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SUBJECT INDEX

Indian Evidence Act, 1872 – Veracity of Victim's Evidence – Conviction in a case of rape can be based solely on the testimony of the victim – Testimony must be truthful and there should be no shadow of doubt over her veracity. It cannot, however, be held that every victim's evidence must be accepted even if the story is improbable and belies logic. The testimony of a victim of rape has to be placed on a higher pedestal than even an injured witness, but when the Court finds it difficult to accept the victim's version because it is not irreproachable, search for direct or circumstantial evidence to lend assurance to her testimony must be undertaken.

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Indian Evidence Act, 1872 – S. 45 – Medical Evidence and Ocular Evidence – Inconsistency – Where prosecution witness's testimonies are totally inconsistent with medical evidence it amounts to a fundamental defect in the prosecution case and if not reasonably explained may discredit the case of the prosecution – If the opinion given by a medical witness is not consistent and probable, the Court does not necessarily have to go by it – When eye witness account is credible, medical opinion cannot be accepted as conclusive – Though, ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when the medical evidence makes the ocular evidence improbable that becomes a relevant factor. If the medical evidence completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved – The expert opinion must be given a great sense of acceptability but the Court cannot be guided by every such opinion even if it is perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

Prem Rai alias Sambhu Rai v. State of Sikkim ***359-B***

Gangtok Rent Control and Eviction Act, 1956 – In eviction proceedings, the question of title to the properties may be incidentally discussed but cannot be decided finally.

Shri Rajendra Prasad Mangla and Another v.
Shri Govind Agarwal ***388-A***

Gangtok Rent Control and Eviction Act, 1956 – Attornment by Implication – Appellant No. 1 in the communications has insisted on a settlement between him and the Respondent to reach an amicable amount to be paid as revised rent to the Respondent. If the Appellant No. 1 did not

consider the Respondent as his landlord then there was no reason for him to seek such a settlement. The Appellants, by the correspondences reflected hereinabove have accepted the Respondent as their landlord.

Shri Rajendra Prasad Mangla and Another v. Shri Govind Agarwal ***388-B***

Notification No. 6326-600/H&WB dated 14.04.1949 – Grounds for eviction in clause 2 – *"Personal occupation"* of the landlord includes the requirement of the dependents as well – Respondent's family consist of his wife, daughter and son. It cannot be doubted that the requirement of adequate accommodation for the family would grow when children grow up – Similarly, the Respondent desire to accommodate a help due to his health issues and to have adequate room when his relatives visit cannot be termed fanciful.

Shri Bishnu Prasad Bhagat v. Shri Prakash Basnett ***416-A***

Indian Penal Code, 1860 – S. 71 – Limit of Punishment of Offence made up of Several Offences – In view of S. 220 Cr.P.C. the Appellant could have been charged and tried at one trial for the offences he was charged with. However, in view of S. 220 (5) Cr.P.C. S. 71 of the IPC and S. 42 of the POCSO Act, it is clear that if the alleged act of penetrative sexual assault, assault or criminal force to woman with intent to outrage her modesty and assault or use of criminal force to woman with intent to disrobe were committed in the course of the same transaction, the offender may not be punished for more than one of such his offences, unless it be so expressly provided.

Prem Rai alias Sambhu Rai v. State of Sikkim ***359-E***

Indian Penal Code, 1860 – S. 376 – Explanation (1) to S. 375 I.P.C clarifies that for the purpose of the section, "*vagina*" shall also include *labia majora* – Partial penetration within the *labia majora* of the vulva or pudendum is sufficient to constitute the offence of rape, depth of penetration being immaterial. The lack of injury on the genital of the victim cannot be considered as conclusive proof that the Appellant had not raped the victim. More so when the injuries on the victim as well as the Appellant does reflect signs of resistance.

Prem Rai alias Sambhu Rai v. State of Sikkim ***359-C***

Protection of Children from Sexual Offences Act, 2012 – S. 3 (a) – Indian Penal Code, 1860 – S. 375 (a) – S. 3(a) of the POCSO Act and S. 375 (a) of the I.P.C are identically worded except the words "*woman*" in S. 375 is replaced by the word "*child*" in S. 3(a) of the POCSO Act. Whereas the POCSO Act is gender neutral, S. 375(a) relates to rape committed on a woman – S. 6 (10), I.P.C – Woman denotes female human being of any age – If the victim is a child i.e. a person less than 18 years of age, S. 3(a) of the POCSO Act would be attracted, consent notwithstanding.

Prem Rai alias Sambhu Rai v. State of Sikkim ***359-D***

SLR (2019) SIKKIM 359

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

Crl. A. No. 40 of 2017

Prem Rai *alias* Sambhu Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. K.T. Tamang, Advocate (Legal Aid Counsel).

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

Date of decision: 7th June 2019

A. Indian Evidence Act, 1872 – Veracity of Victim's Evidence – Conviction in a case of rape can be based solely on the testimony of the victim – Testimony must be truthful and there should be no shadow of doubt over her veracity. It cannot, however, be held that every victim's evidence must be accepted even if the story is improbable and belies logic. The testimony of a victim of rape has to be placed on a higher pedestal than even an injured witness, but when the Court finds it difficult to accept the victim's version because it is not irreproachable, search for direct or circumstantial evidence to lend assurance to her testimony must be undertaken.

(Para 37)

B. Indian Evidence Act, 1872 – S. 45 – Medical Evidence and Ocular Evidence – Inconsistency – Where prosecution witness's testimonies are totally inconsistent with medical evidence it amounts to a fundamental defect in the prosecution case and if not reasonably explained may discredit the case of the prosecution – If the opinion given by a medical witness is not consistent and probable, the Court does not necessarily have to go by it – When eye witness account is credible, medical opinion cannot be accepted as conclusive – Though, ocular

testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when the medical evidence makes the ocular evidence improbable that becomes a relevant factor. If the medical evidence completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved – The expert opinion must be given a great sense of acceptability but the Court cannot be guided by every such opinion even if it is perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

(Para 40)

C. Indian Penal Code, 1860 – S. 376 – Explanation (1) to S. 375 I.P.C clarifies that for the purpose of the section, "*vagina*" shall also include *labia majora* – Partial penetration within the *labia majora* of the vulva or pudendum is sufficient to constitute the offence of rape, depth of penetration being immaterial. The lack of injury on the genital of the victim cannot be considered as conclusive proof that the Appellant had not raped the victim. More so when the injuries on the victim as well as the Appellant does reflect signs of resistance.

(Para 50)

D. Protection of Children from Sexual Offences Act, 2012 – S. 3 (a) – Indian Penal Code, 1860 – S. 375 (a) – S. 3(a) of the POCSO Act and S. 375 (a) of the I.P.C are identically worded except the words "*woman*" in S. 375 is replaced by the word "*child*" in S. 3(a) of the POCSO Act. Whereas the POCSO Act is gender neutral, S. 375(a) relates to rape committed on a woman – S. 6 (10), I.P.C – Woman denotes female human being of any age – If the victim is a child i.e. a person less than 18 years of age, S. 3(a) of the POCSO Act would be attracted, consent notwithstanding.

(Para 52)

E. Indian Penal Code, 1860 – S. 71 – Limit of Punishment of Offence made up of Several Offences – In view of S. 220 Cr.P.C. the Appellant could have been charged and tried at one trial for the offences he was charged with. However, in view of S. 220 (5) Cr.P.C. S. 71 of the IPC and S. 42 of the POCSO Act, it is clear that if the alleged act of penetrative sexual assault, assault or criminal force to woman with intent to outrage her modesty and assault or use of criminal force to woman with intent to disrobe were committed in the course of the same transaction, the

offender may not be punished for more than one of such his offences, unless it be so expressly provided.

(Para 58)

Appeal partially allowed.

Chronological list of cases cited:

1. Ramdas v. State of Maharashtra, (2007) 2 SCC 170.
2. Tameezuddin v. State (NCT of Delhi), (2009) 15 SCC 566.
3. Mohd. Ali v. State of U.P., (2015) 7 SCC 272.
4. Abdul Sayeed v. State of M.P., (2010) 10 SCC 259.
5. Bhajan Singh *alias* Harbhajan Singh v. State of Haryana, (2011) 7 SCC 421.
6. Gangabhavani v. Rayapati Venkat Reddy and Others, 2013 Cri. L.J. 4618.
7. Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263.
8. Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688.
9. Solanki Chimanbhai Ukabhai v. State of Gujarat, (1983) 2 SCC 174.
10. Punjab Singh v. State of Haryana, (1984) Cri. L.J. 921 (SC).
11. Om Prakash v. State of Uttar Pradesh, (2006) 9 SCC 787.
12. Aman Kumar v. State of Haryana, (2004) 4 SCC 379.
13. Yerumalla Latchaiah v. State of A.P., (2006) 9 SCC 713.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Appellant was the driver of the taxi hired by the victim (P.W.7) and her two friends P.W.1 and P.W.2, all three girls, on 15.05.2016 to go sightseeing in an around Gangtok. However, pursuant to First Information Report (FIR) (exhibit-6) lodged by the victim before the Officer in-charge of Sadar Thana, Gangtok, Sikkim Police Inspector, Ton Tshering Lepcha,

Station House Officer (SHO) Phodong, Police Station, North Sikkim and the Investigating Officer (P.W.23) (Investigating Officer) registered a regular criminal case against the Appellant for commission of rape, penetrative sexual assault on a minor as well as for voluntary causing hurt. The victim had alleged that the Appellant while taking them around sightseeing had become violent with the victim's friend when they desired to return as it was getting late. The Appellant started demanding money and thereafter asked the victim's friend to get off. By the time she was losing her senses and she could neither hear nor speak. She alleged that she was kidnapped by the Appellant *"brutally beaten, slapped, hit by a rod, pulled by my hair and raped in the car."*

2. The investigation culminated in the charge-sheet filed on 24.08.2016 against the Appellant for commission of penetrative sexual assault and voluntarily causing hurt.

3. On 19.09.2016 the learned Special Judge, POCSO Act, 2012, North Sikkim at Mangan charged the Appellant for three indictments. Firstly, for voluntarily causing hurt on P.W.2 and the victim by beating them brutally punishable under Section 323 of the Indian Penal Code, 1860 (IPC). Secondly, he was charged for assaulting or using criminal force against P.W.2 and the victim intending to outrage their modesty punishable under Section 354 IPC. Thirdly, he was charged for committing penetrative sexual assault on the victim punishable under Section 4 of the Protection of Children from Sexual Offences, Act, 2012 (POCSO Act).

4. On 07.11.2016 the learned Special Judge framed two more charges. He was charged for committing rape on the victim punishable under Section 376 IPC. He was also charged for using criminal force against the victim with the intention of disrobing her and in fact, disrobing her punishable under Section 354B IPC. The Appellant pleaded not guilty to all the charges and claimed trial.

5. The Appellant has been convicted under Section 323 IPC for voluntarily causing hurt to the victim and P.W.2. He was also convicted under Section 354, 354B, 376 (1) of the IPC as well as Section 3(a)/4 of the POCSO Act for commission of the said offences on the victim by the learned Special Judge.

6. The Appellant was sentenced in the following manner:

- *To undergo rigorous imprisonment for a period of eight years and to pay a fine of Rs.30,000/- for the offence(s) under Section 376(1) of the IPC and Sections 3(a)/4 of the POCSO Act, 2012. In default to pay the fine, to undergo simple imprisonment for a further period of six months;*

- *To undergo simple imprisonment for a period of 5 years and to pay a fine of Rs.20,000/- for the offence under Section 354 IPC. In default to pay the fine, to undergo simple imprisonment for a further period of six months;*

- *To undergo simple imprisonment for a period of three years and to pay a fine of Rs.25,000/- for the offence under Section 354B IPC. In default to pay the fine, to undergo simple imprisonment for a further period of six months; and*

- *To undergo simple imprisonment for a period of one year for the offence under Section 323 IPC.*

7. The learned Special Judge directed that the period of imprisonment shall run concurrently and that the imprisonment already undergone shall be set off. The fine imposed was directed to be applied towards the payment of compensation to the victim. Considering the nature of the case the learned Special Judge also deemed it appropriate to recommend the award of compensation of Rs.1 lakh to the minor victim to be paid out of the Victim Compensation Fund.

8. The Appellant is aggrieved by the impugned judgment and the order on sentence both dated 26.08.2017.

9. Heard Mr. K. T. Tamang, learned Legal Aid Counsel for the Appellant and Mr. S. K. Chettri, learned Additional Public Prosecutor for the Respondent.

10. Mr. K. T. Tamang at the outset conceded that the minority of the victim had been established by the prosecution. The learned Special Judge has also held that the prosecution has been able to prove that the victim was a minor at the time of the incident. The minority of the victim not being in dispute this Court shall examine the evidence let by the prosecution to appreciate if the learned Special Judge had come to the correct conclusion in convicting the Appellant and sentencing him accordingly.

11. The victim as well as her two friends - P.W.1 and P.W.2 identified the Appellant in Court. The cross-examination of these witnesses reflects that the identification of the Appellant as the driver of the taxi hired by them on 15.05.2016 is not disputed. The prosecution has cogently proved that it was in fact the Appellant who had driven the victim and her two friends P.W.1 and P.W.2 on the fateful day.

12. The victim gave a detailed narration of what transpired that day on her, P.W.1 and P.W.2. On the date of the incident they had got up late. They wanted to visit local tourist points in and around Gangtok. They came out of the hotel (xxx name of the hotel withheld) and hired a taxi of the Appellant. They visited few places including a monastery. P.W.2 got out and brought some local *'momos'* for them. The Appellant got some chips and water. He then suggested that they should visit seven sister falls located near Gangtok. He somehow convinced them and they started proceeding towards the said water fall. On the way they came across another water fall. They stopped the vehicle and clicked some photographs and thereafter proceeded further. It was already dark by then. After some distance they were caught in a terrible traffic jam. As it was late they told the Appellant that they wanted to go back. He however, moved further and drove the vehicle rashly. By the time she was feeling nauseous probably due to the *'momos'* and water that she had consumed. She could hear the Appellant and P.W.2 arguing seriously about the matter. She did not remember what happened after that but she could say that the vehicle was still moving. After sometime when she woke up she realized that only she and the Appellant were in the vehicle. The Appellant had reclined her seat backwards and her underwear was missing. The Appellant was smoking on his seat. She somehow

managed to get out of the vehicle but it was already dark. The Appellant came out and caught her by her hand and hair. He dragged her back to the car. Once she was inside the Appellant forced himself on her and put his penis into her vagina. There was some penetration also. He was also slapping her. She kept on kicking him but to no avail. She was also crying with pain. After he raped her he started driving again. She did not remember which direction they were proceeding but on the way some people stopped their vehicle. They had come looking for her. She was then taken to some police station.

13. The defence cross-examined the victim. It was suggested that they had purchased liquor that day before proceeding to seven sister water fall. It was suggested that she was drunk on the relevant day. Both the allegations were denied by the victim. The defence also suggested that the Appellant had gone to another shop to buy mineral water as the shop where P.W.2 went out to get *'momos'* did not have mineral water. It was suggested that the water which was brought by the Appellant was properly sealed. These suggestions were also denied by the victim. The defence suggested that the victim had consented to get physical with the Appellant which was also denied by her. The detailed narration of facts by the victim (P.W.7) constituting the core of the offences alleged have not been assailed by the defence.

14. P.W.1 and P.W.2 also deposed about what transpired on the relevant day. P.W.1 remembered the date of the incident. P.W.2 only remembered that it was during April-May, 2016 when the incident took place. Their deposition corroborates the evidence of the victim of having hired the Appellant's taxi for sightseeing in and around Gangtok and travelling to a monastery and to the water falls in the North District. Their depositions also corroborate the victim's testimony that when it started getting dark they asked the Appellant to turn and drop them back to the hotel. They corroborate the victim's deposition that the Appellant got agitated and was reluctant to turn back. P.W.1 deposed that when they insisted the Appellant became angrier and punched P.W.2 on her face. P.W.2 deposed that when he got agitated he kept on proceeding towards the second water fall. She got angry and started discussing with him. The Appellant became aggressive and even hit her on her face due to which she started bleeding. Both P.W.1 and P.W.2 deposed that thereafter the Appellant made them get out of the vehicle and sped away with the victim.

They somehow managed to reach a nearby house/hotel with some people in it. They narrated the incident to them. The police arrived thereafter and took them for medical treatment to a hospital. Later that night the victim and the Appellant were brought by the police to the Phodong, Police Station.

15. The cross-examination of P.W.1 and P.W.2 by the defence also leads this Court to believe that the Appellant denied only certain details of how the events transpired but not the fact that the Appellant was the driver who drove them on 15.05.2016 and that the incident did in fact occur. The defence had suggested to P.W.2 that she had sustained injury because of the fall while walking in the dark which was denied by her.

16. The testimonies of the victim, P.W.1 and P.W.2 narrate what transpired on that day in great detail. Most of it remained unassailed.

17. The father (P.W.2) of P.W.1 confirmed that he was running the hotel where the victim and P.W.2 had stayed when they came during May, 2016. He also confirmed that on 15.05.2016 all the three of them had gone out sightseeing. He was in touch with her daughter on her mobile. He deposed that around 9-9.30 p.m. he could talk to her. P.W.1 told him that she and her friends had hired a taxi for sightseeing and were at some unknown place. The driver of the vehicle was about to physically assault her and her friends. P.W.1 also told him that the driver had taken away the victim and had abandoned P.W.1 and P.W.2 at the same place. P.W.1 could not tell him her exact location. The phone got disconnected. He kept trying but could not talk to her. After sometime he did speak to her and P.W.1 informed him that she was at Phodong. He told her to take shelter in nearby houses. He then went to Sadar Police Station, Gangtok and informed the police. The Sadar Police Station contacted the Phodong police. In the meantime he received a phone call from an unknown number. It was from a local resident of Phodong who told him that P.W.1 and P.W.2 had taken shelter in his place. He gave the phone to the Police Officer at the Sadar Police Station. After that he was instructed by the said Police Officer to go to Phodong Police Station. He proceeded to Phodong Police Station along with his friend who had accompanied him to Sadar Police Station. They took two vehicles with them. On the way they came across the vehicle of the Appellant. When it was stopped they saw the Appellant and the victim in it. The victim seemed panicky. She told him that she had been sexually assaulted by the Appellant. They brought the Appellant and the

victim to the Phodong Police Station where he met P.W.1 and P.W.2. Later they came back to Sadar Police Station. The FIR in the matter was prepared by the victim in his presence and filed at Sadar Police Station. During cross-examination he admitted that he had not mentioned about the victim telling him that she was sexually assaulted by the Appellant to the police after being confronted with his statement recorder under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C.). He also admitted that in the said statement there is no mention about his daughter informing him that the victim had been taken away by the Appellant. Except these two contradictions the father's deposition stands firm.

18. Mohan Pradhan (P.W.6) was working in a hotel (xxx name of the hotel withheld) located at Tumlong between Phensong and Phodong, North Sikkim. One night while he and the hotel owner were closing the hotel two (xxx ethnic identity withheld) girls came there crying for help. When they inquired from them they told them that they had been left at a lonely place by their taxi driver. He deposed that the girls told them they had hired a taxi. The driver had made them come towards Phodong and abandoned them there after some arguments between them. The girls also told them that their friend had been taken away by the Appellant in his vehicle. They contacted the Sadar Police Station. After sometime police personnel from Phodong Police Station came and took the girls to the Phodong Police Station. During cross-examination he admitted that when they inquired from the (xxx ethnic identity withheld) girls if they had consumed alcohol they denied but they did tell them that their friend who was in the vehicle had consumed duet (alcohol) and that she was drunk.

19. Chudup Bhutia (P.W.22) was the owner of the hotel (xxx name of the hotel withheld). He deposed that two girls had come one night fully drunk. This was about a year ago. One of them had an injury on her forehead. He allowed them to come in and offered them food and clothes. They told him that they had been abandoned by a taxi driver when they did not agree to go further with him. They also told him that they had one more friend who wanted to go further with the driver and as such did not come with them. He testified that on verification they told him that their friend had taken alcohol. They somehow managed to contact their guardian. He informed the Sadar Police Station about the matter. Later some police personnel came and took the girls with them. At this stage the learned Prosecutor sought permission to declare him hostile. Permission was granted

and he was cross-examined by the learned Prosecutor. He then admitted he had not stated to the police that the two girls had told him their friend wanted to go further with the Appellant. No suggestion, however, was made by the prosecutor that he had lied about it. He was also cross-examined by the Appellant's Counsel. On such cross-examination he admitted the two girls had told him that since their friend and the Appellant had consumed alcohol they, most probably, had fallen in love. He admitted that he had gone to Kolkata the following morning of the incident and returned only after 10-12 days. He admitted that he had never seen the Appellant before the day of his examination in Court. He admitted that the girls had told him that their friend and the driver had consumed alcohol which he had mentioned in his statement to the Police. He admitted that the two girls did not tell him about their friend being forcefully taken by the Appellant or of being assaulted by him. The deposition of Chudup Bhutia (P.W.22) regarding the two girls telling him that since their friend and the Appellant had consumed alcohol they, most probably, had fallen in love cannot be believed. However, his evidence, to the extent it finds corroboration from the statement of Mohan Pradhan (P.W.6) and other witnesses can be relied upon.

20. Ash Bahadur Rai (P.W.14) was posted at the Phodong Police Station during May, 2016. He deposed that on 15.05.2016 at around 11 p.m. the Police Station received information from Sadar Police Station, Gangtok about three girl tourists from (xxx name of place withheld) having come towards Phodong in a taxi and being left stranded by the driver. The two girls were reportedly at the hotel (xxx name of hotel withheld) along with the police team. On reaching there they saw the two girls. They told them that their friend had been taken away by the concerned driver i.e. the Appellant. They accordingly, brought the two girls to the Phodong Police Station. Later they were handed over to their guardians after executing a Handing/Taking Memo (exhibit-23).

21. The Senior Medical Officer (P.W.10) at the STNM Hospital examined P.W.2 on 16.05.2016 at around 9.55 a.m. On examination an incised cut injury on her left temporal area was detected and dressed. The injury was simple in nature. The Medical Slip (exhibit-17) and the Medico-Legal Examination Report (exhibit-18) prepared by the Senior Medical Officer (P.W.10) and proved by him confirm the said injury on P.W.2.

22. Section 53A of the Cr.P.C. provides for examination of person accused of rape by a doctor. A strict compliance of the said provision coupled with the keen observations of the doctor would ensure the establishment of truth. The Appellant was also examined by Senior Medical Officer (P.W.12) at the STNM Hospital on 16.05.2016. He found no injury on him. However, some smell of alcohol was noticed in his breath. The Medical Slip (exhibit-19) prepared by the Senior Medical Officer (P.W.12) and proved by him confirms this fact.

23. On 16.05.2016 at around 10.34 a.m. Dr. O.T. Lepcha, (P.W.9) examined the Appellant a few hours after the alleged sexual assault and prepared a Medico-Legal Examination Report (exhibit-16). On the Appellant's examination he noted the following injuries:-

> ***"Injuries over the body:***
>
> *1. Oval shaped reddish blue contusion (? bite mark) over the right lateral aspect of chest just below the (R) clavicle measuring 3 x 1.5 cm.-[on being inquired he states it was a kiss mark.]*
>
> *2. Linear shaped contusion 4 x 0.8 cm just above injury no.1 4 cm above.*
>
> *3. No other injuries over the body.*
>
> ***Genitals:***
>
> *1) Pubic hair normal, no matting seen.*
>
> *2) Smegma absent.*
>
> *3) No sign of any injuries over the penile shaft.*
>
> *4) Penile shaft normal, no organomegaly.*
>
> ***Opinion:***
>
> *From the given history, physical examination, there is nothing to state that the person is incapable of sexual intercourse."*

24. During cross-examination Dr. O. T. Lepcha (P.W.9) clarified that the fact that the contusion at serial no.1 was reddish blue would suggest that it was sustained within 12 hours immediately preceding the medical examination. This clarification would lead the contusion directly to the time of the alleged incident.

25. The Appellant's physical capability of performing sexual act was answered in the affirmative by Dr. O. T. Lepcha (P.W.9). He noticed two injuries on the Appellant as indicated above. The absence of smegma noticed by Dr. O. T. Lepcha (P.W.9) in the examination of the Appellant within twenty four hours of the alleged incident would have been an indicator to his sexual activity but the Dr. O. T. Lepcha (P.W.9) did not venture an opinion based on that. The injuries on the Appellant do indicate physical contact.

26. Section 164A of the Cr.P.C. provides for medical examination of the victim of rape. The victim was also examined on 16.05.2016 at around 11.15 a.m. The Gynaecologist (P.W.15) deposed that when he examined the victim he found four fresh bruise marks purple in colour in front part of her neck which seemed to have been sustained within the preceding twelve hours. Apart from that he did not detect any injury on her person including her private part. On her genital examination he found there was no fresh injury. There was an old healed hymeneal tear and the hymen admitted one finger. No bleeding or injuries were seen in the anal/perianal area. He collected her vaginal wash and forwarded it for pathological examination for presence of spermatozoa. Later, the concerned cytopathology report was received which indicated that no spermatozoa was detected in the vaginal wash. The Gynaecologist (P.W.15) therefore, gave the final opinion on 20.05.2016 stating that no clinical evidence of *"recent forceful sexual intercourse"* as the laboratory report received did not show spermatozoa in the sample examined. During cross-examination he admitted that there was nothing to suggest that they had been recent forceful vaginal penetration. He deposed that normally spermatozoa is detected up to twenty four to thirty six hours however, no spermatozoa was detected in the vaginal wash. On the suggestion of the defence he also admitted that had there been any sexual intercourse with the victim she would have certainly sustained some bruises in the vagina and the neighbouring areas. He honestly admitted that he did not conduct blood test on the victim in order to verify if she had consumed any sedatives or alcohol.

27. The fact that no spermatozoa were detected was also confirmed by the Pathologist (P.W.8) through his report (exhibit-15) dated 16.05.2016.

28. The day after the incident, on 16.05.2016 at the Kabi outpost, certain seizures were made from the Appellant in the presence of two witnesses. They were the vehicle, its key, its R.C. book and other documents along with one grey colour ladies underwear with black strap and one pair of ladies slippers by the I.O. The I.O. deposed that the underwear of the victim and her slippers were seized from the concerned vehicle of the accused along with its documents. He deposed that the underwear was packed and sealed after the seizure.

29. Purna Bahadur Bishwakarma (P.W.3) and Ashim Rai (P.W.6) deposed that while they were travelling in their vehicles to Phodong they were stopped by the police at the Kabi police outpost and requested to stand as witnesses. Except for some minor variations both of them testified that the police had seized the vehicle, one ladies underwear (panty) and ladies slipper from the said vehicle. Seizure Memo (exhibit 5) dated 16.05.2016 records the seizures.

30. The incident is of the late evening of 15.05.2016. The seizure is dated 16.05.2016 at around 7.00 p.m. from the Kabi outpost. The I.O. has deposed about how the seizure was affected. The two seizure witnesses corroborate him. It is incontrovertible that the vehicle was the one involved in the incident of 15.05.2016. The victim did identify her underwear as well as her slippers which were found in the vehicle and seized at the Kabi outpost. The victim and her friends P.W.1 and P.W.2 were not locals familiar with the area. However, they did depose about going to the North District and ultimately being brought to the Phodong Police Station. The seizure of the victim's underwear and the slippers cannot be doubted.

31. The I.O. deposed that he seized the Appellant's boxer shorts which he was wearing as underwear from the STNM Hospital in the presence of two witnesses. The Medico-Legal Examination Report (exhibit-16) of the Appellant also records that one checked printed undergarment was handed over to the police by Dr. O.T. Lepcha (P.W.9) - the Medico-Legal Consultant at the STNM Hospital. Seizure Memo (exhibit-28) dated 16.05.2016 records the red and white boxer shorts of the Appellant were seized at the STNM Hospital. Dr. O. T. Lepcha (P.W.9) did not depose

about the boxer shorts but exhibited the Medico-Legal Report (exhibit-16) of the Appellant which records the fact. The seizure was in the presence of Laku Tshering Lepcha (P.W.18) and Palzor Wangyal Bhutia (P.W.19) both from the STNM Hospital. Both the witnesses identified their signature on the Seizure Memo (exhibit-28) but hesitated to identify the boxer shorts. Unmistakably, the boxer shorts were of the Appellant.

32. The I.O. also deposed that he seized the blood samples of the Appellant and the victim (P.W.7) as well as her vaginal wash from STNM Hospital. He said that the victim's blood sample was collected on 18.05.2016 and the Appellant blood sample was seized on 07.06.2016, both from the STNM Hospital. Seizure Memo (exhibit-28) dated 18.05.2016 records the seizure of the blood sample and the vaginal wash of the victim from STNM Hospital in the presence of Laku Tshering Lepcha (P.W.18) and Palzor Wangyal Bhutia (P.W.19). They identified their signatures on the Seizure Memo (exhibit-28) but not the items that were seized. The Gynaecologist (P.W.15) confirmed that the vaginal wash was collected and sent for examination.

33. Seizure Memo (exhibit-30) dated 07.06.2016 records the seizure of blood sample of the Appellant at the STNM Hospital and handed over by Dr. O. T. Lepcha (P.W.9). One of the witnesses to the Seizure Memo (exhibit-30), Rinzing Bhutia of the Police Department, was not examined. Laku Tshering Lepcha (P.W.18) identified his signature thereon but the blood sample was not drawn in his presence. Dr. O.T Lepcha (P.W.9) was examined. He said nothing about the seizure of the blood samples of the victim as well as the Appellant. Even the victim did not depose about the collection of her blood sample and her vaginal wash. The seizure of the blood samples of the victim and the Appellant as well as the vaginal wash of the victim have not been convincingly established by the prosecution.

34. The Appellant boxer shorts, the victim's underwear and her vaginal wash collected by the Gynaecologist (P.W.15) and their alleged blood samples were forwarded to the Regional Forensic Science Laboratory (RFSL), Saramsa for analysis. The RFSL report (exhibit-21) was received. Pooja Lohar (P.W.13) is the Scientific Officer in the Biology division of the RFSL, Saramsa (Scientific Officer) who examined the underwear of the victim, the boxer shorts of the Appellant, the alleged blood samples of both the victim and the Appellant and the

vaginal wash of the victim. She opined that human semen was detected in both the victim's underwear as well as the Appellant boxer shorts. No blood, semen or body fluid was detected in the vaginal wash of the victim.

35. Since the prosecution failed to establish the collection of blood samples of the victim as well as the Appellant, the RFSL report to that extent cannot help the prosecution. However, the seizure of the victim's underwear from the vehicle and its identification by her is unquestionable. The seizure of the Appellant's boxer shorts is also evident. The Scientific Officer detected human semen on both the victim's underwear as well as the Appellan't boxer shorts. Mr. K. T. Tamang submitted that since there was a gap between the alleged incident and the seizures it cannot be said with certainty that the semen detected in the victim's underwear was that of the Appellant. He further submitted that the prosecution had failed to establish that blood sample had been collected from the Appellant and the blood group of the Appellant was the same as the blood group in the semen detected in the victim's underwear. The learned Special Judge was also hesitant to rely upon the seizure of the underwear and the RFSL report as admittedly it was lying in the vehicle of the accused for 19-20 hours and the vehicle itself was lying in open space at the Kabi out post. Although the defence has cross-examined the I.O. and suggested that the vehicle was lying in the open space at Kabi outpost for about 19-20 hours however, no suggestion was made that the underwear had been tampered with. The victim's deposition that her underwear was missing when she woke up in the vehicle remained undisputed. Admittedly, the Appellant was the only male in the vehicle where the incident took place. It is established that the underwear found in the vehicle was of the victim and quite obviously the semen detected therein was of the Appellant. It is true that the prosecution failed to prove that the blood group of human semen detected in the underwear was the same as that of the Appellant. However, it would be too farfetched to presume that the prosecution or anybody else, without any proven *animus* against the Appellant, would have planted the victim's underwear with human semen and then the victim's underwear in the vehicle of the Appellant between the time of his arrest and the seizure. The boxer shorts which were worn by the Appellant when he was arrested and examined at the STNM Hospital were also detected with human semen which obviously was his own.

36. Mr. K. T. Tamang submitted that the victim's testimony required corroboration as it is seen that she had suppressed about consuming alcohol. He would rely upon the judgments of the Supreme Court in re: ***Ramdas v. State of Maharashtra***[1]***, Tameezuddin v. State (NCT of Delhi)***[2] and ***Mohd. Ali v. State of U.P.***[3]

37. The *ratio decidendi* of the three judgments cited by Mr. K. T. Tamang is that conviction in a case of rape can be based solely on the testimony of the victim. The testimony must be truthful and there should be no shadow of doubt over her veracity. It cannot, however, be held that every victim's evidence must be accepted even if the story is improbable and belies logic. The testimony of a victim of rape has to be placed on a higher pedestal than even an injured witness, but when the Court finds it difficult to accept the victim's version because it is not irreproachable, search for direct or circumstantial evidence to lend assurance to her testimony must be undertaken.

38. The defence has taken the plea that the victim, P.W.1 and P.W.2 had consumed alcohol which fact had been suppressed. The Medico-Legal Examination Reports of P.W.1 (exhibit-20) and P.W.2 (exhibit-18) both dated 16.05.2016 records that their breath did not smell of alcohol. However, during cross-examination, the I.O. admitted that he had mentioned in his charge-sheet about the place and the shop from where alcohol was purchased by the Appellant and the two friends of the victim. He admitted that the shop owners name is Rita Devi Karki (P.W.5) whose statement he had also recorded. He admitted that Rita Devi Karki (P.W.5) had revealed that on 15.05.2016 at around 4.30 p.m. one Nepali boy and two (xxx ethnic identity withheld) girls had come to a shop and bought two half bottles of duet (alcohol). He also admitted Rita Devi Karki (P.W.5) had disclosed that from the total amount of Rs.280/- for the said alcohol only Rs.100/- was paid by the Nepali boy and Rs.180 by the two (xxx ethnic identity withheld) girls. The I.O. admitted that no sedative or other chemical substance were found in the blood of the victim on forensic examination which could substantiate the claim of the victim that she was served sedative through mineral water which made her unconscious. Rita Devi Karki (P.W.5) was examined by the prosecution. She did not recognise the Appellant nor

[1] (2007) 2 SCC 170
[2] (2009) 15 SCC 566
[3] (2015) 7 SCC 272 22

remember seeing him earlier. She also did not remember what she had stated to the police although she admitted having given a statement. She did not remember the (xxx ethnic identity withheld) girls who had come to her shop. However, during cross-examination she remembered that two (xxx ethnic identity withheld) girls had bought some duet/gin from her shop during and around the time when her statement was taken by the police. The Gynaecologist (P.W.15) who examined the victim and prepared the Medico-Legal Examination Report (exhibit-24) did not mention in his deposition that he had noted in his report that there was no breath smell of alcohol. The admission made by the I.O., Mohan Pradhan (P.W.6) as well as the deposition of Rita Devi Karki (P.W.5) does give an impression that on that particular day the Appellant and the victim's friends had purchased alcohol and that the victim had not been sedated but had consumed alcohol as argued by Mr. K. T. Tamang. Even if it is presumed that the victim had consumed alcohol the otherwise detailed testimony of the victim, P.W.1 and P.W.2 cannot be discarded. Further, the victim's deposition is corroborated by both oral as well as material evidence.

39. Mr. K. T. Tamang next submitted that where medical evidence goes so far that it completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved. He relied upon the judgment of the Supreme Court in re: ***Abdul Sayeed v. State of M.P.***[4]. The same proposition of law was followed by the Supreme Court in re: ***Bhajan Singh Alias Harbhajan Singh v. State of Haryana***[5]***, Gangabhavani v. Rayapati Venkat Reddy & Ors.***[6]***, Dayal Singh v. State of Uttaranchal***[7]***, Radhakrishna Nagesh v. State of Andhra Pradesh***[8]***, Solanki Chimanbhai Ukabhai v. State of Gujarat***[9] and ***Punjab Singh v. State of Haryana***[10].

40. It is settled preposition that where prosecution witness's testimonies are totally inconsistent with medical evidence it amounts to a fundamental defect in the prosecution case and if not reasonably explained may discredit the case of the prosecution. Opinion of the medical witness should be tested

[4] (2010) 10 SCC 259
[5] (2011) 7 SCC 421
[6] 2013 CRI. L.J. 4618
[7] (2012) 8 SCC 263
[8] (2013) 11 SCC 688
[9] (1983) 2 SCC 174
[10] (1984) Cri. LJ 921 (SC)

by the Court and it may not be the last word on it. If the opinion given by a medical witness is not consistent and probable, the Court does not necessarily have to go by it. It would not be correct to accord undue primacy to the opinion of medical witness to exclude eye witnesses account tested independently. When eye witness account is credible medical opinion cannot be accepted as conclusive. Eye witness account must be carefully assessed and evaluated for its credibility. Though, ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when the medical evidence makes the ocular evidence inprobable that becomes a relevant factor. If the medical evidence completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved. There is always a possibility of some variations in the exhibits, medical and ocular evidence. However, not every minor variation and inconsistency would tilt the balance in favour of the accused. When contradictions are of serious nature and destroys the substantive case of the prosecution it may provide advantage to the accused. The expert opinion must be given a great sense of acceptability but the Court cannot be guided by every such opinion even if it is perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

41. Mr. K. T. Tamang vehemently argued that the solitary ocular testimony of the victim is completely negated by the victim's Medico-Legal Examination Report (exhibit-24). He submitted that the nature of the allegation of rape alleged would necessary result in injuries on the victim's genitals and more so on the *labia majora*.

42. The learned Special Judge has held that the medical evidence which proved the injuries on the person of the victim goes on to support her claim that criminal force has been used on her and that it also makes the evidence more credit worthy. Although the Gynaecologist (P.W.15) had stated in cross-examination that there was nothing to suggest there had been forceful vaginal penetration the learned Special Judge noticed that the case was not full of penetration and therefore opined that partial penetration also amounts to rape. Relying upon the judgment of the Supreme Court in re: ***Om Prakash v. State of Uttar Pradesh***[11] the learned Special Judge held that in cases involving rape, it is no ground to disbelieve the trustworthy testimony of the victim and if found credit worthy it would be sufficient to prove the case of rape.

[11] (2006) 9 SCC 787

43. In re: ***Aman Kumar v. State of Haryana***[12] the Supreme Court held:

> ***"7.*** *Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979 SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical*

[12] (2004) 4 SCC 379

*characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.***"***

44. In re: ***Yerumalla Latchaiah v. State of A.P.***[13] a three judge bench of the Supreme Court while passing an order of acquittal held:-

"3. *In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW 7) who has*

[13] (2006) 9 SCC 713

> *stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the prosecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction.***"**

45. Mr. K. T. Tamang relied upon the above observation to buttress his argument that in view of the medical evidence of the victim the ocular evidence must be discarded.

46. The difference in the facts of the present case and the facts of in re: ***Yerumalla (supra)*** where the doctor had categorically stated in her evidence that no injury was found on any part of the body of the victim much less on private part must be noticed. It is also important to keep in mind that in re: ***Yerumalla (supra)*** the victim was 8 years old and the doctor had also found that the hymen was intact. The doctor had specifically stated that there was no sign of rape at all. Further, that vaginal smear collected and examined under the microscope did not detect any sperm.

47. In the present case the Gynaecologist (P.W.15) who examined the victim did find four bruise marks purple in colour, in front part of her neck which seemed to have been sustained within the preceding twelve hours. Dr. O. T. Lepcha (P.W.9) who examined the Appellant a few hours after the incident noted that even he had oval shaped reddish blue contusion (like bite mark) over the right lateral aspect of the chest just below the clavicle measuring 3 x 1.5 cm. It is his evidence that on inquiry the Appellant told him that it was a kiss mark. Dr. O.T. Lepcha (P.W.9) also noticed linear shaped contusion measuring 4 x 0.8 cm about 4 cm above the oval shaped reddish blue contusion on the Appellant. The Appellant was given an opportunity to explain this circumstance appearing against him during his examination under Section 313 Cr.P.C. However, he offered no explanation but merely stated that he was medically examined without any reason. The

contusions on the Appellant and the bruise marks would thus date back to the time of the alleged sexual assault.

48. The Gynaecologist (P.W.15) opined that there was no clinical evidence of *"recent forceful sexual intercourse"* as the laboratory report received did not show spermatozoa in the sample examined. However, the Gynaecologist (P.W.15) has provided no material to indicate if the victim was asked whether she had washed herself during the interregnum between the sexual assault and the medical examination the next day. The absence of spermatozoa in the vaginal wash of the victim thus cannot cast doubt on the credit worthiness of her evidence.

49. **A Textbook of Medical Jurisprudence and Toxicology** by Jaising P. Modi, 24th edition, Chapter 31 states that**:**

> ***Page 637.- "****Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. It is a charge made by the investigating officer, on a complaint by the victim. The only statement that can be made by the medical officer is whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.***"**
>
> ***Page 639.- "****To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed.***"**

Page 639.- *"The ingredients that are essential for proving a charge of rape are the accomplishment of the act against her will or without her consent. The issue that the assailant had used force and victim offered resistance could be instances of proof that the act was against her will or without consent. As a measure of normal human conduct, the attempts have been to prove that the resistance offered by the woman was up to her utmost capability, and that every means, such as shouting, crying, biting, or beating had been tried to prevent the successful commission of the act, but it will be doubtful authority to lay down that if signs of resistance are not shown, there could have been no rape, for after all, the act is regarded as rape even if the woman has yielded out of fear, duress or complete exhaustion. The fact that there were no injuries on the private parts of the victim does not prove that there was no rape or that the girl was a consenting party."*

Page 664. - "Different objectives of clinical examinations of the victim and the accused of rape.- *While examining the victim, one searches for corroborative evidence to support or rebut the allegations of sexual assault. In the case of the accused, the medical officer should be able to answer the following questions: (i) is the accused physically capable of performing the sexual act?; and (ii) Is there any evidence to corroborate or rebut the physical contact with the victim?*

Medical Examination of the Victim and the Accused in Cases or Rape.- *As the offence of rape is committed in privacy and direct evidence of rape may not be available, corroboration of the testimony of the complainant is sought from medical evidence. A charge of rape is very easy to make and very difficult to refute, and in*

*common fairness to the accused, the courts insist on corroboration of the story of the complainants. Sometimes rape is clearly proved or admitted, and the question is whether the accused committed the rape. At other times, the association of the accused and the complainant is admitted, and the question is whether the rape was committed. Where rape is denied, the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to the other parts of her body, which may have been occasioned in struggle, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is committed.***"**

50. It is seen that besides the deposition of the victim about penetration there is no direct medical proof. The question which arises for a definite conclusion is whether to accept the deposition of the victim as truthful? The FIR lodged by the victim is a little exaggerated but understandably so. There is no evidence of the victim being brutally beaten and hit by a rod. The victim did not depose about being badly beaten and hit by a rod although she said so in the FIR. The defence also did not bring out the exaggeration in her cross-examination. Otherwise the victim has been consistent that she was raped right from the time she lodged the FIR. The victim was 17.5 years of age at the time of the commission of the offence and therefore capable of understanding what rape means. The prosecution has been able to prove that P.W.2 was hit by the Appellant while they were in the car before they were made to get off from the vehicle. The injury on her forehead corroborates the deposition of P.W.2 as well as P.W.1 about the physical conflict. It is certain that the Appellant and P.W.2 had got into a verbal as well as physical conflict before she got off the vehicle. The victim has also been consistent about the fact that she was nauseous while in the vehicle. Whether it was due to alcohol consumption or sedation has not been cogently proved by the prosecution. That however, may not be as relevant. The prosecution has also been able to prove that there were bruise marks on the victim's neck and contusions on the Appellant's chest both of which dated back to the time of the offence. The seizure of the victim's underwear and the Appellant's boxer shorts and the presence of human semen on both are also proved. There was but only the Appellant with the

victim at the time of the offence. The sequence of events till the time P.W.1 and P.W.2 alighted from the vehicle is clearly established. Except for minor discrepancies the testimony of the victim is consistent. The Appellant has virtually admitted the evidence of the victim as there is not even a denial of having committed the sexual assault upon the victim during her cross-examination. The core ingredients of the offence alleged remains intact. The sixth description of Section 375 IPC makes it clear that if rape is committed on a woman who is less than 18 years of age consent has no relevance. Even if this Court was to accept the defence version made probable by the prosecution evidence that the victim had consumed alcohol and also ignore the fact that she was a minor, in view of the fifth description of Section 375 IPC her intoxication and her inability to understand the nature and consequences of her consent (which evidence is also available) would still drag the act back to rape if even slight penetration is proved. The evidence of the victim is however, clearly of the Appellant putting his penis into the victim's vagina with some penetration also. The surrounding circumstances have been adequately corroborated by the deposition of the prosecution witnesses. There is no reason to doubt the truthfulness of the victim's deposition. The story of what transpired that day as narrated by the witnesses is not improbable. The evidence of the victim is not totally inconsistent with the medical evidence. It is settled that ocular testimony of a witness has greater evidentiary value vis-a'-vis medical evidence. The medical evidence does not completely rule out all possibilities whatsoever of the commission of rape by the Appellant. There is no direct contradiction between the ocular and medical evidence. It must be noted that explanation 1 to Section 375 IPC clarifies that for the purpose of the section, *"vagina"* shall also include *labia majora.* This was not a case of alleged use of blunt forceful blows by the Appellant while committing rape. Partial penetration within the *labia majora* of the vulva or pudendum is sufficient to constitute the offence of rape, depth of penetration being immaterial. The lack of injury on the genital of the victim cannot be considered as conclusive proof that the Appellant had not raped the victim. More so when the injuries on the victim as well as the Appellant does reflect signs of resistance. The learned Special Judge has rightly relied upon the evidence of the victim.

51. In the circumstances, this Court is of the view that the prosecution has been able to establish that the Appellant had committed penetrative sexual assault as defined in Section 3 (a) of the POCSO Act and rape as

defined in Section 375 (a) of the IPC. The prosecution has also been able to prove that the Appellant had voluntarily caused hurt both on the victim as well as on P.W.2.

52. Section 3(a) of the POCSO Act and Section 375 (a) of the IPC are identically worded except the words *"woman"* in Section 375 is replaced by the word *"child"* and *"the child"* in Section 3(a) of the POCSO Act. Whereas the POCSO Act is gender neutral Section 375(a) relates to rape committed on a woman. As per Section 6(10) of the IPC a woman denotes female human being of any age. If the victim is a child i.e. a person less than 18 years of age Section 3(a) of the POCSO Act would be attracted, consent notwithstanding.

53. Mr. K. T. Tamang submitted that in view of Section 42 of the POCSO Act the learned Special Judge could not have punished the Appellant both under Section 4 of the POCSO Act as well as under Section 376 (1) of the IPC as the punishment under 376 (1) is greater in decree then Section 4 of the POCSO Act. To appreciate this argument better the provisions are extracted below:

Section 4 of the POCSO Act	**Section 376(1) of the IPC**
4. Punishment for penetrative sexual assault.- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. [emphasis supplied]	**376. Punishment for rape-(**1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. [emphasis supplied]

54. A perusal of the two provisions extracted above reflects that the quantum of punishment prescribed is identical. Both the provisions provide that the term shall not be less than seven years, but may extend to imprisonment of life, and shall also be liable to fine. However, Section 376 (1) IPC provides that the punishment shall be rigorous. Section 4 of the POCSO Act only provides for imprisonment leaving the discretion to the

Court to either impose rigorous or simple imprisonment. This is clear on reading Section 2(2) of the POCSO Act and Section 53 of the IPC. Section 42 mandates that the offender found guilty of such offence punishable under the POCSO Act and also under Section 376 IPC shall be liable to punishment under either of the acts *"as provides for punishment which is greater in degree"*. Thus this Court is of the view that the punishment under Section 376 (1) IPC which mandates compulsory imposition of rigorous imprisonment with hard labour is greater in degree than the one provided under Section 4 of the POCSO Act. If the ingredients of both the offences i.e. penetrative sexual assault under the POCSO Act and rape under Section 376 IPC are brought home the convicted person cannot be punished for both the offences. He can be punished only for one of such offences i.e. the graver of the two. Consequently, the learned Special Judge could have punished the Appellant only under Section 376 IPC and not under Section 4 of the POCSO Act. Resultantly, the sentence under Section 4 of the POCSO Act is set aside. However, it must be clarified that in the present case the learned Special Judge has imposed one sentence for both the offences. Therefore, the above view would not change the final quantum of sentence imposed. Consequently, the sentence of imprisonment of eight years and payment of fine of Rs.30,000/- under Section 376(1) IPC is upheld.

55. Mr. K. T. Tamang further submitted that as the offences charged amounted to *"the same transaction"* the sentence under Section 354 and 354B IPC could not have been awarded.

56. A perusal of the charges framed for the assault on the victim as well as the deposition of the victim reflects that charges were framed for use of criminal force on the victim intending to outrage her modesty (Section 354 IPC) and for disrobing her (Section 354B IPC). The victim deposes that while in the car the Appellant removed her underwear first, dragged her back into the vehicle after she went out used criminal force and raped her. It is apparent that the acts alleged against the Appellant were committed in the same transaction, one after the other ultimately leading to rape.

57. The ingredient of Section 354 IPC is assault or use of criminal force on a woman with the intention to outrage or knowing it to be likely that he will thereby outrage her modesty. The ingredient of Section 354B IPC is assault or use of criminal force to any woman with the intention of disrobing

or compelling her to be naked. Whereas to constitute the offence under Section 354 IPC the assault or use of criminal force on a woman must be with intention to outrage her modesty or having knowledge that it would to constitute the offence under Section 354B IPC the assault or use of criminal force must be with intention of disrobing or compelling her to be naked. Section 354B IPC is graver of the two crimes. The assault or use of criminal force on a woman with the intention of disrobing or compelling her to be naked may amount to outraging her modesty as well. Thus commission of the offence under Section 354 and 354B IPC were preparatory acts towards the commission of rape in the same transaction in the present case.

58. In view of Section 220 Cr.P.C. the Appellant could have been charged and tried at one trial for the offences he was charged with. However, in view of Section 220 (5) Cr.P.C. Section 71 of the IPC and Section 42 of the POCSO Act it is clear that if the alleged act of penetrative sexual assault, assault or criminal force to woman with intent to outrage her modesty and assault or use of criminal force to woman with intent to disrobe were committed in the course of the same transaction, the offender may not be punished for more than one of such his offences, unless it be so expressly provided. Thus, the sentence of the Appellant under Section 354 and 354B IPC cannot be upheld and is set aside.

59. The learned Special Judge has sentenced the Appellant for commission of two separate offences under Section 323 IPC on the victim as well as P.W.2 by imposing a singular sentence of simple imprisonment for a period of one year. The learned Special Judge was required to examine and sentence the Appellant, if mandated, for the two offences separately. As the punishment prescribed under Section 323 IPC is for a term which may extend to one year without a minimum term the sentence of one year imposed is taken as sentence of six months for each of the two offences. The offence of voluntarily causing hurt upon the victim was in the course of the same transaction while committing rape. Thus, the Appellant was not required to be sentence for the offence under Section 323 IPC. The sentence for voluntarily causing hurt on the victim is set aside. Consequently, for the commission of voluntarily causing hurt upon P.W.2 the Appellant is sentence to undergo six months of simple imprisonment.

60. The rest of the directions passed by the learned Special Judge are maintained.

61. The appeal is partly allowed and disposed of on the above terms. The Appellant is in jail. He shall continue there and serve the rest of the sentence.

62. A copy of this judgment may be sent to the Court of the learned Special Judge, North District, Mangan. A certified copy of the judgment may be furnished to the Appellant.

SLR (2019) SIKKIM 388

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

RFA No. 13 of 2017

Shri Rajendra Prasad Mangla and Another ….. APPELLANTS

Versus

Shri Govind Agarwal ….. RESPONDENT

For the Appellants: Mr. Sudesh Joshi and Mr. Sonam Palden Tamang, Advocates.

For the Respondent: Dr. (Ms.) Doma T. Bhutia, Advocate.

Date of decision: 8th June 2019

A. Gangtok Rent Control and Eviction Act, 1956 – In eviction proceedings, the question of title to the properties may be incidentally discussed but cannot be decided finally.

(Para 10)

B. Gangtok Rent Control and Eviction Act, 1956 – Attornment by Implication – Appellant No. 1 in the communications has insisted on a settlement between him and the Respondent to reach an amicable amount to be paid as revised rent to the Respondent. If the Appellant No. 1 did not consider the Respondent as his landlord then there was no reason for him to seek such a settlement. The Appellants, by the correspondences reflected hereinabove have accepted the Respondent as their landlord.

(Para 15)

C. Code of Civil Procedure, 1908 – Non-joinder of Parties – In a suit by a landlord against a tenant for arrears of rent and eviction, it is not necessary to implead the brothers or other relatives of the landlord and title cannot be an issue – It is settled law that a plea of non-joinder cannot be raised at the appellate stage.

(Para 15)

Appeal dismissed.

Chronological list of cases cited:

1. A.V. Papayya Sastry and Others v. Govt. of A.P. and Others, (2007) 4 SCC 221.
2. Corporation of City of Bangalore v. Zulekha Bi and Others, (2008) 11 SCC 306.
3. Rangammal v. Kuppuswami and Another, (2011) 12 SCC 220.
4. Shreya Vidyarthi v. Ashok Vidyarthi and Others, (2015) 16 SCC 46.
5. Dr. Yogesh Verma v. Shri Shiv Kumar Agarwal and Another, AIR 2018 (NOC 278) 976.
6. Smt. Kaushilya Minda and Another v. Rajesh Verma, AIR 2017 Sikk 1.
7. Shyam Sundar Beriwala and Others v. M/s. Bhajanlal Sajjan Kumar, 2011 SCC OnLine Cal 28808.
8. R.C. Tamrakar and Another v. Nidi Lekha, (2001) 8 SCC 431.
9. Bhogadi Kannababu and Others v. Vuggina Pydamma and Others, (2006) 5 SCC 532.
10. Keshar Bai v. Chhunulal, (2014) 11 SCC 438.
11. Uppalapati Veera Venkata Satyanarayanaraju and Another v. Josyula Hanumayamma and Another, AIR 1967 SC 174.
12. Apollo Zipper India Limited v. W. Newman and Company Limited, (2018) 6 SCC 744.
13. Church of Christ Charitable Trust and Educational Charitable Society, Represented by its Chairman v. Ponniamman Educational Trust, Represented by its Chairperson/Managing Trustee, (2012) 8 SCC 706.
14. Sidhharth Viyas and Another v. Ravi Nath Misra and Others, (2015) 2 SCC 701.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellants herein were ordered to vacate the suit premises of the Respondent on *bona fide* requirement of the Respondent and default in

payment of rent by the Appellants, vide the Judgment dated 31.08.2017 in Eviction Suit No. 08 of 2014 *(Shri Govind Agarwal v. Shri Rajendra Prasad Mangla and Another)*. Aggrieved, the Appellants herein are assailing it in Appeal.

2. The Respondent s/Plaintiff s case before the learned trial Court was that the suit property described in Schedule 'A' to the plaint comprising of a shop measuring 9' x 14½', on the fourth floor of a five storeyed RCC building, along with a *gully* measuring 30x60 and in the third floor of the same building rooms measuring a total area of 22' x 45' and 11' x 20' were rented out by the mother of the Respondent/Plaintiff (hereinafter "Respondent") to the Appellants/Defendants No. 1 and 2 (hereinafter "Appellants No. 1 and 2"), vide an Agreement dated 17.05.1978. The Appellant No. 1 is in continuous occupation of the said suit premises since 1978 with rent fixed at Rs.625/- (Rupees six hundred and twenty five) only, per month, excluding water and electricity charges. The third shop on the fourth floor which is rented to the Appellants, fell in the share of the Respondent by a verbal partition effected by his mother, late Saraswati Agarwal, between him and his two brothers. The Respondents wife carries on business in the adjacent shop, which fell in the share of his youngest brother, after duly obtaining his brothers permission but the income therefrom is paltry. The Respondents specific case is that his family which includes his wife, brother-in-law and two sons who are pursuing higher education are entirely dependent on him, apart from which he suffers from several health issues, hence the requirement for the tenanted premises in order to augment his income. That apart, the Respondent has been compelled to take up premises at a monthly rent of Rs.7,500/- (Rupees seven thousand and five hundred) only, in Gangtok. That, on the other hand, the Appellant No. 1 is settled in Rangpo where he conducts business in his four storeyed RCC building. That, the Respondents mother who was receiving the house rent for the Schedule 'A' premises passed away on 21.01.2010 but despite knowledge of this fact, the Appellant No. 1 continued to remit the monthly rent by Money Order in her name. That, on 19.04.2013, the Respondent issued a Legal Notice to the Appellant No. 1 terminating the rent agreement dated 17.05.1978. The Appellant No. 1 sent a reply through their Lawyer dated 16.05.2013, Exhibit 12, implicitly revealing that the suit premises were in the occupation of his employees and was not in his own use. Later in response, to the Respondents letter dated 04.01.2014, Exhibit 13, the Appellant No. 1 sent another reply on

24.01.2014, Exhibit 14, allegedly reiterating the requirement of the suit premises for his employees. That, although the Appellant No. 1 sought to meet the Respondent to settle the matter amicably, he failed to appear on the dates fixed, hence the prayers in the plaint *inter alia* seeking eviction of the Appellants on grounds of *bona fide* requirement and default in rent.

3. The Appellants, in their written statement, denied and disputed the claims of the Respondent and pleaded ignorance of the partition amongst the Respondent and his two brothers. That, no proof of ownership of the suit premises by the Respondent has been furnished nor disclosure made with regard to who the rent was to be tendered to, hence the Appellant No. 1 has continuously been tendering rent in the name of the Respondents mother by Money Order. The question of default in rent does not arise as it is the Respondent who has failed to accept the rents tendered by him by Money Orders. The Appellants deny having any other business besides the tea business located in the tenanted premises. Admitting that the Appellant No. 1 lives in Rangpo, he specified that it was on account of his ill health and asserted that he periodically visits the tenanted premises to oversee the business which he denies is in the occupation of his employees. That, there is no *bona fide* requirement of the Respondent whose income from the shop suffices for his family, hence the suit be dismissed.

4. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:

> "(1) Whether the Plaintiff is the absolute owner/ landlord of the suit premises?
>
> (2) Whether the Plaintiff requires the suit premises for his and his dependents *bona fide* use and occupation?
>
> (3) Whether the Defendant has defaulted in payment of the monthly rents?
>
> (4) Relief(s), if any."

5. On Issue No. 1, the learned trial Court concluded that the Respondent is the owner of the tenanted premises. On Issue No. 2, it was found that the Respondent required the tenanted premises *bona fide* for

occupation and for his business. Issue No. 3 was decided in favour of the Respondent on account of default of payment of rent by the Appellants from the month of January, 2010. On Issue No. 4, it was concluded that the Appellants are to be evicted from the scheduled premises and to hand over vacant and peaceful possession to the Respondent and to pay arrears of rent from January 2010 to August 2017. The suit was decreed accordingly.

6. The grounds urged in Appeal herein are that in the Notices sent to the Appellants on behalf of the Respondent, he claims to be the owner of the entire five storeyed building and not just of the suit premises, which tantamounts to commission of fraud. That, it is a well settled principle of law that if any Judgment or Order is obtained by fraud it cannot be said to be a Judgment or Order in law. On this count, reliance was placed on ***A.V. Papayya Sastry and Others v. Govt. of A.P. and Others***[1]. The Respondent, due to his vacillating pleadings has failed to establish that he is the owner of the suit premises and his claim of partition of properties remained unproved even by the evidence of his wife, PW 2 or his brother-in-law, PW 5. That, the burden of proof on this aspect rests on the Respondent. On this count, succour was drawn from the ratio in ***Corporation of City of Bangalore v. Zulekha Bi and Others***[2] and ***Rangammal v. Kuppuswami and Another***[3]. That, the provisions of the "Gangtok Rent Control and Eviction Act I of 1956" requires only the owner to file an Eviction Suit but no proof of ownership has been advanced by the Respondent. That, on account of the refusal by the Respondents mother to accept rent in cash after 1998, the Appellants started remitting it by Money Order which they have continued to do even after her death due to ignorance as to the owner of the premises, hence no arrears of rent accrues to the Respondent. That, the evidence of the Postmen examined in the Court clearly reveal that even during the lifetime of Saraswati Agarwal, the Respondent would not allow them to meet her when they went to deliver the Money Order to her. That, the Respondent was bent on evicting the Appellants from the suit premises as can be gauged from his attitude. It was further urged that the Respondent has also failed to establish *bona fide* requirement. Learned Counsel would also deny any attornment by the Appellants No. 1 and 2 to the Respondent. That, in fact the shop being run by PW 2, the Respondents wife is their own shop as established by Exhibit 5,

[1] (2007) 4 SCC 221
[2] (2008) 11 SCC 306
[3] (2011) 12 SCC 220

the Trade Licence issued in her name for business to be carried on in her own property. No evidence has been furnished to establish that the shop fell in the share of the Respondents youngest brother Anand Agarwal. That, during the course of evidence, an effort was made to establish that the Respondent is the *karta* of his family but this is a concept introduced only in the evidence and is in contradiction to the pleadings of partition. Assuming that the property is of a Hindu Undivided Family, the suit cannot be filed by the Respondent in his personal capacity. The Appellants No. 1 and 2 also sought to question the *locus standi* of Saraswati Agarwal to partition the suit properties, verbal or otherwise as she did not qualify as a *karta* of a Hindu Undivided Family and could only act as its manager. On this count, reliance was placed on ***Shreya Vidyarthi v. Ashok Vidyarthi and Others***[4]. That, the evidence of Manila Sherpa, PW 4 to establish that the Respondent has taken premises on rent from her for business purposes remained unproved. PW 7, Suresh Kumar Agarwal claimed that the partition was affected in the year 1979 but no details thereof were furnished. Ironically, the living brothers of the Respondent and his nephews were not brought to establish this fact. That, PW 7 is an unreliable witness as in a bid to improve the Respondents case he has added facts which have not been averred in the Plaint. The witness, under cross-examination, testified that Saraswati Devi Agarwal was not the landlady of the tenanted premises during her lifetime thereby belying the admission of the Respondent. Besides, he was unaware of the mode of payment of rent to her. Although reliance was placed on Exhibit 9 and Exhibit 10 allegedly sent by the Respondent to the Appellant No. 1 requiring him to vacate the suit premises and settle outstanding rents, but no proof of either the letters having been sent or the Appellants being in receipt thereof were furnished. That, although the Legal Notice, Exhibit 10 speaks of an Agreement, dated 17.05.1978, purportedly executed between the Appellants and the Respondent, the document was not exhibited thereby prompting an adverse inference under Section 114(g) of the Indian Evidence Act, 1872. That, Exhibit 12 is the document by which the Respondent claims that the Appellants attorned to him and allegedly requested the Respondent to execute a formal agreement pertaining to revised rent repeatedly but these allegations too went unsubstantiated. That, the Respondents case having remained unestablished, the impugned Judgment requires to be set aside.

[4] (2015) 16 SCC 46

7. Resisting the arguments of learned Counsel for the Appellants No. 1 and 2, learned Counsel for the Respondent in the first instance, admitted that no documents of ownership to establish that the Respondent was indeed the owner of the tenanted premises existed. That, the partition was an oral one effected by the late mother of the Respondent and it is now settled law that in a suit for eviction the title of the landlord cannot be adjudicated upon. Reliance in this context was placed on ***Dr. Yogesh Verma v. Shri Shiv Kumar Agarwal and Another***[5] and ***Smt. Kaushilya Minda and Another v. Rajesh Verma***[6]. That, the evidence of the Appellants witness, Sushmita Mangla, DW 6, the daughter of the Respondents late brother, Raj Kumar Agarwal establishes that Bijay Agarwal, her brother, is running the corner shop thus lending support to the fact of oral partition. That, Exhibit 12, the reply by the Appellants Counsel to the Legal Notice sent by the Respondents Counsel is a clear indication of attornment by the Appellants to the Respondent. That, Exhibit D-1 the Trade Licence issued in the name of the Appellant No. 1 bears the signature of Sispal Chaudhary, his employee lending credence to the fact that the Appellants are not in possession of the tenanted premises but have sublet the premises to Sispal Chaudhary, DW 3. This fact is buttressed by the cross-examination of the Appellant No. 1 who has admitted that he has not filed any document to show that he was running the business of M/S Golden Tea Company. That the *bona fide* requirement of the Respondent is established by the evidence of the witnesses furnished by the Respondent. Contending that there was default in payment of rent for seven years from January 2010 to 2017, it was postulated that the Appellants despite attornment to the Respondent in 2013 continued to send rent in the name of the Respondents deceased mother which he could not accept. On this count reliance was placed on ***Shyam Sundar Beriwala & Ors. v. M/s. Bhajanlal Sajjan Kumar***[7]. That, the requirement of the Respondent is *bona fide* and the tenant cannot dictate terms to the landlord regarding use of his property as held in ***R.C. Tamrakar and Another v. Nidi Lekha***[8]. Hence, no error emanates in the observations and conclusion of the learned trial Court and consequently the Appeal be dismissed.

8. I have considered the rival contentions of both learned Counsel at length and given due consideration to their submissions. I have also carefully

[5] AIR 2018 (NOC 278) 97
[6] AIR 2017 Sikk 1
[7] 2011 SCC OnLine Cal 2880
[8] (2001) 8 SCC 431

considered the evidence and documents on record and perused the impugned judgment as also the citations made at the Bar.

9. The questions that fall for consideration before this Court are as follows:

1. *Whether a jural relationship exists between the Respondent and the Appellants No. 1 and 2?*
2. *Whether the Appellants No. 1 and 2 were liable to be evicted on grounds of bona fide requirement of the Respondent and for default in payment of rent?*

10. While examining the first question hereinabove framed, it is imperative to advert to Issue No. 1 settled for adjudication by the learned trial Court *viz. "Whether the Plaintiff is the absolute owner/landlord of the suit premises?"* The learned trial Court, as already stated, observed that the Respondent was the owner of the tenanted premises. It is now no more *res integra* that in eviction proceedings the question of title to the properties may be incidentally discussed but cannot be decided finally. In this view of the matter, it is relevant to refer to ***Bhogadi Kannababu and Others v. Vuggina Pydamma and Others***[9], wherein the Honble Supreme Court observed *inter alia* as follows;

> "**19.** In this connection, we may also point out that in an eviction petition filed on the ground of sub-letting and default, **the court needs to decide whether relationship of landlord and tenant exists and not the question of title to the properties in question, which may be incidentally gone into, but cannot be decided finally in the eviction proceeding**."
>
> **(emphasis supplied)**

Later in ***Keshar Bai v. Chhunulal***[10], the Honble Supreme Court held as follows;

[9] (2006) 5 SCC 532
[10] (2014) 11 SCC 438

> **"14.** …The High Court has accepted that in his cross-examination the respondent has stated that he was not accepting the appellant as his landlady. …… The High Court has further held that the respondent was within the permissible limit in asking the appellant to produce documentary evidence about his title as a landlord. The High Court, in our opinion, fell into a grave error in drawing such a conclusion. **Even denial of a landlord's title in the written statement can provide a ground for eviction of a tenant. It is also settled position in law that it is not necessary that the denial of title by the landlord should be anterior to the institution of eviction proceedings**. .....
>
> **15.** The High Court has expressed that the respondent was justified in asking the appellant to produce the documents. **Implicit in this observation is the High Court's view that the respondent could have in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. In eviction proceedings the**
> **question of title to the properties in question may be incidentally gone into, but cannot be decided finally**. …"
>
> **(emphasis supplied)**

Hence, it is evident that the question of title is not required to be settled in an Eviction Suit.

11. The Appellants have placed reliance on ***Corporation of City of Bangalore v. Zulekha Bi and Others*** *(supra)* to establish that the burden of proof of ownership lies on the Respondent. This is irrelevant for the present purposes as the instant matter pertains to a landlord-tenant dispute and not title. Reliance was further placed on ***Rangammal v. Kuppuswami and Another*** *(supra)*, which is also misplaced as it is in the context of partition of a joint family property. In these circumstances, the argument of learned Counsel for the Appellants that the owner and none else is to file

the suit in terms of the provisions of the "Gangtok Rent Control and Eviction Act I of 1956" is untenable.

12. Be that as it may, to establish that the Respondent was the landlord of the Appellants, the attention of this Court was drawn to Exhibit 10, a Legal Notice sent to the Appellant No. 1 on 19.04.2013 by the Respondents Advocate. Exhibit 10 *inter alia* informs that the Respondent runs a shop beside the rental shop given to the Appellants on rent and due to his financial constraints he requires the tenanted premises to overcome his financial difficulties, thus he terminates the rent agreement dated 17.05.1978 between him and the Appellant No. 1 and required them to vacate the premises. In response thereof, the Appellant No. 1 sent a reply dated 16.05.2013, Exhibit 12 which *inter alia* reflects as follows;

> "**2.** ... **That your client has been regularly refusing to accept the tendered rents for the last several years**.
>
> .....
>
> **5.** That as regards your client requesting my client to vacate the said premises, the same does not bear an element of truth in it. **As a matter of fact, rather my client has been requesting your client to execute a formal agreement, with revised rent time and again, over almost two decades, to which your client is yet to respond. Your client has been regularly refusing to accept the rents personally, besides he is continuously ignoring to executing a formal rental agreement over two decades, as a result of which my client is forced to tender rent by way of money orders every month without fail since then, each time hoping that the rent would be accepted by your client. In fact your client is neither revising the rent, nor accepting the same directly from my client, or has he executed a revised rental agreement** *(sic)***, as was agreed Orally amongst them over decades ago**. ...
>
> **6.** That my client informs me that by sending a notice, your client appears to create undue

pressure upon my client, to succumb to his so called requirements, **in circumstances when your client has neither revised the rent nor executed a fresh agreement so far, and has been regularly refusing acceptance of rents. In such circumstances, my client is untouched by element of default at any point of time. Your Notice is un-warranted, and it appears that your Client did not tell you truth that - the Oral agreement between my client and your client was that – my Client would live/stay as long as he wish to run the shop** *(sic)*. Your Client had enhanced/revised the rate of rent to Rs.675/- per month in May, 1978, and your Client appear to be adamant in enhancing rent still further. **My client reserves his right to file an application before the appropriate authority under the Law for fixation of rent, if your client does not do so**.

7. That my client has been occupying the rental premises, and has been regularly tendering the rent from the time of his late father, and the rent tendered by money orders is being regularly refused by your client. ... The reason for issuance of the Notice under reference is the refusal by my client to accept the proposal for exorbitant enhancement of rent, as it was unjustified and illegal demand of your client, and against the statutory provisions of the law of the land. ...

8. … **and also your client has not executed any revised agreement or revised the rent despite several requests made by my client, and my client has not defaulted at any point of time in tendering rents to your Client. My Client has been tendering rents regularly to your Client by M.O.; Hence, your Notice to quit and vacate the tenanted shop within 30 days of receipt is not valid**.

9. ... It is your Client who has forced my Client by his refusal to tender the rent every month

> by Money Orders, that too at his cost, which is under the law and the means to make payment directly upon refusal to accept the rent directly from the tenant. My client is not going to vacate the shop under his occupation and use as asked by you. Your client is at liberty to file an eviction suit against my client at his sole risk, ...
>
> **10.** .....
>
> Kindly tell your Client not to file any suit against my Client who is still willing to sit across table to finalise a workable/acceptable rental and execute an amicable agreement thereafter, in order to harass and make un-due pressure over him, as presently he is not well since too long ago, and your client started harassing him, ..."
>
> **(emphasis supplied)**

This response was met by a counter response of the Respondent dated 04.01.2014, Exhibit 13, reiterating that the Respondent was in requirement of the tenanted premises for his *bona fide* personal use and that of his dependents and requested that the Appellants vacate the tenanted premises. Another response ensued from the Appellant No. 1 being Exhibit 14, dated 24.01.2014, reiterating therein that the rent had not been revised by the Respondent nor a fresh agreement executed but the rents being tendered by the Appellant No. 1 were being refused. That, the parties could sit together and work out an acceptable rental and execute an amicable agreement between themselves. On this note, we may now examine what attornment entails.

13. In ***Uppalapati Veera Venkata Satyanarayanaraju and Another v. Josyula Hanumayamma and Another***[11], a four Judge bench of the Honble Supreme Court has explained "attornment" as follows;

> "**14.** "Attornment, in its strict sense, is an agreement of the tenant to a grant of the reversion made by the landlord to another, or, as it has been defined, **'the act of the tenants putting one person in the place of another as his landlord'"** — see para 732, *Foa's General Law of Landlord*

[11] AIR 1967 SC 174

and Tenant. This means that in the first instance attornment is made in favour of the person who has derived his title or supposed title from the original landlord. It implies a continuity of the tenancy created by the original landlord in favour of the tenant. It is in these circumstances that the existing tenant, for the rest of the period of his tenancy, agrees to acknowledge the new landlord as his landlord. Such an agreement of the tenant amounts to attornment and by such an attornment the tenant by his act substitutes the new landlord in place of the previous one. Such attornment is complete the moment the tenant agrees to acknowledge the new landlord to be his landlord. Any future payment or nonpayment of rent does not affect the relationship created by the attornment. The new landlord will have his remedies with respect to the rents falling in arrears.

Again, it is stated in para 745 at p. 475:

"**With regard to the title of a person from whom the possession was not obtained, but who has been recognised as landlord by the tenant, such recognition may be by express agreement, by attornment, or other formal acknowledgment (as by paying a nominal sum of money), by payment of rent, or of a nominal sum as rent, or by submission to a distress." The attornment is here described as one mode of recognising a person as one's landlord, just as payment of rent is another mode for the purpose.** Expression to similar effect is to be found in paras 746, and also 747 where it is further noted:

"**But the tenant is not allowed to impeach the title of a person to whom he has paid rent, or whose title he has otherwise recognised, without showing a better title in some other person.** …"

……

> **16.** These observations make it clear that simply by attornment the tenant is estopped from questioning the derivative title of the claimant's successor just as the acceptance of rent will create an estoppel against the landlord from denying the person, who paid the rent, to be his tenant. **These observations do not indicate that any actual payment of rent by the tenant who has attorned is necessary to make the attornment effective. If it was otherwise, the new landlord in whose favour the tenant has attorned, will not be able to take successfully any action against that person till that person had made the first payment of rent.**
>
> ……."
>
> **(emphasis supplied)**

14. The above-stated decision was referred to by the Honble Supreme Court in ***Apollo Zipper India Limited v. W. Newman and Company Limited***[12] wherein it was also held *inter alia* as follows;

> **"58.** As mentioned above, the title of the landlord over the tenanted premises in a suit for eviction cannot be examined like a title suit. **Similarly, the attornment can be proved by several circumstances including taking into consideration the conduct of the tenant qua landlord**."
>
> **(emphasis supplied)**

The ratiocination extracted *supra* exposits with clarity the position of law on attornment and its implications.

15. A careful examination of the documents relied on by the parties as discussed hereinabove clearly establish that the Appellants had by their conduct attorned to the Respondent. The Appellant No. 1 in the communications has insisted on a settlement between him and the

[12] (2018) 6 SCC 744

Respondent to reach an amicable amount to be paid as revised rent to the Respondent. If the Appellant No. 1 did not consider the Respondent as his landlord then there was no reason for him to seek such a settlement. The Appellants, by the correspondences reflected hereinabove have accepted the Respondent as their landlord. Although the rent was remitted in the name of Saraswati Agarwal, the Appellant No. 1 has insisted in his correspondence that the Respondent refused to accept rent and thus could not hold the Appellants responsible for default, this aspect also points to a clear acceptance of the Respondent as his landlord. Ignorance of oral partition was asserted by the Appellant No. 1 and a feeble attempt was made to establish acrimony amongst the Respondent and his living brother and nephew pertaining to the suit premises, thereby making an insidious attempt to insert a plea of nonjoinder of parties. It would be relevant to point out that in a suit by a landlord against a tenant for arrears of rent and eviction, it is not necessary to implead the brothers or other relatives of the landlord and title cannot be an issue. It may also pertinently be mentioned that it is settled law that a plea of non-joinder cannot be raised at the appellate stage as held in ***Church of Christ Charitable Trust and Educational Charitable Society, Represented by its Chairman v. Ponniamman Educational Trust, Represented by its Chairperson/ Managing Trustee***[13]. It may be claimed that the Respondent by not accepting the rent has denied his position as a landlord, however the Legal Notices, Exhibit 10 and Exhibit 19 and the Counter Reply, Exhibit 13 stand testimony to his assertion that he is the landlord of the tenanted premises.

16. The Appellants relied on ***Shreya Vidyarthi v. Ashok Vidyarthi and Others*** *(supra)* wherein it was held that a Hindu widow is not a coparcener in the undivided family of her husband therefore she cannot act as a *karta* of that undivided family, however she can act as its manager. This is an indubitable position of law but in the instant matter no objections from the brother of the Respondent ensued and the Appellant No. 1 has no *locus standi* to raise this question. Consequently in view of the foregoing discussions, it can safely be concluded that a jural relationship exists between the Appellants and the Respondent.

17. It is now to be examined meticulously as to whether the Respondent herein has been able to establish his *bona fide* requirement and rent in arrears amounting to four months or more.

[13] (2012) 8 SCC 706

18. The Gangtok Rent Control and Eviction Act I of 1956 lays down at Paragraph 4 as follows;

> "**4.** A Landlord may not ordinarily eject any tenant. When, however, the whole or part of the premises are required for the bonafide occupation of the landlord or his dependents or for thorough overhauling (excluding additions and alterations) or when the rent in arrears amount to four months rent or more, the landlord may evict the tenant on filing a suit of ejectment in the Court of the Chief Magistrate. The tenant so evicted shall, however, have the first right to re-occupy the premises, after over-hauling, on such enhanced rent as may be fixed by the Sikkim Darbar before it is let out to any other tenant."

19. The Respondent in his evidence has deposed that his wife, brother-in-law and both his sons who are pursuing higher education, one in USA and one in Nepal are dependent upon him added to which he himself has health issues. According to him, the college fees and living costs of his sons are exorbitant. The evidence of the Respondent on this count is supported by the evidence of his sons PW 3, Ashish Agarwal and PW 6, Akash Agarwal who have both stated that their father bears their educational and other miscellaneous expenses. To further validate this assertion, Exhibit 6 (collectively) has been relied upon by the Respondent, which pertains to the enrolment of PW 6 Akash Agarwal, in the University of Toledo, USA and Lease Agreement for living apartments and student fees of the University. Exhibit 7 (collectively) pertains to the witness PW 3, Ashish Agarwal and his selection in the academic session of 2008, Tribhuvan University, Institute of Medicine, Nepal and fee receipts. Exhibt 17 was also relied upon by the Respondent to indicate the state of his health and the condition *"Generalized myasthenis (myasthenia gravis)"* from which he suffers. The Respondents wife, PW 2 supported the fact that the Respondent is a patient of the said ailment and requires medical treatment and that she along with their sons who are studying as also her brother are dependent on her husband. The evidence of Manila Sherpa, PW 4, however is of no assistance to the Respondent as neither the year of having rented out the premises to the Respondent nor any receipts pertaining to rent have been furnished.

20. The Appellant No. 1 admitted that he is the sole proprietor of Golden Tea Company being run in the tenanted premises and he is in sole occupation of the tenanted premises. As per the Respondent, which is admitted by the Appellant No. 1, he is now settled in Rangpo with his family. The Respondent went on to state that the Appellant No. 1 is not residing in Rangpo on account of ill health but is conducting his business in Rangpo. The Trade Licences, Exhibit D-5, Exhibit D-6 and Exhibit D-7 issued in the name of one Din Dayal Mangla and Lalita Devi Mangla belongs to the joint family of the Appellant No. 1. The evidence of DW 6, Sushmita Mangla supports the evidence of the Respondent that the Appellant No. 1 is living in Rangpo. She added that Din Dayal Mangla lives in Siliguri and has two shops in Rangpo of which his wife was the proprietor of one. She would further testify that Sita Mangla who is the wife of the Appellant No. 1, lives in Siliguri in the house of Usha Mangla and Din Dayal Mangla. Her evidence raises a strong probability that the Appellant No. 1 was indeed conducting his business at Rangpo as Din Dayal Mangla and his wife in whose names the business Licences were issued are living in Siliguri, as also the wife of the Appellant No. 1. No evidence was furnished to prove that the Appellant No. 1 frequented Gangtok to supervise his business while PW 7, Suresh Kumar Agarwal testified that he had never seen the Appellant No. 1 coming to Gangtok to take stock of his business here. In fact from all accounts, it appears that the employee of the Appellant No. 1 has been sublet the premises but since this is not an issue herein the Pandoras box can remain closed. The evidence on record also reveals that the Respondent has no other business except the business of one small tea shop and his family is entirely dependent on the income generated from this business. His medical condition would undoubtedly entail higher expenditure. In view of the afore discussed facts and circumstances, I am of the considered opinion that the Respondent requires the premises *bona fide* for his own use.

21. In ***Sidhharth Viyas and Another v. Ravi Nath Misra and Others***[14] it was propounded as follows;

> **"10.** The object of rent law is to balance the competing claims of the landlord on the one hand to recover possession of building let out to the tenant and of the tenant to be protected against arbitrary increase of rent or arbitrary eviction, when there is

[14] (2015) 2 SCC 701

> acute shortage of accommodation. Though, it is for the legislature to resolve such competing claims in terms of statutory provisions, while interpreting the provisions the object of the Act has to be kept in view by the Court. Unless otherwise provided, a tenant who has already acquired alternative accommodation is not intended to be protected by the Rent Act."

22. That having been said, it would now be necessary to consider whether there was default in payment of rent. It is an admitted fact that the Appellant No. 1 was in the know of the passing away of the Respondents mother as the Appellant No. 1 incessantly insisted on a meeting with the Respondent to settle the rent matter with him. This reveals that he was aware that the Respondent No. 1 was the rightful owner of the suit premises. This is fortified by the fact that the Respondent had a living brother and a nephew but no such arrangements were sought to be made with them by the Appellant No. 1. The Appellant No. 1 admittedly continued to send Money Order in the name of Saraswati Agarwal despite knowledge of her death when in the circumstances *supra* it was imperative that the rent be despatched in the name of the Respondent. The Respondent, in his cross-examination, has denied that the Appellant No. 1, after the death of his mother came and enquired from him as to whom the rent should be tendered to and he had refused to answer. Why the Appellant No. 1 failed to enquire from the other brother and nephew of the Respondent when no response on this count was forthcoming from the Respondent is shrouded in mystery. He also denied that from May 1998, his mother refused to accept the monthly rent tendered in cash by the Appellant No. 1 pursuant to which the Appellant No. 1 had to send it through Money Order. DW 8, the Postman who allegedly went to deliver the Money Order deposed that as per the Post Office Rules, the remitter has to give the proper address of the payee including the house number in order to have the Money Order delivered. DW 5, another Postman deposed that Money Order can be received only by the person in whose name it is sent and not by any other person. DW 4, also a Postman working in the Head Post Office, Gangtok has stated that *"... as per the Rule of the Post Office, in the case of delivery of MO to the concerned payee there has to be two witnesses along with the Postman and the same practice is followed in case of return of the MO. …"* No evidence

in this context is in the records of the case to support the Appellants case neither have any records been put forth to establish the Respondents refusal to accept the rent. Accordingly it is found that the Appellants were in default of payment of rent from January 2010 to 2017.

23. So far as the question of obtaining the judgment by fraud is concerned, the Appellants relied on ***A.V. Papayya Sastry and Others*** *(supra)* wherein it was held that fraud vitiates all judicial acts whether in *rem* or in *personam* and that a judgment, decree or order obtained by fraud has to be treated as *non est* and nullity and can be challenged in any Court at any time. It may be remarked here that the pleadings and the evidence are to be read in its entirety and there cannot be cherry picking of the sentences for the purposes of convenience. It is clear from the Schedule to the plaint that the Respondent was referring only to the suit property, hence this argument of the Appellants is not tenable.

24. In view of the discussions hereinabove, the decision of the learned trial Court save to the extent discussed with regard to Issue No. 1, warrants no interference.

25. Appeal dismissed.

26. Consequently the Appellants shall vacate the suit premises within three months from today i.e. by 10.09.2019 and hand over vacant possession to the Respondent. The Appellants shall pay the arrears in rent from January 2010 till the time they vacate the suit premises. No interest is ordered on the defaulted rent amount.

27. Copy of the Judgment be sent to the learned trial Court for information.

28. No order as to costs.

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

SLR (2019) SIKKIM 407

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

MAC App. No. 03 of 2018

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

Versus

Mrs. Dil Kumari Subba and Others ….. RESPONDENTS

For the Appellant: Mr. Thupden Gyatso Bhutia, Advocate.

For Respondent 1-2: Mr. N. Rai, Senior Advocate with Ms. Sudha Sewa and Mr. Nima Tshering Sherpa, Advocates.

For Respondent No.3: Mr. Ajay Rahti, Mr. Rahul Rathi, Ms. Phurba Diki Sherpa and Ms. Renuka Chhetri, Advocates.

Date of decision: 10th June 2019

A. Indian Evidence Act, 1872 – Proof of Income Certificate issued by Block Development Officer – View taken in re: *Smt. Anita Sunam* and in re: *Smt. Meena Bania* relied – Block Development Officer (BDO) is a competent authority under the State Government to issue certificate of income and also a public servant and therefore certificate issued under his seal and signature can be judicially taken notice of under illustration (e) of S. 114 of the Indian Evidence Act – There was no necessity to examine the BDO to prove the certificate as it would fall within the meaning of a public document under S. 74 of the Indian Evidence Act and thus judicial notice can be taken of it under clause (6) and (7) of S. 57 thereof – BDO being a public officer duly conferred with the authority to issue income certificates, it would not be mandatory to call him in the witness box to prove that he had indeed issued the income certificate.

(Para 15)

Appeal dismissed.

Chronological list of cases cited:

1. Smt. Anita Sunam and Others v. Shri Hom Nath Timshina and Another, 2013 SCC OnLine Sikk 67.
2. Branch Manager, Oriental Insurance Company, Ltd. v. Smt. Meena Bania and Others, 2012 (1) T.A.C. 444 (Sikkim).
3. Shri Silli Man Subba and Others v. Shri Man Bahadur Subba and Another, 2014 SCC OnLine Sikk 198.
4. Sunita and Others v. Rajasthan State Road Transport Corporation and Another, 2019 SCC OnLine SC 195.
5. The Branch Manager, National Insurance Company Limited v. Smt. Tika Devi Limboo and Others, 2017 SCC OnLine Sikk 201.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Appellant is the Insurance Company. It was Opposite Party no.2 before the Motor Accident Claims Tribunal (Tribunal). The Respondent no.1 and Respondent no.2 are the Claimant no.1 i.e. the wife of the deceased-Pem Tshering Lepcha who succumbed due to the accident and the Claimant no.2 i.e. the minor daughter of the deceased and the Claimant no.1. The Respondent no.3 is the owner of the vehicle which met with the accident. The present appeal had been preferred by the Appellant dissatisfied with the impugned judgment and the award both dated 27.11.2017 passed by the learned Tribunal.

2. The quantum of the award passed by the learned Tribunal is not in dispute. The judgment of the learned Tribunal directing the Appellant to pay the compensation is challenged. The income certificate of the deceased (exhibit-11) dated 02.09.2016 having not been proved by the Block Development Officer who issued it, is contested. The Appellant also submits that the Respondent no.3 has categorically stated that the driver had not taken due permission/authorisation from him before taking the said vehicle. Thus, it is argued the Appellant could not be saddled with the compensation.

3. Heard Mr. Thupden Gyatso Bhutia, learned Counsel for the Appellant, Mr. N. Rai, learned Senior Counsel for Respondent nos. 1 and 2 and Mr. Ajay Rahti, learned Counsel for Respondent no.3.

4. On the intervening night of the incident i.e. 13.04.2016 and 14.04.2016 the deceased was travelling along with other occupants in vehicle bearing registration no. SK-01-P-0466 (Estilo LXI Zen) from Marchak to Mangan, North Sikkim driven by its driver-late Gopal Chettri. When the vehicle reached Rangchang Bhir, Dikchu Singtam Road, East Sikkim it fell off the cliff resulting in the death of the deceased. The driver had a valid license issued by the Motor Vehicle Department. The vehicle was duly insured with the Appellant having a valid insurance policy no. 150608/31/16/6700000049 valid from 04.04.2016 to the midnight of 03.04.2017 covering the date of the accident.

5. The learned Tribunal relied upon the certificate of registration (exhibit-8) to hold that the vehicle was registered in the Motor Vehicle Division; tax was paid up to 22.06.2016 covering the date of the accident and that the Respondent no.3 was the owner of the said vehicle.

6. The learned Tribunal came to the conclusion that the accident had occurred on the said date on examining the certified copy of the First Information Report (FIR) dated 14.04.2016 (exhibit-2). The FIR was registered against the driver of the vehicle for rash driving on a public way (Section 279 Indian Penal Code, 1860) (IPC) and causing death by negligence (Section 304A IPC). The learned Tribunal examined the property seizure memo (exhibit-7) vide which the police seized the vehicle, its key and documents.

7. The inquest form (exhibit-4), dead body challan (exhibit-5), autopsy/ post mortem report (exhibit-15), dead body handing and taking memo (exhibit-6), death certificate of the deceased (exhibit-13) satisfied the learned Tribunal regarding the death of the deceased due to the accident.

8. The learned Tribunal came to the conclusion that the collective appreciation of the testimony of Respondent no.1 and the exhibited documents clearly established that the accident occurred on the intervening night on 13.04.2016 and 14.04.2016 when the vehicle owned by the Respondent no.3 and driven by the driver in which the deceased was

travelling fell off the cliff resulting in the death of the deceased, one Dipak Chettri and the driver.

9. The learned Tribunal was aware that Respondent no.1 was not travelling in the vehicle at the relevant time although she deposed that the driver had driven the vehicle rash and negligently. However, the learned Tribunal concluded that the driver had driven the vehicle rash and negligently after examining the FIR and the charge-sheet (exhibit-18) implicating him under Section 279 and 304A of the IPC. The finding in the charge-sheet (exhibit-18) was that the motor vehicle inspection report stated that the vehicle could have lost control due to over speeding resulting in the accident.

10. The driving license of the driver (exhibit-9) assured the learned Tribunal that it was valid at the time of the accident.

11. The learned Tribunal examined the insurance policy (exhibit-10) to come to the conclusion that the vehicle was insured w.e.f. 04.04.2016 till the midnight of 03.04.2017 covering the period of accident. The learned Tribunal also held that there was no doubt created about the genuineness of the documents. Hence, the learned Tribunal came to the conclusion that the deceased while travelling in the vehicle died in the motor accident which was duly insured.

12. The birth certificate (exhibit-12) of the deceased made the learned Tribunal conclude that the age of the deceased was 20 years at the time of the accident.

13. The Respondent nos. 1 and 2 placed reliance on the income certificate of the deceased issued by the Block Development Officer reflecting his monthly income. The income certificate certified that the deceased was working as a local mason which was a skilled profession and was earning Rs.16000/- per month. The income certificate also certified that the deceased was earning some income by selling organic vegetables. The Appellant contested the income certificate being not proved by the Block Development Officer. Although the Block Development Officer was not examined the Respondent no.1 who is the wife of the deceased deposed that the deceased was working as a local mason and earning Rs.16000/- per month. She also deposed that he was also earning some income by selling organic vegetables.

The Respondent no.1 deposed that the income certificate was issued by the Block Development Officer. The learned Tribunal considered that the Appellant did not deny the monthly income of the deceased.

14. Mr. Thupden Gyatso Bhutia drew the attention of this Court to the written objection filed by the Appellant in which the contents of the income certificate were contested. The Respondent no.1 had exhibited the income certificate issued by the Block Development Officer. She was cross-examined by the Appellant. During cross-examination the Respondent no.1 accepted the suggestion that she had not filed any document to substantiate that the deceased used to work as a mason. She also deposed that the income certificate was obtained approximately five months from the date of the accident. Obviously the income certificate was applied for and obtained after the death of the deceased to make the claim. No fault can be attributed to the Respondent no.1 for doing so. She also admitted that the income certificate does not reflect on which documents and facts and it was issued. No suggestion was made to the Respondent no.1 that the income certificate was a false certificate. Mr. N. Rai relied upon Notification No.25/ Home/2007 dated 03.04.2007 published in the Sikkim Government Gazette dated 17.04.2007 by which in exercise of the powers conferred by Section 21 of the Code of Criminal Procedure, 1973 (Cr.P.C.) Block Development Officers have been appointed to be Special Executive Magistrates for the performance of various functions including issuance of income certificate. It is thus clear that the Block Development Officer while issuing the income certificate was exercising a statutory function as a public officer. Thus the income certificate would fall under the category of public documents. Mr. N. Rai would also draw the attention of this Court to two judgments of this Court on this issue. In re: ***Smt. Anita Sunam & Ors. v. Shri Hom Nath Timshina & Anr***[1] the learned Single Judge of this Court held, relying upon an earlier judgment of this Court in re: ***Branch Manager, Oriental Insurance Company Ltd. v. Smt. Meena Bania and Ors.***[2]**,** that the Block Development Officer is a competent authority under the State Government to issue certificate of income and also a public servant and therefore certificate issued under his seal and signature can be judicially taken notice of under illustration (e) of Section 114 of the Indian Evidence Act, 1872. In re: ***Shri Silli Man Subba & Ors. v. Shri Man Bahadur Subba & Anr.***[3] the learned Single Judge of this Court once again held that

[1] 2013 SCC OnLine Sikk 67
[2] 2012 (1) T.A.C. 444 (Sikkim)
[3] 2014 SCC OnLine Sikk 198

there was no necessity to examine the Block Development Officer to prove the certificate as it would fall within the meaning of a public document under Section 74 of the Indian Evidence Act, 1872 and thus judicial notice can be taken of it under clause (6) and (7) of Section 57 thereof. The learned Single Judge also held that the Block Development Officer being a public officer duly conferred with the authority to issue income certificates, it would not be mandatory to call him in the witness box to prove that he had indeed issued the income certificate. It was held even otherwise, it is trite that in cases filed under the provisions of the Motor Vehicles Act, 1988, strict rules of evidence are not applicable. This Court sees no reason to differ from the earlier views of this Court.

15. In the judgment of the Supreme Court in re: ***Sunita & Ors. v. Rajasthan State Road Transport Corporation & Anr.***[4] relied upon by Mr. N. Rai it has been lucidly held:

> ***"31****..... The approach in examining the evidence in accident claim cases is not to find fault with non examination of some "best" eye witness in the case but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability. This court, in Dulcina Fernandes (supra), faced a similar situation where the evidence of claimant's eyewitness was discarded by the Tribunal and the respondent was acquitted in the criminal case concerning the accident. This Court, however, took the view that the material on record was prima facie sufficient to establish that the respondent was negligent. In the present case, therefore, the Tribunal was right in accepting the claim of the appellants even without the deposition of the pillion rider. Rajulal Khateek, since the other evidence on record was good enough to prima facie establish the manner in which the accident had occurred and the identity of the parties involved in the accident.***"**

[4] 2019 SCC OnLine SC 195

16. The first challenge by the Appellant about the non-examination of the Block Development Officer to prove the income certificate therefore, must fail.

17. Relying upon the judgment of this Court in re: ***The Branch Manager, National Insurance Company Limited v. Smt. Tika Devi Limboo & Ors.***[5] Mr. Thupden Gyatso Bhutia sought a remand of this case to examine the Block Development Officer who issued the income certificate. In the said case this Court had remanded the matter in view of the anomaly in the income detailed in the income certificate. No such anomaly could be pointed out in the income certificate by the learned Counsel and evidently none exist. As such the prayer for remand is liable to be rejected.

18. The second ground of challenge by Mr. Thupden Gyatso Bhutia is regarding the unauthorised use of the vehicle by the driver which, as submitted, was admitted by the Respondent no.3. It is argued that the learned Tribunal failed to consider Section 149 (2) of the Motor Vehicle Act, 1988 under which violation of terms and conditions of the Insurance Policy would be a valid ground of defence.

19. The Respondent no.3 in his evidence-on-affidavit deposed that the vehicle was driven by a qualified driver in possession of valid driving license issued by the licensing authority. He also deposed that the driver was authorised to drive light motor vehicle. The Respondent no.3 further deposed that he had taken a road drive test of the driver before giving him employment to make sure that his driving was good. He deposed that after the road drive test he was satisfied with his driving skills. Thereafter, he perused the driving licence which seemed genuine, valid and effective. He deposed that the documents of the vehicle including insurance policy was valid and effective at the time of the accident and that he had not violated any of its terms and conditions. The Respondent no.3 vouched for the trustworthiness of the driver and stated that he used to take the vehicle to his house after duty hours in case he got late. Having stated the above the Respondent no.3 also stated:

> ***"11****.... It is pertinent to mention here that when the said deceased driver Late Gopal Chettri*

[5] 2017 SCC OnLine Sikk 201

*used to take the vehicle to his home from that time he was not in duty hours of the present Respondent No.01. I came to know that the victim driver was proceeding towards Rangchang, Makha-Dikchu Road driving the above mentioned vehicle i.e. bearing Registration Number SK-01-P-0466 and met with an accident resulting to his death at the place of occurrence. I further came to know that two unauthorized occupants were inside the said vehicle as the driver had never taken any permission to take ant (sic-any) friends/ relatives/unauthorized persons/passengers in the said vehicle.....***"**

20. Referring to the above quoted deposition of the Respondent no.3 it was argued that he having admittedly not authorised the driver to take his vehicle when it met with the accident amounted to violation of the terms and conditions of the insurance policy.

21. The Respondent no.3 has categorically deposed that the driver used to take the vehicle to his house after duty hours in case he got late. Thus the driver taking the vehicle with him away from the Respondent no.3's house was authorised. Section 146 of the Motor Vehicles Act, 1988 provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this chapter. The Respondent no.3 had exhibited the insurance policy. The Appellant cross-examined the Respondent no.3. No question was put to the Respondent no.3 about him violating the terms and conditions of the insurance policy in spite of the statement quoted above. In the written objection filed by the Appellant it was contended by him that the use of the vehicle was illegal and therefore there was contributory negligence on the part of the deceased in using the private vehicle for commercial purpose. It is submitted that this tantamount to violation of terms and conditions of the insurance policy. No evidence was led to establish the allegation that the vehicle was used for commercial purpose. A perusal of the insurance policy does not reflect any such terms and condition which have been violated. The Appellant did not rely upon or refer to any specific

term or condition of the policy in question. It is not in dispute that the Appellant had notice through the learned Tribunal of the bringing of the proceedings. The Appellant was made a party to the proceedings and permitted to defend the action on any of the grounds available. It was completely within the Appellant's right to defend the action specifying the breach of the condition of the insurance policy. In spite of the opportunity no evidence was led by the Appellant to satisfy the learned Tribunal about any breach of the conditions of the insurance policy. It is evident that there was no such breach. As such the second ground of challenge by the Appellant also must fail.

22. No further grounds were urged by the Appellant during the course of the hearing. The learned Tribunal has examined the evidence and correctly come to the conclusion that the Respondent no.1 and 2 were entitled to compensation as calculated. The amount of compensation granted by the learned Tribunal not being challenged nothing further remains to be decided.

23. The appeal fails. The judgment and award both dated 27.11.2017 passed by the learned Tribunal are upheld.

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SLR (2019) SIKKIM 416

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

RFA No. 05 of 2016

Shri Bishnu Prasad Bhagat ….. APPELLANT

Versus

Shri Prakash Basnett ….. RESPONDENT

For the Appellant: Mrs. Laxmi Chakraborty and Ms. Manju Rai, Advocates.

For the Respondent: Mr. Zangpo Sherpa, Mr. Deven Sharma (Luitel), Mr. Jushan Lepcha and Ms. Mon Maya Subba, Advocates.

Date of decision: 15th June 2019

A. Notification No. 6326-600/H&WB dated 14.04.1949 – Grounds for eviction in clause 2 –*"Personal occupation"* of the landlord includes the requirement of the dependents as well – Respondent's family consist of his wife, daughter and son. It cannot be doubted that the requirement of adequate accommodation for the family would grow when children grow up – Similarly, the Respondent desire to accommodate a help due to his health issues and to have adequate room when his relatives visit cannot be termed fanciful.

(Paras 7, 17 and 18)

B. Indian Evidence Act, 1872 – Evidence – Appreciation – In a suit of this nature what is important is to gauge the requirement being natural, real, sincere, honest, genuine and *bonafide*. When a witness enters the witness box, it is, most of the time, a new and overwhelming experience. Every sentence spoken in the witness box cannot be minutely dissected and examined through hawk eyes for its truthfulness unless the sentence directly and substantially affects the case set up. A certain degree of latitude must be accommodated for genuine human errors including the

thought being lost in translation. It is better to appreciate the overall impact of the evidence produced rather than go nitpicking and hair-splitting over it.
(Para 20)

Petition allowed.

Chronological list of cases cited:

1. Ashok Kumar Rai v. Girmi Goparama (Sherpa), AIR 2012 Sikk 29.
2. Pradeep Golyan v. Durga Prasad Mukhia, (2016) SCC OnLine Sikk 225.
3. Jagdish Prasad v. Tashi Tshering Bhutia, 2010 SCC OnLine Sikk 48.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The suit for eviction, recovery of possession and mense profit was filed by the Respondent before the Court of the learned District Judge (East and North), East Sikkim at Gangtok, against the tenant, the Appellant herein. Various grounds for eviction were taken. The solitary ground which is being contested in the present appeal is the requirement of the suit premises for the personal occupation of the landlord, the Respondent herein.

2. The suit premises is situated at Pakyong Bazar, East Sikkim and therefore, **"Notification no. 6326-600/H & WB dated 14.04.1949 (1949 Notification) regulating letting and sub letting of premises etc."** issued by the then Health & Works Department, is the law applicable. Clause 2 of the 1949 Notification is relevant and quoted below:

> ***"2.*** *The landlords cannot eject the tenants so long as the scarcity of housing accommodation last, 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. On 27.08.2013 the learned District Judge framed four issues. Issue no.1 is the relevant issue i.e. *"1. Whether Plaintiff is in bonafide requirement of the suit property?"*

4. The Respondent examined himself, his wife-Purna Kumari Basnett his daughter-Puspanjali Basnett, his son-Praveen Basnett and Dr. Chandra Shekher Sharma a Psychiatric at STNM Hospital, Gangtok. The Appellant examined himself, Subash Prasad Gupta, a businessman in Pakyong Bazar, Bhagnarayan Sharma, a carpenter of Pakyong Bazar and Md. Shafi Mohammad also a businessman of Pakyong Bazar.

5. The learned District Judge examined the said issue of *bonafide* requirement and held that the Respondent has been able to prove that their house at Namcheybong is in dilapidated condition. The learned District Judge also came to the conclusion that the Respondent had been able to prove that he was under medication as he was unwell and suffering from schizoaffective disorder. It was held that the Respondent had also been able to show that the suit premises were required for the personal occupation of the Respondent i.e. for the occupation of his dependent son and daughter. It was held that therefore, the Respondent was successful in establishing his claim of *bonafide* requirement and personal occupation. A decree of eviction was accordingly passed against the Appellant. The impugned judgment dated 30.09.2015 passed by the learned District Judge in Eviction Suit No. 05 of 2013 is challenged.

6. Heard Mrs. Laxmi Chakraborty, learned Counsel for the Appellant and Mr. Zangpo Sherpa, learned Counsel for the Respondent.

7. At the outset it must be noticed that Clause 2 of the 1949 Notification provides for eviction of the tenant when the whole or part of the premises are required on the ground of *"personal occupation"* of the landlord. The Respondent had sought eviction on several grounds. A holistic reading of the plaint suggests that the Respondent required the suit premises as his Namchebong house was in a dilapidated condition; due to his fear about the high tension electricity line running above his Namcheybong house endangering their lives; his ill health including mental illness for which he desired to accommodate a help; to accommodate his growing children who did not have adequate personal space in the Namcheybong house and who were pestering him for it which was causing him mental stress; to establish

them in business as they were completing their education and generally to have a larger accommodation for the family. The requirement of the Respondent for the suit premises consisting of two rooms of the building owned by him was for his own requirement as well as for the requirement of his children who were pursuing their education. That *"personal occupation"* of the landlord includes the requirement of the dependents as well is now well settled. While interpreting Clause 2 of the 1949 Notification this Court in re: ***Ashok Kumar Rai v. Girmi Goparama (Sherpa)***[1] and ***Pradeep Golyan v. Durga Prasad Mukhia***[2] held that the term *"personal occupation"* in Clause 2 of the 1949 Notification extends to occupation and requirement of not only the landlord but also his dependants.

8. The Respondent, his wife, daughter and son entered the witness box and deposed about the dilapidated condition of their house at Namcheybong. To establish the dilapidated condition of the house the Respondent exhibited some photographs of the house (exhibit-3 collectively). The learned Counsel for the Appellant pointed out that the Respondent had admitted in cross-examination that he had not submitted the negatives/CD of the photographs of the house. The crossexamination did not go further than that. No suggestion was put to the Respondent that the photographs were fabricated. The exhibition of the photographs was also not objected to. During the Respondent's cross-examination by the Appellant he deposed that he does feel scared living in the dilapidated Namcheybong house but due to compulsion he has to live there as the Appellant has not vacated his house at Pakyong Bazar. On an application for a commission an Advocate Commissioner was appointed by the learned District Judge who examined the house and the high tension electricity line running over the house along with the Advocates for both the Respondent and Appellant and submitted her report (QQ) along with photographs. The order dated 06.08.2013 specifically directed the learned Advocate Commissioner to ascertain about the dilapidated condition of the Namcheybong house as well as the electricity line passing over the house. The learned Advocate Commissioner confirmed the dilapidated condition of the Respondent's house at Namcheybong. Although detailed cross-examination was done by the Appellant's Counsel the learned Advocate Commissioner's report could not be demolished. Comparing the photographs taken by the learned Advocate

[1] AIR 2012 Sikk. 29
[2] (2016) SCC OnLine Sikk 225

Commissioner with the photographs (exhibit 3) produced by the Respondent it is certain that they are genuine. The photographs also reflect the dilapidated condition of the Namcheybong house.

9. The Respondent has been able to cogently prove that his house at Namcheybong is in dilapidated condition. The averment in the plaint that the Respondent requires the suit premises as the Namcheybong house is not in proper condition for human living is not even specifically denied by the Appellant. The learned Advocate Commissioner not only confirmed that the house was dilapidated but also denied the suggestion made by the Appellant during cross-examination that the entire house was habitable. The Respondent's wife, daughter and son also supported the evidence of the Respondent that the Namcheybong house was in dilapidated condition. The learned Advocate Commissioner stated that only the bedroom was habitable. Thus, the Respondent has also been able to establish that he requires the suit premises for his personal occupation.

10. The Respondent has asserted in his plaint that 11000 KV high tension electricity line passes above the roof of the Namcheybong house. The Appellant in his written statement asserted that the electricity line would not endanger the Respondent's life. The Respondent, his wife, daughter and son all deposed about the high tension electricity line passing above the Namcheybong house and that it would endanger their lives. The Appellant did not cross-examine the Respondent's wife and son about it. The mere admission by the daughter that she was not an expert to evaluate whether the electricity line passing above the Namcheybong house endangers human life and property would not destroy their perception that it would in fact do so. The Respondent's asserted during his cross-examination that he had in fact written several letters to the Power Department complaining about the electricity line on the suggestion of the Appellant that he had not done so. The Respondent, his wife, his daughter and son's depositions that the high tension electricity line runs over their Namcheybong house was confirmed by the learned Advocate Commissioner in her report. She confirmed that the line passes just about six toseven feet away from the roof of the Namcheybong house. The Respondent has been able to establish that high tension electricity line passes above the Namcheybong house and they did have concern about it endangering their lives.

11. Yet another ground raised by the Respondent in the plaint was with regard to the son and the daughter requiring their private space. The Appellant did not specifically deny the said averments in the plaint. The Respondent deposed that presently his son was pursuing engineering and his daughter computer education and both requires separate room. The Appellant did not cross-examine the Respondent on this aspect. The Respondent's daughter and son also asserted their need for a separate room. On the suggestion of the Appellant the daughter stated that she has been asking the Respondent for space/house despite knowing that he is unwell. The Respondent's need for the suit premises for his children has also been established.

12. The Respondent has averred that he is suffering from various healths related issues including mental health. He has averred that therefore, he needs the suit premises for a help too. The Respondent has averred that the doctor has advised him against stress and his children approaching him for more space was causing him stress. The Respondent also deposed about the same in his evidence-on-affidavit. Extensive cross-examination was done on this aspect by the Appellant. The Respondent stood firm. His evidence about his mental health is confirmed by his doctor-Dr. Chandra Shekher Sharma, a Psychiatrist at the STNM Hospital, Gangtok who also exhibited a certificate issued by him (exhibit-8) confirming that the Respondent was suffering from Schizoaffective disorder and advised to avoid stress. The cross-examination yielded no fruitful result. The Respondent's wife, daughter and son also confirmed the Respondent's health condition. The Appellant himself made a suggestion to the Respondent during his cross-examination to which he deposed that in 2008 he was admitted in the rehabilitation centre and in Psychiatric clinic due to mental illness which he developed since 1999. The admission of the Respondent's wife pointed out by the learned Counsel for the Appellant that he improved due to treatment cannot destroy the overwhelming evidence about his ill health. The Respondent has been able to establish that due to his health problems he requires the suit premises for his personal occupation.

13. The learned Counsel for the Appellant submitted that the assertion of the Respondent that he requires the suit premises for establishing his daughter and son for their business has been completely demolished by their admission in cross-examination. Besides the Respondent and his wife, both the daughter and the son also deposed that they require the suit premises

for starting their business. The daughter admitted in cross-examination that she had obtained exhibit-6 in the month of July, 2013 for the purpose of this case on the suggestion of her parents. Exhibit-6 is however, a fee receipt from the Sikkim Manipal Institute of Technology in favour of the son showing the date of his admission as 08.07.2013. It is not the application for issuance of trade licence as suggested by the learned Counsel for the Appellant during the hearing. Exhibit-5 is the computer course certificate of the daughter. No suggestion was made that the computer course certificate (exhibit-5) was a false certificate. The computer course certificate (exhibit-5) would show that she in fact was doing the three year degree and diploma in software engineering i.e. B.Sc. I.T. and GNIIT. The son in his cross-examination stated that he was an engineering student although he was not sure what he would like to do in future. This admission may not completely destroy his evidence-onaffidavit that he wants to start his own business for which he had also taken a license from the UDHD Department. The learned Counsel for the Appellant pointed out his admission that exhibit-6 and exhibit-7 where obtained by him according to the legal advice of his Advocate. She would urge that this admission would show that the said documents were procured only for the purpose of this case. No suggestion was made by the learned Counsel to the son that the said documents were false. Exhibit-6 as stated earlier is his fee receipt from the Sikkim Manipal Institute of Technology for his admission. Exhibit-7 is a certificate from the UDHD department dated 29.06.2013 certifying that the son had applied for trade license for a grocery/manihari shop and the daughter for computer sales service. The plaint was filed on 05.03.2012. It is quite evident that exhibit-7 was obtained for the purpose of the eviction suit. However, the crossexamination of the son and the daughter did not yield any damaging result. The stand of Respondent, his wife, his daughter and son that they require the suit premises to start business remains intact. In fact it was on the suggestion of the Appellant that the Respondent admitted that his children constantly pesters him to provide with another accommodation and he had to vacate the Appellant in order to establish his children who desires to run business of their own during cross-examination. Even if this Court was to disbelieve the son and daughter seeking to establish business on the ground that they sought trade license only after the suit was filed by the Respondent other grounds taken by the Appellant sustains.

14. The learned Counsel for the Appellant relied upon the evidence of Subhash Prasad Gupta, a businessman from Pakyong bazar, who was

examined as the Appellant's witness. Subhash Prasad Gupta in his evidence-on-affidavit stated that the Respondent used to live in his Namcheybong house earlier but of late after construction of RCC building at Bardang he has shifted there. In cross-examination he admitted that he had not seen the RCC building constructed at Bardang or who the owner of the said building was. Moreover, during the Respondent's cross-examination by the Appellant he denied the suggestion that he was staying in the Namcheybong house only for the purpose of evicting the Appellant. This clearly indicates that the Appellant was also aware that the Respondent was in fact staying in the Namcheybong house.

15. On an application of the Appellant the learned Advocate Commissioner also inspected the Bardang property and submitted her report (exhibit-QQ1). As per the learned Advocate Commissioner the Bardang property is owned by the Respondent's wife. According to her the entire RCC building is on rent and only one room is with the Respondent.

16. Even if Subhash Prasad Gupta's evidence is taken as correct it is quite evident that the Bardang property owned by the Respondent's wife is fully occupied with only one room with the Respondent. Thus, the Respondent's requirement for the suit premises does not get diminished in any way.

17. The evidence produced by the Respondent establishes that the Nacheybong house does not have adequate accommodation besides the other inadequacies of it being dilapidated and high tension line running above it. It is certain that the Respondent's family consist of his wife, daughter and son. It cannot be doubted that the requirement of adequate accommodation for the family would grow when children grow up.

18. Similarly, the Respondent desire to accommodate a help due to his health issues and to have adequate room when his relatives visit cannot be termed fanciful.

19. The learned Counsel for the Appellant also submitted that the agreement dated 12.03.1999 did not contemplate eviction by the Respondent at all and therefore it was not permissible for the Respondent to seek eviction. The Respondent has sought eviction on the ground of *bonafide* requirement of the suit premises and not under the contract.

Personal occupation of the landlord is a valid ground for eviction under the 1949 Notification. Thus, the submission of the Appellant on this ground must also fail.

20. The next argument raised on behalf of the Appellant was that the Respondent had not approached the Court with clean hands and made false pleas and statements on oath. The learned Counsel for the Appellant sought to refer to the previous plaint filed by the Respondent which was however, subsequently amended. The amendment was allowed by the learned District Judge and the order allowing the amendment, admittedly has not been challenged. The Appellant did not even suggest to the Respondent that he had made false plea on oath in the previous plaint. It would not be permissible for the Appellant to raise the plea of false averments in the previous plaint which has since been amended, at this stage. The learned Counsel also pointed out several statements in the extensive cross-examination of the Respondent and his witnesses and sought to persuade this Court to throw out the suit on the ground that those statements are evidently false. In a suit of this nature what is important is to gauge the requirement being natural, real, sincere, honest, genuine and *bonafide.* When a witness enters the witness box, it is, most of the time, a new and overwhelming experience. Every sentence spoken in the witness box cannot be minutely dissected and examined through hawk eyes for its truthfulness unless the sentence directly and substantially affects the case set up. A certain degree of latitude must be accommodated for genuine human errors including the thought being lost in translation. It is better to appreciate the overall impact of the evidence produced rather than go nitpicking and hair-splitting over it.

21. The learned Counsel for the Appellant pointed out to the deposition of the Respondent in cross-examination in which he stated *"it is true that apart from my Advocate, there was nobody else present when I signed on exhibit-13 in chamber of my Advocate."* It was submitted that from the said deposition it is clear that the evidence-on-affidavit of the Respondent was not under oath. The learned Counsel however, did not point out the next sentence in the cross-examination of the Respondent after the above quoted sentence. The next sentence reads *"it is not true that I do not know the contents of exhibit-13 and that I did not take the oath before I verified the same."* A perusal of the evidence-on-affidavit of the Respondent reflects that it was solemnly affirmed before the learned

Oath Commissioner on 26.09.2013 by the deponent i.e. the Respondent and identified by one Deven Sharma of Gangtok. The said evidence-on-affidavit (exhibit-13) bears the stamp of the learned Oath Commissioner. The fact that the evidence-on-affidavit (exhibit-13) was in fact affirmed before the learned Oath Commissioner cannot be doubted only because of the statement of the Respondent taken in isolation.

22. The learned District Judge has held that the suit premises is genuinely required for the personal accommodation of the Respondent, his dependent son and daughter, the requirement was honest and did not suffer from any ill motive. This Court is in agreement with the said finding of the learned District Judge.

23. In re: ***Jagdish Prasad v. Tashi Tshering Bhutia***[3] this Court held:

> ***"9.*** *A look at the said notification, and in particular Clause 2 thereof, would make it abundantly clear that on no other ground, but only on those three grounds as mentioned therein, the respondent could seek eviction of the appellant. However, the said clause itself gives discretion to the Court to permit eviction. In other words, if any of the three grounds mentioned in the said clause of the said notification in put home, the same would not necessarily result in eviction. The Court would be required to use its discretion in permitting eviction. In order to sue such discretion, the Court was required to take into account the conduct of the respondent, the hardship he is likely to face and other surrounding circumstances.****"***

24. The Respondent has pleaded hardship and proved it. The Respondent had specifically pleaded in the plaint that the Appellant has alternative accommodation. The Appellant vehemently denied the same and pleaded that the suit premises is the only means of livelihood of the Appellant having five family members. The Appellant did not specifically answer whether he had alternative accommodation. The Appellant's business could be his only means of livelihood but not the suit premises. The Appellant also did not choose to address the issue of alternative

accommodation in his evidence-on-affidavit. During cross-examination the Appellant admitted that he is residing in a building of one Ganga Ram at Pakyong Bazar and he has ancestral property at his native place in Bihar. In such circumstances, it is difficult to consider any special equities in favour of the Appellant against eviction.

25. As no other ground was urged in the present appeal nothing further remains to be examined. The appeal must necessarily fail. The judgment dated 30.09.2015 passed in Eviction Suit No. 05 of 2013 is upheld. The decree dated 30.09.2015 is also upheld, except that the Appellant is given time for a period of four months from today to vacate the suit premises on the condition that he will continue to pay rent till then. This is in consideration of the fact that the Appellant has been in occupation of the suit premises and doing his business from there since 1999 and would thus require sometime to shift his business.

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