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(Page 1 to 80)

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Contents

Pages

TABLE OF CASES REPORTED IN THIS PART

EQUIVALENT CITATION

Sl.No.	Case Title	Equivalent Citation	Page No.
1.	Sancha Hang Limboo v. State of Sikkim **(DB)**	2018 SCC OnLine Sikk 10	1-27
2.	Durga Prasad Shrestha v. Special Secretary, Tourism Department and Ors.	2018 SCC OnLine Sikk 05	28-52
3.	Manoj Darjee and Others v. State of Sikkim	2018 SCC OnLine Sikk 04	53-61
4.	The Principal Secretary, Department of Commerce & Industries, Government of Sikkim v. Snowlion Automobile Pvt. Ltd.	2018 SCC OnLine Sikk 06	62-80

SUBJECT INDEX

circumspect while handing out sentence and to abide by the provisions of S. 354.

Sancha Hang Limboo* v. *State of Sikkim ***1 - G***

Code of Criminal Procedure, 1973 – S. 357 – Order to pay compensation – A bare perusal of the provision reveal that it does not envisage payment of the fine amount to any fund. It is either to be paid to the prosecution for defraying the expenses incurred by it or to any person as compensation for loss or injury caused by the offence and recoverable in a Civil Court or the Court may order that the accused pay such compensation to the person who has suffered loss or injury by the act of the accused.

Sancha Hang Limboo* v. *State of Sikkim ***1 - H***

Code of Criminal Procedure 1973 – S. 482 – Extra-ordinary discretionary jurisdiction of the High Court under S. 482 to quash FIR/ criminal proceeding involving non-compoundable offences – Indian Penal Code, 1860, S. 324 – Quashing of FIR – Joint application made on behalf of the parties for quashing FIR in view of the compromise arrived at between them- Held, the High Court is competent enough to exercise its extra-ordinary jurisdiction under Section 482 of the Cr.P.C. to quash FIR, Charge Sheet and consequential criminal proceedings pending in the trial Court in the particular facts and circumstances of the case, in the interest of social relationship and peace in the society.

Manoj Darjee and Others* v. *State of Sikkim ***53 - A***

Constitution of India – Article 226 – Ambit and scope of extra-ordinary jurisdiction of High Court – High Court has discretionary extra-ordinary jurisdiction under Article 226 to correct the manifest, palpable error of law or facts which stare on the face of it – It is manifest that the jurisdiction of the High Court entertaining a Writ Petition is not affected in spite of alternative statutory remedies, particularly, wherein it is shown that the tribunal judicial authority had exercised its power having no jurisdiction or had exercised its jurisdiction without any legal foundation. It is for the party invoking extra-ordinary jurisdiction to demonstrate that there has been (i) a breach of principles of natural justice; or (ii) procedure required for decision has not been adopted, or (iii) to seek enforcement or infringement of violation of fundamental rights; or (iv) proceedings taken or order passed thereon are wholly without jurisdiction, or (v) proceeding itself is an abuse of process of

law. - High Court is fully competent to exercise its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution to correct gross, palpable error of law or facts, to stave off miscarriage of justice.

The Principal Secretary, Department of Commerce and Industries Government of Sikkim* v. *M/s. Snowlion Automobile Pvt. Ltd., 62 - A

Constitution of India – Article 226 – Arbitration and Conciliation Act, 1996 – Ss. 34 and 37 – Held, Petitioner-State has already availed the efficacious remedy as provided under statute. In such an event also and further the Petitioner-State has failed to demonstrate that there was any infringement of fundamental rights or violation of principles of natural justice or the procedure required for decision was not adopted or the proceeding was taken and/or order was passed without any jurisdiction on abuse of process of law, to invoke jurisdiction under Article 226 of the Constitution of India.

The Principal Secretary, Department of Commerce and Industries Government of Sikkim* v. *M/s. Snowlion Automobile Pvt. Ltd., 62 - D

Constitution of India – Article 226 – Pre-condition for exercising extra-ordinary jurisdiction under Article 226 of the Constitution is gross or palpable error on the fact of it. It has clearly been held in a catena of decisions that the high prerogative writ under Article 226 may be issued not to correct mere error but the error which is manifest, palpable and gross leading to miscarriage of justice. The Court is not required to delve deep into the issue on re-appreciation or re-examination of evidence – Held, In this case, indisputably there is no gross failure of justice or grave injustice on the basis of alleged jurisdictional error. Thus, exercise of extra-ordinary jurisdiction of High Court under Article 226 of the Constitution is not warranted.

The Principal Secretary, Department of Commerce and Industries Government of Sikkim* v. *M/s. Snowlion Automobile Pvt. Ltd., 62 - B

Indian Evidence Act, 1872 – S. 35 – Relevancy of entry in public record or an electronic record made in performance of duty – A document may be admissible under S. 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. Infact, the ratio *supra*emphasises that the entries in School

Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

Sancha Hang Limboo* v. *State of Sikkim ***1 - B***

Indian Evidence Act, 1872 – S. 35 – The requirements for admissibility of a document under S. 35 of the Evidence Act can be summarized as follows: (i) The document must be in the nature of an entry in any public or other official book, register or record, (ii) It must state a fact in issue or a relevant fact; and (iii) The entry must be made by a public servant in the discharge of his official duties or in the performance of his duties especially enjoined by the law of the country in which the relevant entry is kept – *State of Bihar* v. *Radha Krishna Singh and Others* cited.

Sancha Hang Limboo* v. *State of Sikkim ***1 - C***

Indian Evidence Act, 1872 – S. 45 – Opinion of Medical Experts – The opinion of the medical expert is just an opinion and not evidence.

Sancha Hang Limboo* v. *State of Sikkim ***1 - E***

Rules relating to Transfer of Immovable Property dated 18.1.1950 – The rules relating to transfer of immovable property requires all contracts pertaining to immovable property must be in writing, signed by the parties and attested by not less than two witnesses – Exhibit – 1 would reveal that the respondent No.4 has received a sum of Rs. 2,001/- from the Appellant, but none of the required criteria as per the Rules are fulfilled. The document has not been signed by any witness nor is there a description of the property- that being so, it is clear that the document cannot be treated as a contract for sale or an agreement to sell.

Durga Prasad Shrestha,* v. *Special Secretary, Tourism Department, Government of Sikkim, and Others ***28 - A***

Sikkim State General Department Notification No. 385/G dated the 11th April, 1928 – If Exhibit - 1 was accepted as an agreement to sell, this document would require no registration for the reason that the Notification No. 385/G does not spell out that an agreement to sell is to be registered. It provides in rather nebulous terms 'other important documents' will not be considered valid until they are duly registered- there ought to be no further speculation and the only conclusion that can be arrived at in the absence of a specific rule in Sikkim, at relevant time, is that an agreement to sell requires no registration.

Transfer of Property Act, 1882 – S. 44 – Transfer by one co-owner – This Section enacts the well-known principle of substation. When one of the several co-owners transfers his share, the transferee stands in the shoes of the transferor and thereby acquires a right to join possession or part enjoyment of the property, including the right to enforce partition. This right is however subject to the conditions and liabilities affecting at the time of the transfer, the share or interest so transferred – No evidence has been furnished to indicate that the Respondent No. 3 was legally competent to transfer the property in dispute, the same having fallen in the share of the Respondent No. 4 **–** The Section specifically lays down the transferor must be legally competent to transfer his share. When the property is not his share the question of legal competence obviously would not arise as in the instant case.

Durga Prasad Shrestha,* v. *Special Secretary, Tourism Department, Government of Sikkim, and Others ***28 - G***

Transfer of Property Act, 1882 – S.53A – Part Performance – It is a settled law that when a document fails to enable a Court to ascertain its terms with reasonable clarity, the benefit of the doctrine of part performance cannot be applied.

Durga Prasad Shrestha,* v. *Special Secretary, Tourism Department, Government of Sikkim, and Others ***28 - B***

SLR (2018) SIKKIM 1

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

Crl. A. No. 11 of 2017

Sancha Hang Limboo ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 19th February 2018

A. Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging the FIR – The victim (8 years old) in her evidence has stated that she had not revealed any of the incidents of sexual assault committed by the appellant on her to either P.W.7 or P.W.8. It was only on the 6th occasion, evidently on 15-02-2016, when the appellant sent her to the bathroom where he followed and sexually assaulted her that she complained of stomach-ache after a few days, i.e., on 19-02-2016. On inquiry by P.W.8, she narrated the incident to her which led to the lodging of Exhibit 8 (FIR). The sexual assaults perpetrated on her on various occasions by the appellant were also detailed in her evidence, although she was unable to specify the time or date. Therefore, if the victim has failed to inform her parents of the previous incident(s) for one reason or another upon which we do not propose to speculate, obviously in their ignorance they would not have been in a position to lodge the FIR for those incidents. The last incident also came to light only on account of the pain in the victim's

stomach and thighs. Besides, it would not be out of place to mention that parents tend to be more circumspect about reporting such incidents bearing in mind all that is at stake for the victim as well as the family – Delay in the lodging of Exhibit 8 has been sufficiently explained.

(Para 8)

B. Indian Evidence Act, 1872 – S. 35 – Relevancy of entry in public record or an electronic record made in performance of duty – A document may be admissible under S. 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. Infact, the ratio *supra* emphasises that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

(Paras 9 and 11)

C. Indian Evidence Act, 1872 – S. 35 – The requirements for admissibility of a document under S. 35 of the Evidence Act can be summarized as follows: (i) The document must be in the nature of an entry in any public or other official book, register or record, (ii) It must state a fact in issue or a relevant fact; and (iii) The entry must be made by a public servant in the discharge of his official duties or in the performance of his duties especially enjoined by the law of the country in which the relevant entry is kept – *State of Bihar* v. *Radha Krishna Singh and Others* cited.

(Para 10)

D. Criminal Trial – Whether the question of authenticity of the Birth Certificate can be raised at the appellate stage – Cross-examination of P.W.4 and P.W.8 with regard to the victim's birth certificate, Exhibit 2 clearly reveal that no questions were put to the witness with regard to the contents of Exhibit 2 or its authenticity, neither were the contents tested for impeachability, admissibility or the mode of proof before the Learned Trial Court – The prescribed

method as per *Mahadeo s/o Kerba Maske* v. *State of Maharashtra and Another* for gauging the age of a juvenile which can be applied to the victim was not followed either by the Prosecution nor sought for by the Learned Trial Court – Appellant cannot now bring to question the contents of Exhibit 2 before this Court, the issue having not been raised before the Learned Trial Court.

(Paras 7, 9 and 15)

E. Indian Evidence Act, 1872 – S. 45 – Opinion of Medical Experts – The opinion of the medical expert is just an opinion and not evidence.

(Para 19)

F. Code of Criminal Procedure, 1973 – S. 164 – So far as the statement of the victim under S. 164 of the Cr.P.C. is concerned, it can only be used for corroboration and in any event is not substantive evidence while the non-examination of the Magistrate has no adverse repercussions on the Prosecution case which stands fortified by the evidence of the victim before the Court.

(Para 23)

G. Code of Criminal Procedure, 1973 – S. 354 – Sentencing ought to have been distinct for every offence, as each offence committed by the appellant is a separate and distinct offence – Trial Courts are advised to be more circumspect while handing out sentence and to abide by the provisions of S. 354.

(Paras 26 and 28)

H. Code of Criminal Procedure, 1973 – S. 357 – Order to pay compensation – A bare perusal of the provision reveal that it does not envisage payment of the fine amount to any fund. It is either to be paid to the prosecution for defraying the expenses incurred by it or to any person as compensation for loss or injury caused by the offence and recoverable in a Civil Court or the Court may order that the accused pay such compensation to the person who has suffered loss or injury by the act of the accused.

(Para 30)

Chronological list of cases cited:

1. State of Madhya Pradesh v. Anoop Singh, (2015) 7 SCC 773.
2. Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57.
3. Virendra *alias* Buddhu and Another v. State of Uttar Pradesh, (2008) 16 SCC 582.
4. Deepak v. State of Haryana, (2015) 4 SCC 762.
5. State of Bihar v. Radha Krishna Singh and Others, (1983)3 SCC 118.
6. Madan Mohan Singh and Others v. Rajni Kant and Another, (2010) 9 SCC 209.
7. Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 1796.
8. Mahadeo s/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
9. Sham Lal *alias* Kuldip v. Sanjeev Kumar and Others, (2009) 12 SCC 454.
10. Madan Gopal Kakkad v. Naval Dubey and Another, (1992) 2 SCR 921.
11. Krishan v. State of Haryana, (2014) 13 SCC 574.
12. State of Rajasthan v. N.K. the Accused, (2000) 5 SCC 30.
13. Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635.
14. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.
15. Robin Gurung v. State of Sikkim, Crl. A. No.33 of 2016 dated 22-09-2017.
16. Murlidhar Dalmia v. State, AIR 1953 All 245.
17. Hari Singh v. Sukhbir Singh, AIR 1988 SC 2127.

JUDGMENT

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

Calling in question the impugned Judgment dated 21-03-2017, of the Court of the Learned Special Judge (POCSO) West Sikkim, at Gyalshing, in Sessions Trial (POCSO) Case No.04 of 2016 convicting the Appellant and the Order on Sentence, dated 23-03-2017, the Appellant is now before this Court. He stood convicted under Section 5(l), 5(m) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs.20,000/- (Rupees twenty thousand) only, with a default stipulation, duly setting off the period of imprisonment already undergone by him.

2. The grounds raised herein by the Appellant are that, although the alleged incident was said to have occurred on 15-02-2016, Exhibit 8 the First Information Report (for short "FIR"), was lodged only on 19-02-2016, with no explanation afforded for the delay, raising doubts about the veracity of the Prosecution case. That, the Learned Trial Court wrongly placed reliance on Section 35 of the Indian Evidence Act, 1872 (in short 'Evidence Act') in admitting Exhibit 2, the Birth Certificate of the victim, without examining the author of the document or testing the contents, therefore, the document as also the age of the victim have remained unproved. That, the statement of the victim under Section 164 Code of Criminal Procedure, 1973 (for short "Cr.P.C".) was considered by the learned Trial Court without examining the concerned Magistrate. That, the Learned Court failed to examine that a heinous offence cannot be committed over an extended period of time without there being a hue and cry in the village. That, the Medical Report and the evidence of the Doctor reveal that the victim's hymen was intact, the *fourchette* was normal and no discharge or bleeding was seen, thereby belying the Prosecution case since it is unimaginable that penetrative sexual assault would leave the hymen intact. That, redness on the genital can easily be sustained on account of allergies or infection which are normal in a girl child or due to gynaecological problems as opined by the examining Doctor. The victim's clothes worn during the alleged offence were not produced. Her continued attendance in School coupled with absence of narration of the alleged incident to her friends or parents casts a doubt on the case, duly supported by lack of injuries on her person. The Learned Trial Court, it is

contended, failed to consider that the Appellant had cordial relations with the victim's mother, leading to the false allegation by the victim's father in a bid to settle scores, as evident from the examination of the Appellant under Section 313 Cr.P.C. Assuming but not admitting the correctness of the Prosecution version, the offence would at best fall under Section 7 of the POCSO Act, and thus, in the alternative deserve a lower sentence.

3. Refuting the arguments of the Appellant, Learned Additional Public Prosecutor while placing reliance on ***State of Madhya Pradesh*** vs. ***Anoop Singh***[1] urged that the Birth Certificate furnished by the Prosecution is sufficient proof that the child's date of birth is "03-03-2008", ancillary thereto of proof that the offence was committed on a minor, the incident having occurred on 15-02-2016. Garnering strength from the decision in ***Radhu*** vs. ***State of Madhya Pradesh***[2] it was next contended that the fact of the incident having occurred was established by the uncontroverted evidence of the minor victim's cogent and consistent evidence. Learned Additional Public Prosecutor would contend that the child was examined by the Learned Trial Court in terms of Section 33 of the POCSO Act and Section 118 of the Evidence Act to gauge her competence to testify and was satisfied thereof, towards which reliance was placed on ***Virendra alias Buddhu and Another*** vs. ***State of Uttar Pradesh***[3]. That, the evidence of the victim is clear proof that the Appellant had perpetrated the offence, therefore, the conviction and sentence be upheld.

4. We have heard at length and considered the opposing arguments of Learned Counsel for the parties. Careful examination has been made of the evidence and documents on record and the citations made at the Bar.

5. The Complaint, Exhibit 8, was lodged by P.W.7 the victim's father, on 19-02-2016 when P.W.1 the victim, complained of stomach-ache and painful thighs, alleging sexual assault on her by the Appellant. Exhibit 8 was registered by the Gyalshing Police Station as FIR No.09/2016, dated 19-02-2016, under Section 376 of the Indian Penal Code (for short "IPC") and Section 4 of the POCSO Act, 2012, upon which investigation commenced. During investigation it transpired that, the Appellant aged about 23 years had subjected the victim, aged about 8 years, to sexual assault on about six occasions at various locations at Upper Gerethang, West Sikkim, between the

[1] (2015) 7 SCC 773
[2] (2007) 12 SCC 57
[3] (2008) 16 SCC 582

months of August, 2015 to February, 2016. Both the victim and the Appellant were medically examined. The Medical Report of the victim revealed that her hymen was intact, the *fourchette* lacked injuries, but there was redness over the *labia minora* suggesting blunt injury due to blunt force but absence of spermatozoa. The Appellant's Medical Report suggested that he was not incapable of performing the sexual act. The victim's statement under Section 164 of the Cr.P.C. was recorded, her Birth Certificate seized. M.O.II the undergarment of the victim, M.O.III, a Jute Sack, on which the Appellant had allegedly sexually assaulted the victim on one occasion were also seized. On completion of investigation, Charge-sheet was submitted against the Appellant under Sections 376/506 of the IPC and Section 4 of the POCSO Act, 2012.

6. Charge was framed against the Appellant under Section 5(l), 5 (m) and 5(n) of the POCSO Act punishable under Section 6 of the same Act and under Section 506 of the IPC. The Appellant having pleaded *"not guilty"* to the Charges, trial commenced during which 9 (nine) Prosecution Witnesses were examined including the Investigating Officer. On closure of evidence, the Appellant was examined under Section 313 of the Cr.P.C. and his responses duly recorded. The Learned Trial Court considered the evidence furnished and pronounced the impugned Judgment and Order on Sentence.

7. The questions that fall for consideration before us are;

1. Whether the delay in lodging the FIR has been adequately explained?
2. Whether the question of authenticity of the Birth Certificate can be raised at the appellate stage the same having not been made an issue before the Learned Trial Court?
3. Whether absence of injuries on the victim negates commission of the offence?
4. Whether the Learned Trial Court erroneously convicted the Appellant?

8. Addressing the first question that there was a delay in the lodging of the FIR, the records would reveal that Exhibit 8 was lodged by the victim's father on 19-02-2016, informing therein that a few days prior to the lodging of the FIR and twenty to twenty-five days earlier on, the Appellant, in the

absence of P.W.7 and P.W.8 had been sexually assaulting the victim P.W.1, their 8 year old daughter. It would be apposite to notice that the victim in her evidence has stated that she had not revealed any of the incidents of sexual assault committed by the Appellant on her to either P.W.7 or P.W.8. It was only on the 6th occasion, evidently on 15-02-2016, when the Appellant sent her to the bathroom where he followed and sexually assaulted her that she complained of stomach-ache after a few days, i.e., on 19-02-2016. On inquiry by P.W.8, she narrated the incident to her which led to the lodging of Exhibit 8. The sexual assaults perpetrated on her on various occasions by the Appellant were also detailed in her evidence, although she was unable to specify the time or date. Therefore, if the victim has failed to inform her parents of the previous incident(s) for one reason or another upon which we do not propose to speculate, obviously in their ignorance they would not have been in a position to lodge the FIR for those incidents. The last incident also came to light only on account of the pain in the victim's stomach and thighs. Besides, it would not be out of place to mention that parents tend to be more circumspect about reporting such incidents bearing in mind all that is at stake for the victim as well as the family. In this context, we may refer to the decision of the Hon'ble Supreme Court in ***Deepak*** vs. ***State of Haryana***[4] wherein it was held that;

> **"15.** The courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384)]."

In the afore stated circumstances, this Court is of the opinion that the delay in the lodging of Exhibit 8 has been sufficiently explained.

9. To examine Question No. 2 *supra*, we may beneficially turn to Exhibit 2, the Birth Certificate. The date of birth mentioned therein is 03-03-2008. Exhibit 2 and Exhibit 8 considered together would reveal that, the victim's age was a few days short of 8 years when the incidents occurred. It was contended by the Appellant that the Learned Trial Court erroneously relied on Exhibit 2 by drawing strength from the provisions of Section 35 of the Evidence 4 (2015) 4 SCC 762 Act. To consider this argument, let us turn to the provisions of Section 35 of the Evidence Act, which reads as follows;

> **"35. Relevancy of entry in public record or an electronic record made in performance of duty**.—An entry in any public or other official book, register or record or any electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.**"**

10. The requirements for admissibility of a document under Section 35 of the Evidence Act can be summarized as follows;

(i) The document must be in the nature of an entry in any public or other official book, register or record;

(ii) It must state a fact in issue or a relevant fact; and

(iii) The entry must be made by a public servant in the discharge of his official duties or in the performance of his duties especially enjoined by the law of the country in which the relevant entry is kept.

[***State of Bihar*** vs. ***Radha Krishna Singh and Others***[5]]

11. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[6] the Hon'ble Supreme Court while distinguishing between admissibility of a document and its probative value observed as follows;

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[5] (1983) 3 SCC 118

[6] (2010) 9 SCC 209

"18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana*[(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.*[(1981) 1 SCC 560 : 1981 SCC (Cri) 208: AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat Singh* [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].

20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value**. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi*v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500].

22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh*

Kumar v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)**" [emphasis supplied]**

A careful reading of the extracts *supra* would clarify that the document may be admissible under Section 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. Infact, the ratio *supra* emphasises that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

12. In ***Birad Mal Singhvi vs. Anand Purohit***[7], the Hon'ble Supreme Court while discussing Exhibits 8, 9, 10 and 11 which were entries in the scholar's register, counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of Secondary School Examination of 1977 respectively, observed as follows;

> **"14.** ..... Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about theirdate of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents.

[7] AIR 1988 SC 1796

Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved.

The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmichand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely,the date of birth of the two candidates as mentioned in the documents could be proved by

admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.

....." **[emphasis supplied]**

The observations are self explanatory, succinctly differentiating between admissibility of the documents and its probative value.

13. On the heels of Section 35 of the Evidence Act, we may consider the provisions of Section 74 of the Evidence Act, which defines public documents and reads as follows;

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

The aforesaid stated provisions thus point to the fact that Exhibit 2 is covered by both the provisions.

14. The seizure of Exhibit 2, the victim's birth certificate vide Exhibit 1 Seizure Memo, is proved by P.W.4 and P.W.8. The crossexamination of P.W.4 and P.W.8 with regard to Exhibit 2 clearly reveal that no questions

were put to the witness with regard to the contents of Exhibit 2 or its authenticity, neither were the contents tested for impeachability, admissibility or the mode of proof before the Learned Trial Court. Apart from the above, attention is also drawn to the judgment in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[8] wherein it was held that the age of the juvenile has to be gauged by the following methods;

> **"12.** …….....…….....
>
> **12. (3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—
>
> (*a*) (*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (*iii*) the birth certificate given by a corporation or a municipal authority or a Panchayat;
>
> Under Rule 12(3)(*b*), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(*a*)(*i*) to (*iii*), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"**
>
> **[emphasis supplied]**

The above prescribed method for gauging the age of a juvenile can be applied to that of the victim but was not followed either by the Prosecution nor sought for by the Learned Trial Court.

[8] (2013) 14 SCC 637

15. Therefore, can the authenticity of the contents of Exhibit 2 be raised now? The answer would have to be in the negative. In this context, we may beneficially turn to the ratio in ***Sham Lal alias Kuldip*** vs. ***Sanjeev Kumar and Others***[9] where the Hon'ble Supreme Court while considering whether there was a validly executed Will in favour of the Defendants No.1 and 2, discussed as follows;

> **"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]**

[9] (2009) 12 SCC 454

This ratiocination would aptly apply to the present circumstances and hence the Appellant cannot now bring to question the contents of Exhibit 2 before this Court, the issue having not been raised before the Learned Trial Court.

16. That having been settled, this Court consequently proceeds on the premise that in terms of Exhibit 2 the victim was a few days short of 8 years on the date that the matter was reported and the incident had been perpetrated on her.

17. Now to address Question No.3, the argument that the victim did not suffer injuries on her body thereby negating sexual assault also holds no water. The Doctor, P.W.6, on examining the victim noted as follows;

> **"**.....
>
> No discharge, bleeding seen. Fourchette - normal. Hymen – intact. Redness present over the left labia minora about 1.5 cm x 0.1 mm.
>
> Three vaginal swabs taken and handed over to the police.
>
> Opinion reserved till reports are available.
>
> Opinion — Local examination is suggestive of blunt injury due to the blunt force. However, lab report shows absence of spermatozoa.
>
> .....**"**

Although the hymen was not ruptured, redness was found on the *labia minora* and it was opined that it could be due to application of blunt force.

18. Modi's Medical Jurisprudence and Toxicology, 24th Edition, in Chapter 31 – *Sexual Offences* at Page 668, explains the result of penetrative sexual assault as extracted hereunder;

> **"**(4) .....
>
> The fourchette and posterior commissure are not usually injured in cases of rape, but they

> may be torn if the violence used is very great. The extent of injury to the hymen and the genital canal depends upon the degree of disproportion between the genital organs of both the parties and the violence used on the female.
>
> In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.
>
> ....." **[emphasis supplied]**

19. Besides, the opinion of the medical expert is just that, an opinion and not evidence. We may refer to ***Radhu v. State of Madhya Pradesh*** (*supra*)**,** where the Hon'ble Supreme Court held that;

> **"6.** ..... Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. ....."

20. This observation is buttressed with the observation in ***Madan Gopal Kakkad v. Naval Dubey and Anr.***[10], it was held as hereinbelow;

> **"34.** A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own

[10] (1992) 2 SCR 921

judgment on those materials after giving due regard to the expert's opinion because once the experts opinion is accepted, it is not the opinion of the medical officer but of the Court.**"**

The above pronouncements set at rest the role and value of a medical expert who is called as a witness.

21. In ***Krishan*** vs. ***State of Haryana***[11] it was ruled that it is not expected that every rape victim should have injuries on her body to prove her case. In ***State of Rajasthan*** vs. ***N. K. the Accused***[12], it held in Paragraph 18 as follows;

> **"18.** …….. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sk. Zakir* [*Sk. Zakir* v. *State of Bihar*, (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In *Balwant Singh* [*Balwant Singh* v. *State of Punjab*, (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case

[11] (2014) 13 SCC 574
[12] (2000) 5 SCC 30

> expected to offer such resistance as would cause injuries to her body. In *Karnel Singh* [*Karnel Singh* v. *State of M.P.*, (1995) 5 SCC 518 : 1995 SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a common-sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.**" [emphasis supplied]**

In ***Ranjit Hazarika v. State of Assam***[13], the Hon'ble Supreme Court of India held that non-rupture of hymen or absence of injury on victim's private part does not belie her testimony. The Court further held that the opinion of the doctor that no rape was committed cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix.

The rationale in the above decisions have to be borne in mind and are undoubtedly relevant to the matter in hand.

22. That apart, it would be trite to once again walk through the provisions of Section 29 of the POCSO Act, 2012, which lays down as follows;

> **"29. Presumption as to certain offences.—** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court *shall presume*, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

[13] (1998) 8 SCC 635

> Nothing to the contrary has been proved beyond a reasonable doubt by the Appellant as envisaged by the above provision and Section 30 of the POCSO Act.

23. So far as the statement of the victim under Section 164 of the Cr.P.C. is concerned, it can only be used for corroboration and in any event is not substantive evidence while the non-examination of the Magistrate has no adverse repercussions on the Prosecution case which stands fortified by the evidence of the victim before the Court. In ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[14] the Hon'ble Supreme Court opined as follows;

> **"22.** It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called the Evidence Act), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an

> accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.**"**

24. From the entire facts and circumstances discussed hereinabove, it can safely be concluded that the finding and conviction handed out to the Appellant by the Learned Trial Court was neither erroneous nor brooks any interference.

25. However, it may be pointed out that while convicting the Appellant in the impugned Judgment, the learned Trial Court ordered as follows;

> 37. ,.....I, therefore hereby find the accused guilty as charged for having repeatedly committed aggravated penetrative sexual assault (section 5 (l) POCSO Act 2012) on a child below 12 years (section 5(M) of POCSO Act 2012) who is related to him, being his niece (section 5(n) POCSO Act 2012) and thus convict him to be sentenced accordingly under section 6 of POCSO 2012.

26. While meting out Sentence to the Appellant, the learned Trial Court ordered as herein below;

> **"5.** Hence considering the gravity of the offence, I am of the view that the ends of justice would be well served if the convict is sentenced under Section 6 of the POCSO Act, 2012 to undergo rigorous imprisonment for a term of 15 years and to pay of (*sic*) fine of Rs.20,000/-. The fine amount shall be deposited in the fund for the Sikkim Compensation to Victims Scheme. In the event of default on payment of fine, convict shall undergo rigorous imprisonment for a term of 2 years".

As is apparent one consolidated Sentence of rigorous imprisonment of 15 years was handed out for the three different offences without

application of mind, in as much as the sentencing ought to have been distinct for every offence, as each offence committed by the Appellant is a separate and distinct offence. The learned Court could have finally ordered that the Sentences shall run concurrently. The imposition of fine also suffers from the same defect.

27. In a similar situation, this Court in ***Robin Gurung vs. State of Sikkim***[15] relying on the decision of the Hon'ble Allahabad High Court in ***Murlidhar Dalmia vs. State***[16] held at Paragraph 29 as follows;

> ***"29.*** ..... conclusion thereof would be that *the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done*. Thus, much was held by the Hon'ble Allahabad High Court in ***Murlidhar Dalmia*** vs. ***State*** [AIR 1953 All 245] and is ostensibly applicable herein. It was further held therein that *We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, ...* Needless to say we garner support from this observation.**"**

Of course, for the purposes of the instant matter, we once again revert to and draw succour from the above observation.

28. In light of the above circumstances, the learned Trial Courts are advised to be more circumspect while handing out sentence and to abide by the provisions of Section 354 of the Cr.P.C., which are reproduced for reference and understanding;

> **"354. Language and contents of judgment.**—(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—
>
> (a) shall be written in the language of the Court;

[15] Crl. A. No.33 of 2016 dated 22-09-2017
[16] AIR 1953 All 245

(b) shall contain the point or points for the reasons for the decision;

(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;

(d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

(4) .....

(6) .....

(7) .....**"**

29. It is further noticed that the learned Trial Court has failed to make any order for payment of compensation to the victim as is wont. We thus invoke the provisions of the Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016. In terms of the said Scheme, a sum of Rs.3,00,000/- (Rupees three lakhs) only, is awarded as compensation to the minor victim and shall be made over by the Sikkim State Legal Services Authority.

30. It is also noticed that the learned Trial Court has ordered that the fine amount be deposited in the fund of Sikkim Compensation to Victims Scheme. In this context, it would be necessary to refer to the provisions of Section 357 of the Code of Criminal Procedure, 1973 for clarity, which lays down as follows;

> **"357. Order to pay compensation**. (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
>
> (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
>
> (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

In ***Hari Singh v. Sukhbir Singh***[17], while discussing the provisions of Section 357 of the Code of Criminal Procedure, 1973 it was, *inter alia*, held that;

> **"10.** ..... In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some

[17] AIR 1988 SC 2127

> extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way".

The purpose of Section 357 of the Code of Criminal Procedure, 1973 has thus been clearly elucidated. A bare perusal of the provision reveal that it does not envisage payment of the fine amount to any fund. It is either to be paid to the prosecution for defraying the expenses incurred by it or to any person as compensation for loss or injury caused by the offence and recoverable in a Civil Court or the Court may order that the accused pay such compensation to the person who has suffered loss or injury by the act of the accused. Consequently, the Order requiring the fine amount of Rs.20,000/- (Rupees twenty thousand) only, to be deposited in the fund for the Sikkim Compensation to Victims is set aside and it is hereby ordered that the said amount be made over to the victim.

31. Consequently, a sum of Rs.2,00,000/- (Rupees two lakhs) only, from the compensation of Rs.3,00,000/- (Rupees three lakhs) only, and a sum of Rs.20,000/- (Rupees twenty thousand) only, granted to the victim as hereinabove, shall be deposited in a fixed deposit with a Nationalised Bank in the name of the minor till she attains majority, while a sum of Rs.1,00,000/- (Rupees one lakh) only, shall be utilised as deemed necessary for the rehabilitation/treatment of the child.

32. No order as to costs.

33. Copy of this Judgment be transmitted to the Court of the Learned Special Judges (POCSO) of all the Districts for information and compliance.

34. Copy be made over to the Member Secretary, Sikkim State Legal Services Authority, for information and compliance.

35. Records be remitted forthwith to the Court of the Learned Special Judge (POCSO), West Sikkim, at Gyalshing.

SLR (2017) SIKKIM 28

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

RSA No. 01 of 2015

Durga Prasad Shrestha, ….. **APPELLANT**

Versus

Special Secretary,
Tourism Department,
Government of Sikkim and Others ….. **RESPONDENTS**

For the Appellant: Mr. B. Sharma, Senior Advocate with Mr. Bhola Nath Sharma, Advocate for the Appellant.

For Respondent 1 to 2: Mr. Karma Thinlay, Senior Government Advocate with Mrs. Sabina Chettri, Legal Retainer (Tourism & Civil Aviation Department) and Mrs. Pollin Rai, Assistant Government Advocate for the State.

For Respondent 3: Mr. Tashi Rapten Barfungpa, Legal Aid Counsel

For Respondent 4: None

Date of decision: 19th February 2018

A. Rules relating to Transfer of Immovable Property dated 18.01.1950 – The rules relating to transfer of immovable property requires all contracts pertaining to immovable property must be in writing, signed by the parties and attested by not less than two witnesses – Exhibit-1 would reveal that the respondent No.4 has received a sum of Rs. 2,001/- from the Appellant, but none of the required criteria as per the Rules are fulfilled. The document has not

been signed by any witness nor is there a description of the property. That being so, it is clear that the document cannot be treated as a contract for sale or an agreement to sell.

(Para 21)

B. Transfer of Property Act, 1882 – S. 53A – Part Performance – it is a settled law that when a document fails to enable a Court to ascertain its terms with reasonable clarity, the benefit of the doctrine of part performance cannot be applied.

(Para 22)

C. Sikkim State General Department Notification No. 385/G dated the 11th April, 1928 – If Exhibit – 1 was accepted as an agreement to sell, this document would require no registration for the reason that the Notification No. 385/G does not spell out that an agreement to sell is to be registered. It provides in rather nebulous terms 'other important documents' will not be considered valid until they are duly registered – There ought to be no further speculation and the only conclusion that can be arrived at in the absence of a specific rule in Sikkim, at relevant time, is that an agreement to sell requires no registration

(Para 24)

D. Sikkim State General Department Notification No. 385/G – Notification Notification No. 385/G allows for validation and admission in Court to prove title or other matters only if the Court opines that it ought to have been registered.

(Para 24)

E. Transfer of Property Act, 1882 – S. 41 – Transfer by ostensible owner – It is an exception to the general rule that a person cannot confer a better title that he had. Being an exception, the onus is on the transferee to show the transferor was the ostensible owner of the property and that he had after taking reasonable care to ascertain that the transferor had the power to make the transfer, acted in good faith. The care required of a transferee is that which an ordinary man of business is expected to take – If the ostensible owner is in possession of the property and he also produces the title deed, the transferee cannot be expected to

make a roving and searching enquiry in the absence of any ground for suspicion that the transferor may not be the real owner.

(Para 27)

F. Transfer of Property Act, 1882 – S. 43 – Transfer by unauthorized person who subsequently acquires interest in property transferred - The provisions of Section 43 of the TP Act makes it clear that when a person with imperfect title transfers the property for consideration and subsequently the transferor's title becomes perfect in law, the transferee is entitled to enforce the terms of the contract by equitable doctrine of feeding the grant by estoppels – The Law assumes that the transferor has no title over at least a portion of a property he has transferred, but which he has since acquired, in which case, upon the principles of elementary equity he is bound to make good his representation to the transferee. This Section, however, has no application when the transfer is vitiated or the property transferred was not transferrable.

(Para 29)

G. Transfer of Property Act, 1882 – S. 44 – Transfer by one co-owner – This Section enacts the well-known principle of substation. When one of the several co-owners transfers his share, the transferee stands in the shoes of the transferor and thereby acquires a right to join possession or part enjoyment of the property, including the right to enforce partition. This right is however subject to the conditions and liabilities affecting at the time of the transfer, the share or interest so transferred – No evidence has been furnished to indicate that the Respondent No. 3 was legally competent to transfer the property in dispute, the same having fallen in the share of the Respondent No. 4 – The Section specifically lays down the transferor must be legally competent to transfer his share. When the property is not his share the question of legal competence obviously would not arise as in the instant case.

(Para 30)

H. Transfer of Property Act, 1882 – The Learned Courts below while examining Exhibit – 1 have concluded that the document being an unregistered document transfers no title or possession to the

Appellant, the document being an unregistered document in terms of S. 54 of the T.P. Act. The learned Trial Courts have deemed Exhibit – 1 to be a Sale Deed document while reaching the above conclusion when infact it is neither an agreement to sell or a Deed of Sale being a *Dhan Rashid,* a Money Receipt or thereby a Hand Note, but it cannot be denied that S. 54 of the TP Act was specifically in vogue in Sikkim at the relevant time the Rules of 1950 standing testimony to this – Even if the finding of the learned Trial Courts that Exhibit 1 was a Sale Deed document requiring registration under S. 54 of the TP Act is erroneous, it cannot be denied that the Section was enforced in view of the above Rules – Held, the finding of the learned Courts below that Exhibit 1 is a sale deed is set aside this Court having concluded that the same is a Money Receipt.

(Para 33)

Appeal dismissed

Chronological list of cases cited:

1. Bishnu Kumar Rai v. Minor Mahendra Bir Lama and Others, AIR 2005 Sikkim 31.
2. Uday Sapkota v. Lakshimi Prasad Sapkota, AIR 2013Sikkim 21.
3. Smt. Leela Krishnarao Pansare and Others v. Babasaheb Bhanudas Ithape and Others, AIR 2014 SC 2867.
4. Union of India v. Ibrahim Uddin and Another, (2012) 8 SCC 148.
5. M/s Technicians Studio Pvt. Ltd. v. Smt. Lila Ghosh and Another, AIR 1977 SC 2425.
6. P. Chandrasekharan and Others v. S. Karnakarajan & Others, AIR 2007 SC 2306.
7. Gowardhan v. Ghasiram and Others, AIR 2002 MP 130.
8. Swarnendu Das Gupta v. Smt. Sadhana Banerjee, AIR 2015 Cal 46.
9. Kinchok Tshering Lepcha v. Kunzang Bhutia, RSA No. 2 of 2012.
10. Furden Tshering Bhutia and Others v. Payzee Bhutia (Sherpa) and Others, AIR 1954 SC 526.

11. Neelu Narayani (Dead) through LRS. and Others v. Lakshmanan (D) through LRS and Others, (1999) 9 SCC 237.

12. Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Others, (1999) 3 SCC 722.

13. Durga Prasad Pradhan v. Palden Lama and Another, AIR 1981 Sikkim 41.

JUDGMENT

Meenakshi Madan Rai, J.

1. This Appeal has wound its way to this Court on the Appellant being aggrieved by the concurrent findings of the learned Civil Judge, West Sikkim at Gyalshing, in Title Suit No. 2 of 2014 and the learned District Judge, West Sikkim at Gyalshing, in Civil Appeal No. 1 of 2014, which dismissed his suit seeking Declaration, Confirmation of Possession, Mutation and other Consequential reliefs.

2. Before the learned Trial Court, the Appellant was the Plaintiff while the Respondents herein were the Defendants, in the same order of appearance.

3. The facts averred by the Appellant before the learnedTrial Court were that, he is the owner in possession of two plots ofland bearing Khasra No.366 measuring an area of 0.2020 hectare and Khasra No. 366/506, measuring an area of 0.0760 hectare, falling under Singlitam Block, Malli Elaka, Gyalshing, West Sikkim, from 1978 having purchased the property from one Sancha Man Subba (Respondent No.4), son of Kalu Ram Subba, resident of Darap, West Sikkim, in the year 1978, the said property being the share of Respondent No.4, inherited from his father. The sale was effected between them by executing Exhibit 1 – 'Dhan Rashid' on 15.7.1978, scribed by one Karna Singh Subba, since deceased. That, Exhibit 1 remained unregistered as valid partition of the inherited properties between the brothers, Respondents No.3 and 4 remained incomplete, but the Appellant remained in continuous and undisputed physical possession of the said properties since purchase and paid all government taxes to the concerned departments in the name of Kalu Ram Subba. That, around 1989-90, the Appellant received compensation from the concerned Department on account of damage caused to his property due to

construction of a power project at Rimbi. In October 2002, the Appellant came to learn that the Respondent No.3 was attempting to transfer the above properties in his name to avail compensation from the Government who proposed to acquire the property. The Appellant vide letter dated 25.10.2002 protested this step and apprised the District Collector of the facts as above to which no response was forthcoming. To the contrary, Respondent No.3 lodged a false complaint in November 2005 before the concerned Panchayat President of Darap, West Sikkim, where on being summoned the Appellant attended and explained his stand before the Panchayat by way of documents pertaining to the scheduled property, the Respondent No.3 failed to put in an appearance. In November 2005, the Appellant came to learn that the scheduled properties excluding a certain portion had been sold to the Tourism Department, Government of Sikkim, to which he again protested to the concerned Department vide letter dated 16.11.2005 enclosing title deeds of the scheduled property. The same month Respondent No.3 lodged a complaint before the District Collector, West Sikkim, that the scheduled properties was sold by him to the Government but the Appellant was erecting a house therein. The matter was referred to the Lok Adalat, in vain. The Appellant then issued a Section 80 Notice under the Code of Civil Procedure, 1908 (hereinafter CPC') to the Tourism Department but this was followed by a false complaint against the Appellant by the Tourism Department before the District Collector, West Sikkim, upon which the District Collector registered a case against him under the Sikkim Public Premises (Eviction of Unauthorized Occupant and Rent Recovery) Act, 1980 and issued Notice. The Respondents have thereafter continuously threatened to dispossess the Appellant illegally from his property and hence, the Title Suit filed by him which was decided against him as also the Appeal, which went against him.

4. The Respondents No.1 and 2 filed a joint Written Statement denying and disputing the claims of the Appellant and asserting that in the year 2002 the Defendant No.3 who was in possession and enjoyment of his partition share of ancestral property, voluntary sold out the same and handed over its possession to the Defendant No.1 in 2003. That, consideration was also paid for the said transaction through the Respondent No.2 in May 2003. That, the property never belonged to Respondent No.4 and alleged that Exhibit 1 is a document manufactured between the Appellant and the Respondent No.4 for the purposes of this suit. It was denied that Notice under Section 80 of the CPC was ever issued by the Appellant to the

Respondents No.1 and 2 and hence, the suit be dismissed.

5. Respondents No.3 and 4 failed to file any Written Statement, but the Respondent No.3 was listed and appeared as a witness for the Respondent No.1.

6. The learned Trial Court framed the Issues hereunder for determination, *viz*;

Issue No.1 - Whether the plaintiff is the owner of the suit land? (*Onus on the plaintiff*)

Issue No.2 - Whether the defendant No.4, Sancha Man Subba ever had the right, title and interest over the suit land? (*Onus on the plaintiff*)

Issue No.3 - Whether the defendant No.3, Makar Dhoj Subba had a right, title and interest to sell out the suit property to the defendant No.1? (*Onus on defendant No.1 and 2*)

Issue No.4 - Whether the defendant No.3 was in actual physical possession of the suit land when the same was acquired by the defendant No.1 i.e. the District Collector, West District for the Tourism Department, Government of Sikkim? (*Onus on defendant No.1 and 2*)

Issue No.5 - To what relief or reliefs the parties are entitled to? (*Onus on plaintiff*)

7. To establish his case, the Plaintiff examined himself and his son Keshav Pradhan as well as one Kul Bahadur Subba, M. B. Tamang, Bharat Bhoj Subedi and Pradeep Chettri. The Defendant No.1 examined the Joint Director, Tourism Department, the Defendant No.3 and Shiv Kumar Subba, the then Revenue Officer in the office of the District Collectorate, West Sikkim.

8. Issues No. 1 and 2 being interrelated were taken up together and the learned Trial Court concluded that there was no evidence to establish right, title and interest of Respondent No.4 over the suit land, thus the only foundation connecting the suit land to the Plaintiff was also destroyed. The learned Trial Court also concluded that adverse possession could not be

established by the Appellant. While deciding Issue No.3 in favour of the Defendants, it determined that there was nothing on record to suggest that the Defendant No.4 was opposed to the transaction executed between he Defendant No.3 and Defendant No.1, thereby making it discernible that the Defendant No.3 was well within his rights to sell out the suit property to Defendant No.1. Issue No.4 was decided against the Defendants but with the observation that the transaction made by him with Defendant No.1 would not be effected, since no law prescribes that the owner need be in physical possession of the land at the time it is being acquired by another. The suit of the Plaintiff ultimately stood dismissed while deciding Issue No.5.

9. Assailing this Judgment, an Appeal was preferred before the learned District Judge who after considering the evidence on record found no infirmity or illegality in the impugned Judgment and thereby upheld the same. The Appellant now stands before this Court on Second Appeal being admitted on the following substantial question of law;

> **"**Whether the Courts below erred in deciding the case by resorting to the provisions of the Transfer of Property Act, 1882, when Exhibit-1 was executed on 15.07.1978 prior to extension and enforcement of the Transfer of Property Act, 1882 in Sikkim, and therefore, wrongly interpreted Exhibit-1 in view of the other exhibited documents being Exhibit-6, Exhibit-11 and Exhibit-14.**"**

10. The arguments raised by learned Senior Counsel for the Appellant were that Exhibit 1 was executed on 15.7.1978 at which time the Transfer of Property Act, 1882 (hereinafter 'TP Act') was neither extended nor enforced in the state of Sikkim and transfer of immoveable property was governed by the Rules relating to Transfer of Immoveable Property (Based on the Law of Contract and Transfer of Property Act of India) dated 18.1.1950. These Rules provide that all contract for sale of immoveable property must be in writing, signed by the parties and attested by not less than two witnesses. If earnest money has been paid it should be mentioned clearly in the document with clear description of the property and boundaries given. The contract would be binding and enforceable in a Court of law. That, in this context, there is no confusion regarding the identity of the suit property, since the parties have throughout contested the suit with

the underlying fact that the sold property is the property described in the Schedule to the Plaint. The office of the Respondent No.1 also considered the scheduled property as the suit property which remained undisputed by the Defendant No.1 and the Defendant No.2, while the Defendant No.3 has described the suit property vide Exhibit 11 and Exhibit 14 as Pokhrel Bari', which fortifies the claim of the Appellant who identified the suit property as Pokhrel Bari'. Thus, the only short coming in Exhibit 1 is that it is not attested by two witnesses as required by the afore stated Rules. That, the learned Appellate Court held Exhibit 1 to be an invalid document relying upon the Judgment of ***Bishnu Kumar Rai v. Minor Mahendra Bir Lama and Ors***.[1], however, the facts pertaining to Exhibit 1 are distinguishable from the document in question in ***Bishnu Kumar Rai*** (*supra*). Moreover, even if Exhibit-1 is not a registered document and it is found that the same is required to be registered, then Notification No.385/G dated 11.4.1928 and Notification No. 2947/G dated 22.11.1946 come to the rescue of the Appellant, towards which an application has been preferred before this Court under Section 151 of the CPC.

11. That, Exhibit 1 having been executed when the suit land was not registered in the name of the executant Sancha Man Subba, the learned Appellate Court ought to have considered Sections 41, 43, 44 and 51 of the TP Act while deciding the matter. It was further agitated that the case of the Appellant falls squarely under Section 53 A' of the TP Act, as the executants had willingly executed Exhibit 1 whereupon the Appellant took possession of the suit land, improved it and also constructed houses and a building thereon thereby establishing his possession. To fortify this submission, reliance was placed on the ratiocination of this Court in ***Uday Sapkota v. Lakshimi Prasad Sapkota***[2]**.** That, Exhibit 1 *vis-a-vis,* Exhibit 11 maybe considered by invoking Section 103 of the CPC and Exhibit 1 be considered valid as Defendant No.3 and Defendant No.4 have not contested the suit. To buttress his arguments, reliance was placed on ***Smt. Leela Krishnarao Pansare and others v. Babasaheb Bhanudas Ithape and others***[3], ***Union of India v. Ibrahim Uddin and Another***[4], ***M/s Technicians Studio Pvt. Ltd. v. Smt. Lila Ghosh and another***[5], ***P. Chandrasekharan & Ors. V. S. Kanakarajan & Ors.***[6], ***Gowardhan***

[1] AIR 2005 Sikkim 33
[2] AIR 2013 Sikkim 21
[3] AIR 2014 SC 2867
[4] (2012) 8 SCC 148
[5] AIR 1977 SC 2425
[6] AIR 2007 SC 2306

v. Ghasiram and others[7], ***Swarnendu Das Gupta v. Smt. Sadhana Banerjee***[8]. That, the learned Appellate Court simply held that the learned Trial Court rightly decided Issues No.1, 2 and 3 but failed to discuss Issue No.4, hence making it a fit case for remand towards which reliance was placed on ***Kinchok Tshering Lepcha vs. Kunzang Bhutia : RSA No.2 of 2012*** and ***Furden Tshering Bhutia and others vs. Payzee Bhutia (Sherpa) and Others***[9]**.** Learned Senior Counsel for the Appellant would further argue that even if the Appellant failed to prove adverse possession, Notification No. 1208/L & F dated 16.5.1950, holds that good title also derives from continuous adverse possession of over 12 years. It is submitted that suit be decreed in favour of the Appellant by setting aside the Judgment and Decree of the learned Trial Court and the first Appellate Court, for the ends of justice.

12. Refuting the arguments of the Appellant, learned Senior Government Advocate for the Respondents No.1 and 2, raised the contention that reasoned findings have been arrived by the learned Trial Court and the first Appellate Court with regard to Exhibit 1. That in fact, Exhibit 1 has not been proved by the Plaintiff and hence, when the document itself is not proved then the substantial question of law being formulated cannot be considered. He has placed reliance on this aspect on ***Neelu Narayani (Dead) through LRS. And Others v. Laskhmanan (D) through LRS. And others***[10] and ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Others***[11]. That, it is evident that Exhibit 1 was rejected on account of the document being a vague document and failing to abide by the provisions of Section 54 of the TP Act, which requires that the document pertaining to sale be a registered document. That, the concurrent findings of the learned Courts ought to remain undisturbed.

13. Learned Counsel for the Respondent No. 3, contended that he had in fact sold the property which was his partition share to the government and received remuneration towards which he has no arguments.

14. Respondent No.4 did not make an appearance.

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[7] AIR 2002 MP 130
[8] AIR 2015 Cal 46
[9] AIR 1954 SC 526
[10] (1999) 9 SCC 237
[11] (1999) 3 SCC 722

15. The parties were heard at length and their rival submissions considered. All evidence and documents on record have been carefully perused by me, as also the impugned Judgments and citations at the Bar.

16. On examining Exhibit 1, it is a Dhan Rashid‘ dated 15.07.1978, in the Nepali vernacular (Devnagari script), scribed by one Karna Singh Subba and alleged to have been signed by Sancha Man Subba (Respondent No.4), purportedly the Seller. The document also bears the signature of the alleged scribe but not of the alleged purchaser, i.e., the Appellant. A Dhan Rashid‘, broadly translated to English would be a Money Receipt. The document details that the Respondent No.4 acknowledges receipt of a sum of Rs.2001/- (Rupees two thousand and one) only, from the Appellant and declares that the Appellant can register and take the vendor‘s share of partitioned property situated at Singlitam Block. That, the document has been signed of his own free will. At this juncture, it is worth noticing that Exhibit 1 is a document which bears neither the plot numbers nor the boundaries or the area of the purported suit land. The details of this document shall be dealt with subsequently.

17. Exhibit 6 is a letter in the Nepali vernacular dated 26.07.2002, addressed to the District Collector (Respondent No.2), Gyalshing, West Sikkim, by Makar Dhoj Subba (Respondent No.3) of Darap, West Sikkim, praying that an area of 21 x 40 feet be set aside from the land named Pokhrel Bari‘ recorded in the name of his late father, Kalu Ram Limboo and being acquired by the government for the purpose of constructing a Rock Garden, to enable construction of a house. In the event of absence of such a provision he is unwilling to part with the aforesaid property.

18. Exhibit 11 is another letter in the Nepali vernacular addressed to the Panchayat Sabhapati, Darap Gram Panchayat, West Sikkim, by Makar Dhoj Subba (Respondent No.3) submitting that the property which had fallen in his partition share inherited from his father, late Kalu Ram Limboo, had been given by him for the purpose of constructing the Rimbi Rock Garden, however, the Appellant was forcibly constructing a house therein. That, the Appellant had invested a sum of Rs.2000/- (Rupees two thousand) only, in Pokhrel Bari‘ but when he sought to return it, the Appellant refused to accept the amount. That, the Appellant had also taken compensation amount of Rs.4800/- (Rupees four thousand and eight hundred) only, for damages to the property due to construction of a power project.

19. Exhibit 14 is an Application in the Nepali vernacular dated 18.11.2005, addressed to the District Collector, West Sikkim, by the Respondent No.3, informing therein, *inter alia*, that the Appellant was forcibly constructing a house on the property known as Pokhrel Bari' which fell in the share of the Defendant No.4 and requested the District Collector to stop the said construction. These documents are adverted to in the substantial question of law formulated hereinabove and have thus been broadly translated hereinabove for clarity.

20. The contention of Learned Senior Counsel for the Appellant to the extent that at the time of execution of Exhibit 1, i.e., on 15.7.1978, the TP Act was not extended or enforced in Sikkim at the relevant time cannot be faulted. The TP Act was extended to the State of Sikkim on 22.7.1983 and enforced on 1.9.1984 in terms of Clause (n) of Article 371F of the Constitution of India. The basis of the argument of Learned Senior Counsel for the Appellant emanates from the fact that Article 371F of the Constitution was inserted by the 36th amendment Act, 1975, making special provisions for the State of Sikkim. Clause k' of Article 371F provides as follows;

> "(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;"

The appointed day being April 26, 1975. However, the argument that the provisions of Section 54 of the TP Act were not enforceable for the self same reason is not sustainable as the Rules related to Transfer of Immoveable Property' dated 18.1.1950 would reveal and are extracted herein below;

> **"Rules related to Transfer of Immoveable Property**
>
> **(Based on the law of Contract and Transfer of the Property Act of India (sic))**
>
> 1. All contracts for sale' of immoveable property must be in writing signed by the parties and attested by not less than two witnesses. If an

earnest money has been paid it should be mentioned clearly in the document. Clear descriptions of the property with boundaries must be given. The contracts will be binding on the properties and enforced in court.

2. A sale or mortgage of immoveable property must be in writing, signed by the vendor or by the parties in case of mortgage, and attested by not less than two witnesses. If one of the parties or both are illiterate their thumb impression must be attested by the scribe..... It must also contain the following matters;

   a) Consideration in cash or kind, and when paid or delivered.

   b) Circumstances, if any

   c) Assessment of the land (rent)

   d) Full description of the property with boundaries.

   e) Full name of the parties with their father‘s name and residence.

   f) Any other matter, which is necessary to incorporate in the document. Once the document is executed and consideration passes the contract is complete and is enforceable. It must be in the model prescribed form attached to these rules so far as prescribed form attached to these Rules as practicable (sic) and be drawn in duplicate each party keeping the copy.

NOTES: “Biyaj” “Masikata” and “Siraney Thaliao” ar mortgages

3. .....

4. .....

5. .....

6. Sec – 54 Transfer of Property Act.

Sale of immoveable property

"Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upward in the case of reversion or other intangible thing can be made only by a registered instrument.

Sd/-
(J.S. Lall, I.C.S)
18.1.50
Dewan of Sikkim State

These Rules point to the fact that not only was it based on the TP Act but Section 54 was specifically mentioned implying its application for all relevant purposes. It would be apposite to recapitulate that this Court while referring to non-extension of the Specific Relief Act in Sikkim held as follows in ***Durga Prasad Pradhan v. Palden Lama and Another***[12];

> **"5.** ..... It is true that the Specific Relief Act, 1963, does not apply in Sikkim and there is no statutory law in Sikkim on this subject. But it is now beyond doubt that even if an enactment does not extend and apply to any area exproprio vigore, but the enactment contains provisions which are statutory embodiment of the rules of equity and justice, such provisions have been, are and may be applied by the Courts to transactions beyond such area, in the absence of any such law operating therein. As is wellknown, the T.P. Act, 1882 did not and even now does not, extend to the whole of India, but those principles contained therein, which embody rules of equity and justice, have been applied by the Courts in the areas beyond the local extent of

[12] AIR 1981 Sikkim 41

> the Act. As pointed out by the Supreme Court in *Namdeo* v. *Naramada Bai* (AIR 1953 SC at 230), it is axiomatic that the Courts must apply the principles of justice, equity and good conscience to transactions which come up before them for determination, even though the statutory provisions of the Transfer of Property Act are not applicable to these transactions and that it follows, therefore, that the provisions of the Act, which are but a statutory recognition of the rules of justice, equity and good conscience also govern those transfers. ……..."

It follows that the absence of enforcement the TP Act at the relevant period would not prevent the Courts from applying the rules of equity and justice embodied therein.

21. That having been said, we may now examine the contents thereof of Exhibit 1, which roughly translated would be as follows;

> "..... I, Sancha Hang Subba, resident of Darap Block, am writing this document to the effect that I have received a sum of Rs.2001/- from Shri Durga Prasad Pradhan, resident of Pelling. In terms of the Money received my share of the partition property at Singlitham Block comprising of two plots of dry fields can be registered and taken by the Mahajan'. I have signed this Dhan Rashid of my own free will and signed and sealed it. ....."

Learned Senior Counsel for the Appellant would urge that the document Exhibit 1 is a contract of sale as evident from the arguments forwarded. Assuming that it is so, the Rule supra requires all contracts pertaining to immoveable property must be in writing, signed by the parties and attested by not less than two witnesses. Exhibit 1 would reveal that the Respondent No.4 has received a sum of Rs.2,001/- (Rupees two thousand and one) only, from the Appellant, but none of the required criteria as per the Rules are fulfilled. The document has not been signed by any witness nor is there a description of the property as learned Counsel for the

Appellant would have me believe, nor boundaries detailed. That being so, it is clear that the document cannot be treated as a contract for sale or an agreement to sell. For the sake of argument, assuming that Exhibit 1 is an agreement to sell, this document would necessarily have to be succeeded by a deed of conveyance, which would require registration in terms of Notification No. 385/G of 1928, which will be dealt with later and which has ofcourse not been complied with. Although, an argument has been extended by learned Senior Counsel for the Appellant that the property has been undisputedly accepted as Pokhrel Bari', it would indeed be serendipity as the extent of the said Pokhrel Bari' is unknown. Speculation can only be made as to whether Pokhrel Bari' includes the entire property owned by late Kalu Ram Subba or whether it comprises of only two plots of dry fields (which bear no details), as mentioned in Exhibit 1. On such speculation and unfathomable description of the property no Court would be in a position to grant relief. Thus the document fails to qualify as an agreement to sell or a sale deed. It is relevant to mention that the document in no way reflects possession of the property by the Appellant. He has merely been permitted to register and thereafter take the property.

22. Learned Senior Counsel for the Appellant had argued that the provisions of Section 53A would be applicable to the facts of this case. For one, this argument flies in the face of his earlier contention that the provisions of the TP Act were not extended at the relevant time and were inapplicable herein. Secondly, Section 53A of the TP Act lays down as follows;

> **"53A. Part performance**.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing

to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.**"**

It is settled law that when a document fails to enable a Court to ascertain its terms with reasonable clarity, the benefit of the doctrine of part performance cannot be applied. The Appellant thus cannot take shelter under Exhibit 1 for the enforcement of part performance for the reasons as laid out hereinabove. What emerges therefore, on pain of repetition is that Exhibit 1 can neither be treated as an agreement to sell or a sale deed. In an actual sale, property transfers from the seller to the buyer, which evidently has not occurred in this matter as revealed by Exhibit 1, the Appellant cannot claim transfer of the property to himself, devoid as the document is not only of description and boundaries of the property but lacking proof of transfer. In an agreement to sell, transfer of the property takes place at a future date subject to some conditions being fulfilled the condition of registration remained pending.

23. Strength was also sought to be drawn by the Appellant from the Notification No. 385/G dated 11.4.1928 referred to *supra*, and Notification No. 2947/G dated 22.11.1946, to contend that even if Exhibit 1 is an unregistered document, it can be registered and validated in terms of the said Notification. For clarity in the matter these Notifications are reproduced below;

"SIKKIM STATE

GENERAL DEPARTMENT

Notification No. 385/G;

All Kazis, Thikadars and Managers of Estates.

In continuation of the previous rules on the subject, His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under:-

"Any document such as mortgage and sale deeds and other important documents and deeds, etc. will not be considered valid unless they are duly registered.

The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.

Exception:- Handnotes duly stamped shall be exempt from registration penalty.

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Gangtok
The 11th April, 1928

Gyaltsen Kazi
General Secretary to
H.H. the Maharaja of Sikkim."

"SIKKIM STATE
GENERAL DEPARTMENT

Notification No. 2947/G;

Amendment of para 2 of Notification No. : 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in

court to prove title or other matters contained in the document on payment of a penalty upto fifty times the usual registration fee.

Issued by order of H.H. the Maharaja of Sikkim.

Gangtok
The 22nd Nov., 46

T. Tsering
(Offs) General Secretary to
H.H. the Maharaja of Sikkim.**"**

24. If Exhibit 1 was accepted as an agreement to sell, this document would require no registration for the reason that the Notification No. 385/G does not spell out that an agreement to sell is to be registered. It provides in rather nebulous terms that "other important documents ...." will not be considered valid until they are duly registered. What an important document constitutes of is a moot point since sauce for the Goose may not necessarily be sauce for the Gander. In other words important is a relative term. In such a situation, in my considered opinion, there ought to be no further speculation and the only conclusion that can be arrived at in the absence of a specific rule in Sikkim, at the relevant time, is that an agreement to sell requires no registration. Had Exhibit 1 fulfilled the requirements of a sale deed and been accepted as such by this Court, which it has not, then the sale deed would have had to be registered. But the aforesaid Notifications allow for validation and admission in Court to prove title or other matters only if the Court opines that it ought to have been registered. It is evident from the foregoing detailed discussions that Exhibit 1 cannot be validated or admitted in Court as it fails to fulfil the criteria of a sale deed. Therefore, these Notifications are of no assistance to the Appellant, the document being sans the legal requirements. These discussions also set to rest the prayer of the Appellant under Section 151 of the CPC, which consequently stand rejected.

25. The fact that the contents of Exhibit 1 have remained unproved in terms of Section 61 to Section 66 of the Indian Evidence Act, 1872 also cannot be overlooked. In view of the fact that Exhibit 1 serves no purpose to fortify the Appellant's case, it would stand to reason that the document sought to be filed by the Appellant by invoking the provisions of Order XLI Rule 27 of the CPC, would also be of no assistance and the prayer thus rejected.

26. In ***Bishnu Kumar Rai*** (*supra*), reference to which was made by

learned Senior Counsel for the Appellant, Exhibit D1 the document in question, could not be validated owing to the contents being vague. Paragraph 11 of the Judgment held as follows;

> **"11.** .....
>
> "Money Receipt
>
> Received a cash of Rs.78,000/- (Rupees seventy eight thousand) only on a/c of consider nature of the land measuring 100' x 12' situated along and attached to the land of Mr. Govind Sharma, and other measuring 60' x 6' situated attached to the land of Sr. B. K. Rai totaling (sic) to 1560 s.ft. sold out to Sri B.K Rai, S/o G. B. Rai, Sichey Busty @ Rs.50/- per s.ft. by me. The land sold is covered by plot No. 631 owned by the undersigned.
>
> Sd/- Basant Bir Lama,
> Sichey Busty,
> Gangtok."
>
> This document Exhibit D-1 is a Money Receipt on the face of it without revenue stamp/fee and also not a registered document and without bearing the date of the execution or writing of such document on it. According to us, it is difficult to treat this document exbt. D1 as an Agreement for Sale or Deed of Sale. From the original patta parcha Khatian it is seen that the land under Khatian No. 256 covered by khasra No. 632/1147, measuring 0.23 acre stands in the name of the defendant No.2, Shri Basant Bir Lama, which is the land described in Schedule A' to the plaint.**"**

Similarly, Exhibit 1 is not only a vague document but even the original title deeds for the land has not been furnished for scrutiny of the learned Trial Court. The learned First Appellate Court cannot be faulted for drawing a parallel between Exhibit 1 and Exhibit D1 discussed in ***Bishnu Kumar Rai*** *(supra)* although it may be noticed that both Courts below have concluded that the document is a Sale Deed requiring registration

under Section 54 of the TP Act. The facts pertaining to the two documents are almost identical.

27. While dealing with the other documents alluded to by the Appellant, Exhibit 6 merely deals with the terms of sale between the Respondent No.3 and the Respondent No.1 and lends no strength to the Appellant's case. While a bare perusal of Exhibit 11 would indicate that the Respondent No.3 sought to return the amount of Rs.2000/- (Rupees two thousand) only, to the Appellant which he refused. It needs no reiteration that an agreement to sell can be rescinded particularly when the person who sold it had no legal right to alienate it. Section 41 of the TP Act, also relied on by the Appellant provides as follows;

> **"41. Transfer by ostensible owner**.— Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:
>
> Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.**"**

It is an exception to the general rule that a person cannot confer a better title that he had. Being an exception, the onus is on the transferee to show that the transferor was the ostensible owner of the property and that he had after taking reasonable care to ascertain that the transferor had the power to make the transfer, acted in good faith. The care required of a transferee is that which an ordinary man of business is expected to take. If the ostensible owner is in possession of the property and he also produces the title deed, the transferee cannot be expected to make a roving and searching enquiry in the absence of any ground for suspicion that the transferor may not be the real owner. In the matter at hand nowhere is it stated that Respondent No.4 had produced title deeds or partition deeds before the Appellant to establish his claim on the property rather vaguely described in Exhibit 1. The argument in reverse would mean that there is no proof either that Respondent No.3 was the owner at the relevant time, but

it needs to be reiterated that the Plaintiff's case has to be proved on its own strength and not on the weaknesses of the Defendant's case.

28. Exhibit 14 would categorically reveal that the Appellant sought to forcibly occupy the suit land. When there is no legal document allowing the Appellant to assume such rights, he cannot presume on the basis of an invalid document that he is entitled to occupy the purported scheduled land. It would be relevant to note that in terms of the exception given in Notification No.385/G dated 11.4.1928, Exhibit 1 ought to at least have been stamped.

29. So far as the arguments pertaining to applicability of Sections 43 and 44 of the TP Act are concerned, Section 43 deals with transfer by unauthorised person who subsequently acquires interest in property transferred. It would be beneficial to extract the Section hereinbelow;

> **"43. Transfer by unauthorised person who subsequently acquires interest in property transferred**.—Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
>
> Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.
>
> *Illustration*
>
> *A*, a Hindu who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying A as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver Z to him.**"**

The provision of Section 43 of the TP Act makes it clear that when a person with imperfect title transfers the property for consideration and

subsequently the transferor's title becomes perfect in law, the transferee is entitled to enforce the terms of the contract by equitable doctrine of feeding the grant by estoppel. In other words, the property embodied in Section 43 of the TP Act is described as the common law doctrine of feeding the grant by estoppels. The law assumes that the transferor had no title over at least a portion of the property he had transferred, but which he has since acquired, in which case, upon the principles of elementary equity he is bound to make good his representation to the transferee. This Section, however, has no application when the transfer is vitiated or the property transferred was not transferable. The illustration thereof suffices to explain the Section and it is evident that in the matter at hand Respondent No.4 had at no point of time inherited the property in question, which I may add is also unidentifiable.

30. Section 44 reads as hereunder;

> **"44. Transfer by one co-owner**.—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.
>
> Where the transferee of a share of a dwellinghouse belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.**"**

This Section enacts the well-known principle of substitution. When one of the several co-owners transfers his share, the transferee stands in the shoes of the transferor and thereby acquires a right to join possession or part enjoyment of the property, including the right to enforce partition. This right is however subject to the conditions and liabilities affecting at the time of the transfer, the share or interest so transferred. No evidence has been furnished to indicate that Respondent No.3 was legally competent to transfer the

property in dispute, the same having fallen in the share of the Respondent No.4. The Section specifically lays down that the transferor must be legally competent to transfer his share. When the property is not his share the question of legal competence obviously would not arise as in the instant case.

31. It was also argued by learned Senior Counsel for the Appellant that the first Appellate Court failed to decide Issue No.4 and accordingly the matter was fit for remand. In this context, it would do well to go through Paragraph 37 of the Judgment of the learned Appellate Court, wherein it is recorded as follows;

> "37. The above evidence of the appellant and his witnesses do not establish that the appellant has acquired the title and interest over the suit property by way of adverse possession. Therefore, I have no hesitation to hold that the learned Trial court has not erred in fact or also in law in deciding the other issues as mentioned above as well."

In any event, remanding a matter to decide an issue in great detail when Issue No.3 has been concluded with the finding that the property belongs to Respondent No.3 thereby having a direct bearing on Issue No.4 would only prolong the *lis* with no substantial reason. The evidence on record suffices to indicate that though the Respondent No. 3 was not in physical possession, his insistence that he had inherited the property and had the right to alienate it was not contested by the Respondent No.4 nor disproved by any evidence. Does the law then debar him from alienating the property merely because he was not in physical possession, the answer would have to be in the negative.

32. Insofar as the question of adverse possession is concerned, the learned Courts below have given rather convoluted reasons for reaching a finding that there can be no adverse possession. I have to opine that the reasons for denying adverse possession do not conform to the legal position as a claim for title based on documents on one hand and a claim for adverse possession on the other hand cannot run parallel. It would suffice to state that this Court in ***RSA No. 02 of 2016 (K. B. Bhandari v. Laxuman Limboo)*** held as follows;

> "22. ..... The Appellant's claim on the Suit property is based on title, on the basis of documents

> as already discussed. The concept of adverse possession is in opposition to a claim under title, the two claims cannot either be parallel or simultaneous."

Reliance of the learned Senior Counsel for the Appellant, on Notification No. 1208/L&F dated 20.05.1950 that good title also derives from continuous adverse possession of over 12 years, is also evidently misplaced, in view of the foregoing discussions.

33. In conclusion, it is clear that both the Learned Courts below while examining Exhibit 1 have concluded that the document being an unregistered document transfers no title or possession to the Appellant, the document being an unregistered document in terms of Section 54 of the TP Act. The learned Trial Courts have deemed Exhibit 1 to be a Sale Deed document while reaching the above conclusion when infact it is neither an agreement to sell or a Deed of Sale being at best a 'Dhan Rashid's, a Money Receipt or thereby a Hand Note, but it cannot be denied that Section 54 of the TP Act was specifically in vogue in Sikkim at the relevant time the Rules of 1950 standing testimony to this. Even if the finding of the Learned Trial Courts that Exhibit 1 was a Sale Deed document requiring registration under Section 54 of the TP Act is erroneous it cannot be denied that the Section was enforced in view of the above Rules. Thus, the finding of the learned Courts below that Exhibit 1 is a sale deed is set aside this Court having concluded that the same is a "Money Receipt". However, this finding in no way alters the fate of the Appellant's case neither is a remand to the learned Trial Court on this ground necessitated.

34. In the end result, the Appeal is dismissed for the grounds enumerated in the foregoing discussions.

35. No order as to costs.

36. Copy each of this Judgment be sent to the Learned Civil Judge and the Learned District Judge, West Sikkim, at Gyalshing, for information.

37. Records of the Courts below be remitted forthwith.

SLR (2017) SIKKIM 53

(Before Hon'ble the Chief Justice)

Crl. Misc. Case No. 16 of 2017

Shri Manoj Darjee and Others ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Ms. Sedenla Bhutia, Advocate for the Petitioners.

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhtutia, Additional Public Prosecutors with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of Order: 20th February 2018

A. Code of Criminal Procedure, 1973 – S. 482 – Extra-ordinary discretionary jurisdiction of the High Court under S. 482 to quash FIR/ criminal proceeding involving non-compoundable offences – Indian Penal Code, 1860, S. 324 – Quashing of FIR – Joint application made on behalf of the parties for quashing FIR in view of the compromise arrived at between them – Held, the High Court is competent enough to exercise its extra-ordinary jurisdiction under S. 482 of the Cr.P.C to quash FIR, Charge Sheet and consequential criminal proceedings pending in the trial Court in the particular facts and circumstances of the case, in the interest of social relationship and peace in the society.

(Paras 6 to 11)

Petition allowed.

Chronological list of cases cited:

1. B.S. Joshi and Others v. State of Haryana and Another, (2003) 4 SCC 675.
2. Manoj Sharma v. State and Others, (2008) 16 SCC 1.
3. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 303.
4. Sushil Suri v. Central Bureau of Investigation and Another, (2011) 5 SCC 708.
5. Nikhil Merchant v. Central Bureau of Investigation and Another, (2008) 9 SCC 677.
6. Gian Singh v. State of Punjab & Another, (2010) 15 SCC 118.
7. Ashok Sadarangani &M Anr. v. Union of India & Others, (2012) 11 SCC 321.
8. Yogendra Yadav and others v. State of Jharkhand and another, (2012) 9 SCC 653.

ORDER

Satish K. Agnihotri, CJ

The instant petition is filed by the accused, the complainant and the victim, who are arrayed as Petitioners No.1, 2 and 3 respectively, under Section 482 of the Code of Criminal Procedure, 1973, (in short, the Cr.P.C.) seeking to quash the F.I.R. No. 34/2016 dated 01.02.2016 and consequential proceedings emanating therefrom in G. R. Case No. 130 of 2017 (*State of Sikkim -vs- Manoj Darjee*) pending on the file of the Court of Judicial Magistrate at Gangtok.

2. The genesis of filing of the instant petition is that the Third Petitioner was allegedly assaulted in Gangtok by the First Petitioner, consequent thereupon sustained severe injuries on his head. The Second Petitioner, being the brother of the Third Petitioner, filed the F.I.R. on 01.02.2016, stating that the Third Petitioner, his brother was assaulted by the First Petitioner, who stays in Tibet Road, sustaining severe injuries on his head. He was admitted to S.T.N.M. Hospital under critical condition. On investigation, the case was registered as Sessions Trial (S.T.) Case No. 12 of 2017 in the Judicial Service Centre, Gangtok on 02.06.2017.

3. On 16.08.2017, learned Sessions Judge, East Sikkim at Gangtok, on examination of the materials on record, came to the conclusion that the case was triable for an offence under Section 324 of the Indian Penal Code, 1860 (in short, the IPC). Accordingly, the case file was transferred to the Court of the Chief Judicial Magistrate (East) at Gangtok and a charge under Section 324 of the IPC was framed. Thereafter, the case was transferred to the Court of the Judicial Magistrate (First Class) at Gangtok.

4. In the meantime, the accused, i.e. First Petitioner, entered into compromise with the complainant, the Second Petitioner and the victim, the Third Petitioner on 31.10.2017, which was recorded in writing and filed herein. The terms of the Compromise read as under:-

> "1. That the Second Party shall withdraw the F.I.R. dated 01.02.2016 lodged by him before the Sadar P.S.
>
> 2. That after the execution of this deed of compromise all the parties shall maintain cordial relations with each other.
>
> 3. That all the parties hereto have voluntary arrived at this compromise without any duress, force, pressure or undue influence from any quarter whatsoever."

Pursuant thereto, the instant petition is filed by all the parties, as afore-stated, seeking quashing of F.I.R. and Charge Sheet thereafter against the First Petitioner.

5. Ms. Sedenla Bhutia, learned Counsel appearing for the Petitioners, would contend that in the heat of argument as the accused and victim both were inebriated, the First Petitioner assaulted the Third Petitioner without any intention or ill will. They were moving around together, dining and wining together, thus, the injury caused by the First Petitioner to the Third Petitioner was a result of quarrel between them. It is further contended that since the parties have settled their dispute amicably and decided to live peacefully together, the petition may be allowed and the F.I.R. as well as the Charge Sheet be quashed.

6. Referring to the observations made by the Supreme Court in ***B.S. Joshi and Others*** vs. ***State of Haryana and Another***[1]***, Manoj Sharma*** vs. ***State and Others***[2] and ***Gian Singh*** vs. ***State of Punjab and Another***[3] and also Order dated 19.05.2017 rendered by this Court in Rajendra Rai and Others vs. State of Sikkim, it is submitted by Ms. Sedenla Bhutia, learned Counsel that this is a fit case to quash the F.I.R. and Charge Sheet in exercise of extra-ordinary discretionary jurisdiction of this Court under Section 482 of the Cr.P.C.

7. Responding, Mr. Karma Thinlay, learned Additional Public Prosecutor, would urge that the case was initially registered as sessions case looking into the injuries sustained by the Third Petitioner. However, on examination, it was noticed that it was a case of an offence under Section 324 of the IPC only. Accordingly, charge was framed and the case is pending on trial.

8. Considering the factual aspects involved in this case and also on examination of the submissions made by the learned Counsel appearing for the parties, it is indisputable that the First Petitioner and the Third Petitioner were friends and dining and wining together. The assault was made in the heat of argument without any ill intention. Subsequently, realizing their mistakes, all the parties have reached to a compromise to live peacefully together. In such facts situation, the issue needs the examination.

9. In ***B.S. Joshi*** *(supra)*, it is evidently observed that while exercising inherent power of quashing under Section 482 of the Cr.P.C., it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue.

10. In the case of ***Manoj Sharma*** *(supra)*, wherein the question involved was as to whether a first information report under Sections 420/ 468/471/34/120-B IPC deserve to be quashed either under Section 482 of the Code of Criminal Procedure or under Article 226 of the Constitution, when the accused and the complainant have compromised and settled the matter between themselves. The Supreme Court speaking through Hon'ble Mr. Justice Altamas Kabir (as he then was), observed as under:

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[1] (2003) 4 SCC 675
[2] (2008) 16 SCC 1
[3] (2012) 10 SCC 303

> **"8.** In our view, the High Court's refusal to exercise its jurisdiction under Article 226 of the Constitution for quashing the criminal proceedings cannot be supported. The first information report, which had been lodged by the complainant indicates a dispute between the complainant and the accused which is of a private nature. It is no doubt true that the first information report was the basis of the investigation by the police authorities, but the dispute between the parties remained one of a personal nature. Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. We do not suggest that while exercising its powers under Article 226 of the Constitution the High Court could not have refused to quash the first information report, but what we do say is that the matter could have been considered by the High Court with greater pragmatism in the facts of the case.**"**

Concurring, Hon'ble Mr. Justice Markandey Katju (as he then was) observed as under:

> **"27**. There can be no doubt that a case under Section302 IPC or other serious offences like those under Sections 395, 307 or 304-B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power under Section 482 CrPC or in writ jurisdiction on the basis of compromise. However, in some other cases (like those akin to a civil nature), the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. ……."**

11. In yet another case, ***Sushil Suri vs. Central Bureau of Investigation & Anr.***[4], the Supreme Court considered the ambit and scope

[4] (2011) 5 SCC 708

of Section 482 of the Cr.P.C. and held as under:-

> **"16**. Section 482 CrPC itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely, *(i)* to give effect to an order under CrPC; *(ii)* to prevent an abuse of the process of court; and *(iii)* to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provisions is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdiction under Section 482 CrPC. Though it is emphasized that exercise of inherent powers would depend on the facts and circumstances of each case, but the common thread which runs through all the decisions on the subject is that the Court would be justified in invoking its inherent jurisdiction where the allegations made in the complaint or charge-sheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged.**"**

12. A larger Bench of Supreme Court in ***Gian Singh*** *(supra)*, examining the correctness of the decisions of the Supreme Court in ***B. S. Joshi*** *(supra)*, ***Nikhil Merchant*** vs. ***Central Bureau of Investigation & Anr.***[5] and ***Manoj Sharma*** *(supra)* in reference made in ***Gian Singh*** vs. ***State of Punjab & Anr.***[6] settled the proposition of law as under:

> **"57**. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of

[5] (2008) 9 SCC 677
[6] (2010) 15 SCC 118

> offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the end of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment**.**
>
> **58**. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. ……**"**

13. Subsequently, in ***Ashok Sadarangani & Anr.*** vs. ***Union of India & Ors.***[7], referring to earlier decision rendered by the Supreme Court, the Supreme Court observed as under:

> "24. Having carefully considered the facts and circumstances of the case, as also the law relating to the continuance of criminal cases where the complainant and the accused had settled their differences and had arrived at an amicable arrangement, we see no reason to differ with the views that had been taken in *Nikhil Merchant case* or *Manoj Sharma case* or the several decisions that have come thereafter. It is, however, no coincidence that the golden thread which runs through all the

[7] (2012) 11 SCC 321

decisions cited, indicates that continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimate, may conclude in a decision which may be of any consequence to any of the other parties."

14. In ***Yogendra Yadav and others*** vs. ***State of Jharkhand and another***[8], the appellants were charge-sheeted under Sections 341, 323, 324, 504 and 307 read with Section 34 of the IPC. However, having regard to the compromise entered by the complainant and the accused persons, the Supreme Court held as under:

"4. Now, the question before this Court is whether this Court can compound the offences under Sections 326 and 307 IPC which are non-compoundable? Needless to say that offences which are non-compoundable cannot be compoundable by the court. Courts draw the power of compounding offences from Section 320 of the Code. The said provision has to be strictly followed (*Gian Singh v. State of Punjab : (2012) 10 SCC 303)*. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve more turpitude, grave offences like rape, murder, etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely

[8] (2012) 9 SCC 653

> personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace."

15. A common thread running through the afore-stated cases is that the High Court is competent enough to exercise its extra-ordinary jurisdiction under Section 482 of the Cr.P.C. to quash the F.I.R., Charge Sheet and consequential criminal proceedings pending in the Trial Court in the particular facts and circumstances of the case, in the interest of social relationship and peace in the society.

16. Resultantly, F.I.R. bearing No. 34/2016 dated 01.02.2016 and consequential proceedings in G. R. Case No. 130 of 2017 (*State of Sikkim -vs- Manoj Darjee*) pending on the file of the Court of Judicial Magistrate at Gangtok, East Sikkim are quashed.

17. Petition is allowed.

SLR (2017) SIKKIM 62
(Before Hon'ble the Chief Justice)

W.P. (C) No. 69 of 2016

The Principal Secretary, Department of Commerce and Industries Government of Sikkim ….. **PETITIONER**

Versus

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

For the Petitioner: Mr. J. B. Pradhan, Additional Advocate General, Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Assistant Government Advocates for the Petitioner.

For Respondent 1 to 2: Mr. Pabitra Pal Chowdhury, Mr. Samir Kumar Ghosh and Mr. B. K. Gupta, Advocates for the Respondent.

Date of decision: 26th February 2018

A. Constitution of India – Article 226 – Ambit and scope of extra-ordinary jurisdiction of High Court – High Court has discretionary extra-ordinary jurisdiction under Article 226 to correct the manifest, palpable error of law or facts which stare on the face of it – It is manifest that the jurisdiction of the High Court entertaining a Writ Petition is not affected in spite of alternative statutory remedies, particularly, wherein it is shown that the tribunal judicial authority had exercised its power having no jurisdiction or had exercised its jurisdiction without any legal foundation. It is for the party invoking extra-ordinary jurisdiction to demonstrate that there has been (i) a breach of principles of natural justice; or (ii) procedure required for decision has not been adopted, or (iii) to seek enforcement or infringement of violation of fundamental rights; or (iv) proceedings taken or order passed

thereon are wholly without jurisdiction, or (v) proceeding itself is an abuse of process of law – High Court is fully competent to exercise its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution to correct gross, palpable error of law or facts, to stave off miscarriage of justice.

(Paras 14, 23 and 24)

B. Constitution of India – Article 226 – Pre-condition for exercising extra-ordinary jurisdiction under Article 226 of the Constitution is gross or palpable error on the fact of it. It has clearly been held in a catena of decisions that the high prerogative writ under Article 226 may be issued not to correct mere error but the error which is manifest, palpable and gross leading to miscarriage of justice. The Court is not required to delve deep into the issue on re-appreciation or re-examination of evidence – Held, In this case, indisputably there is no gross failure of justice or grave injustice on the basis of alleged jurisdictional error. Thus, exercise of extra-ordinary jurisdiction of High Court under Article 226 of the Constitution is not warranted.

(Paras 27 and 28)

C. Arbitration and Conciliation Act, 1996 – Enacted with the sole object of expeditious disposal of the contractual disputes – Ss. 34 and 37 – Statutory remedies under Ss. 34 and 37 to seek redressal of grievances, if any, in the Award on the grounds prescribed therein.

(Para 29)

D. Constitution of India – Article 226 – Arbitration and Conciliation Act, 1996 – Ss. 34 and 37 – Held, Petitioner-State has already availed the efficacious remedy as provided under statute. In such an event also and further the Petitioner-State has failed to demonstrate that there was any infringement of fundamental rights or violation of principles of natural justice or the procedure required for decision was not adopted or the proceeding was taken and/or order was passed without any jurisdiction on abuse of process of law, to invoke jurisdiction under Article 226 of the Constitution of India.

(Para 30)

Petition dismissed.

Chronological list of cases cited:

1. Rohtas Industries Ltd. and Another v. Rohtas Industries Staff Union and Others, (1976) 2 SCC 82.

2. Miss Maneck Gustedji Burjarji v. Sarafazali Nawabali Mirza, (1977) 1 SCC 227.

3. Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others, (1998) 8 SCC 1.

4. Surya Devi Rai v. Ram Chander Rai and Others, (2003) 6 SCC 675.

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

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

7. Hari Vishnu Kamath v. Ahmad Ishaque and Others, AIR 1955 SC 233.

8. L. K. Verma v. H.M.T. Ltd. and Another, AIR 2006 SC 975.

9. Shalini Shyam Shetty and Another v. Rajendra Shankar Patil, (2010) 8 SCC 329.

JUDGMENT

Satish K. Agnihotri, CJ

Invoking the extra-ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India, the instant petition is filed, wherein the Petitioner seeks to impugn the Award dated 12.06.2015 rendered by the learned Arbitrator and consequential dismissal Order dated 10.06.2016 passed by the District Judge, East Sikkim at Gangtok, in application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, the Act, 1996), on stated grounds that there was palpable, manifest error causing miscarriage of justice.

2. The facts, in brief, relevant for examination and consideration of the lis involved in this petition, are that the Respondent was allotted a plot of land

measuring an area of 0.56 acres situated at 5th Mile, Tadong, East Sikkim by the State Government, the Petitioner herein, vide letter bearing No.730 dated 24.06.1981 under the terms and conditions of Lease Deed dated 15.02.1989 for a period of thirty years. The Respondent herein was permitted to make development on the land by erecting structure to set up an automobile workshop under the terms of Lease Deed. On expiry of the period of 3 W.P. (C) No. 69 of 2016 The Principal Secretary, Deptt. of C & I, Govt. of Sikkim vs. M/s. Snowlion Automobile Pvt. Ltd. lease, the lease was not renewed and the State Government, the Petitioner herein, decided to resume the land back. Accordingly, it was communicated by letter dated 17.05.2011. The dispute arose in reference to the arrears of lease rent and proper valuation for the development made and the construction raised thereon. The Respondent herein preferred a Writ Petition being W.P. (C) No. 23 of 2013, seeking recovery of reasonable compensation after proper valuation of the development made thereon. Learned High Court disposed of the Writ Petition on 04.12.2013, holding as under: -

> "13. …….. Considering the proviso contained in Clause 4(2)(xi), the petitioner shall not be compelled to hand over possession of the land in question and the buildings unless reasonable compensation as mutually agreed upon is paid to the petitioner.
>
> 14. The entire exercise of valuation shall be completed within a period of 30 days from today. The petitioner shall give all assistance in ensuring that the order is complied with within the period stipulated."

3. Feeling dissatisfied, the Respondent herein preferred a review petition being Review Pet (C) No. 01 of 2014. The said review petition was disposed of on 25.02.2014 in following terms:-

> "…….
>
> (i) On the consent of both the parties, Hon ble Shri Justice A. P. Subba, former Judge of this Court, is requested to act as the Arbitrator in terms of arbitration clause 8 of the lease

agreement dated 15-02-1989 to decide the dispute and differences between them on the question of valuation of the developments made on the land by the Petitioner. 4 W.P. (C) No. 69 of 2016 The Principal Secretary, Deptt. of C & I, Govt. of Sikkim vs. M/s. Snowlion Automobile Pvt. Ltd. (ii) The Learned Arbitrator shall enter into the reference within a period of thirty days from the date of his appointment. Within this period, the parties shall ascertain as to whether Honble Shri Justice Subba is willing to act as an Arbitrator. In the event of his inability, this Court shall be informed so that necessary order may be passed.

(iii) In order to ensure that the interest of the parties are safeguarded the Learned Arbitrator shall draw up an inventory of the developments that have been made by the Petitioner on the lease hold property by making a visit personally and take other steps including taking photographs, if necessary.

(iv) Upon drawing up such inventory and collecting necessary evidence, the Petitioner shall handover possession of the leasehold land to the Respondent-Department as undertaken by him.

(v) The Learned Arbitrator shall ensure that the entire proceeding is completed and the award passed within a period of six months from the date of his entering upon the reference.

(vi) The order of appointment of the Arbitrator is being passed in view of the consent expressed by both the parties and is, therefore, independent of the provisions of Section 11(6)

of the Arbitration and Conciliation Act, 1996. However, the proceedings of the arbitration shall be governed by the procedure prescribed under that Act.

The cost of the arbitration shall be borne by the parties."

4. In pursuance thereof, Shri Justice A. P. Subba, former Judge of this Court initiated the arbitration proceedings on reference made hereinabove. The learned Arbitrator passed the arbitration Award on 12.06.2015, granting a sum of Rs.3,34,43,444.00 (Rupees Three crore Thirty Four lakhs Forty Three thousand Four hundred and Forty Four) in favour of the Respondent Company, deducting the amount of Rs.71,87,891.00 already paid earlier to the Respondent, with pendent lite and future interest at the rate of 12% per annum. The dispute does not rest therein.

5. Initially, an application under Section 34 the Act, 1996 was filed before the High Court on 27.11.2015, which, it appears, was withdrawn and filed before the Court of the District Judge, East Sikkim at Gangtok, on 04.12.2015, seeking setting aside the Award preferred by the State Government in Arbitration Case No.01 of 2015, along with an application for condonation of delay under provision of Section 34(3) of the Act, 1996. The Learned District Judge, holding that Section 5 of the Limitation Act, 1963 is not applicable to the provisions of limitation enshrined under Section 34(3) of the Act, 1996, dismissed the application on the ground of being barred by limitation, on 10.06.2016.

6. Feeling further aggrieved and dissatisfied, the State Government, Petitioner herein, preferred further an appeal under Section 37 of the Act, 1996, in Arb. A. No.01 of 2016 on 13.09.2016, questioning the legality and validity of the Order dated 10.06.2016 passed by the learned District Judge, East Sikkim at Gangtok. Subsequently, the appeal was withdrawn by the State Government, Petitioner herein, on 13.12.2016, with liberty to take recourse to an appropriate forum, if so advised.

7. Thus, this petition under Article 226 of the Constitution of India, seeking quashing of the Award dated 12.06.2015 and consequential

dismissal Order dated 10.06.2016 passed by the District Judge, East Sikkim at Gangtok, in Section 34 application preferred against the Award.

8. Mr. J. B. Pradhan, learned Additional Advocate General appearing for the State Government, the Petitioner herein, challenges the Award as well as the consequential dismissal Order of the District Judge on the ground that the Award as well the consequential dismissal Order dated 10.06.2016 was manifestly improper, incorrect and based on the erroneous appreciation and wrong interpretation of the legal aspect. Mr. Pradhan would further contend that the Arbitrator has exceeded his jurisdiction by not confining the dispute to the terms of lease dated 15.02.1989. The Arbitrator has examined the compensation, not the reasonable compensation as prescribed under the Lease Deed and also has not considered clause 4(2)(ix) of the Lease Deed which provides that the Lessee shall not erect any building or make any alteration or addition to such building on the plot without sanction and permission in writing of the Lessor or other authority approved by the Lessor, while assessing the compensation for development made and construction raised on the plot; thus, exceeded his jurisdiction. It is also contended that the District Judge, East Sikkim at Gangtok, has also failed to examine the application under Section 34 of the Act, 1996 made by the State Government, Petitioner herein in its proper perspective. It is further submitted that consideration of the entitlement of the claimant-company for compensation, but not the reasonable compensation, was beyond jurisdiction and terms of reference of the arbitration proceedings and as such, it was a case of palpable, gross, apparent error of law and facts. It is further contended that in such fact situation, this Court is fully competent to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution of India to correct the error of law and facts.

9. Referring ***Rohtas Industries Ltd. and Another*** *vs.* ***Rohtas Industries Staff Union and Others***[1], it is urged by Mr. Pradhan that an award can be upset if an apparent error of law stains its face, in a Writ Petition under Article 226 of the Constitution. To bolster his submission, learned Additional Advocate General further refers and relies on ***Miss Maneck Gustedji Burjarji*** vs. ***Sarafazali Nawabali Mirza***[2], ***Whirlpool***

[1] (1976) 2 SCC 82
[2] (1977) 1 SCC 227

Corporation vs. ***Registrar of Trade Marks, Mumbai and Others***[3] and ***Surya Devi Rai*** vs. ***Ram Chander Rai and Others***[4]**.**

10. Contrasting, Mr. Pabitra Pal Chowdhury, learned Counsel appearing for the Respondent, would submit that the Award is perfect and legally sound and as such, this petition deserves to be dismissed as not maintainable on the sole ground that the Petitioner has availed and failed in efficacious statutory remedy by preferring an application under Section 34 of the Act, 1996 before the Court of District Judge and further an appeal under Section 37 of the Act, 1996 before this Court. The State Government, Petitioner herein, has exhausted its remedy, raising ground of alleged error in law and facts. Mr. Chowdhury would further contend that the Arbitrator was appointed by consent Order dated 25.02.2014 rendered in Review Pet. (C) No.01 of 2014, wherein it was clearly directed that the Arbitrator was to decide the dispute and differences between them on the question of valuation of the developments made on the land by the Petitioner, i.e. the Respondent herein. The allegation of making developments or erecting structure without permission of the authorities is not an issue in this petition, but the issue before the Arbitrator was how much reasonable compensation, the Respondent herein, was entitled to for the developments made on the plot or structure erected thereon. The learned Arbitrator has carefully, legally examined the issue and came to a proper conclusion by assessing the compensation and awarding the same.

11. Referring to a passage in ***Surya Devi Rai*** (supra), it was contended that the High Court would not assign to itself the role of an appellate court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court in the exercise of certiorari jurisdiction under Article 226 of the Constitution of India.

12. Heard learned Counsel for the parties, examined the pleadings and documents appended thereto carefully.

13. On studied examination, it is apposite to examine the ambit and scope of extra-ordinary jurisdiction of this Court under Article 226 of the

[3] (1998) 8 SCC 1
[4] (2003) 6 SCC 675

Constitution. In the facts of the case, the Petitioner-State has preferred an application under Section 34 of the Act, 1996 to set aside the Award impugned herein, which was dismissed being barred by limitation. Thereafter, an appeal preferred under Section 37 of the Act, 1996, was withdrawn. This Court, on consideration, framed the following question of law in this petition:- "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 provided is availed by the party, however, belatedly and the case could not be considered on merit, as pleaded by the petitioner?"

14. Indisputably, this Court has discretionary extra-ordinary jurisdiction under Article 226 to correct the manifest, palpable error of law or facts which stare on the face of it.

15. The Constitution Bench of the Supreme Court in ***G. Veerappa Pillai*** vs. ***Raman and Raman Ltd.***[5], examining the ambit and scope of jurisdiction under Article 226 of the Constitution, held as under:-

> "20. Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

16. Again, in ***T. C. Basappa*** vs. ***T. Nagappa and another***[6], the Supreme Court, while examining a petition preferred under Article 226 of the

[5] AIR 1952 SC 192
[6] AIR 1954 SC 440

Constitution wherein decision of the election tribunal was under challenge, held as under:-

> " 7. One of the fundamental principles in regard to the issuing of a writ of „ certiorari, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L. J. thus summed up the law on the point in – „Rex v. Electricity Commissioners, 1924-1 KB 171 at p. 205 (C) :
>
> > "Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."
>
> The second essential feature of a writ of „ certiorari is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of „certiorari the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide per Lord Cairns in – „Walsalls Overseers v. L. & N. W. Rly. Co., (1879) 4 AC 30 at p. 39 (D)." `

17. Again, in ***Hari Vishnu Kamath*** vs. ***Ahmad Ishaque and others***[7], wherein the decision of the election tribunal was in challenge, the Supreme Court reiterated scope of proceedings under Article 226 of the Constitution, as under:-

> " 23. It may therefore be taken as settled that a writ of„ certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.
> ……....……"

18. This view was consistently followed and in ***Rohtas Industries Ltd.*** (supra), the Supreme Court reiterated and observed as under:-

> " 12. Should the Court invoke this high prerogative under Article 226 in the present case? That depends. We will examine the grounds on which the High Court has, in the present case, excised a portion of the award as illegal, keeping in mind the settled rules governing judicial review of private arbitrators awards. Suffice it to say, an award under Section 10A is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory bodys decision. Admittedly, such an award can be upset if an apparent error of law stains its face. The distinction, in this area, between a private award and one under Section 10A is fine, but real. However it makes slight practical difference in the

[7] AIR 1955 SC 233

present case; in other cases it may. The further grounds for invalidating an award need not be considered as enough unto the day is the evil thereof."

19. In ***Whirlpool Corporation*** (supra), the Supreme Court explained the power to issue prerogative writs under Article 226 of the Constitution as under:-

" 14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

20. In ***Surya Dev Rai*** (supra), the Supreme Court examined the difference between Articles 226 and 227 of the Constitution of India, holding, *inter alia,* as under:-

> " 12. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an appellate court and step into reappreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.
>
> xxx xxx xxx xxx
>
> 38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-
>
> *(1)* Amendment by Act No.46 of 1999 with effect from 1-7-2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> *(2)* Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.
>
> *(3)* Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its

jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts 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 occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has

> almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

21. In ***L. K. Verma*** vs. ***H.M.T. Ltd. & Anr.***[8], the Supreme Court, while examining the provisions of sub-rule (3) of Rule 14 of the U.P. Factories (Safety Officers) Rules, 1984, wherein appeal was maintainable before the State Government, viewed the scope of proceedings under Article 226 of the Constitution in lieu of appeal, held as under:-

> " 20. The High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite existence of an alternative remedy, a writ court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle of natural justice or where vires of the act is in question. In the aforementioned circumstances, the alternative remedy has been held not to operate as a bar. [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others , (1998) 1 SCC

[8] AIR 2006 SC 975

> 1, Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd., (2005) 8 SCC 242, State of H.P. and Others v. Gujarat Ambuja Cement Ltd. and Another (2005) 6 SCC 499]."

22. Further, the Supreme Court in ***Shalini Shyam Shetty and Another*** vs. ***Rajendra Shankar Patil***[9], re-examined the power of jurisdiction of the High Court under Article 226 and Article 227 of the Constitution and held as under:-

> " 48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. The jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex debito justitiae or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a letters patent appeal or an intra-court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all the High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court."

23. On studied examination of the afore-mentioned authoritative judicial pronouncements made by the Supreme Court time to time on the issue of the

[9] (2010) 8 SCC 329

scope of jurisdiction of High Court in exercise of power under Article 226 of the Constitution, it is manifest that the jurisdiction of the High Court entertaining a Writ Petition is not affected in spite of alternative statutory remedies, particularly, wherein it is shown that the tribunal judicial authority had exercised its power having no jurisdiction or had exercised its jurisdiction without any legal foundation. It is for the party invoking extra-ordinary jurisdiction to demonstrate that there has been (i) a breach of principles of natural justice; or (ii) procedure required for decision has not been adopted, or (iii) to seek enforcement or infringement of violation of fundamental rights; or (iv) proceedings taken or order passed thereon are wholly without jurisdiction, or (v) proceeding itself is an abuse of process of law.

24. For the afore-stated contingencies, the High Court is fully competent to exercise its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution to correct gross, palpable error of law or facts, to stave off miscarriage of justice.

25. Applying the well-settled principle to the facts of the case, it is established that the learned Arbitrator had entered into arbitration reference pursuant to the Order dated 25.02.2014 rendered by the High Court in Review Pet. (C) No.01 of 2014. The High Court, on the consent of both the parties, appointed the Arbitrator in terms of arbitration clause 8 of the Lease Deed to decide the dispute and differences between them on the question of valuation of the developments made on the land by the Petitioner. The reference is not circumscribed to any condition, namely, only those developments which have been made with permission or approval of the Lessor or its authority. The clause 4(2)(ix) of the Lease Deed prescribes that the Lessee shall not erect any building or make any alteration or addition to such building on the industrial plot without sanction or permission in writing of the Lessor or its authority. The clause 4(2)(xi) prescribes that if the lease is not renewed on the termination of the lease period, reasonable compensation, as mutually agreed upon by the parties, will be paid to the Lessee by the Lessor on development of land and construction of buildings. Sub-clause (2)(ix) and sub-clause (2)(xi), if read together, contemplate the erection of building or making any alteration or addition to such building with sanction or permission. However, if some developments on the land and construction of building are made without permission, that does not deprive the Lessee, the claimant, of the reasonable compensation as agreed upon between the parties.

26. The High Court, while examining the Writ Petition as well as Review Petition, has not restricted the valuation of the development on the land and for the erection of the building or alteration done, with permission or sanction of the Lessor only.

27. Be that as it may, on a detailed examination, it may be a simple error of law or of facts. However, the pre-condition for exercising extra-ordinary jurisdiction under Article 226 of the Constitution is gross or palpable error on the fact of it. It has clearly been held in a catena of decisions that the high prerogative writ under Article 226 may be issued not to correct mere error but the error which is manifest, palpable and gross leading to miscarriage of justice. The Court is not required to delve deep into the issue on re-appreciation or re-examination of evidence.

28. In this case, indisputably there is no gross failure of justice or grave injustice on the basis of alleged jurisdictional error. Thus, exercise of extra-ordinary jurisdiction of High Court under Article 226 of the Constitution is not warranted.

29. Further, the State Government, the Petitioner herein, has availed the remedy of Section 34 of the Act, 1996 and also Section 37 of the Act, 1996, by preferring an appeal against the Order passed by the District Judge, which was subsequently withdrawn. Needless to state that the Arbitration and Conciliation Act, 1996 was enacted with the sole object of expeditious disposal of the contractual disputes. The Act provides for statutory remedies under Section 34 and Section 37 to seek redressal of grievances, if any, in the Award on the grounds prescribed therein.

30. In the case on hand, as aforestated, the Petitioner-State has already availed the efficacious remedy as provided under statute. In such an event also and further the Petitioner-State has failed to demonstrate that there was any infringement of fundamental rights or violation of principles of natural justice or the procedure required for decision was not adopted or the proceeding was taken and/or order was passed without any jurisdiction on abuse of process of law, to invoke jurisdiction under Article 226 of the Constitution of India.

31. Resultantly, the petition is dismissed as not maintainable.

32. No order as to costs.

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