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and foot prints which would obviously be available. The physical evidence would never lie or commit perjury or forget. The Investigating agencies human failure alone in finding it, preserving it and studying it would allow it to remain inanimate and voiceless – We would believe that the forensic evidence would be decipherable with the use of scientific methods and technology. We would desire, nay implore the State to introduce and make available to the investigative agencies new, updated scientific methods and technologies for forensic examination although we are certain that we would not err even if we were to adjure the State to do so.

State of Sikkim* v. *Suren Rai ***629-A***

Code of Criminal Procedure, 1973 – S. 154 – F.I.R – Addressing the argument that the Appellant was not named in the F.I.R, common sense prevailing, would lead to the inevitable conclusion that the name of an accused is not necessarily known to the victim unless they were previously acquainted. No such acquaintance of the victim and the Appellant prior to the incident has been referred to in evidence.

Md. Atiullah* v. *State of Sikkim ***726-A***

Code of Criminal Procedure, 1973 – S. 313 – Object – S. 313 is an important section of the Code of Criminal Procedure. S. 313 requires the Court to put questions to the accused for the purpose of enabling the accused "personally" to explain any circumstances appearing in the evidence against him. The section enables a direct interaction between the Court and the accused for the sole purpose of allowing the accused to provide his explanation to each and every incriminating circumstance appearing in the evidence. The statement is not to be taken on oath which is prohibited under sub-section (3) thereof – The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The answers, however, given by the accused may be taken into consideration in such enquiry or trial, and put in evidence for or against him in any other enquiry into, or trial for, any other offence which such answers may tend to show that he had committed – Under S. 313, the accused has a duty to furnish explanation in his statement regarding any incriminating material that has been produced against him. It is not sufficient compliance with the section to generally ask the accused what he has to say after having heard the prosecution evidence. Every material circumstance must be questioned separately. Providing fair, proper and sufficient opportunity to the accused to explain the circumstances appearing against him should be the whole object of the Court in compliance with S. 313 –

The Court must be particularly sensitive when the accused is ignorant or illiterate and may not understand the language of Court. The questions must be simple and understandable even to an illiterate and ignorant of the law. Preferably, the Court should avoid using legal language and keep the questions simple especially while dealing with people who are uneducated, illiterate, ignorant or simple. The question should be short and each new incriminating fact must be separately put to the accused. If the accused is unable to understand the language of the Court, the Court must translate the question in the language understood by the accused. It is obligatory on the accused while being examined to furnish explanation with respect to incriminating circumstances against him and the Court is duty bound to note such explanation even in a case of circumstantial evidence – S. 313 was enacted for the benefit of the accused.

State of Sikkim* v. *Suren Rai ***629-F***

Code of Criminal Procedure, 1973 – S. 313 – Appellant cannot be convicted merely on the basis that he failed to make out his innocence in his statement under S. 313 of the Cr.P.C.

Md. Atiullah* v. *State of Sikkim ***726-C***

Constitution of India – Article 226 – Writ Jurisdiction – It is evident that the present dispute relates to a contractual matter where there are several and serious disputed questions of fact. The present dispute necessarily involves examining the detailed facts which are disputed and the terms of the contract and whether the act of the Respondents to issue the fresh tender after the extended period of the said contract had come to an end amounted to a breach of the said contract which can be only examined in a Civil Court – Although there is no absolute bar to the maintainability of a Writ Petition even in contractual matters or where there are disputed questions of facts, it is evident that in the present case no issue of public law character has been raised. The disputed questions of facts raised herein are of complex nature and require oral evidence for their determination and cannot be determined in present proceeding under Article 226 of the Constitution of India.

Sri Avantika Contractors (I) Ltd* v.*Union of India and Others ***611-A***

Constitution of India – Article 226 – Writ Jurisdiction – It is well settled that Writ Petition is not maintainable to avoid contractual obligations. Occurrence of commercial difficulty, inconvenience or hardship in

performance of the condition agreed to in the contract can provide no justification in not complying with the terms of the contract which the parties had accepted with open eyes. It is trite law that a writ can be issued where there is executive action unsupported by law and there is a denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of the principles of natural justice. It is also settled law that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

***Sri Avantika Contractors (I) Ltd* v. *Union of India and Others* 611-B**

Constitution of India – Article 226 – Writ Jurisdiction – This Court is of the firm view that the only substantial prayer being the prayer for directing the Respondents to clear all pending outstanding dues along with interest to the Petitioner cannot also be examined in the writ jurisdiction of this Court – The Petitioner may take recourse to remedy under the contract or such other remedies provided under the ordinary civil law as may be advised.

***Sri Avantika Contractors (I) Ltd* v. *Union of India and Others* 611-C**

Constitution of India – Article 226 – It is noticed that the so called high ranking functionary of the State Government, who happens to be the husband of the 4th respondent, has no say in the entire exercise. On mere assertion without producing any material, there is no reason to accept that the High Power One Man Selection Committee of former Chief Justice was under influence of any high ranking functionary. Resignation from two or three posts earlier cannot be held as a disqualification, debarring her or him from consideration for selection to a post unless there is some disqualification or stigma attached thereto – This Court has had an occasion, to examine the chart prepared by the selection committee, wherein all the candidates were awarded marks under different criteria. The maximum mark meant for the interview was only 10. It was found that even if the petitioner were awarded full marks i.e. 10, in totality, her position would not have improved or the petitioner would not have acquired more marks than the 4th respondent. In overall consideration, placing the 4th respondent at serial number 1 was just and proper.

***Sushmita Dong* v. *State of Sikkim and Others* 711-A**

Constitution of India – Article 226 – Colourable Exercise of Power – Holding the interview at some place other than Gangtok, when the place of interview was not specified in the employment notice, cannot be held as irregular, as Rangpo is within the territory of Sikkim. The advertisement also cannot be held as vitiated on the stated ground that the pay scale was not stated when the petitioner was aware of it. However, the pay scale granted to the successful candidate was at par with the District Judge, who becomes eligible on completion of five years to make application and participate in the selection for the post – In such backdrop, it cannot be held that there was a colourable exercise of power or some favour was shown to the 4th respondent.

Sushmita Dong* v. *State of Sikkim and Others ***711-B***

Constitution of India – Tenth Schedule – Disqualification on ground of Defection – The Constitution (Fifty-second Amendment) Act, 1985 was enacted by the Parliament incorporating Article 191(2), providing for disqualification of a person for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule – The Tenth Schedule was also incorporated by the said Amendment Act – On bare perusal of the relevant paragraphs 2, 4 and 5 of the Tenth Schedule, it is evident that a Member of a House stands disqualified, if he has voluntarily given up his membership of such political party or if he votes or abstain from voting in such House contrary to any direction issued by the political party to which he belongs or an elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election – Paragraph 4 contemplates disqualification on ground of defection not to apply in case of merger of original party with another political party. The merger of the original political party of a Member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the Members of the legislature party concerned have agreed to such merger – The contesting respondents 5th to 11th, who are more than two-thirds of the Members of the concerned legislature party have not formed any separate party to merge with another political party. Thus, Article 191 (2) clearly mandates that disqualification incurred by a member under the Tenth Schedule to the Constitution shall be disqualified for being a Member of the Legislative Assembly.

Pahalman Subba and Others* v.*The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-B***

Constitution of India – Tenth Schedule – Object – Rule of Interpretation – The principle of reading down deducible is that the statutory provision which fails to effectuate the objective and purpose of the enactment may be read down to further objective of the enactment as well as the Constitution – Rules 6 and 7 of the Rules of 1985 are in the domain of procedure and intended to facilitate the holding of inquiry and not to defeat or destruct the objective of the Tenth Schedule by introducing the technicality. Indisputably the Rules are in the nature of subordinate delegated legislation and cannot supplant the very object of the Tenth Schedule, as the Tenth Schedule was added to the Constitution to remove the evil of political defection which became a matter of national concern and undermines the very foundation of the democracy.

Pahalman Subba and Others* v. *The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-C***

Constitution of India – Writ Jurisdiction – The High Court is competent to exercise its powers of judicial review under Articles 226 and 227 of the Constitution when the validity of the order of the Speaker is in question in Writ Jurisdiction, as laid down by the Constitution Bench in *KihotoHollohan* v. *Zachillhu*, when the challenge is made on the ground of *ultra vires* or *mala fides* or having been made in colourable exercise of power based on extraneous and irrelevant considerations – That situation has not arisen in this case, as no decision has been taken by the Speaker yet on merit – The impugned order dated 2nd February 2017 is not faulted with, as the same was rendered in accordance with Rules as it stood at the relevant time, thus, no interference is warranted.

Pahalman Subba and Others* v. *The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-F***

Criminal Trial – Last Seen Theory – It is trite that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. However, where the other links would be satisfactorily made out and the circumstances would point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which would complete the chain.

State of Sikkim* v. *Suren Rai ***629-E***

Employees Compensation Act, 1923 – S. 20 – It is manifest that the Parliament has created the post of Labour Commissioner on prescribing specific qualification. The State Government was empowered to appoint the

Labour Commissioner keeping in view the prescribed qualification stated therein – The prescribed qualification under the provision of S. 20 of the Act of 1923 is: who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations. All the candidates had the requisite qualifications.

Sushmita Dong v. State of Sikkim and Others **711-C**

Indian Evidence Act, 1872 – Circumstantial Evidence – The circumstances from which the conclusion of the guilt is to be drawn must be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and no other – The circumstances should be of conclusive nature and should exclude every possible hypothesis except that it is the accused and he alone who is guilty of murder. The chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and the Court must be judicially confident that it is the accused who is guilty and the heinous act has been perpetrated by him and none other.

State of Sikkim* v. *Suren Rai ***629-B***

Indian Evidence Act, 1872 – Circumstantial Evidence – It is trite that in a case like the present one where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, his failure to offer any explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain – The failure of the accused to offer any explanation in his S. 313 Cr.P.C. statement alone would not be sufficient to establish the charge against the accused. The Court can, however, rely on a portion of the statement of the accused and find him guilty in consideration of other evidence against him. The accused has a right to maintain silence during examination or completely deny the incriminating circumstance but in such an event adverse inference could be drawn against him.

State of Sikkim* v. *Suren Rai ***629-G***

Indian Evidence Act, 1872 – S. 27 – S. 27 makes information received

from a person accused of anyoffence even if in the custody of Police Officer and whether it amounts to confession or not admissible to the extent it relates distinctly to the fact thereby discovered in consequence of information received from the said person – Disclosure statement is required to be voluntary in order to be admissible. Involuntariness has an element of compulsion which has been held prohibited although the mere recording of the disclosure statement in the custody of police would not make it inadmissible.
State of Sikkim* v. *Suren Rai ***629-C***

Indian Evidence Act, 1872 – S. 106 – Burden of Proof – When any fact is especially within the knowledge of any person, the burden of proving the fact is upon him.
State of Sikkim* v. *Suren Rai ***629-D***

Indian Penal Code, 1860 – S. 96 – Right of Private Defence – We find that the deceased had blamed SurenRai for the loss of his mobile. We also find that the deceased had more than once provoked SurenRai. Considering the confession of SurenRai it seems that the deceased had provoked him into a fight and hurled a *"khukuri"* at him on which SurenRai had grabbed the *"khukuri"* from him and assaulted the deceased multiple times and severely which caused the death of the deceased. There was reasonable apprehension of danger to SurenRai's life which would put the right of self defence into operation giving him the right to inflict any harm even extending to death – The multiple and gaping chop wounds on the back of the neck, below the skull causing the six severe *anti-mortem* injuries with the *"khukuri"*, a sharp moderately heavy weapon and his running away whilst the deceased was still alive makes us firmly believe that SurenRai exceeded the power given to him by law in order to defend himself although the exercise of the right, quite clearly, was done whilst deprived of the power of self control by grave and sudden provocation in his own defence and without premeditation – The homicide does not amount to murder in view of exception 1 of S. 300 IPC. We are of the view that SurenRai is guilty of causing death of the deceased with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under S. 304.
State of Sikkim* v. *Suren Rai ***629-H***

Indian Penal Code, 1860 – S. 300 – Murder – Exceptions – The exceptions do not offer complete vindication to the conduct of the accused but they do reduce the impact of the gravity of the offence. Nevertheless,

although the onus of proving the guilt of the accused rests with the prosecution but the burden of proving the circumstances to bring the case within the exceptions enumerated above, lies with the accused as would be evident from the provisions of S. 105 of the Indian Evidence Act, 1872 – Had the Appellant physically attacked the deceased immediately after the verbal duel between them inside the house of the deceased then it could well be said that the fight broke out suddenly without premeditation, in the heat of passion upon a sudden quarrel. Exception 4 of S. 300 IPC applies not only to cases where the fight is unpremeditated and sudden but with the rider that the accused did not take undue advantage or act in a cruel or unusual manner. When a man is being throttled mercilessly and the entreaties of the wife to stop the act fell on the deaf ears of the Appellant, it cannot be said that there was no undue advantage – None of the exceptions to S. 300 including Exception 4 are available to the Appellant to reduce his criminality to S. 304 of the IPC.

Lakpa Lepcha* v. *State of Sikkim ***700-A***

Indian Penal Code, 1860 – S. 300 – Murder – Although, it may be accepted that the fight between the Appellant and the deceased arose initially without premeditation when he momentarily lost control upon a sudden quarrel but when he throttled the deceased it was not a continuance of the previous fight but after he had time for reason to regain dominion of his mind. Even assuming it was a continuation of the same fight as already emphasised, the Appellant took undue advantage and in an unusual manner while throttling the deceased by putting him in a physically disadvantageous position, strangulating him with his arm from behind and thereby causing his death. It cannot be said that in such a circumstance he had no intention to cause the death of the deceased.

Lakpa Lepcha* v. *State of Sikkim ***700-B***

Indian Penal Code, 1860 – S. 354 – Absence of Injuries on the Victim – Absence of injuries do not falsify the offence or incident and merely because the Doctor and the victim's father testified that the victim is hallucinatory, sans proof, no credence can be lent to this aspect, incidents of such behaviour not being established. If it is to be assumed that she falsely implicated the Appellant how she sought help from two male strangers coming in the vehicle and made no allegation against them needs to be ruminated over – In other words, it is evident that the incident did occur and hence the existence of the F.I.R. At the same time, it is pertinent to notice that cross-examination has not demolished the fact of the presence of

the Appellant at the place of occurrence or what he was doing therein at that time of the night.
Md. Atiullah* v. *State of Sikkim ***726-B***

Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 6 – The 1st and 2nd petitioners were the petitioners before the Speaker. Out of five petitioners, two have chosen to file the present Writ Petition and three have chosen not to join the present petition. Out of three, one has not signed even the petition filed before the Speaker, Sikkim Legislative Assembly. Copies of the petition was endorsed to several constitutional functionaries and also to the press and media, which was not the requirement of the procedure or of the constitutional provisions – The petition was signed by four petitioners and it was not duly verified, as required under the Rules. There were no documents except a newspaper report which gave reasons to the applicants therein to believe that 5th to 11th respondents have switched over from the original party to the new party. Newspaper report was neither authenticated nor duly signed and verified. Even other annexures were neither authenticated nor duly signed and verified, as required under Rule 6. Thus, it does not meet the requirement of Rule 6.
Pahalman Subba and Others* v. *The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-A***

Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 6 – Rule 6 (2) prescribes that only any other Member of the Assembly may make petition in relation to a Member in writing to the Speaker – We are of the view that Rule 6 (2) does not achieve the object of the Tenth Schedule, as examined by the Supreme Court in various cases and as such it may be read down making clear that not only a Member of the Legislative Assembly but any other person interested is competent to make a reference (petition) to the Speaker for initiating a process of disqualification of a Member, who has incurred it under the Tenth Schedule. The other provisions of Rule 6 are mere procedural and do not obstruct or impede the objective of the Tenth Schedule.
Pahalman Subba and Others* v. *The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-D***

Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 7 – Rule 7 (1) provides that the

Speaker shall consider whether the petition complies with the requirements of the Rule 6. Rule 7 (2) contemplates dismissal of the petition if it is not in accord with Rule 6. Sub-rule (3) (4) (5) (6) (7) and (8) of Rule 7 deals with the requirements after admission of petition while adjudicating the issue – Indisputably, the procedural rules are in the domain of procedure and may not supplant the constitutional provision. If there is any irregularity in compliance of the procedure, the defect is curable and the petitioners are entitled to an opportunity to make good the defect before rejecting the petition under Rule 7 (2). Thus, Rule 7 (2) is also read down to this effect that if a petition fails to comply with the requirement of Rule 6, the petitioner be granted an opportunity to cure the defect before dismissing the petition at the threshold.

Pahalman Subba and Others* v. *The Hon'ble Speaker, Sikkim Legislative Assembly and Others ***742-E***

Notification No. M(3)/(55)/GEN/DOP/PT.II dated 3rd July 2017 of the Department of Personnel, Administrative Reforms, Training and Public Grievances, Government of Sikkim – Prescribing Uniform Upper Age Limit of 40 years for all Communities of the State services/posts to be Filled up by Direct Recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim – Indisputably, the post of Commissioner for employees compensation, which is termed as Labour Commissioner, is a creation of Parliament enactment, not under the State Government but under the Central Government. The contention of the respondents that this notification is inapplicable deserves acceptance and I do not find any reason to the contrary. No other documents have been produced, in support of the contention that the upper age limit of 40 years is prescribed for Labour Commissioner also. Moreover, looking into the requirement of requisite qualification, 40 years cannot be fixed as upper age limit, thus the upper age limit appears to be for those services wherein appointment is made directly by the young freshers – S. 20 of the Act of 1923 contemplates experienced person having put in some qualifying services as Judicial Officer or as a Gazette Officer or in legal profession. This requirement is for a senior seasoned man, wherein the upper age limit of 40 years cannot be prescribed.

Sushmita Dong* v. *State of Sikkim and Others ***711-D***

SLR (2018) SIKKIM 603
(Before Hon'ble the Chief Justice)

Review Pet. (C) No. 01 of 2016

Shri Kharga Bahadur Gurung and Others ….. PETITIONERS

Versus

Shri Nirmal Gurung ….. RESPONDENT

For the Petitioners: Mr. B. Sharma, Sr. Advocate with Mr. Sajal Sharma, Advocate.

For the Respondent: Mr. A. Moulik, Sr. Advocate with Ms. Kessang Diki Bhutia, Mr. Ranjit Prasad and Ms. Kesang Choden Tamang, Advocates

Date of Order: 4th June 2018

A. Code of Civil Procedure, 1908 – Order 47 Rule 1 – Review Jurisdiction – The petitioners have attempted to argue the case on merit, afresh seeking re-appreciation of evidence on facts, which is impermissible in review. The petitioners have not brought any facts into notice, which establishes that there was an error apparent or some mistakes or palpable error which is self evident in the Judgment sought to be reviewed in this petition.

(Para 14)

Petition dismissed.

Chronological list of cases cited:

1. Des Raj and Others v. Bhagat Ram (deceased by LRs) and Others 1, AIR 2007 SC (Supp) 512.
2. Mr. Nar Bahadur Khatiwada v. State of Sikkim and Another, Review Pet. No. 06 of 2015.
3. Moran Mar Basselios Catholicos and Another v. Most Rev. Mar Poulose Athanasius and Others, AIR 1954 SC 526.

ORDER

Satish K. Agnihotri, J.

Seeking review of the Judgment dated 26th November 2015 rendered by this Court in RFA No. 10 of 2013, whereby the first appeal was dismissed confirming the Judgment and Order dated 30th March 2013 rendered in Title Suit No. 13 of 2012 by the Court of District Judge, Special Division-II, East Sikkim at Gangtok, the instant review petition is filed.

2. The facts, in brief, relevant for consideration of the instant review petition are that the respondent/plaintiff filed a suit for recovery of possession, eviction and other consequential benefits claiming a decree for recovery of khas possession of the suit property described in the Schedule 'B' of the plaint, after removing the defendants/ review petitioners herein and also a decree for damages, wherein the following issues were framed:-

> "1. Whether the suit of the plaintiff is maintainable?
>
> 2. Whether the suit barred by Law of Limitation?
>
> 3. Whether the suit of the plaintiff is bad for non-joinder of necessary parties?
>
> 4. Whether the counter-claim made by the defendants is barred by the Principles of Resjudicata and Estoppel?
>
> 5. Whether the schedule 'A' land as described in the plaint is the ancestral property of the parties? If so, whether the same is liable to be partitioned?
>
> 6. Whether the defendants have perfected their rights over the schedule 'B' land through adverse possession?
>
> 7. To what relief or reliefs, if any, are the parties entitled?"

3. Learned District Judge holding the suit as maintainable, decided issue No. 2 in favour of the plaintiff/ respondent herein, that the suit was not time barred under law of limitation. On the issue No. 3 as to whether the suit of the plaintiff was bad for non-joinder of necessary parties, it was held against the defendants. On issue No. 6, it was held that the defendants have not perfected their rights over the suit property. On issue No. 5, it was held

that the same issue came up for consideration earlier in Civil Suit No. 65 of 1997 for partition of Schedule 'A' property, wherein the Civil Judge held that the suit property was self-acquired property of Bhaktay Gurung, which he purchased in auction sale. It was stated that the said finding was upheld in Civil Appeal No. 05 of 2001 on 26th March 2002 in the first appeal. Accordingly, the Schedule 'A' property was held as self-acquired property. The learned District Judge further observed that the issue has attained finality, as Judgment dated 26th March 2002 rendered by the First Appellate Court was taken in the second appeal, which was dismissed on 02nd July 2002. The Special Leave Petition filed thereagainst in the Supreme Court of India was also dismissed on 30th September 2002. Thus, the issue was also hit by the rule of *res judicata,* holding that the Schedule 'A' property was not an ancestral property. Issue No. 4 was related to the counter claim which was, accordingly, considered along with issue No.5. Resultantly, the suit was disposed of, decreeing the suit denying the counter claim made by the defendants.

4. Feeling aggrieved, the defendants have preferred a Regular First Appeal being RFA No. 10 of 2013. The High Court by Judgment dated 26th November 2015 upheld the findings and decree passed by the learned District Judge and dismissed the appeal.

5. Feeling dissatisfied, the instant review petition is filed by the appellants/defendants solely on the ground that issue No. 5 as framed in the trial Court was not considered and decided in the same terms and the learned Single Judge of the High Court also committed an apparent error by not appreciating the issue No. 5 properly in its term framed by the trial Court. It is also pleaded that the issue as to whether the suit was barred by law of limitation was also not justly considered by the trial Court as well as the High Court in the first appeal. Mr. B. Sharma, learned Senior Counsel appearing for the review petitioners would contend that the learned trial Court has completely overlooked the wording of the issue which seeks finding on the issue as to whether the Schedule 'A' land as described in the plaint was the ancestral property of the parties, if so, whether the same was liable to be partitioned. The learned trial Judge has wrongly relied on the decision of the Civil Judge in Civil Suit No. 65 of 1997, wherein it was held as self-acquired property of Bhaktay Gurung, but there was no finding as to whether the said Schedule 'A' land as described in the plaint was ancestral property of the parties or not. Thus, there is apparent error on the

face of it, as the issue was fully ignored by the learned trial Court as well as the High Court in the first appeal.

6. On the issue of limitation, Mr. B. Sharma, learned Senior Counsel would contend that the trial Court has not appreciated the scope of Section 3 and Section 9 of the Limitation Act while holding that the suit preferred by the plaintiff/respondent herein was not barred by limitation. The review petitioners seek appreciation of factual evidence in the case.

7. Mr. Sharma, referring to the observation of the Supreme Court in paragraph 24 of the Judgment rendered in *Des Raj & Ors. v. Bhagat Ram (deceased by LRs) & Ors.*[1], submits that mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. The plaintiff has to establish that his possession on the property in a suit was exclusive, which was not done in the case on hand.

8. Countering the submissions, Mr. A. Moulik, learned Senior Counsel appearing for the respondent/plaintiff would submit that the review petition seeks to challenge the Judgment and Decree rendered by the trial Court. There is no challenge to the observations made by this Court in Regular First Appeal. It is further contended that the issue as to whether the Schedule 'A' land as stated in the plaint was an ancestral property has been settled way back in the earlier suit. Once it is held that the property was self-acquired property, it was not necessary to reiterate that it was not an ancestral property. Holding that the land in question was self-acquired property clearly negates the contention of the petitioner that it was an ancestral property and the issue attained finality. Thus, the trial Judge has rightly dismissed the claim of the defendants applying the principle of *res judicata* also. Mr. Moulik would further contend that the limitation issue has clearly been considered and found that the suit was not barred by limitation, which does not need further appreciation in review jurisdiction.

9. This Court in *Mr. Nar Bahadur Khatiwada vs. State of Sikkim & Anr.*[2] decided on 01st December 2017, on examination of various cases wherein the Supreme Court had deliberated and examined the ambit and scope of review jurisdiction, held as under: -

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[1] AIR 2007 SC (Supp) 512
[2] Review Pet. No. 06 of 2015

"22. On studied examination of the aforestated decisions laid down by the Supreme Court, the following principles for maintainability of review are discernible:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Review may be entertained when there is some mistake or palpable error which is self-evident and is not detectable by the long drawn process of reasoning.

(iii) The error must strike at mere looking of the record.

(iv) Jurisdiction of review is not exercisable merely on the ground that the decision is erroneous.

(v) There should be apparent grave miscarriage of justice.

(vi) On mere ground that other view on the subject is possible, the review cannot be maintained. In other words, power of review can be invoked for correction of mistake but not to substitute a view.

(vii) In a review petition, it is impermissible to reappreciate the evidence to reach a different conclusion. Review is not a rehearing of a original matter.

(viii) Review will be maintainable on discovery of new and important fact or evidence which after the exercise of due diligence was not within the knowledge of the petitioner or could not be brought by him.

(ix) Review may be exercised for application of wrong authority or law that falls within the ambit of error apparent on the face of the record.

(x) Sufficient reasons, as specified in Order 47 Rule 1 CPC has to be read

analogous to those specified in the statutory provision.**"**

10. Applying the well-settled principles of law on scope of review jurisdiction to the facts of the instant case, it is noticed that the issue as to "whether the said Schedule 'A' land as described in the plaint is the ancestral property of the parties" came into consideration in the first appeal i.e. RFA No. 10 of 2013 in the High Court. The learned Single Judge in RFA No. 10 of 2013 has examined the issue at length and held as under:-

> "33. In the earlier Civil Suit (CS No. 65/1997) the Appellants-Defendants herein (except Appellant-Defendant No. 6) had claimed a decree for declaration that they had equal ½ right title and interest in the properties of Schedule-A; a decree directing the partition of the properties mentioned in Schedule-A by metes and bounds; and issuance of perpetual injunction restraining Defendant No. 1, Respondent-Plaintiff herein, or any other person claiming or acting under him, from disturbing the possession of the Appellants and many other reliefs. The main reliefs claimed by the Appellants in the earlier Civil Suit were exactly the same which they claimed vide their counter-claim in the instant suit. The counter-claim made by them in the instant suit has been quoted in paragraph 3.8 (supra). In earlier Civil Suit, the claim of the Appellants was examined by a competent court between the same parties and a finding was recorded that Ganja Bahadur Gurung had separated from his father during his life time after realizing some amount in lieu of his share in his father's property. This position remains undisturbed in First Appeal and Second Appeal and the SLP filed against the rejection of Second Appeal was dismissed by the Supreme Court. Thus, the question relating to the source of title allegedly derived by the Appellants in their successory rights attained finality between the parties in the previous Civil Suit filed for the same reliefs, which they claimed in their counter-claim. In

> such circumstances, the counter-claim made by the Appellants-Defendants in the instant suit on the same strength of their right and title, thus, was not maintainable on the principles of res judicata and the learned trial Court was fully justified in holding so."

11. On examination, I do not find any mistake or palpable error, which is self evident, even on long drawn arguments advanced by the learned Senior Counsel appearing for the review petitioners. Extended elaborate arguments put forth by the Senior Counsel for the review petitioners does not detect any error, as pleaded by the review petitioners, warranting review of the Judgment dated 26th November 2015. It is established that the Schedule 'A' land was an issue in Civil Suit No. 65 of 1997 which was held as self-acquired property of Bhaktay Gurung, on his purchase on auction sale. This finding stood confirmed in the first appeal, second appeal and ultimately in the Special Leave Petition preferred by the defendants, except defendant No. 9, thus, the issue as to whether the Schedule 'A' land as described in the plaint was the ancestral property of the parties is settled and no further argument is necessary on the purported ground that there is an error in appreciation of the facts, thus, the review is rejected on this ground.

12. On the issue of limitation, the High Court has examined at length in the first appeal and held as under:-

> "16. In the instant case, the Appellants-Defendants throughout admitted that they were the co-sharers of the suit – property along with the Respondent-Plaintiff and they raised the plea of adverse possession for the first time when they filed their written statement on 18.08.2005. Thus, Article 65 will apply and the period for claiming adverse possession shall begin to run from 18.08.2005 when the Appellants-Defendants raised the above plea for the first time. The above position has also been highlighted by the Supreme Court in ***Des Raj*** (supra), relied by learned Counsel for the Appellants-Defendants, in which it was laid down that if a hostile title was asserted at any point of time, then the period of limitation shall begin to run from the

> said date and time and pendency of litigations between the parties would never stop the running of limitation. In the instant case, as I have already said, upto the Supreme Court the Appellants-Defendants claimed themselves to be the co-sharers and they raised the plea of adverse possession for the first time in the instant suit on 18.08.2005. Thus, the instant suit filed by the Respondent-Plaintiff on 16.06.2005 was neither barred by limitation nor the Appellants-Defendants had perfected their title by way of adverse possession."

13. On appreciation of the facts as put forth by the learned Senior Counsel in the review petition, I do not find any error on application of legal provisions which falls within the ambit of error apparent on the face of the record. Reliance of the review petitioners in *Moran Mar Basselios Catholicos and another vs. Most Rev. Mar Poulose Athanasius and others*[3], does not alter the well-settled legal principles on exercise of review jurisdiction, wherein on examination of the facts involved therein, the Supreme Court held that there was certainly an error apparent on the face of the record. The facts involved in the instant case are distinct and different.

14. The petitioners have attempted to argue the case on merit, afresh seeking re-appreciation of evidence on facts, which is impermissible in review. The petitioners have not brought any facts into notice, which establishes that there was an error apparent or some mistakes or palpable error which is self evident in the Judgment sought to be reviewed in this petition.

15. On studied and anxious examination of the pleadings and the submissions put forth by the learned Senior Counsel appearing for the parties, I do not find any merit in the review petition, warranting interference.

16. Consequently, the review petition is dismissed. No order as to costs.

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[3] AIR 1954 SC 526

SLR (2018) SIKKIM 611

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

W.P. (C) No. 55 of 2017

Sri Avantika Contractors (I) Ltd. ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner: Mr. B. S. Banthia, Mr. Vaibhav Mishra, Mr. Sushant Subba, Mr. Passang Tshering Bhutia, and Mr. Ugen Lepcha, Advocates.

For the Respondent: Mr. Karma Thinlay, Central Govt. Counsel with Mr. Thinlay Dorjee Bhutia, Advocate.

Date of decision: 4th June 2018

A. Constitution of India – Article 226 – Writ Jurisdiction – It is evident that the present dispute relates to a contractual matter where there are several and serious disputed questions of fact. The present dispute necessarily involves examining the detailed facts which are disputed and the terms of the contract and whether the act of the Respondents to issue the fresh tender after the extended period of the said contract had come to an end amounted to a breach of the said contract which can be only examined in a Civil Court – Although there is no absolute bar to the maintainability of a Writ Petition even in contractual matters or where there are disputed questions of facts, it is evident that in the present case no issue of public law character has been raised. The disputed questions of facts raised herein are of complex nature and require oral evidence for their determination and cannot be determined in present proceeding under Article 226 of the Constitution of India.

(Para 12)

B. Constitution of India – Article 226 – Writ Jurisdiction – It is well settled that Writ Petition is not maintainable to avoid contractual obligations. Occurrence of commercial difficulty, inconvenience or hardship in performance of the condition agreed to in the contract can provide no justification in not complying with the terms of the contract which the parties had accepted with open eyes. It is trite law that a writ can be issued where there is executive action unsupported by law and there is a denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of the principles of natural justice. It is also settled law that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

(Para 12)

C. Constitution of India – Article 226 – Writ Jurisdiction – This Court is of the firm view that the only substantial prayer being the prayer for directing the Respondents to clear all pending outstanding dues along with interest to the Petitioner cannot also be examined in the writ jurisdiction of this Court – The Petitioner may take recourse to remedy under the contract or such other remedies provided under the ordinary civil law as may be advised.

(Para 14)

Petition dismissed.

Chronological list of cases cited:

1. Kisan Sahkari Chini Mills Ltd. and Others v. Vardan Linkers and Others, (2008) 12 SCC 500.

2. Joshi Technologies International INC v. Union of India and Others, (2015) 7 SCC 728.

JUDGMENT

Bhaskar Raj Pradhan, J

1. In re: ***Kisan Sahkari Chini Mills Ltd. & Ors. vs. Vardan Linkers & Ors.***[1] the Supreme Court would lay down the law with regard to interference in contractual matters under Article 226 of the Constitution of India:

> ***"23.*** *If the dispute was considered as purely one relating to existence of an agreement, that is, whether there was a concluded contract and whether the cancellation and consequential non-supply amounted to breach of such contract, the first respondent ought to have approached the civil court for damages. On the other hand, when a writ petition was filed in regard to the said contractual dispute, the issue was whether the Secretary (Sugar), had acted arbitrarily or unreasonably in staying the operation of the allotment letter dated 26-3-2004 or subsequently cancelling the allotment letter. In a civil suit, the emphasis is on the contractual right. In a writ petition, the focus shifts to the exercise of power by the authority, that is, whether the order of cancellation dated 24-4-2004 passed by the Secretary (Sugar), was arbitrary or unreasonable. The issue whether there was a concluded contract and breach thereof becomes secondary. In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the petitioner to the remedy of a civil suit.*
>
> *Even in cases where the High Court finds that there is a valid contract, if the impugned*

[1] (2008) 12 SCC 500

*administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a civil court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full-fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action.***"***

2. In re: ***Joshi Technologies International INC vs. Union of India & Ors.***[2] the Supreme Court would examine its various judgments on the legal position as to the maintainability of the Writ Petition in a case arising out of contractual obligation and hold:

"69. *The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:*

[2] (2015) 7 SCC 728

69.1. *The Court may not examine the issue unless the action has some public law character attached to it.*

69.2. *Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.*

69.3. *If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.*

69.4. *Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.*

70. *Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:*

70.1. *At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.*

70.2. *State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.*

70.3. *Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.*

70.4. *Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.*

70.5. *Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.*

70.6. *Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.*

70.7. *Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.*

70.8. *If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.*

70.9. *The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to*

see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. *Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.*

70.11. *The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.***"**

3. The present Writ Petition assails the act of the Respondents to issue tender bid No.12/CE/IBBZ-II/SE/BRPC/EE/BRPD-I/2017-18 (tender bid No.12) for construction of the ITBP road from Lugnak-La to Muguthang in Sikkim during the subsistence of the contract entered between the Petitioner and the Respondents for construction of ITBP 31 Kilometres road from Thangu to Muguthang (the said contract). It is the case of the Petitioner that the construction of the road contemplated vide tender bid No.12 was part of the said contract. Although, originally the Petitioner had sought for a prayer of stay of the tender bid No.12 and for direction to the Respondents to clear the pending outstanding dues with interest to the Petitioner due to certain subsequent events an amendment was sought for and on being granted the amended Writ Petition now seeks the following prayers:

"a) *Issue a Writ in the nature of* ***MANDAMUS*** *and/or any other appropriate Writ/Order/*

Direction of like nature thereby directing the Respondents to stay the tender bid number 12/CE/IBBZ-II/SE/BRPC/EE/BRPD-I/2017-18 for construction of ITBP road Lugnak-La to Muguthang in Sikkim in relation to earth work, drainage and protection work, culverts, bituminous surfacing works and other appurtenant structures from Lugnak-La (altitude 16,500 ft.) to Rd 31.40 km (Muguthang) (altitude 14,000 ft.) (length 11.40 km approx.).

b) *Issue Writ in the nature of **MANDAMUS** and/or any other appropriate Writ/Order/ Direction of like nature thereby, directing respondents to clear all pending outstanding dues along with interest to the Petitioner.*

c) *Issue writ in the nature of **MANDAMUS** and/or any other appropriate Writ/Order/ Direction of like nature thereby directing the Respondents to stay the re-tender of construction of road from Thangu to Muguthang via NIT No. 16/CE/IBBZ-II/SE/ BRPC/EE/BRPD-I/2017-18 which is in violation of the 06.12.2017 order of this Hon'ble High Court.*

d) *Issue writ in the nature of **MANDAMUS** and/or any other appropriate Writ/Order/ Direction of like nature thereby directing the Respondents not to invoke Bank Guarantees vide letter dated 12.01.2018 and prohibiting the respondents to take coercive action against the Petitioner vis-á-vis the contract already awarded to the Petitioner on which the Petitioner is currently working on until the disposal of the Writ Petition.*

e) *Pass any other order(s) as this Hon'ble Court may deem fit, in the facts and circumstances of the case, in the interest of justice.***"**

4. It is seen that the scope of the present Writ Petition is limited. Prayer **a)** and **c)** seeks stay of tender bid No. 12 and tender bid No.16 respectively and prayer **d)** seeks an interim direction upon the Respondents not to invoke the bank guarantees until the disposal of the Writ Petition.

5. In so far as the first relief sought for is concerned for stay of tender bid No.12 which was floated on 12.09.2017 the said tender was subsequently cancelled by the Respondents and therefore the said prayer has become infructuous.

6. The second relief sought for seeks a direction upon the Respondents to clear all pending outstanding dues along with interest to the Petitioner. Except for stray references of unpaid bills no further specific details have been provided by the Petitioner in the amended Writ Petition. In the amended counter-affidavit the Respondents pleads that the bill raised by the Petitioner was exorbitantly high and they withdrew the same after protracted correspondence in 2017. The Respondents further alleges that fake measurement had been provided by the Petitioner and the measurement was not found in order in terms of executed quantity. It is settled law that money claims particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances. The Petitioner has not made out any case of exceptional circumstance in the present Writ Petition. The Petitioner is fully within its rights to realize their outstanding dues, if any, under the terms of the said contract they had entered into with the Respondents or by any other legal means as may be advised.

7. The third relief sought for seeks a stay of the re-tender of construction of road from Thangu to Muguthang via NIT No.16/CE/IBBZ-II/SE/BRPC/EE/BRPD-I/2017-18 (tender bid No.16) since as per the Petitioner the floating of the tender bid No.16 violates the order of this Court dated 06.12.2017. The order dated 06.12.2017 passed by this Court reads as under:

"IA No. 03/2017

This is an application, whereby and whereunder an order dated 27th November 2017 passed by the Supreme Court in Petition (s) for Special Leave to Appeal (C) No (s). 30648/2017 (Sri Avantika Contractors (I) Limited vs. Union of India & Others) was brought to the notice of this Court.

It appears that the petitioner feeling aggrieved by the order dated 11th October 2017, wherein notice was issued to other side and no order was passed in I.A., awaiting response of the respondents on interim application (I.A. No.02/ 2017), approached the Supreme Court. The Supreme Court, considering the submissions made by the petitioner, passed the following order:-

> *"Taking into consideration the aforementioned statement of learned senior counsel and having regard to the facts of the case, without expressing any opinion on the merits of the case, we request the High Court to consider the prayer made by the petitioner for interim protection in the pending Writ Petition and pass appropriate orders, within a period of two weeks from today."*

The respondents have field counter affidavit on 01st December 2017, enclosing several letters, especially letters dated 28th October 2017 and 10th November 2017, wherein it is alleged that the petitioner had suspended the works and demobilized the machineries and equipments without permission of the Department.

On query, as to whether the said letters were responded to, learned counsel appearing for

the petitioner submits that he could not seek instructions on this issue from the petitioner and, as such, some time is required to obtain necessary instructions and file rejoinder, if any.

The matter is taken up with consent of the parties for final hearing. However, on account of lack of instructions from the parties, the hearing could not be completed.

On perusal of the documents, it is noticed that the period of contract has come to an end on 30th November 2017. Learned counsel for the petitioner would contend that before initiating the new tender process, no notice under clause 12 read with clauses 15 and 16 was served on him. Prima facie, it is not found that on completion of the time schedule, notice for termination of work is required. However, it requires examination.

Learned Senior Counsel appearing for the respondents, in all fairness, would contend that during this season normally no work is possible on the site on account of inclement weather. The respondents have already floated tender for engagement of a new contractor, as the work done by the petitioner in the past was slack and the petitioner had not maintained the time schedule.

Be that as it may, without going deep into the disputes, as the petitioner does not have full instructions from his client on several issues, the matter is adjourned for further hearing to 08.03.2018.

In the meantime, the respondents may proceed with the tender process, but final decision shall not be taken till the next date of hearing.

…….

*06.12.2017***"**

8. A perusal of the said order dated 06.12.2017 makes it evident that it was passed in I.A. No. 03 of 2017. In I.A. No. 03 of 2017 the Petitioner apprehending that tender bid No.12 would be awarded before the next date of hearing rendering the present Writ Petition infructuous a prayer was sought for preponement of the hearing of the present Writ Petition as well as I.A. No. 02 of 2017 and to consider the prayer for interim relief. I.A. No. 02 of 2017 sought for stay of the tender bid No.12. Evidently therefore, the Petitioner had specifically complained of its apprehension that the Respondents would complete the tender process of tender bid No.12 before the hearing to which this Court had directed that the Respondents may proceed with the said tender process but final decision shall not be taken till the next date of hearing. The tender bid No.12 was subsequently cancelled. When the Petitioner became aware of the issuance of the tender bid No.16, I.A.No.6 of 2018 was filed before this Court on 05.03.2018 seeking an amendment of the Writ Petition which was allowed by this Court vide order dated 06.04.2018. The amended Writ Petition seeks a prayer to stay the tender bid No.16 on the sole ground of violation of the order dated 06.12.2017. Tender bid No.16 which was admittedly floated on 21.01.2018 was not even an issue before this Court when the said order dated 06.12.2017 was passed. Thus it is evident that the issuance of tender bid No.16 by the Respondents did not violate the order dated 06.12.2017 passed by this Court and consequently no stay can be granted against the issuance of tender bid No.16 on the ground that it violated an interim order dated 06.12.2017 passed by this Court as a final relief in the Writ Petition.

9. A thorough scrutiny of the pleadings and the documents filed by the Petitioner as well as the Respondents makes it evident that the issues sought to be raised in the present Writ Petition pertains to the said contract admittedly executed on 21.01.2011 and the date of completion of the project was 20.07.2013. Admittedly again the said date of completion of project was extended on several occasions till November 2017. The pleadings in the Writ Petition are replete with factual statements regarding various hindrances and difficulties faced by the Petitioner in the course of the execution of the contract. Hindrances regarding change in alignments by the Respondents, failure to provide the alignments on time, increase in volume of work, climatic change due to weather at the site project, milestones shifting, delay in payment of bills, pending bill not paid, delay in sanction of deviated item rates, issues of minus extra items, issues of illegal

recoveries, issue of approval of structures and issue of access to site due to the altitude of work project have been cited by the Petitioner in the Writ Petition. It is the case of the Petitioner that due to the aforesaid reasons the work could not be completed as per schedule and therefore, mile stone had to be shifted time and again and date of completion of the project shifted several times till November, 2017.

10. The Respondents have filed a detailed amended counter-affidavit in which it has been pleaded that initially the Petitioner was awarded construction of the ITBP road from Thangu to Muguthang in North Sikkim vide contract dated 21.01.2011 after the Respondents had accepted the bid of the Petitioner vide letter dated 30.12.2010. It is stated that the time of completion as per the said contract was 30 months w.e.f. 21.01.2011 and the date of completion was 20.07.2013. It is the Respondents case that at the time of signing of contract, the details of the work including surfacing, formation cutting, culverts, breast wall, retaining wall, hill side drain, cross section of road and road alignments etc. formed part and parcel of the contract and was set out with the contract agreement which was duly accepted by the Petitioner and therefore, the Petitioner had knowledge about the work specifications and the location in detailed right from the inception. It is the case of the Respondents that after 9.6 kilometres of the total 31 kilometres ITBP road at North Sikkim, the Petitioner deviated from the alignment provided by the Respondents till 18 kilometres which fact was brought to the knowledge of the Respondents in December 2015. The deviation from 9.6 to 18 kilometres was approved by the Respondent No.4 and from Kilometres 18 to 30 (Muguthang) the Respondents provided the Petitioner with the new alignment on 07.06.2017. The Respondents plead that the Petitioner had not achieved the milestones as prescribed in the contract and therefore, necessitating shifting of the milestones. It is the case of the Petitioner that shifting of the milestones was to be re-scheduled on the proposal submitted by the Petitioner to the Respondents and the same was approved after due verification of the records. The Respondents pleads that the Petitioner moved the proposal five times which were duly approved by the Respondents as the first milestones could not be achieved by the Petitioner the second and the third milestones would automatically shift. It is the case of the Respondents that the Petitioner has failed to achieve the first milestone as per the contract. The Respondents further avers that the Petitioner had requested for extension of time on five different occasions

and the Respondents had approved the same on the firm belief that the Petitioner would complete the work but they failed to do so. It is the case of the Respondents that the tender amount was valued at Rs.95,77,72,163/- (Rupees ninety five crores seventy seven lakhs seventy two thousand one hundred sixty three) out of which the Respondents have made payment of Rs.60.54 crores to the Petitioner so far for gross work done on the road from Thangu to Muguthang measuring 31 kilometres including price escalation, statutory recoveries as per the terms and conditions of the contract and mobilization advance to the Petitioner for machineries and plants. The Respondents further pleads that despite the series of re-scheduled milestones on the request made by the Petitioner the Petitioner failed to achieve the milestones and the Respondents having no other alternative floated a new tender to expedite the work since the road is required for national security. It is the Respondents case that the Petitioner has completely failed to perform its work as required under the contract and also within the extended time thereby hampering the work of national security as the road connectivity between Lugnak-La to Muguthang is of vital importance for movement of army during emergency and time and again the office of the Respondents have been receiving directions from the Ministry of Home Affairs to expedite the work at the same time the Army, National Security Agency and Prime Minister's Office have been stressing that the road be completed at the earliest i.e. 2019. The Respondents submits that various letters were issued to the Petitioner regarding slow progress of work and to accelerate the pace of work but despite such letters the Petitioner has failed to achieve the milestones as extended. Numerous such letters have been annexed by the Respondents with the amended counter-affidavit. The averments regarding the hindrances and difficulties claimed by the Petitioner in the amended Writ Petition filed by the Petitioner have been specifically denied. The Respondents to the contrary submits that the so called difficulties mentioned by the Petitioner are all after thoughts as the Petitioner was well aware of the site location and condition 9 of the General Specifications and Condition of the Contract Agreement requires the contractors to inspect the site for the work and other requirements and get familiarized beforehand. The Respondents also contest the fact pleaded by the Petitioner that it was the Respondents who is to be blamed for the milestones shifting. The Respondents avers that show cause notice was issued to the Petitioner on his failure to execute the work as per the time schedule. As per the Respondents in spite of the assurance by the

Petitioner in the meeting chaired by Additional Director General (Border) on 24.09.2016 held at Zonal office at Siliguri, the Petitioner could achieve formation cutting up to road 17 kilometres only. As per the Respondents the Petitioner made commitment in the meeting to achieve the formation cutting up to 27 kilometres by end of August 2017 and bitumen surfacing up to 25 kilometres by the end of October 2017. However, the Petitioner could not achieve 17 kilometres formation cutting till date and no work of bitumen surfacing has even started. It is the case of the Respondents that although time and again the Petitioner's request for rescheduling milestones had been considered positively and milestones shifted the Petitioner failed to achieve the same. It is the case of the Respondents that in such circumstances they were compelled to issue a show cause notice dated 14.12.2017 and after receipt and consideration of the reply by the Petitioner dated 21.12.2017 determine the contract on 09.01.2018. The Respondents submits that it was only after the determination of the contract on 09.01.2018 that the Respondents wrote a letter to the Bank for encashment of bank guarantees dated 12.01.2018 and thereafter floated tender bid No.16 on 21.01.2018 for balance work of Thangu to Lugnak-La (length 20 kilometres).

11. It is the case of the Respondents that the period of contract having ended on 30.11.2017 a new tender process had been initiated by the Respondents. It is specifically averred that the Respondents in compliance with the order passed by this Court on 06.12.2017 has not awarded the contract for the new tender floated.

12. In the amended counter-affidavit the Respondents portrays their version about the alignments and modifications of different stretches of the 31 kilometres of ITBP road and the responsibilities of the Petitioner with regard to the same. It is evident that the present dispute relates to a contractual matter where there are several and serious disputed questions of fact. The present dispute necessarily involves examining the detailed facts which are disputed and the terms of the contract and whether the act of the Respondents to issue the fresh tender after the extended period of the said contract had come to an end amounted to a breach of the said contract which can be only examined in a Civil Court. Although there is no absolute bar to the maintainability of a Writ Petition even in contractual matters or where there are disputed questions of facts it is evident that in the present case no issue of public law character has been raised. The

disputed questions of facts raised herein are of complex nature and require oral evidence for their determination and cannot be determined in present proceeding under Article 226 of the Constitution of India. It is well settled that Writ Petition is not maintainable to avoid contractual obligations. Occurrence of commercial difficulty, inconvenience or hardship in performance of the condition agreed to in the contract can provide no justification in not complying with the terms of the contract which the parties had accepted with open eyes. It is trite law that a writ can be issued where there is executive action unsupported by law and there is a denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of the principles of natural justice. It is also settled law that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

13. The last relief sought for which also requires examination is the penultimate prayer seeking a direction upon the Respondents not to invoke the bank guarantees vide letter dated 12.01.2018 and prohibiting the Respondents to take coercive action against the Petitioner vis-à-vis the contract already awarded to the Petitioner on which the Petitioner is currently working until the disposal of the Writ Petition. Evidently this is an interim prayer made by the Petitioner. Vide order dated 25.01.2018 this Court in I.A. No.04 of 2018 ordered status quo in respect of bank guarantees till the next date of hearing which order continues till date. Since the Writ Petition is being finally disposed off the interim order dated 25.01.2018 is required to be vacated as all the prayers prayed for by the Petitioner in the amended Writ Petition have been found to be not maintainable.

14. This Court has heard the detailed submissions made by Mr. B. S. Banthia, Learned Counsel for the Petitioner and Mr. Karma Thinlay, Learned Central Government Advocate for the Respondents. This Court has also examined the pleadings in the amended Writ Petition, the amended counter-affidavit and the rejoinder along with all the documents filed by the Petitioner as well as the Respondents including the additional documents filed by the Petitioner. On such examination this Court is of the firm view that the Petitioner has failed to make out any case for

interference in the writ jurisdiction of this Court. This Court is also of the firm view that the only substantial prayer being the prayer for directing the Respondents to clear all pending outstanding dues along with interest to the Petitioner cannot also be examined in the writ jurisdiction of this Court and the Petitioner may take recourse to remedy under the contract or such other remedies provided under the ordinary civil law as may be advised.

15. The Writ Petition is dismissed. No order as to costs.

SLR (2018) SIKKIM 629

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

Crl. A. No. 17 of 2016

State of Sikkim **…..** **APPELLANT**

Versus

Suren Rai **…..** **RESPONDENT**

For the Appellant: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia Addl. Public Prosecutors with Mr. S.K Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors.

For the Respondent: Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate.

Date of decision: 4th June 2018

A. Code of Criminal Procedure – Investigation – The truth of what transpired that rainy night when a young 27 year old youth lost his life and that too by multiple assaults below the skull and on the neck would be accessible to the Investigating Officer within the confines of the little temporary shed strewn with evidence which had the propensity to narrate the gruesome story. The voiceless cry for justice of the deceased could have been heard from the blood soaked clothes, GIS sheets, profile mat, jute sack, slippers, track pants and the quilt recovered and seized. An investigative mind with a determination to do justice and seek the truth would do so from each of these evidences. The Investigating Officer should be mindful of what is commonly known as *"Locard's Principle"* formulated by Dr. Edmond Locard. Simply put it is: *"Every contact leaves a trace"*. This principle explained means that the perpetrator of a crime will bring something into the crime scene and leave with something from it and that both can be used as forensic evidence. We would believe that forensic evidence and not limited to finger prints alone would be

available at the scene of crime, which, it is quite obvious, the perpetrator had not even bothered to tamper. The scene of crime and in this case the little temporary shed, immediately sanitized from any outside interference, would be a place where the perpetrator would have stepped, touched and been in physical contact with the material objects available and therefore, rich with both biological and physical evidence. The biological evidence like blood and hair seen at this place of occurrence and seized are required to be not only preserved carefully and scientifically but also examined in right earnest to come to a definite conclusion before time chooses to erode the evidence and fog the vision. Those inanimate objects would have witnessed silently the gruesome act and could serve as witnesses to the perpetrator committing homicide. Similarly, the scene of crime ought to be scanned for finger print and foot prints which would obviously be available. The physical evidence would never lie or commit perjury or forget. The Investigating agencies human failure alone in finding it, preserving it and studying it would allow it to remain inanimate and voiceless – We would believe that the forensic evidence would be decipherable with the use of scientific methods and technology. We would desire, nay implore the State to introduce and make available to the investigative agencies new, updated scientific methods and technologies for forensic examination although we are certain that we would not err even if we were to adjure the State to do so.

(Para 20)

B. Indian Evidence Act, 1872 – Circumstantial Evidence – The circumstances from which the conclusion of the guilt is to be drawn must be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and no other – The circumstances should be of conclusive nature and should exclude every possible hypothesis except that it is the accused and he alone who is guilty of murder. The chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and the Court must be judicially confident that it is the accused who is guilty and the heinous act has been perpetrated by him and none other.

(Para 23)

C. Indian Evidence Act, 1872 – S. 27 – S. 27 makes information received from a person accused of any offence even if in the custody of Police Officer and whether it amounts to confession or not admissible to the extent it relates distinctly to the fact thereby discovered in consequence of information received from the said person – Disclosure statement is required to be voluntary in order to be admissible. Involuntariness has an element of compulsion which has been held prohibited although the mere recording of the disclosure statement in the custody of police would not make it inadmissible.

(Paras 68 and 69)

D. Indian Evidence Act, 1872 – S. 106 – Burden of Proof – When any fact is especially within the knowledge of any person, the burden of proving the fact is upon him.

(Para 76)

E. Criminal Trial – Last Seen Theory – It is trite that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. However, where the other links would be satisfactorily made out and the circumstances would point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which would complete the chain.

(Para 87)

F. Code of Criminal Procedure, 1973 – S. 313 – Object – S. 313 is an important section of the Code of Criminal Procedure. S. 313 requires the Court to put questions to the accused for the purpose of enabling the accused "personally" to explain any circumstances appearing in the evidence against him. The section enables a direct interaction between the Court and the accused for the sole purpose of allowing the accused to provide his explanation to each and every incriminating circumstance appearing in the evidence. The statement is not to be taken on oath which is prohibited under sub-section (3) thereof – The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The answers, however, given by the accused may be taken into consideration in such enquiry or trial, and put in evidence for or

against him in any other enquiry into, or trial for, any other offence which such answers may tend to show that he had committed – Under S. 313, the accused has a duty to furnish explanation in his statement regarding any incriminating material that has been produced against him. It is not sufficient compliance with the section to generally ask the accused what he has to say after having heard the prosecution evidence. Every material circumstance must be questioned separately. Providing fair, proper and sufficient opportunity to the accused to explain the circumstances appearing against him should be the whole object of the Court in compliance with S. 313 – The Court must be particularly sensitive when the accused is ignorant or illiterate and may not understand the language of Court. The questions must be simple and understandable even to an illiterate and ignorant of the law. Preferably, the Court should avoid using legal language and keep the questions simple especially while dealing with people who are uneducated, illiterate, ignorant or simple. The question should be short and each new incriminating fact must be separately put to the accused. If the accused is unable to understand the language of the Court, the Court must translate the question in the language understood by the accused. It is obligatory on the accused while being examined to furnish explanation with respect to incriminating circumstances against him and the Court is duty bound to note such explanation even in a case of circumstantial evidence – S. 313 was enacted for the benefit of the accused.

(Para 90)

G. Indian Evidence Act, 1872 – Circumstantial Evidence – It is trite that in a case like the present one where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, his failure to offer any explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain – The failure of the accused to offer any explanation in his S. 313 Cr.P.C. statement alone would not be sufficient to establish the charge against the accused. The Court can, however, rely on a portion of the statement of the accused

and find him guilty in consideration of other evidence against him. The accused has a right to maintain silence during examination or completely deny the incriminating circumstance but in such an event adverse inference could be drawn against him.

(Paras 91 and 92)

H. Indian Penal Code, 1860 – S. 96 – Right of Private Defence – We find that the deceased had blamed Suren Rai for the loss of his mobile. We also find that the deceased had more than once provoked Suren Rai. Considering the confession of Suren Rai it seems that the deceased had provoked him into a fight and hurled a *"khukuri"* at him on which Suren Rai had grabbed the *"khukuri"* from him and assaulted the deceased multiple times and severely which caused the death of the deceased. There was reasonable apprehension of danger to Suren Rai's life which would put the right of self defence into operation giving him the right to inflict any harm even extending to death – The multiple and gaping chop wounds on the back of the neck, below the skull causing the six severe *anti-mortem* injuries with the *"khukuri"*, a sharp moderately heavy weapon and his running away whilst the deceased was still alive makes us firmly believe that Suren Rai exceeded the power given to him by law in order to defend himself although the exercise of the right, quite clearly, was done whilst deprived of the power of self control by grave and sudden provocation in his own defence and without premeditation – The homicide does not amount to murder in view of exception 1 of S. 300 IPC. We are of the view that Suren Rai is guilty of causing death of the deceased with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under S. 304.

(Para 117)

Appeal allowed.

Chronological list of cases cited:

1. Raja v. State of Haryana, (2015) 11 SCC 43.
2. State of Sikkim v. Suren Rai, Crl. A. No. 17 of 2016.
3. Subramania Goundan v. State of Madras, AIR 1958 SC 66.

4. Aloke Nath Dutta v. State of W.B., (2007) 12 SCC 230.
5. Pulukuri Kottaya and Others v. The King Emperor, AIR 1947 PC 67.
6. State of Maharashtra v. Damu, (2000) 6 SCC 269.
7. State of Maharashtra v. Suresh, (2000) 1 SCC 471.
8. Selvi v. State of Karnataka, (2010) 7 SCC 263.
9. Rammi *alias* Rameshwar v. State of M.P., (1999) 8 SCC 649.
10. State of Bombay v. Kathi Kalu Oghat, AIR 1961 SC 1808.
11. Kishore Thapa v. State of Sikkim, 2010 SCC OnLine Sikk 10.
12. Anter Singh v. State of Rajasthan, (2004) 10 SCC 657.
13. Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1.
14. Prithipal Singh v. State of Punjab, (2012) 1 SCC 10.
15. State of U.P. v. Santosh Kumar, (2009) 9 SCC 626.
16. Om Prakash v. State of Haryana, (2011) 14 SCC 309.
17. Mohibur Rehman v. State of Assam, (2002) 6 SCC 715.
18. Sahadevan v. State, (2003) 1 SCC 534.
19. Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646.
20. Dharam Deo Yadav v. State of U.P., 2014) 5 SCC 509.
21. Gajanan Dashrath Kharate v. State of Maharashtra, (2016) 4 SCC 604.
22. Laxman Singh v. Poonam Singh, (2004) 10 SCC 94.
23. Darshan Singh v. State of Punjab, (2010) 2 SCC 333.
24. Buta Singh v. State of Punjab, (1991) 12 SCC 612.
25. Suresh Singhal v. State (Delhi Administration), (2017) 2 SCC 737.
26. Naveen Chandra v. State of Uttaranchal, (2009) 16 SCC 449.

JUDGMENT

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

1. The death is homicidal. It is also gruesome. Multiple and gaping chop wounds on the back of the neck, below the skull with a sharp, moderately heavy weapon have done away with a young human life of barely 27 years in the prime of his youth. The heinous act was committed inside a temporary shed in the compound of one Padam Kumar Rai (P.W.5) in which the deceased and Suren Rai (Respondent), another *"lumberjack"*, hired by him were residing till the night of the incident. The evidence of the brutal act is smeared all over the temporary shed. Dark coloured round collared 'T' shirt of the deceased with cuts over the neck and the right side of shoulder stained with blood and more at the back and aluminium GIS sheet walls of the temporary shed with a spray of blood. There is no quarrel about the aforesaid facts and also stands proved by cogent evidence.

2. The day before the incident, past sunset, at around 8.00 p.m. on 23.05.2013, the version of the altercation between Suren Rai and the deceased regarding the deceased's mobile which had gone missing would be complained about by Suren Rai to Padam Kumar Rai. This was at the house of Padam Kumar Rai, a little distance from the temporary shed, but within his compound, where the gruesome act would take place. As requested, Padam Kumar Rai would, a little later after 8.00 p.m., visit the temporary shed and find Suren Rai having his meal and the deceased sitting close by. Padam Kumar Rai would inquire about the mobile and admonition both Suren Rai and the deceased not to quarrel about trifles and look for the mobile instead. Padam Kumar Rai would return to his house. Suren Rai would shortly follow. Padam Kumar Rai would again ask Suren Rai if the mobile was found. Suren Rai would, thereafter, leave Padam Kumar Rai's house. Thereafter, Padam Kumar Rai would retire to bed as it would be raining heavily. There is also no dispute about the aforesaid facts which also stands proved by cogent evidence. Padam Kumar Rai would depose and prove these facts and is admitted by Suren Rai.

3. What happened thereafter till the next morning is unknown, save the disclosure and the confessional statement of Suren Rai recorded under Section 27 of the Indian Evidence Act, 1872 and Section 164 of the Code of Criminal Procedure (Cr.P.C.) respectively and the last scene theory pressed by the Prosecution, it is pleaded.

4. The next morning at around 6.00 a.m. on 24.05.2013, much after the first rays of the sun would illuminate Okherbotey, Padam Kumar Rai would notice something unusual. Smoke was not coming out of the temporary shed as usual. He would find it curious and walk to the temporary shed from his house to discover the cadaver of the deceased in a sleeping position covered with a blanket and the tell-tale signs of the gruesome act smeared all over. These facts also stand proved by the evidence of Padam Kumar Rai.

5. At 8.45 a.m., the same morning, a written complaint (exhibit-12) by Padam Kumar Rai received by the Naya Bazar Police Station in West Sikkim would lead to the registration of the First Information Report (FIR) (exhibit-13) and set in motion the investigation taken up by Police Inspector, Mr. Chewang D. Bhutia, Investigating Officer (P.W.10) alleging that Suren Rai had done away with the deceased and absconded. The same day, Suren Rai would be apprehended from Karmatar School ground in the neighbouring State of West Bengal by two Police Officers, Constable Topden Lepcha (P.W.6) and Home Guard, Yamnath Sharma (P.W.7) and brought to the Naya Bazar Police Station to face justice. These facts also stand proved by the Prosecution. The arrest of Suren Rai is also not an issue.

6. The deceased was Monit Rai, the dead *"lumberjack"* and temporary shed-mate of Suren Rai, the then accused, and now acquitted and a free man. These facts also stands proved by the prosecution.

7. When the Investigating Officer would visit the crime scene it would still be fresh with evidence, both physical and biological, of the gruesome incident the night before. On 24.05.2013 at 1100 hours the Investigating Officer would seize blood stained red/white/pink printed quilt; blood stained old while 'T' shirt with *"Pirelli"* printed on it; one pair of blood stained old blue slipper; one pair of red blood stained slipper; one faded black cap with *"Chattanooga"*; one light brown Adidas track pant; one blue 'T' shirt with *"Adventure Tour"* printed on it and one light green 'T' shirt with *"Angry Birds"* printed on it through Property Seizure Memo (exhibit-16) in the presence of two witnesses Bhadrey Bishwakarma (P.W.8) and Dhiraj Rai (P.W.9). The seizures vide Property Seizure Memo (exhibit-16) also stands proved by the Investigating Officer and the two seizure witnesses named above.

8. On 24.05.2013 at 1115 hours the Investigating Officer would further seize white/green/grey old sleeping bag with blood stain; plastic mat with blood stain (red and green); controlled sample of blood collected from place of occurrence in a glass container; controlled sample of mud collected from the place of occurrence in a plastic container; one plastic profile mat (black) with blood stain; one blood stained jute sack with *"M.P."* printed on it through Property Seizure Memo (exhibit-18) from the place of occurrence in the presence of two witnesses, Bhadrey Bishwakarma and Dhiraj Rai. The seizure vide Property Seizure Memo (exhibit-18) would also be proved by the Investigating Officer and the two seizure witnesses named above.

9. On the same day i.e 24.05.2013 at half an hour past mid noon, the Investigating Officer would forward Suren Rai to the Medical Officer stationed at the Jorethang-Primary Health Center (PHC) for his medical examination. Dr. S. N. Adhikari (P.W.1) would then examine him and record his observation in the Medical Report (exhibit-1). However, in the said Medical Report of Suren Rai, Dr. S. N. Adhikari would endorse:-

> **"***Suren Rai, 27 years s/o Dhan Bdr. Rai r/o Karmatar (W.B.). As stated by accused, he has assaulted on Monit Rai of same place with 'khukuri' which leads to death of the victim at the place of occurrence (Zoom/West Sikkim).***"**

10. Dr. S. N. Adhikari in his deposition before the Trial Court however, would not expound about the extra judicial confession recorded in the Medical Report and only state that on examination of Suren Rai, there was no complaint or injuries and that he was physically and mentally sound and fit for custody. We would not be confident about the purported extra- judicial confession because the truth of what was scribed by Dr. S. N. Adhikari in the Medical Report would not be brought forth in his oral testimony and it was made whilst in custody of the police and thus clearly barred by Section 26 of the Indian Evidence Act, 1872.

11. On 24.05.2013 at 1245 hours the Investigating Officer would seize three wearing apparels of Suren Rai, i.e., blood stained black 'T' shirt with *"Marshall"* printed on it, blue faded blood stained jeans pant with 'Salsa' printed on the inner side and one faded blue blood stained underwear with *"Jookey"* written on it through property seizure memo (exhibit-19) from Suren

Rai at Naya Bazar Police Station in the presence of two witnesses, Bhadrey Bishwakarma and Dhiraj Rai. The seizure vide Property Seizure Memo (exhibit-19) would be proved by the Investigating Officer and the two seizure witnesses named above. The Investigating Officer would specifically depose that the police escort party produced Suren Rai at Naya Bazar, Police Station on 24.05.2013 at 1245 hours, after completion of medical examination and seize the said wearing apparels from the possession of Suren Rai. The defence wouldn't be able to tarnish this deposition. At 1250 hours thereafter the Investigating Officer would arrest Suren Rai at the Naya Bazar Police Station where he would be produced by Constable Topden Lepcha and Home Guard Yamnath Sharma.

12. It is said; Suren Rai confessed to his crime, made a disclosure statement (exhibit-14) which would be recorded under Section 27 of the Indian Evidence Act, 1872, before the Investigating Officer at 1255 p.m. on 24.5.2013, in the presence of two independent witnesses and signed the same stating that he had hidden the *"khukuri"* near Padam Kumar Rai's residence and he could show it to the police. The confession to the Investigating Officer and the disclosure statement are highly contested.

13. The same May midsummer afternoon on 24.05.2013 at 1325 hours the alleged weapon of offence, an 18 inch long *"khukuri"*, the traditional curved machete and the symbol of the Nepalese/Gorkha communities' valour, would also be recovered from an open space just outside the kitchen window within the compound of Padam Kumar Rai, unfortunately, allegedly used for the dastardly act. The Property Seizure Memo (exhibit-15) would be proved by the Investigating Officer and two seizure witnesses, Bhadrey Bishwakarma and Dhiraj Rai and the said *"khukuri"* identified by them. However, both the said seizure witnesses would state that the alleged *"khukuri"* was lying in an open place which could be easily seen by everyone. The prosecution case as deposed by the Investigating Officer that the recovery of the *"khukuri"* was pursuant to the disclosure statement would, therefore, be contested by the defence as being tainted.

14. On 06.06.2013 an application (exhibit-7) would be made by the Investigating Officer to the Learned Judicial Magistrate, West District at Gayzing (P.W.3) with a request to record the confessional statement of Suren Rai under Section 164 Cr.P.C. as he volunteers to depose about the facts with regard to the case.

15. The Learned Judicial Magistrate would put preliminary questions (exhibit-8) to Suren Rai after he was brought to the Court on 06.06.2013 at 13.30 hours by one Krishna Bahadur Rai from the District Jail Namchi, which was recorded and later proved during trial, through the Learned Judicial Magistrate. As many as 16 questions would be put to Suren Rai by the Learned Judicial Magistrate.

16. The Learned Judicial Magistrate, thereafter, would give four days time for reflection to Suren Rai informing him that he should not mix around with the police or any other person and accordingly would send him to jail and direct him to appear on 10.06.2013 at 10.00 a.m.

17. Suren Rai would be produced on 10.06.2013 before the Learned Judicial Magistrate after which he would be placed in custody of the staff of the Learned Judicial Magistrate and the Head Constable would be directed to leave the Court premises. On being satisfied that there were no policemen in the Court and chamber from where the Court could be seen or heard, the Learned Judicial Magistrate would put six questions to Suren Rai, record the memorandum of statement of the accused (exhibit-9) in compliance of Section 164 Cr.P.C., explain to Suren Rai that he was not bound to make any statement before her, record her satisfaction that the statement was voluntary and the fact that it was made in her presence and thereafter record the confession of the then accused, Suren Rai, under Section 164 Cr.P.C. on 10.06.2013 (exhibit-10). The said confession would read as under:-

> **"***At the relevant time I was working at Zoom, West Sikkim in the house of one Padma, I was given the job of cutting firewood along with one Manit Rai. We both are permanent residents of Karmatar, Darjeeling, West Bengal and were at Zoom for the work.*
>
> *On the relevant day, I drank some alcohol with Manit Rai at our temporary shed at around 2100 hours at Zoom, West Sikkim and we were little intoxicated and the said Manit Rai went out. Around 2130 hours, while I was still at my temporary shed, Manit Rai returned back and he had drank more alcohol outside and started*

provoking me into a fight for no reason. He also hurled a khukuri at me to kill me, however I dodged myself from that, after which I took the khukuri from him and stabbed him at the back of his neck thrice and stayed there for about an hour. At the time he was still alive.

*Thereafter I ran off towards Naya Bazar and the next day at about 0830 hours, the police apprehended me.***"**

18. The investigation of the case which would commence on 25.04.2013 would result in a final report dated 22.07.2013 within barely three months of the incident and a Sessions trial Case would be registered on 26.08.2013. Supplementary charge-sheets would however, be filed only on 01.10.2015. The first supplementary charge-sheet would relate to blood collected in a glass container seized from the place of occurrence on 24.05.2013 vide Property Seizure Memo (exhibit-18), controlled sample gauge piece with blood stains of the deceased, black hair samples having blood stains of the deceased, black hair samples of the deceased, six black hair strands of Suren Rai and blood sample of Suren Rai collected vide requisition dated 06.06.2013 (exhibit-11). The evidence collected and seized on 03.07.2013 would be sent to CFSL, Kolkatta for DNA comparison and analysis and vide expert opinion dated 03.08.2015 under the signature of Dr. Anil Kumar Sharma, Deputy Director (Biology) and Scientist 'D', from CFSL Kolkata (P.W.11) the result would be placed before the Court. The other supplementary charge-sheet would relate to the soil sample collected from the place of occurrence, blood stained *"khukuri"* seized vide Property Seizure Memo (exhibit-15), blood stained black 'T' shirt with *"Marshall"* printed on it, blood stained faded blue jeans pant with *"Salsa"* printed on it and blood stained underwear with *"Jookey"* printed on it all seized on 24.05.2013 from the possession of Suren Rai vide Property Seizure Memo (exhibit-19). The expert opinion dated 08.09.2015 (exhibit-26) would also be placed before the Court. The expert who gave the said opinion would be one Dr. P. Paul Ramesh from CFSL, Kolkata. The expert would not be examined. However, the expert opinion would be exhibited by the Investigating Officer without a protest by the defence.

19. These seizures of the biological as well as physical evidence and the expert opinions would reveal disturbing and unfortunate situation. The seizures

and collection of blood samples and hair samples would take place on 24.05.2013 and 06.06.2013. The seized evidence would be forwarded and received by the CFSL, Kolkatta on 24.07.2013. The CFSL, Kolkatta would keep these evidences till 17.03.2015 and 10.07.2015 and finally give its opinion on 29.06.2015 and 25.07.2015 during which period material evidence collected would degrade to such an extent that the experts examining them would not be able to decipher the evidence completely.

20. The truth of what transpired that rainy night when a young 27 year old youth lost his life and that too by multiple assaults below the skull and on the neck would be accessible to the Investigating Officer within the confines of the little temporary shed strewn with evidence which had the propensity to narrate the gruesome story. The voiceless cry for justice of the deceased could have been heard from the blood soaked clothes, GIS sheets, profile mat, jute sack, slippers, track pants and the quilt recovered and seized. An investigative mind with a determination to do justice and seek the truth would do so from each of these evidences. The Investigating Officer should be mindful of what is commonly known as *"Locard's Principle"* formulated by Dr. Edmond Locard. Simply put it is: *"Every contact leaves a trace"*. This principle explained means that the perpetrator of a crime will bring something into the crime scene and leave with something from it and that both can be used as forensic evidence. We would believe that forensic evidence and not limited to finger prints alone would be available at the scene of crime, which, it is quite obvious, the perpetrator had not even bothered to tamper. The scene of crime and in this case the little temporary shed, immediately sanitized from any outside interference, would be a place where the perpetrator would have stepped, touched and been in physical contact with the material objects available and therefore, rich with both biological and physical evidence. The biological evidence like blood and hair seen at this place of occurrence and seized are required to be not only preserved carefully and scientifically but also examined in right earnest to come to a definite conclusion before time chooses to erode the evidence and fog the vision. Those inanimate objects would have witnessed silently the gruesome act and could serve as witnesses to the perpetrator committing homicide. Similarly, the scene of crime ought to be scanned for finger print and foot prints which would obviously be available. The physical evidence would never lie or commit perjury or forget. The Investigating agencies human failure alone in finding it, preserving it and studying it would allow it to remain inanimate and voiceless. We would believe that the forensic evidence would be decipherable with the use of scientific methods and

technology. We would desire, nay implore the State to introduce and make available to the investigative agencies new, updated scientific methods and technologies for forensic examination although we are certain that we would not err even if we were to adjure the State to do so. This was a little diversion, much necessitated by the facts of this case, now back to the facts.

21. Suren Rai would be charged for manslaughter. The trial, however, would result in acquittal of Suren Rai. The State is aggrieved by the Impugned Judgment dated 29.02.2016 of the Learned Sessions Judge, West Sikkim at Gyalshing in Sessions Trial Case No. 06 of 2014.

22. The Appeal is therefore, against acquittal. The presumption of innocence in favour of Suren Rai from the lodging of the FIR till judgment day is now fortified. If the view adopted by the Trial Court is a reasonable one in the conclusion reached by it and had its ground well set out on the materials on record, numerous precedents from the Supreme Court would say- the acquittal may not be interfered with.

23. There being no eye witness to the crime the present case is based on circumstantial evidence. The law, to prove a case on circumstantial evidence, is also well settled. The circumstances from which the conclusion of the guilt is to be drawn must be fully established. The facts so established should be consistent only with the hypothesis of the guilt of Suren Rai and no other. The circumstances should be of conclusive nature and should exclude every possible hypothesis except that it is Suren Rai and Suren Rai alone who is guilty of murder. The chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of Suren Rai and the Court must be judicially confident that it is Suren Rai who is guilty and the heinous act has been perpetrated by him and none other.

24. The question, so vital, to be answered by the Trial Judge was whether on the fateful intervening night of 23.05.2013 and 24.05.2013 did Suren Rai assault the deceased Monit Rai with the *"khukuri"* and murder him?

25. The solitary charge for murder was framed on 23.05.2014 and in the trial that ensued, 11 witnesses would be examined by the prosecution. The statement of the then accused, Suren Rai, on his examination under Section 313 Cr.P.C. to explain the various incriminating circumstances appearing in the evidence against him, would be conducted on 30.07.2015 and 16.02.2016 in

the end of which Suren Rai would plead innocence and state that he had not committed the offence. Suren Rai would also resile from his confessional statement.

26. The judgement of acquittal by the Learned Sessions Judge is based on the Trial Courts judicial analysis on four pivotal issues. The Learned Sessions Judge would not believe the prosecution version of the recording of the disclosure statement (exhibit-14) purportedly under Section 27 of the Indian Evidence Act, 1872 in the presence of two witnesses and the subsequent recovery of the alleged weapon of offence, the *"khukuri"*, vide Property Seizure Memo (exhibit-15). The Learned Session Judge would also not believe the last scene theory put-forth by the prosecution. The judicial confession of Suren Rai made before the Learned Judicial Magistrate would be disregarded. The evidence of Padam Kumar Rai, the employer of both the deceased and Suren Rai, the *"lumberjacks"* and in whose compound the gruesome act was committed would not also inspire confidence in the Learned Sessions Judge due to which the Learned Sessions Judge would hold the evidence of Padam Kumar Rai, Bhadrey Bishwakarma and Dhiraj Rai *"totally doubtful"*.

27. The Learned Sessions Judge would believe the explanation given by Suren Rai in his statement under Section 313 Cr.P.C. by which he would state that due to the continuous harassment and threat by the deceased he had left for Karmatar around 8.30 p.m. on 23.05.2013.

28. It was the same night that the deceased was mercilessly hacked to death. This is well established.

29. The burden of proof so heavily set on the prosecution to prove every ingredient of the alleged offence of murder would be held not satisfied and the Learned Sessions Judge would find that the gap between the deceased last seen alive by Padam Kumar Rai and his finding the dead body the next morning was so wide that the trial Court could not rule out the possibility of a third person coming in between. A purported confession of Suren Rai to the Investigating Officer would also not be believed and thus Suren Rai would be held not guilty and acquitted of the solitary charge of murder.

30. We have meticulously examined the evidences, oral and documentary, as well as the impugned judgment. This is a case of a brutal murder. This is

also a case in which Suren Rai has been acquitted by the trial Court. The able assistance rendered by Mr. Karma Thinlay Namgyal, the Additional Public Prosecutor and Mr. B. Sharma, Senior Advocate, appearing for the Respondent are well appreciated. The various judicial pronouncements of the Supreme Court relied upon by the Learned Counsels have guided our judgment in the present case.

31. The Learned Sessions Judge would hold that the death was homicidal and proved by the medical evidence. Dr. O. T. Lepcha, (P.W.2) the Medico Legal Specialist at the S.T.N.M. Hospital, Gangtok has coherently and convincingly proved his Autopsy Report (exhibit-2).

32. It was the deceased who succumbed to the multiple wounds by a sharp, moderately heavy weapon in the intervening night of 23.05.2013 and 24.05.2013 in the temporary shed in which the deceased and Suren Rai were residing within the premises owned by Padam Kumar Rai and the subsequent recovery of the dead body of the deceased are also proved by the evidence of Padam Kumar Rai, the evidence of the Investigating Officer, inquest witnesses Bhadrey Bishwakarma and Dhiraj Rai proving the Inquest Report (exhibit-20) of the inquest conducted on 24.05.2013, the evidence of Dr. O. T. Lepcha and the Autopsy Report (exhibit-2) and the Dead Body Challan (exhibit-3) proved by Dr. O. T. Lepcha. The FIR proved by Padam Kumar Rai corroborates the above facts. The photographs marked (exhibit-21) (collectively) captures and freezes the Investigating Officers first memory of the scene of crime evidencing the heinous act upon the deceased, when he exhibits the same during his deposition.

33. The arrest of Suren Rai from Karmatar by two Police Officers Constable, Topden Lepcha and Home Guard, Yamnath Sharma on 24.05.2015 would be proved by their evidence as well as the arrest Memo (exhibit-24) proved by the Investigating Officer. The Learned Sessions Judge would find fault in the failure of the prosecution to examine any witness from Karmatar or any evidence as to what time the accused reached Karmatar. The Learned Sessions Judge would consequently doubt the entire evidence of the prosecution witnesses. Constable Topden Lepcha would depose that on 24.05.2010 at around 9.00 a.m. as per the instructions given by the Station House Officer, Naya Bazar Police Station he and Home Guard Yamnath Sharma went to Karmatar to apprehend Suren Rai, met him at the Karmatar School ground, apprehended him and brought him to Naya Bazar Police

Station. In cross-examination Constable Topden Lepcha would state that it would take 10 to 15 minutes to reach Karmatar from Naya Bazar Police Station and 30 to 35 minutes from the place of occurrence. Padam Kumar Rai would depose that Suren Rai left his house after 8.00 p.m. on 23.05.2013. Suren Rai would himself explain in his statement under Section 313 Cr.P.C. that he left for Karmatar at 8.30 p.m. on 23.05.2013. It is thus clear that Suren Rai would have reached Karmatar 30 to 35 minutes thereafter. The failure of the prosecution to examine any witness from Karmatar, which could be for any number of reasons ought not to have distracted the focus of the Learned Sessions Judge to see whether from the evidence available the prosecution had been able to establish their case. In re: ***Raja v. State of Haryana***[1] the Supreme Court would hold:-

> ***"13.*** *..... It is well settled in law that non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record, if the same is natural, trustworthy and convincing .....***"**

34. All other circumstances having been cogently proved by the prosecution, the four pivotal issues examined by the Learned Special Judge are required to be reconsidered in the present appeal within the parameters of settled law of appreciation of appeal against acquittal. If the evidence produced and proved gives rise to a strong suspicion but does not conclusively prove the guilt, Suren Rai's acquittal is to be upheld. If the evidence produced and proved gives rise to two probable conclusions one in favour of Suren Rai and the other against, even then Suren Rai's acquittal is to be upheld.

Judicial Confession

35. On 06.06.2013 the Investigating Officer vide a communication (exhibit-7) would appraise the Learned Judicial Magistrate that Suren Rai was arrested on 24.05.2013 and sent to judicial custody on the same date and further that Suren Rai *"volunteers to depose facts with regard to the instant case in the Hon'ble Court of law."* The Investigating Officer, therefore, would request the Learned Judicial Magistrate to record the statement of Suren Rai under Section 164 Cr.P.C. The said application would be examined by the

[1] (2015) 11 SCC 43

Learned Judicial Magistrate on the same date. On 06.06.2013 itself, Suren Rai, having been brought before the Learned Judicial Magistrate at 1330 hours, would be placed in custody of peon Dhrona Sharma and the police would be directed to leave the premises. Having satisfied herself that there was no policeman in the Court or in any place where the proceedings could be seen or heard except the peon, not concerned in the investigation of the crime, as necessary to guard the witness, the Learned Judicial Magistrate would put 16 questions to Suren Rai to ensure the voluntariness of the confession to be recorded. It would be explained to Suren Rai that she was a Magistrate and had no concern with the police. Suren Rai would be asked whether he had any complaint of ill treatment against the police or other person responsible for bringing him to the Court. Suren Rai would reply with a *"no"*. Suren Rai would be asked whether he consented to be examined by the Learned Judicial Magistrate. He would reply in the affirmative. Suren Rai would be asked if he wished to make any statement. He would again reply in the affirmative. Suren Rai would be specifically asked whether he wanted to consult an advocate of his choice before proceeding any further. He would reply with a *"no"*. Suren Rai would be informed that he was not bound to make a statement or there is no compulsion that he should make a statement. He would say he understood the information. Suren Rai would also be informed that if he made a statement it would be taken down and may be used against him as evidence. He would say he understood the information. Suren Rai would be asked whether the police or any other person threatened him to make a statement. He would say *"no"*. Suren Rai would be asked whether the police or anyone else promised him that lesser punishment would be awarded if he made a statement or that he would be acquitted. Suren Rai would state *"no they have not told me anything like that"*. Suren Rai would be asked whether the police or any other person had given him any allurement to make a statement and the reply would be a *"no"*. Suren Rai would be specifically asked if he was under pressure of the police to make statement under Section 164 Cr.P.C. and the reply would again be a *"no"*. Suren Rai would be asked if he still desired to make a statement and the reply would be a *"yes"*. When asked when it first occurred to him that he should make the statement and why did it occur to him to do so, Suren Rai would reply: *"immediately after I was arrested and realized that I had made a mistake"*. When asked why he was making a statement, Suren Rai would state: *"because I had committed the offence"*. Suren Rai would be specifically asked whether he was making the statement voluntarily, Suren Rai would reply with a *"yes"*. Finally, Suren Rai would be informed that he was

given four days time for reflection. He would also be told not to keep in touch with the police. On being asked whether he understood the same he would reply with a *"yes"*. Accordingly, Suren Rai would be given four days time for reflection and sent to jail with personnel with a direction to appear before the Learned Judicial Magistrate on 10.06.2013 at 10 a.m.

36. The aforesaid details culled out from the record of the questionnaires put to Suren Rai amply and substantially fulfil the requirements of Section 164 (2) of Cr.P.C. Complete and adequate examination seems to have been undertaken by the Learned Judicial Magistrate to satisfy herself regarding the voluntariness of the statement of Suren Rai to be recorded.

37. On 10.06.2013 Suren Rai would be produced by a Head Constable from the District Jail. He would be placed in custody of the Learned Judicial Magistrate's staff and the Head Constable from the District Jail would be directed to leave the Court premises. The Learned Judicial Magistrate would satisfy herself that there was no policeman in the Court and chamber from where the Court could be seen or heard. Thereafter, the Learned Judicial Magistrate would inform Suren Rai that she was a Magistrate and had no connection with the police. Suren Rai would be asked whether he understood the said fact to which he would reply with a *"yes"*. Suren Rai would once again be asked whether he had any complain of ill treatment by the police and the answer would be a *"no"*. Suren Rai would be asked whether he was induced, coerced, promised or advised by the police to make a statement and the answer would be a *"no"*. Suren Rai would be asked whether the statement he offered to make was induced by any harsh treatment and if so by whom and the answer would be a *"no"*. Suren Rai would be informed that he was a free agent and not bound to make any statement. He would also be informed that it is open to him to make statement before her or not. Suren Rai would answer that he had understood the information. Suren Rai would be asked whether he still desired to make a statement after having been given four days of reflection time to think about it and the reply would be: *"yes, since I have committed the offence, I desire to make my statement*." The Learned Judicial Magistrate, thereafter, would explain to the accused that he is not bound to make any statement before her. The Learned Judicial Magistrate would believe that the statement was made voluntarily. Having satisfied herself regarding the voluntariness of the statement, the Learned Judicial Magistrate would record the confessional statement after which the mandate of Section 164 (4) and 281 of Cr.P.C. would be complied with. Memorandum of the

statement of the accused recorded under Section 164 of Cr.P.C. would be prepared and signed by both the Learned Judicial Magistrate as well as the accused as required. However, the statement of Suren Rai would be recorded in the *"form for recording deposition"* and the details of Suren Rai, the Magistrate recording the deposition, the date of the deposition, the name of the person deposing, his father's name, age, village would be duly filled which would read thus:-

> ***"FORM FOR RECORDING DEPOSITION***
>
> *The deposition of accused Suren Rai for the Court taken on Oath solemn affirmation before me Subarna Rai, Judicial Magistrate, West Sikkim at Gyalshing on this the 10th day of June, 2013*
>
> *My name is Suren Rai*
>
> *My father's name is Dhan Bahadur Rai,*
>
> *I am aged about 27 yrs.*
>
> *My home is at village Karmatar, Darjeeling, West Bengal*
>
> *I reside at present at village Karmatar, Darjeeling, West Bengal where I am a labourer.***"**

38. The Learned Judicial Magistrate would be examined and she would depose that she had been satisfied that Suren Rai had understood the nature of the proceeding and he was willing to give his statement voluntarily despite knowing that it would be used against him. The Learned Judicial Magistrate would also depose that the contents of the confession so recorded was read over and explained to Suren Rai in Nepali and admitted by him to be his true statement. The Learned Judicial Magistrate would also be cross-examined by the defence when she would state that she had not informed the accused about free legal aid before recording his confession under Section 164 Cr.P.C. The defence would take a denial that the statement under Section 164 Cr.P.C. was voluntarily. No question would be asked, as sought to be raised in the present appeal, on the issue of purported administration of oath on Suren Rai, in the manner detailed above, before recording his confession.

39. As we would find that the issue of administration of oath on an accused before recording a confession raised important question to be judicially answered, a reference would be made vide Order dated 03.07.2017 to the Full Court. The Full Court would render its judgment dated 10.03.2018 answering all the three questions referred.

40. From the perusal of the records it is quite clear that the mandate of Section 164 and 281 of Cr.P.C. had been substantially complied with by the Learned Judicial Magistrate before recording the confession. The Learned Sessions Judge would, however, hold that Suren Rai would explain in a statement under Section 313 Cr.P.C. that he had expressed his desire to make the statement on being pressurised by the Investigating Officer. The Learned Sessions Judge would also hold that the statement recorded under Section 164 of Cr.P.C. is not a substantive piece of evidence and could be used only to corroborate the statement of the witnesses or to contradict them. On the said two grounds, the Learned Sessions Judge would not rely upon the confession.

41. The Full Bench of this Court vide its judgment dated 10.03.2018 in re: ***State of Sikkim v. Suren Rai*** would hold:-

> **"***"Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary. Although the word confession has not been defined in the Evidence Act, 1872 the*

Privy Council in re: ***Pakala Narayanaswami v. King Emperor*** *has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though. As per* ***Taylor's Treaties on the law of Evidence, Vol. I*** *a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat. As held by the Supreme Court in re:* ***Navjot Sandhu (supra)*** *the authority recording the confession at the pre-trial stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter. To do so the Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to speak the truth and confess the crime. In deciding*

*whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.***"**

42. The Supreme Court in re: ***Subramania Goundan v. State of Madras***[2] would hold:-

"14*. The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially.***"**

43. In re: ***Aloke Nath Dutta v. State of W.B.***[3] the Supreme Court would hold:

"113. *The value of a retracted confession is now well known. The court must be satisfied that the confession at the first instance is true and voluntary. (See Subramania Goundan v. State of Madras [AIR 1958 SC 66 : 1958 Cri LJ 238] and Pyare Lal Bhargava v. State of Rajasthan [AIR 1963 SC 1094 : (1963) 2 Cri LJ 178].)*

[2] AIR 1958 SC 66
[3] (2007) 12 SCC 230

114. *Caution and prudence in accepting a retracted confession is an ordinary rule. (See Puran v. State of Punjab (I) [AIR 1953 SC 459 : 1953 Cri LJ 1925].) Although if a retracted confession is found to be corroborative in material particulars, it may be the basis of conviction. (Balbir Singh v. State of Punjab [AIR 1957 SC 216 : 1957 Cri LJ 481])*

115. *We may notice that in 1950s and 1960s corroborative evidence in "material particulars" was the rule. (See Puran [AIR 1953 SC 459 : 1953 Cri LJ 1925] , Balbir Singh [AIR 1957 SC 216 : 1957 Cri LJ 481] and Nand Kumar v. State of Rajasthan [(1963) 2 Cri LJ 702 (SC)].) A distinctiveness was made in later years in favour of "general corroboration" or "broad corroboration". (See for "General Corroboration" — State of Maharashtra v. Bharat Chaganlal Raghani [(2001) 9 SCC 1 : 2002 SCC (Cri) 377] ; "General trend of Corroboration" — Jameel Ahmed v. State of Rajasthan [(2003) 9 SCC 673 : 2003 SCC (Cri) 1853] and "Broad Corroboration" — Parmananda Pegu v. State of Assam [(2004) 7 SCC 779 : 2004 SCC (Cri) 2081 : AIR 2004 SC 4197].)*

116. *Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it*

is found that retraction made by the accused was wholly on a false premise. (See Balbir Singh [AIR 1957 SC 216 : 1957 Cri LJ 481].)

117. *There cannot, however, be any doubt or dispute that although retracted confession is admissible, the same should be looked at with some amount of suspicion — a stronger suspicion than that which is attached to the confession of an approver who leads evidence in the court.***"**

44. It would be apposite to point out that Suren Rai had voluntarily given his confession before the Learned Magistrate before whom he candidly stated that he wanted to make the confession because he had committed the offence. Various opportunities would be provided by the Learned Judicial Magistrate in the form of questions inquiring about any direct or indirect pressure, influence, hope or lure from the police or anyone else to Suren Rai and on each such occasion he would candidly reply with an emphatic *"no"*. The confession was recorded by the Learned Judicial Magistrate on 10.06.2013. The charges were framed on 23.05.2014. 11 witnesses were examined including the Investigating Officer during the trial. On the closure of evidence, the examination of Suren Rai, as an accused, would be conducted on 30.07.2015 and 16.02.2016 more than a year after the framing of charges against him. Suren Rai sought to retract his confession only at the time of recording his statement under Section 313 Cr.P.C. The reason, Suren Rai would assign, for retracting his confession is that he made his confession being pressurised by the Investigating Officer. There are no specific details of how the Investigating Officer exerted pressure on Suren Rai in his explanation. The Investigating Officer was cross-examined by the defence. There is not even a denial of having confessed before the Learned Judicial Magistrate in the cross-examination of the Investigating Officer. If there was any kind of pressure exerted by the Investigating Officer due to which Suren Rai would volunteer to give his confession to the Learned Judicial Magistrate it was incumbent upon the defence to cross-examine the Investigating Officer regarding the specific details of the alleged pressure exerted by him to elicit the truth of the allegation, which was not done. In his subsequent examination under Section 313 Cr.P.C. the Respondent would also be asked: *"3. As per P.W.3, after recording the statement same was read over and explained to you which was admitted by you to be true and correct. Exhibit 10 is your statement*

recorded by her under Section 164 Cr.P.C. What have you to say?" The Respondent would answer: *"It is true"*. In view of the same it is unequivocally clear that the allegation of the confession not being voluntarily and made only after pressure was exerted by the Investigating Officer was an afterthought of the defence far too late in the day to invoke any further and deeper consideration. However, as adverted before, since an issue of substantial importance that oath having been administered the confession must be discarded had been raised by Mr. B. Sharma this Court would refer the issue before the Full Bench. A Full Bench of this Court in re: ***State of Sikkim v. Suren Rai (supra)*** would *inter-alia* hold:-

> ***"126****. It is also evident that on examination of Section 164(5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the mandate of Section 164 and 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, Section 463 Cr.P.C would be applicable and the Court shall take evidence of non-compliance of Section 164 and 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence. We answer the second question accordingly."*

45. Admittedly this issue was not raised before the trial Court. Admittedly again no questions were asked to the Learned Judicial Magistrate who recorded the confession about the administration of oath nor any explanation

sought. The record of the confession clearly reflects that the confession was recorded in the *"Form for recording deposition"*. The issue not having been raised specifically before the Court it is evident that the Court has not taken evidence under Section 463 Cr.P.C. After the Full Bench of this Court rendered his judgment on the issue of administration of oath to an accused the matter would be listed for hearing to give an opportunity to the Appellant as well as the Respondent to make submissions on the effect of the said judgment. At the said hearing held on 11.04.2018 Mr. Karma Thinlay would submit that a bare perusal of the confession recorded under Section 164 Cr.P.C. makes it clear that oath was not actually administered upon the Respondent and the words *"taken on oath solemn affirmation"* was part of a pre-typed *"form or recording deposition"* and as such in view of paragraph 126 of the said judgment rendered by the Full Bench of this Court it would be important to remit the matter to the Court of the Learned Sessions Judge for the limited purpose of taking evidence of non-compliance of Section 164 and 281 Cr.P.C. On hearing the parties this Court would direct that the case papers be remitted to the Court of the Learned Sessions Judge for examining whether oath was actually administered upon the Respondent by the Learned Magistrate while recording his confession. The Learned Sessions Judge would re-examine the Learned Magistrate now Learned Chief Judicial Magistrate, giving an opportunity to the Respondent to cross-examine the Learned Chief Judicial Magistrate and thereafter give further opportunity to the Respondent to explain the circumstances under Section 313 Cr.P.C. pursuant to which the records would be placed before this Court. The Appellant as well as the Respondent would be re-heard on 30.05.2018. Mr. Karma Thinley would submit that the evidence of the Learned Chief Judicial Magistrate would make it evident that oath was in fact not administered upon the Respondent and the confessional statement was voluntary. Mr. B. Sharma to the contrary would submit that in view of the judgement of the Full Bench of this Court the Learned Chief Judicial Magistrate stated that she had not actually administered oath although the records of the examination would reveal that oath was actually administered. He would further submit that in view of the documentary evidence which records that oath was administered there was no question of taking oral evidence and the said oral evidence would thus have little evidentiary value. He would draw the attention of this Court to Sections 91 and 94 of the Evidence Act, 1872. Mr. B. Sharma's submission on exclusion of oral evidence is in ignorance of Section 463 Cr.P.C. A perusal of the cross-examination of the Learned Chief Judicial Magistrate would disclose that the defence had not cross-examined her on the allegation made before us that

her evidence was the result of the judgment of the Full Bench which is impermissible. Ambiguities, peculiarities in expression and the inconsistencies between the written words and the existing facts can also be explained by intrinsic evidence. The deposition of the Learned Magistrate dated 26.04.2018 makes it abundantly clear that oath had in fact not been administered upon the Respondent while recording the confession. It is thus quite evident that this Court must examine the confession statement.

Disclosure statement (Exhibit 14)

46. The disclosure statement dated 24.05.2013 is recorded in Nepali. It is signed by Suren Rai, the Investigating Officer and two witnesses, Bhadrey Biswakarma and Dhiraj Rai. The Investigating Officer has proved his signature thereon. So have the two witnesses.

47. The disclosure statement of Suren Rai states that on the night of 23.05.2013 he and the deceased had a fight after which he took out the *"khukuri"* he had and hit him from behind after which Suren Rai hid the *"khukuri"* close to the house of Padma *"kopa"* (grandfather in the Rai language). Suren Rai also stated that he could show the *"khukuri"* to the police in the presence of witnesses.

48. Both Bhadrey Bishwakarma and Dhiraj Rai have deposed that on 24.05.2013 one Police Personnel of Naya Bazar Police Station recorded the statement of Suren Rai wherein he stated that he has concealed the weapon of offence i.e., *"khukuri"* near the house of Padam Kumar Rai. The said two witnesses also deposed that the disclosure statement was the statement given by Suren Rai. The said two witnesses also deposed about how Suren Rai took the Police Personnel and them near the house of Padam Kumar Rai and the subsequent discovery of the *"khukuri"* at his instance. However, during their cross-examination they stated that the disclosure statement was prepared by the Police only after the Suren Rai was asked by the police to make statement regarding the weapon of offence. The Learned Sessions Judge would take exception of the fact that the said two witnesses deposed that the disclosure statement was prepared by the police only after Suren Rai was asked to make a statement. This exception, to our mind is not correct as merely asking an accused to make a statement without anything more cannot lead to any negative inference. However, the said two witnesses would also state that the statement was not voluntary. The said two witnesses were not

declared hostile on this aspect and cross-examined by the prosecution. The prosecution is bound by their evidence that the disclosure statement was not voluntary.

49. The submission of the defence found favour with the Learned Sessions Judge who would hold the disclosure statement not proved. On perusal of the depositions of the seizure witnesses it is seen that both of them deposed that the disclosure statement was not the voluntary statement of Suren Rai.

50. The question which therefore falls for consideration is whether a disclosure statement is required to be voluntary?

51. Section 27 of the Indian Evidence Act, 1872 provides:-

> ***"27. How much of information received from accused may be proved.*** *- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

52. Section 25 and 26 of the Indian Evidence Act, 1872 are also important for the purpose of understanding Section 27 thereof and thus reproduced herein below**:-**

> ***"25. Confession to police officer not to be proved.*** *-No confession made to a police officer, shall, be proved as against a person accused of any offence."*
>
> ***"26. Confession by accused while in custody of police not to be proved against him.*** *No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.*

*Explanation.- In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).***"**

53. Sir John Beaumont, in re***: Pulukuri Kottaya and others v. The King Emperor***[4] would hold that Section 27 of the Indian Evidence Act, 1872 seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence.

54. In re: ***State of Maharashtra v. Damu*[5]*,*** the Supreme Court would hold:

"35*. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embrace the place from which the object was produced, the*

[4] AIR 1947 PC 67
[5] (2000) 6 SCC 269

*knowledge of the accused as to it, but the information given must relate distinctly to that effect.***"**

55. The only portion of the disclosure statement which is admissible is the statement of Suren Rai that he had hidden the *"khukuri"* near the house of Padma Kumar Rai and he can show the same to the police in the presence of witnesses which is covered by Section 27 of the Evidence Act, 1872. The rest of the disclosure statement is in-admissible, being confessional and prohibited by Section 25 and 26 of the Indian Evidence Act, 1872.

56. In re***: Pulukuri Kottaya (supra)*** the Privy Council would hold**:**

"S. 27, *which is not artistically worded, provides an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information*

*which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of S. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information, relating to an object subsequently produced, it seems reasonable to suppose that the pursuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. .....***"***

57. It is not the case of the defence that Suren Rai did not make the disclosure statement or that he did not sign on it. However, the defence would contend that the disclosure statement was not given by Suren Rai *"voluntarily"*. Bhadrey Bishwakarma and Dhiraj Rai have clearly deposed that the disclosure statement was not given *"voluntarily"*.

58. In re: ***State of Maharashtra* v. *Suresh***[6] the Supreme Court would hold:

"26*. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have*

[6] (2000) 1 SCC 471

*concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.***"***

59. Relying upon the Judgment of the Supreme Court reported in re: ***Raja (supra)*** (paragraph 15 to 17) and emphasizing on the use of the word *"obtained"* Mr. Karma Thinlay, would argue that the disclosure statement does not necessary have to be voluntary. The relevant paragraphs of the said judgment are extracted herein below:-

"15. *Another circumstance that has been proven is about the recovery of knife, bloodstained clothes and the ashes of the burnt blanket. The seizure witnesses Sukha PW 7 and Nanak PW 9 have proven the seizure. It is submitted by the learned counsel for the appellant that the police had recorded the confessional statement of the appellant-accused at the police custody and thereafter, as alleged, had recovered certain things which really do not render any assistance to the prosecution, for the confession recorded before the police officer is inadmissible. That apart, the accused had advanced the plea that the articles and the weapon were planted by the investigating agency.*

16. *To appreciate the said submission in proper perspective, we may profitably reproduce a passage from State of U.P. v. Deoman Upadhyaya :AIR p. 1129, para 7)*

> *"7.. ... The expression, 'accused of any offence' in Section 27, as in Section 25, is also descriptive of the person concerned i.e. against a person who is accused of an offence. Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable insofar as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by Section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered."*

"17. *In State of Maharashtra v. Damu [State of Maharashtra v. Damu, (2000) 6 SCC 269 : 2000 SCC (Cri) 1088], while dealing with the fundamental facet of Section 27 of the Evidence*

*Act, the Court observed that the basic idea embedded in the said provision is the doctrine of confession by subsequent events, which is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. It further stated that the information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information and, therefore, the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum…..***"**

[Emphasis supplied]

60. In re: ***State of Maharashtra v. Damu (supra)*** after the arrest of accused no. 3 therein, he would tell the Investigating Officer that the dead body of the deceased was thrown in the canal. The said statement was not found admissible as the dead body was not recovered. On reconsideration the Supreme Court would find that pursuant to the said statement and the offer made by the said accused that he would point out the spot, he was taken to the spot and there the Investigating Officer found a broken piece of glass lying on the ground which was picked up by him. A motorcycle was also recovered from the house of accused no. 2 and its tail lamp was found broken and one piece missing. The broken piece of glass recovered on the ground from the spot pointed out by accused no. 3 was placed on the broken situs of the tail lamp of the motorcycle it fitted the space and the Investigating Officer had no doubt that the said glass piece was originally part of the tail lamp of that motorcycle. It is in this context that the Supreme Court would hold what was reproduced in re: ***Raja (supra)*** in paragraph 17 of the said judgment. The Supreme Court was not called upon to examine whether a disclosure statement was required to be voluntary.

61. In re: ***Selvi v. State of Karnataka***[7] the Supreme Court would hold:

*"**133**..... However, Section 27 of the Evidence Act incorporates the "theory of*

[7] (2010) 7 SCC 263

confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

*"**27**. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

134. *This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda [16 L Ed 2d 694 : 384 US 436 (1965)] warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).***"**

[Emphasis supplied]

62. The word *"voluntarily"* has not been defined in the Cr. P.C. Section 2 (y) Cr.P.C. however, provides:

> ***"****(y). Words an expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.****"***

63. Section 39 of the IPC provides:

> ***"39****. "Voluntarily".- A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.****"***

64. The word "*involuntary*" has been defined in the Black's Law Dictionary, 10th Edition to mean:

> ***"****Involuntary, adj.(15c) Not resulting from a free and unrestrained choice; not subject to control by the will.****"***

65. The Supreme Court in re: ***Rammi alias Rameshwar v. State of M.P.***[8] would hold:

> ***"11.*** *Regarding the recovery of weapons, the prosecution could utilise statements attributed to the accused on the basis of which recovery of certain weapons was affected. Section 27 of the Evidence Act permits so much of information which lead to the discovery of a fact to be admitted in evidence. Here the fact discovered by the police was that the accused had hidden the bloodstained weapons. In that sphere what could have been admitted in evidence is only that part of the information which the accused had furnished to the police officer and which led to the recovery of the weapons.*

[8] (1999) 8 SCC 649

> ***12.*** *True, such information is admissible in evidence under Section 27 of the Evidence Act, but admissibility alone would not render the evidence, pertaining to the above information, reliable. While testing the reliability of such evidence the court has to see whether it was voluntarily stated by the accused.***"**
>
> *[Emphasis supplied]*

66. A Constitutional Bench of the Supreme Court, as far back as in the year 1961, would clearly hold in re*:* ***State of Bombay v. Kathi Kalu Oghat***[9] held:-

> ***"(13)*** *..... It was held by this court that S. 27 of the Evidence Act did not offend Art. 14 of the Constitution and was, therefore, 'intra vires'. But the question whether it was unconstitutional because it contravened the provisions of cl. (3) of Art. 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been raised in one of the cases before us and has, therefore, to be decided. The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of cl. (3) of Art. 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of S. 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion had been used in obtaining the information.***"**
>
> *[Emphasis supplied]*

[9] AIR 1961 SC 1808

67. A Division Bench of this Court also had occasion to examine whether a disclosure statement under Section 27 of the Indian Evidence Act, 1872 was required to be voluntary and in re: ***Kishore Thapa v. State of Sikkim***[10] would hold:

> ***"14****. As can be seen from the above, Section 27 is an exception made to Section 25 and 26 in as much as the information received from a person accused of an offence, in the custody of a police officer, so much of such information, as relates distinctly to the facts thereby discovered may be which proved. In other words, subject to the provisions contained in Sections 24, 25 and 26, information disclosed by a person, whether it amounts to confession or not, would be relevant only the factum of discovery and nothing more. However, the pre-condition for a statement to be admissible under Section 27 is that it should have been made voluntarily bereft of threat or coercion."*
>
> *[Emphasis supplied]*

68. Section 27 of the Indian Evidence Act, 1872 makes information received from a person accused of any offence even if in the custody of Police Officer and whether it amounts to confession or not admissible to the extent it relates distinctly to the fact thereby discovered in consequence of information received from the said person.

69. The question raised in the present case is not merely whether the recording of a disclosure statement in the custody of police officer is inadmissible but whether the recording of a disclosure statement in the custody of police officer and admittedly made not voluntarily is admissible in evidence. In view of the judgment of the Supreme Court in re: ***State of Bombay v. Kathi Kalu Oghat (supra)***, ***Selvi v. State of Karnataka (supra), Rammi alias Rameshwar v. State of M.P (supra)*** and the Division Bench of this Court in re: ***Kishore Thapa v. State of Sikkim (supra),*** it is unequivocally clear that the disclosure statement is required to be voluntary in order to be admissible. Involuntariness has an element of compulsion which has been held prohibited although the mere recording of the disclosure statement in the

[10] 2010 SCC OnLine Sikk 10

custody of police would not make it inadmissible. The disclosure statement, therefore, is required to be kept out of consideration.

Seizure of Khukuri (vide Exhibit-15).

70. The Learned Sessions Judge would hold: *"As per the evidence of the witnesses the articles were seized by the police from open place, accessible to all."* The Learned Sessions Judge would further hold: *"the evidence of witnesses does not connect the accused with seizure articles i.e. M.O.XIV. There are contradiction in the evidence of PW-9, Exhibit-14 and Exhibit-15."* M.O.XIV was the *"khukuri"*. Bhadrey Bishwakarma and Dhiraj Rai would depose, in cross-examination, that the alleged *"Khukuri"* was lying in an open place and everyone could clearly see the place where alleged *"khukuri"* was lying. Surely, it could not be a logical argument that merely because the *"khukuri"*, was found in an open space it was not admissible in evidence or in all crimes, the criminals would be well advised not to hide the weapon of offence and leave it in open spaces. The Supreme Court in ***Anter Singh v. State of Rajasthan***[11] would hold:-

> ***"10.*** *..... Though recovery from an open space may not always render it vulnerable, it would depend upon the factual situation in a given case and the truthfulness or otherwise of such claim. .....***"**

71. **In re:** ***Yakub Abdul Razak Memon v. State of Maharashtra***[12] the Supreme Court would hold:

> ***"1706.*** *In State of H.P. v. Jeet Singh [(1999) 4 SCC 370 : 1999 SCC (Cri) 539] this Court dealt with the issue of recovery from the public place and held: (SCC p. 377, para 21)*
>
> > ***"21****. The conduct of the accused has some relevance in the analysis of the whole circumstances against him. PW 3 Santosh Singh, a member of the Panchayat hailing from the same ward, said in his evidence*

[11] (2004) 10 SCC 657
[12] (2013) 13 SCC 1

that he reached Jeet Singh's house at 6.15 a.m. on hearing the news of that tragedy and then accused Jeet Singh told him that Sudarshana complained of pain in the liver during the early morning hours. But when the accused was questioned by the trial court under Section 313 of the Code of Criminal Procedure, he denied having said so to PW 3 and further said, for the first time, that he and Sudarshana did not sleep in the same room but they slept in two different rooms. Such a conduct on the part of the accused was taken into account by the Sessions Court in evaluating the incriminating circumstance spoken to by PW 10 that they were in the same room on the fateful night. We too give accord to the aforesaid approach made by the trial court."

1707. *Similarly, in State of Maharashtra v. Bharat Fakira Dhiwar [(2002) 1 SCC 622 : 2002 SCC (Cri) 217] , this Court held: (SCC p. 629, para 22)*

"22. In the present case the grinding stone was found in tall grass. The pants and underwear were buried. They were out of visibility of others in normal circumstances. Until they were disinterred, at the instance of the respondent, their hidden state had remained unhampered. The respondent alone knew where they were until he disclosed it. Thus we see no substance in this submission also."

1708. *In view of the above, it cannot be accepted that a recovery made from an open space or a public place which was accessible to everyone, should not be taken into consideration for any reason. The reasoning behind it, is that, it will be*

the accused alone who will be having knowledge of the place, where a thing is hidden. The other persons who had access to the place would not be aware of the fact that an accused, after the commission of an offence, had concealed contraband material beneath the earth, or in the garbage.

xxxxxxxxxxxxxxxxxxxx

1793. *The submission made by Mr Mushtaq Ahmad, learned counsel appearing on behalf of the appellant that the recovery was made from a public place and, therefore, could not be relied upon and cannot be accepted, as it is the accused alone on whose disclosure statement the recovery was made and it is he alone, who is aware of the place he has hidden the same. It cannot be presumed that the other persons having access to the place would be aware that some accused after the commission of an offence has concealed the contraband material beneath the earth or in the garbage.*

1794. *In State of H.P. v. Jeet Singh [(1999) 4 SCC 370 : 1999 SCC (Cri) 539] , this Court held: (SCC p. 378, para 26)*

> *"26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is 'open or accessible to others'. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others."*

72. The said Bhadrey Bishwakarma and Dhiraj Rai were re-examined. They would prove that the *"khukuri"* was the same *"khukuri"* seized in their presence vide the Property Seizure Memo (exhibit-15).

73. The recovery of the *"khukuri"* from near the place of occurrence as well as its seizure vide Property Seizure Memo (exhibit-15) cannot be doubted. It is important that it is not the defence case that the *"khukuri"* recovered from near the place of occurrence was planted by the police. Two questions still remain to be answered. Firstly whether the prosecution has been able to connect the *"khukuri"* to the crime? Secondly whether the Learned Sessions Judges hesitation to rely upon the same due to the fact that the seizure witnesses deposed that the Property Seizure Memo (exhibit-15) was prepared after they were asked to make the statement, is correct? The fact that the *"khukuri"* was seized near the place of occurrence in front of the kitchen of Padam Kumar has been proved. The existence of the blood stained *"khukuri"* cannot also be doubted merely because the two seizure witnesses stated that the said *"khukuri"* was recovered after the involuntary statement of Suren Rai. The Property Seizure Memo (exhibit 15) would clearly reflect that the said *"khukuri"* had blood stains on it. Dr. O.T. Lepcha would opine that the cause of death, to the best of his knowledge and belief, was due to fracture with resection of the spinal cord as a result of a sharp, moderately heavy weapon homicidal in nature. The Investigating Officer would state that the *"khukuri"* seized from the place of occurrence has been sent to CFSL, Kolkatta for analysis and examination and the said report would be received and placed before the Court through supplementary charge-sheet. Dr. Anil Kumar Sharma, would depose that the said *"khukuri"* with large reddish brown stain on the metallic part with wooden handle contained in a sealed cloth packet was received by him. He would depose that a portion of the *"khukuri"* was examined for the presence of human blood by Tetramethyl Benzidine and anti-human Haemoglobin test and human blood could be detected therein. The aforesaid evidences would cogently and clearly prove that the *"khukuri"* with suspected blood stains had been seized from near the place of occurrence and the said *"khukuri*" was found, in fact, to be stained with human blood. The CFSL, Report (exhibit-26) would also record the examination of *"One metallic knife with wooden handle stated to be khukuri of length 18 inches approx"*. Unfortunately, the genetic profiles from the blood stains on the *"khukuri"* could not be developed after repeated experiments which could be due to minute and/or highly degraded DNA material. In re: ***Raja (supra)*** the Supreme Court would observe:-

"19. *Another circumstance which has been taken note of by the High Court is that the bloodstained clothes and the weapon, the knife, were sent to the Forensic Science Laboratory. The report obtained from the laboratory clearly shows that bloodstains were found on the clothes and the knife. True it is, there has been no matching of the blood group. However, that would not make a difference in the facts of the present case. The accused has not offered any explanation as to how the human blood was found on the clothes and the knife. In this regard, a passage from John Pandian v. State [John Pandian v. State, (2010) 14 SCC 129:(2011) 3 SCC (Cri) 550] is worth reproducing: (SCC p. 153, para 57)*

> *"57. … The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."*

*In view of the aforesaid, there is no substantial reason not to accept the recovery of the weapon used in the crime. It is also apt to note here that Dr N.K. Mittal PW 1, has clearly opined that the injuries on the person of the deceased could be caused by the knife and the said opinion has gone unrebutted.***"**

74. Padam Kumar Rai would tell the Court that the police also recovered the weapon of offence *"khukuri"* which was given by him to Suren Rai and the deceased for cutting logs. This fact is vital. The defence would not deny this statement but only assert that the said *"khukuri"* was not shown to him in Court. Although the defence would deny the recovery of *"khukuri"* at the instance of Suren Rai it would assert that the said *"khukuri"* was lying at an open place through the cross-examination of Bhadrey Bishwakarma and Dhiraj Rai. Both the aforesaid witnesses would identify the *"khukuri"* as the one seized under Property Seizure Memo (exhibit-15). The Property Seizure Memo (exhibit-15) would be prepared at the place of occurrence.

75. In re: ***Prithipal Singh v. State of Punjab***[13] the Supreme Court would hold:

> ***"Burden of proof under Section 106***
>
> ***53.*** *In State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] ,*

[13] (2012) 1 SCC 10

Sucha Singh v. State of Punjab [(2001) 4 SCC 375 : 2001 SCC (Cri) 717 : AIR 2001 SC 1436] and Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382 : AIR 2003 SC 215].)"

76. Under Section 106 of the Indian Evidence Act, 1872 when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him. The only person who could throw light on how the *"khukuri"* which was admittedly given to Suren Rai and the deceased by Padam Kumar Rai was found blood stained with human blood in the open space near the place of occurrence, is Suren Rai, since the other was hacked to death. No such explanation is forthcoming.

77. The Learned Sessions Judge would hesitate to rely upon the seizure of the *"khukuri"* vide Property Seizure Memo (exhibit-15) due to discrepancy in the time in the said memo, the disclosure statement and the evidence of Dhiraj Rai who stated that the alleged *"khukuri"* was seized about 10 a.m. The disclosure statement would be recorded at Naya Bazar Police Station. Disclosure statement would record the date of recording the disclosure as 24.05.2013 and the time 1255 hrs. The Property Seizure Memo (exhibit-15) would record the place of seizure as *"in front of the kitchen of Shri Padam Kumar Rai's residence"* at *"Okherbotey, Zoom, West Sikkim"*, the date of seizure as 24.05.2013 and the time as 1325. The disclosure statement being recorded at Naya Bazar and the seizure of the *"khukuri"* having taken place at Okherbotey there was bound to be difference in the time. Dhiraj Rai in his cross-examination, however, would state: *"Alleged khukuri and other material exhibits were seized at about 10 a.m. on the relevant day"*. The evidence of Dhiraj Rai would be recorded on 19.05.2015.

78. In re: ***State of U.P. v. Santosh Kumar***[14] the Supreme Court would hold:

"24. *In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur. But it is the duty of the court to ensure that the truth prevails. If on material particulars, the statements of prosecution*

[14] (2009) 9 SCC 626
[15] (2011) 14 SCC 309

*witnesses are consistent, then they cannot be discarded only because of minor inconsistencies.***"**

79. The Supreme Court in re: ***Om Prakash v. State of Haryana15*** would hold:

> ***"****Every small discrepancy or minor contradictions which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct prospective and in light of the attendant circumstances brought on record by the prosecution.***"**

80. We are of the view that the minor discrepancy of the exact time of recovery of the *"khukuri"* is explainable and can be overlooked. The time of seizure as provided by Dhiraj Rai was an approximate time and not an exact time that too after a gap of two years. Thus, although we are hesitant to rely upon the disclosure statement because it has been said to be involuntary, the recovery of the blood stained *"khukuri"* from the front of the kitchen of Padam Kumar Rai's residence and close to the place of occurrence which was within the holding of Padam Kumar Rai cannot be doubted. Further, the failure of Suren Rai to explain how the *"khukuri"* given to him and the deceased would be found blood stained in an open place close to the place of occurrence admittedly occupied by him and the deceased till the night before provides a vital link to the chain of circumstances. More so when Suren Rai failed to deny the fact that the said *"khukuri"* had been given to him and the deceased for cutting logs by Padam Kumar Rai when specifically put to him by the Learned Sessions Judge at the time of his examination under Section 313 Cr.P.C.

Evidence of Padam Kumar Rai, Bhadrey Bishwakarma and Dhiraj Rai.

81. The Learned Sessions Judge would hold that: *"On deep consideration of the evidence of P.W.5, P.W.8 and P.W.9, their presence become totally doubtful. If they were present together at the P.O. then why P.W.5 did not know about the statement made by the accused."* The solitary reason

on which the Learned Sessions Judge would brush aside the evidence of the three witnesses was on the above ground. Padam Kumar Rai would be the sole witness present in the vicinity where the crime was committed and therefore not only a natural witness but also a vital witness. Bhadrey Bishwakarma and Dhiraj Rai would be witnesses to the purported disclosure statement, seizures, as well as the inquest. Padam Kumar Rai in cross-examination would state: *"It is true that accused person did not confess anything before me. It is true that I cannot say what statement was given by the accused before the police. It is true that Dhiraj Rai and Bhadrey Bishwakarma Panchayat Member were accompanying me throughout the investigation process on 24.05.2013." (Emphasis supplied).* It was not the case of the prosecution that Suren Rai confessed before Padam Kumar Rai. Padam Kumar Rai was not a witness to the disclosure statement or any confessional statement. Padam Kumar Rai would clearly depose that he cannot say what statement was given before the police by Suren Rai. The disclosure statement would be purportedly recorded in the presence of Bhadrey Bishwakarma and Dhiraj Rai at the Naya Bazar Police Station and not at the place of occurrence i.e. Okherbotey, Zoom, West Sikkim. Both the witnesses would clearly state that the disclosure statement was made by Suren Rai in their presence. It is a completely different matter that we hesitate to rely upon the disclosure statement because of the fact that both the said witnesses would state that it was not voluntary. Bhadrey Bishwakarma in cross-examination would state that: *"one Padam Kr. Rai was with us on the relevant day."* Bhadrey Bishwakarma would not be asked whether Padam Kr. Rai was near him when Suren Rai confessed. Dhiraj Rai would not even be asked about the presence of Padam Kumar Rai. In such circumstances, it is quite evident the defence was trying to steal a march by the afore-quoted general statement of Padam Kumar Rai obviously made on the suggestion of the defence. On examination of the depositions of the said three witnesses in its entirety, correct prospective and in light of the attendant circumstances brought on record by the prosecution we are of the view that the same are consistent and brooks no hesitation to receive them in evidence.

Last seen theory

82. In re: ***Mohibur Rehman v. State of Assam***[16] the Supreme Court would hold that there must be a close proximity between the events of accused last seen together with deceased and the factum of death. This was a

[16] (2002) 6 SCC 715

case in which the dead body was recovered 14 days after the date on which the deceased was last seen in the company of the accused.

83. In re*:* ***Sahadevan v. State***[17] the Supreme Court would hold:

> ***"19.*** *The last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the fact that Vadivelu was seen in the company of the appellants from the morning of 5-3-1985 till at least 5 p.m. on the same day, when he was brought to his house and thereafter his dead body was found in the morning of 6-3-1985. Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 CrPC they have not taken any specific stand whatsoever. In the evidence of PW 25, it is elicited that on 5-3-1985 in the afternoon when Vadivelu was produced before the said witness, he after interrogation allowed Vadivelu to go, but then it is found from his evidence that he instructed A-1 to keep a watch over Vadivelu. In such circumstances, it was incumbent upon A-1 to have explained to the court in what circumstances they parted company. He has not given any explanation in this regard. On the contrary, the prosecution has established the fact that on the very day at about 5 p.m., Vadivelu was brought to the house of PW 1*

[17] (2003) 1 SCC 534

by the appellants which was seen by PW 5. This part of the evidence of PW 5 has gone unchallenged in the cross-examination and, therefore, we will have to proceed on the basis that, what is stated by PW 5 in this regard is true. If that be so, the prosecution has established the fact that on 5-3-1985 at 5 p.m. Vadivelu was still in the company of these appellants and, therefore, in the absence of any specific explanation from the appellants in this regard, and in view of the other incriminating circumstances against the appellants having been proved by the prosecution, an adverse inference will have to be drawn against these appellants as to their part in the missing of Vadivelu. At this point, it may be relevant to note that though no specific stand has been taken by the appellants as to their parting company with Vadivelu, in their statement under Section 313 CrPC, it is seen from the evidence of PWs 1 and 5 that A-1 told the said witnesses on the night intervening between 5-3-1985 and 6-3-1985 that Vadivelu had escaped from the police station when he was allowed to sleep in the verandah of the police station. This explanation given by A-1 to PW 1 which was also heard by PWs 5 and 14, clearly shows that the same is totally false and obviously was an excuse made by the appellants to conceal the true facts and, therefore, this circumstance of A-1 making a false statement to PW 1 can also be taken as a circumstance against the appellants, in establishing the appellants' guilt. This Court in more than one case has held, that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. (See Joseph v. State

*of Kerala [(2000) 5 SCC 197 : 2000 SCC (Cri) 926] .) Therefore, we are in agreement with the finding of the courts below that Circumstance 7 also stands established against the appellants.***"**

[Emphasis supplied]

84. The Supreme Court in re: ***Shyamal Ghosh v. State of W.B.***[18] would hold:

> ***"73.*** *Application of the "last seen theory" requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of Yusuf case [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620] while referring to Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082] and State v. Mahender Singh Dahiya [(2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821], held as under: (Yusuf case [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620], SCC pp. 760-61)*
>
> > *"21. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082] and State v. Mahender Singh Dahiya [(2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821].)"*

[18] (2012) 7 SCC 646

> ***74.*** *The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the court to examine that where the time of last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.****"***
>
> *[Emphasis supplied]*

85. In re: ***Dharam Deo Yadav v. State of U.P.***[19] the Supreme Court would hold:

> ***"19.*** *It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the*

[19] (2014) 5 SCC 509

*basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382] . In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.***"***

[Emphasis supplied]

86. In the present case the evidence of Padam Kumar Rai would clearly prove that Suren Rai was last seen with the deceased in the temporary shed a little latter after 8.00 p.m. on 23.05.2013. The dead body of the deceased was then discovered by Padam Kumar Rai the very next day on 24.05.2013 at 6.00 a.m. barely ten hours later in the temporary shed in which, admittedly, both the deceased and Suren Rai were last residing together. In fact it is even the defence case that Suren Rai was with the deceased till 8.30 p.m. on 23.05.2013. Suren Rai would admit in his statement under Section 313 Cr.P.C. that he was with the deceased at the place of occurrence till 8.30 pm on 23.05.2013. Padam Kumar Rai would clearly depose that after Suren Rai left his house he went off to sleep as it was raining. This is an important fact. The defence would not even attempt to deny this fact. The defence would not be able to tarnish Padam Kumar Rai's deposition. In fact through Padam Kumar Rai's cross-examination the defence would assert that Suren Rai had appeared before Padam Kumar Rai at around 8.30 p.m. The only person who was present in the vicinity of the place of occurrence was Padam Kumar Rai. However, from the evidence adduced it is certain that Padam Kumar Rai was asleep when the crime was perpetrated. The defence would not even try to point a needle of suspicion towards Padam Kumar Rai and suggest instead,

in his cross-examination, that there was *"some other person"* in the temporary shed of Suren Rai and the deceased. The only person who could have named the said *"some other person"* is Suren Rai as the other is dead. It is quite obvious that this is a false defence. The fact that when Suren Rai left the house of Padam Kumar Rai it would be raining and Padam Kumar Rai would go to sleep was specifically put to Suren Rai by the Learned Sessions Judge and in reply thereof Suren Rai in his statement under Section 313 Cr.P.C. would admit it to be true. It is evident that there is proximity of both time and place in the present case. The time gap between the point of time when Suren Rai and the deceased was seen together and deceased alive then and when the deceased was found dead within a period of just about 10 hours, all of it in the middle of the rainy night at a remote village-Okherbotey, Zoom, West Sikkim, is so small that the possibility of any other person other than Suren Rai being the perpetrator of the crime would become impossible. It is also admitted that immediately prior to the death of the deceased there was a quarrel between the deceased and Suren Rai.

87. It is trite that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. However, where the other links would be satisfactorily made out and the circumstances would point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which would complete the chain.

88. The Learned Sessions Judge would rely upon the statement of Padam Kumar Rai in cross-examination to hold that his statement does not lend full support to the prosecution case. The said statement is:-

> **"**……*It is true that when the accused appeared before me at around 8.30 pm at my house and thereafter, I cannot say whether he left towards his temporary shed or somewhere else.***"**

89. The evidence of Padam Kumar Rai would establish that on the fateful night of 23.05.2013 Suren Rai and the deceased were together after 08.00 pm at the temporary shed in which both Suren Rai and the deceased, admittedly, were residing till the fateful day. Padam Kumar Rai would also state that after he met the deceased and Suren Rai in the temporary shed, he returned home and *"Suren Rai came following me"*. In cross-examination, Padam Kumar

Rai would thus concede that he could not say whether Suren Rai went towards his temporary shed or somewhere else. It would be because of this statement of Padam Kumar Rai that the Learned Sessions Judge would find it unsafe to rely on the last seen theory. What Padam Kumar Rai said was absolutely truthful; how could he have known where Suren Rai went after they parted? The Learned Sessions Judge was required to examine what happened after they parted instead of dismissing the last seen theory, which in fact, was even admitted by Suren Rai in his statement under Section 313 Cr.P.C. Being last seen with the deceased, Suren Rai had sought to explain under what circumstances he had parted ways with the deceased who had been residing with him till that fateful night in his statement under Section 313 Cr.P.C. The relevant questions and answers are reproduced herein:-

> *"Q.No.14. It is in the evidence of PW-5 Shri Padam Kr. Rai that he knows you. He is a resident of Zoom. At the relevant time, you were hired by him to work as a lumberjack at his house. Along with you, deceased Monit Rai also worked with you. About 100 meters away from his house, you and the deceased had build a temporary shed with plastic and GIS sheets and the same could be seen from the Veranda of his house.*
>
> *What have you to say?*
>
> *Ans. It is true.*
>
> *Q.No.15. PW-5 deposed that on 23.05.2013, around 8 pm, you came to his house and requested him to pacify the deceased Monit Rai as he was provoking you* into a fight regarding his mobile phone. He told you that he will be coming later and after some time, he went to your temporary shed and saw that you were having your meal and deceased Monit Rai was sitting inside the temporary shed. He asked both of you about the matter and he was told that deceased Monit Rai had misplaced his mobile phone and was blaming for it.
>
> *What have you to say?*
>
> Ans. It is true.

Q.No.16. PW-5 deposed that he told both of you, not to fight over such things and look for the mobile phone as it could be misplaced somewhere and could be found later. Accordingly, he went to his house and you came following him and he again asked you whether you found the mobile phone. Thereafter, you left his house and it started raining heavily he went to sleep.

What have you to say?

Ans. It is true.

xxxxxxxxxxxxxxxx

Q.No.58. Do you have any statements to make in your defense?

Ans:- I am innocent and I did not commit any offence. I humbly submitted that on the relevant night when I requested the complainant twice for settlement of dispute between me and the deceased (Monit Rai) but the complainant did not take positive steps and I was continuously harassed and threatened by the deceased Monit Rai to kill and due to the fear I left for Karmatand around 8.30 pm on 23.05.2013 and as such, I have no knowledge about the murder of the deceased Monit Rai."

90. Section 313 Cr.P.C is an important section of the Code of Criminal Procedure. Section 313 Cr.P.C requires the Court to put questions to the accused for the purpose of enabling the accused "*personally*" to explain any circumstances appearing in the evidence against him. The section enables a direct interaction between the Court and the accused for the sole purpose of allowing the accused to provide his explanation to each and every incriminating circumstance appearing in the evidence. The statement is not to be taken on oath which is prohibited under sub-section (3) thereof. The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The answers, however, given by the accused may be taken into consideration in such enquiry or trial, and put in evidence for or against him in any other enquiry into, or trial for, any other offence which

such answers may tend to show that he had committed. Under Section 313 Cr.P.C the accused has a duty to furnish explanation in his statement regarding any incriminating material that has been produced against him. It is not sufficient compliance with the section to generally ask the accused what he has to say after having heard the prosecution evidence. Every material circumstance must be questioned separately. Providing fair, proper and sufficient opportunity to the accused to explain the circumstances appearing against him should be the whole object of the Court in compliance with Section 313 Cr.P.C. The Court must be particularly sensitive when the accused is ignorant or illiterate and may not understand the language of Court. The questions must be simple and understandable even to an illiterate and ignorant of the law. Preferably the Court should avoid using legal language and keep the questions simple especially while dealing with people who are uneducated, illiterate, ignorant or simple. The question should be short and each new incriminating fact must be separately put to the accused. If the accused is unable to understand the language of the Court, the Court must translate the question in the language understood by the accused. It is obligatory on the accused while being examined to furnish explanation with respect to incriminating circumstances against him and the Court is duty bound to note such explanation even in a case of circumstantial evidence. Section 313 Cr.P.C. was enacted for the benefit of the accused.

91. It is trite that in a case like the present one where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, his failure to offer any explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.

92. The failure of the accused to offer any explanation in his Section 313 Cr.P.C. statement alone would not be sufficient to establish the charge against the accused. The Court can, however, rely on a portion of the statement of the accused and find him guilty in consideration of other evidence against him. The accused has a right to maintain silence during examination or completely deny the incriminating circumstance but in such an event adverse inference could be drawn against him.

93. Suren Rai has accepted as true substantially all the deposition of Padam Kumar Rai till Suren Rai left the house of Padam Kumar Rai on the fateful night. In fact in his explanation to what transpired after Suren Rai left the house of Padam Kumar Rai, Suren Rai would state that since Padam Kumar Rai did not take positive steps to settle the dispute between him and the deceased and as he was continuously harassed and threatened by the deceased to kill, due to fear, he left for Karmatar around 08.30 pm on 23.05.2013. Suren Rai's explanation, however, does not inspire confidence. Admittedly, Suren Rai was there at the scene of crime till 08.30 pm on 23.05.2013. Suren Rai also admits his arrest the very next day. Suren Rai's arrest at Karmatar is cogently proved by the evidence of two Police Officers, Constable Topden Lepcha and Home guard Yamnath Sharma on 24.05.2015 as well as the arrest Memo (exhibit-24) proved by the Investigating Officer. At the time of the arrest on 24.05.2013 at 1245 hours it would be proved that three wearing apparels had been seized from Suren Rai in the presence of Dhiraj Rai and Bhadrey Biswakarma when he was brought from Karmatar to Naya Bazar Police Station.

94. The aforesaid three items were seized vide Property Seizure Memo (exhibit-19) duly signed by the Investigating Officer as well as the aforesaid two witnesses. The defence, quite clearly, would not be able to demolish the aforesaid seizure. The Investigating Officer, Dhiraj Rai and Bhadrey Biswakarma would cogently prove it.

95. Suren Rai, however, would provide no explanation to this circumstance appearing against him, although, he would be the only person who would have been able to explain the same when the question is put to him. Suren Rai would simply deny it by saying: *"it is not true"* when the specific circumstance is put to him by the Learned Sessions Judge under Section 313 Cr.P.C. The said three wearing apparels seized vide property seizure memo (exhibit-19) were sent for forensic examination to CFSL, Kolkata for its examination. The Investigating Officer also collected blood sample of Suren Rai vide requisition letter (exhibit-11). The result of the forensic examination would be placed before the Court through Dr. Anil Kumar Sharma who would prove the Forensic Examination Report dated 29.06.2015 (exhibit-25).

96. The Forensic Examination Report (exhibit-26) would opine about the said three wearing apparels seized from the possession of Suren Rai at the Naya Bazar Police Station vide Property Seizure Memo (exhibit-19). The

result of the examination would reflect that the soil particles found in the blue faded jeans of Suren Rai seized after his arrest were found to be similar to the sample soil particles collected from the place of occurrence seized vide (exhibit-18). The Forensic Examination Report dated 29.06.2015 (exhibit-25) would opine that human blood could be detected in the said wearing apparels seized from Suren Rai. It would also be opined that the blood stains in the black T-shirt and the blue jeans pant were of Suren Rai. Suren Rai would be examined by Dr. S. N. Adhikari at PHC Jorethang, South Sikkim on 24.05.2013 at 12.40 p.m. His examination would reveal that Suren Rai had no injuries. The Learned Sessions Judge would observe that: *"If there was such fight between the accused and the deceased one day prior to the incident, the accused would have sustained some injury"*. It is not necessary that in every fight there must be injury sustained by both the parties. However, what is vital is that it would be proved that at the time of his arrest Suren Rai was in possession of his blood stained wearing apparels which would also be seized. It was incumbent upon Suren Rai to explain how he was in possession of his blood stained wearing apparels on 24.05.2013, the day of his arrest, when he clearly denied any physical brawl between him and the deceased in the intervening night of 23.05.2013 and 24.05.2013 when admittedly they had quarrelled over a mobile phone. In re: ***Gajanan Dashrath Kharate v. State of Maharashtra***[20] the Supreme Court would hold:

> ***"13.*** *As seen from the evidence, appellant Gajanan and his father Dashrath and mother Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4-2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by*

[20] (2016) 4 SCC 604

simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

14. *In Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , it was held as under: (SCC pp. 694-95, para 22)*

> *"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [Nika Ram v. State of H.P., (1972) 2 SCC 80 : 1972 SCC (Cri) 635] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the*

relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Ravindra Prakash Mittal [State of U.P. v. Ravindra Prakash Mittal, (1992) 3 SCC 300 : 1992 SCC (Cri) 642] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and

convicted him under Section 302 IPC. In State of T.N. v. Rajendran [State of T.N. v. Rajendran, (1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

*Same view was reiterated by this Court in State of Rajasthan v. Parthu [State of Rajasthan v. Parthu, (2007) 12 SCC 754: (2009) 3 SCC (Cri) 507].***"**

97. Under Section 106 of the Indian Evidence Act, 1872 Suren Rai was required to discharge the burden of proving the said fact especially within his knowledge. Suren Rai has offered no such explanations. The presence of blood stains in Suren Rai's wearing apparels seized at the time of his arrest shortly after the crime is surely a circumstance against him which remained unexplained. The cumulative effect of the admitted fact of the quarrel between Suren Rai and the deceased, the fact that Suren Rai failed to explain the incriminating circumstance of human blood in his wearing apparels seized at the time of his arrest on 24.05.2013 itself, the fact that Suren Rai made a false defence of an unknown: *"some other person"*, the impossibility of: *"some other person"* or even Padam Kumar Rai being even a suspect along with the fact that Suren Rai was admittedly last seen with the deceased at 8.30 p.m. in the temporary shed i.e. the place of occurrence on 23.05.2013 and in spite of all these Suren Rai would offer no reasonable explanation would itself be the additional vital link in the chain of circumstances against Suren Rai all of which, as stated above, had been cogently established.

98. The evidence produced by the prosecution and tested by a detailed and intrusive cross-examination by the defence has cogently established the following circumstances against Suren Rai:-

(i) Suren Rai and the deceased had been hired by Padam Kumar Rai to work as "lumberjacks" at his premises at Zoom.

(ii) Suren Rai and the deceased had built a temporary shed with plastic and GIS sheets close to Padam Kumar Rai's house.

(iii) On 23.05.2013 around 8 p.m. Suren Rai went to Padam Kumar Rai's house and requested him to pacify the deceased as he was provoking him into a fight regarding his mobile phone. This circumstance provides the animus nocendi or the intention to harm for Suren Rai to commit the offence.

(iv) Padam Kumar Rai visited the temporary shed after sometime and found Suren Rai and the deceased together inside the temporary shed. The deceased was alive then.

(v) A little while later, Suren Rai came to the house of Padam Kumar Rai who asked him about the mobile. It was raining heavily that night. Suren Rai left Padam Kumar Rai's house after which Padam Kumar Rai went off to sleep. This was the time when Suren Rai was last seen.

(vi) Next morning at 6 a.m. when Padam Kumar Rai discovered the dead body of the deceased and the GIS sheet used to make the temporary shed splattered with blood, Suren Rai was not there without informing his hirer, Padam Kumar Rai.

(vii) The FIR was lodged by Padam Kumar Rai on 24.05.2013 at 8.45 a.m. to 9 a.m.

(viii) Suren Rai was arrested from Karmatar School ground, Darjeeling and brought to the Naya Bazar Police Station on 24.05.2013 and formally arrested at the Naya Bazar Police Station at 1250 hrs.

(ix) At the time of his arrest three wearing apparels of Suren Rai, all of them blood stained, were seized by the Investigating Officer. The blood stains on the said wearing apparel were found to be that of Suren Rai on forensic examination. Save a bald denial,

Suren Rai failed to provide a convincing explanation to his blood in his wearing apparels including his underwear. If there was no physical brawl Suren Rai had got into there was no reason for the blood to be found.

(x) The soil particles found in the blue jean pant seized from Suren Rai after his arrest matched the soil particles from the place of occurrence.

(xi) After the arrest of Suren Rai a blood stained "khukuri" which was give to Suren Rai and the deceased was recovered from outside the kitchen of Padam Kumar Rai close to the temporary shed where the deceased suffered:- (1) multiple gaping chop wounds over the back of the neck situated below the skull involving the neck and the back; (2) chop wound 12 x 2 cm x bone situated over the posterior aspect of neck, 1.8 cms behind the right ear involving the scalp, bone and direct downward and outward; (3) chop wound 11 x 2 cms, 1.8 cms below the first injury directed downwards involving skin muscle and second and third cervical vertebrae; (4) chop wound, 21 x 2.8 cms situated at 2.5 cms below injury No. 2 and extended up to the lower angle of mandible. The wound involved the skin, muscle, vessels and the spinal cord, which clean cut with fracture of second cervical vertebrae; (5) Spindal shaped injury 15 x 4.5 cms x bone covering the right shoulder with underline fracture of shoulder joint and; (6) Spindal shaped injury 2 x 1.5 cms involving skin, muscle and bone over the right upper back situated 4.5 cms below and middle to injury No.5. The medical opinion opined that the cause of death was due to fracture and resection of the spinal cord as a result of a sharp, moderately heavy weapon homicidal in nature.

(xii) The failure of Suren Rai to convincingly explain the circumstances appearing in evidence against him including the fact that admittedly he was last seen with the deceased at around 8:30 p.m. on 23.05.2013 barely 10 hours before the dead body of the deceased was discovered and the blood being noticed and proved on his wearing apparels seized at the time of the arrest after 6 hours 45 minutes of the discovery of the dead body of the deceased brutally hacked to death.

99. This is a case of circumstantial evidence as said before. We have re-examined the entire case and marshalled the evidence and documents on record. We are constrained to hold that the Learned Sessions Judges conclusion and the consequential judgment of acquittal is not at all a possible or plausible view. Each of the other circumstances, as held above, having been conclusively proved by the prosecution, we are of the view that the only gap in the chain of circumstances has been conclusively filled by the aforesaid evidence and circumstances. The factum of Suren Rai being last seen together with the deceased, the blood on his wearing apparels, soil particles in his blue jeans pant matching the soil at the place of occurrence, the recovery of human blood stained *"khukuri"*, definitely a sharp, moderately heavy weapon (which has been cogently proved to have caused the death of the deceased) given by Padam Kumar Rai to Suren Rai and the deceased for cutting wood on 24.05.2013 from near the place of occurrence itself are strong circumstances against Suren Rai directly connecting him to the crime. Suren Rai's failure to convincingly explain the incriminating circumstances as above including the factum of his being last seen together, together with the fact that there was a short gap would eventually lead to the inference that Suren Rai was responsible for the crime against the deceased and it was incumbent upon Suren Rai to explain how the death occurred. His failure to do so fortifies our conclusion of guilt of Suren Rai. There is no one else in the same circumstance with even a remote possibility of the same motive. All the proved facts are consistent only with the hypothesis of the guilt of Suren Rai and no other. The circumstances are of conclusive nature and exclude every possible hypothesis except that it is Suren Rai and Suren Rai alone who is guilty of the crime. The chain of evidence is complete. We, thus, hold that the view adopted by the Learned Sessions Judge is not a reasonable one in the conclusion reached by it and does not have its ground well set out on the materials on record. The judgment passed by the Learned Sessions Judge acquitting Suren Rai is not only unreasonable but palpably wrong, manifestly erroneous and demonstrably unsustainable.

100. The confessional statement of Suren Rai would disclose that Suren Rai and the deceased would consume alcohol in their temporary shed at around 2100 hours. They would get a little intoxicated. The deceased would go out for a while and return after having consumed more alcohol and start provoking Suren Rai into a fight. The deceased would then hurl a *"khukuri"* at him. Suren Rai would believe that this assault was to kill him. Suren Rai would dodge himself, take the *"khukuri"* from the deceased and use it to give three

fatal blows on the neck of the deceased. Suren Rai would stay in the temporary shed for half an hour more till which time the decease would be still alive and thereafter he would run off towards Naya Bazar.

101. Section 96 IPC, 1860 provides:-

> ***"96. Things done in private defence.*** *– Nothing is an offence which is done in the exercise of the right of private defence."*

102. Section 97 IPC, 1860 provides:-

> ***"97. Right of private defence of the body and of property.*** *- Every person has a right, subject to the restrictions contained in section 99, to defend-*
>
> ***First.*** *- His own body, and the body of any other person, against any offence affecting the human body;*
>
> ***Secondly.*** *-The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."*

103. Section 99 IPC, 1860 provides:-

> ***"99. Acts against which there is no right of private defence.*** *-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*
>
> *There is no right of private defence against an act which does not reasonably cause the*

apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is not right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.- The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.- A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, so such, unless he knows or has reason to believe, that the person doing the act is such public servant.

*Explanation 2.- A person is not deprived of the right or private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.***"**

104. Section 100 IPC, 1860 provides:-

"100. When the right of private defence of the body extends to causing death*.-The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—*

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.—An assault with the intention of committing rape;

Fourthly.—An assault with the intention of gratifying unnatural lust;

Fifthly.—An assault with the intention of kidnapping or abducting;

Sixthly.— An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

[Seventhly.—An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]"

105. Section 102 IPC, 1860 provides:-

***"102. Commencement and continuance of the right of private defence of the body**.- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues."*

106. In re: ***Laxman Singh v. Poonam Singh***[21] the Supreme Court would hold:-

> ***"6.*** *The only question which needs to be considered is the alleged exercise of the right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets off the plea of self-defence, and, in absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to*

[21](2004) 10 SCC 94

circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows: (SCC p. 654, para 9)

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge

his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

*The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.***"**

107. In view of the categorical confession of Suren Rai that it was he who had assaulted the deceased thrice with a *"khukuri"* after he was provoked to a fight and hurled the *"khukuri"* at him by the deceased, although Mr. B. Sharma has raised the plea of private defence during the hearing of the present appeal as an alternative argument, it is considered necessary to examine the same.

108. In re: ***Darshan Singh v. State of Punjab***[22] the Supreme Court would hold:

"58. *The following principles emerge on scrutiny of the following judgments:*

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into

[22] (2010) 2 SCC 333

operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb

> *may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.***"**

109. Padam Kumar Rai would clearly depose that Suren Rai, at around 8.00 p.m. on 23.05.2013, would request him to pacify the deceased as he was provoking him into a fight regarding his mobile phone. Padam Kumar Rai would also depose that Suren Rai had come following him to his house after he had gone to the temporary shed and told them not to fight and look for the mobile instead, when he would ask Suren Rai whether the mobile had been found. The fact that the deceased had lost his mobile and was blaming Suren Rai for it is evident from the deposition of Padam Kumar Rai. The fact there was an altercation between the deceased and Suren Rai is also evident. We have found that the confession to be true and voluntary. We have also found that the retraction was an afterthought and had no basis. The judicial confession of Suren Rai discloses that the deceased had provoked him to a fight. This confessional statement corroborates the evidence of Padam Kumar Rai that Suren Rai had complained to him about the deceased provoking him to a fight. Although we are aware that a retracted confession if found to be corroborative in material particulars it may be the basis of conviction we are also alive to the rule that no judgment of conviction shall be passed on an uncorroborated retracted confession. We are also alive to the rule that although retracted confession is admissible, the same should be looked at with some amount of suspicion-a stronger suspicion then that which is attached to the confession of an approver who leads evidence in the Court. In the circumstances, we examine the confession for the limited purpose of examining the alternative plea of Mr. B. Sharma of the right of private defence. Suren Rai in his confession would state that the deceased, after provoking him to a fight, had hurled the *"khukuri"* at him with the intention to kill him. Suren Rai would also state in his confession that he took the *"khukuri"* from the deceased. It is evident that, therefore, the *"khukuri"* was no longer with the deceased.

110. The Supreme Court in re: ***Buta Singh v. State of Punjab***[23] would hold:

> ***"****A person who is apprehending death or bodily injury cannot weigh in golden scales on the*

[23] (1991) 12 SCC 612

spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailant who are armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use only so much force in retaliation commensurate with the danger apprehended to him.

*Where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hypertechnical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negative. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially a finding of fact.***"***

111. Dr. O. T. Lepcha who conducted the post-mortem would find six anti-mortem injuries on the deceased as stated above. Each of the said injuries are severe and in the neck region. Section 102 of IPC provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues. The moment Suren Rai had taken the *"khukuri"* from the deceased the threat

was over. It may be true that in the spur of the moment, and in view of the provocation, the attempted assault by the deceased with a *"khukuri"* and his apprehension of the imminent danger on his life, Suren Rai may have taken the *"khukuri"* and assaulted the deceased. It is true that it is unrealistic to expect a person under assault to modulate his defence step by step with an arithmetical exactitude. However, the multiple and severe anti-mortem injuries on the deceased coupled with the fact that Suren Rai after commission of the act ran away from the scene of the crime even while the deceased would be still alive makes it unequivocally clear that Suren Rai had exceeded his right of self defence.

112. Section 299 IPC, 1860 provides:-

> ***"299. Culpable homicide.-*** *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.***"**

113. Section 300 IPC, 1860 provides:-

> ***"300. Murder.***—*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*
>
> ***(Secondly)*** *—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—*
>
> ***(Thirdly)*** *—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—*
>
> ***(Fourthly)*** *—If the person committing the act knows that it is so imminently dangerous that it*

*must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.***"**

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

The above exception is subject to the following provisos:—

(First) *—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.*

(Secondly) *—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.*

(Thirdly) *—That the provocation is not given by anything done in the lawful exercise of the right of private defence.*

Explanation.—*Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.*

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

such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

***Exception 3**.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*

***Exception 4**.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.*

Exception 5**.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."**

114. In re: ***Suresh Singhal v. State (Delhi Administration)***[24] the Supreme Court would examine the case in which the accused had exceeded the right of private defence. In the said case the accused, Suresh Singhal was sought to be strangulated by the deceased. Suresh Singhal would reach for his revolver, upon which the deceased would release him and turn around to run away. At this point the accused would shoot him, either still lying down or

[24] (2017) 2 SCC 737

having got up. The Supreme Court would hold that the accused had reasonably apprehended danger to his life on being strangulated which would be reasonable apprehension to put the right of self defence into operation. In such situation on the face of imminent and reasonable danger of losing life or limb the accused may in exercise of self defence inflict any harm even extending to death on his assailant. The Supreme Court would find that the accused had been put in such a position. The Supreme Court would, however, hold that the accused had exceeded the power given to him by law in order to defend himself although the exercise of the right was in good faith, in his own defence and without premeditation. The Supreme Court would, thus, hold that the homicide does not amount to murder in view of exception 2 of Section 300 IPC, 1860 and that the homicide falls within exception 4 of Section 300 IPC, 1860 and does not amount to murder. In such circumstances the Supreme Court would hold:-

> ***"32.*** *In these circumstances, we are of the view that Suresh Singhal is undoubtedly guilty of causing death to Shyam Sunder with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under Section 304 IPC. We are informed that the appellant has already undergone a sentence of 13½ years as on date. We thus sentence him to the period already undergone.***"**

115. In re: ***Naveen Chandra v. State of Uttaranchal***[25] the Supreme Court would examine a situation where the accused would while exercising his right of private defence, exceeded by continuing attacks after threat to life had seized. The Supreme Court would draw the distinction between the first and the fourth exception of Section 300 IPC thus:

> ***"12. "17****. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution (sic provocation) not covered by the First Exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of*

[25] (2009) 16 SCC 449

premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1.

***18**. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of*

fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

***19**. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan [(1993) 4 SCC 238 : 1993 SCC (Cri) 1156 : AIR 1993 SC 2426] it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs had come out. In view of the aforesaid factual position, Exception 4 to Section 300 IPC has been rightly held to be inapplicable."*

The above position was highlighted in Babulal Bhagwan Khandare v. State of Maharashtra [(2005) 10 SCC 404 : 2005 SCC (Cri) 1553] , at SCC pp. 410-11, paras 17-19.

***13**. Considering the background facts in the backdrop of the legal principles as set out above,*

*the inevitable conclusion is that Fourth Exception to Section 300 IPC does not apply***"**

116. In re: ***Naveen Chandra (supra)*** was a case in which the Trial Court had convicted the accused under Section 302 IPC and awarded the death sentence which led to a reference before the High Court for confirmation in terms of Section 366 Cr.P.C. The High Court converted the death sentence to life imprisonment partly allowing the appeal. The case would relate to an altercation between two sets of family members. It was alleged that the appellant before the Supreme Court, Naveen Chandra rushed and injured the deceased on his head with a *"khukuri"*. When the Appellant would be asked to spare the deceased the Appellant would attack the said persons too and injured them. The deceased would succumb to his injuries on the spot.

117. We find that the deceased had blamed Suren Rai for the loss of his mobile. We also find that the deceased had more than once provoked Suren Rai. Considering the confession of Suren Rai it seems that the deceased had provoked Suren Rai into a fight and hurled a *"khukuri"* at him on which Suren Rai had grabbed the *"khukuri"* from him and assaulted the deceased multiple times and severely which caused the death of the deceased. There was reasonable apprehension of danger to Suren Rai's life which would put the right of self defence into operation giving him the right to inflict any harm even extending to death. The multiple and gaping chop wounds on the back of the neck, below the skull causing the six severe anti-mortem injuries with the *"khukuri"*, a sharp moderately heavy weapon and his running away whilst the deceased was still alive makes us firmly believe that Suren Rai exceeded the power given to him by law in order to defend himself although the exercise of the right, quite clearly, was done whilst deprived of the power of self control by grave and sudden provocation in his own defence and without premeditation. The homicide therefore does not amount to murder in view of exception 1 of Section 300 IPC, 1860. We are of the view that Suren Rai is guilty of causing death of the deceased with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under Section 304 IPC, 1860. Resultantly, Suren Rai is convicted for the offence of culpable homicide not amounting to murder under paragraph 1 of Section 304 IPC, 1860. The appeal against conviction is allowed. The acquittal of the Respondent vide impugned judgment dated 29.02.2016 passed by the Learned Sessions Judge, West Sikkim at Gyalshing is set aside.

118. As this Court is reversing a judgment of acquittal in favour of the Respondent and convicting him we deem it appropriate to grant a hearing to the Respondent on the quantum of sentence. Accordingly the Respondent shall be produced before this Court on 11.06.2018 and heard on the quantum of sentence.

119. Certified copies of this judgment shall be furnished free of cost to the Respondent and also forwarded to the Court of the Learned Sessions Judge, West Sikkim at Gyalshing forthwith.

SLR (2018) SIKKIM 711

(Before Hon'ble the Chief Justice)

W.P. (C) No. 08 of 2018

Sushmita Dong ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Tashi Rapden Barfungpa, Advocate.

For Respondent 1 and 2: Mr. A. Mariarputham, Advocate General, Mr. J.B. Pradhan, Addl. Advocate General with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Asstt. Govt. Advocates.

For Respondent 3: Mr. A. Moulik, Sr. Advocate with Ms. Tshering Uden Sherpa and Ms. Archana Sharma, Advocates.

Date of decision: 12th June 2018

A. Constitution of India – Article 226 – It is noticed that the so called high ranking functionary of the State Government, who happens to be the husband of the 4th respondent, has no say in the entire exercise. On mere assertion without producing any material, there is no reason to accept that the High Power One Man Selection Committee of former Chief Justice was under influence of any high ranking functionary. Resignation from two or three posts earlier cannot be held as a disqualification, debarring her or him from consideration for selection to a post unless there is some disqualification or stigma attached thereto – This Court has had an occasion, to examine the chart prepared by the selection committee, wherein all the candidates were awarded marks under different criteria. The maximum mark meant for the interview was only 10. It was found that even if the petitioner were awarded full marks i.e. 10, in totality, her position would not have improved or the petitioner

would not have acquired more marks than the 4th respondent. In overall consideration, placing the 4th respondent at serial number 1 was just and proper.

(Para 23)

B. Constitution of India – Article 226 – Colourable Exercise of Power – Holding the interview at some place other than Gangtok, when the place of interview was not specified in the employment notice, cannot be held as irregular, as Rangpo is within the territory of Sikkim. The advertisement also cannot be held as vitiated on the stated ground that the pay scale was not stated when the petitioner was aware of it. However, the pay scale granted to the successful candidate was at par with the District Judge, who becomes eligible on completion of five years to make application and participate in the selection for the post – In such backdrop, it cannot be held that there was a colourable exercise of power or some favour was shown to the 4th respondent.

(Paras 24 and 25)

C. Employees Compensation Act, 1923 – S. 20 – It is manifest that the Parliament has created the post of Labour Commissioner on prescribing specific qualification. The State Government was empowered to appoint the Labour Commissioner keeping in view the prescribed qualification stated therein – The prescribed qualification under the provision of S. 20 of the Act of 1923 is: who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations. All the candidates had the requisite qualifications.

(Para 27)

D. Notification No. M(3)/(55)/GEN/DOP/PT.II dated 3rd July 2017 of the Department of Personnel, Administrative Reforms, Training and Public Grievances, Government of Sikkim – Prescribing Uniform Upper Age Limit of 40 years for all Communities of the State services/posts to be Filled up by Direct Recruitment under the Government of Sikkim and in the State Public Sector Undertakings of

Sikkim – Indisputably, the post of Commissioner for employees compensation, which is termed as Labour Commissioner, is a creation of Parliament enactment, not under the State Government but under the Central Government. The contention of the respondents that this notification is inapplicable deserves acceptance and I do not find any reason to the contrary. No other documents have been produced, in support of the contention that the upper age limit of 40 years is prescribed for Labour Commissioner also. Moreover, looking into the requirement of requisite qualification, 40 years cannot be fixed as upper age limit, thus the upper age limit appears to be for those services wherein appointment is made directly by the young freshers – S. 20 of the Act of 1923 contemplates experienced person having put in some qualifying services as Judicial Officer or as a Gazette Officer or in legal profession. This requirement is for a senior seasoned man, wherein the upper age limit of 40 years cannot be prescribed.

(Paras 28 and 29)

Petition dismissed.

Chronological list of cases cited:

1. Madras Institute of Development Studies and Another v. Sivasubbramaniyan and Others, (2016) 1 SCC 454.
2. Ashok Kumar and Another v. State of Bihar and Others, (2017) 4 SCC 357.
3. Dhananjay Malik and Others v. State of Uttaranchal and Others, (2008) 4 SCC 171.
4. State of Punjab and Another v. Gurdial Singh and Others, (1980) 2 SCC 471.
5. Kerala State Cashew Development Corporation v. Shahal Hassan Mussaliar and Another, (2009) 12 SCC 635.
6. State of Kerala and Another v. Peoples Union for Civil Liberties, Kerala State Unit and Others, (2009) 8 SCC 46.
7. Pratibha Nema and Others v. State of M.P. and Others, (2003) 10 SCC 626.

JUDGEMENT

Satish K. Agnihotri, J

The Petitioner, stated to be the applicant for consideration and selection for appointment on the post of Commissioner for employees compensation under the Employees Compensation Act, 1923 (hereinafter referred to as "the Act of 1923"), on being unsuccessful, has come up with the instant petition questioning the legality and validity of the select list, wherein the 4th respondent was found successful in the merit list and placed at Sl. No. 1 and subsequently appointment on the post.

2. The facts, in brief, as projected in the pleadings, are that the Labour Department, Government of Sikkim invited applications from the eligible local candidates to fill up the post of one Labour Commissioner under sub-Section (1) of Section 20 of the Act of 1923 by publication of notice in the news papers, Sikkim Express dated 14th December 2017 and also in other news papers, namely Sikkim Herald dated 12th December 2017, Samay Dainik dated 14th December 2017 and also published again on 15th December 2017. It was stated in the notification that applications are invited for appointment of the Labour Commissioner to deal with the compensation cases of the labourers, prescribing the qualification as under: -

> "(i) The candidates should have been a member of State Judicial Service for the period of not less than 5 (five) years or is or has been for not less than 5 (five) years an Advocate or a Pleader or is or has been a Gazetted Officer for not less than 5 (five) years having educational qualification and experience in Personal Management, Human Resource Development and Industrial Relations."

3. It was further stated that the preference shall be given to the candidates having knowledge of local language, culture and local law. The last date of submission of the application along with CV was on or before 29th December 2017. In response thereto, as many as 11 applicants, including the petitioner and the 4th respondent, submitted the applications. The Labour Department appointed One Man Selection Committee of Mr. Justice Kalyanjyoti Sengupta, Chairman, Sikkim Lokayukta, former Chief

Justice of a High Court. The applicants were informed the date of interview for the post, to be held on 05th February 2018 at Tourist Lodge, Rangpo. Consequent to the selection, a Select List dated 05th February 2018 of three candidates on merit was published, wherein the 4th respondent ranked first, the petitioner ranked second and one Mr. Dinesh Chawhan was at Sl. No. 3.

4. The petitioner, finding her unsuccessful, sent a legal notice dated 19th February 2018 to the respondents, stating that the notification dated 03rd July 2017 issued by the Government prescribed the upper age limit of 40 years for employment in the State services/posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim. The 4th respondent, who was placed at Sl. No. 1 in the merit list, had already crossed the age limit of 40 years and as such her appointment was illegal. Accordingly, her candidature and appointment be declared as illegal, null and void and the petitioner be declared as selected.

5. The Labour Department replied to the legal notice, stating that the notification dated 3rd July 2017 has no relevance. The post of Labour Commissioner is created by the Parliament under the Act of 1923. The notification dated 3rd July 2017 is applicable only to the posts created by the State Government. The 4th respondent has also responded to the notice, as it was addressed to her also.

6. Consequent upon the selection, the 4th respondent was appointed as Labour Commissioner by notification dated 14th February 2018, followed by an Office Order issued on the same date, wherein the scale of Rs.51500-1230-58930-1380-63070 was granted. It was also stated that the incumbent would be entitled to draw all perquisite and benefits at par with officers of the State Government in the said pay scale. Further, it was stated that her previous service shall be counted for pensionary benefits. Being aggrieved, the instant petition is filed.

7. It is averred in the petition that the appointment of the 4th respondent is in contravention of the notification No. M(3)/(55)/GEN/DOP/PT.II dated 03rd July 2017 wherein the upper age limit is prescribed as 40 years and as such it was a clear case of nepotism and favouritism by the State Government. It is further stated that the 4th respondent had resigned

from the post of Legal Remembrancer-cum-Secretary, Law Department, subsequently also from the post of Secretary in the Legal, Legislative and Parliamentary Affairs Department within a short span of time. As such, her appointment as Labour Commissioner is a case of colourable exercise of power, overlooking the statutory provisions, as stated hereinabove. It is further stated that the appointment of the 4th respondent is on account of undue favours shown by other respondents. The notification was not widely published, disabling many aspiring candidates from making applications for the post. The constitution of One Man Committee is without any authority of law. Confining applications to the local candidates clearly establishes that the provisions of Sikkim Government Establishment Rules, 1974 are made applicable to the process of appointment. The entire selection process was just an eye-wash. The petitioner has sought a declaration to the effect that the appointment of the 4th respondent be declared as null and void and in her place, the petitioner be appointed.

8. Mr. Tashi Rapten Barfungpa, learned counsel appearing for the petitioner, in addition to the aforestated pleadings, submits that the selection is bad on the ground that the advertisement does not prescribe pay scale. It is further alleged that since the interview was conducted in Rangpo and not in Gangtok, it vitiates the selection process. Mr. Barfungpa further submits that the 4th respondent was chosen unduly in colourable exercise of power, nepotism and favouritism. The 4th respondent has crossed the age limit of 40 years which was prescribed in the Government notification dated 03rd July 2017 and as such her appointment is null and void. Further, it was contended that the 4th respondent had resigned from various posts, thus, appointing her again shows mala fide intention of the authorities.

9. In response, Mr. A. Mariarputham, learned Advocate General appearing for the 1st and 2nd respondents, referring and relying on the counter affidavit dated 9th May 2018, denies the allegation that the advertisement was published only in one newspaper. It is stated that the advertisement was widely published firstly on 12th December 2017 in Sikkim Herald, on 14th December 2018 in Sikkim Express and Samay Dainik, a Nepali newspaper. Again it was published on 15th December 2017 in Sikkim Herald, Sikkim Express and Samay Dainik, which was manifest by the clippings of the newspapers, annexed to the counter affidavit. Further, it is contended that the purpose of wide publicity is to inform all the eligible candidates to enable them to make applications. In the

case on hand, no other persons have come forward to complain that he or she didn't have the information of the employment notice. The petitioner had due knowledge and, accordingly, she made the application and was considered for selection, thus, the petitioner cannot raise the issue that there was lack of due publicity. It is urged by the learned Advocate General that the appointment of Labour Commissioner is made under the provision of Section 20 the Act of 1923, which is a parliamentary legislation. Under the statutory provision, the post of Commissioner, being in the nature of Tribunal, in terms of the Sikkim Public Service Commission (Exemption from Consultation) Regulation, 1986, wherein the State Government could have appointed a person, whom it consider suitable, without advertisement and selection by a Selection Committee. However, in the case on hand, proper Committee was constituted, applications were invited from the eligible candidates, as prescribed in the statute, and on due selection the appointment was made. The notification dated 03rd July 2017 has no application, as the same is applicable only for the posts created by the State Government and to the posts in Public Sector Undertakings of the State. The post of Labour Commissioner is a creation of the Parliament and as such, the same provision is not applicable. It is further contended that looking the requisite qualification and nature of job, 40 years cap could not have been prescribed. The notice inviting application for the post of Labour Commissioner was confined to serve the local needs and the interests of labourers, who are locally employed, the responsibility of the Commissioner for Employees Compensation is limited to local area, particularly, the labourers who know local language only. Even otherwise, the petitioner is a local candidate and no non-local applicant has come forward to question the veracity of employment notice. It is also submitted that if the selection process itself is illegal or improper, as pleaded by the petitioner, claim of the petitioner for appointment cannot be pleaded and considered. The allegation of the petitioner that the selection of the 4th respondent is arbitrary and in colourable exercise of power is without any basis as the petitioner has neither pleaded nor established any fact which comes within the purview of the colourable exercise of power. Resignation of the 4th respondent from the posts of Legal Remembrancer-cum-Secretary, Law or Secretary, Legal, Legislative and Parliamentary Affairs Department, does not debar or disqualify the 4th respondent from being considered for selection as there was no stigma during her service career as she has been awarded "outstanding" grade. The petition is without any basis.

10. Referring to the observations made by the Supreme Court in Madras Institute of Development Studies and another vs. Sivasubbramaniyan and others[1] and Ashok Kumar and another vs. State of Bihar and others[2], it is next contended that the petitioner after having participated in the selection process and having been unsuccessful, is debarred from questioning the selection process, particularly, when she was found placed at Sl. No. 2 in the select list. The petitioner has not questioned the correctness of the select list.

11. Adopting the submissions put forth by the learned Advocate General, Mr. A. Moulik, learned Senior Council appearing for the 4th respondent, would contend that the 4th respondent was fully eligible for the post and there is no challenge to her merit, the 4th respondent is not disabled on account of the fact that she had resigned from Government service, that the alleged notification, wherein the maximum age limit is prescribed to 40 years, is not applicable to the post in question, as it is a post created by Parliament and also there is no age limit prescribed in the statute itself.

12. On anxious and careful consideration of the pleadings and submissions put forth by the learned counsel appearing for the parties, it is evident that the petitioner had applied, in response to the employment notice, participated in the selection process and also she was placed at Sl. No. 2 in the select list, on being unsuccessful, she has come up with this petition, now questioning the selection process.

13. In Dhananjay Malik and others vs. State of Uttaranchal and others[3], cited by learned Advocate General, the Supreme Court considered the selection and appointment of Physical Education Teachers at the instance of unsuccessful candidates and held as under:

> **"8.** In *Madan Lal* v. *State of J&K* [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance

[1] (2016) 1 SCC 454
[2] (2017) 4 SCC 357
[3] (2008) 4 SCC 171

to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.

9. In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done."

14. Again in Madras Institute of Development Studies and another vs. Sivasubbramaniyan and others[1], referring to the observation made earlier by the Supreme Court in several cases, reiterated that by having taken part in selection process with full knowledge that the candidates have the right to question the advertisement or methodology adopted by the selection board, on being unsuccessful, cannot turn around and question the selection process. It is not proper to entertain the grievance made by the unsuccessful candidates.

15. In Ashok Kumar and another vs. State of Bihar and others[2], the Supreme Court re-examined the issue and held as under:

13. The law on the subject has been crystallised in several decisions of this Court. In *Chandra Prakash Tiwari* v. *Shakuntala Shukla* [*Chandra Prakash Tiwari* v. *Shakuntala Shukla*, (2002) 6 SCC 127 :

2002 SCC (L&S) 830], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India* v. *S. Vinodh Kumar* [*Union of India* v. *S. Vinodh Kumar*, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , this Court held that: (SCC p. 107, para 18)

> "*18*. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar* v. *Rajiv Govil* [*Munindra Kumar* v. *Rajiv Govil*, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and *Rashmi Mishra* v. *M.P. Public Service Commission* [*Rashmi Mishra* v. *M.P. Public Service Commission*, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345].)"

14. The same view was reiterated in *Amlan Jyoti Borooah* [*Amlan Jyoti Borooah*v. *State of Assam*, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

16. In the case on hand, the petitioner was a local candidate, participated and also was selected and ranked 2nd in the select list and as such she is not permitted to challenge the purported non-publicity of advertisement and also the selection process, being irregular and illegal.

17. The colourable exercise of power, as pleaded by the petitioner, is considered by the Supreme Court in several cases, and defined as under.

18. In State of Punjab and another vs. Gurdial Singh and others[4], the Supreme Court elucidated colourable exercise of power, as under:

> "9. ……..Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist" ……..".

19. In Kerala State Cashew Development Corporation vs. Shahal Hassan Mussaliar and another[5], it was observed by the Supreme Court that an exercise of power which the State did not possess under the Act is colourable exercise of power.

20. In State of Kerala and another vs. Peoples Union for Civil Liberties, Kerala State Unit and others[6], it is observed that –

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[4] (1980) 2 SCC 471
[5] (2009) 12 SCC 635
[6] (2009) 8 SCC 46

> "37. ..... The doctrine of "colourable legislation" is directly connected with the legislative competence of the State."

21. In Pratibha Nema and others vs. State of M.P. and others[7], dealing with a case under Land Acquisition Act, wherein the proposed acquisition of land was primarily and predominantly meant to cater to the interests of the private companies, a twist was given to the acquisition as if it were for a public purpose, bypassing the requirements of Part VII of the Act, the Supreme Court held that the entire exercise was an instance of colourable exercise of power and was, therefore, *ultra vires* the powers of the State Government.

22. In the instant case, it is submitted that the 4th respondent had resigned from the post of Legal Remembrancer-cum-Secretary, Law Department, thereafter from the post of Secretary, Legal, Legislative and Parliamentary Affairs Department. Again her case was considered and appointed to the post of Labour Commissioner. It is further contended that the 4th respondent's husband is high ranking functionary of the State Government, thus, undue favour was shown to her.

23. On studied examination, it is noticed that the so called high ranking functionary of the State Government, who happens to be the husband of the 4th respondent, has no say in the entire exercise. On mere assertion without producing any material, there is no reason to accept that the High Power One Man Selection Committee of former Chief Justice was under influence of any high ranking functionary. Resignation from two or three posts earlier cannot be held as a disqualification, debarring her or him from consideration for selection to a post unless there is some disqualification or stigma attached thereto. In the case on hand, there is nothing to establish that there was any stigma or disqualification. This Court has an occasion, in the course of argument, to examine the chart prepared by the selection committee, wherein all the candidates were awarded marks under different criteria. The maximum mark meant for the interview was only 10. It was further found that even if the petitioner were awarded full marks i.e. 10, in totality, her position would not have improved or the petitioner would not have acquired more marks than the 4th respondent. In overall consideration, placing the 4th respondent at Sl. No. 1 was just and proper.

[7] (2003) 10 SCC 626

24. Holding the interview at some place other than Gangtok, when the place of interview was not specified in the employment notice, cannot be held as irregular, as Rangpo is within the territory of Sikkim. The advertisement also cannot be held as vitiated on the stated ground that the pay scale was not stated when the petitioner was aware of it. However, the pay scale granted to the successful candidate was at par with the District Judge, who becomes eligible on completion of five years to make application and participate in the selection for the post.

25. In such backdrop, it cannot be held that there was a colourable exercise of power or some favour was shown to the 4th respondent. The facts are not in dispute, as stated hereinabove.

26. Section 20 of the Act of 1923 reads as under:

> **"20. Appointment of Commissioners.-** (1) The State Government may, by notification in the Official Gazette, appoint any person who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations to be a Commissioner for Employees's Compensation for such area as may be specified in the notification.
>
> (2) Where more than one Commissioner has been appointed for any area, the State Government may, by general or special order, regulate the distribution of business between them.
>
> (3) Any Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.
>
> (4) Every Commissioner shall be deemed to be a

public servant within the meaning of the Indian Penal Code (45 of 1860).**"**

27. On bare perusal of the provision, it is manifest that the Parliament has created the post of Labour Commissioner, on prescribing the specific qualification. The State Government was empowered to appoint the Labour Commissioner keeping in view the prescribed qualification stated therein. The prescribed qualification under the provision of Section 20 of the Act of 1923 is, who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations. All the candidates had the requisite qualifications.

28. The prime contention of the petitioner is that the notification dated 3rd July 2017 of the Department of Personnel, Administrative Reforms, Training and Public Grievances, prescribing the upper age limit of 40 years for State employees, was not applied in the instant case. The notification reads as under:

" NOTIFICATION

The State Government is hereby pleased to prescribe a uniform upper age limit of 40 (forty) years for all communities of the State in the services/ posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim with immediate effect.

However, the posts and services for recruitment in Sikkim Police, Indian Reserve Battalion, Sikkim Armed Forces, Forest Services, Fire Services and any other posts and services which have specifically prescribed upper age limit lower than 30 (thirty) years in their recruitment rules are kept outside the purview of this notification.

This is in supersession of Notification No. M(135)/12/GEN/DOP dated 27/05/2015.

By order and in the name of the Governor.

Sd/-
(Surekha Pradhan) Mrs.
Additional Secretary to the Government
Department of Personnel, Administrative Reforms,
Training and Public Grievances"

The notification is crystal clear that the uniform upper age limit of 40 years prescribed therein is applicable for all communities of the State services/posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim and some services were excluded from the notification.

29. Indisputably, the post of Commissioner for employees compensation, which is termed as Labour Commissioner, is a creation of Parliament enactment, not under the State Government but under the Central Government. This contention of the respondents that this notification is inapplicable deserves acceptance and I do not find any reason to the contrary. No other documents have been produced, in support of the contention that the upper age limit of 40 years is prescribed for Labour Commissioner also. Moreover, looking into the requirement of requisite qualification, 40 years cannot be fixed as upper age limit, thus the upper age limit appears to be for those services wherein appointment is made directly by the young freshers. Section 20 of the Act of 1923 contemplates experienced person having put in some qualifying services as judicial officer or as a gazette officer or in legal profession. This requirement is for a senior seasoned man, wherein the upper age limit of 40 years cannot be prescribed.

30. It is also contended by the petitioner that before selection, no rules were framed under the Act of 1923. Section 32 of the Act of 1923 empowers the State to make rules to carry out the purpose of the Act. Under that Section, there is no delegation with regard to appointment of Labour Commissioner. Thus, the State Government is not competent to frame rules for selection and appointment of the Labour Commissioner. Even otherwise non framing of rules does not invalidate the selection for any post.

31. As a sequitur, the writ petition is devoid of merit and is, accordingly, dismissed.

32. Costs made easy.

SLR (2018) SIKKIM 726

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

Crl. A. No. 03 of 2017

Md. Atiullah ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. K.T. Tamang and Mr. Hem Lall Manger, Advocates.

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors with Mrs. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 12th June 2018

A. Code of Criminal Procedure, 1973 – S. 154 – F.I.R – Addressing the argument that the Appellant was not named in the F.I.R, common sense prevailing, would lead to the inevitable conclusion that the name of an accused is not necessarily known to the victim unless they were previously acquainted. No such acquaintance of the victim and the Appellant prior to the incident has been referred to in evidence.

(Para 12)

B. Indian Penal Code, 1860 – S. 354 – Absence of Injuries on the Victim – Absence of injuries do not falsify the offence or incident and merely because the Doctor and the victim's father testified that the victim is hallucinatory, sans proof, no credence can be lent to this aspect, incidents of such behaviour not being established. If it is to be assumed that she falsely implicated the Appellant how she sought help from two male strangers coming in the vehicle and made no allegation against them needs to be ruminated over – In other words, it is evident that the incident did occur and hence the existence of

the F.I.R. At the same time, it is pertinent to notice that cross-examination has not demolished the fact of the presence of the Appellant at the place of occurrence or what he was doing therein at that time of the night.

(Para 16)

C. Code of Criminal Procedure, 1973 – S. 313 – Appellant cannot be convicted merely on the basis that he failed to make out his innocence in his statement under S. 313 of the Cr.P.C.

(Para 18)

Appeal dismissed.

Chronological list of cases cited:

1. Bhimapa Chandappa Hosamani and Others v. State of Karnataka, (2006) 11 SCC 323.
2. Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57.
3. Vidyadharan v. State of Kerala, (2004) 1 SCC 215.
4. Tarkeshwar Sahu v. State of Bihar, (2006) 8 SCC 560.
5. Ramesh v. State through Inspector of Police, (2014) 9 SCC 392.
6. Alagarsamy and Others v. State represented by Deputy Superintendent of Police, Madurai, (2010) 12 SCC 427.
7. Raju Pandurang Mahale v. State of Maharashtra and Another, (2004) 4 SCC 371.
8. State of U.P. v. Pappu *alias* Yunus and Another, (2005) 3 SCC 594. (2015) 4 SCC 739
9. Nagaraj v. State represented by Inspector of Police, Salem Town, Tamil Nadu, (2015) 4 SCC 739.

JUDGEMENT

Meenakshi Madan Rai, J

1. Questioning the legality of the conviction handed out to the Appellant under Sections 341, 354 and 506 of the Indian Penal Code, 1860 (for

short "IPC") and the sentence meted out consequently both in Sessions Trial (F.T.) Case No.05 of 2016 by the Learned Judge, Fast Track Court, South and West Sikkim, at Gyalshing, on 29-12-2016, the Appellant is before this Court.

2. The impugned sentence are as follows;

(i) For the offence under Section 354 of the IPC, the convict was sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.20,000/- (Rupees twenty thousand) only;

(ii) For the offence under Section 341 of the IPC, the convict was sentenced to undergo simple imprisonment for a period of one month and to pay a fine of Rs.500/- (Rupees five hundred) only; and

(iii) For the offence under Section 506 of the IPC, he was sentenced to undergo simple imprisonment for a period of 8 months and to pay a fine of Rs.1,000/- (Rupees one thousand) only.

The sentences were ordered to run concurrently and all the sentences of fine bore a default clause of imprisonment.

3. Raising his contentions before this Court, Learned Counsel for the Appellant argued that several infirmities and anomalies arose in the evidence of the Prosecution Witnesses, more particularly, the evidence of the prosecutrix (hereinafter, P.W.1) who in her cross-examination contradicted the contents of the First Information Report (FIR), Exhibit 1, apart from deposing that no offence occurred in the month of May, 2016. Her evidence established that she was not present at Gyalshing, West Sikkim, on 08-05-2016 or on 09-05-2016, thereby disproving the alleged dates of the incident. Admittedly, she did not mention the registration number of any vehicle in her statement before the Gyalshing Police as she did not notice the registration number. Her statement to the effect that she went till 8th Mile, Gyalshing, in the vehicle of her friend's male companion was also admitted by her to be false and being illiterate she was not in a position to state whether Exhibit 1, the FIR, was scribed as per her narration. P.W.4,

the father of P.W.1, had categorically confirmed that P.W.1 did not inform him of any offence being committed on her and the evidence of the Doctor, P.W.8 substantiated by P.W.4 would establish that P.W.1 was hallucinatory with a mild mental disability. Besides she did not raise any hue and cry when she was allegedly taken by the Appellant in his vehicle nor did she attempt to escape although doors of the vehicle were accessible to her. No eye-witnesses to the incident were furnished nor was it proved that P.W.1 was at the Gyalshing Taxi Stand on 08-05-2016 and at Gyalshing Bazar on 09-05-2016. The investigation failed to trace out Renuka, her alleged friend or the vehicle in which P.W.1 travelled to 8th Mile Mandir, Gyalshing, from the Taxi Stand on the night of 09-05-2016. The registration number of the vehicle in which P.W.1 travelled from Gangtok to Gyalshing on 08-05-2016 was not indicated nor was the Appellant named in the FIR, while the signatures appearing on Exhibit 1 purportedly of witnesses have gone unproved. That, these anomalies were afforded scant regard by the Learned Trial Court, on which counts the convict deserves an acquittal. His submissions were fortified with reliance on ***Bhimapa Chandappa Hosamani and Others*** vs. ***State of Karnataka***[1] and ***Radhu*** vs. ***State of Madhya Pradesh***[2].

4. Contesting the contentions of Learned Counsel for the Appellant, Learned Additional Public Prosecutor would insist that the evidence of the Prosecution Witnesses have been consistent and although as per the doctor, P.W.8, P.W.1 may be suffering from mild hallucination, nevertheless she made no error in identification of the Appellant when the Test Identification Parade (TI Parade) was conducted. The presence of the Appellant at the place of occurrence as testified by independent witnesses P.W.2 and P.W.3 corroborates the evidence of P.W.1. P.W.2 and P.W.3 have stated that they saw P.W.1 running towards Legship at around 10.30 p.m. that night and after stopping and hearing out P.W.1, found the Appellant sometime shortly thereafter, walking towards Khopa/Legship. No motive has been insinuated against P.W.1 to concoct a false incident against the Appellant, besides, the conduct of the Appellant and his following the vehicle of P.W.2 and P.W.3 after P.W.1 sought help from them and was in their vehicle, would effectively conclude that the incident had indeed occurred. The statement of P.W.1 recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C."), sheds light on the fact that she narrated the

[1] (2006) 11 SCC 323
[2] (2007) 12 SCC 57

incident to the Magistrate P.W.7, which is corroborated by her evidence before the Court as to how the convict had violated her. The fact of commission of the offence is also strengthened by the evidence of P.W.5, the Doctor who examined P.W.1 at the District Hospital, Gyalshing, on 10-05-2016, on which occasion the Doctor was informed of the same incident by P.W.1. The evidence of P.W.1 has been consistent and has not been demolished by cross-examination, it is, therefore, urged that the Judgment of conviction and Order on Sentence require no interference. To buttress his submissions, strength was drawn from the ratiocination in ***Vidyadharan*** vs. ***State of Kerala***[3] and ***Tarkeshwar Sahu*** vs. ***State of Bihar***[4].

5. The rival contentions were heard *in extenso* and the evidence and documents scrutinised carefully.

6. To appreciate the points canvassed on behalf of the Appellant the relevant facts are briefly stated. P.W.1 aged about 18 years, resident of Lower Omchung, Gyalshing, West Sikkim, had fled Gangtok where she was working as a domestic help on 08-05-2016 and spent the night at the Gyalshing Taxi Stand. On 09-05-2016, she remained in Gyalshing Bazar, where around 2130 hours, her friend Renuka told her to accompany her till 8th Mile Mandir area, Gyalshing. On reaching there, Renuka desired to proceed on to Rabongla with her male companion, thus, P.W.1 alighted from the vehicle and started walking towards her house at Lower Omchung. At the relevant time, vehicle bearing No.SK 01 J 0701 stopped in front of her and the driver/Appellant started chasing her. As she fell, he grasped her hand, took her inside his vehicle, kissed her, fondled her breasts, touched her private part and threatened to push her off the cliff if she cried out. On the pretext of drinking water, she escaped from the vehicle and after sometime saw a vehicle coming towards her from Legship, upon which she sought help from the two persons in the vehicle duly narrating the incident to them. After driving for a few meters the Appellant was shown and identified to them by P.W.1. The two persons reprimanded the Appellant who appeared to be drunk and aggressive. To avoid confrontation they went to the Police Station where P.W.1 lodged a Complaint, Exhibit 1 which was reduced in writing by the Police.

7. Pursuant thereto, Gyalshing Police Station (**P.S.**) case was registered under Sections 354A/341/366/506 of the IPC against the Appellant, aged

[3] (2004) 1 SCC 215
[4] (2006) 8 SCC 560

about 37 years and investigation taken up by the Investigating Officer (for short "I.O."). Investigation would reveal that P.W.1 had been in an unsuccessful marriage for almost 8/9 months on which she returned home and then sought employment in March, 2016 as a house maid in Gangtok. On 08-05-2016, she returned home upon which the aforestated incident unfolded. On completion of investigation, Charge-sheet came to be filed against the Appellant under Sections 354D/366/341/506/ 511/376 of the IPC.

8. The Learned Trial Court framed Charge against the Appellant under Sections 376(1)/511, Section 341 and Section 506 of the IPC and proceeded to examine 10 (ten) Prosecution Witnesses furnished before her including the I.O. of the case, appreciation of which led to the impugned Judgment and Order on Sentence.

9. What thus requires consideration by this Court is whether the Learned Trial Court erred in convicting the Appellant and sentencing him to imprisonment, as already detailed hereinabove.

10. While bearing in mind the arguments of Learned Counsel for the Appellant that anomalies existed in the evidence of P.W.1, I now proceed to meticulously examine P.W.1's evidence. In her evidence-in-chief, she has made no mention of the date of incident, however, on cross-examination she has not denied that she came to Gyalshing on 08-05-2016 and remained therein on 09-05-2016. The only admission she has made is that she did not sleep at Gyalshing Taxi Stand on the date she came to Gyalshing from Gangtok and that this statement is false, but at the same time she has clarified the above by stating that she did not tell the Police that she had slept at the Gyalshing Taxi Stand on 08-05-2016. Her evidence indubitably is to the effect that **"***the incident in this case occurred one month ago***"** which would be in the month of August instead of the month of May, but merely because of this anomaly the Prosecution case cannot be thrown out of the window, that would tantamount to throwing the baby out with the bath water as the narration of the incident of sexual assault has been categorical and consistent. Admittedly, her statement to the effect that she went till 8th Mile, Gyalshing in the vehicle of male companion of her friend Renuka is false, but it is also her case that she was not tutored by the Gyalshing Police to make an oral Complaint, hence indicating that her Complaint in no way falsely implicated the Appellant. That apart, she has

also stated that although she has a habit of talking to herself she does not have hallucinatory behaviour and reiterated that was she not making a false complaint against the Appellant. She further asserted that Exhibit 1 is the statement made by her and identified Exhibit 1(a) as her signature. What thus emerges is that although she was unable to specify the date and month of the incident, the fact that the Appellant came to the place of occurrence, alighted from his vehicle, chased her, put her in his vehicle, kissed her on her cheeks and lips, fondled her breasts, touched her private part has remained undemolished, as also the fact that she escaped from his clutches and fled on the pretext of wanting to drink water and made good her escape when the Appellant was drinking water. What transpired prior to the incident to my mind is irrelevant once the incident in question has been unerringly established, consistent and uncontroverted. Pursuant thereto the Court is to only examine the credibility of the witness and whether she was under a compulsion to concoct a false story. There is no cross-examination conducted to establish that P.W.1 knew the Appellant before the incident or that she carried any angst against him for any past incident or that they had past enmity, their families were inimical or that she had any other motive to falsely implicate the Appellant in the instant matter. In these circumstances, there is no reason for the Court to doubt the testimony of P.W.1.

11. The evidence of P.W.1 with regard to the Appellant being at the place of incident is supported by the evidence of P.W.2 and P.W.3 the driver and occupant of the vehicle that P.W.1 met when she was running towards Legship having escaped from the Appellant. P.W.2 and P.W.3 would testify that around 10/10.30 p.m. on the night that they were returning from Darjeeling on nearing Khopa, Legship-Gyalshing Road, they saw P.W.1 running towards Legship and when they stopped and enquired as to where she was going, she narrated the incident to them. There are no inconsistencies in the evidence of P.W.2 and P.W.3 with regard to what they have stated in their evidence. They have both also deposed that as they approached Khopa they saw the Appellant upon which P.W.3 enquired from the Appellant as to where he was going, in response, the Appellant pushed a beer bottle on the face of P.W.3. P.W.2 and P.W.3 then proceeded towards Gyalshing while the Appellant closely followed them in his vehicle. P.W.3 stopped his vehicle on the road side while the Appellant, as per both the witnesses, stopped his vehicle as well and refused to proceed although the witnesses told him to. P.W.2 and P.W.3 then went towards Gyalshing Out Post (**O.P.**). Pausing here, it would be relevant to point out that,

according to Learned Counsel for the Appellant, as per P.W.2 and P.W.3 they had left P.W.1 at the Gyalshing O.P. That in contradiction the I.O. stated that the statement of P.W.1 was recorded at the Gyalshing P.S. That the I.O. testified that P.W.2 and P.W.3 along with P.W.1 straightway came to the P.S. to lodge a Complaint against the driver of the vehicle bearing No.SK 02 J 0701 and not the O.P. That, a perusal of Exhibit 1 would also indicate that two witnesses being P.W.2 and P.W.3 have signed on Exhibit 1, but no evidence was given by these two witnesses that the contents of Exhibit 1 were recorded in their presence, thus there is a doubt with regard to the very existence of Exhibit 1. It is pertinent to point out that the FIR is required to be signed only by P.W.1 and hence the requirement of the identification of the signatures of P.W.2 and P.W.3 on Exhibit 1 does not arise. The evidence of P.W.2 and P.W.3 also reveals that they narrated to the Police whatever P.W.1 had told them and a while later the Police Gyalshing O.P. apprehended the Appellant. Their evidence would sufficiently establish that they remained with P.W.1 not only till the FIR was reduced to writing at 01.00 a.m. on 10-05-2016, but till 02.00 a.m. of the same night, when the Appellant was apprehended as revealed by the Arrest Memo, in the records furnished before the Learned Trial Court. The words "Gyalshing O.P." and "Gyalshing P.S." appear to have been used interchangeably, at the same time, it must be pointed out that despite sufficient opportunity it was not clarified by cross-examination as to whether the words had been used interchangeably or whether "Gyalshing O.P." and "Gyalshing P.S." have been correctly recorded as separate places.

12. Addressing the argument that the Appellant was not named in the FIR, Exhibit 1, common sense prevailing, would lead to the inevitable conclusion that the name of an accused is not necessarily known to the victim unless they were previously acquainted. No such acquaintance of the victim and the Appellant prior to the incident has been referred to in evidence. The following decision of the Hon'ble Supreme Court in ***Ramesh*** vs. ***State through Inspector of Police***[5] in this context would stand the victim in good stead;

> **"22.** It has been held by this Court in *Jitender Kumar* v. *State of Haryana* [(2012) 6 SCC 204 : (2012) 3 SCC (Cri) 67] : (SCC pp. 213-14, paras 16-18)

[5] (2014) 9 SCC 392

"*16*. As already noticed, the FIR (Ext. P-2) had been registered by ASI Hans Raj, PW 13 on the statement of Ishwar Singh, PW 11. It is correct that the name of accused Jitender, son of Sajjan Singh, was not mentioned by PW 11 in the FIR. However, the law is well settled that merely because an accused has not been named in the FIR would not necessarily result in his acquittal. An accused who has not been named in the FIR, but to whom a definite role has been attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. Every omission in the FIR may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the court, including the physical and mental condition of the informant, the normal behaviour of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused. The court has to examine these aspects with caution. Further, the court is required to examine such challenges in the light of the settled principles while keeping in mind as to whether the name of the accused was brought to light as an afterthought or on the very first possible opportunity.

17. The court shall also examine the role that has been attributed to an accused by the prosecution. The informant might not have named a particular accused in the FIR, but such name might have been revealed at

> the earliest opportunity by some other witnesses and if the role of such an accused is established, then the balance may not tilt in favour of the accused owing to such omission in the FIR.
>
> *18*. The court has also to consider the fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopaedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to *State of U.P.* v. *Krishna Master* [(2010) 12 SCC 324 : (2011) 1 SCC (Cri) 381] and *Ranjit Singh* v. *State of M.P.* [(2011) 4 SCC 336 : (2011) 2 SCC (Cri) 227] ”
>
> **23.** Therefore, the contention of the appellant that since his name did not appear in the FIR, he is entitled to acquittal, is not maintainable. We accordingly, answer this point in favour of the respondent.**”**

13. An unrelenting assault has been made by the Appellant on the veracity of the FIR, Exhibit 1, nevertheless it would be beneficial also to refer to

Alagarsamy and Others vs. ***State represented by Deputy Superintendent of Police, Madurai***[6], wherein the Hon'ble Supreme Court opined that;

> **"39.** After all, the FIR is not a be-all and end-all of the matter, though it is undoubtedly, a very important document. In most of the cases, the FIR provides corroboration to the evidence of the maker thereof. It provides a direction to the investigating officer and the necessary clues about the crime and the perpetrator thereof. True it is that a concocted FIR, wherein some innocent persons are deliberately introduced as the accused persons, raises a reasonable doubt about the prosecution story, however, a vigilant, competent and searching investigation can despoil all the doubts of the court and on the basis of the evidence led before the court, the court can weigh the inconsistencies in the FIR and the direct evidence led by the prosecution. It is not a universal rule that once FIR is found to be with discrepancies, the whole prosecution case, as a rule, has to be thrown. Such can never be the law.
>
> **40.** In the decision relied upon by Shri Altaf Ahmed, learned Senior Counsel for the appellants in Sevi v. State of T.N. [1981 Supp SCC 43 : 1981 SCC (Cri) 679] , it is clear that the Court had thrown the prosecution case not merely because the FIR was doubtful, but as the Court found that the prosecution case and the evidence of the eyewitnesses, even otherwise, were liable to be rejected, as they were the partisan witnesses. The Court took into account the dramatic pattern of the evidence of the witnesses and, therefore, threw the prosecution case because of the non-availability of the FIR book.**"**

Besides in the instant matter, it has to be appreciated that consequent to the lodging of Exhibit 1, the Appellant was arrested, thereby proving his identification.

[6] (2010) 12 SCC 427

14. What emerges from the evidence of P.W.2 and P.W.3 is that the Appellant was at the place where P.W.1 alleged that he had chased her, put her into his vehicle and outraged her modesty. Outraging modesty has lucidly been explained in ***Raju Pandurang Mahale*** vs. ***State of Maharashtra and Another***[7] wherein it was detailed as follows;

> "**12.** What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The *Shorter Oxford Dictionary* (3rd Edn.) defines the word "modesty" in relation to a woman as follows:
>
> > "Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste."

15. The penalty for such outrage finds place in Section 354 of the IPC which is extracted below for convenience;

> **"354. Assault or criminal force to woman with intent to outrage her modesty**.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**"**

[7] (2004) 4 SCC 371

The evidence on record and discussions hereinabove indeed reveals the fact of such an outrage.

16. Absence of injuries do not falsify the offence or incident and merely because the Doctor P.W.8 and P.W.4 the father of P.W.1 testified that P.W.1 is hallucinatory, sans proof, no credence can be lent to this aspect, incidents of such behaviour not being established. If it is to be assumed that she falsely implicated the Appellant how she sought help from two male strangers coming in the vehicle and made no allegation against them needs to be ruminated over. In other words, it is evident that the incident did occur and hence the existence of Exhibit 1. At the same time, it is pertinent to notice that cross-examination has not demolished the fact of the presence of the Appellant at the place of occurrence or what he was doing therein at that time of the night. Although, reliance was placed by the Appellant on ***Bhimapa Chandappa Hosamani*** (*supra*) wherein the Appellants who were found guilty of the offence under Section 302 of the IPC were acquitted by the Hon'ble Supreme Court on appeal on the grounds of non-reliability of the prosecution witness, who was the mother of the deceased, the instant case can be differentiated from that matter as the P.W.1 herself is the victim of the offence and there is no reason to disbelieve her version. In this context, it is worthwhile noticing that in ***State of U.P.*** vs. ***Pappu alias Yunus and Another***[8] the Supreme Court held that—

> **"12.** It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.**"**

[8] (2005) 3 SCC 594

As the Appellants' evidence has been consistent there is no requirement for corroborative evidence. Moreover the evidence of P.W.2 and P.W.3 substantiates the evidence of P.W.1 as per the discussions which have ensued hereinabove.

17. The evidence of P.W.5, the Gynaecologist posted at District Hospital Gyalshing, reveals that she medically examined the victim on 10-05-2016 at around 01.37 a.m. while the evidence of P.W.6 would show that the accused was examined by her at 03.00 a.m. on 10-05-2016 where it emerged that the Appellant had consumed alcohol but was not intoxicated. Had the incident not occurred there would be no reason for the police to forward the victim and the Appellant for medical examination at that unearthly hour.

18. A careful scrutiny of the responses of the Appellant in his Section 313 Cr.P.C. statement, to the questions put to him by the Court, reveal inconsistencies as follows:

> ***"****Q. No.5. PW-1 has further deposed that she also gave her statement in the Court at Tikjuk and proved Exhibit-4. She says on the same day, the said madam conducted a Test Identification Parade and proved Exhibit 5 as the same document where she had signed in the Court.*
>
> *What have you to say?*
>
> *Ans: It is true she recognised me in the T.I. Parade.*
>
> .....
>
> *Q. No.18, P.W.7 has further deposed that the victim was then called to identify you from amongst the line up of 12 people sharing similar physical traits. She says, the victim identified you positively on all three rounds of the identification despite the fact that you were made to change your position in each round and interchange your shirt and sweater with the other persons in the line up. She has proved Exhibit-10 as the memorandum of TIP. What have you to say?*
>
> *Ans: I do not remember.***"**

The contradictions extracted above raise doubts as to the veracity and the truthfulness of his answers. At the same time, I hasten to clarify that this Court is conscious of the legal position that the Appellant cannot be convicted merely on the basis that he failed to make out his innocence in his statement under Section 313 of the Cr.P.C. as has been held in ***Nagaraj*** vs. ***State represented by Inspector of Police, Salem Town, Tamil Nadu***[9] where it has been specifically held that;

> **"15.** In the context of this aspect of the law it has been held by this Court in *Parsuram Pandey* v. *State of Bihar* [(2004) 13 SCC 189 : 2005 SCC (Cri) 113] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is notto nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, ……. Having made this clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. ……..**"**
>
> [emphasis supplied]

19. The evidence of P.W.7, the Magistrate who conducted the TI Parade would indicate that P.W.1 had identified the Appellant three times

[9] (2015) 4 SCC 739

from amongst 12 (twelve) other persons sharing similar features as that of the Appellant. No arguments have been advanced on this count by Learned Counsel for the Appellant contesting this aspect of the evidence of P.W.7. The question of P.W.1 telling her father of the incident does not arise as the evidence on record reflects P.W.1 had not met P.W.4 till then and it was the Police who went to the home of P.W.4 and told him of the incident.

20. That having been said, the Medical Report Exhibit 7 of P.W.1 would indicate that there were no visible external injuries on P.W.1 and her hymen was intact, no bleeding, discharge or redness was seen on her genital. This would establish that although the acts of the Appellant emphatically amounted to outraging P.W.1's modesty, but no offence under Sections 376/ 511 of the IPC is established.

21. Thus, in view of the entirety of the discussions, the evidence on record and while carefully analysing and appreciating it, I am of the considered opinion that the impugned Judgment and Order on Sentence of the Learned Trial Court warrants no interference.

22. Appeal fails and is accordingly dismissed.

23. The Appellant shall surrender today before the Learned Judge, Fast Track Court, South and West Sikkim, at Gyalshing, to undergo the sentence imposed on him by the impugned Order on Sentence, duly setting off the period of imprisonment if undergone by him during investigation and as an under-trial prisoner.

24. No order as to costs.

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

SLR (2018) SIKKIM 742
(Before Hon'ble the Chief Justice and
Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (PIL) No. 14 of 2017

Pahalman Subba and Others ….. PETITIONERS

Versus

The Hon'ble Speaker, Sikkim Legislative Assembly and Others ….. RESPONDENTS

For the Petitioners: Mr. Sabyasachi Chatterjee and Mr. Pem Tshering Lepcha, Advocates.

For Respondent 1: Mr. D.K. Siwakoti, Advocate.

For Respondent 2 and 3: Mr. A. Mariarputham, Advocate General, Mr. J.B. Pradhan, Addl. Advocate General with Mr. Thinlay Dorjee Bhutia, Govt. Advocate, Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Asstt. Govt. Advocates

For Respondent 4: Mr. Tashi Rapden Barfungpa, Advocate.

For Respondent 5 to 11: Mr. N. Rai, Sr. Advocate with Mr. Suraj Chettri, Advocate.

Date of decision: 19th June 2018

A. Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 6 – The 1st and 2nd petitioners were the petitioners before the Speaker. Out of five petitioners, two have chosen to file the present Writ Petition and three have chosen not to join the present petition. Out of three, one has not signed even the petition filed before the Speaker, Sikkim Legislative Assembly. Copies of the petition was endorsed to several

constitutional functionaries and also to the press and media, which was not the requirement of the procedure or of the constitutional provisions – The petition was signed by four petitioners and it was not duly verified, as required under the Rules. There were no documents except a newspaper report which gave reasons to the applicants therein to believe that 5th to 11th respondents have switched over from the original party to the new party. Newspaper report was neither authenticated nor duly signed and verified. Even other annexures were neither authenticated nor duly signed and verified, as required under Rule 6. Thus, it does not meet the requirement of Rule 6.

(Para 14)

B. Constitution of India – Tenth Schedule – Disqualification on ground of Defection – The Constitution (Fifty-second Amendment) Act, 1985 was enacted by the Parliament incorporating Article 191(2), providing for disqualification of a person for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule – The Tenth Schedule was also incorporated by the said Amendment Act – On bare perusal of the relevant paragraphs 2, 4 and 5 of the Tenth Schedule, it is evident that a Member of a House stands disqualified, if he has voluntarily given up his membership of such political party or if he votes or abstain from voting in such House contrary to any direction issued by the political party to which he belongs or an elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election – Paragraph 4 contemplates disqualification on ground of defection not to apply in case of merger of original party with another political party. The merger of the original political party of a Member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the Members of the legislature party concerned have agreed to such merger – The contesting respondents 5th to 11th, who are more than two-thirds of the Members of the concerned legislature party have not formed any separate party to merge with another political party. Thus, Article 191 (2) clearly mandates that disqualification incurred by a member under the Tenth Schedule to

the Constitution shall be disqualified for being a Member of the Legislative Assembly.

(Paras 15, 18 and 19)

C. Constitution of India – Tenth Schedule – Object – Rule of Interpretation – The principle of reading down deducible is that the statutory provision which fails to effectuate the objective and purpose of the enactment may be read down to further objective of the enactment as well as the Constitution – Rules 6 and 7 of the Rules of 1985 are in the domain of procedure and intended to facilitate the holding of inquiry and not to defeat or destruct the objective of the Tenth Schedule by introducing the technicality. Indisputably the Rules are in the nature of subordinate delegated legislation and cannot supplant the very object of the Tenth Schedule, as the Tenth Schedule was added to the Constitution to remove the evil of political defection which became a matter of national concern and undermines the very foundation of the democracy.

(Para 25)

D. Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 6 – Rule 6 (2) prescribes that only any other Member of the Assembly may make petition in relation to a Member in writing to the Speaker – We are of the view that Rule 6 (2) does not achieve the object of the Tenth Schedule, as examined by the Supreme Court in various cases and as such it may be read down making clear that not only a Member of the Legislative Assembly but any other person interested is competent to make a reference (petition) to the Speaker for initiating a process of disqualification of a Member, who has incurred it under the Tenth Schedule. The other provisions of Rule 6 are mere procedural and do not obstruct or impede the objective of the Tenth Schedule.

(Paras 28 and 30)

E. Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 – Rule 7 – Rule 7 (1) provides that the Speaker shall consider whether the petition complies with the requirements of the Rule 6. Rule 7 (2) contemplates dismissal of the petition if it is not in accord with Rule 6. Sub-rule (3) (4) (5) (6) (7)

and (8) of Rule 7 deals with the requirements after admission of petition while adjudicating the issue – Indisputably, the procedural rules are in the domain of procedure and may not supplant the constitutional provision. If there is any irregularity in compliance of the procedure, the defect is curable and the petitioners are entitled to an opportunity to make good the defect before rejecting the petition under Rule 7 (2). Thus, Rule 7 (2) is also read down to this effect that if a petition fails to comply with the requirement of Rule 6, the petitioner be granted an opportunity to cure the defect before dismissing the petition at the threshold.

(Paras 29 and 31)

F. Constitution of India – Writ Jurisdiction – The High Court is competent to exercise its powers of judicial review under Articles 226 and 227 of the Constitution when the validity of the order of the Speaker is in question in Writ Jurisdiction, as laid down by the Constitution Bench in *Kihoto Hollohan* v. *Zachillhu*, when the challenge is made on the ground of *ultra vires* or *mala fides* or having been made in colourable exercise of power based on extraneous and irrelevant considerations – That situation has not arisen in this case, as no decision has been taken by the Speaker yet on merit – The impugned order dated 2nd February 2017 is not faulted with, as the same was rendered in accordance with Rules as it stood at the relevant time, thus, no interference is warranted.

(Paras 32 and 33)

Petition dismissed.

Chronological list of cases cited:

1. Pahlman Subba and Others v. State of Sikkim and Others, WP (PIL) No. 04 of 2016.
2. Speaker, Orissa Legislative Assembly v. Utkal Keshari Parida, (2013) 11 SCC 794.
3. Ravi S. Naik v. Union of India and Others, 1994 Supp (2) SCC 641.
4. Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council and Others, (2004) 8 SCC 747.

5. Jagjit Singh v. State of Haryana and Others, (2006) 11 SCC 1.

6. Rajendra Singh Rana and Others v. Swami Prasad Maurya and Others, (2007) 4 SCC 270.

7. Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi and Others, (2015) 12 SCC 381

8. Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651.

JUDGMENT

The Judgment of the Court was delivered by ***Satish K. Agnihotri, J***

The first petitioner, stated to be a social activist and a former Member of Union Parliament but not being a member of any political party, the second and third petitioners, stated to be social and political activists but not the members of any political party, have come up with this petition seeking reading down of Rules 6 and 7 of the Members of Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 (hereinafter referred to as "the Rules of 1985"), in the light of Article 191 (2) and the Tenth Schedule to the Constitution of India. Further a direction is sought to cancel/quash/rescind the communication being No. 516/SLAS/ L&PA dated 02nd February 2017 of the Additional Secretary, L&PA, Sikkim Legislative Assembly Secretariat, whereby the petition made by the first and second petitioners along with three others, seeking disqualification of 5th to 11th respondents on the ground of alleged defection, was not admitted in terms of Rule 7 Clauses (1) and (2) of the Rules of 1985. The petitioners have further prayed for declaration that the 5th to 11th respondents be held as disqualified for being the member of Sikkim Legislative Assembly on the ground of defection, in addition other directions of interim nature during pendency of the petition.

2. The genesis of *lis* involved in this petition is that 32 members were elected in the General Election for Sikkim Legislative Assembly held in the month of May, 2014. Out of 32 members, 10 members including the 5th to 11th respondents won the election on Sikkim Krantikari Morcha (SKM) tickets. It is stated that on 30th November 2015, the 5th to 11th respondents switched over to the ruling party Sikkim Democratic Front (SDF) and thereafter were appointed as Parliamentary Secretaries. Their appointments,

as Parliamentary Secretaries, were quashed on 25th August 2017 by this Court in Pahlman Subba & others vs. State of Sikkim & Others[1]. After a period of 13 months, the first and second petitioners along with three other persons, namely, Mr. T.B. Rai, Mr. Sonam Pintso Bhutia and Mr. Mohan Kr. Rai, filed a petition addressed to the Speaker through the Secretary, Sikkim Legislative Assembly on 25th January 2017 seeking disqualification of the 5th to 11th respondents. It is apt to state here that Mr. T.B. Rai did not sign the petition, as is manifest from the petition. It is also relevant to mention at this stage that the petition was not addressed only to the competent authority i.e. the Speaker, but a copy was endorsed to the President of India, Prime Minister of India, Chief Justice of India, Minister of Law and Justice, Chairman, Law Commission of India, Chief Election Commissioner and other three elected members of Sikkim Krantikari Morcha. In addition, a copy was given to the press and media also. The Additional Secretary, Sikkim Legislative Assembly Secretariat by the impugned communication dated 02nd February 2017 informed the petitioners that the petition dated 25th January 2017 could not be admitted in terms of Rule 7 Clauses (1) and (2) of the Rules of 1985. After about 10 months, the 1st and 2nd petitioners, who submitted the petition, with others before the 1st respondent, filed the instant petition on 12th December 2017. It is relevant to state here that the 3rd petitioner was not the petitioner before the Speaker.

3. On perusal of the records, it is found that one more letter was sent by Mr. P.S. Tamang, an elected member and President, Sikkim Krantikari Morcha party to the Speaker, seeking disqualification of 5th to 11th respondents on 29th December 2015, however, we are not concerned with the said letter in this petition.

4. Mr. Sabyasachi Chatterjee, learned counsel appearing for the petitioners in the aforestated backdrop submits that the petition dated 25th January 2017 was in the form of information to the Speaker. The Speaker, should not have insisted on other formalities and on having come to know about the defection by the contesting private respondents, which was against the spirit of Tenth Schedule of Constitution as well as Article 191 (2) of the Constitution of India, ought to have declared them disqualified cancelling their membership. The defection of 5th to 11th respondents to the ruling party thereafter assuming the office of Parliamentary Secretaries could not

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be termed as merger of original party, which is exempted from the disqualification under the Tenth Schedule. The action of the 1st respondent frustrates the constitutional objectives. It is not necessary to be a Member of Legislative Assembly to make a petition to the Speaker, seeking compliance of provisions of the Tenth Schedule read with Article 191 (2) of the Constitution of India. The petitioners, not being members of any registered political party, filed the petition to uphold the sanctity of the Constitutional mandate and protect it from vice of defection.

5. The learned counsel for the petitioner further submits that the Constitution (Fifty-second Amendment) Act, 1985 was passed with the sole objective to prevent evil of political defection, which undermines the very foundation of democracy and the principles which sustain it. The Speaker, being the head of Legislature, is under obligation to uphold constitutional values. On having come to know the alleged defection made by the 5th to 11th respondents, who were elected on the symbol of Sikkim Krantikari Morcha and thereafter defected to the ruling party for personal gain, without proper merger with the party, the first respondent failed to discharge constitutional mandate and as such it needs correction by this Court in this petition. The petitioners are discharging their fundamental duties, as enshrined under Article 51A to abide and uphold the sanctity of the Constitution. It is further stated that there was no merger of Sikkim Krantikari Morcha with the Sikkim Democratic Front, the ruling party, to escape from clutches of the anti-defection law.

6. Referring to the judicial pronouncement in Speaker, Orissa Legislative Assembly vs. Utkal Keshari Parida[2], laid down by the Supreme Court, wherein it was made clear that not only a member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a member of the House had incurred disqualification under the Tenth Schedule to the Constitution of India, learned counsel would contend that the Speaker ought to have admitted the petition and decided on merit. Dismissal of it at threshold for non-compliance of rules is illegal and as such relevant provisions of Rules 6 and 7 deserve to be read down to facilitate all the persons who are interested in upholding the values of Constitution of India, in this petition seeking disqualification of defaulting members.

[2] (2013) 11 SCC 794

7. To garner support, Mr. Chatterjee referred and relied on the observations made by the Supreme Court in Ravi S. Naik vs. Union of India and others[3], Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council and others[4], Jagjit Singh vs. State of Haryana and others[5], Rajendra Singh Rana and others vs. Swami Prasad Maurya and others[6] and Speaker, Haryana Vidhan Sabha vs. Kuldeep Bishnoi and others[7].

8. Contesting, Mr. A. Mariarputham, learned Advocate General, appearing for the 2nd and 3rd respondents, referring to the counter affidavit filed by the 3rd respondent would contend that the Members of the Sikkim Legislative Assembly (Disqualification on ground of Defection) Rules, 1985 was made in exercise of powers conferred on the Speaker of the House under paragraph 8 of the Tenth Schedule to the Constitution to regulate the procedure to work out the provisions of the Tenth Schedule on 20th December 1985, gazetted on 23rd December 1985. The petition of the 1st and 2nd petitioners along with three others, who have not approached this Court, was not admitted on the ground that it was not in accordance with the requirement of Rules 6 and rejected in terms of Rule 7 Clauses (1) and (2) of the Rules of 1985. It is further submitted by the learned Advocate General that out of three petitioners herein, only 1st and 2nd petitioners have joined with other three persons in the so called petition before the Speaker. Out of five petitioners, one had chosen not to sign the petition before the Speaker and only 1st and 2nd petitioners have approached this Court under this writ petition, along with third petitioner, who was not before the Speaker.

9. Mr. Mariarputham would next urge that Clause (1) of Rule 7 of the Rules of 1985 prescribes that the Speaker shall consider whether the petition complies with the requirements of Rule 6. Clause (2) of Rule 7 of the Rules of 1985 contemplates dismissal of the petition at the threshold, if the same does not comply with the requirements of Rule 6. Rule 6 of the Rules of 1985 provides that no reference of any question in respect of disqualification of a member shall be made by a petition without compliance

[3] 1994 Supp (2) SCC 641
[4] (2004) 8 SCC 747
[5] (2006) 11 SCC 1
[6] (2007) 4 SCC 270
[7] (2015) 12 SCC 381

of requirement of provisions of Rules. The Rules provides firstly that it be made in writing by any other member addressed to the Speaker. Further, the petition shall contain a concise statement of the material facts on which the petitioner relies, be accompanied by copies of the documentary evidence, if any, on which the petitioner relies. It should be duly signed and verified by the petitioner in the manner laid down in the Code of Civil Procedure, 1908. Every annexure shall also be signed and verified by the petitioner in the same manner as the petition. The petition dated 25th January 2017 was defective, as firstly it was not made by a member of the House; secondly, it was not duly signed and verified by all the petitioners while making the petition and also the documentary evidence duly signed and verified was not annexed with the petition. Thus, the petition was rightly not admitted at the threshold itself and the Additional Secretary was authorized to duly communicate the order to the petitioners.

10. The Advocate General would further submit that this Court may not interfere with the petition at this stage, when the Speaker has not decided the petition on merit in the light of Article 212 of the Constitution of India. The non-admission of petition, which was not in accordance with the prescribed Rules, is a legislative proceeding, which may not be examined by this Court unless it is ultra vires, in violation of principles of natural justice, mala fide or having been made in colourable exercise of power based on extraneous material. The question as to whether the petitioners were competent to make a petition before the Speaker, came up for consideration in Speaker, Orissa Legislative Assembly, wherein the Supreme Court read down the Rule 6 holding that not only a member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact of disqualification incurred by a member. The other provisions of Rules are strictly in accordance with the principles of natural justice, thus, the same may not be read down, as pleaded by the petitioners. It is further contended that the petitioners have not placed any material on record to indicate that the procedural rules framed therein which facilitates proper examination and inquiry are meant to destroy the objectives and purpose of the Tenth Schedule, thus, the relief seeking reading down of Rules 6 and 7 of the Rules 1985, be rejected.

11. Mr. D.K. Siwakoti, learned counsel appearing for the Speaker adopts the arguments put forth by the learned Advocate General.

12. Mr. Tashi Rapten Barfungpa, learned counsel appearing for the Election Commission of India states that the Election Commission of India has nothing to say in the matter at this stage.

13. Mr. N. Rai, learned Senior Counsel appearing for the private 5th to 11th respondents submits that the petition made by the 1st and 2nd petitioners along with three others was filed before the Speaker not with the purpose to uphold the constitutional provision but to gain the publicity and also it was in the nature of complaint, as it was sent to other high constitutional functionaries. The motive was not fair and proper, thus, the same was rightly rejected by the Speaker. Mr. Rai, learned Senior Counsel, adopting the arguments advanced by the learned Advocate General on the other issues, submitted that the petition was not in accord with the procedure and as such it was rightly not admitted at the threshold itself. There was no irregularity or illegality in not considering the petition on the part of the Speaker, thus, this Court may not entertain this petition at this stage.

14. On anxious and conscientious consideration of pleadings and submissions put forth by the learned counsel appearing for the parties, it is found that the 1st and 2nd petitioners were the petitioners before the Speaker. Out of five petitioners, two have chosen to file the present writ petition and three have chosen not to join the present petition. Out of three, one has not signed even the petition filed before the Speaker, Sikkim Legislative Assembly. It is also manifest that a copy of the petition was endorsed to several constitutional functionaries and also to press and media, which was not the requirement of the procedure or of the constitutional provisions. On further examination of the original petition produced before us, it is established that the petition was signed by four petitioners and it was not duly verified, as required under the Rules. There were no documents except a newspaper report which gave reasons to the applicants therein to believe that 5th to 11th respondents have switched over from the original party to the new party. Newspaper report was neither authenticated nor duly signed and verified. Even other annexures were also neither authenticated nor duly signed and verified, as required under Rule 6 of the Rules of 1985. Thus, it does not meet the requirement of Rule 6.

15. The Constitution (Fifty-second Amendment) Act, 1985 was enacted by the Parliament incorporating Article 191 (2), providing for disqualification

of a person for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule. The Tenth Schedule was also incorporated by the said Amendment Act.

16. Paragraph 2 of the Tenth Schedule prescribes for Disqualification on ground of defection, which reads as under: -

> **"2. Disqualification on ground of defection**.— (1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—
>
> (a) if he has voluntarily given up his membership of such political party; or
>
> (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.
>
> *Explanation*.— For the purposes of this sub-paragraph,—
>
> (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;
>
> (b) a nominated member of a House shall,—

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—

(i) where he was a member of political party immediately before such commencement, be deemed, for the

purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.**"**

17. Paragraph 3 provided for non-application of qualification in case of split in original political party consisting of more than one-third of the members of such legislature party. Paragraph 3 was omitted subsequently by the Constitution (Ninety-first Amendment) Act, 2003 and also paragraphs 4 and 5 were reframed as under:

"4. Disqualification on ground of defection not to apply in case of merger.— (1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party—

(a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or

(b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political

party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.

5. Exemption.— Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule,—

(a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office."

18. On bare perusal of the relevant paragraphs 2, 4 and 5 of the Tenth Schedule, it is evident that a member of a House stands disqualified, if he has voluntarily given up his membership of such political party or if he votes or abstain from voting in such House contrary to any direction issued by the political party to which he belongs or an elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

19. Paragraph 4 contemplates disqualification on ground of defection not to apply in case of merger of original party with another political party. The merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger. It is pleaded that there was no merger of the political party on defection of two-thirds of the members of the concerned legislature party i.e. Sikkim Krantikari Morcha. The contesting respondents 5th to 11, who are more than two-thirds of the members of the concerned legislature party, have not formed any separate party to merge with another political party. Thus, Article 191 (2) clearly mandates that disqualification incurred by a member under the Tenth Schedule to the Constitution shall be disqualified for being a member of the Legislative Assembly.

20. The Defection Rules of Goa Legislative Assembly, akin to the present one, which were framed to regulate the procedure, had fallen for consideration in Ravi S. Naik vs. Union of India3, wherein the Supreme Court held as under:-

> **"18.** …… The Disqualification Rules have been framed to regulate the procedure that is to be followed by the Speaker for exercising the power conferred on him under sub-paragraph (1) of paragraph 6 of the Tenth Schedule to the Constitution. The Disqualification Rules are, therefore, procedural in nature and any violation of the same would amount to an irregularity in procedure which is immune from judicial scrutiny in view of sub-paragraph (2) of paragraph 6 as construed by this

Court in Kihoto Hollohan case [1992 Supp (2) SCC 651] . Moreover, the field of judicial review in respect of the orders passed by the Speaker under sub-paragraph (1) of paragraph 6 as construed by this Court in Kihoto Hollohan case [1992 Supp (2) SCC 651] is confined to breaches of the constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity. We are unable to uphold the contention of Shri Sen that the violation of the Disqualification Rules amounts to violation of constitutional mandates. By doing so we would be elevating the rules to the status of the provisions of the Constitution which is impermissible. Since the Disqualification Rules have been framed by the Speaker in exercise of the power conferred under paragraph 8 of the Tenth Schedule they have a status subordinate to the Constitution and cannot be equated with the provisions of the Constitution. They cannot, therefore, be regarded as constitutional mandates and any violation of the Disqualification Rules does not afford a ground for judicial review of the order of the Speaker in view of the finality clause contained in sub-paragraph (1) of paragraph 6 of the Tenth Schedule as construed by this Court in Kihoto Hollohan case [1992 Supp (2) SCC 651] .**"**

21. In Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council and others[4], the Supreme Court held as under: -

> **"8.1.** This authoritative pronouncement clearly lays down that the decision of the Chairman or the Speaker of the House can be challenged on very limited grounds, namely, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity and further a mere irregularity in procedure can have no bearing on the decision.
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> X X X

12. Paragraph 8 gives the rule-making powers and it provides that the Chairman or the Speaker of a House may make rules for giving effect to the provisions of the Tenth Schedule. Clause (*d*) of sub-para (1) of this rule provides that the rule may provide the procedure for deciding any question referred to in sub-para (1) of Paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question. In exercise of the power conferred by Paragraph 8 of the Tenth Schedule, the Chairman, Bihar Legislative Council has made the Bihar Legislative Council Members (Disqualification on Ground of Defection) Rules, 1994 (hereinafter referred to as "the Rules"). Rule 3 of the Rules provides that the leader of each legislature party shall furnish to the Chairman a statement in writing containing the names of members of such political party. Sub-rules (1) and (6) of Rule 6 and sub-rules (1) and (2) of Rule 7 read as under:

> "6. *References to be by petitions*.—(1) No reference of any question as to whether a member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such member made in accordance with the provisions of this rule.
>
> (2)-(5) * * *
>
> (6) Every petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908), for the verification of pleadings.
>
> 7. *Procedure*.—(1) On receipt of a petition under Rule 6, the Chairman shall consider

whether the petition complies with the requirements of that rule.

(2) If the petition does not comply with the requirements of Rule 6, the Chairman shall dismiss the petition and intimate the petitioner accordingly".

13. It may be noted that under Paragraph 8, the Chairman or the Speaker of a House is empowered to make rules for giving effect to the provisions of the Tenth Schedule. The rules being delegated legislation are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it. The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention. Power delegated by an enactment does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends. (See Section 59 in chapter "Delegated Legislation" in Francis

Bennion's *Statutory Interpretation*, 3rd Edn.) The aforesaid principle will apply with greater rigour where rules have been framed in exercise of power conferred by a constitutional provision. No rules can be framed which have the effect of either enlarging or restricting the content and amplitude of the relevant constitutional provisions. Similarly, the rules should be interpreted consistent with the aforesaid principle.**"**

22. In Jagjit Singh vs. State of Haryana and others[5], the Supreme Court again examined the powers of the Speaker vis-à-vis the procedural rule prescribed therein and observed as under:-

"11. The Speaker, while exercising power to disqualify Members, acts as a Tribunal and though validity of the orders thus passed can be questioned in the writ jurisdiction of this Court or High Courts, the scope of judicial review is limited as laid down by the Constitution Bench in *Kihoto Hollohan* v. *Zachillhu* [1992 Supp (2) SCC 651] . The orders can be challenged on the ground of ultra vires or mala fides or having been made in colourable exercise of power based on extraneous and irrelevant considerations. The order would be a nullity if rules of natural justice are violated.

12. The requirement to comply with the principles of natural justice is also recognised in rules made by the Speaker in exercise of powers conferred by para 8 of the Tenth Schedule. The Speaker, Haryana Legislative Assembly, made the Haryana Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986 in exercise of power conferred by para 8 of the Tenth Schedule. Rule 7(7), inter alia, provides that neither the Speaker nor the Committee shall come to any finding that a Member has become subject to disqualification under the Tenth Schedule without affording a reasonable

opportunity to such Member to represent his case and to be heard in person.**"**

23. In Speaker, Orissa Legislative Assembly vs. Utkal Keshari Parida[2], the Supreme Court examined an identical provision of Rule 6 of the Members of the Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987 and held as under:

> **"18.** The conundrum presented on account of the provisions of the Tenth Schedule in addition to Rules 6(1) and (2) of the 1987 Rules had fallen for consideration in *Mahachandra Prasad Singh case* [(2004) 8 SCC 747] . Speaking for the Bench, G.P. Mathur, J. (as His Lordship then was), observed in para 16 of the judgment that the purpose and object of the Rules framed by the Chairman in exercise of the power conferred by Para 8 of the Tenth Schedule was to facilitate the Chairman in discharging his duties and responsibilities in resolving any dispute as to whether the Member of the House had become subject to disqualification under the Tenth Schedule. It was also observed that: (SCC pp. 761-62, para 16)
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> > *"16.* … The Rules being in the domain of procedure, are intended to facilitate the holding of inquiry and not to frustrate or obstruct the same by the introduction of innumerable technicalities. Being subordinate legislation, the Rules cannot make any provision which may have the effect of curtailing the content and scope of the substantive provision, namely, the Tenth Schedule".
>
> **19.** The aforesaid observation is precisely what we too have in mind, as otherwise, the very object of the introduction of the Tenth Schedule to the

> Constitution would be rendered meaningless. The provisions of sub-rules (1) and (2) of Rule 6 of the 1987 Rules have, therefore, to be read down to make it clear that not only a Member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a Member of the House had incurred disqualification under the Tenth Schedule to the Constitution of India. On receipt of such information, the Speaker of the House would be entitled to decide under Para 6 of the Tenth Schedule as to whether the Member concerned had, in fact, incurred such disqualification and to pass appropriate orders on his findings.**"**

24. In Speaker, Haryana Vidhan Sabha vs. Kuldeep Bishnoi and others[7], the Supreme Court held as under: -

> **"43.** ……. Under the scheme of Schedule X the Speaker does not have an independent power to decide that there has been split or merger as contemplated by Paras 3 and 4 respectively and such a decision can be taken only when the question of disqualification arises in a proceeding under Para 6. It is only after a final decision is rendered by the Speaker under Para 6 of Schedule X to the Constitution that the jurisdiction of the High Court under Article 226 of the Constitution can be invoked.
>
> **44.** We have to keep in mind the fact that these appeals are being decided in the background of the complaint made to the effect that the interim orders have been passed by the High Court in purported exercise of its powers of judicial review under Articles 226 and 227 of the Constitution, when the disqualification proceedings were pending before the Speaker. In that regard, we are of the view that since the decision of the Speaker on a petition under Para 4 of Schedule X concerns only a question of

> merger on which the Speaker is not entitled to adjudicate, the High Court could not have assumed jurisdiction under its powers of review before a decision was taken by the Speaker under Para 6 of Schedule X to the Constitution. It is in fact in a proceeding under Para 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is amenable to the writ jurisdiction of the High Court. It is in such proceedings that the question relating to the disqualification is to be considered and decided. Accordingly, restraining the Speaker from taking any decision under Para 6 of Schedule X is, in our view, beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under Para 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order.**"**

25. The principle of reading down deducible from the aforestated promulgation of judicial pronouncements, is that the statutory provision which fails to effectuate the objective and purpose of the enactment may be read down to further objective of the enactment as well as the Constitution. Rules 6 and 7 of the Rules of 1985 are in the domain of procedure and intended to facilitate the holding of inquiry and not to defeat or destruct the objective of the Tenth Schedule by introducing the technicality. Indisputably the rules are in the nature of subordinate delegated legislation and cannot supplant the very object of the Tenth Schedule, as the Tenth Schedule was added to the Constitution to remove the evil of political defection which became a matter of national concern and undermines the very foundation of the democracy.

26. The Supreme Court in Speaker, Orissa Legislative Assembly[2], read down the provisions of sub-rules (1) and (2) of Rule 6 of the Members of Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987, holding that not only a member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a Member of the House had incurred disqualification.

27. Applying the well-settled principles of law to the facts of the instant case, wherein the Rules of 1985 was framed by the Speaker in exercise of the power conferred by paragraph 8 of the Tenth Schedule to the Constitution of India, we proceed to examine the relevant provisions of the Rules of 1985. Rules 6 and 7 are extracted hereunder: -

> **"6** (1) No reference of any question as to whether a member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such member made in accordance with the provisions of this rule.
>
> (2) A petition in relation to a member may be made in writing to the Speaker by any other member:
>
> Provided that a petition in relation to the Speaker shall be addressed to the Secretary.
>
> (3) The Secretary shall,
>
> (a) as soon as may be after the receipt of a petition under the proviso to sub-rule (2) make a report in respect thereof to the House, and
>
> (b) as soon as may be after the House has elected a member in pursuance of the proviso to sub-paragraph (1) of paragraph 6 of the Tenth Schedule place the petition before such member.
>
> (4) Before making any petition in relation to any member, the petitioner shall satisfy himself that there are reasonable grounds for believing that a question has arisen as to whether such member has become subject to disqualification under the Tenth Schedule.

(5) Every petition –

(a) shall contain a concise statement of the material facts on which the petitioner relies; and

(b) shall be accompanied by copies of the documentary evidence, if any, on which the petitioner relies and where the petitioner relies on any information furnished to him by any person, a statement containing the names and addresses of such persons and the gist of such information as furnished by each such person.

(6) Every petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908), for the verification of pleadings.

(7) Every annexure to the petitioner shall also be signed by the petitioner and verified in the same manner as the petition.

7 (1) On receipt of a petition under rule 6, the Speaker shall consider whether the petition complies with the requirements of that rule.

(2) If the petition does not comply with the requirements of rule 6, the Speaker shall dismiss the petition and intimate the petitioner accordingly.

(3) If the petition complies with the requirements of rule 6, the Speaker shall cause copies of the petition and of and of the annexures thereto to be forwarded,-

(a) to the member in relation to whom the petition has been made; and

(b) where such member belongs to any legislature party and such petition has not been made by the leader thereof, also to such leader, and such member or leader shall, within seven days of the receipt of such copies, or within such further period as the speaker may for sufficient cause allow, forward his comments in writing thereon to the Speaker.

(4) After considering the comments, if any in relation to the petition, received under sub-rules (3) within the period allowed (whether originally or on extension under that sub-rule), the Speaker may either proceed to determine the question or, if he is satisfied, having regard to the nature and circumstances of the case that it is necessary or expedient to do so, refer the petition to the Committee for making a preliminary inquiry and submitting a report to him.

(5) The Speaker shall, as soon as may be after referring a petition to the Committee under sub-rule (4) intimate the petitioner accordingly and make an announcement with respect to such reference in the House or, if the House is not then in session, cause the information as to the reference to be published in the Bulletin.

(6) Where the Speaker makes a reference under sub-rule (4) to the Committee, he shall proceed to determine the question as soon as may be after receipt of the report from the Committee.

(7) The procedure which shall be followed by the Speaker for determining any question and the procedure which shall be followed by the Committee for the purpose of making a preliminary inquiry under sub-rule (4) shall be, so far as may be same as the procedure for enquiry and determination by the Committee of any question as to breach of privilege of the House by a member, and neither the Speaker nor the Committee shall come to any finding that a member has become subject to disqualification under the Tenth Schedule without affording a reasonable opportunity to such member to represent his case and to be heard in person.

(8) The provisions of sub-rule (1) to (7) shall apply with respect to a petition in relation to the Speaker as they apply with respect to a petition in relation to any other member and for this purpose, reference to the Speaker in these sub-rules shall be construed as including references to the member elected by the House under the proviso to sub-paragraph (1) of paragraph 6 of the Tenth Schedule".

28. Rule 6 (2) of the Rules of 1985 prescribes that only any other member of the Assembly may make petition in relation to a member in writing to the Speaker. Rule 6 (3) (4) (5) (6) and (7) deal with how a petition be made. Under Rule 6 (3) (a), the Secretary, Legislative Assembly is required to make a report in respect of making of petition to the House. Under clause (3) (b) of Rule 6, a copy of the petition be supplied to such member against whom a petition is made. Rule 6 (4) contemplates that the petitioner making a petition must indicate reasonable reasons for believing that a question has arisen in respect of a member who has become subject to disqualification under the Tenth Schedule. Rule 6 (5) provides for making a petition containing a concise statement of the material facts and also the same be accompanied by relevant documentary evidence. Rule 6 (6) and (7) is made to ensure authenticity of the facts and documents laid down by prescribing that the petition as well as the annexures be duly signed and verified by the petitioner.

29. Rule 7 (1) provides that the Speaker shall consider whether the petition complies with the requirements of the Rule 6. Sub-rule (2) of Rule 7 contemplates dismissal of the petition if it is not in accord with Rule 6. Sub-rule (3) (4) (5) (6) (7) and (8) of Rule 7 deal with requirements after admission of petition while adjudicating the issue.

30. On examination, we are of the view that Rule 6 (2) does not achieve the object of the Tenth Schedule, as examined by the Supreme Court in various cases and as such it may be read down making clear that not only a member of the Legislative Assembly but any other person interested is competent to make a reference (petition) to the Speaker for initiating a process of disqualification of a member, who has incurred it under Tenth Schedule. The other provisions of Rule 6 are mere procedural and do not obstruct or impede the objective of the Tenth Schedule. Thus, it does not need any reading down. Rule 7 (1) and (2) also need consideration.

31. Indisputably, the procedural rules are in the domain of procedure and may not supplant the constitutional provision. If there is any irregularity in compliance of the procedure, the defect is curable and the petitioners are entitled to an opportunity to make good the defect before rejecting the petition under Rule 7 (2) of the Rules of 1985. Thus, Rule 7 (2) of the Rules of 1985 is also read down to this effect that if a petition fails to comply with the requirement of Rule 6, the petitioner be granted an opportunity to cure the defect before dismissing the petition at the threshold.

32. At this stage, it is apt to state that the High Court is competent to exercise its powers of judicial review under Article 226 and 227 of the Constitution, when the validity of the order of the Speaker is in question in writ jurisdiction, as laid down by the Constitution Bench in Kihoto Hollohan vs. Zachillhu[8], when the challenge is made on the ground of ultra vires or mala fides or having been made in colourable exercise of power based on extraneous and irrelevant considerations. That situation has not arisen in this case, as no decision has been taken by the Speaker yet on merit.

33. As a sequitur, Rule 6 (2) and Rule 7 (2) are explained hereinabove. The impugned order dated 02nd February 2017 is not faulted with, as the

[8] 1992 Supp (2) SCC 651

same was rendered in accordance with rules as it stood at the relevant time, thus, no interference is warranted. Consequently the other reliefs sought cannot be ordered at this stage, thus, rejected.

34. Resultantly, the writ petition is disposed of. No order as to costs.

SLR (2018) SIKKIM 770

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

Crl. A. No. 28 of 2016

Lakpa Lepcha ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N.B. Khatiwada, Senior Advocate with Mrs. Gita Bista, Advocate (Legal Aid Counsel).

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

Date of decision: 25th June 2018

A. Indian Penal Code, 1860 – S. 300 – Murder – Exceptions – The exceptions do not offer complete vindication to the conduct of the accused but they do reduce the impact of the gravity of the offence. Nevertheless, although the onus of proving the guilt of the accused rests with the prosecution but the burden of proving the circumstances to bring the case within the exceptions enumerated above, lies with the accused as would be evident from the provisions of S. 105 of the Indian Evidence Act, 1872 – Had the Appellant physically attacked the deceased immediately after the verbal duel between them inside the house of the deceased then it could well be said that the fight broke out suddenly without premeditation, in the heat of passion upon a sudden quarrel. Exception 4 of S. 300 IPC applies not only to cases where the fight is unpremeditated and sudden but with the rider that the accused did not take undue advantage or act in a cruel or unusual manner. When a man is being throttled mercilessly and the entreaties of the wife to stop the act fell on the deaf ears of the Appellant, it cannot be said that there was no undue advantage – None of the exceptions to S. 300 including Exception 4 are available to the Appellant to reduce his criminality to S. 304 of the IPC.

(Paras 9 and 16)

B. Indian Penal Code, 1860 – S. 300 – Murder – Although, it may be accepted that the fight between the Appellant and the deceased arose initially without premeditation when he momentarily lost control upon a sudden quarrel but when he throttled the deceased it was not a continuance of the previous fight but after he had time for reason to regain dominion of his mind. Even assuming it was a continuation of the same fight as already emphasised, the Appellant took undue advantage and in an unusual manner while throttling the deceased by putting him in a physically disadvantageous position, strangulating him with his arm from behind and thereby causing his death. It cannot be said that in such a circumstance he had no intention to cause the death of the deceased. (Para 19)

Appeal dismissed.

Chronological list of cases cited:

1. State of Haryana v. Sher Singh and Others, (1981) 2 SCC 300.
2. Aradadi Ramudu *alias* Aggiramudu v. State Through Inspector of Police, Yanam, (2012) 5 SCC 134.
3. Chahat Khan v. State of Haryana, (1972) 3 SCC 40.
4. Virsa Singh v. The State of Punjab, AIR 1958 SC 465.

JUDGMENT

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

1. Calling in question the conviction handed out to the Appellant under Section 302 of the Indian Penal Code, 1860 (hereinafter 'IPC'), in S.T. Case No. 20 of 2015 and assailing the Sentence of imprisonment for life, with fine and a default clause of imprisonment, the instant Appeal has found its way to this Court.

2. The facts that culminated in the aforesaid Conviction and Sentence commenced with a written report submitted by Sub Inspector Avinash Lamichaney of Singtam Police Station PW-14, on 27.04.2015 in connection with Singtam P.S., U.D. Case No. 11/2015, dated 25.04.2015, under Section 174 Cr.P.C., on account of the unnatural death of the deceased, Mingma Tshering Lepcha. The report after investigation, detailed that the cause of

death was asphyxiation. Suspecting foul play, the Sub Inspector sought further necessary action. In pursuance thereto, the U.D. case was converted to Singtam P.S. Case No. 35/2015 dated 27.04.2015, under Section 302 IPC, against the Appellant Lakpa Lepcha and endorsed to the Investigating Officer (for short "I.O.). Investigation would unravel that the deceased, Mingma Tshering Lepcha, was married to Hizing Lhamu Lepcha PW-1 and they had two children from the wedlock, Lakit Lepcha, PW-2 aged about 14 years and Dawa Ongchen Lepcha, PW-10 aged about 8 years. The Appellant, Lakpa Lepcha, the younger brother of the deceased Mingma Tshering Lepcha, resided alone while Phurkit Lepcha PW-11, the sister of the deceased, lived close to the house of the deceased. On the fateful evening, the Appellant along with his friend Bal Bahadur Chettri PW-3, stopped by at the house of the deceased where they all drank some liquor. An argument and a physical fight thereafter ensued between the brothers on account of the deceased asking his wife, PW-1, to wash his clothes which evidently did not find favour with the Appellant on which he protested by throwing a plate of food at the deceased. On the intervention of PW-1, the fight ended with the enraged Appellant leaving the house of the deceased. He then started throwing splintered bamboo on the courtyard of the house of the deceased. On the request of PW-1 and the deceased to desist from the act, he verbally abused and threatened them with dire consequences. P.W.1, who in the meanwhile was pushed by the deceased, fell into a drain injuring her right hand. She was taken to a nearby bamboo groove by her children, who on returning to their house witnessed the Appellant physically assaulting their father, the deceased, with fists and blows in the balcony of their house. When PW-2 attempted to intervene, the Appellant threatened her as well. Consequently, PW-1, PW-2 and PW-10 ran to the house of Phurkit Lepcha PW-11. On the request of PW-1 to accompany her to the hospital to treat her injured arm, PW-11 advised her to go the next day as night had fallen. Leaving her children in the house of PW-11, she returned to her home, where *en route* at a place known as "Bhulkay forest", she saw the Appellant holding the deceased by his neck and strangulating him. When she shouted out enquiring as to what he was doing, he threatened to annihilate her and her entire family if she related the incident to anyone. Afraid, she returned to the house of PW-11 but did not disclose the incident to either PW-2, PW-10 or PW-11. Thereafter, she along with her children returned home via a different path. Finding the Appellant in the balcony of their house she enquired into the whereabouts of the deceased to which he feigned ignorance and returned to his home. On a search of the deceased the next morning, the children found

their father lying dead at "Bhulkay forest". It emerged during investigation that the deceased used to physically assault his wife who he suspected of having illicit relations with the Appellant. Investigation thus concluded that the deceased met his fate on account of the physical assault on him due to his suspicion of illicit relations between the Appellant and PW-1. The post mortem report revealed that the death of the deceased was due to asphyxia as a result of strangulation. Hence, chargesheet was submitted under Section 302 of the IPC against the Appellant.

3. On hearing the rival submissions of the Prosecution and the Defence, the learned Trial Court framed charge against the Appellant under Section 302 of the IPC. On his plea of "not guilty", the witnesses of the Prosecution numbering fifteen were examined, followed by the examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') and arguments. The examination and consideration of the evidence on record, concluded in the impugned Judgment and Order on Sentence.

4. Learned Counsel for the Appellant raised the argument that the evidence of PW-1 to the extent that she told the Appellant to leave her husband alone but that he continued to throttle him and threatened to kill her and her entire family has not been supported or corroborated by her children PW-2 and PW-10. That, PW-1 also failed to explain the reason for not informing her children and PW-11 about the incident. Assuming but not admitting that the Appellant committed the murder of the deceased, the ingredient of "*intention*" which is a *sina qua non* for an offence under Section 302 of the IPC is absent in the instant case. Pointing to the evidence of PW-1, learned Counsel urged that there was no intention or premeditation on the part of the accused, and the death was the consequence of a free fight between the brothers where no weapon was wielded by the Appellant and death occurred unintentionally. That, such a circumstance would bring the offence within the parameters of Section 304 of the IPC and this Court consider it accordingly.

5. *Per contra*, learned Senior Government Counsel strenuously contended that PW-1 has with clarity deposed that she witnessed the throttling of the deceased by the Appellant who turned a deaf ear to her entreaties to forbear from the act. The evidence of PW-2 and PW-10 confirms the presence of the Appellant at their home and the physical fight between the brothers. The evidence of PW-9, the Doctor, lends credence to

the cause of death being due to strangulation. That, although PW-1 is now re-married, it is not to the Appellant but to a person from Samdong which would establish her non-involvement with the Appellant. Thus, what emerges is that there is no doubt whatsoever as to the role of the Appellant in the death of the deceased which cannot be said to be unintentional considering the evidence on record. Hence, the impugned judgment and Order on Sentence ought not to be interfered with in view of the clinching evidence against the Appellant. His submissions were fortified with reliance on ***State of Haryana vs. Sher Singh and Others***[1] and ***Aradadi Ramudu alias Aggiramudu vs. State Through Inspector of Police, Yanam***[2]**.**

6. Having heard learned Counsel for the parties at length and given due consideration to their submissions, perused the records of the case meticulously and examined all documents on record, it would be appropriate to assess whether the Judgment of Conviction and Order on Sentence of the learned Trial Court were justified. In order to reach such a conclusion, it would be essential to carefully traverse through and analyse the evidence on record. Before we embark on the above, we may extract the relevant Section under which charge was framed against the Appellant for convenient reference.

7. Section 300 of the IPC reads as follows;

> **"300. Murder. -** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-
>
> Thirdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
>
> Fourthly,- If the person committing the act knows that it is so imminently dangerous that it must,

[1] (1981) 2 SCC 300
[2] (2012) 5 SCC 134

in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

8. The Section carves out five exceptions to the offence of murder and explains when culpable homicide is not murder. These exceptions are as follows;

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

The above exception is subject to the following provisos:

First. – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. – Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

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

any intention of doing more harm that is necessary for the purpose of such defence.

Exception 3. – Culpable homicide is not murder if the offender being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. – It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. – Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

9. These exceptions however do not offer complete vindication to the conduct of the accused but they do reduce the impact of the gravity of the offence. Nevertheless, although the onus of proving the guilt of the accused rests with the prosecution but the burden of proving the circumstances to bring the case within the exceptions enumerated above, lies with the accused as would be evident from the provisions of Section 105 of the Indian Evidence Act, 1872. In the light of the evidence before us, we may now examine whether the act of the Appellant amounted to murder or to man slaughter, in other words to culpable homicide. While turning our attention to the arguments canvassed on behalf of the Appellant, the contention that PW-1 told the Appellant to leave her husband alone when he was throttling the deceased is not corroborated by PW-2 and PW-10, is to say the least, incongruous. It is

clear from the evidence of PW-1 that in the first instance, PW-2 and PW-10 had been left by her in the house of PW-11, while she returned to her house. *En route* she witnessed the said incident. Besides, she has clarified that she did not disclose the incident to PW-2, PW-10 or PW-11 for fear of obliteration as per the threat held out to her by the Appellant which included her children. The further argument that PW-1 did not explain why she did not inform PW-11 either, meets the same argument as *supra*. While addressing the argument that the Appellant had no intention to cause the death of the deceased, we may revert back to the evidence of PW-1 who with no hesitation has stated that after leaving her children in the house of PW-11, where she had also spent half an hour, she returned home. While on her way back in the jungle near her house, she witnessed the Appellant strangulating her husband from behind with his arm. When she told him to leave her husband alone and not to hurt him, the Appellant continued throttling him and threatened her and her entire family with death. It is also apparent that she witnessed the death of her husband, as it is her specific statement that "*He killed my husband and threatened me by saying that if I disclosed this incident to anybody, he would come after me and kill me also*."

10. The evidence of PW-1 sheds no light as to what transpired inside her home and how the fight started between the Appellant and the deceased while all of them partook of food. Her narration of the incident starts with the Appellant demanding to know from her and the deceased as to why they had kept bamboo mesh (*chitra*) on his land on which a verbal discussion ensued between the brothers. Her husband pushed her at that time resulting in her sprained arm. Fearing for her life from both men she hid for some time and thereafter took her children PW-2 and PW-10, to the house of PW-11. When she returned after half an hour, leaving her children there, she witnessed the incident as already reflected hereinabove. This witness makes no mention of a physical fight between the brothers but details the act of throttling carried out by the Appellant on the deceased, painting the Appellant as the aggressor.

11. The evidence of PW-2 reveals that when she along with her parents and the Appellant were in their house, her mother served dinner to her while both the deceased and the Appellant refused food. The witness went on to testify that on the deceased asking her mother to wash his clothes the Appellant scolded the deceased and threw food on his face at which the deceased told him to go home. Evidently thereafter, the Appellant left threatening to kill the deceased and then started throwing pieces of splintered bamboo on their field.

The evidence of PW-1 and PW-2 corroborate the fact of the deceased pushing PW-1 on which she injured her hand. The Appellant then came towards their house and started assaulting the deceased upon which PW-1, PW-2 and PW-10 escaped to the house of PW-11. Thereafter, PW-2 and PW-10 stayed in the house of PW-11 but she did not see her mother PW-1. After about half an hour, her mother came and took them back to the house. The evidence of this witness is silent about how the deceased died but reveals that the Appellant was assaulting her father, indicative once more of the fact that the Appellant was the aggressor. According to her, on the next day, on recovery of the body of the deceased, the Appellant assured them that he would take care of them including providing them with education but that they should not disclose the fact of the fight between him and the deceased on the previous night.

12. The evidence of PW-10, the nine year old son of the deceased and PW-1, reveals that on the relevant night he had seen his father scolding his mother and he too had witnessed the Appellant having a fight with the deceased near their house before they went to their aunts home. When they returned back they did not see the deceased and the Appellant told them that he was unaware of their fathers whereabouts.

13. The evidence of PW-11, the sister of the Appellant and the deceased, sheds light on the violent aspect of the Appellants character when she states that her mother used to previously reside with the Appellant but on being beaten by him on several occasions, the members of their village „Samaj passed a resolution that thereafter her mother would reside with her. This evidence of PW-11 finds corroboration in the evidence of PW-12, the Panchayat member, according to whom the mother of the Appellant came to her and reported that she had been assaulted by the Appellant and as a Panchayat member she settled the matter. The evidence of PW-11 and PW-12 thus establishes that the Appellant was evidently a violent person, although we hasten to observe that such an opinion as can be formed by the foregoing evidence would have no bearing on the merits of the instant matter, which will obviously be considered only on the relevant evidence. Suffice it to conclude that the evidence of PW-11 is of no assistance to the prosecution case for the purposes of the matter at hand, *inasmuch* as she was at the house of the deceased and PW-1 till a little after 4:00 p.m. after which she left. Later in the night, PW-1, PW-2 and PW-10 came to her house. She was only told of the death of Mingma Tshering Lepcha the following morning at around 5:30 p.m. and she suspected that the Appellant may have caused his death. Her

evidence would also indicate that PW-1 after bringing her children to the house of PW-11 had left her children there and disappeared for a "moment" but she was unaware as to where PW-1 had gone and after some time she also saw that both the children were also not in the house and was unaware as to who had taken them. However, it may be pointed out here that the evidence of PW-1 that she had sustained injuries on her hand due to her husband pushing her is corroborated by the evidence of PW-2 and PW-11. PW-11 testified that PW-1 came to her house along with PW-2 and PW-10, she was crying and requested PW-11 to take her to the hospital since she had broken her arm. This is being pointed out to establish that PW-1 had broken her arm prior to her having disappeared after leaving her children in the house of PW-11, thereby ruling out any suspicion that she may have sustained the injuries after she left the house of PW-11 or may have any role in the death of her husband.

14. The evidence of PW-14 reveals that he had been endorsed to investigate the U.D. Case No. 11 of 2015 dated 25.04.2015 pertaining to the death of Mingma Tshering Lepcha. On his investigation after coming to learn about the cause of death of the deceased, he suspected foul play and prepared the Enquiry Report and submitted it to the Station House Officer, Singtam P.S. which was then registered as Singtam P.S. Case No. 35 of 2015 dated 27.04.2015, against the Appellant under Section 302 IPC. He went on to reveal that his Enquiry Report was based on information collated from PW-1, PW-2, PW-10 and PW-12. He also found that the matrimonial relations between the deceased and PW-1 was not cordial, with the deceased suspecting her of infidelity.

15. Turning to the evidence of PW-9, the Doctor, he conducted the autopsy over the body of the deceased on 26.04.2015. He has detailed in his report, Exhibit-6, the ante mortem injuries on the person of the deceased as follows;

" Ante mortem injuries:

1. Linear abraded contusion 2x0.8 cm placed horizontally over the right lower surface of the chin;

2. Circular shape abraded contusion 0.8x0.8 cm placed over the right upper surface of the chin over the lateral aspect;

3. Circular abraded contusion 0.6x0.6 cm placed just behind the right ear;

4. Multiple small abraded contusions with size ranging from 0.2x0.1 cm to 0.8x0.5 cm over an area extending from the right side of thyroid over the neck and measuring 3x2 cm;

5. Fine linear abrasion (two in numbers) each separated from one another by 4.5 cm and extending from the right side of the neck to the angle of mandible (left side) whereby both the ends joined; and

6. Linear abrasion (two in numbers) separated 4.5 cm from each other placed just below the right ear and moving downwards and forward and extending over till the left side of the neck.

Head and neck: on dissection of the neck, the neck muscles showed multiple deep contusions over the lateral aspect with bleeding with clots present over the right side of neck and also the left side of the neck and the bleeding was superficial in nature. There were no fractures of the hyoid bone. The lungs were congested and oedematus."

According to the Doctor, the cause of death to the best of his knowledge and belief was due to asphyxia as a result of strangulation, homicidal in nature. This conclusion was drawn from the fact that he found severe congestion of the face of the deceased along with cyanosis of the lips, the fingers and bleeding from nose and ear and the injuries present over the neck and the findings of the injuries after dissection of the neck, mentioned in his report which he identified has Exhibit-6. The evidence of PW-9 bears a direct relevance to the evidence of PW-1 who had witnessed the strangulation of the deceased by the Appellant from behind thereby rendering him possibly immobile and helpless.

16. What can be culled out from the evidence is that the Appellant was spoiling for a fight as he threw food on the face of the deceased for the reason already set forth *supra*, and went back to his own home threatening to kill the Appellant. Thereafter, he returned and started assaulting the deceased thereby assuming the role of the aggressor. Had the Appellant physically attacked the deceased immediately after the verbal duel between them inside the house of the deceased then it could well be said that the fight broke out suddenly without premeditation, in the heat of passion upon a sudden quarrel. Exception 4 of Section 300 IPC applies not only to cases where the fight is unpremeditated and sudden but with the rider that the accused did not take undue advantage or act in a cruel or unusual manner. When a man is being throttled mercilessly and the entreaties of the wife to stop the act fell on the deaf ears of the Appellant, it cannot be said that there was no undue advantage. Thus, none of the exceptions to Section 300 of the IPC including Exception 4 are available to the Appellant to reduce his criminality to Section 304 of the IPC. It is also worth contemplating over the fact that the Appellant has failed to enlighten the Court as to what transpired between him and the deceased when they were left alone by PW-1, PW-2 and PW-10. Hence, the evidence of PW-1 and PW-2, indicating him to be the aggressor stands untainted. No evidence establishes that the death of the deceased was without premeditation.

17. The Honble Supreme Court in ***Chahat Khan v. State of Haryana***[3] held: (SCC p. 410, para 9)

> "9. ... When a person is causing an injury on such a vital part the intention to kill can certainly be attributed to him."

18. Further, in ***Virsa Singh v. The State of Punjab***[4], the Honble Supreme Court, speaking through Vivian Bose, J., held;

> "13. ... It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to

[3] (1972) 3 SCC 408
[4] AIR 1958 SC 465

> cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

19. In the light of the evidence on record, can it be concluded that the death of the deceased by the Appellant was unintentional? In our considered opinion, the response would have to be in the negative. Although, it may be accepted that the fight between the Appellant and the deceased arose= initially without premeditation when he momentarily lost control upon a sudden quarrel but when he throttled the deceased it was not a continuance of the previous fight but after he had time for reason to regain dominion of his mind. Even assuming it was a continuation of the same fight as already emphasised, the Appellant took undue advantage and acted in an unusual manner while throttling the deceased by putting him in a physically disadvantageous position, strangulating him with his arm from behind and thereby causing his death. It cannot be said that in such a circumstance he had no intention to cause the death of the deceased.

20. On the anvil of these observations *supra* and the evidence placed before us, the impugned Judgment of the learned Trial Court as well as the impugned Order on Sentence, do not suffer from any legal infirmity which calls for interference by this Court.

21. Accordingly, Appeal is dismissed.

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

23. Records be remitted forthwith.

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GANGTOK
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Date : Signature

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