral payment from the Accused is also unclear. Although, the learned Trial Court was of

the opinion that there is an existence of presumption under Section 118(a) of the NI Act which can be rebutted, he has failed to indicate how the Respondent has rebutted the presumption. The argument of he learned Trial Court that the facts pleaded by the Complainant and his evidence has no foundational facts upon which the presumptions under Section 139 and Section 118(a) of the NI Act, in my considered opinion is erroneous *inasmuch* as the Appellant has relied on Exhibit-1, the cheque, and the signatures of the Respondent therein, which were not denied by the Respondent and Exhibit-6, his Evidence on Affidavit, in which the facts have been put forth before the learned Trial Court and remained unstained during cross-examination. The issuance of Exhibit-1 as already explained leads to the irrevocable conclusion of acceptance of liability. The reasoning of the learned Trial Court that the repayment of Rs.1,00,000/- (Rupees one lakh) only, by the Respondent during the pendency of the trial can amount to an evidence of conduct but it would not suffice to raise a presumption under Section 139 of the NI Act does not impress.

19. In view of the foregoing discussions, I find that the Appellant has proved his case.

20. Consequently, the Appeal is allowed.

21. The impugned Judgment is set aside.

22. The Respondent is convicted of the offence under Section 138 of the NI Act.

23. He is sentenced to undergo simple imprisonment of one month.

24. He shall also pay compensation of Rs.2,00,000/- (Rupees two lakhs) only, within two months from today to the Appellant in terms of Section 357(3) of the Cr.P.C. with interest at the rate of 9% per annum on the above stated amount from the date of filing of the Complaint before the learned Trial Court, failing which the learned Trial Court shall take necessary steps for realisation of the said amount in accordance with law.

25. The Appellant shall surrender before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, within sixty days from today, to undergo his Sentence. Should there be failure on his part to surrender, the

learned Trial Court shall issue a non-bailable warrant of arrest against the Respondent/Convict and thereafter commit him to jail for serving the Sentence.

26. Copy of this Judgment be transmitted to the learned Trial Court for information and compliance.

27. Records be remitted forthwith.

28. No order as to costs.

SLR (2018) SIKKIM 1082

(Hon'ble Mr. Justice Bhaskar Raj Pradhan)

W.P. (Crl.) No. 01 of 2018

**NHPC Ltd. Rangit Power Station, South Sikkim.
Represented by Shri Rajesh Kumar
(Manager Mechanical). ….. PETITIONER**

Versus

**State of Sikkim,
Through the Public Prosecutor,
High Court of Sikkim. ….. RESPONDENT**

For the Petitioner:	Mr. A.K. Upadhyaya, Senior Advocate with Ms. Aruna Chettri, Ms. Hemlata Sharma and Mr. Sonam Palzor Lepcha, Advocates.
For Respondent:	Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S.K Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.
For the Complainant:	Mr. Jigme P. Bhutia and Ms. Rajani Rizal, Advocates.

Date of decision: 30th August 2018

A. Code of Criminal Procedure, 1973 – S. 451 – Order for Custody and Disposal of Property Pending Trial – S. 451 Cr.P.C. provides for an order for "proper custody and disposal of property" pending trial and not determination of title after a civil trial. The Criminal Court only provides for "proper custody" having regard to the nature of such property. The entrustment of the property to rival claimants does not amount to adjudication of any competing rights of the claimants. S. 451 Cr.P.C. provides for interim custody of the property produced before the Court during the trial. An order passed under this provision is temporary and intended to protect the property pending the trial. The person who is

entrusted with the property even if he be the actual owner acts as a representative of the Court.

(Para 17)

B. Code of Criminal Procedure, 1973 – S. 451 – The rejection of the release petition admittedly preferred by the Complainant has not been challenged – The pendency of the investigation may not be a ground to fulfil the mandate of S. 451 Cr.P.C. Failure to determine the ownership of the machine has led to the learned Judicial Magistrate declining the release petition filed by the Petitioner Corporation as well as the Complainant. Failure of the Petitioner Corporation to make the Complainant a party should not have deterred the learned Judicial Magistrate to issue summons upon the Complainant and hear him for the just determination of the case. The machine is not a small item which can be safely kept in a Bank for safe custody. If the machine is not regularly started, used and maintained the machine may become useless before the determination of the present investigation. Admittedly neither the Complainant nor the Petitioner Corporation has approached any Court for adjudication upon the title of the machine. Both insist that the machine belongs to them. The Registration Certificate if any of the machine has not been produced by anyone. However, the Complainant has admitted that he came to learn that the machine has been registered in the name of the Petitioner Corporation. In spite of summons being issued to the Complainant who is represented by learned Counsel no steps were taken to challenge the rejection of the release petition – The Complainant in fact would submit that he had no objection to the release of the machine to the Petitioner Corporation if it assured that the said machine would not be used by them. The very purpose of release of the machine would be lost if such a condition is imposed. The object of S. 451 Cr.P.C. appears to be that where the property which is the subject matter of the offence alleged is seized by the police it ought not to be retained in the custody of the Court or of the police for anytime longer than what is absolutely necessary. Damage due to failure to maintain it or keep it properly during investigation can lead to loss of valuable property.

(Para 22)

Petition allowed.

Chronological list of cases cited:

1. Sunderbhai Ambalal Desai v. State of Gujarat with C.M. Mudaliar v. State of Gujarat, (2002) 10 SCC 283.
2. Ashok Kumar v. State of Bihar and Others, (2001) 9 SCC 718.
3. Rajendra Prasad v. State of Bihar and Another, (2001) 10 SCC 88.
4. Shyamal Kumar Ghosal v. State of Sikkim, 2013 Cr.L.J. 628.

ORDER

Bhaskar Raj Pradhan, J

1. The Petitioner is NHPC Limited, a Government of India Enterprise. The present Writ Petition seeks to assail the order dated 29.12.2017 passed by the learned Judicial Magistrate, First Class, East Sikkim (learned Judicial Magistrate) rejecting the application filed by the Petitioner Corporation for release of the vehicle seized by the Investigating Officer in connection with Sadar Police Station Case No. 51 of 2017 dated 04.03.2017 under Section 420/406/465/471/120B/381/411 of the Indian Penal Code, 1860 (IPC).

2. The First Information Report (FIR) dated 04.03.2017 was lodged by Phigu Tshering Bhutia and Sonam Palzor Bhutia (the Complainant). In the said FIR it was alleged that Phigu Tshering Bhutia had become acquainted with Sudish Kumar Yadav claiming to be the proprietor of M/s Naman Equipments Services, an authorised dealer of Escorts Construction Equipment Limited in West Bengal and Sikkim. It was alleged that Sudish Kumar Yadav induced the said Phigu Tshering Bhutia to buy Hydra-14 Crane bearing Chasis number 195B491621 and Engine number S433-A48180 (the said machine) with an assurance that he would engage it with some private company and pay him a sum of 50,000/- (Rupees fifty thousand) as monthly rental. It is stated that Phigu Tshering Bhutia thereafter, requested his cousin Sonam Palzor Bhutia to apply for hypothecation loan from IndusInd Bank Limited. Sonam Palzor Bhutia then got the said machine financed from IndusInd Bank Limited and also received a tax invoice dated 09.08.2012 amounting to 15,30,000/- (Rupees fifteen lakhs thirty thousand) only in his name and the motor insurance cover note dated 09.08.2012 in favour of M/s Naman Equipments Services. Phigu Tshering

Bhutia states in the FIR that after the down payment was made to the Indusind Bank Limited, the said machine was received by Sudish Kumar Yadav on 09.08.2012 as he assured that the said machine would be given on lease to some construction company/contractor/power projects and lured him. It was alleged that to win over his confidence, Sudish Kumar Yadav initially paid him a sum of 4 lakhs on 21.09.2012 as advance payment and thereafter a further sum of 13,17,000/- (Rupees thirteen lakhs seventeen thousand) which amounts to rental payment of 26 months till October, 2014. It is alleged that when Sudish Kumar Yadav stopped making payment after October, 2014 he requested him to pay the entire rental amount due and return the machine to which Sudish Kumar Yadav requested for time. It is further alleged that the EMIs to the Bank closed on 27.08.2015 after full and final payment was made by Sonam Palzor Bhutia. Various efforts to contact Sudish Kumar Yadav went in vain after which Phigu Tshering Bhutia made inquiries with Escorts Private Limited, Kolkatta after which he came to know that as per their records the said machine had been sold to the Petitioner Corporation in the year 2013 itself and registered in its name. It is alleged that Phigu Tshering Bhutia personally visited the Petitioner's office and made inquiries and got confirmation through documents that the Petitioner Corporation had bought the said machine from Sudish Kumar Yadav in the year 2013. It is stated that both Phigu Tshering Bhutia and Sonam Palzor Bhutia were unaware of these facts. Phigu Tshering Bhutia further alleges that in the month of February, 2017 he visited the IndusInd Bank Limited and inquired as to how they had issued the *"No Objection Certificate"* for the sale of the said machine which was still under hypothecation in the year 2013. He complains that the officials were unable to provide any satisfactory reply and therefore he doubted that the officials of IndusInd Bank Limited and Sudish Kumar Yadav were hand in glove in the illegal transaction. It is further alleged that the officials of the Petitioner Corporation has by dishonest means bought the stolen property without any clearance from lawful authorities. On the aforesaid allegations FIR was registered against Sudish Kumar Yadav *alias* Sudish Yadav, officials of IndusInd Bank Limited, Gangtok and official of NHPC Limited.

3. The Petitioner Corporation claims that it is the absolute owner of the machine which was seized on 15.09.2017 by the Investigating Officer. The Petitioner Corporation therefore, filed an application for release of the said machine on 20.09.2017 which was rejected by the impugned order dated 25.09.2017.

4. The learned Judicial Magistrate while rejecting the said application of the Petitioner Corporation has held that there was dispute regarding ownership of the said machine which has not yet been determined. The learned Judicial Magistrate was also of the view that in spite of knowledge that there was another claimant of the said machine the Petitioner Corporation did not make them a party to enable them to file any objection. The learned Judicial Magistrate opined that if the said machine is released without first determining to whom the said machine actually belongs, there is every possibility that huge commotion and unrest may be created between the two parties claiming ownership. To ensure that the machine does not get rusted or become defunct the Investigation Officer was directed to take steps to start and run the said machine for its upkeep and maintenance and keep necessary records.

5. The Petitioner Corporation has preferred the present petition under Article 226/227 of the Constitution of India for setting aside the impugned order dated 29.12.2017 passed by the learned Judicial Magistrate and for further direction upon the Respondent to release this machine to the petitioner.

6. The State-Respondent has filed its counter-affidavit. It is pleaded that Phigu Tshering Bhutia lodged the complaint on 04.03.2017 which was registered at the Sadar Police Station as an First Information Report (F.I.R.). During the investigation tax invoice and bank statement were seized from the complainant. On 02.05.2017 the original documents of the said machine were received from the Petitioner Corporation. On 14.09.2017 the said machine was seized. On 21.09.2017 a release petition was filed by the Petitioner Corporation which was objected to by the Investigating Officer and therefore, the said machine was not released. On 23.09.2017 a release petition was preferred by the complainant which was objected to by the Investigating Officer and therefore the, said petition was also rejected. The State-Respondent thus, submits that the ownership of the machine not yet determined, the machine cannot be released.

7. This Court on 22.05.2018 directed issuance of notice upon one of the Complainant-Sonam Palzor Bhutia as the State-Respondent would submit that he was the one who claimed to have purchased the said machine, pursuant to which he is represented by Mr. Jigme P. Bhutia, learned Counsel.

8. On 18.07.2018 the learned Counsel for the respective parties as well as the Complainant were heard in part. The Complaint was granted liberty to file any document they seek to rely upon.

9. On 20.07.2018 the Complainant filed a reply affidavit stating that the said machine was purchase by the Complainant with the financial assistance of IndusInd Bank Limited. Since it was purchased with financial assistance there was a hypothecation endorsement in the insurance policy of the said machine. The loan was duly repaid by the Complainant on 21.05.2016 and no objection certification obtained from the IndusInd Bank Limited. It is stated that the Complainant never sold the said machine nor gave consent to sell the said machine and therefore the Petitioner Corporation claim is baseless. It is submitted that unless the actual owner conveys title in favour of the subsequent owner no title in respect of the subject matter is created. It is also claimed that the Complainant has paid for the insurance policy of the machine till date. It is submitted that the learned Judicial Magistrate having exercised her original jurisdiction under the Code of Criminal Procedure, 1973 (Cr.P.C.) and passed a judicial order by exercising her judicial mind the writ petition was not maintainable. The Complainant would also submits that since there are rival claims about the ownership of the machine which is required to be properly adjudicated by a competent Civil Court after considering all the material on record and after adducing all the evidence the Writ Court should not interfere. In support of the factual submissions made the Complainant has filed the following documents:

1) Copy of the FIR lodged by the Complainant.

2) Copy of the tax invoice dated 09.08.2012 for an amount of 15,30,000.00 and the delivery order of IndusInd Bank Limited to M/s Naman Equipment Services authorising it to deliver Hydra 14 (Escorts make) vehicle/chassis/ equipment in favour of the complainant under hypothecation and loan agreement.

3) Copy of statement of loan account of the Complainant in IndusInd Bank Limited and No Due Certificate dated 02.03.2017 issued by the IndusInd Bank Limited in favour of the complainant.

4) Copies of insurance policies.

10. I.A. No. 01 of 2018 filed by the Petitioner Corporation which has been allowed by this Court vide order dated 30.08.2018 seeks to rely upon the following documents:

1) Copy of the supply order made by the Petitioner Corporation upon M/s Naman Equipment Services, dated 11.02.2013 for purchase of the Hydra Crane-(Escorts make) with terms and conditions and schedule of quantity and prices.

2) The Petitioner Corporation's Inspection Report of inspection of the machine.

3) Tax invoice of M/s Naman Equipment Services dated 16.03.2013 for an amount of 15,19,800.00/- (Rupees fifteen lakhs nineteen thousand eight hundred) for the said machine along with the Petitioner Corporation internal records of release of payments.

4) Extract of the register maintained by the Holder of Trade Certificate i.e. M/s Naman Equipment Services dated 16.03.2013.

11. I. A. No.02 of 2018 filed by the Petitioner Corporation which was also allowed vide order dated 30.08.2018 sought to rely upon another tax invoice dated 16.03.2013 with the correct engine number as against purported tax invoice with the incorrect engine number filed earlier.

12. I.A. No. 03 of 2018 filed by the Petitioner Corporation has been allowed by this Court vide order dated 14.08.2018. The application places the copies of statement of accounts of the Petitioner Corporation maintained with the State Bank of India showing details of payment made to M/s Naman Equipment Services with regard to the purchase of the machine. It is stated that the Petitioner Corporation paid 13,67,820.00 + 46,000.00 + 1,51,979.00 = 15,65,799 (Rupees fifteen lakhs sixty five thousand seven hundred ninety nine) to M/s Naman Equipment Services. The said payments were made on or before 02.03.2013.

13. I.A. No. 04 of 2018 was filed by the State-Respondent which was also allowed by this Court vide order dated 14.08.2018. The said

application places on record statement under Section 161 Cr.P.C. recorded of Sudish Kumar Yadav as well as document seized from him i.e.:

1) One cancellation order of Hydra 14 Crane dated 28.09.2012 purportedly signed by the Complainant addressed to M/s Naman Equipment Services stating that due to cancellation of work order with the Department he no longer requires the machine and therefore request cancellation of the said order of the machine and refund of the amount of payment made through IndosInd Bank Limited to enable him to close his loan account with the said bank.

2) One Debit note dated 03.10.2012 under the signature of the authorised signatory of M/s Naman Equipment Services for Escorts Hydra 14 Crane machine of 15,30,000.00 (Rupees fifteen lakhs thirty thousand) issued against tax invoice No.NES/ESCORTS/SLG/12-13/12 dated 09.08.2012 for the machine with an endorsement on it "*received for Sonam Palzor Bhutia 03.10.2012"* with a signature under the endorsement.

3) M/s Naman Equipment Services Communication dated 04.10.2012 to the Branch Manager IndosInd Bank Limited informing that vide invoice dated 09.08.2012 one Sonam Palzor Bhutia had booked one Hydra 14 Crane but in spite of repeated follow up he did not take over the machine and ultimately a letter dated 28.09.2012 was received from him requesting to cancel the said order and refund the amount to liquidate the loan.

14. I.A. No. 05 of 2018 filed by the State-Respondent was also allowed by this Court vide order dated 14.08.2018 by which the following documents were brought on record:

1) Order dated 23.09.2017 and 25.09.2017 passed by the learned Judicial Magistrate, East Sikkim on an application filed by the Complainant for release of the machine. The order dated 25.09.2017 declines the application for release of the said machine filed by the Complainant on the ground that the said machine is being claimed by two persons.

2) Axis Bank statement of account of the Complainant Shri Phigu Tshering Bhutia reflecting the various payments received from Sudish Kumar Yadav.

15. Heard Mr. A. K. Upadhyaya, learned Senior Advocate for the Petitioner Corporation, Mr. Karma Thinlay, Additional Public Prosecutor for the State-Respondent and Mr. Jigmi P. Bhutia, learned Advocate for the Complainant.

16. Section 451 Cr.P.C. provides:

> ***"451. Order for custody and disposal of property pending trial in certain cases****.- When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*
>
> *Explanation.- For the purposes of this section, "property" includes-*
>
> *(a) property of any kind or document which is produced before the Court or which is in its custody,*
> *(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."*

17. Evidently Section 451 Cr.P.C. provides for an order for "*proper custody and disposal of property*" pending trial and not determination of title after a civil trial. The Criminal Court only provides for "*proper*

custody" having regard to the nature of such property. The entrustment of the property to rival claimants does not amount to adjudication of any competing rights of the claimants. Section 451 Cr.P.C. provides for interim custody of the property produced before the Court during the trial. An order passed under this provision is temporary and intended to protect the property pending the trial. The person who is entrusted with the property even if he be the actual owner acts as a representative of the Court.

18. In re: ***Sunderbhai Ambalal Desai v. State of Gujarat with C.M. Mudaliar v. State of Gujarat***[1] the Supreme Court would hold:

> *"**7.** In our view, the powers under Section 451 CrPC should be exercised expeditiously and judiciously. It would serve various purposes, namely:*
>
> *1. owner of the article would not suffer because of its remaining unused or by its misappropriation;*
>
> *2. court or the police would not be required to keep the article in safe custody;*
>
> *3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and*
>
> *4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.*
>
> ***8.** The question of proper custody of the seized article is raised in a number of matters. In Basavva Kom Dyamangouda Patil v. State of Mysore [(1977) 4 SCC 358 : 1977 SCC (Cri)*

[1] (2002) 10 SCC 283

598] this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under: (SCC p. 361, para 4)

> *"4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the court or should be in its custody. The object of the Code seems to be that any property which is in the*

control of the court either directly or indirectly should be disposed of by the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always acts under the direct control of the court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

(Emphasis supplied)

xxxxxxxxxxxx

15. *Learned Senior Counsel Mr Dholakia, appearing for the State of Gujarat further submitted that at present in the police station premises, a number of vehicles are kept unattended and vehicles become junk day by day. It is his contention that appropriate directions should be given to the Magistrates who are dealing with such questions to hand over such vehicles to their owners or to the person from whom the said vehicles are seized by taking appropriate bond and guarantee for the return of the said vehicles if required by the court at any point of time.*

16. *However, the learned counsel appearing for the petitioners submitted that this question of handing over the vehicle to the person from whom it is seized or to its true owner is always a matter of litigation and a lot of arguments are advanced by the persons concerned.*

17. *In our view, whatever be the situation, it is of no use to keep such seized vehicles at the*

police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

18. *In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.***"**

[Emphasis supplied]

19. In re: ***Ashok Kumar v. State of Bihar & Ors***.[2] the Supreme Court would direct:

"***2.*** *We do not think it necessary to keep the vehicle in the compound of the court indefinitely for a very long time till the final disposal of this case. It is more advisable to entrust it to the registered owner on behalf of the court under certain conditions. We, therefore, direct the court in whose custody the vehicle is presently kept to release the same to the appellant on the following conditions:*

[2] (2001) 9 SCC 718

> *1. He shall execute a bond in a sum of Rs 1,00,000 (one lakh) with two solvent sureties to the satisfaction of the Chief Judicial Magistrate, Muzaffarpur.*
>
> *2. He must satisfy the court that he is the registered owner of the vehicle.*
>
> *3. He shall not allow his son Deepak Singh to use the vehicle until disposal of the prosecution case against him. He shall file an undertaking in court to that effect.*
>
> *4. He shall produce the vehicle either before the court or before such other authorities as the court may direct.*
>
> *5. He will not transfer the vehicle to anybody else nor possession of the same be parted with until disposal of the case.***"**
>
> *[Emphasis supplied]*

20. In re: ***Rajendra Prasad v. State of Bihar & Anr.***[3] the Supreme Court would direct:

> *"***2.** *We are not deciding the question as to the title of the vehicle in dispute nor the correctness of the rival versions regarding the transactions relating to the vehicle. We do not want the vehicle to remain in the compound of the police station exposed to heat and cold because the automobile is likely to be lost to all in such situation. To avert this situation, we are inclined to entrust it temporarily to the appellant who is the ostensible name-holder in the registration certificate. The custody of the vehicle with the appellant will be on behalf of the court and this arrangement is only till the stage when*

[3] (2001) 10 SCC 88

the court passes the order regarding disposal of the property on conclusion of the trial. We direct the trial court to release the vehicle to the appellant on the following conditions:

> *"(a) The appellant will produce the original registration certificate (as issued by the Transport Office. If it is a 'duplicate' he must obtain a certificate from RTO that duplicate was issued from the office).*
>
> *(b) The appellant shall execute a bond in a sum of Rs 2 lakhs with two solvent sureties that he will produce the vehicle back in court whenever required by the court."***"**
>
> *[Emphasis supplied]*

21. In re: ***Shyamal Kumar Ghosal v. State of Sikkim***[4] this Court would hold:

> ***"****It is settled position that in a proceeding under Section 451, Cr.P.C. custody of property ought to be given to the person from whom it had been seized or in whose name it stands registered.***"**

22. The rejection of the release petition admittedly preferred by the Complainant has not been challenged. It is common ground that the machine was seized from the possession of the Petitioner Corporation. On the submission of Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor this Court vide order dated 22.05.2018 permitted the Petitioner Corporation to visit the Hingdam Police Station occasionally and maintain the machine under supervision of the authorities of the police station and to maintain proper records thereof. It is quite evident that the Investigating Officer is not in a position to maintain the machine and keep it safe from wear and tear. The pendency of the investigation may not be a ground to

[4] 2013 Cr.L.J. 628

fulfil the mandate of Section 451 Cr.P.C. Failure to determine the ownership of the machine has led to the learned Judicial Magistrate declining the release petition filed by the Petitioner Corporation as well as the Complainant. Failure of the Petitioner Corporation to make the Complainant a party should not have deterred the learned Judicial Magistrate to issue summons upon the Complainant and hear him for the just determination of the case. The machine is not a small item which can be safely kept in a bank for safe custody. If the machine is not regularly started, used and maintained the machine may become useless before the determination of the present investigation. Admittedly neither the Complainant nor the Petitioner Corporation has approached any Court for adjudication upon the title of the machine. Both insist that the machine belongs to them. The Registration Certificate if any of the machine has not been produced by anyone. However, the Complainant has admitted that he came to learn that the machine has been registered in the name of the Petitioner Corporation. In spite of summons being issued to the Complainant who is represented by Mr. Jigmi P. Bhutia, learned Counsel no steps were taken to challenge the rejection of the release petition. The Complainant in fact would submit that he had no objection to the release of the machine to the Petitioner Corporation if it assured that the said machine would not be used by them. The very purpose of release of the machine would be lost if such a condition is imposed. The object of Section 451 Cr.P.C. appears to be that where the property which is the subject matter of the offence alleged is seized by the police it ought not to be retained in the custody of the Court or of the police for anytime longer than what is absolutely necessary. Damage due to failure to maintain it or keep it properly during investigation can lead to loss of valuable property. This Court is neither deciding the question as to the title of the machine in dispute nor the correctness of the rival versions regarding the transactions relating to the sale and purchase of the machine. This Court does not want the machine to remain in the compound of the Hingdam Police Station exposed to the vagaries of nature. To avert this situation this Court is inclined to entrust it temporarily to the Petitioner Corporation who is the ostensible purchaser of the machine, who had been in possession of the machine till it was seized by the Investigating Officer and is desirous of its custody. The Complainant on the other hand never had actual possession of the machine. The custody of the machine with the Petitioner Corporation will be on behalf of the Court and this arrangement is only till the stage when the Court passes the order regarding disposal of the machine on conclusion of the trial.

23. In the peculiar facts and circumstances this Court deems it appropriate to release the machine to the Petitioner Corporation on certain specific conditions. This Court directs the learned Judicial Magistrate to release the machine to the Petitioner Corporation on the following conditions:

a) The Petitioner Corporation shall execute a bond of 7,50,000.000/- (Rupees seven lakhs fifty thousand) only with two solvent sureties of the like amount to the satisfaction of the learned Judicial Magistrate.

b) The Petitioner shall produce the machine before the Investigating Officer during the period of investigation and before the Court during the trial if any as required by law or by specific orders of the Court.

c) The Petitioner Corporation shall maintain the machine and not transfer its possession or ownership to any third party until disposal of the case.

d) The Investigating Officer shall prepare a *"panchnama"* as well as keep photographic evidence of the machine before handing over possession of the machine to the Petitioner Corporation and if necessary evidence may also be recorded by the Court describing the nature of the machine in detail.

24. The Complainant and the Petitioner Corporation are at liberty to approach the Civil Court or any Court of appropriate jurisdiction as advised to decide upon the title of the said machine if the law permits. Until its determination or the determination by the Court regarding the disposal of the machine whichever is earlier the Petitioner Corporation shall keep the custody of the machine on behalf of the Court. The passing of this order shall not entitle the Petitioner Corporation to claim a better title than what it may have in fact and this order shall not be read against the Complainant while determining title of the machine.

25. The Writ Petition is disposed of on the aforesaid terms. No order as to costs.

26. Certified copy of this order shall be forwarded to the Court of the learned Judicial Magistrate, First Class, East Sikkim, at Gangtok forthwith for compliance.

SLR (2018) SIKKIM 1099

(Before Hon'ble the Acting Chief Justice)

Crl. A. No. 09 of 2017

State of Sikkim ….. APPELLANT

Versus

Ram Nath Choudhary ….. RESPONDENT

For the Appellant: Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

For the Respondent: Mr. B.K. Gupta, Advocate(Legal Aid Counsel).

Date of decision: 31st August 2018

A. Protection of Children from Sexual Offences Act, 2012 – S. 10 – Ingredients – The victim was 14 years old and depended on her father who instead of offering her protection and being an anchor to all her emotional needs perpetrated continuous sexual assault on her in the presence of her 11 year old brother. One cannot even imagine the trauma that the child suffered and the indelible adverse imprint and scar that the incestuous act has left in her psyche – Held, in view of the facts and circumstances sentence enhanced.

(Paras 8 and 9)

Appeal allowed.

Case cited:

1. O. M. Cherian *alias* Thankachan v. State of Kerala and Other (2015) 2 SCC 501.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. Assailing the minimum sentence of rigorous imprisonment for ten years under Section 376(2)(f)(i)(n) of the Indian Penal Code, 1980 (for short "the IPC") with fine of Rs.2,000/- (Rupees two thousand) only, five years under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act") with fine of Rs.2,000/- (Rupees two thousand) only, and three years under Section 354A of the IPC imposed by the Learned Trial Court on the Respondent/Convict, the State-Appellant is before this Court seeking imposition of the maximum sentence against the Respondent under the provisions of law under which he was convicted.

2. By the Judgment dated 09-06-2016, in S.T. (POCSO) Case No.21 of 2015, in the Court of the Special Judge, Protection of Children from Sexual Offences Act, 2012, East District, at Gangtok, the Respondent was convicted of the offence under Section 6 and Section 10 of the POCSO Act and under Section 376(2)(f)(i)(n) and Section 354A of the IPC. Since the offence punishable under Section 376(2)(f)(i)(n) of the IPC and Section 6 of the POCSO Act are the same, the Learned Trial Court imposed the punishment under Section 376(2)(f)(i)(n) of the IPC which is greater in degree, keeping in mind the provisions of alternative punishment provided under Section 42 of the POCSO Act. The impugned sentence was as follows;

(i) For the offence under Section 376(2)(f)(i)(n) of the IPC, the convict was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- (Rupees two thousand) only.

(ii) For the offence under Section 10 of the POCSO Act, the convict was sentenced to undergo rigorous imprisonment for five years and pay a fine of Rs.2,000/- (Rupees two thousand) only.

All the sentences of fine bore a default clause of imprisonment.

(iii) For the offence under Section 354A of the IPC, the convict was sentenced to undergo rigorous imprisonment for three years.

The period of imprisonment already undergone by the convict during investigation and trial was ordered to be set off against the sentences imposed which were ordered to run consecutively.

3. The submission of Learned Additional Public Prosecutor is that the offence pertains to penetrative sexual assault by the Respondent on his own child aged about 14 years and therefore in view of the gravity of the offence, he ought to be sentenced to life imprisonment.

4. On the other hand, Learned Counsel for the Respondent would contend that since Learned Trial Court has ordered that the sentence is imposed on the convict are to run consecutively, the total imprisonment is of 13 years and is thus commensurate with the offence.

5. Having heard Learned Counsel for the parties, it is apposite to refer to the Judgment of this Court in Crl.A. No.20 of 2016 dated 02-04-2018 : Ram Nath Choudhary vs. State of Sikkim, the Appellant therein is the Respondent in the instant Appeal. Having been convicted by the aforesaid Judgment of the Learned Trial Court, he assailed the Judgment and Order on Sentence in the aforementioned Appeal. This Court while upholding the Judgment and Order on Sentence of the Learned Trial Court modified the sentence to the extent that the various sentences of imprisonment imposed on the Appellant shall run concurrently and not consecutively relying on the ratio of the Hon'ble Supreme Court in ***O. M. Cherian alias Thankachan vs. State of Kerala and Others***[1] wherein it was held as follows;

> **"17.** This Court in Mohd. Akhtar Hussain v. Collector of Customs [(1988) 4 SCC 183 : 1988 SCC (Cri) 921], recognised the basic rule of conviction arising out of a single transaction justifying the concurrent running of the sentences. The following

[1] (2015) 2 SCC 501

passage in this regard is relevant to be noted: (SCC p. 187, para 10)

> "10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different." ……."

6. The facts shorn of details are that, on 14-07-2015, P.W.14, the Child Protection Officer in the Social Justice, Empowerment and Welfare Department, Government of Sikkim, lodged an FIR Exhibit 23, informing therein that P.W.1, the Victim, aged about 14 years, studying in Class V in a Junior High School, as per information from the School Authorities was being sexually abused by her father, the Respondent. During counselling, the Victim P.W.1 confided to P.W.14, that, her father had been sexually assaulting her since she was in Class III. That, he would beat up her younger brother, P.W.2, and send him out during the evenings after which he would sexually assault her. Both of them lived with their father whom they are afraid of, their mother having abandoned them when they were very young. The FIR also reported that the Victim had confided to P.W.15, her neighbour, about the incident and seemed to be mentally disturbed. Acting on such information, the Police registered a Case under Section 376 IPC read with Section 4 of the POCSO Act against the Respondent, viz., Sadar P.S. Case No.193/ 2015, dated 14-07-2015, and endorsed it to the Investigating Officer (for short "I.O."). Investigation would reveal that the Respondent was aged about 45 years, his wife had abandoned him and he was living with his minor children, the Victim and a son, aged about 11 years, in a single rented room. The Respondent remained inebriated most of the time and would sexually abuse the Victim by committing various sexual acts on her person notwithstanding the presence of her brother who on

protesting was subjected to physical assaults by the Respondent. The Victim despite warnings from the Respondent of dire consequences if she disclosed the offence to anyone else, did so to P.W.15, her neighbour, who in turn brought it to the notice of P.W.5, the Victim's relative. P.W.5 took the Victim away for some time to her own house, which was short-lived on the Respondent's refusal to permit her to continue her stay. The neighbours thereafter became aware of the sexual assaults by the Respondent on the Victim. On 14-07-2015, P.W.3, the Teacher of the School which the Victim, P.W.1, was attending, on learning of the alleged sexual assault on the Victim, shared the information with P.W.4 and P.W.6. Thereafter, they summoned the Victim and enquired into the matter which she confirmed. P.W.6 then contacted the Legal Officer of the Social Justice, Empowerment and Welfare Department, who directed P.W.14 to enquire and take necessary action, pursuant to which the above facts came to light. The Victim was subjected to medical examination as also the Respondent. The Medicolegal Report of the minor Victim suggested that she had been subjected to sexual intercourse while the medical report of the Respondent indicated that he was not incapable of the sexual act. In the absence of a Birth Certificate of the Victim, an Ossification Test was conducted on her and her bone age estimated to be between 14 to 15 years. On completion of the investigation, Charge-Sheet was submitted against the Respondent under Section 376(1) IPC read with Sections 4 and 8 of the POCSO Act.

7. On hearing the rival contentions of the parties, the Learned Trial Court framed Charge against the Respondent under Sections 5(1), 5(n), 9(1) and 9(n) of the POCSO Act and under Sections 376(2)(f)(i)(n) and 354A of the IPC. The Charges having been read to the Respondent, on his plea of "not guilty", the trial commenced. The Prosecution examined eighteen witnesses and on conclusion of the evidence, an opportunity was afforded to the Respondent in terms of Section 313 of the Code of Criminal Procedure, 1973, to explain the circumstances appearing in the evidence against him. Final arguments were heard and the Respondent was convicted and sentenced as detailed hereinabove.

8. It is evident that the victim was 14 years old and dependant on her father who instead of offering her protection and being an anchor to all her emotional needs perpetrated continuous sexual assault on her in the presence of her 11 year old brother. One cannot be even begun to imagine the

trauma that the child suffered and the indelible adverse imprint and scar that the incestuous act has left in her psyche.

9. In view of the facts and circumstances that have emanated in the discussions in the Judgment of this Court *supra* which for brevity is not being detailed herein, I am of the considered opinion that enhancement of sentence would indeed be the proper course to meet the ends of justice.

10. Consequently, the Respondent is hereby sentenced as follows;

(i) For the offence under Section 376(2)(f)(i)(n) of the IPC, the convict is to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/- (Rupees two thousand) only, in default of payment of fine, he shall undergo further simple imprisonment of six months.

(ii) For the offence under Section 10 of the POCSO Act, the convict is to undergo rigorous imprisonment for seven years and pay a fine of Rs.2,000/- (Rupees two thousand) only, in default of payment of fine, he shall undergo further simple imprisonment of six months.

(iii) For the offence under Section 354A of the IPC, the convict is sentenced to undergo rigorous imprisonment for three years.

As ordered by this Court in Crl.A. No.20 of 2016 (supra), the sentences of imprisonment imposed hereinabove shall run concurrently.

11. The sentences of imprisonment imposed by the Learned Trial Court stand modified to the above extent.

12. Appeal allowed to the above stated extent and disposed of.

13. No order as to costs.

14. Records be remitted forthwith.

HIGH COURT OF SIKKIM
GANGTOK
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