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SUBJECT INDEX

investigations – This is not a fit case for exercising discretion under S. 438 in favour of the Applicant. It does not sound to reason to arm the Applicant with anticipatory bail when pitted against such grave allegation of defrauding young medical aspirants with the lure of admission in SMIMS. The fact that there are more than one F.I.R registered for similar offences reveal the gravity of the situation. In such circumstances, custodial interrogation may be a necessity and consequently it would greatly harm the investigation and impede the prospect of further investigation if the Applicant is granted anticipatory bail.

Sumantra Gupta* v. *State of Sikkim ***472-C***

Employee's Compensation Act, 1923 – S. 4A – In spite of the learned Commissioner's direction to pay the compensation to the Petitioner, the Respondent failed to do so. This compelled the Petitioner to seek execution of the Commissioner's order dated 02.06.2016. Even after assurance given to the learned District Judge, the same was not respected and payment was made only on 19.01.2018 – S. 4A of the said Act clearly contemplates not only the manner but also the extent of interest as well as penalty to be paid in the circumstances described. If the requirement of the provision were satisfied it was incumbent upon the learned Commissioner to have directed payment of interest and penalty. This Court is of the view that the prayer for closure of the execution petition before the learned District Judge due to the assurance given by the Petitioner, wife of a casual labourer, cannot be taken as a waiver as sought to be argued. The Respondent's assurance was not fulfilled in the first place. The prayer for closure is reflective of the frustration due to the delay in receiving the compensation. This should not deter this Court in passing appropriate directions upon the Respondent to pay the compensation interest and penalty which is due and payable to the Petitioner if the circumstances demands and the law permits.

Maya Devi Darjee* v. *Executive Engineer, CWC ***481-A***

Employee's Compensation Act, 1923 – S. 4A – The scheme under S. 4A of the said Act is clear. Compensation under S. 4 has to be paid as soon as it falls due. It falls due on the date of the accident. This was a case in which the employer did not grant compensation to the Petitioner. The Petitioner therefore, approached the learned Commissioner for appropriate orders. The Respondent chose to contest this application instead of paying compensation. The records reveal that compensation amount as calculated by the learned Commissioner was paid only after the Petitioner had approached the learned District Judge for executing the direction of the

learned Commissioner. That too after the period the Respondent had assured payment. The undisputed facts as reflected above makes it evident that the Respondent was in default in paying the compensation due under the Act within one month from the date it fell due. The facts also revealed that there is no justification for the delay in payment – In such circumstances, the learned Commissioner was required to direct the employer, to pay the interest as provided in S. 4A (3) (a) of the said Act as well as pay the penalty as envisaged by S. 4A (3) (b) of the said Act. This was the mandate of the law.

Maya Devi Darjee* v. *Executive Engineer, CWC ***481-B***

General Clauses Act, 1897 – S. 27 – Meaning of Service by post – The provision of law assumes that service is deemed to be effected *inter alia* only if the address furnished is correct. In the absence of a correct address, it cannot be assumed merely because there is only one "Professor S.K. Nepal" in Rhenock that it referred to the Appellant and none else – Consequently, there was default in payment of rent by the Respondent.

Shiva Kumar Nepal* v. *Shankar Roy ***454-C***

Limitation Act, 1963 – S. 5 – Condonation of Delay – S. 5 has conferred the power to condone delay in order that the Courts could do substantial justice – The expression "sufficient cause" is sufficiently elastic. The Supreme Court has been adopting a justifiable liberal approach while examining cases for condonation of delay. The doctrine of seeking day to day explanation of the delay must be applied in a pragmatic manner and the Court should not have a pedantic approach. Substantial justice must be preferred to technical considerations. The Court must avoid any presumption that the delay is deliberate and the negligence culpable. A justice oriented approach would be the right approach in examining whether or not to condone delay – In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation – Also held in *re: Zolba* that unless compelled by express and specific language of the statute, the provisions of Order VIII Rule 1 CPC should not be construed in a manner, which would lead the Court helpless to meet extraordinarily situation in the ends of justice.

***Sr. Branch Manager, Oriental Insurance Co. Ltd.* v.**
Managing Director, SPDCL ***520-A***

Limitation Act, 1963 – S. 5 – Condonation of Delay – Perusal of the orders does not reflect that the Petitioner was guilty of adopting any

delaying tactics – Time should not be granted as a matter of routine and merely for the asking. However, when the learned District Judge has considered those grounds and thought it fit to grant extension of time again and again, the same cannot be said to be gross negligence while considering the application for condonation of delay filed subsequently – While considering the application, it was necessary for the learned District Judge to have taken into account the fact, as reflected in the various orders, that the Court had considered each of the said grounds for extension on each separate occasion and granted the same. If sufficient cause is shown or is reflected in the records of the case a more liberal approach must be adopted to ensure that a party in the adversarial system of justice dispensation is not denied the opportunity of participating in it – The delay cannot be attributable to the Petitioner alone. Sufficient cause for condoning the delay was also reflected in the orders passed by the learned District Judge – The frequent retirement of advocates during the period when the Petitioner was required to file the written statement and the grant of several extensions beyond the statutory period by the learned District Judge would make it an exceptional case in favour of the Petitioner while considering the application.

***Sr. Branch Manager, Oriental Insurance Co. Ltd.* v.**
Managing Director, SPDCL ***520-B***

Motor Vehicles Act, 1988 –*Res Ipsa Loquitur* **–** A doctrine that infers negligence from the very nature of an accident or injury in the absence of direct evidence on how any person has behaved – Principle refers to *"the thing speaks for itself"* – The damage to the truck is a clear indication that the truck was responsible for having hit the Sumo from behind – Concluded that the truck was instrumental in the accident.

***The Municipal Commissioner, GMC and Another* v.**
Mrs. Pabitra Singh Kami and Others ***427-A***

Motor Vehicles Act, 1988 – The Motor Vehicles Act is a benevolent legislation and the absence of a Motor Vehicle Inspector's Report does not demolish the claim of Respondents No. 1 and 2 to establish that the truck hit the Sumo – Respondents No. 1 and 2 were able to prove the fact of the accident and the rash and negligent act of the Appellant No. 2 – As the truck belongs to Appellant No. 1, they become vicariously liable for the act of their employee and thereby liable to pay the compensation.

***The Municipal Commissioner, GMC and Another* v.**
Mrs. Pabitra Singh Kami and Others ***427-B***

Motor Vehicles Act, 1988 – S. 173 (1) – The second proviso to S. 173 (1) lays down that the High Court may entertain the Appeal after expiry of a pieriod of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time – The key consideration is "sufficient cause" - No reason emanates for condoning the delay, apart from which it must be borne in mind that the Motor Vehicles Act, 1988 is beneficial legislation enacted for the purposes of meting out even-handed justice to victims of a tragedy. The victims cannot be made to wait endlessly on the whims and fancies of the Company sans substantial reasons.

***The Branch Manager, National Insurance Co. Ltd.* v.**
Smt. Tika Devi Limboo and Others ***513-A***

Negotiable Instruments Act, 1881 – S. 142 (1)(b) – Limitation of filing a complaint – Complaint is to be made within one month of the date on which the cause of action arises – S. 142 (1)(b) does not clarify as to how many days one month would comprise of. In such a circumstance, it could be deduced that the term "one month" would be a calendar month in terms of S. 3 (35) of the General Clauses Act – For the purpose of calculating the period of one month, the period has to be reckoned by excluding the date on which the cause of action arose. In r*e:* M/s. Saketh India Ltd. and Econ Antri Ltd. referred.

Ankit Sarda* v. *Subash Agarwal ***445-A***

Notification No. 6326-600-H&W-B dated 14.04.1949 – *Bona-fide* use – The tenant cannot dictate terms to the landlord about how he should utilize his own premises. It is the prerogative of the landlord to decide what he seeks to do with his property and how best to utilize it – A person does not require experience in business, all that the Appellant is required to establish before the Court is his *bona fide* requirement.

Shiva Kumar Nepal* v. *Shankar Roy ***454-A***

Notification No. 6326-600-H&W-B dated 14.04.1949 – Appellant has made out a case for requirement of the suit premises for his *bona fide* use – There is default in payment of rent by the Respondent for four months.

Shiva Kumar Nepal* v. *Shankar Roy ***454-D***

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – It is indeed unscrupulous and inequitable on the part of the Petitioner to hand over the allotted property to

a major child, (who, it may be remarked, would have been eligible for allotment of Government property subject to fulfillment of necessary conditions) and thereafter entreat the Government for a second allotment. This is an unacceptable circumstance. Even assuming that a second allotment is made to her, can it be ruled out that she would not hand over the said allotment to another child of hers or any other person of her choice and then appear before the Government once again invoking the grounds of her disability? This would indeed be stretching the interpretation of the Disabilities Act of 1995 beyond its ambit and purport – She does not have the licence to invoke the disabilities provision repeatedly while magnanimously handing out the property previously allotted to the family.
Ganga Maya Gurung* v. *State of Sikkim and Another ***500-B***

NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015 – Under the NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015 the Sikkim State Legal Services Authority (SSLSA) is required to, in coordination with the Sikkim State Mental Health Authority, constitute a team of psychiatrists/ psychologists/ counsellors to visit the jails and assess the state of mental health of the inmates in the jails – SSLSA directed to ensure that the team so constituted assesses the state of mental health of the Appellant and initiate corrective measures, if necessary, to facilitate his treatment by psychologist or psychiatrist during the period of sentence – Jail authorities to maintain record of such assessment and treatment, if any, and make such records available to the SSLSA which shall monitor the progress.
Mohan Rai alias Shekar Rai* v. *State of Sikkim ***489-E***

Protection of Children from Sexual Offences Act, 2012 – S. 11 (i) – Sexual Harassment – Sexual intent is a vital ingredient of the offence under S. 11 – Sexual intent is a state of mind and therefore, the culpable mental state of the accused-
Mohan Rai alias Shekar Rai* v. *State of Sikkim ***489-A***

Protection of Children from Sexual Offences Act, 2012 – Ss. 11 and 30 – A composite reading of Ss. 11 and 30 makes it manifest that in a prosecution for sexual harassment that requires the establishment of sexual intent also the Special Court shall presume its existence if the commission of the act constituting sexual harassment, save the sexual intent, has been proved by the prosecution. However, it shall be a defence for the accused

to prove the fact that he had no such sexual intent with respect to the act charged as an offence in that prosecution. The fact that he had no such sexual intent as alleged is however, required to be proved beyond reasonable doubt and not merely when its existence is established by preponderance of probability.

Mohan Rai alias Shekar Rai* v. *State of Sikkim ***489-B***

Protection of Children from Sexual Offences Act, 2012 – S. 30 – The presumption of law against the Appellant cannot be discharged by offering an explanation which may be reasonable and probable alone. The explanation must also be true. Unless the explanation is supported by proof, the presumption of law created by S. 30 of the POCSO Act cannot be held to be rebutted. The words *"prove the fact"* in S. 30 should not be required to mean anything beyond what S. 3 of the Indian Evidence Act, 1872 interprets the word *"proved"* to signify – The rebuttable presumption of law created by S. 30 of the POCSO Act puts the onus upon the Appellant to rebut the presumption. When the prosecution has successfully established the fact that the Appellant had exhibited part of his body i.e. his penis and buttocks to PW-1 and PW-2 with the intention that it is seen by them, the Special Court is required to draw a presumption that the Appellant had sexual intent in doing so. The Special Court has no choice in the matter thereafter. However, this presumption cannot be understood to mean that the burden of proof upon the prosecution has been done away with by S. 30 of the POCSO Act. The burden of proving the facts constituting sexual harassment rest on the prosecution who has asserted it. The presumption started to operate only when the prosecution had established that the Appellant had exhibited parts of his body to PW-1 and PW-2 with the intention that they saw it.

Mohan Rai alias Shekar Rai* v. *State of Sikkim ***489-C***

Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – Definition of the term "family" *vis-a-vis* Notification No. 6326-600-H&W-B dated 14.04.1949– "Family" as defined in the Act of 1985 is for the purposes of allotment of house sites inasmuch as if one family is allotted a site by the Government it is expected that the entire family will be accommodated in the building and allotment will not be given individually to each member. This definition cannot be foisted in the instant matter as it was coined for the specific purposes of the Act of 1985 and is relevant thereto and not otherwise.

Shiva Kumar Nepal* v. *Shankar Roy ***454-B***

Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – Ss. 2 (c) and 6 – Family – On a careful conjunctive reading of the above provisions it is apparent that once an allotment is made to a family comprising of a husband, wife, their children which includes major children living with them they would not be eligible for a second allotment – When the allotment was made to the Petitioner's husband in the year 1975 by the concerned Government Department, she comprised of his "family" having married her husband in the year 1974.

Ganga Maya Gurung* v. *State of Sikkim and Another ***500-A***

SLR (2019) SIKKIM 427

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

MAC App. No. 11 of 2017

The Municipal Commissioner,
Gangtok Municipal Corporation and Another ….. APPELLANTS

Versus

Mrs. Pabitra Singh Kami and Others ….. RESPONDENTS

For the Appellants: Mr. Jorgay Namka and Ms. Tashi Doma Sherpa, Advocates.

For Respondent 1-2: Mr. N. Rai, Senior Advocate with Mr. K.B. Chhetri and Mr. Sunil Baraily, Advocates.

For Respondent No.3: Mr. Thupden G. Bhutia, Advocate.

Date of decision: 1st July 2019

A. Motor Vehicles Act, 1988 –*Res Ipsa Loquitur* – A doctrine that infers negligence from the very nature of an accident or injury in the absence of direct evidence on how any person has behaved – Principle refers to *"the thing speaks for itself"* – The damage to the truck is a clear indication that the truck was responsible for having hit the Sumo from behind – Concluded that the truck was instrumental in the accident.

(Para 19)

B. Motor Vehicles Act, 1988 – The Motor Vehicles Act is a benevolent legislation and the absence of a Motor Vehicle Inspector's Report does not demolish the claim of Respondents No. 1 and 2 to establish that the truck hit the Sumo – Respondents No. 1 and 2 were able to prove the fact of the accident and the rash and negligent act of Appellant No. 2 – As the truck belongs to the Appellant No. 1, they become vicariously liable for the act of their employee and thereby liable to pay the compensation.

(Paras 20 and 21)

Appeal dismissed.

Chronological list of cases cited:

1. Surendra Kumar Arora and Another v. Manoj Bisla and Others, (2012) 4 SCC 552.
2. Minu B. Mehta and Another v. Balakrishna Ramchandra Nayan and Another, (1977) 2 SCC 441.
3. Oriental Insurance Co. Ltd. v. Meena Variyal and Others, (2007) 5 SCC 428.
4. Nishan Singh and Others v. Oriental Insurance Company Limited through Regional Manager and Others, (2018) 6 SCC 765.
5. Cholamandalam General Insurance Co. Ltd., through Regional Manager v. Smt. Badami and Others, MANU/RH/0525/2018.
6. The Branch Manager, Reliance General Insurance Company Limited v. Sa-Ngor Chotshog Centre and Another, MANU/SI/0013/2019.
7. Mangla Ram v. Oriental Insurance Company Limited and Others, (2018) 5 SCC 656.
8. Vimla Devi and Others v. National Insurance Company Limited and Another, (2019) 2 SCC 186.
9. Sunita and Others v. Rajasthan State Road Transport Corporation and Another, AIR 2019 SC 994.
10. National Insurance Company Limited v. Pranay Sethi and Others, 2017 (4) TAC 673.
11. British Columbia Electric Railway Company Limited v. Loach, AIR 1916 PC 208.
12. SarlaVerma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.
13. National Insurance Company Limited v. Pranay Sethi and Others, AIR 2017 SC 5157.
14. Magma General Insurance Co. Ltd. v. Nanu Ram and Others, MANU/SC/1012/2018.

JUDGMENT

Meenakshi Madan Rai, J

1. The learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok (hereinafter 'learned Tribunal') vide the impugned Judgment dated 28.07.2017, in MACT Case No. 27 of 2016 (Mrs. Pabitra Singh Kami and Another v. Municipal Commissioner, Gangtok Municipal Corporation and Others) directed payment of compensation of Rs.17,29,380/- (Rupees seventeen lakhs, twenty nine thousand, three hundred and eighty) only, to the Respondents No. 1 and 2 (Claimants No. 1 and 2 before the learned Tribunal) by the Appellant No. 1 (Opposite Party No. 1 before the learned Tribunal) along with interest fixed thereon. Aggrieved thereof the Appellants No. 1 and 2 are before this Court.

2. A motor vehicle accident occurred on 04.07.2015 at a place known as "32 Number," whereby a commercial vehicle bearing No. WB-76-7946 (Tata Sumo, Gold), driven by the deceased from Gangtok to Siliguri, allegedly hit a parapet and a telephone pole on the left side of the road and was thereafter struck from behind by the Truck bearing No. SK-01-D-2807, driven by the Appellant No. 2 (Opposite Party No. 2 before the learned Tribunal). This caused the Sumo to careen off about 100 feet below the road, leading to the instantaneous death of the deceased. Respondent No. 1, wife of the deceased and Respondent No. 2, his daughter claimed compensation of Rs.20,04,386/- (Rupees twenty lakhs, four thousand, three hundred and eighty six) only.

3. Before the learned Tribunal, the Appellants No. 1 and 2 (Opposite Parties No. 1 and 2, therein) vehemently denied the claims of the Respondents and averred that the accident occurred solely on account of the fault of the deceased. Neither was the vehicle of the Appellant No. 1 involved in the alleged accident nor was the Appellant No. 2 responsible for rash and negligent driving or the death of the deceased.

4. The Respondent No. 3 averred *inter alia* that the cause of accident and the death of the victim was the outcome of the rash and negligent driving on the part of the Appellant No. 2, who failed to maintain a safe braking distance. Besides the deceased was the owner of the vehicle and being the Insured did not come within the ambit of Third Party and hence could not be compensated.

5. The learned Tribunal after due consideration of the pleadings struck one issue for determination *viz.*

> *"(1) Whether the Claimants are entitled to the compensation claimed? If so, who is liable to compensate them?"*

On consideration of the entire evidence on record and the documents furnished before it, the learned Tribunal pronounced the impugned Judgment granting the compensation *supra* to the Respondents No. 1 and 2.

6. Before this Court, learned Counsel for the Appellants put forth the contention that it is doubtful as to whether the deceased was a kin of Respondents No. 1 and 2 as Exhibit 2, the First Information Report (for short 'FIR') lodged by one Ratan Pradhan before the Police Inspector, Singtam Police Station mentioned the name of the deceased as "Chaman Diyali" and not "Harka Raj Biswakarma" the person the Respondents No. 1 and 2 claim is their kin and finds place in the Claim Petition. The name of the deceased on Exhibit 12, the Income Tax Return Verification Form, allegedly of the deceased also differs. That, the name of the deceased in the Property Seizure Memo Exhibit 3, the Inquest Report Exhibit 4, the Death Certificate Exhibit 8, Driving Licence Exhibit 9 and the PAN Card Exhibit 10, all vary, consequently raising doubts on the very identification of the deceased. It was next contended that although the accident occurred on 04.07.2015, Exhibit 12 is dated 03.11.2015 much after the accident, thereby raising doubts on the income of the deceased. Besides, the Claim Petition has been filed under Section 166 of the Motor Vehicles Act, 1988 (for short the 'M.V. Act') with no proof of rash and negligent driving on the part of the Appellant No. 2 who was in fact acquitted of charges under Sections 279, 336, 337, 338 and 304 A of the Indian Penal Code, 1860 (for short the 'IPC') by a Magisterial Court. That the accident occurred on account of the deceased overspeeding and overtaking the vehicle of the Appellant No. 2 and thereby due to his own fault, hence, the Appellant No. 1 could not be held liable to pay compensation. Towards this submission reliance was placed on ***Surendra Kumar Arora and Another v. Manoj Bisla and Others***[1], ***Minu B. Mehta and Another v. Balakrishna Ramchandra Nayan and Another***[2] and ***Oriental Insurance Co. Ltd. v.***

[1] (2012) 4 SCC 552
[2] (1977) 2 SCC 441

Meena Variyal and Others[3]. The next argument advanced was that although the allegation of the Investigating Officer (for short 'I.O.') in the Criminal Case was that the vehicle of the Appellant No. 1 hit that of the deceased, sans Mechanical Report, thus rendering the allegation inconsequential. That, the statements of the passengers in the ill-fated vehicle recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') in the Criminal Case did not reveal that the Truck hit the Sumo from behind. Hence, in view of the afore detailed circumstances, the findings of the learned Tribunal is perverse and deserves to be set aside. To bolster his contentions reliance was placed on ***Nishan Singh and Others v. Oriental Insurance Company Limited through Regional Manager and Others***[4] and ***Cholamandalam General Insurance Co. Ltd., through Regional Manager v. Smt. Badami and Others***[5].

7. *Per contra,* learned Senior Counsel for the Respondents No. 1 and 2 while disputing the contentions of learned Counsel for the Appellants No. 1 and 2, walked this Court through the evidence of the Appellant No. 2 and contended that it was the driver, Appellant No. 2 no less, who had admitted his complicity in the accident. This was substantiated by the evidence of the Respondent No. 2. In light of the admission of the Appellant No. 2 the contention of the Counsel for the Appellants concerning absence of rash and negligent driving is contradicted. The I.O. discovered that the front of the Truck had sustained damages which sufficed as proof of the accident having been caused by it. Exhibit 3, the Property Seizure Memo prepared in connection with the Criminal Case fortifies that the front right side of the truck was damaged lending credence to the fact of accident and proof of rash and negligent driving of Appellant No. 2. The fact of the accident is also supported by Exhibit 2, the FIR pertaining to the incident. That, this Court in ***The Branch Manager, Reliance General Insurance Company Limited v. Sa-Ngor Chotshog Centre and Another***[6] has held that a conviction recorded by a Criminal Court is enough to hold that the driver had driven the vehicle rashly and negligently but his acquittal, on the other hand, would be no ground to dismiss the claim petition. That, in ***Mangla Ram v. Oriental Insurance Company Limited and Others***[7] the Hon ble Supreme Court has observed that when the accused were to be

[3] (2007) 5 SCC 428
[4] (2018) 6 SCC 765
[5] MANU/RH/0525/2018
[6] MANU/SI/0013/2019
[7] (2018) 5 SCC 656

acquitted in a criminal case, the same may be of no effect on the assessment of the liability required in respect of motor accident cases by the Tribunal. That, the differences emerging in the name of the victim on various documents has been clarified by Exhibit 21, the Affidavit sworn by Respondent No. 1 and relied on by Respondent No. 2 which remained undecimated in cross-examination. It was also contended that even if the party has failed to exhibit documents the claim petition cannot be dismissed. On this count, strength was garnered from ***Vimla Devi and Others v. National Insurance Company Limited and Another***[8]. That, nonexamination of relevant witnesses is not an issue in matters under the M.V. Act and the evidence on record is to be analysed to ascertain whether it suffices to answer the issue raised as observed by the Honble Supreme Court in ***Sunita and Others v. Rajasthan State Road Transport Corporation and Another***[9]. However, on the computation of compensation learned Senior Counsel urged that in view of the decision in ***National Insurance Company Limited v. Pranay Sethi and Others***[10], future prospects may also be granted on the income of the deceased and compensation under other heads may be modified in terms of the said Judgment.

8. Learned Counsel for the Respondent No. 3 submitted that since the learned Tribunal has not ordered payment to be made by Respondent No. 3 he had nothing to add to the instant matter.

9. I have heard *in extenso* and considered the rival submissions of learned Counsel for the parties. I have also carefully perused the impugned Judgment including the documents and evidence on record as well as the citations made at the Bar.

10. The only question that arises for determination before this Court is whether there was any error in the findings of the learned Tribunal.

11. Exhibit 2 is the FIR dated 04.07.2015, lodged by one Ratan Pradhan, an employee of the Sikkim Manipal University, informing that the same morning at around 5.20 a.m., the vehicle (Tata Sumo Gold bearing No. WB-76-7946) in which the Auditors of the University were travelling to

[8] (2019) 2 SCC 186
[9] AIR 2019 SC 994
[10] 2017 (4) TAC 673

Siliguri from Gangtok had met with an accident. At the spot he found that the Sumo had fallen into the river and one Truck bearing No. SK-01-2807 of the Gangtok Municipal Corporation was standing at a distance of about 100 feet away from the accident spot and the body of the deceased "Chaman Diyali" on the road side having been taken out from the river by the villagers. It was his summation that the Truck could have been instrumental in causing the accident as one side of the Truck was damaged.

12. In this context, while addressing the doubts raised by the Appellants with regard to the identity of the victim caused by the variation of his name in different documents, I have examined the concerned documents. Undoubtedly the name of the victim in Exhibit 4 the Inquest Report, Exhibit 5 Challan forwarding the dead body for Post Mortem Examination and Exhibit 9 his Driving Licence, all record his name as "Harka Raj Biswakarma." In Exhibit 8, his Death Certificate, it is recorded as "Harkaraj Singh (Kami)" while in Exhibit 10, his PAN Card, it is recorded as "Harkaraj Singh Kami." Exhibit 11, the Certificate of Enlistment of the victim for his Tours and Travels Office also reflects his name as "Harkaraj Singh" leading to discombobulation. However, from the evidence of the Respondent No. 2 it is clear that Respondent No. 1 her mother, the wife of the victim has sworn an Affidavit, Exhibit 21, wherein she has clarified *inter alia* that the Affidavit was sworn to declare that the names "Harka Raj Biswakarma," "Harka Raj Singh Kami," "Harka Raj Singh" and "Chaman Diyali" denotes and relates to one and the same person, that is, her husband. No contrary evidence on this aspect was furnished by the Appellants. Thus, Exhibit 21 is accepted on this count.

13. A doubt ensued on Exhibit 12, Income Tax Return Verification Form being dated 03.11.2015 while the victim was already deceased on 04.07.2015. It has been clarified by Respondent No. 2 that Exhibit 12 pertains to a particular Financial Year and cannot be submitted as and when a person passes away. Exhibit 12 thus pertains to the relevant Financial Year, besides which, Respondent No. 1 survives him and has taken necessary steps as required. The circumstances of Exhibit 12 having been explained, there can be no doubt that this document establishes the per annum income of the deceased.

14. While addressing the question of rash and negligent driving, the Appellant No. 2 has stated that when his vehicle crossed the Water Garden,

he saw the vehicle bearing No. WB 76 7946 which had overtaken his vehicle at full speed, skid off the metalled road, hit an electric post and then fall into the river. However, his cross-examination elicited an admission as hereunder extracted;

> *"... It is not a fact that no other vehicle or vehicles were involved in the said accident. (Witness volunteers to state that; it was only him and his vehicle involved in the said accident.) ..."*

Nothing could be clearer on this point to establish his role in the accident. Cross-examination of the witness coupled along with meticulous scrutiny of Exhibit 3, the Property Seizure Memo in G.R. Case No. 339 of 2015, arising out of Singtam Police Station Case bearing FIR No. 47 of 2015, reveals that the front right side of the Truck bearing No. SK-01-D-2807 was damaged. No explanation was forthcoming from the Appellants on the reason as to the damage on the Truck.

15. In support of the Appellants that rash and negligent driving was not proved, the Judgment of the learned trial Court acquitting the Appellant No. 2 was filed before this Court in I.A. No. 2 of 2018. The Judgment *inter alia* at Paragraph 7 reads as follows;

> "7. The other witnesses PW2 first informant is not a eye witness *(sic)*, PW 3 to PW 6 are seizure witnesses, PW 7 is the doctor who conducted autopsy on the deceased, PW 9 is the motor vehicle inspector and PW 10 is the investigating Officer. Thus there exists no evidence that the accused is the driver of the garbage truck, there is also no evidence that the accused was driving the said truck at the time of the accident. More importantly there is no evidence that the accused drove the truck rashly or negligently or committed any act which was rash or negligent. The evidence of the investigating officer that the garbage truck followed closely and hit the Tata Sumo has no evidence apart from his. The case of the prosecution has no iota of evidence to sustain the accusation as framed against the accused."

Evidently the learned trial Court truncated the proceedings under Section 258 of the Cr.P.C. being convinced that no evidence sustained the accusations against the accused/ Appellant No. 2. Whether the findings of the learned trial Court is correct in view of the evidence before it is another question altogether.

16. Exhibit 22 which is the Final Report submitted by the I.O. of the Criminal Case *supra* reflects *inter alia* that the surface width of the asphalt road where the accident occurred is approximately 25 feet wide with 2.3 feet width on the left flank and 4 feet width on the right flank of the road with parapets on the left side and easily accommodates two vehicles on either direction. At the time of the accident, there was reportedly no traffic except the vehicles involved in the accident and the weather was clear with visibility up to 100 metres ahead. No brake marks or skid marks were found on the spot to indicate that the Appellant No. 2 had applied the brakes at the relevant time to establish efforts exercised to prevent an accident.

17. Although reliance was placed by the Appellants on ***Nishan Singh and Others*** *supra* assistance sought thereof is misplaced. In the said matter a Maruti car was driving behind a truck and dashed into it. According to the Claimants therein *viz.* occupants of the car, the truck driver suddenly applied the brakes when the said truck was in the centre of the road, bringing it to the right side, as a result of which the Maruti car collided with the back of the truck. The Tribunal concluded that the driver of the Maruti car was responsible for rash and negligent driving consequently neither the truck driver nor the insurer of the truck were liable to pay the compensation. The matter went before the Honble High Court of Uttarakhand which similarly dismissed the Appeal reiterating the finding recorded by the Tribunal observing *inter alia* that the driver of the Maruti car had failed to keep sufficient distance between the two vehicles, running in the same direction. The Appellants assailed the finding of the Tribunal and the Honble High Court before the Honble Supreme Court. The Honble Supreme Court observed that the Maruti car which was following the truck was expected to maintain a safe distance as envisaged in Regulation 23 of the Rules of the Road Regulations, 1989. It was further held that the expression “sufficient distance” as given in the said Regulations has not been defined anywhere however the thumb rule of “sufficient distance” is at least a safe distance of two to three seconds gap in ideal conditions to avert

collision and to allow the following driver time to respond. The distance of 10 to 15 feet between the truck and the Maruti car was certainly not a safe distance for which the driver of the Maruti car must take the blame. That having been said, the Honble Supreme Court would also mull over whether the Tribunal should have at least answered the issue of contributory negligence of the truck driver in favour of the Appellants/Claimants and held as follows;

> "**14.** ...The question of contributory negligence would arise when both parties are involved in the accident due to rash and negligent driving. ***In a case such as the present one, when the Maruti car was following the truck and no fault can be attributed to the truck driver, the blame must rest on the driver of the Maruti car for having driven his vehicle rashly and negligently***. The High Court has justly taken note of the fact that the driver and owner of the Maruti car, as well as insurer of that vehicle, had not been impleaded as parties to the claim petition. The Tribunal has also taken note of the fact that in all probability, the driver and owner of the Maruti car were not made party being close relatives of the appellants. In such a situation, the issue of contributory negligence cannot be taken forward. ..."
>
> **(Emphasis supplied)**

No support can be gained by the Appellants from the aforestated citation which in fact assists the case of the Respondents.

18. In ***British Columbia Electric Railway Company Limited v. Loach***[11], an accident similar to the one under discussion arose. It was observed therein as follows;

> "... The accident which gave rise to the action occurred while the deceased was being driven by another man in a wagon called a "rig." The highway along which the wagon was proceeding crossed the appellants track on the level at a point

[11] AIR 1916 PC 208

> near a station and an orchard. While the wagon was being driven across the track it was run into by an electric car belonging to the appellants, with the result that the deceased was killed. ...
>
> …….
>
> In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, **the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it.** Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs. …"
>
> **(Emphasis supplied)**

19. In the instant case, it is worth noting that: (i) except the evidence of Appellant No. 2 who has stated that the Sumo overtook him, no other evidence is factored in on this aspect from any other witnesses; (ii) it is clear that the road surface was adequately wide and (iii) even assuming that the vehicle of the deceased being a smaller and faster vehicle, had overtaken the Truck driven by the Appellant No. 2, no rule of the road bars overtaking. If one vehicle overtakes the other, the overtaken vehicle is required to exercise caution and responsibly maintain a safe distance thereafter. There is no evidence whatsoever to indicate that the Sumo was driven at breakneck speed whereby the driver lost control and hit the electric pole. At this juncture, we may relevantly refer to the principle of *res*

ipsa loquitur, a doctrine that infers negligence from the very nature of an accident or injury in the absence of direct evidence on how any person has behaved. In other words, the aforestated principle refers to "*the thing speaks for itself*" and infers negligence from the very nature of an accident in the absence of direct evidence. The damage to the Truck is a clear indication that the Truck was responsible for having hit the Sumo from behind. Contributory negligence, in my considered opinion cannot be invoked neither can it be an issue in the circumstances. Thus it cannot but be concluded that the Truck was instrumental in the accident. That having been said it may be reiterated that the principles governing rash and negligent driving as required to be proved under Section 166 of the M.V. Act and its non-requirement under Section 163 A of the M.V. Act as sought to be urged by learned Counsel for the Appellants are no more *res integra* and do not merit a protracted discussion herein.

20. Now to address the argument of the Appellants that the Criminal Case was devoid of Mechanical Report to establish that the Truck hit the Sumo, it would be apposite to reiterate that the M.V. Act is benevolent legislation and the absence of a Motor Vehicle Inspectors Report does not demolish the claim of the Respondents No. 1 and 2. In ***Vimla Devi's*** case *supra* the Honble Supreme Court was considering the Judgment of the Tribunal which dismissed the claim petition of the Appellants holding that though the Claimants had filed the documents but did not exhibit them thus denying the Insurance Company an opportunity of crossexamining the Claimants' witnesses on the documents. The Hon'ble High Court in appeal agreed with the decision. To the contrary the Honble Supreme Court while allowing the claim petition observed as hereunder;

> "....
>
> **15. At the outset, we may reiterate as has been consistently said by this Court in a series of cases that the Act is a beneficial piece of legislation enacted to give solace to the victims of the motor accident who suffer bodily injury or die untimely. The Act is designed in a manner, which relieves the victims from ensuring strict compliance provided in law, which are otherwise applicable to the suits and other proceedings while prosecuting the claim petition**

filed under the Act for claiming compensation for the loss sustained by them in the accident.

.....

20.1. Firstly, the appellants had adduced sufficient evidence to prove the accident and the rash and negligent driving of the driver of the offending vehicle, which resulted in death of Rajendra Prasad.

20.2. Secondly, the appellants filed material documents to prove the factum of the accident and the persons involved therein.

20.3. Thirdly, the documents clearly established the identity of the truck involved in the accident, the identity of the driver driving the truck, the identity of the owner of the truck, the name of the insurer of the offending truck, the period of coverage of insurance of the truck, the details of the lodging of FIR in the police station concerned in relation to the accident.

20.4. In our view, what more documents could be filed than the documents filed by the appellants to prove the factum of the accident and the persons involved therein.

.....

20.8. Seventhly, if the Court did not exhibit the documents despite the appellants referring to them at the time of recording evidence, then in such event, the appellants cannot be denied of their right to claim the compensation on such ground. In our opinion, it was nothing but a procedural lapse, which could not be made basis to reject the claim petition. It was more so when the appellants adduced oral and documentary evidence to prove their case and the respondents did nothing to counter them."

(Emphasis supplied)

It goes without saying that the principles so enunciated have equal applicability herein.

21. In light of the aforementioned reasons, I am of the considered opinion that the Respondents No. 1 and 2 were able to prove the fact of the accident and the rash and negligent act of the Appellant No. 2. Consequently as the Truck belongs to the Appellant No. 1, they become vicariously liable for the act of their employee and thereby liable to pay the compensation.

22. So far as computation of compensation is concerned, the learned Tribunal correctly adopted the Multiplier of "9" for calculating loss of income in terms of the approved table laid down in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[12] as the age of the deceased was 56. However, future prospects was not granted. In this context, we may beneficially refer to the ratiocination of the Honble Supreme Court in ***National Insurance Company Limited vs. Pranay Sethi & Ors.***[13], wherein it was held as follows;

> **"61.** ...
>
> **(iii)** While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> **(iv) In case the deceased was selfemployed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component**."
>
> **(Emphasis supplied)**

[12] (2009) 6 SCC 121
[13] AIR 2017 SC 5157

The income of the deceased was reflected as Rs.2,61,980/- (Rupees two lakhs, sixty one thousand, nine hundred and eighty) only, per annum as per Exhibit 12. Hence, in view of the ratio *supra* of the Honble Supreme Court, it is evident that where the deceased was on a fixed income and between the age of 50 to 60 years, an addition of 10% of the established income should be made towards future prospects. Thus, 10% shall be calculated as future prospects.

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

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

Later in time, in ***Magma General Insurance Co. Ltd. v. Nanu Ram and Ors.***[14], while discussing the right to consortium, the Honble Supreme Court determined as under;

> "8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.
>
> **In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.**
>
> **The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.**
>
> **Spousal consortium is generally defined as rights pertaining to the relationship of a**

[14] MANU/SC/1012/2018

husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

.....

A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra). ..."

(Emphasis supplied)

24. Consequently Rs.15,000/- (Rupees fifteen thousand) only, is granted towards funeral expenses in terms of ***Pranay Sethi and Others*** *(supra)* instead of Rs.25,000/- (Rupees twenty five thousand) only, granted by the learned Tribunal. Rs.15,000/- (Rupees fifteen thousand) only, is granted towards loss of estate in terms of ***Pranay Sethi and Others*** *(supra)* instead of Rs.2,500/- (Rupees two thousand and five hundred) only, granted by the learned Tribunal. Rs. 40,000/- (Rupees forty thousand) only, each, is granted to the Respondents No. 1 and 2 towards "spousal consortium" and "parental consortium" respectively, in terms of ***Magma General Insurance Co. Ltd.*** *(supra)* instead of Rs.1,00,000/- (Rupees one lakh) only, granted by the learned Tribunal. The question of compensation on account of "loss of love and affection" as granted by the learned Tribunal, in view of the ratio *supra* becomes superfluous and is deducted from the compensation amount. With regard to the amount of Rs.5,000/- (Rupees five thousand) only, having been granted towards "Cost of transportation of the victim to the Hospital," no evidence has been furnished by the Respondents No. 1 and 2 to support such claim, hence cannot be granted and is duly deducted.

25. In conclusion, in light of the above discussions and findings, the compensation which is found to be just is as follows;

Annual Income of the deceased	Rs.2,61,980.00
Add 10% of Rs.2,61,980.00 as future prospects	Rs.26,198.00
Yearly income of the deceased	Rs.2,88,178.00
Less 1/3 of Rs. 2,88,178.00 [deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	Rs.96,059.00
Net yearly income	Rs.1,92,119.00
Multiplier of **'9'** adopted in terms of ***Sarla Verma's case (supra)*** (Rs.1,92,119 x 9)	Rs.17,29,071.00
Add Funeral expenses in terms of ***Pranay Sethi's case (supra)***	Rs.15,000.00
Add Loss of consortium [Rs.40,000/- each, payable to Respondents No. 1 and 2 as spousal consortium and parental consortium, respectively] in terms of ***Magma General Insurance Co. Ltd.'s case (supra)***	Rs.80,000.00
Add Loss of estate in terms of ***Pranay Sethi's case (supra)***	Rs.15,000.00
Total	**Rs.18,39,071.00**

(Rupees eighteen lakhs, thirty nine thousand and seventy one) only.

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

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

28. In the end result, the computation of compensation of the learned Tribunal stands modified to the extent above.

29. Appeal dismissed.

30. No order as to costs.

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

32. Records of the learned Tribunal be remitted forthwith.

SLR (2019) SIKKIM 445

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

Crl. L.P. No. 10 of 2017

Ankit Sarda ….. **PETITIONER**

Versus

Subash Agarwal ….. **RESPONDENT**

For the Petitioner: Mr. Jorgay Namka and Ms. Tashi Doma Sherpa, Advocates.

For the Respondent: Mr. Rahul Rathi, Advocate.

AND

Crl. L.P. No. 11 of 2017

Ankit Sarda ….. **PETITIONER**

Versus

Kailash Agarwal ….. **RESPONDENT**

For the Petitioner: Mr. Jorgay Namka and Ms. Tashi Doma Sherpa, Advocates.

For the Respondent: Mr. Rahul Rathi, Advocate.

Date of Order: 4th July 2019

A. Negotiable Instruments Act, 1881 – S. 142 (1)(b) – Limitation of filing a complaint – Complaint is to be made within one month of the date on which the cause of action arises – S. 142 (1)(b) does not clarify as to how many days one month would comprise of. In such a circumstance, it

could be deduced that the term "one month" would be a calendar month in terms of S. 3 (35) of the General Clauses Act – For the purpose of calculating the period of one month, the period has to be reckoned by excluding the date on which the cause of action arose. In re: M/s. Saketh India Ltd. and Econ Antri Ltd. referred.

(Para 7)

Both petitions dismissed.

Chronological list of cases cited:

1. Keshav Chouhan v. Kiran Singh and Others, 2015 (4) M.P.L.J. 230.
2. Surekha Sandip Hajare v. Instacomp through Partner Sanjeev Shivapurkar and Another, 2004 (2) R.C.R. (Criminal) 408.
3. M/s Saketh India Ltd. v. M/s India Securities Ltd., 1999 (2) R.C.R. (Criminal) 153.
4. Haru Das Gupta v. State of West Bengal, (1972) 1 SCC 639.
5. Econ Antri Ltd. v. Rom Industries Ltd. and Another, AIR 2013 SC 3283.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. By filing the application under Section 378(4) of the Code of Criminal Procedure, 1973, the Petitioner herein who was the Complainant before the learned trial Court, seeks leave to Appeal against the impugned Judgment dated 30.11.2016, of the learned Judicial Magistrate, East Sikkim at Gangtok in Private Complaint Case No. 03 of 2015 *(Ankit Sarda v. Subash Agarwal)*, by which, the Respondent herein was acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter, "N.I. Act").

2. Learned Counsel for the Petitioner advanced the contention that the Petitioner is a businessman trading in Stock Exchange and had business dealings with the Respondent herein (the accused before the learned trial Court). In October, 2014, the Respondent issued three Cheques to the

Petitioner of which two Cheques were of AXIS Bank, Gangtok Branch and one of the Canara Bank, Gangtok Branch, which were marked as Exhibits 1, 2 and 3 respectively. The Cheques when presented by the Petitioner for encashment before the HDFC Bank, Gangtok Branch was dishonoured with the remark "insufficient funds" with regard to Exhibits 1 and 2 and "account closed" for Exhibit 3. The Petitioner consequently issued Legal Notice to the Respondent on 11.11.2014, demanding repayment of Rs.15,00,000/- (Rupees fifteen lakhs) only, covered by Exhibits 1 to 3. The Respondent failed to comply with the Legal Notice of the Petitioner upon which the Petitioner filed Private Complaint Case *supra* on 31.12.2014. It is strenuously urged by learned Counsel for the Petitioner that the said Complaint was well within the period of limitation prescribed under Section 138(c) and Section 142(1)(b) of the N.I. Act. That, on completion of trial before the learned trial Court, the impugned Judgment was pronounced on 30.11.2016, wrongly acquitting the Respondent by overlooking the vital materials on record apart from misreading the provisions of law and erroneously calculating the period of limitation, hence the Petitioner be allowed to file his Appeal.

3. Vehemently resisting the stance of the Petitioners Counsel, learned Counsel for the Respondent contended that the concerned Cheques Exhibits 1 to 3 were all issued on 10.10.2014. On 07.11.2014 all the Cheques were dishonoured on the grounds as mentioned by the Petitioner. Notice under Section 138 of the N.I. Act came to be issued on 11.11.2014. In this context, reliance was placed on Exhibit 7 which is the Notice issued to the Respondent. On the same day it was despatched by registered AD to the Respondent i.e. 11.11.2014 and the Notice came to be delivered on 12.11.2014. Admittedly no documents have been filed by either party to establish receipt of the Notice by the Respondent on 12.11.2014, however on this count the attention of this Court was drawn by learned Counsel for the Respondent to the cross-examination of the Petitioner. It was urged that in his cross-examination before the learned trial Court the Petitioner has unequivocally admitted that the Notice marked Exhibit 7 is dated 11.11.2014 and was delivered to the accused on 12.11.2014. That, on such admission of the Petitioner nothing further remains to be contested on the fact of the date of delivery of Notice. That, Section 138 of the N.I. Act requires that the payee or the holder of the cheque, as the case may be, is to make a demand for the payment of the required amount of money by

giving a notice, in writing, to the drawer of the cheque, within thirty days from the receipt of information by him, from the Bank, regarding the return of the cheque as unpaid. The drawer of such cheque is to make payment of the said amount of money to the payee or, as the case may be, to the holder of the cheque, within fifteen days of the receipt of the said notice. It is admitted that the Notice, Exhibit 7 was issued within thirty days of the Cheques being dishonoured. When the accused fails to make payment within fifteen days of the receipt of Notice, then Section 142 of the N.I. Act mandates that the Complaint ought to be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the N.I. Act. That, in the instant case since Notice was delivered on 12.11.2014, fifteen days thereof expired on 27.11.2014, hence the Complaint ought to have been filed on 28.12.2014 but came to be filed only on 31.12.2014 thereby leading to a delay of two days. That, although the delay is of two days, the proviso to Section 142(1)(b) of the N.I. Act requires that if such delay has occurred then the Complainant is required to satisfy the Court that he had sufficient cause for not making a Complaint within such period, upon which, the Court if so convinced, may take cognizance of the Complaint. That the Petitioner failed to take the required steps as mandated by law before the learned trial Court, hence his prayer deserves no consideration and his petition seeking leave to Appeal ought to be rejected. In order to fortify his submissions, reliance was placed on ***Keshav Chouhan v. Kiran Singh and others***[1], ***Surekha Sandip Hajare v. Instacomp through Partner Sanjeev Shivapurkar and another***[2] and ***M/s Saketh India Ltd. v. M/s India Securities Ltd.***[3]

4. I have heard the rival contentions of learned Counsel for the parties and have given due consideration to the same. I have also perused the documents on record of the learned trial Court as well as the citations made at the Bar.

5. Admittedly the Cheques in question were issued on 10.10.2014 which were dishonoured vide Memos dated 07.11.2014. Notice, Exhibit 7, was issued to the Respondent by the Petitioner on 11.11.2014 and delivered on 12.11.2014. Although it is true that no written documents establish delivery of Notice on 12.11.2014 but reference to the cross-

[1] 2015 (4) M.P.L.J. 230
[2] 2004 (2) R.C.R. (Criminal) 408
[3] 1999 (2) R.C.R. (Criminal) 153

examination of the Petitioner before the learned trial Court, relied on by learned Counsel for the Respondent, indubitably establishes as follows;

> *"… It is true that the said notice marked as exbt-7 is dated 11.11.2014. It is true that the said notice was delivered to the accused on 12.11.2014. …"*

At this juncture, we may pertinently refer to Section 58 of the Indian Evidence Act, 1872 which provides as hereunder;

> "58. Facts admitted need not be proved.-No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Courts may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

The unequivocal admission of the Petitioner *supra* leaves no manner of doubt that not only was the Notice issued on 11.11.2014 but was also delivered to the Respondent on 12.11.2014. The cross-examination *supra* of the Petitioner was not retracted at any point in time.

6. The air on delivery of Notice having been cleared, I now deem it essential to address the question of limitation as envisaged in Section 142(1)(b) of the N.I. Act. In ***Haru Das Gupta v. State of West Bengal***[4] a two Judge Bench of the Honble Supreme Court held as follows;

> "… When a period of time running from a given day or event to another day or event is prescribed by law or fixed by contract and the question arises whether the computation is to be made inclusively or exclusively of the firstmentioned or of the last-mentioned day, regard must be had to the context and to the purpose for which the computation has to be made. [Halsbury's *Laws of*

[4] (1972) 1 SCC 639

England, (3rd. ed.) Vol. 37, p. 92]. There is, however, a volume of authority in England showing that where a certain thing has to be done within a specified period, the day on which the cause of action arose is to be excluded from computation and the day on which such action is taken is to be included. …

5. … The rule is well-established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded. (See *Goldsmiths Company* v. *West Metropolitan Railway Company*). [(1904) KB 1 at 5]. This rule was followed in *Cartwright* v. *Maccormack* [(1963) 1 All ER 11 at 13] where the expression "fifteen days from the date of commencement of the policy" in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in *Marren* v. *Dawson Bentley & Co. Ltd.* [(1961) 2 QB 135], **a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. (See also *Stewart* v. *Chadman* [(1951) 2 KB 792] and *In re North, Ex parte Wasluck* [(1895) 2 QB 264]). Thus, as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day.** [See *Halsbury's Laws of England*, (3rd ed.), Vol. 37, pp. 92 and 95.] There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here.

6. In computing the period of three months from the date of detention, which was February 5, 1971, before the expiration of which the order or

> decision for confirming the detention order and continuation of the detention thereunder had to be made, the date of the commencement of detention namely, February 5, 1971, has to be excluded. So done, the order of confirmation was made before the expiration of the period of three months from the date of detention.
> ....."
>
> **(Emphasis supplied)**

In ***M/s. Saketh India Ltd. v. M/s. India Securities Ltd.***[5], a two Judge Bench of the Honble Supreme Court while citing the aforestated decision with approval observed as hereunder;

> **"7.** The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'.
>
> **8**. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last.

[5] 1999 (2) R.C.R. (Criminal) 153

> Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires. Period of 15 days in the present case, expired on 14th October, 1995. So cause of action for filing complaint would arise from 15th October, 1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15th November, 1995. The result would be that the complaint filed on 15th November is within time. …"

More recently the ratio *supra* of ***M/s. Saketh India Ltd.*** was cited with approval by a three Judge Bench of the Honble Supreme Court in ***Econ Antri Ltd. v. Rom Industries Ltd. and another***[6] as under;

> "**25.** Having considered the question of law involved in this case in proper perspective, in light of relevant judgments, we are of the opinion that Saketh lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. We hold that SIL Import USA does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in Saketh by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly. …"

7. Section 142(1)(b) of the N.I. Act provides that the Complaint is to be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act. Pertinently it may be noticed that Section 142(1)(b) does not clarify as to how many

[6] AIR 2013 SC 3283

days one month would comprise of. In such a circumstance, it could be deduced that the term "one month" would be a calendar month in terms of Section 3(35) of the General Clauses Act which provides as follows;

> "**3. Definitions**.- In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,-
>
> .....
>
> (35) "month" shall mean a month reckoned according to the British calendar; …"

8. In the instant case, it is clear that fifteen days from 12.11.2014 after delivery of Notice expired on 27.11.2014. The cause of action for filing the Complaint therefore arose from 28.11.2014. On the anvil of the ratiocinations extracted *supra* the computation of limitation for one month would commence on 29.11.2014. The Complaint however came to be filed only on 31.12.2014 evidently beyond the period prescribed by the statute. The learned trial Court in the impugned Judgment opined that the case was time barred as the matter came to be filed only on 31.12.2014. No error arises on this conclusion. It is also clear that the Petitioner failed to bring to the Notice of the learned trial Court that a delay in filing the Complaint had occurred neither did he take steps as required under the proviso to Section 142(1)(b) of the N.I. Act.

9. In conclusion, considering the entire gamut of facts and circumstances, I am of the considered opinion that the Petitioner not only failed to lodge the Complaint on time but is also guilty of having approached the learned trial Court with unclean hands. Hence the petition deserves to be and is accordingly rejected.

10. Consequently, no leave to Appeal is granted.

11. Criminal Leave Petition No. 10 of 2017 stands disposed of accordingly.

SLR (2019) SIKKIM 454

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

RFA No. 07 of 2016

Shiva Kumar Nepal ….. APPELLANT

Versus

Shankar Roy ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate with
Ms. Malati Sharma, Advocate.

For the Respondent: Mr. A. Moulik, Senior Advocate with
Mrs. K. D. Bhutia and Mr. Ranjit Prasad,
Advocates.

Date of decision: 4th July 2019

A. Notification No. 6326-600-H&W-B dated 14.04.1949 – *Bona-fide* use – The tenant cannot dictate terms to the landlord about how he should utilize his own premises. It is the prerogative of the landlord to decide what he seeks to do with his property and how best to utilize it – A person does not require experience in business, all that the Appellant is required to establish before the Court is his *bona fide* requirement.

(Para 15)

B. Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – Definition of the term "family" *vis-a-vis* Notification No. 6326-600-H&W-B dated 14.04.1949 – "Family" as defined in the Act of 1985 is for the purposes of allotment of house sites inasmuch as if one family is allotted a site by the Government it is expected that the entire family will be accommodated in the building and allotment will not be given individually to each member. This definition cannot be foisted in the instant matter as it was coined for the specific purposes of the Act of 1985 and is relevant thereto and not otherwise.

(Para 17)

C. General Clauses Act, 1897 – S. 27 – Meaning of Service by post – The provision of law assumes that service is deemed to be effected *inter alia* only if the address furnished is correct. In the absence of a correct address, it cannot be assumed merely because there is only one "Professor S.K. Nepal" in Rhenock that it referred to the Appellant and none else – Consequently, there was default in payment of rent by the Respondent.

(Para 19)

D. Notification No. 6326-600-H&W-B dated 14.04.1949 – Appellant has made out a case for requirement of the suit premises for his *bona fide* use – There is default in payment of rent by the Respondent for four months.

(Para 21)

Appeal allowed.

Chronological list of cases cited:

1. Joginder Pal v. Naval Kishore Behal, 2002 (5) SCC 397.
2. Dwarkaprasad v. Niranjan and Another, (2003) 4 SCC 549.
3. Malpe Vishwanath Acharya and Others v. State of Maharashtra and Another, (1998) 2 SCC 1.
4. Adil Jamshed Frenchman v. Sardar Dastur Schools Trust and Others, (2005) 2 SCC 476.
5. Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Ltd., (2011) 10 SCC 420.
6. Om Prakash and Another v. Mishri Lal, (2017) 5 SCC 451.
7. Ragavendra Kumar v. Firm Prem Machinery & Co., (2000) 1 SCC 679.
8. Bhupinder Singh Bawa v. Asha Devi, (2016) 10 SCC 209.
9. Kailash Chand and Another v. Dharam Dass, (2005) 5 SCC 375.
10. Siddalingamma and Another v. Mamtha Shenoy, (2001) 8 SCC 561.
11. Smt. Jahejo Devi and Others v. Moharam Ali, AIR 1988 SC 411.

12. Pratap Rai Tanwani and Another v. Uttam Chand and Another, (2004) 8 SCC 490.

13. Deena Nath v. Pooran Lal, (2001) 5 SCC 705.

14. State of Gujarat through Chief Secretary and Others v. Savitri Devi, (1996) 1 SCC 558.

15. Vengdasalam Pillai v. Union Territory of Pondicherry, AIR 1985 SC 571.

16. Commissioner of Income Tax, Bombay and Others v. Podar Cement Pvt. Ltd. and Others, (1997) 5 SCC 482.

17. State of Gujarat v. Savitri Devi, (1996) 1 SCC 558.

18. Haricharan Singh v. Shivrani and Others, (1981) 2 SCC 535.

19. Deena Nath v. Pooran Lal, (2001) 5 SCC 705.

20. Sait Nagjee Purushotham and Co. Ltd. v. Vimalabai Prabhulal and Others, (2005) 8 SCC 252.

JUDGMENT

Meenakshi Madan Rai, J

1. Dissatisfied with the Judgment of the learned District Judge, South Sikkim, at Namchi, in Eviction Suit No.02 of 2014, decreeing the Suit of the Respondent/Plaintiff (hereinafter, Respondent) and dismissing the Counter-Claim of the Appellant/Defendant (hereinafter, Appellant), the Appellant seeks redressal before this Court.

2. A brief factual narrative is essential for clarity in the matter. The Respondents case is that he was a tenant in the ground and first floor of a building initially owned by one Purnima Shreshta, at a monthly rent of Rs.3,500/- (Rupees three thousand and five hundred) only, used for his residence and business respectively. The property was purchased by the Appellant in the year 2011. From January, 2012 he demanded an enhanced monthly rent of Rs.8,000/- (Rupees eight thousand) only, which the Respondent refused to pay, while the Appellant declined to accept the original rent of Rs.3,500/- (Rupees three thousand and five hundred) only, the intention allegedly being to declare the Respondent a defaulter and

thereby evict him. Consequently the Respondent was compelled to send the rent by Money Order from January, 2012. The Appellant also employed some musclemen to intimidate the Respondent in order to expedite his eviction from the suit premises. On 12-01-2014, the Appellant coerced him in the presence of witnesses into affixing his signature on Exhibit 'A', an Undertaking to vacate the suit premises. Pursuant thereto the Respondent issued a Legal Notice, Exhibit 2A, to the Appellant denying execution of such Agreement. The Respondent then approached the learned Trial Court under Notification No.6326—600-H&W—B of the Health and Works Department, Government of Sikkim, dated 14-04-1949 (for short "Notification of 1949"), seeking a declaration that he is entitled to enjoy his rented premises free from undue harassment and interference from the Appellant, his agents or servants till such time that he is evicted by due course of law. He also sought prohibitory injunction on the same grounds, till final disposal of the Suit.

3. Denying and disputing the allegations, the Appellant in his Written Statement-cum-Counter Claim averred that he required the suit premises *bona fide*, for the purposes of opening a beauty parlour for his wife, a trained beautician and a fast food eatery for his unemployed brothers. The building also required overhauling for proper residential and commercial use, the premises having been damaged by the Respondent, though subsequently this ground was abandoned. Despite the original owners assurance that the Respondent would vacate the suit premises within two months of registration of the building in the Appellants name, another five months time was sought from January, 2012. Later, he agreed to vacate within a period of two months, but ceased paying rent from the same month, *viz.* January, 2012. On enquiry by the Appellant in the month of May, 2012, the Respondent informed him that the rent was being sent by Money Order, while enquiry from the Postal Authorities negatived such remittance, thereby rendering the Respondent a defaulter. The Appellant enumerated the following prayers in his Counter-Claim;

> 'a. A decree for declaration that the defendant is the owner and the plaintiff is the tenant of the suit premises.
>
> b. A decree for eviction of the plaintiff from the suit premises on the ground of default on payment of house rent to the defendant for more than the statutory period for payment of

monthly house rent, for the ground of bona fide requirement of the defendant, his wife, brothers and mother of the defendant of the suit premises and thorough overhauling of the suit premises for the purpose of remodeling or Modifying the suit premises for running the beauty parlour and a fast food joint.

c. A decree for recovery of Rs.1,15,500/- being the arrear rent along with the interest at the rate of 10% per annum of the suit premises from the month of January, 2012 to the month of June 2014.

d. A decree for Rs.6,750/- for court fees paid by the defendant for his Counter-Claim.

e. Permanent injunction.

f. Ad interim and temporary injunction, if prayed for.

g. Receivership of the suit premises, if prayed for.

h. Cost of litigation.

i. Any other relief or reliefs as this Honble Court may deem fit and proper.'

4. The Respondent, while countering the averments of the Appellant stated that the Appellants claim of *bona fide* requirement was fallacious as the Appellant is already in possession of three storeys in the five storeyed building. The Respondent in fact had been assured by the original owner that despite the sale he would not be required to vacate the suit premises. That, his eviction would have a cascading effect on his employees who would consequently be unemployed, thereby affecting their families. Besides, the brothers of the Appellant being independent had their own sources of income and the grounds forwarded for eviction were a ploy to hire out the premises to Companies at enhanced monthly rents. That, rents for the months of December, 2013 to May, 2014, were collected by the Appellant from the Post Office, therefore, the question of the Respondent defaulting in payment of rent does not arise. Hence, the Counter-Claim be dismissed with costs.

5. The learned Trial Court on the basis of the pleadings of the parties settled the following Issues for adjudication;

1. Whether the suit is maintainable?

2. Whether the Defendant has been harassing the Plaintiff in order to illegally evict him from the suit premises?

3. Whether the Defendant stopped accepting the monthly rent with effect from January, 2012, owing to which the Plaintiff was constrained to send the monthly rent through Money Order which too was refused by the Defendant?

4. Whether on 12-01-2014 the Plaintiff was compelled to sign on the concerned document(s)/undertaking(s) pertaining to the suit premises/demised premises?

5. Whether the Defendant unilaterally enhanced the monthly rent of the suit premises from Rs.3,500/- to Rs.8,000/-?

6. Whether the Plaintiff is entitled to the reliefs as prayed for by him?

6. Separate Issues were framed on the Counter-Claim as follows;

1. Whether the Counter-Claim of the Defendant is maintainable?

2. Whether the Defendant requires the suit premises for his/his family's *bona fide* use?

3. Whether the suit premises need thorough overhauling?

4. Whether the Plaintiff has willfully defaulted in payment of the monthly rent from January, 2012?

5. Whether the Plaintiff is liable to be evicted on any of the above grounds?

6. Whether the Defendant is entitled to the reliefs as prayed for by him in his Counter-Claim including arrears of rent?

7. The learned Trial Court took up Issue No.3 of the main Suit and Issue No.4 of the Counter-Claim and on consideration of the evidence and documents furnished before it, reached the finding that there is always a presumption under the law that any Registered Post sent to the correct address of the addressee has duly reached him and it was for the Appellant to rebut the said presumption, which he failed to do. That, there was no reason for the Plaintiff to have sent the monthly rent by Money Order had the Appellant been willing to accept the same and it was this refusal that

constrained the Respondent to send it through Money Orders. The Issues were decided accordingly. Issue No.4 of the main Suit was taken up next and it was concluded that the Respondent had been pressurized to sign on Exhibit 'A'. While deciding Issue No.2 of the Counter-Claim the learned Trial Court concluded that the plea of requirement of the suit premises by the Appellants wife, brothers and mother was made only to evict the Respondent without *bona fide* requirement. In Issue No.3 of the Counter-Claim it was observed that the claims regarding the suit premises/building requiring thorough overhauling were rightly abandoned by the Appellant as he was unable to prove the same. Issue No.5 of the main Suit however came to be decided in favour of the Appellant with the observation that the Respondent had miserably failed to prove unilateral enhancement of rent by the Appellant. In Issue No.2 of the main Suit the learned Trial Court concluded that the Respondent had proved harassment caused to him on account of the Appellant's refusal to accept the monthly rent and by pressuring him to sign Exhibit 'A'. Issues No.1 and 6 of the main Suit were decided in favour of the Respondent. Issues No.1, 5 and 6 of the Counter-Claim of the Appellant were found to be not maintainable on the Appellants failure to establish *bona fide* use or default in payment of monthly rent. In the end result, the Suit of the Respondent stood decreed while the Counter-Claim of the Appellant was dismissed.

8. Before this Court, on the ground of *bona fide* requirement of the suit premises by the Appellant, learned Senior Counsel for the Appellant contended that the family of the Appellant also comprises of his unemployed brothers and ailing mother who is in constant need of medical attention. That, the income of the Appellant does not suffice for the upkeep of his entire family and hence the requirement of employment for his brothers by way of opening business in the suit premises in order to augment the family income. On this count, reliance was placed on ***Joginder Pal v. Naval Kishore Behal***[1] and ***Dwarkaprasad v. Niranjan and Another***[2]. Admittedly, the Appellant and his brothers own landed property in the village with theirrespective shares demarcated which remain registered in their late fathers name besides no income is generated therein. That, although the second, third and fourth floor of the building are being used by the Appellant, it is inadequate for the purposes of beauty parlour and fast food eatery, hence the requirement of the two other floors. That the

[1] 2002 (5) SCC 397
[2] (2003) 4 SCC 549

Appellant's brother DW3 Hari Lall Sharma bolstered the evidence of the Appellant by stating that although he had not submitted either an Unemployment Card issued to him or Income Certificate before the Court, his elder brother requires the suit premises for the purposes as stated by him. Strength was garnered from the ratio in ***Malpe Vishwanath Acharya and Others v. State of Maharashtra and Another***[3] and ***Adil Jamshed Frenchman v. Sardar Dastur Schools Trust and Others***[4]. It was vehemently denied that Exhibit A was signed by the Respondent under coercion in the presence of witnesses, and to the contrary was done voluntarily with the assurance of vacating the suit premises and handing over vacant possession to the Appellant in the month of June, 2014. In this context reliance was placed on ***Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited***[5]. That, it is now settled law that it is not necessary to establish that a person is trained or has Licence to take up a profession in the premises, all that is to be established is the *bona fide* requirement and not mere whim or desire of the landlord.

9. On the aspect pertaining to default in payment of rent by the Respondent, it was contended by the Appellant that the learned trial Court erroneously decided Issue No. 3 of the main suit and Issue No. 4 of the Counter-Claim assuming that the rent was sent by Money Order to the correct address, however Exhibit 3 reveals an incorrect and incomplete address. The Postman who allegedly delivered the money was not examined as a witness neither is there any evidence to establish refusal by the Appellant. Exhibit 3 is therefore proof of the fact of default in payment of rent for the months of January 2012 to November, 2013 which remained unreceived due to incorrect address. Rents for the months of December, 2013 to June, 2015 was sent in the Appellants Jorethang address and duly received by him. It was also argued that the finding of the learned trial Court that the Appellant had been coerced to sign on Exhibit A is an incorrect presumption arrived at sans proof. Besides, despite the Respondent s undertaking to furnish his wife and daughter as witnesses, he failed to comply, thereby, leading to adverse inference against him. On this count reliance was placed on ***Om Prakash and Another v. Mishri Lal***[6]. To buttress his other submissions, reliance was placed on ***Ragavendra***

[3] (1998) 2 SCC 1
[4] (2005) 2 SCC 476
[5] (2011) 10 SCC 420
[6] (2017) 5 SCC 451

Kumar v. Firm Prem Machinery & Co.[7]***, Bhupinder Singh Bawa v. Asha Devi***[8]***, Kailash Chand and Another v. Dharam Dass***[9]***, Siddalingamma and Another v. Mamtha Shenoy***[10]***, Smt. Jahejo Devi and Others v. Moharam Ali***[11] and ***Pratap Rai Tanwani and Another v. Uttam Chand and Another***[12].

10. Rebutting the arguments of the Appellant, learned Senior Counsel for the Respondent urged that the Appellants averments are false as the negotiations for purchase of the building took place around the year 2010-2011 while the Appellant married only in the year 2014. In this circumstance, the probability of the Appellant having informed the original owner of his intention to buy her property for his wifes beauty parlour is nil. That, in fact, Exhibit A was the outcome of coercion on the Respondent by the Appellant, in the presence of witnesses who were in the Appellants house at that time. The Appellant also does not possess any Licence to run any business for his brothers while the Licence for his wife was obtained much later, hence the Appellant has not approached the Court with clean hands. It was next contended that no proof whatsoever was furnished to establish that the brothers were dependent on the Appellant or that he requires the suit premises to start a business venture for them. On this count, reliance was placed on ***Deena Nath v. Pooran Lal***[13]. Denying that the Appellants aged mother would form a part of his family, attention was drawn to the definition of "family" as detailed in the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 (for short 'Act of 1985') which describes "family" as father, mother, their minor children and major children living jointly with the parents. It was urged that the definition excludes mother or brothers whose needs cannot be taken into consideration for the purposes of *bona fide* requirement. To fortify this submission, reliance was placed on the ratiocination of ***State of Gujarat through Chief Secretary and Others v. Savitri Devi***[14] wherein the Honble Supreme Court held that the mother has not been included as a member of the family to the claim in Family Pension from the Government. The evidence furnished by the Appellant would lead to the unequivocal

[7] (2000) 1 SCC 679
[8] (2016) 10 SCC 209
[9] (2005) 5 SCC 375
[10] (2001) 8 SCC 561
[11] AIR 1988 SC 411
[12] (2004) 8 SCC 490
[13] (2001) 5 SCC 705
[14] (1996) 1 SCC 558

conclusion that it is a mere desire of the Appellant to be in possession of the other floors of the building although law mandates the "genuine need" of the landlord to be proved. Reliance was placed on ***Vengdasalam Pillai v. Union Territory of Pondicherry***[15].

11. While resisting the arguments of the Appellant on the ground of default of payment of rent learned Senior Counsel for the Respondent advanced the argument that the address of the Appellant at Rhenock had been correctly detailed in the Money Orders remitting rent to the Appellant. That, there was only one "Professor S.K. Nepal" in Rhenock at the relevant time. The denial of acceptance of rent by the Appellant after enhancement led to remittance thereof by Money Order. The declaratory suit was a result of the coercion on the Respondent to sign on Exhibit A and refusal to receive the rents remitted by Money Orders. That, the finding of the learned trial Court that there was no unilateral enhancement of rent of the suit premises while deciding Issue No.5 of the main suit is erroneous and hence requires rectification. That in view of the aforementioned grounds, the Appeal be dismissed. Learned Senior Counsel placed reliance on ***Commissioner of Income Tax, Bombay and Others v. Podar Cement Pvt. Ltd. and Others***[16], ***Vengdasalam Pillai v. Union Territory of Pondicherry***[17], ***State of Gujarat v. Savitri Devi***[18], ***Haricharan Singh v. Shivrani and Others***[19] and ***Deena Nath v. Pooran Lal***[20] to fortify this submission.

12. The rival contentions advanced by both learned Counsel have been afforded due consideration as also the evidence and documents on record and the citations made at the Bar. The impugned judgment has been perused.

13. The only point that requires consideration by this Court is:

> Whether the Appellant requires the suit premises for his *bona fide* use and whether there was default in payment of rent by the Respondent?

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[15] AIR 1985 SC 571
[16] (1997) 5 SCC 482
[17] AIR 1985 SC 571
[18] (1996) 1 SCC 558
[19] (1981) 2 SCC 535
[20] (2001) 5 SCC 705

14. It is relevant in the first instance to consider what the Notification of 1949 deals with. In this context it is essential to extract the Notification hereinbelow for convenience;

"**GOVERNMENT OF SIKKIM**
Health and Works Department
Notification No.6326—600-H&W—B.

Under powers conferred in para 2 of Notification No.1366-G, dated the 28th July 1947, the following Rules have been framed to regulate letting and sub-letting of premises controlling rents thereof and unreasonable eviction of tenants as the scarcity of housing accommodation still exists in Sikkim.

I The landlords can charge rent for premises either for residential or business purposes on the basis of the rents prevailing in locality in year 1939, plus an increase upto 50 per cent so long as the scarcity of housing accommodation lasts.

2. The landlords cannot eject the tenants so long as the scarcity of housing accommodation lasts, but when the whole or part of the premises are required for their personal occupation or for thorough overhauling the premises or on failure by the tenants to pay rent for four months the landlords may be permitted to evict the tenant on due application to the Chief Court.

3. Any tenant may apply to this Department for fixing his rent. On receipt of such application the Department will enquire about the rent prevailing in the locality in 1939, and fix rent as per Rule (I) above.

4. Any person acting in contravention of this Notification will be liable to prosecution under para. 4. of notification No.I366-066-G, dated the 28th July, 1947.

5. The tenant means those person in actual occupation. Landlord means owners of the premises.

These rules will come into force with immediate effect.

By order of his Highness the Maharaja of Sikkim.

R.B. Singh

Gangtok, **Secretary,**
Health and Works Department;
The 14th, April, 1949. **Government of Sikkim.**"

This Notification mandates that the tenants cannot be unreasonably evicted from their tenanted premises so long as the scarcity of housing accommodation exists in Sikkim. Paragraph 2 of the Notification would be relevant for the present purposes as it gives the landlords grounds to eject the tenants which *inter alia* includes requirement of the landlord of the whole or part of the premises for his personal occupation, or for thorough overhauling, or on failure by the tenants to pay rent for four months. Pausing here it may relevantly be noted that this Paragraph does not specify that non-payment of rent should be continuously for four months. That having been said, we may now first examine the requirement for *bona fide* use of the Appellant.

15. It is the specific case of the Appellant that his brothers are dependent on him which is supported by the evidence of his brother DW3 Hari Lall Sharma and the wife of the Appellant, DW4 Beena Sharma. She has also reiterated the stand of the Appellant that he is the only member of the joint family to have a Government job and the rest of his brothers also require some work for their livelihood in view of which the Appellant has decided to open a business for them in the suit premises. Although it was argued by the Respondent that no Unemployment Card of the brothers or Licence to establish business was put forth by the Appellant, this is of no assistance to the Respondents case. In ***Sait Nagjee Purushotham & Co. Ltd. vs. Vimalabai Prabhulal and Others***[21] the Honble Supreme Court held as follows;

"... It is always the prerogative of the landlord that if he requires the premises in question

[21] (2005) 8 SCC 252

> for his *bona fide* use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. …"

It was also held therein that the tenant cannot dictate terms to the landlord about how he should utilize his own premises. It is the prerogative of the landlord to decide what he seeks to do with his property and how best to utilize it. That apart, it is also now settled law that a person does not require experience in business, all that the Appellant is required to establish before the Court is his *bona fide* requirement. Admittedly the Appellant and his brothers own landed property, duly partitioned, but no income is generated from the said property and they require to set up business in town.

16. In ***Siddalingamma and Another*** *(supra),* the Appellant who was the landlady of the premises sought eviction of the Respondent under Section 21(1)(h) of the Karnataka Rent Control Act, 1961. She was residing at the relevant time in her village home and the requirements as set out in the suit was that her husband was suffering from asthma and respiratory problems for which he required medical treatment and was required to be taken to Bangalore from the village which was situated at some distance. On the demise of her spouse during the pendency of the matter, an amendment was inserted to the effect that the suit properties were required by her on account of her own ill-health. The learned trial Court held that the suit premises was required for the use of the Appellant No. 1 and her family members in view of her ill-health and for the requirement of the children in her family such as better schooling and educational facilities. The Honble High Court in revision held that the husband of the Appellant No. 1 for whose sickness the shifting was required had since passed away and the cause had ceased to exist and thereby dismissed the Eviction Petition. The Honble Supreme Court supporting the judgment of the learned trial Court held that the Honble High Court ought to have adopted a realistic and objective approach rather than being skeptical about the landlady's mannerism when the need of the landlady as borne out from the amended pleadings was *bona fide* and not arbitrary, whimsical or fanciful and thus upheld the well reasoned findings of the learned trial Court. These principles hold in good stead in the matter at hand as well.

17. In ***Smt. Jahejo Devi and Others*** *(supra)* the Honble Supreme Court would opine that which shop is suited best to the interest of the Respondent is a prerogative of the landlord and the tenant cannot question his choice, therefore even if some houses are vacant and the family of the Respondent (landlord) has become large and the members have become major then the requirement of the suit house is *bona fide* and reasonable. In ***Joginder Pal*** *(supra)* the Honble Supreme Court interpreted the meaning of the words "for his own use" as occurring in Section 13(3)(*a*)(ii) of the East Punjab Urban Rent Restriction Act, 1949 and observed that the words must receive a wide, liberal and useful meaning rather than a strict or narrow construction. It was further held that the expression that the landlord requires for "his own use," is not confined in its meaning to the actual physical user by the landlord personally but includes the normal "emanations" of the landlord. This would depend on a variety of factors such as interrelationship and interdependence, economic or otherwise between the landlord and such person in the background of social, socioreligious and local customs and obligations of the society or region to which they belong. It was also *inter alia* held that his own use would also depend on the nature and degree of relationship or the dependence between the landlord and the person who actually uses the premises, the circumstances in which the claim arises and is put forward and the intrinsic tenability of the claim. Although this ratio was also relied on by both parties, I am of the considered opinion that it is of no assistance to the Respondents case since the Honble Supreme Court was of the firm opinion that the expression "for his own use" arising in the aforementioned statute cannot be narrowly construed. This Court is indeed conscious that the law under consideration is the Notification of 1949 but the principles enunciated by the Honble Supreme Court *supra* apply with equal measure in the instant matter. Besides, "family" as defined in the Act of 1985 *supra* is for the purposes of allotment of house sites inasmuch as if one family is allotted a site by the Government it is expected that the entire family will be accommodated in the building and allotment will not be given individually to each member. This definition cannot be foisted in the instant matter as it was coined for the specific purposes of the Act of 1985 and is relevant thereto and not otherwise. In ***Malpe Vishwanath Acharya and Others*** *(supra)* the Honble Supreme Court while emphasizing the need of social legislations like Rent Control Act striking a balance between rival interests so as to be just, held that, the law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. That

while the shortage of accommodation makes it necessary to protect tenants it is coupled with an obligation to ensure that the tenants are not conferred with a benefit disproportionately larger than the one needed. That, socially progressive legislation must have a holistic perception and not a short-sighted parochial approach. The power to legislate socially progressive legislations is coupled with a responsibility to avoid arbitrariness and unreasonability. A legislation impregnated with tendency to give undue preference to one section, at the cost of constraints by placing shackles on the other section, not only entails miscarriage of justice but may also result in constitutional invalidity. The Hon'ble Supreme Court in ***Adil Jamshed Frenchman*** *(supra)* held that the concept of *bona fide* need or genuine requirement needs a practical approach instructed by the realities of life and it is to be assessed whether in the given facts proved by the material on record whether the need to occupy the premises can be said to be natural, real, sincere and honest. The requirement should be so as to convince the Court that it is not a mere fanciful or whimsical desire. In ***Ragavendra Kumar*** *(supra)* the Honble Supreme Court was considering eviction based on *bona fide* requirement of the landlord for starting business. It was held *inter alia* that it is a settled position of law that the landlord is the best judge of his requirement for residential or business purpose and he has complete freedom in the matter and this could not be faulted. The decision in ***State of Gujarat through Chief Secretary and Others*** *(supra)* relied on by the Respondent which disentitles the mother from the pension is with the reasoning that when the widow of the deceased survives him then she would be entitled to the pension and the upkeep of the family which would be done from the said amount received. Reliance on this ratio is misplaced as here the property is purchased by the Appellant, it is for him to decide what best use he wants to put it to. That apart it is the duty of a son or daughter to look after their mother for which purpose we may also draw on the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 which mandates as follows;

> "**4. Maintenance of parents and senior citizens.-**(1)…
>
> (2) The obligation of the children or relative as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

> (3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.
>
> ……"

Cross-examination did not decimate the requirement of the premises of the Appellants mother on medical grounds.

18. The allegation that there was coercion on the Respondent to sign on Exhibit A cuts no ice since the witnesses who were examined before the learned trial Court being DW2 Hari Bhakta Sharma on a suggestion put to him has denied that the Respondent did not voluntarily desire to vacate the suit premises or that the Respondent was not ready to sign on Exhibit A. DW5 Jagat Sharma also deposed that the Respondent came to the house of the Appellant where the Appellant informed them that the premises were required by him. The Respondent thereupon stated that he would vacate the rented premises in six months' time. He denied that he was deposing in favour of the Appellant being of the same caste. He denied that the assembled persons and the Appellant pressurized the Respondent to affix his signature on the *Akarnama* or that the contents thereof were not read over to the Respondent. If this be the circumstance, then, as correctly pointed out by learned Senior Counsel for the Appellant, the Respondent cannot be heard to approbate and reprobate, such conduct is not worthy of approval. Hence on the allegations of coercion by the Appellant on the Respondent to sign on Exhibit A, I have to differ with the findings of the learned trial Court. Besides, Exhibit 'A' has no tangible effect on the merits of the matter in view of the law points involved and is only a peripheral matter with no bearing on the outcome.

19. Coming to the next point as to whether there was default in payment of rent by the Respondent. Section 27 of the General Clauses Act, 1897 provides as follows;

> "**27. Meaning of service by post**.-Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give"

> or "send" or any other expression is used, then, unless a different intention appears, **the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document**, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."
>
> **(Emphasis supplied)**

The learned trial Court observed that the address was sent correctly and the rents consequently delivered. Having examined the first page of Exhibit 3 which is collectively in four pages, it is seen that the address is mentioned as *"To: Prof. S,K. Nepal (Renock)."* This address is consistent for the months of January, 2012 to April 2012. There are no Acknowledgment Cards furnished before the Court to establish as to who received it or who refused to accept the rent. The provision of law extracted hereinabove assumes that service is deemed to be effected *inter alia* only if the address furnished is correct. In the absence of a correct address it cannot be assumed merely because there is only one "Professor S.K. Nepal" in Rhenock that it referred to the Appellant and none else. This could have been a consideration had the place of work been detailed in Exhibit 3. Nothing in this context is revealed in Exhibit 3, hence this is an incorrect submission, finds no credibility in the eyes of the Court and the finding of the learned trial Court on this aspect is erroneous. Consequently I am of the considered opinion that there was default in payment of rent by the Respondent.

20. Although an allegation emanated from the Respondent that there was a unilateral increase in the rent by the Appellant from Rs.3,500/- (Rupees three thousand and five hundred) only, to Rs.8,000/- (Rupees eight thousand) only, and he refused to accept the rent, no proof whatsoever on this count has been advanced, neither are there witnesses and nor is there substantiation of the allegation by way of documentation. Random statements by witnesses without proof cannot be considered by the Court and in fact requires to be castigated.

21. On the basis of the discussions which have been detailed hereinabove, I find that the Appellant has made out a case for requirement

of the suit premises for his *bona fide* use which is not a mere desire nor is it whimsical or dictated by avarice. That apart the evidence reflects default in payment of rent by the Respondent for four months, which ground by itself suffices to evict him from the suit premises.

22. Consequently, the findings of the learned Trial Court on Issues No. 1, 2, 4 and 6 of the Main Suit, Issue No.3 of Main Suit and Issue No.4 of the Counter-Claim and Issues No.1, 2, 5 and 6 of the Counter-Claim are set aside. Issue No.3 of the Counter-Claim was abandoned and requires no orders.

23. The grounds raised by learned Senior Counsel for the Respondent pertaining to the question of Rent Control Tribunal in Sikkim does not merit a discussion herein.

24. Appeal allowed.

25. The Respondent shall vacate the suit premises and hand over vacant possession to the Appellant within five months from today.

26. The Respondent shall pay the arrears in rent for the months of January, 2012 to November, 2013 and from the month of July, 2015 till the time he hands over vacant possession of the suit premises to the Appellant.

27. No interest is ordered on the defaulted rent amount.

28. No order as to costs.

29. Copy of this Judgment be sent to the Learned Trial Court for information.

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

SLR (2019) SIKKIM 472

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

Bail Application No. 01 of 2019

Sumantra Gupta ….. APPLICANT

Versus

State of Sikkim ….. RESPONDENT

For the Applicant: Mr. A. K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha, Advocate.

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

Date of Order: 6th July 2019

A. Code of Criminal Procedure, 1973 – S. 438 – Anticipatory Bail – S. 438 Cr.P.C which is concerned with personal liberty cannot be whittled down by reading restrictions and limitation into it. In order to meet the challenge of Article 21 of the Constitution of India, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable – In re: *Gurbaksh Singh Sibbia* referred.

(Para 4)

B. Code of Criminal Procedure, 1973 – S. 438 – Anticipatory Bail – S. 438 Cr.P.C permits any person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence to approach the High Court or the Court of Session for anticipatory bail – Applicant approached the Sessions Court under S. 438 which was rejected vide order dated 30.05.2019 – Rejection of anticipatory bail application by the Sessions Judge is not in appeal or revision. The present application for anticipatory bail is an independent application filed on 07.06.2019 barely one month after the rejection of the anticipatory bail application by the Sessions Judge – Second or subsequent bail application under S. 438 is maintainable if there is a change in the fact situation or in law which requires

the earlier view being interfered with or where the earlier finding has become obsolete – In re: *Ganesh Raj* referred.

(Paras 8, 10, 11, 14 and 15)

C. Code of Criminal Procedure, 1973 – S. 438 – Anticipatory Bail – In the present case, the case diary reflects that the Applicant fled when sought to be apprehended. In spite of knowledge of two F.I.Rs lodged against him, the record reflects that the Applicant has failed to join the investigations – This is not a fit case for exercising discretion under S. 438 in favour of the Applicant. It does not sound to reason to arm the Applicant with anticipatory bail when pitted against such grave allegation of defrauding young medical aspirants with the lure of admission in SMIMS. The fact that there are more than one F.I.R registered for similar offences reveal the gravity of the situation. In such circumstances, custodial interrogation may be a necessity and consequently it would greatly harm the investigation and impede the prospect of further investigation if the Applicant is granted anticipatory bail.

(Paras 17 and 19)

Application dismissed.

Chronological list of cases cited:

1. Shri Gurbaksh Singh Sibbia and Others v. State of Punjab, (1980) 2 SCC 565.
2. Siddharam Satlingappa Mhetre v. State of Maharashtra and Others, (2011) 1 SCC 694.
3. Susanta Kumar Sahoo v. State of Sikkim, (2014) SCC OnLine Sikk. 68.
4. Ganesh Raj v. State of Rajasthan, 2005 SCC OnLine Raj 319.

ORDER

Bhaskar Raj Pradhan, J

1. The *locus classicus* on the concept of *"anticipatory bail" vis-à-vis* the concern for personal liberty under Article 21 of the Constitution of India is the Constitutional Bench judgment in re: ***Shri Gurbaksh Singh Sibbia***

& Ors. v. State of Punjab[1] **.** The said judgment and the comparatively recent rendition of the Supreme Court in re: ***Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.***[2] were relied upon by Mr. A. K. Upadhyaya, learned Senior Advocate for the Applicant who apprehends imminent arrest in view of the lodgment of First Information Report (FIR) No.0004 dated 16.03.2019 at the office of the Crime Branch (CID), Police Headquarter, Gangtok for alleged offences committed by unknown person under Section 419, 468, 471, 420, 120B of the Indian Penal Code, 1860 (IPC) as well as Section 66 (C) and Section 66(D) of the Information Technology Act, 2000 (IT Act).

2. Emphasizing the need to preserve the personal liberty of the Applicant the learned Senior Counsel submitted that the Applicant was not involved in any crime for which punishment prescribed was death or imprisonment for life. He pointed out the order dated 04.06.2019 passed by the learned Judicial Magistrate, 1st Class, East Sikkim and submitted that the co-accused had already been granted regular bail. He would draw this Courts attention to a certificate issued by Katihar Medical College, Bihar dated 25.05.2019 and emphasise that he was a sick person. The learned Senior Counsel stressed that the Applicant hails from a respectable family. His father Dr. Saibal Gupta is presently a Professor and Head of the Department of Forensic Medicine, Katihar Medical College, Bihar and also its Medical Superintendent and Vice Principal. The Applicant himself is a Doctor by profession and running a Nursing Home at Malbazar, Jalpaiguri, West Bengal. The Applicant's mother works in a school in Katihar and his wife is also a medical graduate associated with running the Nursing Home with her husband. The learned Senior Counsel drew the attention of this Court to the order dated 30.05.2019 passed by the learned Sessions Judge, East Sikkim at Gangtok in Criminal Misc. Case (Bail) No. 20 of 2019. This was on an application for anticipatory bail filed by the Applicant in anticipation of his arrest for the same FIR for which, after its rejection, the Applicant seeks protection from this Court. One of the main contentions, much emphasised by the learned Senior Counsel, is that the Applicant was not implicated in the FIR.

3. The State is being represented from the date of the first hearing itself. Mr. S.K. Chettri, learned Assistant Public Prosecutor for the

[1] (1980) 2 SCC 565
[2] (2011) 1 SCC 694

Respondent vehemently objected to the grant of anticipatory bail to the Applicant. It was submitted that substantial materials have been collected which directly implicate the Applicant. The said materials were placed before this Court for its perusal along with the case diary. The learned Assistant Public Prosecutor submitted that the Petitioner is also involved in yet another case for which another FIR bearing no. 201/2018 dated 21.09.2018 (previous FIR) under Section 419 IPC has been registered in the Sadar Thana, East District at Gangtok against the Applicant. It was pointed out that the previous FIR also reflects identical *modus operandi* as involved in the present FIR for defrauding aspirants for medical seats in Sikkim Manipal Institute of Medical Sciences (SMIMS). It was stated that although attempts have been made to arrest the Applicant he has been evading it. The learned Assistant Public Prosecutor relied upon the judgment of this Court in re: ***Susanta Kumar Sahoo v. State of Sikkim***[3] and submitted that an absconder is not entitled to anticipatory bail.

4. As held by the Constitutional Bench of the Supreme Court in re: ***Gurbaksh Singh Sibbia (supra)*** Section 438 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which is concerned with personal liberty cannot be whittled down by reading restrictions and limitation into it. In order to meet the challenge of Article 21 of the Constitution of India the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Gurbaksh Singh Sibbia was a Minister in the Congress Ministry of the Government of Punjab. Grave allegations of political corruption were made against him. The matter travelled to the Supreme Court from the judgment of a full Bench of the High Court of Punjab and Haryana dismissing the application for anticipatory bail.

5. The Constitutional Bench noticed that the Cr.P.C. did not contain any specific provision corresponding to the present Section 438 Cr.P.C. It was also noticed that the Law Commission of India, in its 41st report dated September 24, 1969 pointed out the necessity of introducing a provision for grant of anticipatory bail. The necessity for granting anticipatory bail, it was observed in the report arose mainly because sometimes influential persons try to implicate their rivals in getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, these tendencies were showing signs of steady increase. It was observed that apart from false

[3] (2014) SCC OnLine Sikk. 68

cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. It was observed that it would not be practicable to lay down conditions under which alone anticipatory bail could be granted and Superior Courts would undoubtedly exercise their discretion properly.

6. The Supreme Court held in re: ***Gurbaksh Singh Sibbia (supra)*** that in regard to anticipatory bail, if the proposed accusation appears to stem not from motive of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the Applicant by having him arrested, a direction for the release of the Applicant on bail in the event of his arrest would generally be made. However, besides making a statement that he is innocent and not involved in the alleged commission of offence the Applicant herein has neither pleaded nor placed any material to show that from some ulterior motive to injure and humiliate him he was sought to be arrested.

7. The Constitutional Bench of the Supreme Court also held that on the other hand, if it appears likely, considering the antecedents of the Applicant, that taking advantage of the order of anticipatory bail he will flee from justice such an order would not be made. The submissions of the learned Assistant Public Prosecutor were focused on the fact that in spite of the two FIRs the Applicant has been fleeing from justice.

8. The fact that the Applicant was aware of similar accusation made against him in the previous FIR but did not disclose about it in the application before this Court does not auger well with his claim of innocence.

9. Mr. A. K. Upadhayaya submitted that although the Applicant had in fact approached the Sessions Court for anticipatory bail apprehending arrest in connection with the same FIR there was no impediment in law to approach the High Court for anticipatory bail once again as he was approaching a higher Court.

10. Section 438 Cr.P.C. permits any person who has reason to believe that he may be arrested on accusation of having committed a non-bailable

offence to approach the High Court or the Court of Session for anticipatory bail.

11. The Applicant approached the Sessions Court under Section 438 Cr.P.C. which was rejected vide order dated 30.05.2019. The Applicant has not filed copy of the application for anticipatory bail preferred before the Sessions Court. The order dated 30.05.2019 reflects that the Applicant had sought to impress the learned Sessions Judge that there is every possibility of him being arrested in connection with the present FIR and that there is no material against him. It was submitted that the CID is determined to arrest the Applicant only to humiliate and harass him. As argued by Mr. A. K. Upadhayaya before this Court it was also submitted before the learned Sessions Judge that Section 438 Cr.P.C. confers ample powers to protect the Applicant from unjustified arrest when there is no material against him.

12. The said application for anticipatory bail before the Sessions Court was objected to by the learned Public Prosecutor. It was submitted that the offence is of wide magnitude having great adverse impact on the society in as much as large number of gullible students and their parents were cheated by the Applicant on the false promise of securing admission in the medical institute. It was pointed out that clinching materials pointing directly towards the involvement of the Applicant were available. Though FIR was registered on 16.03.2019 the Applicant had been evading the Investigating Officer and thus proper investigation has not been possible. The involvement of the Applicant could also be seen from other documentary evidence. It was also pointed out that the Applicant was involved in a similar matter earlier and therefore his custodial interrogation was required and if released on bail there was every possibility of the Applicant abusing his liberty.

13. The learned Sessions Judge examined the case materials, including the statements of witnesses, case diary and rejected the application for anticipatory bail. It was held that the alleged offences could not be viewed lightly and the same are of great magnitude affecting not only the education system but the society at large. The role of the Applicant was *prima facie* direct in the commission of the alleged offence. Nothing convincing was put forward to suggest false implication. No explanation was forthcoming regarding the involvement in similar incidents on earlier occasion although the learned Public Prosecutor had submitted that he was involved. Since the

registration of the case it has not been possible for the investigating agency to contact the Applicant.

14. The rejection of anticipatory bail application by the learned Sessions Judge is not in appeal or revision. The present application for anticipatory bail is an independent application filed on 07.06.2019 barely one month after the rejection of the anticipatory bail application by the learned Sessions Judge.

15. A three Judge Bench of the Rajasthan High Court in re: ***Ganesh Raj v. State of Rajasthan***[4] while answering the question whether second or subsequent bail application under Section 438 Cr.P.C. is maintainable or not held:

> ***"25.*** *In the ultimate analysis, placing reliance on the ratio indicated in Kalyan Chandra Sarkar's case (supra), we hold that second or subsequent bail application under section 438 Cr.P.C. can be filed if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. ……."*

16. One ground which has not been dealt with by the learned Sessions Judge is the ground of illness pressed before this Court. The certificate of the Katihar Medical College, Bihar is dated 25.05.2019. The said certificate advices bed rest for the Applicant for a period of four weeks. The period of four weeks expired on 22.06.2019. The application for anticipatory bail was disposed by the learned Sessions Judge on 30.05.2019 on which date the said medical certificate dated 25.05.2019 ought to have been available and if desired pressed before the Sessions Court. However, there is no mention about any claim for bail on the ground of illness before the Sessions Court. The certificate dated 25.05.2019, it is noticed, has been issued by the same Medical College in which the Applicant claims his father is the Professor and Head of the Department of Forensic Medicine as well as the Medical Superintendent and Vice Principal. In any case it is quite evident that the Applicant has had more than his share of rest needed for his ailment, if at all. This ground therefore, would not *per se* entitle him for anticipatory bail.

[4] 2005 SCC OnLine Raj 319

17. The next contention which needs to be addressed is the claim of parity as the co-accused in the FIR had been granted bail by the learned Judicial Magistrate vide order dated 04.06.2019. The order dated 04.06.2019 was passed on an application for regular bail. The learned Judicial Magistrate thought it fit to grant bail to the Petitioner therein on the ground that the offence is not punishable with death or imprisonment for life and that there was nothing on record to show that the Petitioner shall abscond or tamper with evidence and witnesses for the prosecution. In the present case the case diary reflects that the Applicant fled when sought to be apprehended. In spite of knowledge of two FIRs lodged against him the record reflects that the Applicant has failed to join the investigations. A perusal of the order dated 30.05.2019 passed by the learned Sessions Judge reflects that the Applicant had filed another bail application no. 3 of 2015 before this Court in yet another case. The learned Assistant Public Prosecutor submits that the failure of the Applicant to join in the investigation has hampered the investigation. In the circumstances, no parity can be claimed for an order of anticipatory bail on the ground that the co-accused has secured regular bail. No further change in circumstance or changes in the law have been pleaded by the Applicant.

18. Mr. A. K. Upadhayaya strenuously urged that if granted anticipatory bail he would join in the investigation. The fact that he had moved the Sessions Court for anticipatory bail more than a month prior to approaching this Court does reflect that the Applicant is aware of the accusation of the commission of cheating by personation; forgery for the purpose of cheating; using as genuine forged document or electronic record; cheating and dishonesty inducing delivery of property; criminal conspiracy; identity theft and cheating by personation by using computer resource made against him. It is also evident that the Applicant was made aware of lodgement of the previous FIR at least during the hearing of his anticipatory bail application before the Sessions Court. The case diary however, reflects that he has not only evaded arrest but fled from justice when sought to be apprehended.

19. This Court is strongly of the opinion that this is therefore not a fit case for exercising discretion under Section 438 Cr.P.C. in favour of the Applicant. It does not sound to reason to arm the Applicant with anticipatory bail when pitted against such grave allegation of defrauding young medical aspirants with the lure of admission in SMIMS. The fact that there are more than one FIR registered for similar offences reveal the

gravity of the situation. In such circumstances, custodial interrogation may be a necessity and consequently it would greatly harm the investigation and impede the prospect of further investigation if the Applicant is granted anticipatory bail.

20. On the touchstone of the law declared by the Supreme Court in re: ***Siddharam Satlingappa Mhetre (supra)*** while considering the prayer for grant of anticipatory bail the balance in favour of the investigating agency to ensure free fair and full investigation, far outweighs all other consideration sought to be projected in favour of the Applicant. In any case no ground to satisfy the reason for which Section 438 was originally incorporated in Cr.P.C has been urged or made out by the Applicant. *Per contra*, both ***Gurbaksh Singh Sibbia (supra)*** and ***Siddharam Satlingappa Mhetre (supra)*** were relating to alleged political rivalry. Unless the investigating agency is given a free hand in the light of the allegations made against the Applicant the absolute truth may not surface. The materials collected by the investigating agency so far placed for perusal before this Court does reflect *prima facie* involvement of the Applicant in the offences alleged. The lodging of more than one FIR for commission of similar offences for different periods of time also reflects accusation of repeated commission of similar offences. Considering the conduct of the Applicant which has definitely not been amenable for investigation thus far the question of granting anticipatory bail does not arise.

21. The application for anticipatory bail is rejected.

SLR (2019) SIKKIM 481

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

WP (C) No. 09 of 2019

Maya Devi Darjee ….. PETITIONER

Versus

Executive Engineer,
Central Water Commission ….. RESPONDENT

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

For the Respondent: Mr. Karma Thinlay, Central Government Counsel with Mr. Manish Kumar Jain, Advocate.

Date of decision: 12th July 2019

A. Employee's Compensation Act, 1923 –S. 4A – In spite of the learned Commissioner's direction to pay the compensation to the Petitioner, the Respondent failed to do so. This compelled the Petitioner to seek execution of the Commissioner's order dated 02.06.2016. Even after assurance given to the learned District Judge, the same was not respected and payment was made only on 19.01.2018 – S. 4A of the said Act clearly contemplates not only the manner but also the extent of interest as well as penalty to be paid in the circumstances described. If the requirement of the provision were satisfied it was incumbent upon the learned Commissioner to have directed payment of interest and penalty. This Court is of the view that the prayer for closure of the execution petition before the learned District Judge due to the assurance given by the Petitioner, wife of a casual labourer, cannot be taken as a waiver as sought to be argued. The Respondent's assurance was not fulfilled in the first place. The prayer for closure is reflective of the frustration due to the delay in receiving the compensation. This should not deter this Court in passing appropriate directions upon the Respondent to pay the compensation interest and penalty which is due and payable to the Petitioner if the circumstances demands and the law permits.

(Para 6)

B. Employee's Compensation Act, 1923 –S. 4A – The scheme under S. 4A of the said Act is clear. Compensation under S. 4 has to be paid as soon as it falls due. It falls due on the date of the accident. This was a case in which the employer did not grant compensation to the Petitioner. The Petitioner therefore, approached the learned Commissioner for appropriate orders. The Respondent chose to contest this application instead of paying compensation. The records reveal that compensation amount as calculated by the learned Commissioner was paid only after the Petitioner had approached the learned District Judge for executing the direction of the learned Commissioner. That too after the period the Respondent had assured payment. The undisputed facts as reflected above makes it evident that the Respondent was in default in paying the compensation due under the Act within one month from the date it fell due. The facts also revealed that there is no justification for the delay in payment – In such circumstances, the learned Commissioner was required to direct the employer, to pay the interest as provided in S. 4A (3) (a) of the said Act as well as pay the penalty as envisaged by S. 4A (3) (b) of the said Act. This was the mandate of the law.

(Paras 11 and 12)

Petition allowed.

Chronological list of cases cited:

1. Pratap Narain Singh Deo v. Srinivas Sabata and Another, (1976) 1 SCC 289.
2. Saberabibi Yakubbhai Shaikh v. National Insurance Company, (2014) 2SCC 298.

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

1. Late Pirthi Ram Sewa, a casual labourer working with the Respondent, Central Water Commission while on his way from Gangtok to Central Water Commission, Bhopal in the Narmada Division after receipt of letter of offer of regularisation as skilled work assistance met with a fatal accident and died on 26.04.2013. He had expressed his willingness to proceed and join duty anywhere in India pursuant to which he was called to Bhopal.

2. Section 3 of the Employee's Compensation Act, 1923 (the said Act) provides for employers liability for compensation if personal injury is caused to an employee by accident arising out of and in the course of his employment. The fact that late Pirthi Ram Sewa died on 26.04.2013 is not an issue. The Respondent, it seems, did not pay compensation payable on his death. This compelled the Petitioner-wife of late Pirthi Ram Sewa to approach the Court of the Commissioner for Workman's Compensation, Sikkim at Gangtok (the learned Commissioner). The application for compensation was contested by the Respondent. The Respondent submitted before the learned Commissioner that late Pirthi Ram Sewa having not been employed at the office of the Central Water Commission, Bhopal on the date of his death was not eligible to receive compensation. The learned Commissioner rejected this contention and held that the accident occurred in the course of his employment. The learned Commissioner determined the amount of compensation and directed the Respondent by order dated 02.06.2016 to pay an amount of Rs.7,02,160/- as compensation within a period of two months from the date of the order. When the Respondent failed to make the said payment of compensation within the prescribed period the Petitioner approached the learned Commissioner once again by filing an execution petition. The learned Commissioner after examining the law was of the opinion that the Commissioner under the said Act is not in a position to execute the award but as the amount of compensation has already been determined and ordered for payment the parties should consider approaching the Civil Court for execution of the award. The Respondent neither appealed against the order nor paid the compensation amount as directed by the learned Commissioner compelling the Petitioner to approach the Court of the learned District Judge, East Sikkim, at Gangtok for execution of the learned Commissioner's order. Before the learned District Judge the representative of the Respondent submitted that the necessary approval for the release of the compensation amount along with interest thereon @ 10% w.e.f. the date of filing of the execution petition had been accorded by the Ministry of Water Resources, River Development & Ganga Rejuvenation, Government of India. A copy of the letter dated 27.11.2017 recording the said approval was also filed. It was informed that in view of the approval necessary instructions has also been made and it was assured that payment would be made within December, 2017. On such assurance from the Respondent the learned District Judge on 06.12.2017 closed the case with the direction that the payment shall be made within December 2017. The payment however, was not paid in December but only

on 19.01.2018. Thereafter, the Petitioner made an application dated 07.02.2018 to the Respondent by which she claimed that the interest amount should have been 12% as per the said Act and the death compensation had been wrongly calculated from 09.10.2017 to 10.12.2017 whereas it should have been counted after one month from the date of death i.e. 16.05.2013 to 10.12.2017. The Respondent replied to the said communication vide letter dated 05.06.2018 informing the Petitioner to approach the competent authority and stating that further payment of interest could be made only after the Court order or approval of the competent authority. The Petitioner, therefore, desired to approach the learned Commissioner. Accordingly after having had an appropriate application drafted sought to present the same before the learned Commissioner. However, it is submitted that the said application was not accepted and returned to the complainant without any consideration. It is in these circumstances, that the Petitioner has approached this Court for appropriate reliefs by filing the present Writ Petition.

3. The present Writ Petition seeks directions upon the Respondent to make payment of interest @ of 12% per annum from the date of the accidental death of late Pirthi Ram Sewa till the date of final payment. Additionally the Petitioner seeks a further direction upon the Respondent to make payment of penalty amounting to 50% of the principal amount of death compensation as per Section 4 A (3) (a) (b) of the said Act.

4. Heard, Mr. Zangpo Sherpa, learned Counsel for the Petitioner and Mr. Karma Thinlay Namgyal, learned Central Government Counsel for the Respondent.

5. Mr. Karma Thinlay submitted that the facts are not in dispute and therefore, there is no need to file a counter affidavit. He sought to raise two oral objections. His first contention that on the date of the accident late Pirthi Ram Sewa was not in the employment of the Central Water Commission, Bhopal had been raised before the learned Commissioner and determined in favour of the Petitioner. The Respondent has not appealed against the learned Commissioner's order. The Respondent is therefore precluded from raising it in the present writ proceedings.

6. The second objection raised by Mr. Karma Thinlay was with regard to the Petitioner's submission before the learned District Judge as reflected

in the order dated 06.12.2017. A perusal of the said order and the records reflect that in spite of the learned Commissioner's direction to pay the compensation to the Petitioner, the Respondent failed to do so. This compelled the Petitioner to seek execution of the Commissioner's order dated 02.06.2016. The records reveal however, that even after assurance given to the learned District Judge the same was not respected and payment was made only on 19.01.2018. Section 4A of the said Act clearly contemplates not only the manner but also the extent of interest as well as penalty to be paid in the circumstances described. If the requirement of the provision were satisfied it was incumbent upon the learned Commissioner to have directed payment of interest and penalty. This Court is of the view that the prayer for closure of the execution petition before the learned District Judge due to the assurance given by the Petitioner, wife of a casual labourer, cannot be taken as a waiver as sought to be argued. The Respondent's assurance was not fulfilled in the first place. The prayer for closure is reflective of the frustration due to the delay in receiving the compensation. This should not deter this Court in passing appropriate directions upon the Respondent to pay the compensation interest and penalty which is due and payable to the Petitioner if the circumstances demands and the law permits.

7. Section 4A of the Employee's Compensation Act, 1923 deals with compensation to be paid when due and penalty for default. The said section reads as under:

> ***"4A. Compensation to be paid when due and penalty for default.-*** *(1) Compensation under Section 4 shall be paid as soon as it falls due. (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the [employee], as the case may be, without prejudice to the right of the [employee] to make any further claim. (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner*

shall— (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty: Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed. Explanation.—For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934). (3-A) The interest and the penalty payable under sub-section (3) shall be paid to the [employee] or his dependant, as the case may be."

8. Compensation under Section 4 of the said Act shall be paid as soon as it falls due. In re: ***Pratap Narain Singh Deo v. Srinivas Sabata & Anr.***[1] the Supreme Court held that it was the duty of the Appellant/ proprietor under Section 4(a) (1) of the said Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the Respondent. This judgment by a four Judge Bench was once again followed in re: ***Saberabibi Yakubbhai Shaikh v. National Insurance Company***[2] in which it was observed that in various judgments including ***Pratap Narain Singh Deo (supra)*** it was held that compensation has to be paid from the date of the accident.

9. In view of the aforesaid, it is evident that the Respondent was required to pay compensation to the Petitioner from the date of the accident

[1] (1976) 1 SCC 289
[2] (2014) 2 SCC 298

i.e. 26.04.2013 as determined by the learned Commissioner and as reflected in the death certificate. The Respondent however, did not make payment of compensation to the Petitioner when it fell due.

10. The Petitioner has also made a further claim of penalty of 50% of the principal amount of death compensation. This claim for penalty is as per Rule 4A (3)(b) of the said Act. Under the said provision where an employer is in default in paying the compensation due under the said Act within one month from the date it fell due the learned Commissioner shall if, in his opinion there is no justification for the delay, direct that the employer shall in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding 50% of such amount by way of penalty.

11. The scheme under Section 4A of the said Act is clear. Compensation under Section 4 has to be paid as soon as it falls due. It falls due on the date of the accident. This was a case in which the employer did not grant compensation to the Petitioner. The Petitioner therefore, approached the learned Commissioner for appropriate orders. The Respondent chose to contest this application instead of paying compensation. The records reveal that compensation amount as calculated by the learned Commissioner was paid only after the Petitioner had approached the learned District Judge for executing the direction of the learned Commissioner. That too after the period the Respondent had assured payment. The undisputed facts as reflected above makes it evident that the Respondent was in default in paying the compensation due under the Act within one month from the date it fell due. The facts also revealed that there is no justification for the delay in payment.

12. In such circumstances, the learned Commissioner was required to direct the employer, to pay the interest as provided in Section 4A(3) (a) of the said Act as well as pay the penalty as envisaged by Rule 4A(3) (b) of the said Act. This was the mandate of the law. The Petitioner has stated that an appropriate application was filed before the learned Commissioner for seeking the relief as prayed for on affidavit. The said application was returned instead of receiving it, considering it on merits and disposing it by passing appropriate directions. The determination under Section 4A of the said Act is required to be done by the learned Commissioner. The learned Commissioner did not do so. Sending the case back to the learned Commissioner would further delay the determination and grant of prayers for

interest and penalty. The uncontroverted facts reveal that the Petitioner, wife of a casual labourer, has been running from pillar to post from the year 2013 chasing the legitimate compensation due to her for the death of her husband who had been gainfully employed by the Respondent. This Court is of the view that any further delay in determination would not serve the purpose of the said Act. The Respondent was given an opportunity to contest the Writ Petition. Opportunity therefore, was granted to the Respondent to show cause as to why the order for penalty should not be passed. The Writ Petition had sought a specific prayer for penalty. The Respondent chose not to file a counter-affidavit.

13. The undisputed facts which have not been contested by the Respondent leads to the inevitable conclusion that the provision of Section 4A (3) (a) and (b) are attracted in the present case. In the circumstances, the Writ Petition is allowed.

14. The Respondent is directed to make payment as per Rule 4A (3) (a) and (b) of the said Act of both the simple interest @ 12% per annum on the amount due from the date of the accident i.e. 26.04.2013 till date of final payment as well as penalty of 50% of the amount of compensation payable to the Petitioner within a period of three months from the date of this judgment.

15. No order as to costs.

SLR (2019) SIKKIM 489

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

Crl. A. No. 37 of 2017

Mohan Rai *alias* Shekar Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Ajay Rathi, Ms. Phurba Diki Sherpa, Ms. Lidya Pradhan and Ms. Deechen Doma Tamang Advocates.

For the Respondent: Ms. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 16th July 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 11 (i) – Sexual Harassment – Sexual intent is a vital ingredient of the offence under S. 11. – Sexual intent is a state of mind and therefore, the culpable mental state of the accused.

(Paras 7 and 8)

B. Protection of Children from Sexual Offences Act, 2012 – Ss. 11 and 30 – A composite reading of Ss. 11 and 30 makes it manifest that in a prosecution for sexual harassment that requires the establishment of sexual intent also the Special Court shall presume its existence if the commission of the act constituting sexual harassment, save the sexual intent, has been proved by the prosecution. However, it shall be a defence for the accused to prove the fact that he had no such sexual intent with respect to the act charged as an offence in that prosecution. The fact that he had no such sexual intent as alleged is however, required to be proved beyond reasonable doubt and not merely when its existence is established by preponderance of probability.

(Para 10)

C. Protection of Children from Sexual Offences Act, 2012 – S. 30 – The presumption of law against the Appellant cannot be discharged by offering an explanation which may be reasonable and probable alone. The explanation must also be true. Unless the explanation is supported by proof, the presumption of law created by S. 30 of the POCSO Act cannot be held to be rebutted. The words *"prove the fact"* in S. 30 should not be required to mean anything beyond what S. 3 of the Indian Evidence Act, 1872 interprets the word *"proved"* to signify – The rebuttable presumption of law created by S. 30 of the POCSO Act puts the onus upon the Appellant to rebut the presumption. When the prosecution has successfully established the fact that the Appellant had exhibited part of his body i.e. his penis and buttocks to PW-1 and PW-2 with the intention that it is seen by them, the Special Court is required to draw a presumption that the Appellant had sexual intent in doing so. The Special Court has no choice in the matter thereafter. However, this presumption cannot be understood to mean that the burden of proof upon the prosecution has been done away with by S. 30 of the POCSO Act. The burden of proving the facts constituting sexual harassment rest on the prosecution who has asserted it. The presumption started to operate only when the prosecution had established that the Appellant had exhibited parts of his body to PW-1 and PW-2 with the intention that they saw it.

(Paras 11 and 12)

D. Code of Criminal Procedure, 1973 – S. 313 – The examination of an accused under S. 313 enables the accused to personally explain the circumstances against him. The said provision embodies the fundamental principles of *Audi Alteram Partem* Rule. Strictly speaking, the explanation given by an accused during such examination cannot be considered as evidence. The statement of an accused which is not taken under oath can however be considered in the trial. The Court would be entitled to draw an inference including such adverse inference against the accused as may be permissible in accordance with law on such consideration.

(Para 14)

E. NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015 – Under the NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015 the Sikkim State Legal Services Authority (SSLSA) is required to, in

coordination with the Sikkim State Mental Health Authority, constitute a team of psychiatrists/ psychologists/ counsellors to visit the jails and assess the state of mental health of the inmates in the jails – SSLSA directed to ensure that the team so constituted assesses the state of mental health of the Appellant and initiate corrective measures, if necessary, to facilitate his treatment by psychologist or psychiatrist during the period of sentence – Jail authorities to maintain record of such assessment and treatment, if any, and make such records available to the SSLSA which shall monitor the progress.

(Para 20)

Appeal dismissed.

Chronological list of cases cited:

1. Shiva Kala Subba v. State of Sikkim, 2019 SCC OnLineSikk 51.
2. Dharamvir v. State of Punjab, 2018 R.C.R. (Cril) 707 (P&H).

JUDGMENT

Bhaskar Raj Pradhan, J

1. The appeal assails the judgment of conviction by the learned Special Judge dated 27.11.2017 for sexual harassment as defined under Section 11(i) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) for which the Appellant has been sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5000/- under Section 12 thereof.

2. The ingredients of the offence of sexual harassment as defined under Section 11 (i) of the POCSO Act, to the extent of the indictment against the Appellant, are:

(i) Sexual intent;

(ii) Making any gesture or exhibiting any object or part of body with the intention that such gesture or object or part of body shall be seen by the child.

3. Heard Mr. Ajay Rathi the learned Counsel for the Appellant and Ms. Pollin Rai the learned Assistant Public Prosecutor for the State.

Mr. Ajay Rathi submits that the prosecution had failed to bring home the charge by leading cogent evidence. *Per contra* Ms. Pollin Rai submits that the ingredient of Section 11(i) of the POCSO Act for which the Appellant was indicted has been fully satisfied by the deposition of P.W.1 and P.W.2 and their evidence have stood firm unable to be demolished by the defence.

4. P.W.1 has specifically deposed that at the relevant time when she was playing with her friend near their house she saw the Appellant standing by the window inside his house. The Appellant opened his clothes and displayed his private parts to them. He fondled his private part with his hands and showed it to them. She and her friend felt embarrassed on seeing the Appellant naked and displaying his private part.

5. P.W.2 also deposed that the Appellant was standing near the window of his house on the relevant day. The window was open and so was the curtain. She was playing with her friend, i.e. P.W.1. P.W.1 showed her the Appellant who was naked and standing by the window of his room. On seeing them the Appellant showed them his genitals and his buttocks. He also started shaking his torso on seeing them.

6. The evidence of P.W.1 and P.W.2 reflects that the Appellant displayed his private parts to them with the intention that they saw it. P.W.1 aged seven years and P.W.2 five years were both examined by the Special Court. Having put several questions the learned Special Judge came to the conclusion that they were not prevented from understanding the questions put to them. They were found competent to testify despite their tender age. Both P.W.1 and P.W.2 have unflinchingly identified the Appellant as the one who committed the alleged act. There is no uncertainty about his identification by them. This Court has perused the cross-examinations of both P.W.1 and P.W.2. Specifically the portions highlighted by Mr. Ajay Rathi wherein they have admitted having seen the Appellant accidentally. It was his contention that due to this admission the question of sexual intent would not arise. P.W.1 and P.W.2 have no doubt admitted that they saw the Appellant accidentally. However, the mere fact that P.W.1 and P.W.2 saw the Appellant accidentally would not demolish their evidence that the Appellant had showed his private parts to them in the manner they described. This Court has no hesitation to uphold the finding of the learned Special Judge that it was the Appellant and the Appellant alone who had committed the alleged act. The depositions of P.W.1 and P.W.2 established

the second ingredient of the offence of sexual harassment i.e. exhibiting part of his body with the intention that the part of his body be seen by P.W.1 and P.W.2. The question which however, must necessarily be answered is whether the said act of displaying his private parts to P.W.1 and P.W.2 by the Appellant was with sexual intent.

7. Mr. Ajay Rathi submitted that the evidence put forth by the prosecution does not reflect sexual intent on the part of the Appellant which is a vital ingredient of the offence under section 11(i) of the POCSO Act. To support his contention he relied upon the judgment of the Division Bench of this Court in re: ***Shiva Kala Subba v. State of Sikkim***[1]. Sexual intent is a vital ingredient of the offence under Section 11 of the POCSO Act. In re: ***Shiva Kala Subba (supra)*** this Court held that there was no evidence of sexual intent on the part of the Appellant (a woman) therein but only of commission of the offence of hurt upon the victim.

8. The learned Special Judge has not discussed if the prosecution has been able to prove sexual intent. Sexual intent is a state of mind and therefore, the culpable mental state of the accused. Section 30 of the POCSO Act provides as under:

> ***"30. Presumption of culpable mental state****.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.***"***

[1] 2019 SCC OnLine Sikk 51

9. This was a prosecution for an offence under Section 11 of the POCSO Act and therefore Section 30 of the POCSO Act would be attracted.

10. A composite reading of Section 11 and Section 30 of the POCSO Act therefore, makes it manifest that in a prosecution for sexual harassment that requires the establishment of sexual intent also the Special Court shall presume its existence if the commission of the act constituting sexual harassment, save the sexual intent, has been proved by the prosecution. However, it shall be a defence for the accused to prove the fact that he had no such sexual intent with respect to the act charged as an offence in that prosecution. The fact that he had no such sexual intent as alleged is however, required to be proved beyond reasonable doubt and not merely when its existence is established by preponderance of probability.

11. The presumption of law against the Appellant cannot be discharged by offering an explanation which may be reasonable and probable alone. The explanation must also be true. Unless the explanation is supported by proof the presumption of law created by Section 30 of the POCSO Act cannot be held to be rebutted. The words *"prove the fact"* in Section 30 of the POCSO Act should not be required to mean anything beyond what Section 3 of the Indian Evidence Act, 1872 interprets the word *"proved"* to signify. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

12. The rebuttable presumption of law created by Section 30 of the POCSO Act puts the onus upon the Appellant to rebut the presumption. When the prosecution has successfully established the fact that the Appellant had exhibited part of his body i.e. his penis and buttocks to P.W.1 and P.W.2 with the intention that it is seen by them the Special Court is required to draw a presumption that the Appellant had sexual intent in doing so. The Special Court has no choice in the matter thereafter. However, this presumption cannot be understood to mean that the burden of proof upon the prosecution has been done away with by Section 30 of the POCSO Act. The burden of proving the facts constituting sexual harassment rest on the prosecution who has asserted it. The presumption started to operate

only when the prosecution had established that the Appellant had exhibited parts of his body to P.W.1 and P.W.2 with the intention that they saw it.

13. The prosecution has been, as held above, able to prove the second ingredient of the offence of sexual harassment save the sexual intent i.e. the culpable mental state of the Appellant. On the application of Section 30 of the POCSO Act the Special Court was required to presume that the act was committed by the Appellant with sexual intent. To rebut the presumption thus raised by the application of Section 30 of the POCSO Act the defence examined the Appellant (D.W.1). He deposed that on the relevant day he woke up late and as he was in a hurry, quickly took a bath and came to his bedroom for putting on his clothes. He stated that the window of the room was open, however, the curtains of the window was drawn. He thereafter put on his clothes and left his house for his duty. He also deposed that the weather was windy on the relevant day. He asserted that his two sons aged 32 years and 25 years were also at home. He pleaded his innocence. He did not deny his presence in the bedroom from where he was seen by P.W.1 and P.W.2 on the relevant day. He deposed that he had enmity with his landlord (P.W.12) regarding the house rent as he tried to increase it many times but he had refused. However, earlier when the landlord (P.W.12) was examined no suggestion was made regarding such enmity. The defence was not only false but also absurd and obviously an afterthought. It is absurd to even presume that the landlord (P.W.12) would be able to influence his neighbours and especially their children-P.W.1 aged seven years and P.W.2-aged five years to falsely depose against the Appellant about displaying his private parts to them. The learned Special Judge has rightly concluded that there was no evidence to support this defence. The defence did not examine the Appellant's sons. The Appellant's wife (P.W.9) was tendered by the prosecution and cross-examined by the Appellant. During such cross-examination she admitted that on the relevant day she was at Kalimpong. She also deposed that after being called to Gangtok she reached home and saw her husband there. She did not depose that their sons were at home on the relevant day. P.W.8 who had deposed earlier stated that on the date of the incident she was present at her residence and the family members of the Appellant were not present at his residence as they had gone out of station. The defence did not think it fit to deny this assertion by P.W.8 that the family members of the Appellant were not present at his residence on the relevant day. No evidence whatsoever is

available to corroborate his defence that in fact he had taken a bath and come to the bedroom for putting on his clothes and he had not committed the offence. The question therefore, is whether the deposition of the Appellant establishes beyond reasonable doubt the fact that in fact he had innocently come out naked after his bath to his bedroom for putting on his clothes and that he had no sexual intent.

14. The Appellant had been examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) one day before he was examined as defence witness. In such examination he had specifically denied his presence and stated that on the relevant day he was not at home. The examination of an accused under Section 313 Cr.P.C. enables the accused to personally explain the circumstances against him. The said provision embodies the fundamental principles of *Audi Alteram Partem* Rule. Strictly speaking the explanation given by an accused during such examination cannot be considered as evidence. The statement of an accused which is not taken under oath can however be considered in the trial. The Court would be entitled to draw an inference including such adverse inference against the accused as may be permissible in accordance with law on such consideration. The denial of his presence in his house on the relevant day during his examination under Section 313 Cr.P.C. and admitting his presence during his deposition as his own defence witness does raise a presumption that his defence was false. The prosecution evidence also establishes that the Appellant's deposition about his sons being present on the relevant day was also a false statement. In the circumstances the Appellant has failed to prove the fact necessary to rebut the presumption of his culpable mental state i.e. sexual intent when he committed the act as deposed by P.W.1 and P.W.2. A presumption of law cannot be discharged by a mere explanation as sought to have been done by the Appellant by offering himself as a witness. It is necessary to prove that the explanation is true. The Appellant failed to do so. In fact it is unequivocal that his explanation is false.

15. The next contention raised by Mr. Ajay Rathi was that P.W.1 and P.W.2 had been tutored. He drew the attention of this Court to the cross-examination of the said two witnesses. P.W.1 admitted in cross-examination that she had come along with her mother. She admitted that the previous evening and the morning of the day of her examination her mother told her what to depose before the Court. She also admitted that her mother told her to identify the accused in the Court and gave the description of the

Court. P.W.2 admitted in cross-examination that her friend told her about the proceedings in Court when she came back home. Neither P.W.1 nor P.W.2 admitted that they were tutored. In spite of their tender age the defence did not dare to put any question to them directly suggesting that they were tutored. It was natural that P.W.1 was accompanied by her mother and P.W.2 was accompanied by her parents due to their tender age. P.W.1's admission that she was told by her mother what to depose would not *ipso facto* lead to a conclusion that the mother had told her to implicate the Appellant in a false case. There was no reason for the mother to do so. Similarly, the admission made by P.W.2 in cross-examination that her friend told her about the proceedings in the Court after she came back home falls short of evidence required to conclude that the said witness had been tutored. No evidence whatsoever is available in the records to even remotely suggest that there was any reason for the parents of P.W.1 and P.W.2 to falsely implicate the Appellant and subject the child witnesses to the trauma of secondary victimisation. Reading the testimonies of P.W.1 and P.W.2 in its entirety it can be safely held that their innocent admission, after being led to say so by the defence, that they saw the Appellant accidentally, could not lead to the inevitable conclusion that the act committed by the Appellant was innocent and accidental.

16. The issue, half heartedly raised, that the victims had not been called upon by the investigating agency to identify the Appellant in a test identification parade would also be of no consequence in as much as both P.W.1 and P.W.2 have categorically identified the Appellant in Court.

17. Mr Ajay Rathi relied upon Judgment of a learned Single Bench of the Punjab and Haryana High Court in re: ***Dharamvir v. State of Punjab***[2] and submitted that the evidence of a child must be carefully scrutinised. The submission that the evidence of a child must be carefully scrutinised is correct. Both P.W.1 and P.W.2 were of tender age. If their evidence stands the test of scrutiny it is enough to bring home the charge without any corroboration. This is a case in which there are two victims i.e. P.W.1 and P.W.2 who witnessed the act of the Appellant. Their depositions tested through cross-examination by the defence have withstood that scrutiny. Their depositions also corroborate each other. The lodging of the First Information Report (FIR) on hearing about the incident has been proved by P.W.3-the

[2] 2018 R.C.R. (Cril) 707 (P&H)

paternal uncle of P.W.1. The circumstances leading to the lodging of the FIR has been proved by the evidence of P.W.4. P.W.5 although uncertain that it was in fact the Appellant who she saw masturbating near the window of the Appellant's residence, was certain that it was the Appellant who lived there. Even P.W.6 saw one individual standing naked with his back visible. However, she could not be sure that it was the Appellant who she saw that day. The evidence of P.W.13 who also identified the Appellant establishes that the Appellant had indulged in similar activity sometime ago. After the incident the mother of one of the victims and the father of another had approached the Appellant's landlord (P.W.12) and complained about his act. The landlord (P.W.12) subsequently lodged a report (exhibit-8) at the Sadar Police Station. In the report proved by the landlord (P.W.12) it has been stated that he had received a complaint from his neighbours about the Appellant exposing his nude body and making obscene gestures from the window of his house to the neighbours' kids playing outside. In the report it was also alleged that similar incidents have happened in the past. The report also named P.W.3, P.W.6, Ritika Chettri and P.W.5 as the persons from whom the landlord (P.W.12) had received the complaint. All of them except Ritika Chettri have been examined by the prosecution. These evidences led by the prosecution corroborate the depositions of P.W.1 and P.W.2. Therefore, even after meticulous scrutiny of the evidence of P.W.1 and P.W.2 it is clear that their evidence were truthful, without any embellishment and reliable.

18. The learned Special Judge has examined the evidence led by the prosecution as well as the defence. The learned Special judge found sufficient evidence to hold that P.W.1 and P.W.2 were minors at the relevant time which was also not disputed by the defence. It was held that there was no reason to disbelieve their testimonies which were reliable and trustworthy and duly corroborated by the evidence of P.W.5. The learned Special Judge examined the provision of Section 11 of the POCSO Act and came to the conclusion that the prosecution had been successful in proving the case against the Appellant beyond any reasonable doubt. This Court is of the view that this is not a fit case for interference and the judgment of conviction must be upheld. The learned Special Judge has convicted the Appellant to simple imprisonment for a period of one year and to pay a fine of Rs.5000/-. Section 12 of the POCSO Act provides that the imprisonment may extend to three years and may also be liable to pay a fine. Although the learned Special Judge had come to the conclusion that it

was the Appellant who had committed sexual harassment against P.W.1 and P.W.2 considering that the Appellant was 59 years of age, had a wife, two sons and a daughter, the learned Special Judge deemed it appropriate to sentence the Appellant with simple imprisonment for a term of one year only and with a fine of Rs.5000/-. This Court is of the view that the sentence imposed was appropriate in the facts and circumstances put forth and may not be interfered with. Similarly, the direction under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 is also upheld.

19. The appeal fails. The impugned judgment and order on sentence both dated 27.11.2017 are upheld. The Appellant is on bail. He shall surrender before the Court of learned Special Judge, East Sikkim at Gangtok on 18.07.2019 to undergo the sentence.

20. P.W.4 has deposed that when she looked towards the residence of the Appellant as pointed out by the lady who told her that he was masturbating and displaying his private parts to P.W.1 and P.W.2 she saw him standing by his window *"grinning"* at her. P.W.13 in cross-examination admitted that the Appellant seems to be *"weird"*. Under the NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015 the Sikkim State Legal Services Authority (SSLSA) is required to, in coordination with the Sikkim State Mental Health Authority, constitute a team of psychiatrists/psychologists/counsellors to visit the jails and assess the state of mental health of the inmates in the jails. The SSLSA is thus directed to ensure that the team so constituted assesses the state of mental health of the Appellant and initiate corrective measures, if necessary, to facilitate his treatment by psychologist or psychiatrist during the period of sentence. The jail authorities shall maintain record of such assessment and treatment, if any, and make such records available to the SSLSA which shall monitor the progress.

21. A copy of the judgment is directed to be sent forthwith to the Court of the learned Special Judge, East Sikkim at Gangtok, the SSLSA and to the Assistant Superintendent of Police, Prisons, State Central Jail, Rongyek, East Sikkim for compliance.

22. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Counsel for the parties upon compliance of all formalities.

SLR (2019) SIKKIM 500

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

WP (C) No. 08 of 2016

Ganga Maya Gurung ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner: Mr. N.B. Khatiwada, Senior Advocate (Legal Aid Counsel) with Ms. Gita Bisa, Advocate (Legal Aid Counsel).

For Respondent No.1: Dr. Doma T. Bhutia, Additional Advocate General with Mr. Thupden Youngda, Government Advocate and Ms. Pollin Rai, Assistant Government Advocate.

For Respondent No.2: Mr. M.N. Dhungel, Advocate.

Date of decision: 20th July 2019

A. Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – Ss. 2 (c) and 6 – Family – On a careful conjunctive reading of the above provisions it is apparent that once an allotment is made to a family comprising of a husband, wife, their children which includes major children living with them they would not be eligible for a second allotment – When the allotment was made to the Petitioner's husband in the year 1975 by the concerned Government Department, she comprised of his "family" having married her husband in the year 1974.

(Para 12)

B. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – It is indeed unscrupulous and inequitable on the part of the Petitioner to hand over the allotted property to a major child (who, it may be remarked, would have been eligible for

allotment of Government property subject to fulfillment of necessary conditions) and thereafter entreat the Government for a second allotment. This is an unacceptable circumstance. Even assuming that a second allotment is made to her, can it be ruled out that she would not hand over the said allotment to another child of hers or any other person of her choice and then appear before the Government once again invoking the grounds of her disability? This would indeed be stretching the interpretation of the Disabilities Act of 1995 beyond its ambit and purport – She does not have the licence to invoke the disabilities provision repeatedly while magnanimously handing out the property previously allotted to the family.

(Para 16)

Petition dismissed.

Chronological list of cases cited:

1. U.P. Avas Evam Vikas Parishad and Another v. Friends Co-op. Housing Society Ltd. and Another, AIR 1996 SC 114.
2. Justice Sunanda Bhandare Foundation v. U.O.I. and Another, AIR 2014 SC 2869.
3. Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited, (2011) 10 SCC 420.
4. Olga Tellis and Others v. Bombay Municipal Corporation and Others, (1985) 3 SCC 545.

JUDGMENT

Meenakshi Madan Rai, J

1. Claiming abrogation of her fundamental rights as guaranteed under Article 14 of the Constitution of India and violation of the principles of natural justice, the Petitioner herein seeks a direction to the Respondent No.1 not to disturb her possession on a plot of land measuring 20 feet x 25 feet at Deorali School Road, Gangtok, East Sikkim. That, the Respondent No.1 be restrained from acting contrary to the rights of the Petitioner and to stay the Order of the Respondent No.1 requiring demolition of a structure on the said plot of land constructed by her.

2. The facts as projected by the Petitioner are that she is a 50% physically challenged person with permanent impairment of both her upper limbs as certified by the concerned authority at the Safdarjung Hospital, New Delhi vide a Disability Certificate, dated 11.10.1991. In 1974 she was married to one Lhendup Dorjee Bhutia from whom she allegedly separated in the year 1988. In the year 1991, a kitchen accident rendered her disabled and in order to maintain the three minor children from her husband, she sought for and was granted maintenance from him, vide a Magisterial Order, dated 30.03.1992 (Annexure P-2). Pursuant to the passing away of her husband in 1992, the Court of the learned District and Sessions Judge, Sikkim at Gangtok granted her Guardianship of her three minor children in August, 1993.

3. In this backdrop, in November, 1993 she moved an application before the Office of the Respondent No.1 seeking allotment of a housing site, around Gangtok area but was unable to follow up the matter on account of her disability. During this time she also met a person who she decided to share her life with but the relations did not last. Meanwhile her children also attained majority and in the year 2000 she transferred the property of her late husband to her children by issuing a "No Objection Certificate" towards this end. Her children have since deserted her. Thereafter, despite several pleas made by her to the concerned Minister and even the Chief Minister from the year 2005 through 2015, seeking allotment of a housing site, her pleas fell on deaf ears. She however identified a site at Deorali School Road for allotment to her and constructed a shed thereon. In April 2015, the Assistant Town Planner-I, Urban Development and Housing Department (for short "UD&HD") finally turned down her request *inter alia* on grounds of insufficient proof of occupancy of the site and that the land in question was previously alloted to one Smt. Ganga Pradhan in the year 1984 and was disputed. In January 2016 the Petitioner received a Demolition Order from the UD&HD, requiring her to demolish the shed at the said site. She responded vide a letter dated 20.01.2016, requesting that the Order be recalled. That she has come to learn that her application was in fact considered in April, 2015 and site inspection was carried out but later the site was offered to the Respondent No.2 in terms of an amicable settlement arrived at between the Respondent No.1 and Respondent No.2 in connection with another Writ Petition, which thereby stood disposed of. Hence, being aggrieved she has put forth her prayers as detailed hereinabove.

4. In response, it was averred by the Respondent No.1 that the allotment of house sites is governed by the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 wherein Section 6 of the Act mandates that the Government shall not allot more than one housing site to one family in the State. The husband of the Petitioner had been alloted a house site in Deorali on 26.12.1975, by the concerned Government Department at the relevant time upon which he constructed a five storeyed RCC building. In February 2000, the Petitioner gave her consent by issuance of a "No Objection Certificate" for transfer of the said alloted site along with the building in favour of her daughter Tshering Choden Bhutia, which was accordingly executed. In 2003 the Petitioner made an application to the Hon'ble Chief Minister for allotment of a house site adjacent to the plot presently in dispute, the allotment was however made in favour of one C.K. Rai on 02.06.2010. Vide an application dated 15.06.2013 the Petitioner sought site allotment abutting the site of C.K. Rai but in March 2015 she claimed to be in possession of the said vacant land wherein she had constructed a *kutcha* structure and sought regularization of the said site in her name. The Respondent No.1 declined her request vide its response dated 28.04.2015. That, the Respondent No.2 had filed Writ Petition (C) No.1 of 2013 challenging allotment of a site to one Smt. Beena Rai at "SNT Complex" and later agreed to an amicable settlement if alloted a plot for himself. A site measuring 20 feet x 25 feet was identified and offered to him near the Working Womens' Hostel, Deorali School Road and accepted by him, however, the Petitioner had constructed a *kutcha* shed measuring 10 feet x 8 feet = 80 square feet on the said site identified and converted it into a store but did not live there. The Respondent No.1 consequently issued a Demolition Order dated 16.01.2016, requiring her to demolish the unauthorized construction and vacate the premises within seven days from the date of the Order. Hence the petition be dismissed.

5. The Respondent No.2 conceded that he had agreed to the proposal of the Respondent No.1 for allotment of the site measuring 20 feet x 25 feet at Deorali with the purpose of amicably settling Writ Petition (C) No.1 of 2013 filed by him against an allotment made by Respondent No.1 to a third party. That thereafter on such allotment which was duly accepted by him, he had paid the Site Salami of Rs.1,25,000/- (Rupees one lakh and twenty five thousand) only and withdrawn the said Writ Petition.

6. In Rejoinder, the Petitioner contended that she had severed all ties with her late husband and after her children attained majority they had deserted her. According to her, the definition of "family" as per the Act of 1985 as defined in Section 2(c) has been amended by the Sikkim State Site Allotment Rules, 2012 hence the legal objection raised under the provision of Section 6 of the Act of 1985 has no application to her case. While drawing attention to the mandate of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "Disabilities Act of 1995") the Petitioner averred that this has not been complied with as no preferential allotment has been made in her favour. While admitting that the property in Deorali was transferred in her daughter's name in the year 2000, she submitted that she had done so as it was not her property. The grounds taken by the Respondent No.1 to deny her rights are *mala fide* and contradictory to the principles of natural justice and Articles 14 and 21 of the Constitution of India, hence the prayers in the instant Writ Petition be allowed.

7. Learned Senior Counsel while advancing his arguments for the Petitioner relied on the provisions of Section 3, Section 34, Section 37(a) and (c) and Section 38 of the Rights of Persons with Disabilities Act, 2016 (for short "Disabilities Act of 2016") and urged that the law mandates preferential treatment to persons with disabilities thus she has the first right to allotment of the concerned site. That the Sikkim State Site Allotment Rules, 2012 are violative of Article 21 of the Constitution of India and the Petitioner is deprived of her right to shelter as guaranteed under Article 19(1)(g) *[sic(e)]* and Article 21 of the Constitution of India towards which reliance was placed on ***U.P. Avas Evam Vikas Parishad and another v. Friends Co-op. Housing Society Ltd. and another***[1]. That, despite approval accorded and endorsed by the then Hon'ble Chief Minister on her representation, this was ignored by the Department and the allotment made in favour of the Respondent No.2. It was reiterated that the property which was alloted to her late husband in the year 1975 has already been transferred in the name of her children in the year 2000 and she was a mere guardian of the said property. Such allotment made in 1975 to her husband when she had not even met him cannot be an embargo on the Respondent No.1 to allot the land to her, besides which, she is not the legal wife of late Lhendup Dorjee Bhutia as per Section 5(1) *[sic(i)]* of the Hindu Marriage Act, 1955. That she was not arrayed as a party in Writ Petition (C) No.1 of 2013 although the land in her

[1] AIR 1996 SC 114

possession was alloted to Respondent No.2 and hence the Order passed in the Writ Petition does not bind her. It was further urged that reservation for the disabled is horizontal reservation which cuts across all vertical categories including SC, ST, OBC and General as held by the Hon'ble Supreme Court in ***Justice Sunanda Bhandare Foundation v. U.O.I. and another***[2] and thus applies to her case. She is an economically weaker woman when pitted against the Respondent No.2 hence her petition be allowed in the interest of substantial justice.

8. While resisting the arguments of the Petitioner, learned Additional Advocate General would submit that it is evident from the Order, dated 30.03.1992 of the Court of the Civil Judge-cum-Judicial Magistrate, East and North Sikkim at Gangtok, relied on by the Petitioner herself, that, she was indeed married to late Lhendup Dorjee Bhutia. Her claims that in the year 1975 she did not know her husband is incorrect, as the Order *supra* reveals that she was married to her husband in the year 1974 while site allotment came to be made in his favour in December 1975. She has voluntarily handed over the property to her daughter vide Annexure R-2 in October 2000 duly executing a "No Objection Certificate," along with her husband's first wife. Vide the document they have volunteered to grant mutation in favour of Miss Tshering Choden Bhutia, daughter of Lhendup D. Bhutia and Ganga Maya Gurung with regard to the property measuring 12 feet x 10 feet which had been alloted to their late husband who passed away in the year 1992. In the document, both the wives of late Lhendup Dorjee Bhutia have admitted that they are his legal heirs and successors to the property. Now having given the property to her daughter she cannot seek another allotment in her favour. That the definition of "family" as per the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 clearly covers the Petitioner and she cannot claim rights under the Disabilities Act of 1995, as due compliance has been given by the Respondent No.1 to the provision of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985. A second allotment cannot be made to the Petitioner after an allotment was already made to her husband in terms of the Act. If she claims desertion by her children then she ought to invoke the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and not claim a second allotment. That, in view of the categorical arguments, the petition be dismissed.

[2] AIR 2014 SC 2869

9. Learned Counsel for the Respondent No.2 submitted that the allotment to the Respondent No.2 has not been challenged in the instant petition and therefore cannot be set aside. Besides in view of the scarcity of land in the State there has to be an equitable distribution and a second allotment does not accrue to the Petitioner when a first allotment was clearly made to her in terms of the provision of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 and she has willingly handed it over to her daughter.

10. I have considered the rival contentions put forth by learned Counsel at length and meticulously examined all the documents on record.

11. The question that arises for consideration before this Court is;

> Whether the Petitioner is entitled to allotment of a housing site in view of a previous allotment made to her husband? In such a circumstance, can she invoke the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 or would the provisions of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 be applicable?

12. While addressing the question formulated, it would be relevant to delve into the provisions of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 (hereinafter the "Act of 1985"). Section 2(c) of the Act of 1985 defines "family" as follows;

> "***2. Definitions****:*
> *(a)* ……
> *(b)* ……
> *(c) "family" means* father, mother, their minor children and includes major children living jointly with the parents."

The Sikkim State Site Allotment Rules, 2012 (hereinafter the "Rules of 2012") at Rule 2(1)(e) reiterates the composition of "family" as defined in

Section 2(c) of the Act of 1985 tweaking it by inserting the words "applicant's wife or husband." The said provision reads as follows;

> "***2. (1) In these rules, unless the context otherwise requires:-***
> *(a) ……*
> *(b) ……*
> *(c) ……*
> *(d) ……*
> *(e) "Family" means applicant's wife or husband as the case may be, minor children and also includes major children living jointly with the parents;"*

From a reading of the provisions of Section 2(c) of the Act of 1985 and Rule 2(1)(e) of the Rules of 2012, it is evident that the intent and purport of the provisions remain the same inasmuch as although the Act of 1985 says "family" means the persons as described in the Act, the Rules of 2012 provides that "family" means the applicant's wife or husband etc., as already extracted *supra*. On the heels of these two provisions, it is essential to notice the provisions of Section 6 of the Act of 1985 which reads as hereunder;

> **"6. Restriction on allotment of site:**
> The Government shall not allot more than one site to one family in the state."

The provisions of Section 6 of the Act of 1985 are lucid and selfexplanatory. Hence on a careful conjunctive reading of the above provisions it is apparent that once an allotment is made to a family comprising of a husband, wife, their children which includes major children living with them they would not be eligible for a second allotment. Ergo, when the allotment was made to the Petitioner's husband in the year 1975 by the concerned Government Department, she comprised of his "family" having married her husband in the year 1974. This is evident from the Order of the learned Magisterial Court dated 30.03.1992 (Annexure P-2), a document brought forth by the Petitioner herself. This document reflects that the Petitioner had represented three of her minor children as their guardian

and sought maintenance from her husband under Section 488 of the Code of Criminal Procedure, 1973. The Order specifically reveals as follows;

> "… It is the case of the petitioners that Smt. Ganga Maya Gurung and the Opposite party was **married in the year 1974 according to local customs**. …"
> **(emphasis supplied)**

Having pleaded so before the learned Magisterial Court, in my considered opinion she cannot now reprobate and state that she is not the legal wife of her husband in terms of Section 5(i) of the Hindu Marriage Act 1955. In ***Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited***[3] the Hon'ble Supreme Court has *inter alia* held as follows;

> **"34.** A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, …"

Besides, the learned Magistrate has recorded that she was married to her late husband as per the local customs. No further discussions need ensue on this point with regard to her statement *viz-a-viz* the legality of her marriage to her late husband as the Order *supra* clarifies the position. This Court thereby proceeds on the postulation that she was married to her late husband in the year 1974 and thereby a part of his family at that point of time.

13. The rather feeble contention that the Petitioner had decided to share her life with another person has not been elucidated either in the averments or in the arguments. Although vide Annexure P-5, the Petitioner tried to establish that her children had abandoned her on account of the fact that she was involved with another man, and the document states that the Petitioner had eloped with another man but it is relevant to note that the document is neither dated nor does it bear the signature of witnesses. In my

[3] (2011) 10 SCC 420

considered opinion the document appears to have been prepared only for the purposes of the instant matter and therefore requires no further consideration.

14. While reverting to the arguments of learned Senior Counsel for the Petitioner, it was contended by learned Counsel that the Act of 1985 was amended by the Rules of 2012. This is clearly a misconception. The Act of 1985 is law passed by the legislature and the Rules of 2012 have been made in exercise of the powers conferred by Section 16 of the aforestated Act to enable application or enforcement of the Act. They are not two separate Acts as sought to be interpreted by learned Senior Counsel for the Petitioner. Hence, the question of the Act of 1985 being amended by the Rules of 2012 is a preposterous proposition and unacceptable.

15. That having been said, the Petitioner admittedly along with the first wife of her late husband voluntarily handed over the alloted site with the standing structure to Miss Tshering Choden Bhutia, the daughter of the Petitioner and her late husband. On this aspect, we may usefully refer to Annexure R-2 which is a "No Objection Certificate" addressed to the District Collector, East District at Gangtok in October, 2000 by one "Mrs. Phungchung Bhutia, 1st Wife of Late Lhendup Dorjee Bhutia" and the Petitioner, wherein both the applicants being the wives of late Lhendup Dorjee Bhutia have stated as much in the said application and that their late husband left them as his "legal heirs and successors" to his estate. It is also admitted therein that their husband owned and possessed a five storeyed RCC building situated at Deorali Bazar, East Sikkim measuring 12 feet x 10 feet and the documents thereof were enclosed. It was further stated that one Miss Tshering Choden Bhutia is the legal daughter of Lhendup Dorjee and Ganga Maya Bhutia, (the Petitioner herein) and that both the wives of late Lhendup Dorjee Bhutia had "no objection whatsoever in granting mutation of the property mentioned above in favour of Miss Tshering Choden Bhutia" and that they bind themselves "not to revoke the instant document." Pursuant thereto the UD&HD vide Annexure R-3 transferred the concerned property from the name of late Lhendup Dorjee Bhutia to his daughter Tshering Choden Bhutia. No grounds for any compulsion for alienating the property emanate in the document nor was it clarified before this Court. Pausing here for a moment and reverting back to the dates as made out in the petition, it is clear that the Petitioner was married to Lhendup Dorjee Bhutia in 1974, separated in 1988, was disabled in 1991, widowed in 1992

and in the year 2000 voluntarily made over the alloted property to her daughter. Thus, admittedly she was separated from her husband but divorce did not rear its head either in the pleadings or in the verbal arguments. On separation from her husband she sought maintenance and despite being physically disabled in 1991, in the year 2000 of her own accord and free will, she handed over the said property to her daughter. It is consequently relevant to mull over as to whether she can now come before the Government claiming another allotment by seeking preferential treatment on account of disability when her disability existed at the time of alienation of property to her daughter. Was it prudent on her part to have voluntarily handed over the property of her late husband to her daughter when the site on which the structure came to be erected was in fact a Government allotment? After such voluntary action, does a right accrue to her in terms of the Disabilities Acts to seek allotment? In my considered opinion, these ponderings would have to be answered in the negative. While having said so, although the arguments of learned Senior Counsel pivoted around the provisions of the Disabilities Act of 2016 and its application to the Petitioner, it may pertinently be noted that the instant petition was filed on "12.04.2016" and the Rights of Persons with Disabilities Act, 2016 was enforced on "19.04.2017," therefore the Petitioner would be covered by the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Chapter VII of the said Act provides for affirmative action wherein Section 43 provides for "Schemes for preferential allotment of land for certain purposes" including land at concessional rates for the purposes of a house. In compliance thereof the Rules of 2012 has alloted 33% reservation for Economically Weaker Sections of the society and physically handicapped persons in the State as mentioned therein. The Rules of 2012 at Rule 5(1) lays down as follows;

> **"5. …**
>
> (1) Thirty three percent (33%) **of the site area** will be reserved for Economically Weaker Sections (EWS) of the society, physically handicapped persons, victims of natural calamities and people with exemplary records in the area of Art, Science and Sports."
>
> **(emphasis supplied)**

The relevant Rules provide for reservations for the category of persons described therein including for allotment of housing land however, admittedly,

an allotment in terms of Section 2 of the Act of 1985 was already made to the Petitioner's husband.

16. Although averments in her pleadings have constantly tried to mislead the Court by stating that the property was given away to her "children" however the documents on record bear out that it was in fact handed over to one child. It is indeed unscrupulous and inequitable on the part of the Petitioner to hand over the alloted property to a major child, (who, it may be remarked, would have been eligible for allotment of Government property subject to fulfillment of necessary conditions) and thereafter entreat the Government for a second allotment. This is an unacceptable circumstance. Even assuming that a second allotment is made to her, can it be ruled out that she would not hand over the said allotment to another child of hers or any other person of her choice and then appear before the Government once again invoking the grounds of her disability? This would indeed be stretching the interpretation of the Disabilities Act of 1995 beyond its ambit and purport. A person once alloted a property in terms of Section 2 of the Act of 1985 and Rules of 2012 is duly covered by the embargo of Section 6 of the Act of 1985. She does not have the licence to invoke the disabilities provision repeatedly while magnanimously handing out the property previously alloted to the family. The argument that when the land was allotted in the name of Lhendup Dorjee Bhutia in the year 1975 she did not know him is a blatantly incorrect statement when the records (Annexure P-2) relied on by the Petitioner herself reveal that she was married to him in the year 1974.

17. It emanates from the averments and the arguments advanced before this Court that the Petitioner was squatting on the land by constructing a shed measuring about 80 square feet. The Respondent No.1 on inspection found that it was merely a godown and she was not living in the area. The Petitioner, before this Court, is now taking the stance of a bully and persuading the Respondent No.1 to legitimize her illegitimate claim over the property by claiming disability. Merely because she was a squatter on the property does not give her preferential rights nor does her disability clothe her with preferential rights in light of the foregoing circumstances and detailed discussions thereof. It is not denied that a Writ Petition filed by Respondent No.1 against Respondent No.2 was pending before this Court previously and consequently by way of a settlement between the Respondent No.1 and Respondent No.2 it was agreed that the said area

measuring 20 feet x 25 feet would be allotted to the Respondent No.2 upon which the Writ Petition was withdrawn. When a person claims a right as against the Government pertaining to land, they are required to establish possession either by production of title deeds to the property or by establishing possession adverse to the Government for a period of not less than thirty years. Vague claims of stray or sporadic entries into any property which is owned by the Government will not be adequate to prove possession as is sought to be made out by the Petitioner and is to be ignored by the Court.

18. The claim of violation of Articles 14 or 21 of the Constitution of India and the principles of natural justice cannot sustain. In ***Olga Tellis and Others v. Bombay Municipal Corporation and Others***[4] the Hon'ble Supreme Court has *inter alia* held that;

> "...any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."

The Constitution bench had considered the rights of pavement dwellers and observed that it was a part of right to life enshrined in Article 21 of the Constitution. Their eviction from their dwellings which were close to their place of work would tantamount to deprivation of their right to livelihood. The Petitioner herein has not revealed as to how she earns her living or where she resides, in any event she is not living in the structure purported to have been constructed by her nor is it her case that the structure is near her place of livelihood, these details are not disclosed and are shrouded in mystery. The records would reveal that after she filed an application seeking allotment, the Government has furnished her with reasons as to why the allotment cannot be made to her. The principle of *audi alteram partem* has not been sidestepped by the State-Respondent No.1.

19. In the end result, the Writ Petition being devoid of merit deserves to be and is accordingly dismissed.

20. No order as to costs.

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[4] (1985) 3 SCC 545

SLR (2019) SIKKIM 513

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

IA No. 01 of 2018 in MAC App No. 04 of 2019

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

Versus

Smt. Tika Devi Limboo and Others ….. RESPONDENTS

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

For Respondent 1-3: Mr. N. Rai, Senior Advocate with Mr. K.B. Chettri and Mr. Umesh Gurung, Advocates.

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

Date of decision: 22nd July 2019

A. Motor Vehicles Act, 1988 – S. 173 (1) – The second proviso to S. 173 (1) lays down that the High Court may entertain the Appeal after expiry of a pieriod of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time – The key consideration is "sufficient cause" - No reason emanates for condoning the delay, apart from which it must be borne in mind that the Motor Vehicles Act, 1988 is beneficial legislation enacted for the purposes of meting out even-handed justice to victims of a tragedy. The victims cannot be made to wait endlessly on the whims and fancies of the Company sans substantial reasons.

(Paras 8 and 12)

Application and appeal dismissed.

Chronological list of cases cited:

1. Office of the Chief Post Master General and Others v. Living Media India Ltd. and Another, AIR 2012 SC 1506.

2. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The Appellant Company has filed the instant Application under Section 173(1) of the Motor Vehicles Act, 1988 (M. V. Act), seeking condonation of 274 days delay which occurred in filing the Appeal. It is averred that the delay occurred on account of the various grounds as detailed herein;

> **"**a. That the Impugned award was passed by the Learned Member, Motor Accidents Claims Tribunal, East Sikkim at Gangtok in M.A.C.T. Case No.10 of 2016 on 28.02.2018.
>
> b. That the certified copy of impugned award was received by Branch Office at Gangtok from Advocate Ms. Vidya Lama on 20.03.2018.
>
> c. That the Impugned award was studied by Branch office at Gangtok and further forwarded to Kolkata Regional Office on 30.03.2018.
>
> d. That due to incomplete documents the Kolkata Regional Office returned back the file to Branch Office at Gangtok for rectification on 10.04.2018.
>
> e. That the Branch Office at Gangtok again forwarded the said file with complete documents to Kolkata Regional Office on 13.04.2018.
>
> f. That the Branch Office at Gangtok received an email on 19.04.2018 from Kolkata Regional Office, with an instruction to prefer an appeal before this Hon'ble High Court.
>
> g. That the Branch Office at Gangtok had initially appointed Counsel Shri Thupden G. Bhutia on 11.05.2018 to file an

appeal before this Hon'ble High Court and the said appointment letter was received by him on 23.05.2018.

h. That the Counsel Shri Thupden G. Bhutia on first week of November, 2018, expressed his inability to file the instant appeal, stating his personal difficulties.

i. That the Branch Office at Gangtok, thereafter appointed Shri Mandan Kumar Sundas on 09.12.2018 for filing the instant appeal against the impugned Judgment before this Hon'ble High Court.

j. That by the last week of December, 2018 Shri Madan Kumar Sundas, had collected all the required documents and completed the Memorandum of Appeal to be filed before this Hon'ble High Court.

k. That from 8th January, 2019, Counsel Shri Madan Kumar Sundas was on paternity leave for one month.

l. That in the first week of February, 2019, Memorandum of Appeal was submitted to Branch Office at Gangtok by Advocate Shri Madan Kumar Sundas for verification and approval and the same was further forwarded to Kolkata Regional Office.

m. That the same had taken few days to verify and for signature.**"**

Hence, the occurrence of the delay.

2. A response was filed to the said Application objecting to the grounds advanced and it was averred that the MV Act is a social and beneficial legislation and as such the Award which has been passed by the Learned Motor Accident Claims Tribunal, East Sikkim, at Gangtok (hereinafter, Learned Claims Tribunal) cannot be treated lightly by the Appellant Company. That, the grounds given by the Appellant Company do not suffice to condone the delay and the Respondents No.1 to 3 ought not to bear the brunt for the lethargy and fault of the Appellant Company. Hence, the Application be dismissed.

3. While reiterating the points raised in the averments Learned Counsel for the Appellant Company in his verbal submissions contended that it is a settled position of law that Government and Government Undertakings have been permitted some flexibility in case of condonation of delay on account of time required for processing the papers by such Offices. In this context, various High Courts and the Hon'ble Supreme Court have upheld this view in condoning such delay. In the circumstances, the said Application be considered and delay condoned.

4. Learned Senior Counsel refuting the contentions held that the Hon'ble Supreme Court in ***Office of the Chief Post Master General and Ors.*** vs. ***Living Media India Ltd. & Anr.***[1] has observed that delay cannot be condoned if there is no proper explanation except mentioning various dates. That, no explanation emanates for the delay in the instant matter although various dates have been mentioned sans reasons. Thus, the Application deserves a dismissal.

5. Counsel for the Respondent No.4 filed no objection nor were verbal submissions made.

6. Learned Counsel for the parties were heard at length and the impugned Judgment and Award perused before considering the condonation of delay application.

7. It is pertinent to mention that the Appeal challenges the quantification of the compensation *inter alia* on grounds of the income of the victim. This Court had earlier remanded the matter back to the Learned Claims Tribunal to clarify the anomalies arising in the income of the deceased, by way of examining witnesses. The concerned witness was examined by the Claimants/Respondents herein and cross-examined by the Appellant Company and necessary clarifications made. Pursuant thereto the impugned Judgment came to be pronounced.

8. The second proviso to Section 173(1) of the Motor Vehicles Act, 1988, lays down that the High Court may entertain the Appeal after expiry of a period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. Hence, the key

[1] AIR 2012 SC 1506

consideration is "sufficient cause", whether the Appellant Company has been able to make out "sufficient cause" is the next consideration.

9. The Hon'ble Supreme Court in ***Basawaraj and Another*** vs. ***Special Land Acquisition Officer***[2] while explaining the expression "sufficient cause" would also opine as follows;

> **"11.** The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned*, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide *Madanlal* v. *Shyamlal* [(2002) 1 SCC 535 : AIR 2002 SC 100] and *Ram Nath Sao* v. *Gobardhan Sao* [(2002) 3 SCC 195 : AIR 2002 SC 1201].)
>
> **12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute."**
>
> [emphasis supplied]

[2] (2013) 14 SCC 81

10. On the anvil of this opinion, it would be essential to examine whether the grounds put forth by the Appellant Company qualify as "sufficient cause". While carefully walking through the grounds given by the Appellant Company seeking condonation of delay it is clear that the impugned Judgment was pronounced on 28-02-2018, certified copy of the impugned Award was received by the Branch Office from their Counsel on 20-03-2018. Pausing here for a moment, the Appellant Company has failed to reveal when the certified copy of the Judgment was applied for, although the date of Judgment is revealed. The dates revealed *supra* indicate a delay in applying for a copy of the Judgment. Admittedly the Branch Office of the Appellant Company is at Gangtok, in such a circumstance an explanation for the delay of almost three weeks for the certified copy of the impugned Judgment to reach the Branch Office was imperative but finds no place in the pleadings or verbal submissions. Thereafter, the impugned Judgment was allegedly forwarded to Kolkata Regional Office on 30-03-2018. Pursuant thereto steps were taken on account of incomplete documents till 19-04-2018, on which date the Branch Office was directed to prefer an Appeal before this High Court. More than a month elapsed before the Counsel so appointed by the Branch Office received the letter of appointment. This also lacks any explanation. Six months thereafter elapsed on account of the inability of the Counsel to file the instant Appeal on grounds of personal difficulties, this is not substantiated by any documentation. The Branch Office in December, 2018, appointed another Counsel for filing the Appeal who filed it only in March, 2019. The grounds, in my considered opinion, cannot qualify as "sufficient cause". As already pointed out the delay lacks substantiation by documentation.

11. The Supreme Court in ***Office of the Chief Post Master General*** (*supra*) while disapproving preferential treatment expected by Government Departments in matters of delay held as follows;

> **"13.** In our view, it is the right time to inform all the Government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree or

> procedural red-tape in the process. The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. ……..**"**

The Supreme Court in the aforestated ratio has thus observed that even Government Departments are to be treated with the same yardstick as other litigants in matters of delay and law cannot be tweaked for the benefit of a few. The Appellant Company herein merely by virtue of being a Public Sector Undertaking ought not to expect preferential treatment while lacking the grounds required to establish "sufficient cause".

12. In conclusion, I am of the considered opinion that no reason emanates for condoning the delay, apart from which it must be borne in mind that the Motor Vehicles Act, 1988, is beneficial legislation enacted for the purposes of meting out even-handed justice to victims of a tragedy. The victims cannot be made to wait endlessly on the whims and fancies of the Company sans substantial reasons.

13. The Application is devoid of merit and consequently dismissed and disposed of, as also the Appeal.

14. No order as to costs.

SLR (2019) SIKKIM 520

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

C.R.P. No. 02 of 2019

Senior Branch Manager,
Oriental Insurance Company Ltd. ….. PETITIONER

Versus

Managing Director,
Sikkim Power Development Co. Ltd. ….. RESPONDENT

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

For the Respondent: Mr. Sudhir Prasad, Advocate.

Date of decision: 25th July 2019

A. Limitation Act, 1963 – S. 5 – Condonation of Delay – S. 5 has conferred the power to condone delay in order that the Courts could do substantial justice – The expression "sufficient cause" is sufficiently elastic. The Supreme Court has been adopting a justifiable liberal approach while examining cases for condonation of delay. The doctrine of seeking day to day explanation of the delay must be applied in a pragmatic manner and the Court should not have a pedantic approach. Substantial justice must be preferred to technical considerations. The Court must avoid any presumption that the delay is deliberate and the negligence culpable. A justice oriented approach would be the right approach in examining whether or not to condone delay – In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation – Also held in *re: Zolba* that unless compelled by express and specific language of the statute, the provisions of Order VIII Rule 1 CPC should not be construed in a manner, which would lead the Court helpless to meet extraordinarily situation in the ends of justice.

(Paras 8 and 9)

B. Limitation Act, 1963 – S. 5 – Condonation of Delay – Perusal of the orders does not reflect that the Petitioner was guilty of adopting any delaying tactics – Time should not be granted as a matter of routine and merely for the asking. However, when the learned District Judge has considered those grounds and thought it fit to grant extension of time again and again, the same cannot be said to be gross negligence while considering the application for condonation of delay filed subsequently – While considering the application, it was necessary for the learned District Judge to have taken into account the fact, as reflected in the various orders, that the Court had considered each of the said grounds for extension on each separate occasion and granted the same. If sufficient cause is shown or is reflected in the records of the case a more liberal approach must be adopted to ensure that a party in the adversarial system of justice dispensation is not denied the opportunity of participating in it – The delay cannot be attributable to the Petitioner alone. Sufficient cause for condoning the delay was also reflected in the orders passed by the learned District Judge – The frequent retirement of advocates during the period when the Petitioner was required to file the written statement and the grant of several extensions beyond the statutory period by the learned District Judge would make it an exceptional case in favour of the Petitioner while considering the application.

(Para 14)

Petition allowed.

Chronological list of cases cited:

1. Kailash v. Nanhku and Others, (2005) 4 SCC 480.
2. Salem Advocate Bar Association, T.N. v. Union of India, (2005) 6 SCC 344.
3. Zolba v. Keshao and Others, (2008) 11 SCC 769.

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

1. This is a Civil Revision Petition filed by the Petitioner (defendant in the suit) challenging an order dated 22.08.2018 (impugned order) passed by the learned District Judge, Special Division-II at Gangtok (learned District Judge) in Money Suit No. 30 of 2017 (the suit) by which the application under Section 5 of the Limitation Act, 1963 (the application) filed by the Petitioner seeking condonation of the delay in filing written statement was rejected.

2. The learned District Judge was of the view that the delay was inordinate and the explanation unacceptable. In the learned District Judge's opinion apart from gross negligence and laxity there is nothing to suggest that the Petitioner could not file the written statement in spite of its best efforts.

3. Order VIII Rule 1 of the CPC is the relevant provision and reads as under:

> ***"ORDER VIII***
>
> ***1. Written statement****.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*
>
> *Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.***"**

4. The defendant is required to present a written statement of his defence within a period of 30 days from the service of summons on him. Where the defendants fails to file the written statement within the said period of 30 days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons.

5. The provision quoted above has been examined by the Supreme Court in its various judgments and is no longer *res integra*. The learned Counsel for the Petitioner relied upon in re: ***Kailash v. Nanhku & Ors.***[1]; ***Salem Advocate Bar Association, T.N. v. Union of India***[2] and ***Zolba v. Keshao & Ors.***[3]**.** The learned District Judge has also referred to the judgment of the Supreme Court in re: ***Kailash (supra).***

6. The ratio of the above judgments is that the provision is procedural and directory. It would be open to the Court to permit the defendant to file his written statement beyond the prescribed period of 30 days and 90 days if exceptional circumstances have been made out.

7. In fact Mr. Sudhir Prasad, learned Counsel for the Respondent (Plaintiff in the suit) was also of the view that written statement can be accepted by the Court beyond the time permitted only in exceptional circumstances. It was his case that such of the facts placed before the learned District Judge could not be considered as exceptional. The learned Counsel for the Respondent also submitted that the Petitioner had failed to explain the delay day to day.

8. Section 5 of the Limitation Act, 1963 has conferred the power to condone delay in order that the Courts could do substantial justice. The expression “sufficient cause” is sufficiently elastic. The Supreme Court has been adopting a justifiable liberal approach while examining cases for condonation of delay. The doctrine of seeking day to day explanation of the

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[1] (2005) 4 SCC 480
[2] (2005) 6 SCC 344
[3] (2008) 11 SCC 769

delay must be applied in a pragmatic manner and the Court should not have a pedantic approach. Substantial justice must be preferred to technical considerations. The Court must avoid any presumption that the delay is deliberate and the negligence culpable. A justice oriented approach would be the right approach in examining whether or not to condone delay.

9. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, it has also been held in re: ***Zolba (supra)*** that unless compelled by express and specific language of the statute, the provisions of Order VIII Rule 1 CPC should not be construed in a manner, which would lead the Court helpless to meet extraordinarily situation in the ends of justice.

10. Having examined the law it would be necessary to consider the facts relevant for the disposal of the present petition. These facts are not in dispute.

11. On 27.10.2017 the Petitioner was served the summons from the Court. 30 days for filing the written statement would thus end on 26.11.2017. If the proviso to Order VIII Rule 1 of the CPC was to be applied the 90 days period would expire on 25.01.2018. Admittedly, no application for extension of time was filed by the Petitioner on or before the expiry of the 30 days period i.e. 26.11.2017. Nevertheless, the record of the orders passed by the learned District Judge reflects that on 30.10.2017 time was granted to the Petitioner to file written statement on or before 13.11.2017. The order dated 13.11.2017 reflects that the Advocate for the Petitioner sought time for filing written statement till 18.11.2017 on the ground that the conducting Counsel was mourning the death of a close relative. The ground was considered and time was granted till 18.11.2017 by the learned District Judge. On 28.11.2017 the Petitioner was represented by a proxy advocate who pleaded that the advocate for the Petitioner had to suddenly go out of station to attend important matters and sought further time to file the written statement. This ground was also considered and time granted till 18.12.2017. The order dated 18.12.2017 reflects that the

advocate for the Petitioner was not present and notice was issued to the Petitioner returnable on 13.02.2018. On 13.02.2018 the advocates for the parties sought adjournment as the matter was likely to be amicably settled. Accordingly time was granted till 28.02.2018. On 28.02.2018 the advocate for the Petitioner expressed her intention to retire from the case. However, since the Petitioner was absent the retirement was not considered on the date and the Petitioner was directed to appear on 09.03.2018. On 09.03.2018 the advocate for the Petitioner submitted that she had informed the Petitioner about her intention to retire but no intimation has been received from the Petitioner. The learned District Judge considered and issued notice to the Petitioner returnable on 15.03.2018. On 15.03.2018 as notice to the Petitioner had not returned, on the request of the advocate for the Respondent, a fresh notice was issued. On 04.04.2018 another advocate filed his vakalatnama and prayed for a short date to take appropriate steps in the matter which was considered and granted till 11.04.2018. On 11.04.2018 the advocate for the Petitioner sought for further time to take steps as he was out of station and necessary instructions from the Petitioner could not be obtained. The same was considered by the learned District Judge and time was granted till 17.04.2018. On 17.04.2018 an application for adjournment was filed by the advocate for the Petitioner on the ground that the Branch Manager was out of station and hence he could not take instructions for taking steps. This was also considered and allowed by the learned District Judge but as a final opportunity. The matter was posted to 03.05.2018 for taking steps. On 03.05.2018 the advocate for the Petitioner sought for further time on the same ground that the Branch Manager has been out of station since the month before. The learned District Judge imposed cost but considered the oral prayer and granted time till 19.05.2018. On 19.05.2018 the advocates for the Petitioner expressed their desire to retire from the case due to personal reasons. The reasons were considered and the advocates were allowed to withdraw their vakalatnama. The advocates for the Petitioner undertook to inform the Petitioner about the next date of hearing which was posted on 05.06.2018. On 05.06.2018 yet another advocate appeared on behalf of the Petitioner and undertook to file his vakalatnama on the next date. The advocate for

the Petitioner sought a weeks' time to file application seeking leave to file the written statement. The matter was posted to 15.06.2018 after the learned District Judge considered and allowed the Petitioner's prayer for further time. On 15.06.2018 the advocate for the Petitioner filed the application for condonation of delay and prayed that the written statement as well as counter claim may be placed on record. The Respondent sought time to file objection to the application and the matter was therefore posted to 05.07.2018. On 05.07.2018 an adjournment was sought for by the Respondent as the reply could not be filed. This was considered and allowed and the matter posted to 21.07.2018. On 21.07.2018 the Petitioner once again sought time on the personal ground of the Respondent's advocate which was considered and time allowed till 09.08.2018. On 09.08.2018 the application for condonation of delay was heard at length and matter posted for orders on 22.08.2018 on which date the impugned order rejecting the application for condonation of delay was passed by the learned District Judge.

12. The orders reflect that on every occasion time was sought on various grounds, considered and granted by the learned District Judge. It also reveals that during this period several advocates came on record on behalf of the Petitioner and retired with the leave of the Court.

13. Some of these facts have been narrated in the application. In any case these facts are clearly reflected in the orders passed by the learned District Judge from time to time. The same have been placed on record in the present proceedings with the leave of the Court. The Petitioner has also pleaded in the application that they had entrusted the matter for defending its case to various advocates but due to communication gap and lack of instructions the Petitioner was not able to file the written statement. A perusal of the said orders reflect that each of the advocates save the last retired from the case before getting a firm grip of the case. The records also reveal that time was sought for filing written statement more on the personal grounds of the learned advocates for the Petitioner. In the confusion of the advocate seeking time to take necessary steps and in not being able to do so due to their personal reasons time which started running

did not stop and in the process there has been an admitted delay of 138 days. The learned District Judge has calculated the period between 27.10.2017 and 15.06.2018 i.e. the day the Petitioner filed the written statement and subtracted 90 days there from to arrive at the figure of 138 days delay. The learned District Judge has not considered the fact that time for filing written statement had been extended by the Court after considering the grounds on several dates till 05.06.2018. Thereafter the learned District Judge had granted time to the Petitioner to file application for condonation of delay on 15.06.2018. Pursuant thereto time was granted to the Respondent to file objections till 09.08.2018.

14. A perusal of the orders does not reflect that the Petitioner was guilty of adopting any delaying tactics. In fact, this was neither the contention of the learned Counsel for the Respondent nor the opinion of the learned District Judge. Time should not be granted as a matter of routine and merely for the asking. However, when the learned District Judge has considered those grounds and thought it fit to grant extension of time again and again the same cannot be said to be gross negligence while considering the application for condonation of delay filed subsequently. While considering the application it was necessary for the learned District Judge to have taken into account the fact, as reflected in the various orders, that the Court had considered each of the said grounds for extension on each separate occasion and granted the same. If sufficient cause is shown or is reflected in the records of the case a more liberal approach must be adopted to ensure that a party in the adversarial system of justice dispensation is not denied the opportunity of participating in it. This Court is therefore, unable to agree with the conclusion that there has been an inordinate delay and the reasons are unacceptable. The delay cannot be attributable to the Petitioner alone. Sufficient cause for condoning the delay was also reflected in the orders passed by the learned District Judge. The learned District has rightly held that the object behind Order VIII Rule 1 CPC is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of the case much to the chagrin of the Plaintiffs. However, the record of the present case does not reflect such unscrupulous dilatory tactics being adopted by the Petitioner. Rightly again the learned District Judge has not

come to a finding that the Petitioner was unscrupulous in its approach and was adopting dilatory tactics. The frequent retirement of advocates during the period when the Petitioner was required to file the written statement and the grant of several extensions beyond the statutory period by the learned District Judge would make it an exceptional case in favour of the Petitioner while considering the application. This Court is satisfied that the reasons pleaded in the application and also reflected in the various orders passed by the learned District Judge from time to time in support of the prayer for extension of time were sufficient. It would also be in the interest of justice and fairness that the suit is decided on the merits of the case by permitting the written statement filed by the Petitioner.

15. In view of the aforesaid, the Civil Revision Petition No. 02 of 2019 is allowed. The impugned order dated 22.08.2018 is set aside. The learned District Judge shall accept the written statement filed on 15.06.2018 and proceed with the case in accordance with the law.

16. A copy of the judgement shall be forwarded to the Court of the learned District Judge, Special Division-II at Gangtok forthwith.

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