Justice Satish K Agnihotri
Chief Justice
High Court of Sikkim

सत्यमेव जयते

Bungalow No. 11
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MESSAGE

Ever since the formation of Courts, judicial precedents have been a source of law. Precedent is based upon the principle of stare decisis. This is a doctrine of precedent, under which a Court must follow earlier judicial decisions when the same point arises again in litigation. A report published by the High Court of Sikkim would be cited, received and treated as an authority. It would carry with it the weight of accurate and correct reporting of binding precedents passed by the Constitutional Court. It was precisely for this reason that Notification No.42/HCS dated 24.11.2017 was issued by the High Court of Sikkim constituting a Committee for the publication of the Sikkim Law Reports of the High Court of Sikkim containing important judgments delivered by the High Court of Sikkim w.e.f. the 11th July, 2017.

I am delighted to see that the Committee has worked in right earnest and is publishing the inaugural volume within a record time. I compliment the Chairman, Justice Bhaskar Raj Pradhan, the Secretary-cum-Chief Editor, Mr. K.W. Bhutia, Registrar, High Court of Sikkim, the Members as well as the Reporters of the Committee for accomplishing this significant task and hope that the Committee would continue to publish the Sikkim Law Report, reporting binding precedents of the High Court of Sikkim accurately which would be of immense benefit to the judge, lawyer, litigants and the general public.

Satish

05 December 2017 **(Satish K Agnihotri)**

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Justice Meenakshi Madan Rai
Judge
High Court of Sikkim

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December 5, 2017.

MESSAGE

It is indeed a matter of great pride that the High Court of Sikkim is compiling and publishing its Judgments and Orders.

The monthly compilation will undoubtedly render it indispensable to Judicial Officers, Advocates and Students of Law and serve as an easy and invaluable reference of judicial pronouncements.

I congratulate all concerned with this publication in their endeavour and am confident that the objective of the publication will be fulfilled.

(Justice Meenakshi Madan Rai)

Justice Bhaskar Raj Pradhan
Judge

सत्यमेव जयते

High Court of Sikkim
Gangtok-737101

MESSAGE

The ability of a Judge to make a judicious decision and form opinion objectively, authoritatively and wisely makes sound judgment. The interpretation and applications of provisions of the Constitution, the laws, substantial, procedural and customary by the High Court not only makes those judgments binding on all Courts within its jurisdiction but also commands persuasive value. Sikkim is uniquely situated. The sources of laws in Sikkim are the Constitution of India; all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim until amended or repealed by a competent Legislature or other competent authority; those enactments which were in force in a State in India at the date of notification duly extended to the State of Sikkim by the President by public notification; all enactments passed by the Parliament and extended to the State of Sikkim after the appointed day; the customary laws prevailing in Sikkim and the State Laws.

The Committee was constituted by Hon'ble Mr. Justice Satish K. Agnihotri, Chief Justice of the High Court of Sikkim with the vision to give an authoritative report, month by month, of all the precedents pronounced by this Court. I am happy to see the inaugural issue of the Sikkim Law Reports published enthusiastically and in right earnest.

I congratulate Mr. K.W. Bhutia, Registrar, High Court of Sikkim, Mr. T. B. Thapa, Senior Advocate, Mr. Jorgay Namka, Advocate and General Secretary, Bar Association of Sikkim, Ms. Yangchen D. Gyatso and Ms. Priyanka Chettri, Advocates for their dedication and hard work in the process of reporting, head note writing, vetting and editing the Sikkim Law Reports and hope that the reports are not only published regularly as mandated but the quality of accurate reporting and skill of head note writing also reaches its zenith making it a report which would be found useful by all its beneficiaries.

05TH December 2017

(Bhaskar Raj Pradhan)

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HIGH COURT OF SIKKIM

CHIEF JUSTICE

Hon'ble Mr. Justice Satish K. Agnihotri

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Hon'ble Mrs. Justice Meenakshi Madan Rai,

Hon'ble Mr. Justice Bhaskar Raj Pradhan

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State of Sikkim* v. *Keshab Prasad Pradhan ***89-F***

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State of Sikkim* v. *Keshab Prasad Pradhan ***89-G***

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State of Sikkim* v. *Keshab Prasad Pradhan ***89-H***

Code of Civil Procedure, 1908 - Order VIII Rule 6C of C.P.C to be presented to the Court in which the suit have been instituted. As a counter-claim shall be treated as a plaint and governed by the rules applicable to plaints under the provision of Order VII Rule 10 of C.P.C, the counter-claim filed by the Defendants No. 3 and 4 must also be returned to be presented to the Court in which the said counter-claim should be filed consquently, the Court fee paid by the Defendants No 3 and 4 for the counter-claim is also liable to be returned to the Defendants No. 3 and 4.
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Dr. C.P. Rai and Others* v. *State of Sikkim and Others ***60-A***

Constitution of India – Article 226 – The constitutional philosophy of employment is enshrined in Article 14 read with Article 16 of the Constitution of India – Public employment has to be made after a proper competition among qualified persons on the basis of invitation through wide publicity, enabling all eligible candidates to make applications for the same – Selection is required to be made in accordance with statutory provisions, on merit, in the spirit of constitutional mandate of equality of opportunity without discrimination on the ground of sex, caste, place of birth, residence and religion.

Mandeep Sunwar and Others* v. *State of Sikkim and Others ***53-A***

Constitution of India – Article 226 – No material has been produced by both the parties to establish that the appointment of the petitioners was made in accordance with the constitutional scheme – It is difficult to hold that the appointment of the petitioners was made strictly in accordance with the constitutional scheme of employment – No positive direction can be issued to the State Government to regularize the petitioners only on the sole ground that they have been working for last 10 to 15 years – However, in view of Circular dated 20.08.2014 which remains unchallenged and by which benefits was given to other similarly placed employees – State Government is obligated to consider cases of the petitioners in accordance with the Circular dated 20.08.2014 expeditiously within three months.

Mandeep Sunwar and Others* v. *State of Sikkim and Others ***53-B***

Constitution of India – Article 226 (2) – Jurisdiction – Even if a part of the cause of action accrues within the jurisdiction of the concerned Court, it will lend jurisdiction in the matter – After insertion of clause (1-A) in Article 226, subsequently renumbered as clause (2), the High Court could issue writ when the person or the Authority against whom writ is issued, is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the Court's territorial jurisdiction.

Gajendra Singh Rana* v *Union of India and Others ***19-A***

Constitution of India – Article 226 – Public Interest Litigation – Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 – Petitioner seeking compliance of the direction passed by the Supreme Court in *Seema Lepcha v. State of Sikkim and Others* – Directions of the Supreme Court reiterated – State Government and State Legal Services Authority complying with the directions – Petition disposed of with further directions to the Respondents to give instructions to all employers to comply with S. 19 (b) and (c) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
Ms. Yangchen Dahdul* v. *State of Sikkim and Others ***1-A***

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Criminal Procedure Code, 1973 – S. 31 – Sentence in cases of conviction of several offences at one trial – when the prosecution is based on single transaction where it constitutes two or more offences, sentence are to run concurrently – Held, award of sentence on the Appellant to run consecutively was not correct and it ought to run concurrently – Penal Code, 1860, S. 392 – does not grant any discretion vis-a-vis Sentence – when found guilty of offence of robbery u/s 392, IPC it was incumbent to sentence the Appellant with 'rigorous' imprisonment.
Kaziman Gurung* v. *State of Sikkim ***134-M***

Criminal Procedure Code, 1973 – S.102 – powers upon the Police officer to seize property suspected to be stolen, or found under circumstances which creates suspicion of the commission of any offence – Investigation Officer is a police officer and as such, authorised to exercise the power under S. 102 Cr.P.C. – No such in flexible proposition of law that there ought to be independent witnesses associated with the seizure – Police Officer in the course of investigation can seize any property if such property alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has a direct link with the commission of offence. Failure of the Prosecution to explain how certain items were seized from the house of the victim does not shake the foundational facts of the

case. Held, the Court has a duty to ensure that truth prevails. In material particulars the fact being well established, this Court is of the view that the said discrepancy does not shake the foundational facts of the case. Held, the Court has a duty to ensure that truth prevails. In material particulars the fact being well established, this Court is of the view that the said discrepancy does not shake the foundational facts of the present case.
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Criminal Procedure Code, 1973 – S. 154 – FIR – being lodged by someone who has witnessed the crime – non-mentioning of the name of the Appellant in FIR is not much significance – FIR although not a substantive piece of evidence, however, reassures the Court and corroborates the oral testimony.
Kaziman Gurung* v. *State of Sikkim ***134-A***

Criminal Procedure Code, 1973 – S. 162 – Sketch map prepared by IO – Admissibility in evidences **–** Contents of rough sketch map prepared by Investigating officer is admissible except the identification of the place of occurrence marked "P.O" as same is hit by the provision of S. 162 Cr.P.C – no witness came forward and deposed that the place of occurrence was shown to the Investigation Officer.
Kaziman Gurung v. State of Sikkim ***134-J***

Criminal Procedure Code, 1973 – S. 482 – Relative scope – Extraordinary powers of High Court under S. 482 to quash FIR/ criminal proceeding involving non-compoundable offence in view of compromise arrived at between the parties – Penal Code, 1860 – Ss. 498-A, 352 and 323 – Quashing of FIR – Joint application made on behalf of parties for quashing of FIR – State has no objection – FIR and consequential proceedings quashed – Petition allowed, "to protect and preserve the sanctity of family life and also for proper development of the child,..."
Sanjay Prasad and Another* v. *State of Sikkim ***127***

Criminal Trial – Appreciation of evidence – Discrepancy as to time of incident – On facts, discrepancy of time of incident is not considered as such a discrepancy that would render the evidence inadmissible. Considering human conditioning, it is difficult to expect witnesses to remember every little detail with mathematical precision, especially of events which have transpired much earlier. There is a need for completion of effective investigation and filing of charge sheet before good evidence is lost due to lapse of time and faded memory.
Kaziman Gurung* v. *State of Sikkim ***134-C***

Criminal Trial – Identification mark – The fact that the Appellant had inflicted a deep cut injury in the front of the neck of the victim by a sharp edged weapon having been proved, the failure to clinchingly identify the weapon of offence by the seizure witnesses, although categorically identified by the Investigation Officer, is irrelevant – The failure of the Investigating Officer to affix identification mark on material objects for proper identification is improper – However, in the present case, the failure of the Investigating Officer to do so thereby allowing confusion to the mind of the seizure witnesses does not detract the case of the Prosecution which has otherwise been proved by congent evidence.
Kaziman Gurung* v. *State of Sikkim ***134-H***

Criminal Trial – Witnesses – Injured witness – Testimony of – Evidentiary value - Held, an injured person in the natural course of events would not implicate an innocent person and let go the real culprit – identification of the Appellant by the Victim in Court, although after one year eleven months is without any hesitation and unblemished – Appellant had been seen by the victim from close quarters categorically identified the Appellant as the assailant – Victim's evidence is truthful and clear and needs no corroboration – Eye witness account of the victim who was injured with a deep cut injury on the neck could have easily seen the face of the Appellant assaulting him and his appearance and identity would well remain imprinted in his mind. Evidence of an injured victim, if truthful need no corroboration.
Kaziman Gurung* v. *State of Sikkim ***134-E***

Criminal Trial – Identification – Identification of accused – Dock identification vis-a-vis Test Identification Parade – Failure to hold Test Identification Parade does not make the evidence of identification in Court inadmissible – Identification in Court is a substantive piece of evidence – Test Identification Parade if conducted, would corroborate the same – Failure to do so does not make the evidence of identification in Court inadmissible – Held, that the Investigating Officer not conducting Test Identification Parade, in the facts and circumstances of the case, is not fatal. – Defence cannot take advantage of an unknowing error committed by a witness unfamiliar to Trial Court procedure – Justice may not be served if the Defence were to be allowed to steal a march by an innocuous act of the victim to accompany his wife to Court.
Kaziman Gurung* v. *State of Sikkim ***134-F***

Criminal Trial – Sentencing policy – Heavenly retribution - Incapacitation, in the present case, also seems to have been achieved by the heavenly retribution. Both the offences committed by the Appellant being heinous offences the deterrence theory as a rationale for punishing the Appellant were more relevant, without anything more - Act of discouraging criminality may perhaps have been partially achieved by the paraplegic incapacitation - When the offender suffered serious physically injury in a bid to escape after the crime and in the process physically incapacitated himself, this fact relevant for sentencing.
Kaziman Gurung* v. *State of Sikkim ***134-N***

Evidence Act, 1872 – S. 60 – Evidence of a witness of a fact which could be heard being direct evidence – Admissible. Truth of what was heard by that witness – not admissible not being direct unless the person from whom the witness heard about the fact is examined as 'best evidence'.
Kaziman Gurung* v. *State of Sikkim ***134-B***

Evidence Act, 1872 – Ss. 60, 64 and 65 – Best Evidence Rule – Wound Certificate of the victim – Certificate of injury of the Appellant – Doctor who conducted the examination of the victim and the Appellant – not examined – Wound Certificate and Certificate of injury not admissible.
Kaziman Gurung* v. *State of Sikkim ***134-I***

Evidence Act, 1872 – S. 103 – Burden of proof as to any particular fact lies on that person who wishes the Court to believe in it existence, unless, it is provided by any law that the proof of that fact shall lie on any particular person – An assertion made has to be substantiated by the person who makes the assertion.
Ratna Pradhan* v. *Krishna Deo Thakur ***114-C***

Evidence Act, 1872 – S. 114 illustration (a) – Presumption of facts – Court may presume that the Appellant who was found in possession of the stolen bag along with its contents belonging to the victim and which bag was found by the wife in the possession of the Appellant soon after the incident is the person who is the thief.
Kaziman Gurung* v. *State of Sikkim ***134-D***

General Clauses Act, 1897 – S. 27 – Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or

either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post – Section importantly lays down that letter is to be "properly addressed" – Held, it is clear that in absence of any cogent proof to establish dispatch of the house rents and refusal of payment by the Plaintiff, no other conclusion can be arrived at, save the fact that the Defendant failed to pay the rents and hence defaulted.
Ratna Pradhan* v. *Krishna Deo Thakur ***114-D***

Human Rights – Appellant suffers from disability – prison authorities would keep in mind the diaability, on being so satisfied and protect his human rights, which is paramount.
Kaziman Gurung* v. *State of Sikkim ***134-O***

Indian Penal Code, 1860 – S. 307 – Attempt to murder – Nature of Injury – "Hurt" – In order to attract S. 307, injury need not be on a vital part of body – Held, Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section – It has been found that the victim was inflicted a deep cut injury in the front of his neck, a vital part of his body, which injury is more grievous than a hurt – premeditation is discernible in the act of the Appellant – Appellant knew what he was doing – Appellant committed the heinous act, unprovoked – time, place and manner of the commission of the crime are indicative of the motive.
Kaziman Gurung* v. *State of Sikkim ***134-K***

Indian Penal Code, 1860 – Ss. 392 and 390 – Punishment for robbery – Theft is an ingredient of robbery – Felonious taking from the person of another or in his presence against the persons will, by violence or putting him in the form of injury elevates theft to robbery – Essential ingredients of robbery: (1) accused committed theft; (2) accused voluntarily caused or attempted to cause (i) death, hurt or wrongful restraint, (ii) fear of instant death, hurt or wrongful restraint; (3) accused did either act for the end (i) to commit theft; (ii) while committing theft, (iii) in carrying away or in the attempt to carry away property obtained by theft – Held, evidence of victim and Seema Singhal read with other evidence on record clearly brings the act of the Appellant within the parameters of S. 392 and amounts to 'robbery' as defined therein.
Kaziman Gurung* v. *State of Sikkim ***134-L***

Land Records of 1951 – Validity **–** Notification No. 991/D.D.L.R. dated 17th January, 1984 – The Land Records prior to 1984, was in acres and subsequently on converting the measurements to hectares, this Notification fell in place. However, it does not mean that the Land Records of 1951 have been shut out for the purposes of corroborating the possession of property held by different individuals, the subsequent records can be verified from the 1951 Land Records.
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Motor Vehicles Act, 1988 – Ss. 166 and 173 – Multiplier of "17" adopted by the Claims Tribunal upheld in terms of the ratio laid down in Sarla Verma (Smt). and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121 since the age of the deceased was 27.
The Branch Manager, United India Insurance Co. Ltd.*, v. *Subash Rai and Others ***36-A***

Motor Vehicles Act, 1988 – Ss. 166 and 173 – Deduction towards personal and living expenses – Only mother can be consider as a dependent of her deceased bachelor son – Deduction has to be 50% her personal and living expenses of the deceases bachelor – Father and Siblings cannot be considered as his dependents.
The Branch Manager, United India Insurance Co. Ltd.*, v. *Subash Rai and Others ***36-B***

Motor Vehicles Act, 1988 – Ss. 166 and 173 – Compensation towards loss of estate, only a sum of Rs.2,500 granted by the Tribunal – Enhanced to Rs.1,00,000.
The Branch Manager, United India Insurance Co. Ltd.*, v. *Subash Rai and Others ***36-D***

Motor Vehicles Act, 1988 - Ss. 166 and 173 - Siblings cannot be considered as the responsibility of the deceased.
The Branch Manager, United India Insurance Co. Ltd.*, v. *Subash Rai and Others ***36-C***

National Highways Act, 1956 – 3G (5) – Central Government is competent to appoint an Arbitrator being a party to the dispute, on receipt of a representation/demand made by other party, being aggrieved by the determination of the compensation amount **–** The provisions of Arbitration and Conciliation Act, 1996 will apply to every arbitration under the National Highways Act, 1956 - Competent Authority alone is empowred to recieve the request by a party to refer the dispute to an Arbitrator, to be appointed by the Central Government.

Prakash Chand Pradhan* v. *Union of India and Others ***4-A***

National Highways Act, 1956 – **Ss. 3A, 3G** – Order dated 8th July 2016 of the Central Government notifying Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim as Arbitrator for all Districts in the State of Sikkim not communicated to any concerned persons likely to be impacted by the said Order – Notification dated 9th July 2016, by which the land-in-question along with other lands were declared to have been acquired and vested ablolutely in the Cental Governement does not indicate the appointment of Arbitrator before publication of the notice – Even if an Arbitrator is appointed, the same shall come into effect, so far as the petitioner is concerned, from the date when the petitioner comes to know about the Order. Held, Arbitrator was not appointed in the instant dispute.

Prakash Chand Pradhan* v. *Union of India and Others ***4-C***

National Highways Act, 1956 – **Ss. 3, 3A, 3G (5)** – Competent Authority – Power to acquire land – Competent authority who notifies in the Official Gazette of the intention of the Central Government to acquire the land, is a competent person to receive application of either parties for appointment of an Arbitrator, in the event, the amount so determined is not acceptable – The District Collectors of all the Districts are appointed as Competent Authority for their respective Districts vide Order dated 31st December 2015.

Prakash Chand Pradhan* v. *Union of India and Others ***4-B***

National Highways Act, 1956 – S. 3G (6) – Refusal to appoint Arbitrator – Appointment of the Arbitrator and adjudication by the Arbitrator shall be in accordance with the provision of Arbitration and Conciliation Act, 1996.

Prakash Chand Pradhan* v. *Union of India and Others ***4-D***

Rent Control and Eviction – Bona fide requirement of landlord – Rule 2 of the Notification No. 6326-600- H&W-B dated Gangtok the 14th April, 1949 deals with regulation "letting and sub-letting" of premises, controlling rents and to prevent unreasonable eviction of tenants – spirit behind the Notification is to prevent vagrancy till such time as scarcity of accommodation prevails in Sikkim, and to prevent harassment to the tenants on account of such scarcity – three grounds enumerated for eviction are (i) if the premises are required for personal occupation, (ii) overhauling and (iii) failure on the part of the tenant to pay rent for four months – Landlord is required to establish a genuine need of the premises – Defendant is to confine his case to the property in question and it is not his place to enquire into the number of properties owned by the Plaintiff.

Ratna Pradhan* v. *Krishna Deo Thakur ***114-A***

Scope of judicial review in disciplinary matters – To be confined to the decision-making process and to determine whether the inquiry was held by a Competent Authority and conducted as per procedure – Cannot travel into the arena of the decision nor can it sit as a Court of Appeal.

Gajendra Singh Rana* v. *Union of India and Others ***19-B***

Sikkim Government Servants' Conduct Rules, 1981 – If the admission of guilt is ambiguous and conditional, enquiry is mandatory before holding the employee guilty of charges – The petitioners have not admitted their participation in the said meeting knowingly that the meeting was organized by political leaders. The petitioners, except second petitioner, have further stated that they have gone for picnic and wherein they found that there was a meeting attended by some known leaders, they were simply present without speaking or organizing, or taking active participation in the meeting – The said statement cannot fall within the ambit of admission of charges, as required within the requisites of Rule 6 of the Sikkim Government Servants' Conduct Rules, 1981.

Dr. C.P. Rai and Others* v. *State of Sikkim and Others ***60-B***

Sikkim Government Servants' Conduct Rules, 1981 – Charge of misconduct is that the petitioners have participated in a meeting organized by political leaders, which was duly published earlier and as such willingly took active participation – There is no allegation that the petitioners are member of or associated with any political party, or any organization which takes part in political movement or activity – There is no allegation that there is any participation in aid of or assisting in any manner, any movement or activity which is or tends directly, or indirectly to be, subversive of the

SLR (2017) SIKKIM 1

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

W.P. (PIL) No. 05 of 2015

Ms. Yangchen Dahdul ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner : Dr. (Ms.) Doma T. Bhutia with Ms. Rachhitta Rai, Ms. Babita Rai and Ms. Rupa Dhakal, Advocates.

For Respondent 1-3 : Mr. Karma Thinlay, Senior Government Advocate with Mr. S. K. Chettri, Asst. Government Advocate.

For Respondent No.4 : Ms. K. D. Bhutia, Advocate.

Date of decision: 3rd July 2017

A. Constitution of India – Article 226 – Public Interest Litigation – Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 – Petitioner seeking compliance of the directions passed by the Supreme Court in *Seema Lepcha v. State of Sikkim and Others* – Directions of the Supreme Court reiterated – State Government and State Legal Services Authority complying with the directions – Petition disposed of with further directions to the Respondents to give instructions to all employers to comply with S. 19 (b) and (c) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. (Para 3)

Petition allowed.

Chronological list of cases cited:

1. Seema Lepcha v. State of Sikkim and Others, (2013) 11 SCC 641

ORDER (ORAL)

The Order of the Court was delivered by ***Satish K. Agnihotri, CJ***

The Petitioner, stated to be an Advocate, has come up with this petition by way of Public Interest Litigation petition, seeking a direction to the State Government as well as Sikkim State Legal Services Authority to give comprehensive publicity in compliance of the directions passed by the Supreme Court in **Seema Lepcha vs. State of Sikkim & Ors. : (2013) 11 SCC 641,** wherein the Supreme Court, while disposing of the appeal, passed the following directions: -

> "……
>
> **7.1** The State Government shall give comprehensive publicity to the notifications and orders issued by it in compliance with the guidelines framed by this Court in Vishaka case[1] and the directions given in Medha Kotwal case† by getting the same published in the newspapers having maximum circulation in the State after every two months.
>
> **7.2** Wide publicity be given every month on Doordarshan Station, Sikkim about various steps taken by the State Government for implementation of the guidelines framed in Vishaka case[1] and the directions given in Medha Kotwal case†.
>
> **7.3** Social Welfare Department and the Legal Services Authority of the State of Sikkim shall also give wide publicity to the notifications and orders issued by the State Government not only for the government departments of the State and its agencies/instrumentalities but also for the private companies.
>
> 1 Vishaka v. State of Rajasthan, (1997) 6 SCC 241: 1997 SCC (Cri) 932
>
> † From the Judgment and Order dated 29-9-2010 in WP No. 15 of 2010 of the High Court of Sikkim"

and also a direction to organize meetings, workshop, awareness programme at regular intervals, sensitize employees with the provisions of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (for short, the Act, 2013), further to notify officers for wide publicity of the guidelines in the newspapers, televisions as well as in FM Radio.

2. In response, various affidavits were filed. The State Government has already notified constituting Internal Complaints Committee as required under Section 4 of the Act, 2013 and also the Local Complaints Committee as contemplated under Chapter III of the Act, 2013, has been constituted. Subsequently, various awareness and sensitization programmes have been organized in consultation with the Sikkim State Legal Services Authority in all the four districts and regions.

3. The respondents are further directed to give instruction to all the employers to comply with requirements as prescribed in Section 19 under the heading "Duties of employer", in particular clause (b) and (c), of the Act, 2013.

4. Thus, nothing survives for further monitoring and adjudication at this stage. Resultantly, the petition stands disposed of. However, liberty is reserved to the petitioner to take recourse to the Court if it is found that the provisions of the Act, 2013, are not complied with in future in its letter and spirit.

SLR (2017) SIKKIM 19

(Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 35 of 2016

Shri Gajendra Singh Rana ….. PETITIONER

Versus

The Union of India & Others ….. RESPONDENTS

For the Petitioner: Mr. Tashi Rapten Barfungpa with Mr. Thinlay Dorjee Bhutia and Ms. Dorjee Uden Nadik, Advocates.

For the Respondents: Mr. Karma Thinlay Namgyal, Central Government Advocate.

Date of decision: 7th July 2017

A. Constitution of India – Article 226 (2) – Jurisdiction – Even if a part of the cause of action accrues within the jurisdiction of the concerned Court, it will lend jurisdiction in the matter – After insertion of clause (1-A) in Article 226, subsequently renumbered as clause (2), the High Court could issue writ when the person or the Authority against whom writ is issued, is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the Court's territorial jurisdiction. (Paras 14, 15 and 17)

B. Scope of judicial review in disciplinary matters – To be confined to the decision-making process and to determine whether the inquiry was held by a Competent Authority and conducted as per procedure – Cannot travel into the arena of the decision nor can it sit as a Court of Appeal. (Para 18)

C. Constitution of India – Article 311(2) – No person shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges- The inordinate delay, coupled with the fact that the procedure

prescribed in Rule 15 of the CCS Rules, 1965 have not been complied with.

(Paras 24, 25, 26 and 27)

Petition allowed.

Chronological list of cases cited:

1. Union of India and Others v. S.K. Kapoor, (2011) 4 SCC 589
2. Sri Pratap Kaivarta v. The Union of India and Others, MANU/GH/0315/2015 [WP(C) No.6481 of 2007 dated 12-06-2015]
3. Union of India and others v. Mohd. Ramzan Khan, (1991) 1 SCC 588
4. Managing Director, ECIL, Hyderabad and Others v. B. Karunakar & Others, (1993) 4 SCC 727
5. State of A.P. v. N. Radhakishan, (1998) 4 SCC 154
6. P.V. Mahadevan v. MD, T.N. Housing Board, (2005) 6 SCC 636
7. Praveen Bhatia v. Union of India and Others, (2009) 4 SCC 225
8. Registrar General, High Court of Judicature of Madras v. K. Muthukumarasamy, (2014) 16 SCC 555
9. Delhi Police, Through Commissioner of Police and Others v. Sat Narayan Kaushik, (2016) 6 SCC 303
10. Chairman, Life Insurance Corporation of India and Others v. A. Masilamani, (2013) 6 SCC 530
11. C.B.I. Anti-Corruption Branch, Mumbai v. Narayan Diwakar, (1999) 4 SCC 656
12. National Textile Corpn. Ltd. and Others v. Haribox Swalram and Others, (2004) 9 SCC 786
13. Alchemist Ltd. and Another v. State Bank of Sikkim and Others, (2007) 11 SCC 335
14. Kusum Ingots and Alloys Ltd. v. Union of India and Another, (2004) 6 SCC 254
15. Nawal Kishore Sharma v. Union of India and Others, (2014) 9 SCC 329
16. State of Uttar Pradesh and Another v. Man Mohan Nath Sinha and Another, (2009) 8 SCC 310

JUDGMENT

Meenakshi Madan Rai, J.

1. The Petitioner, by filing the instant Writ Petition, seeks;

(i) Quashing of the impugned Inquiry Report dated **19-02-2010**, the impugned Office Memorandum issued by the Director, Central Vigilance Commission, vide letter dated **13-03-2012**, the impugned Advice dated **11-05-2015** issued by the Union Public Service Commission and the Impugned Order dated **23-08-2016**.

(ii) A declaration that the Disciplinary Proceeding dated **19-06-2008** is bad and *non est* in the eye of law, to accredit his upgradation and grant his non-functional upgradation, with effect from **01-04-2011**, arrears of salary and all other service benefits, with interest, from **01-04-2011**.

2. The Petitioner joined the Border Roads Organisation (BRO) on 20-02-1995, as an Assistant Executive Engineer (Civil), through the Union Public Service Commission (UPSC). He served in different parts of the country and is presently posted in Sikkim, as an Executive Engineer, HQ, Project Swastik. The matter goes back to August 2005, when he was posted in Jaisalmer, Rajasthan and assigned the task, *inter alia*, of resurfacing Jaisalmer Bye Pass Road, comprising of a stretch of 18.655 kms.

3. On completion of the works, a Court of Inquiry was convened against the Petitioner by the HQ, Director General Border Roads (DGBR), vide its letter dated **13-10-2005**, with the terms of reference, as follows;

> *"*……
>
> 2. Terms of Reference:-
>
> *(a) The mode of execution of resurfacing of Jaisalmer bye pass, i.e., by manual or by machine and whether the works documents maintained accordingly.*
>
> *(b) Whether HSD booked during the period Aug & Sep 05 for the works, in works diary and charged off in POL documents are justified ?*

(c) Out of 735 labourers mustered against Jaisalmer bye pass to investigate why 492 CPLs in SW Bill bearing Vr No. 45TF/ 95RCC/2306/2408/45TF dated 21 Sep 2005 did not turn up for receiving their monthly wages inspite of ample chances / time given by the paying officer detailed by CE (P) Chetak resulting in depositing of unpaid amount of Rs. 3.10 Lacs in single Muster Roll. It may also be investigated why large number of CPLs were recruited with out completion of formalities like medical examination by medical officer and without completion of documentation by RCC / TF and subsequently 492 CPLs so recruited were discharged upto 01 Sep 2005. The court to also ascertain the aspect of false mustering in above cases by physical verification / verification of thumb impression from forensic Labs in respect of paid Muster Rolls.

(d) The court to examine physically in detail the resurfacing works of 18.645 Kms executed with 19% BUSG works as reflected / booked as correction works where as per preliminary enquiy, hardly any correction works less than 5% carried out. The actual work done on ground, booking and justification of resources including receipt/ consumption of contract materials as per MB, RMR, works diary be checked by court.

(e) To bring out the total loss to state due above irregularities and pin point the rewponsibility.

……."

4. Pursuant thereto, two Articles of Charge were formulated against the Petitioner vide Memorandum bearing No.BRDB/02 (197)/2007-GE.II, dated **19-06-2008**. Article II being relevant for the present purposes is being reproduced hereunder;

"STATEMENT OF ARTICLE OF CHARGES FRAMED AGAINST SHRI GS RANA, EE (CIV) (GO-2504M) EX OC 95 RCC/45 BRTF/(P) CHETAK

……..…….

ARTICLE-II

1. *That during aforesaid period while functioning as Officer Commanding the said Shri GS Rana, EE (Civ) did not maintain long roll, Identity Card register of CPL and did not ensure medical examination of CPLs before their recruitment as per instructions/SOP which led into irregularities in mustering of CPLs.*

2. *During Aug 2005, 750 CPLs were paid wages for the period from 21 Jul 2005 to 20 Aug 2005 according to Muster Roll Nos. 2306/2362/45 TF and 2306/2364/45 TF both dated 26 Aug 2005. While making payment to CPLs for Sep 2005 for the period from 21 Aug 2005 to 31 Aug 2005, 490 CPLs out of 734 CPLs mustered under Muster Roll No. 2306/2408/45 TF dated 21 Sep 2005 did not turn up for receiving the payment. Therefore an amount of Rs. 3,10,474/- was deposited into Government Treasury by means of TR as unpaid wages. To these 490 CPLS an amount of Rs. 4,30,567/- was paid as wages for Aug 2005 for the period from 21 Jul 2005 to 20 Aug 2005. These 490 CPLs were later found false mustered which has been proved by forensic experts thereby causing a loss of Rs.4,30,567/- to the State.*

3. *By the above act, the said Shri GS Rana, EE (Civ) has failed to maintain absolute integrity, devotion to duty and acted in a manner which was unbecoming of his official position and status, as held by him, thereby violated the provisions of Rule 3 (1) (i), (ii) and (iii) of CCS (Conduct) Rules, 1964.***"**

5. The aforesaid Memorandum was received by the Petitioner on 30-07-2008, duly acknowledged by him on 31-07-2008, whereby he denied all Charges. On appointment of Presenting Officer and Inquiring Authority, information thereof was forwarded to him, vide letter dated 20-10-2008, received by him on 01-11-2008. Proceedings before the Inquiry Officer in which the Petitioner participated, commenced on

07-01-2009 and concluded on 30-07-2009. As directed, he submitted his defence statement on 27-07-2009 and a Case Brief on 18-09-2009. After a spell devoid of communication, on 19-03-2012 he was supplied with a copy of the Inquiry Report, dated 01-12-2009, in which he had been exonerated of all Charges, along with Disagreement Note of the Disciplinary Authority and copies of the 2nd Stage Advice of the Central Vigilance Commission (CVC), dated 13-03-2012, advising sanction of prosecution and imposition of suitable major penalty on him and another personnel. On 31-03-2012, in order to submit an effective written representation within the period prescribed by relevant Rules, the Petitioner sought more documents from the Respondent Authorities. In response, the First Inquiry Report and Disagreement Note were re-furnished to him. He submitted a written representation on 17-07-2012 confining it to the First Inquiry and Disagreement Note of the Disciplinary Authority, being oblivious of a Second Inquiry which had been ordered by the Disciplinary Authority on 29-01-2010 and Report submitted on 19-02-2010, finding him partially guilty under Article II, after the Inquiring Authority re-examined the matter. Meanwhile, on a case registered against him, on the same issue he appeared before the CBI, ACB, Jodhpur, on 29-09-2012, wherein the matter stood closed on account of lack of Prosecution materials. From 17-07-2012 no communication ensued between the Petitioner and the Respondent Authorities till 25-05-2015, when he received letter of even date, enclosing copy of the impugned advice dated 11-05-2015 of the UPSC, giving him an option of submitting a reply within fifteen days. Through this communication, he learnt of the further Inquiry against him where he was found partially guilty.

6. In response to the letter dated 25-05-2015, the Petitioner submitted a representation, dated 11-06-2015, stating therein that, for the Second Inquiry the Disciplinary Authority had collected evidence behind his back, but denied him an opportunity of rebutting the new evidence against him. Based on this representation, a letter dated 09-12-2015 was issued by the Ministry of Defence D. (Vigilance) to the DGBR, relying upon the decision of the Hon'ble Supreme Court in ***Union of India and Others*** vs. ***S. K. Kapoor***[1], requiring the Authority to furnish copies of relevant documents to the Petitioner. In due compliance thereof, the Petitioner received the documents on 29-12-2015. On 11-01-2016, the Petitioner submitted his detailed Written Statement in response to the communication

[1] (2011) 4 SCC 589

of 29-12-2015 and prayed for exoneration. That after an elapse of eleven years since the initiation of the proceedings, which has caused him serious prejudice, mental agony and trauma, denial of non-functional upgradation w.e.f. 01-04-2011 and non-upgradation of his scale, the impugned Order dated 23-08-2016 was issued, which reads as follows;

> **"**……
>
> 15. NOW THEREFORE, in exercise of the powers conferred by Rule 15 (4) of Central Civil Service (Classification, Control and Appeal) Rules, 1965, and in consultation and agreement with the Union Public Service Commission, the President is inclined to take a view that justice would be met by imposing the penalty of **"reduction to a lower stage in the time scale of pay by one stage for a period of one year with further direction that the CO will not earn increments of pay during the period of this reduction and, on the expiry of such period, the reduction will not have the effect of postponing his future increments"** with immediate effect on Shri GS RANA, EE (Civil) (GO No.2504M). It is further direction that a relevant entry in the service records of Shri GS RANA, EE (Civil) (GO No.2504M) be made.
>
> ……**"**

That, Office Memorandum dated 08-01-1971 and 14-10-2013 of the Ministry of Personnel, Public Grievances and Pensions, *inter alia*, provides that a Disciplinary Authority is required to take a final decision after receipt of Inquiry Report within three months and all major penalty proceedings against a Government Servant is required to be completed and final orders issued within eighteen months from the date of delivery of Charges, respectively, which have clearly been flouted, hence, the prayers in the Petition.

7. In the Counter-Affidavit, it was averred that the Writ Petition is liable to be dismissed, the cause of action having arisen beyond the jurisdiction of this Court. That, the Order of the Disciplinary Authority dated 23-08-2016 was based on a finding that the Petitioner had committed lapses in the works which he was to execute, for which Charges were levelled against him. Admittedly, the First Inquiry Report was submitted by the Inquiry Officer on 01-12-2009 and the dates furnished by the Petitioner pertaining to the Inquiry were undisputed. However, while admitting delay in the proceedings, it was explained that the delay was on account of the

active deliberation by the Disciplinary Authority in consultation with the CVC and UPSC. The documents being voluminous required detailed study by various Authorities, in the channel of administration, to avoid any miscarriage of justice. That, despite the delay, which was unintentional, the Petitioner was supplied with copies of all relevant documents, thus no violation or deprivation of reasonable opportunity to the Petitioner occurred. That, the Report of the Inquiring Authority is only an enabling document, to assist the Disciplinary Authority in arriving at his opinion about the guilt of the Petitioner, but is not binding on the Disciplinary Authority. Hence, the Petitioner cannot claim exoneration by the Inquiring Authority unless its findings are accepted in totality by the Disciplinary Authority. A Departmental Inquiry requires "preponderance of probability" which was established against the Petitioner, hence, the Writ Petition not being sustainable in law, deserves a dismissal.

8. In Rejoinder, it was averred that the Petitioner at the time of filing the Writ Petition was posted in the State of Sikkim as Executive Engineer, HQ Project Swastik and the very fact that the impugned Order dated 23-08-2016 was served on the Petitioner, within the State of Sikkim, reveals jurisdiction of this Court, as provided under Article 226 of the Constitution of India.

9. While canvassing the point that this Court has jurisdiction, Learned Counsel for the Petitioner drew strength from the decision of the Gauhati High Court in ***Sri Pratap Kaivarta*** vs. **The *Union of India and Others***[2]. It was further contended that the principles of natural justice have been violated as relevant documents were not made over to him, on which count, reliance was placed on ***Union of India and others*** vs. ***Mohd. Ramzan Khan***[3] and ***Managing Director, ECIL, Hyderabad and Others*** vs. ***B. Karunakar and Others***[4]. That, delay has vitiated the disciplinary proceedings as no reasons for the delay have been revealed. In support of this submission, Learned Counsel for the Petitioner relied on ***State of A. P.*** vs. ***N. Radhakishan***[5] and ***P.V. Mahadevan*** vs. ***MD, T.N. Housing Board***[6]. That, the penalty was not commensurate to the offence which was minor and the Respondents have clearly violated the provision of Rule 15(2) of the Central Civil Service (Classification, Control and Appeal) Rules, 1965 [CCS (CCA) Rules], hence, the Petitioner deserves the reliefs, as prayed.

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[2] MANU/GH/0315/2015 [WP(C) No.6481 of 2007 dated 12-06-2015]
[3] (1991) 1 SCC 588
[4] (1993) 4 SCC 727
[5] (1998) 4 SCC 154
[6] (2005) 6 SCC 636

10. *Per contra,* dwelling on the ambit of this Court under judicial review, Learned Central Government Counsel expostulated that this Court cannot sit on Appeal on the conclusion of the Disciplinary Authority and drew attention to the following decisions;

(i) ***Praveen Bhatia*** vs. ***Union of India and Others***[7]***;***

(ii) ***Registrar General, High Court of Judicature of Madras*** vs. ***K. Muthukumarasamy***[8]***;***

(iii) ***Delhi Police, Through Commissioner of Police and Others*** vs. ***Sat Narayan Kaushik***[9]***.***

11. While gathering strength from the ratio in ***Chairman, Life Insurance Corporation of India and Others*** vs. ***A. Masilamani***[10], it was vehemently argued that delay cannot be a reason for setting aside the proceedings. It was next contended that the magnitude of the offence deserved a major penalty, as in the absence of medical examination and Report of Casual Paid Labourers (CPLs), if a fatality of any CPL had occured, compensatory payment would have resulted in enormous financial loss to the Respondents. That, the cause of action arose in Jaisalmer, thereby debarring the jurisdiction of this Court, for which reliance was placed on ***C.B.I. Anti-Corruption Branch, Mumbai*** vs. ***Narayan Diwakar***[11], ***National Textile Corpn. Ltd. and Others*** vs. ***Haribox Swalram and Others***[12] and ***Alchemist Ltd. and Another*** vs. ***State Bank of Sikkim and Others***[13].

12. The submissions put forth by Learned Counsel were heard at length. I have carefully perused and considered the pleadings, the entire documents appended, as well as the Judgments cited at the Bar.

13. The first relevant question for determination would be, whether this Court has jurisdiction in the instant matter? If this be answered in the positive, the next query would be, whether the disciplinary and other proceedings initiated against the Petitioner is liable to be quashed on grounds of inordinate delay and violation of the principles of natural justice?

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[7] (2009) 4 SCC 225
[8] (2014) 16 SCC 555
[9] (2016) 6 SCC 303
[10] (2013) 6 SCC 530
[11] (1999) 4 SCC 656
[12] (2004) 9 SCC 786
[13] (2007) 11 SCC 335

14. Addressing the issue flagged by Learned Counsel for the Respondent pertaining to jurisdiction, it would be worthwhile firstly to contemplate on the provision of the Article 226(2) of the Constitution of India. This provision reads as follows;

> **"226. Power of High Courts to issue certain writs'**-(1).....
>
> (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. ....."

It is apparent on the face of the provision that even if a part of the cause of action accrues within the jurisdiction of the Court, it will lend jurisdiction in the matter.

15. It may be beneficially be recapitulated that in 1963, by the Constitution (Fifteenth) Amendment, Clause (1-A) was inserted in Article 226 of the Constitution, which was subsequently renumbered as Clause (2), by the Constitution (Forty-second) Amendment Act of 1976. After insertion of this provision the High Court could issue a writ when the person or the Authority against whom the writ is issued, is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the Court's territorial jurisdiction. In ***Kusum Ingots and Alloys Ltd.*** vs. ***Union of India and Another***[14], the Supreme Court held that, although in view of Section 141 of the Code of Civil Procedure, 1908 (for short "CPC"), the provisions of Section 20(c) of the CPC would not apply to Writ proceedings, however, the phraseology used in Section 20(c) of the CPC and Clause (2) of Article 226 of the Constitution, being in *pari materia*, the decisions of the Supreme Court rendered on interpretation of Section 20(c) of the CPC, shall apply to the Writ proceedings also. That, keeping in view the expressions used in Clause (2) of Article 226 of the Constitution, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. That, although cause of action has not been

[14] (2004) 6 SCC 254

defined in any statute, but judicially interpreted would, *inter alia*, mean every fact which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Thus, we find that the provisions have been succinctly explained and the phraseology of cause of action has been clearly defined.

16. We may usefully refer to a fairly recent decision of the Supreme Court on the same question, i.e., jurisdiction. In ***Nawal Kishore Sharma*** vs. ***Union of India and Others***[15], the Appellant therein was employed in the Off-Shore Department of the Shipping Corporation of India and on medical examination found unfit for service at sea. His registration as a seaman was cancelled and a copy of the letter sent to the Appellant in Bihar, his native place, where he had settled, after being found medically unfit. The Appellant sent a representation from his home to the Respondents, claiming disability compensation to which, a response was sent by the employer. The Supreme Court found that the employer had issued the order cancelling his registration as seaman to his Gaya address where he had settled and all claims and representations were made by the Petitioner from his home address at Gaya, which were entertained by the Respondent and responded to in his Bihar address. It was held that the Writ Petition ought not to have been dismissed for want of territorial jurisdiction, as a part or fraction of cause of action arose within the jurisdiction of the Patna High Court.

17. On the bedrock of the said ratiocination, while examining the facts herein, it is undisputed that the impugned letter/order dated 23-08-2016 issued by the Ministry of Defence, Respondent No.1, was forwarded to his place of posting, i.e., Sikkim. Clearly, a fraction of the cause of action has arisen within the jurisdiction of this Court. The matter pertaining to jurisdiction is determined accordingly.

18. Now, very pertinently to address the issue regarding the parameters of judicial review in disciplinary matters, this Court is conscious that the scope of judicial review is to be confined to the decision-making process and to determine whether the Inquiry was held by a Competent Authority and Inquiry conducted as per procedure. It cannot travel into the arena of the decision nor can it sit as a Court of Appeal. In ***State of Uttar Pradesh and Another*** vs. ***Man Mohan Nath Sinha and Another***[16] at Paragraph 14, it is held as follows;

[15] (2014) 9 SCC 329
[16] (2009) 8 SCC 310

"14. The scope of judicial review in dealing with departmental enquiries came up for consideration before this Court in the case of *State of A.P.* v. *Chitra Venkata Rao* [(1975) 2 SCC 557] and this Court held: (SCC pp.562-63, paras 21 and 23-24)

> *"21.* ……... The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability or that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.
>
> ……..……..**"**

The ambit of judicial review in Disciplinary Proceedings having thus been lucidly laid down, no further discussions need ensue on this point.

19. The chronology of the facts reveal that the proceedings against the Petitioner commenced in the year 2005 and terminated on 23-08-2016, when the impugned Order was issued, traversing a period of almost eleven years, during which the Petitioner was left in suspended animation. It would now be appropriate to peruse the provision of Rule 15(1) of the CCS (CCA) Rules, 1965. Rule 15(1) provides that the Disciplinary Authority, if it is not itself the Inquiring Authority, may for reasons to be recorded by it in writing, remit the case to the Inquiring Authority for further Inquiry and Report and the Inquiring Authority shall thereupon proceed to hold further Inquiry, according to the provisions of Rule 14, as far as may be. Pausing here for a moment, Rule 14 is the Procedure for major penalties and provides that no order imposing any penalties specified in Clauses (v) to (ix) of Rule 11 shall be made except after an Inquiry held, as far as may be, in the manner provided by the Public Servants (Inquiries) Act, 1850, where such Inquiry is held under that Act. Rule 15(2) requires the Disciplinary Authority to forward a copy of the Report of the Inquiry held by it. If the Disciplinary Authority is not the Inquiring Authority, a copy of the Report of the Inquiring Authority, together with its own tentative reasons for disagreement with the findings of Inquiring Authority on any Article of Charge to the Government Servant shall be forwarded, who, if he so desires, may file a written submission within fifteen days, irrespective of whether the Report is favourable to him or not.

20. Bearing the above provisions in mind, we may walk back in time and examine whether there was compliance of the Rules set out above. The Terms of Reference were set out on 13-10-2005, almost three years later, the Articles of Charge were formulated against the Petitioner on 19-06-2008. No explanation for this delay has been extended by the Respondents. The proceedings before the Inquiring Authority, in which the Petitioner participated, commenced on 07-01-2009 and concluded on 30-07-2009. It emanates that the Inquiring Authority had submitted his Report on 01-12-2009 exonerating the Petitioner on all counts, but no intimation regarding this state of affairs was made to the Petitioner. Instead, the Disciplinary Authority remitted the case on 29-01-2010 to the Inquiring Authority for further Inquiry. Vide letter dated 19-03-2012 the Disciplinary Authority served a copy of the First Inquiry Report and copy of the 2nd Stage Advice of the

CVC to the Petitioner, when infact, by this time the Second Inquiry had already drawn to a close, wherein the Petitioner without his participation, had been found partially guilty of the offence under Article II. For undisclosed reasons, the Disciplinary Authority concealed the fact of the Second Inquiry Report while making over the First Inquiry Report and 2nd Stage Advice of CVC to him on 19-03-2012. Consequently, the Petitioner being unaware of the Second Inquiry confined his response dated 17-07-2012 to the aforesaid two documents. It was only on 25-05-2015 after almost three long years of his response and five years after completion of Second Inquiry, a communication was sent to him, enclosing a copy of the impugned Advice of the UPSC dated 11-05-2015, that he learnt of the Second Inquiry conducted against him and completed on 19-02-2010. The above facts clearly reveal that the conduct of the Disciplinary Authority who took its own time to conduct the proceedings, i.e., from 2005 onwards, and deemed it fit to complete it only on 23-08-2016 with the impugned Order with no valid reasons afforded for the delay. Relevant documents were submitted belatedly to the Petitioner, inasmuch as although the First Inquiry was completed on 01-12-2009, copy was sent to him on 19-03-2012. The Second Inquiry Report although completed on 19-02-2010, was sent to him only on 25-05-2015, more than five years, after conclusion of Inquiry. The act of the Disciplinary Authority in choosing not to disclose the fact of Second Inquiry to the Petitioner is indeed violative of the principles of natural justice, as it is clear that no opportunity of either putting forth his case in defence or hearing was afforded to the Petitioner. After the First Inquiry Report was remitted to the Inquiring Authority for re-examination, it was incumbent upon the Disciplinary Authority to have informed the Petitioner that the matter was being re-examined and an opportunity undoubtedly should have been afforded to him to put forth his stand on the issue. In other words, the Petitioner ought to have been put to notice, that, the Disciplinary Authority being in disagreement with the findings of the First Inquiry Report had in terms of Rule 15(1) of the CCS (CCA) Rules, 1965, remitted the matter for re-examination. Not only was the above fact concealed from the Petitioner, but the Second Inquiry Report was also not made over to him, clearly establishing *mala fide* on the part of the Respondent Authorities as they have adopted a cloak and dagger approach. The provisions of Rule 15(1) and (2) of the CCS (CCA) Rules, 1965, having already been put forth hereinabove, goes without saying have been clearly flouted by the Disciplinary Authority.

21. On this count, it would be appropriate to refer to the decision of ***S.K. Kapoor***[1], wherein it was held that it is a settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same be supplied in advance to the Charge-Sheeted employee, so that he may have the chance to rebut the same. Further, in ***B. Karunakar***[4] it was, *inter alia*, held that when the Inquiry Officer is not a Disciplinary Authority, the delinquent employee has the right to receive a copy of the Inquiry Officer's Report, before the Disciplinary Authority arrives at its conclusion with regard to the guilt or innocence of the employee, with regard to the Charges levelled. That right is a part of the employee's right to defend himself against the Charges levelled against him. The denial of the Inquiry Officer's Report, before the Disciplinary Authority takes its decision on the Charges, is the denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

22. It was urged by the Respondents that in view of the findings of the Disciplinary Authority, this Court ought not to interfere in the decision thereof, for which attention of this Court was drawn to ***Praveen Bhatia***[7]. The Appellant therein was issued an Order for Compulsory Retirement as he failed to submit his property returns for the years 1981 to 1986 and the Return was belatedly filed after about six years on 28-03-1992. The conduct was found unbecoming of an Officer of the Air Force. The High Court accepted the stand of the State-Respondent and dismissed the Petition. The Supreme Court dismissed the Appeal of the Petitioner, as from the records, it was evident that the prescribed period for filing the property return was 6 months and although the Appellant was aware of the requirement, he chose not to file his return. The facts and the offence in ***Praveen Bhatia***[7] are clearly distinguishable from the facts in the case under discussion, inasmuch as the Charge under which the Petitioner herein was found to be guilty was for not conducting a medical inquiry of the CPLs, while in ***Praveen Bhatia***[7] the Appellant had failed to abide by the prescribed period of filing property returns which was transgression of the Conduct Rules. In my considered opinion, the magnitude of the two offences cannot be compared.

23. In ***A. Masilamani***[10] relied on by Learned Central Government Counsel for the Respondents, it was held that, whether or not the Disciplinary Authority should be given an opportunity to complete the Inquiry afresh from the point that it stood vitiated, depended upon the gravity of the

delinquency involved and the magnitude of misconduct alleged against the employee. The matter therein was remitted for *de novo* Inquiry from the stage that the Inquiry stood vitiated as the Honble Supreme Court was of the view that Charges were grave inasmuch as the Appellant, an employee of the LICI had after taking Housing Loan, committed certain irregularities and deviations with respect of the construction of the said house and the loan had been obtained upon non-disclosure of the facts in entirety. In the case at hand, the records and the submissions of Learned Counsel indicate that the criminal proceedings initiated against the Petitioner before the CBI Court was closed due to lack of materials for Prosecution, while in the Disciplinary Proceedings the Petitioner was found guilty of not getting the CPLs medically examined and obtaining their Reports. The magnitude of the delinquency in the said case and the case at hand do not merit comparison.

24. In this context, we may also keep in view the requirement in Article 311(2) of the Constitution which provides that "*No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges*".

25. The Respondent Authorities have admitted the delay caused by them, but given a frail argument that, it was on account of the voluminous documents that required to be studied and the journey of the documents through various Authorities in the channel of administration that caused the delay. On this count, we may usefully refer to the decision of ***P.V. Mahadevan***[6], in which the Honble Supreme Court quashed the disciplinary proceedings on the ground of delay holding that;

> **"11.** ..... Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. .....**"**

26. In ***N. Radhakishan***[5], it was observed as under;

> **"19.** …….. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that his is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately the court is to balance these two diverse considerations.**"**

27. Thus, on the entirety of the facts and circumstances and discussions placed hereinabove, the Inquiry is evidently vitiated on account of the inexplicable inordinate delay, coupled with the fact that the procedure prescribed in Rule 15 of the CCS (CCA) Rules, 1965, have not been complied with.

28. Consequently, the Writ Petition is allowed.

29. The impugned Inquiry Report dated 19-02-2010, Office Memorandum dated 13-03-2012, Advice dated 11-05-2015 and the Impugned Order dated 23-08-2016, reflected in Paragraph 1(i) above are quashed and set aside. The Disciplinary Proceeding dated 19-06-2008 is *non est* in the eyes of law.

30. Accordingly, necessary consequential reliefs to the Petitioner to follow in accordance with Law.

31. No order as to costs.

INDIAN LAW REPORT (SIKKIM SERIES)
SLR (2017) SIKKIM 36
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

MAC App. No. 01 of 2017

The Branch Manager,
United India Insurance Co. Ltd., ….. APPELLANT

Versus

Mr. Subash Rai and Others ….. RESPONDENTS

For the Appellant : Mr. Pema Ongchu Bhutia, Advocate.

For Respondent 1 to 6 : Mr. Ajay Rathi with Mr. Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates.

For Respondent No.7 : Mr. Deven Sharma Luitel, Advocate.

Date of decision: 12th July 2017

A. Motor Vehicles Act, 1988 – Ss. 166 and 173 – Multiplier of "17" adopted by the Claims Tribunal upheld in terms of the ratio laid down in Sarla Verma (Smt). and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121 since the age of the deceased was 27 (Para 3)

B. Motor Vehicles Act, 1988 – Ss. 166 and 173 – Deduction towards personal and living expenses – Only mother can be consider as a dependent of her deceased bachelor son – Deduction has to be 50% her personal and living expenses of the deceases bachelor – Father and Siblings cannot be considered as his dependents. (Para 6)

C. Motor Vehicles Act, 1988 – Ss. 166 and 173 – Siblings cannot be considered as the responsibility of the deceased. (Para 7)

D. Motor Vehicles Act, 1988 – Ss. 166 and 173 – Compensation towards loss of estate, only a sum of Rs. 2,500/- granted by the Tribunal – Enhanced to Rs. 1,00,000/-. (Para-9)

Appeal partially allowed.

Chronological list of cases cited:

1. Sarla Verma (Smt.) and others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121
2. Munna Lal Jain and Another v. Vipin Kumar Sharma and Others, (2005) 6 SCC 347
3. Kalpana Raj and Others v. Tamil Nadu State Transport Corporation, (2015) 2 SCC 764
4. Sandhya Rani Debbarma and Others v. National Insurance Company Ltd. & Another, (2016) (8) SCJ 775

JUDGMENT (ORAL)

Meenakshi Madan Rai, J

1. Contending that the learned Motor Accident Claims Tribunal, East Sikkim at Gangtok (for short 'Claims Tribunal'), was in error in granting compensation to the tune of Rs.26,49,500/- (Rupees twenty-six lakhs, forty-nine thousand and five hundred) only, in MACT Case No. 7 of 2016 on 29.11.2016, the instant Appeal assails the award of the learned Claims Tribunal on the following grounds;

i. That, the multiplier adopted by the learned Claims Tribunal was '18', instead of '17', in terms of the ratio in **Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another**[1], as the age of the deceased on the date of accident was 27 years.

ii. That, the learned Claims Tribunal erred in not considering that the deceased was a bachelor and deducted one-third only towards personal and living expenses of the deceased, when a deduction of 50% was appropriate, as laid down in **Sarla Verma**[1]**.**

2. Learned Counsel for the Respondents No. 1 to 6, fairly conceded that the choice of multiplier ought to have been '17', as the victim was 27 years at the relevant time. However, the argument pertaining to 50% deduction was vehemently contested, inter alia, on the ground that the deceased has parents and four siblings, who are dependent on him. That, the father is aged about 50 years, while the mother is aged about 48 years and both are struggling with several physical ailments

[1](2009) 6 SCC 121

and are unable to earn a living. Consequently, both parents and siblings have lost their bread winner. Relying on the ratio of **Sarla Verma**[1], it was pointed out that the Judgment specifically provides at Paragraph 30, that deduction towards living expenses ought to be calculated on the basis of the dependents. As the deceased had six dependents, the deduction ought to have been calculated accordingly and that in fact, the learned Claims Tribunal was in error in deducting one-third towards living expenses of the deceased, without considering his dependents.

No submissions were made by learned Counsel for the Respondent No.7.

3. Having heard the parties and on admission of learned Counsel for the Respondents No. 1 to 6, with regard to the multiplier, no further discussion need ensue on this point and the matter is accordingly settled, inasmuch as the multiplier to be adopted shall be '17' in terms of the ratiocination in **Sarla Verma**[1].

4. I now limit myself to the question of 50% deduction, for which it not necessary to delve into the facts of the case. Suffice it to say that admittedly the deceased was a bachelor at the time of the accident, on account of which he met his death on the intervening night of 29.12.2015 to 30.12.2015, near Makha, East Sikkim, while he was travelling from Mangan to Singtam, in a vehicle Maruti Alto, bearing Registration No. SK-03-T-0170, driven by one Budhi Raj Subba.

5. In **Sarla Verma**[1], which was also upheld in the decision of **Munna Lal Jain and Another vs. Vipin Kumar Sharma and Others**[2], it was held at Paragraphs 30 and 31, as follows;

> **"30.** Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, onefourth (1/4th) where the number of dependent family members is 4 to 6, one-fifth (1/5th) where the number of dependent family members exceeds six."
>
> **31.** When the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted

[2](2005) 6 SCC 347

> as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father."

6. Thus, it is clear that the mother only can be considered as a dependent of her deceased bachelor son. The argument of the Respondents that the deduction for living expenses of the deceased ought to be based on the number of his dependents, flies in the face of the settled position of law, in other words the deduction has to be 50% for personal and living expenses of the deceased, who was a bachelor. His father and siblings cannot be considered as his dependents.

7. Although, it has been urged by learned Counsel for the Respondents No. 1 to 6, that the legislation is a benevolent legislation and should be extended accordingly. However, as per the decision extracted supra, it is clear that siblings cannot be considered as the responsibility of the deceased. Moreover, if we are to take the retirement age of government servants as a yardstick, in the case at hand, the father has not even stepped into the age of retirement.

8. The learned Counsel for the Respondents contended that the learned Claims Tribunal was in error in granting a sum of Rs.2500/- (Rupees two thousand & five hundred) only, towards Loss of Estate, when it has been clearly laid down in the decision of **Kalpana Raj & Ors. vs. Tamil Nadu State Transport Corpn.[3] and Sandhya Rani Debbarma & Ors. vs. National Insurance Company Ltd. & Anr.[4]**, that the amount to be granted for such compensation ought to be Rs.1,00,000/- (Rupees one lakh) only.

9. In view of the said decision, there is no reason to hold otherwise. Thus, a sum of Rs.1,00,000/- (Rupees one lakh) only, is allowed as compensation towards Loss of Estate.

10. Having considered the submissions of learned Counsel on the aspects

[3] (2015) 2 SCC 764
[4] 2016 (8) SCJ 775

above and after perusing the records, the citation of learned Counsel at the Bar and the impugned Judgment, I am of the considered opinion that the compensation granted by the learned Claims Tribunal is to be recalculated as follows;

Monthly income of the deceased	Rs.	12,000.00
Annual Income of the deceased **(Rs.12,000/- x 12 months)**	Rs.	1,44,000.00
Multiplier of **'17'** adopted.	Rs.	24,48,000.00
Add 50% of Rs.24,48,000/- as Future Prospects	Rs.	12,24,000.00
	Rs.	36,72,000.00
Less 50% of Rs.36,72,000.00 as deceased was a Bachelor	Rs.	18,36,000.00
Net yearly income	Rs.	18,36,000.00
Add Funeral Expenses	Rs.	25,000.00
Add Loss of estate (in terms of the decision of Munna Lal)	Rs.	1,00,000.00
Add Cost of transportation of the body of the victim	Rs.	5,000.00
Add Non-pecuniary damages	Rs.	25,000.00
Total=	**Rs.**	**19,91,000.00**

(Rupees nineteen lakhs and ninety-one thousand) only.

11. The Judgment of the learned Claims Tribunal stands modified accordingly and Appeal is allowed to that extent.

13. Consequently, the Appellant-Insurance Company is directed to pay the awarded amount to the Respondent No.2, within one month from today with interest @ 10% per annum, failing which the Appellant-Insurance Company shall pay simple interest @ 12% per annum, from the date of filing of the Claim Petition till full realisation.

14. Copy of this Judgment be sent to the Learned Motor Accident Claims Tribunal, East Sikkim at Gangtok, for information.

15. Records be remitted forthwith.

SLR (2017) SIKKIM 41

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

R.S.A No. 02 of 2016

Shri K.B. Bhandari ….. APPELLANT

Versus

Shri Laxuman Limboo and Another ….. RESPONDENTS

For the Appellant: Mr. Udai P. Sharma with Mr. Anup Gurung, Advocates.

For Respondent No. 1: Mr. N. Rai, Sr. Counsel with Ms. Tamanna Chettri and Mr. Suraj Chhetri, Advocates.
None for Respondent No. 2.

Date of decision: 12th July 2017

A. Code of Civil Procedure, 1908 – S. 100 – The Sikkim State Rules, Registration of Documents, 1930 –"Rule 10. All interlineations, erasures or alterations appearing in the document must be attested by the parties to it with their signatures before the said documents could be accepted for registration." – Argument of the Appellant that the Rule 10 would not apply to cases which have already been accepted for registration is not tenable nor backed by any legislation. (Para 19)

B. Adverse Possession – The Appellant's claim on the suit property is based on title – The concept of adverse possession is in opposition to a claim under title, the two claims cannot either be parallel or simultaneous – The findings of the Appellate Court that the Appellant has not been able to make out a case for adverse possession, suffers from no infirmity. (Para 22)

C. Land Records of 1951 – Validity – Notification No. 991/ D.D.L.R. dated 17th January, 1984 – The Land Records prior to 1984, was in acres and subsequently on converting the measurements

to hectares, this Notification fell in place. However, it does not mean that the Land Records of 1951 have been shut out for the purposes of corroborating the possession of property held by different individuals, the subsequent records can be verified from the 1951 Land Records. (Para 23)

Appeal dismissed.

Chronological list of cases cited:

1. S. R. Tewari v. Union of India, (2013) 6 SCC 602

2. Sashidhar and Others v. Ashwini Uma Mathad and Another, (2015) 11 SCC 269

3. Damodar Lal v. Sohan Devi and Others, (2016) 3 SCC 78

4. Krishnan v.Backiam and Another, (2007) 12 SCC 190

5. Easwari v. Parvathi and Others, (2014) 15 SCC 255

6. Vinod Kumar v. Gangadhar, (2015) 1 SCC 391

JUDGMENT

Meenakshi Madan Rai, J.

1. This Appeal arises out of the impugned Judgment of the learned District Judge, East Sikkim at Gangtok, in Title Appeal No. 2 of 2015, dated 9.6.2016, which in turn arose out of the impugned Judgment and Decree of the learned Civil Judge, East Sikkim at Gangtok, in Title Suit No. 9 of 2014 dated 30.4.2015.

2. The learned Appellate Court, vide its impugned Judgment confirmed the findings of the learned Civil Judge, East Sikkim, hence this Second Appeal which was admitted on the following substantial question of Law.

"Whether in arriving in its findings, the Judgment of the First Appellate Court has ignored the material evidence on record?"

3. In order to understand the matter in its correct perspective, it is essential to briefly advert to the facts of the case. The appearance of the parties before the learned Trial Court was as follows;

The Appellant before the First Appellate Court and herein, was the Defendant No.1. The Respondent No.1 was the Plaintiff, while the Pro-forma Respondent herein was the Defendant No.2. The parties shall be addressed herein in terms of their appearance before this Court. As the Defendant No.3 before the learned Trial Court is not a party to this Appeal, he shall be referred to as Defendant No.3.

4. It was averred by the Respondent No.1 before the learned Trial Court that he is the son of Til Bahadur Limboo, who owned landed property, which included Plot No. 250 and 251 under Khatiyan No. 25, having an area of 1.20 acres and 0.38 acres respectively at Tharpu Block, Soreng, West Sikkim. In the year 1979, Til Bahadur Limboo sold out a portion of land from Plot No.250, measuring an area of 0.15 acres equivalent to 0.0600 hectare to late Phip Raj Limboo. Phip Raj Limboo in turn, in 1983, sold the aforesaid land measuring 0.15 acres to the Appellant, by which time the Plot Number was renumbered as 329 and the area measured in hectares. The sold land did not share any boundary with the Naya Bazaar Sombaria road. After a few years of such purchase, the Appellant started encroaching on another plot of land belonging to Til Bahadur Limboo, being Plot No. 324 and into the unsold portion of Plot No.329. The Appellant, after purchasing the land from Phip Raj Limboo, interpolated the Sale Deed document, Exhibit D-1-1, executed between him and late Phip Raj Limboo, thereby increasing the area of land purchased by him to 0.19 acres equivalent to 0.0780 hectare, instead of 0.15 acres equivalent to 0.0600 hectare, actually purchased by him. He then sold a portion of the land from Plot No. 329 to the Pro-forma Respondent in the year 1999, who also started encroaching upon Plot No. 324 of the land of the Respondent No.1 and the unsold portion of Plot No.329, hence the Respondent No.1, inter alia, sought the following reliefs;

> "a) a decree declaring that the suit land is the integral part of plot No. 324 and unsold portion of plot No. 329 belonging to the plaintiff and the plaintiff has right, title and interest over the suit land.

b) a decree directing the defendant No.1 and 2 for vacating the Schedule land and to hand over the same to the plaintiff.

c) a decree for removal/demolition of the structure put up by the defendant No.1 and 2 upon the suit land.

d) a decree for nullifying and canceling the interpolation made in the sale deed of the Defendant No.1 and/or 2 and resultant direction to the defendant No.3 to make correction of the said documents along with the mutated records of right of defendant No.1 and/or 2, if any.

e) a decree directing the defendant No.1 and 2 to pay a compensation of Rs.50,000/- to the plaintiff for the damages caused to the suit land.

f) the cost of this title suit may be awarded to the plaintiff.

g) any other relief or relieves as the plaintiff may be found entitled to under the law."

5. The Appellant for this part averred that his land is covered by Khasra No. 329/684 and he had originally purchased 0.0780 hectare of land from Plot No.329. That, the boundaries mentioned by the Respondent No.1 in the Plaint are incorrect, as the Northern boundary extended up to the Naya Bazaar Sombaria road. According to him, he retained 0.0080 hectare from Plot No. 329 for his own use, after selling the larger portion to Pro-forma Respondent and therefore, has been in possession since the year 1983 i.e. more than 12 years and has perfected his right, title and interest over the Suit property by way of adverse possession.

6. The Pro-forma Respondent denied and disputed the claims of the Respondent No.1 and claimed to have purchased 0.0700 hectare from the Appellant in the year 1999 vide a registered Sale Deed, duly registered in the office of the Sub–Registrar, Soreng, West Sikkim. Hence, the question of encroaching upon the land of the Respondent No.1, does not arise.

7. The Defendant No.3, the Sub-Registrar/Sub-Divisional Officer (not a party in this Appeal) for his part, averred that he had no role to play in the interpolation of documents as alleged.

8. The learned Trial Court on the basis of the pleadings of the parties settled the following Issues for determination.

"a) Whether the suit land/schedule land belongs to the Plaintiff and the Plaintiff has right, title and interest over it?

b) Whether Defendants no.1 and 2 are liable to vacate the suit land and to hand over the possession of the same to the Plaintiff? And if so, whether the Defendants no. 1 and 2 are liable to remove/demolish the structure upon the suit land?

c) Whether the sale deed of Defendants no. 1 and 2 have been interpolated rendering the same null and void. If so, whether Defendant No.3 is required to make correction of records of right (Sale deed and mutation records) of the Defendants no.1 and 2 vis–a–vis the Plaintiff?

d) Whether the suit has been under valued or not?

e) Whether the Defendants No.1 and 2 are liable to pay compensation to the Plaintiff for the damage of the suit land?

f) Whether the Defendant No.1 has acquired right, title and interest over the suit property measuring 0.0780 hectares by virtue of the Principles of Adverse Possession?

g) Any other reliefs, as the Plaintiff is entitled to?"

9. The Respondent No.1 examined himself as P.W.1 and two other witnesses i.e. P.W.4 and P.W.5 in support of his case but dropped his witnesses, P.W.2 and P.W.3, before the learned Trial Court. The Appellant examined himself as D.W.1 and three others i.e. D.W.2, D.W.3 and D.W.4 in support of his case. Pro-forma Respondent examined himself as D.W.1 and two other witnesses.

10. The learned Trial Court took up Issues (a) and (f) together and considered Exhibit 1 to Exhibit 6, Exhibit 14, Exhibit 15, Exhibit D-1-1 and the evidence of the witnesses and concluded that the evidence and

documents on record establishes that the Appellant and the Pro-forma Respondent, herein, had encroached upon the land of the Respondent No.1, being 0.08 acres in Plot Nos. 324 and 329. It was also found that the Appellant could not show that he had perfected his title by way of adverse possession. For Issue (b), it was found that the Appellant and the Pro-forma Respondent are liable to remove/demolish any existing structure over the encroached portion of the Suit land. In Issue (c), the Court concluded that there appeared to be corrections made in Exhibit D-1-1, without following the mandate of the Registration Rules and there is encroachment by the Appellant and the Pro-forma Respondent upon the land of the Respondent No.1. Thus, the records of right maintained in respect of Plot Nos. 324 and 329 be corrected accordingly. The Suit was not undervalued as per the finding in Issue (d). While discussing Issue (e), the learned Trial Court did not deem it appropriate to impose compensation on the Appellant and the Pro-forma Respondent, as the demolition, removal of the structure and restoration of the Suit property to its original form would suffice as compensation. Hence, the Suit of the Respondent No.1 was decreed accordingly.

11. The Appellant being aggrieved by the said Judgment was in Appeal before the Court of the learned District Judge, East Sikkim at Gangtok. The learned Appellate Court taking into consideration the entire evidence and documents relied on by the parties, concluded that the actual area of land sold by the Respondent No.1's father to Phip Raj Limboo was 0.15 acres, equivalent to 0.0600 hectare. When this was the factual position, the question of Phip Raj Limboo selling 0.0780 hectare did not arise. The learned Appellate Court took into consideration Exhibits C-1 to C-5 and concluded that the veracity of the documents were not free from uncertainty and thereafter confirmed the findings of the learned Trial Court.

12. Before this Court, it is urged by learned Counsel for the Appellant, that, the Appellant on 22.11.1983, purchased the Suit land measuring 0.0780 hectare, as per the new survey operations enforced from 17.1.1984, belonging to and recorded in the name of the vendor, one Phip Raj Limboo. However, the learned District Judge ignored the documents marked as Exhibits C-1, C-2, C-3, C-4 and C-5, produced by the P.W.4 Shri I.B. Limboo, which clearly establishes that Plot No. 329, measuring 0.0780 hectare, was recorded in the name of late Phip Raj Limboo. The Appellant

after purchasing it, mutated the land in his name vide Mutation Order dated 19.04.1991, as borne out by Exhibit D-1-1, the Sale Deed document executed between the two persons.

13. It was expostulated by learned Counsel for the Appellant that the learned District Judge erred in considering the statements allegedly given by witnesses before the Sub-Divisional Magistrate, Soreng, when the statements had not been proved in accordance with law. The cross-examination of P.W.-4 was also ignored, as according to the witness, the Appellant was absent at the time of spot verification and the report was prepared without consulting the Sale Deed document of Phip Raj Limboo but was allegedly based on the Survey Map and Khatiyan Register. That, this evidence is falsified, as the Khatiyan Register reflects that the vendor's land covers an area of .0780 hectare. That, the First Appellate Court erred in holding that the Appellant had encroached an area measuring 0.08 acres in Plot No. 324 and 329, as Plot No. 324 did not exist after 17.1.1984 and Plot No. 329 was already converted to hectares. That, the findings of the learned District Judge are perverse, as the Land Records of 1951 ceased to be in operation since 17.1.1984, when the new Land Records were enforced. To substantiate this argument reliance was placed on **S. R. Tewari vs. Union of India**[1], where while dealing with "perverse findings" it was held that findings of fact are perverse if arrived at by ignoring or excluding relevant material. That, the observation of the District Judge that the Trial Court had rightly relied on Section 10 of the Sikkim State Rules, Registration of Document, 1930, is erroneous, as the said Rule does not apply to documents which have already been accepted for registration. Besides, the learned Court also erred in holding that the Appellant being unsuccessful in establishing his case on title, would not be permitted to raise a contradictory claim on adverse possession. That, the findings of the learned District Judge, that the possession of the Appellant over the Suit property was not uninterrupted is perverse as the averments of the Respondent No.1 and his evidence indicate that shortly after the registration and mutation, the Appellant fenced the entire land with wires and constructed an Ekra house, hence it is prayed that the impugned Judgment and Decree dated 9.6.2016, be set aside.

[1](2013) 6 SCC 602

14. To substantiate his submissions, learned Counsel for the Appellant placed reliance on **Sashidhar and Others** vs. **Ashwini Uma Mathad and Another**[2]. Reliance was also placed on **S. R. Tewari** vs. **Union of India**[1] with Contempt Petition (C): **S. R. Tewari** vs. **R. K. Singh and Another.** While forwarding the contention that Exhibits 'C1' to 'C5' were totally ignored by the Learned Trial Court while reaching its findings, thereby leading to a decision which is perverse, which therefore, can be set aside, support was taken from the decisions of **Damodar Lal** vs. **Sohan Devi and Others**[3], **Krishnan** vs. **Backiam and Another**[4] and **Easwari** vs. **Parvathi and Others**[5]. Reliance was also placed on **Vinod Kumar** vs. **Gangadhar**[6].

15. *Per contra,* it was the contention of learned Senior Counsel for the Respondent that, in the first instance, the learned Trial Court has not ignored any substantial evidence placed before it and in Second Appeal, facts cannot be taken into consideration. That, the new records which are in hectares ought to have reflected the equivalent of 0.15 acres i.e. 0.0600 hectare but the land recorded in the name of the Appellant is in excess of his purchase and reflected as 0.0780 hectare. A perusal of the impugned Judgment would indicate that the Trial Court as well the First Appellate Court have considered all necessary evidence and the submission of the Appellant that there was no cross-examination conducted on the Sub-Divisional Magistrate's report is clearly misplaced and erroneous. Exhibit C1, Exhibit C-2 and Exhibit C-3 have been prepared on the basis of the Sale Deed, Exhibit D-1-1, which is incorrect, as a consequence, the other documents are incorrect as well. That, Exhibit D-1-1, the Sale Deed executed between Phip Raj Limboo and the Appellant, has been considered by the Trial Court which reveals that in the line "Khatiyan Plot No./Nos.", the numerical '329' in English has been inserted after scoring out the numerical '250', written in Nepali. The area i.e. .15 decimal *Sukhabari* which had been written in Nepali, has also been scored out and ".0780 hac" inserted, but there is no revelation as to who was responsible for the corrections. Exhibit 6 reveals that the Office is unaware of the interpolation on Exhibit D-1-1. Hence, the concurrent findings of the learned Courts below ought not to be disturbed.

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[2](2015) 11 SCC 269
[3](2016) 3 SCC 78
[4](2007) 12 SCC 190
[5](2014) 15 SCC 255
[6](2015) 1 SCC 391

16. I have heard learned Counsel at length and given due consideration to their submissions. I have also perused the entire records of the case including the evidence, documents and the impugned Judgment.

17. The argument that, the District Judge ignored the fact that the Plot No.329 bearing .0780 hectare, as per the new survey operation which came into force from 17.1.1984, and was mutated in the name of the Appellant vide Mutation Order dated 19.4.1991, is incorrect, as the Appellate Court has considered the evidence and documents on record and elaborately discussed it from Paragraph 28 to Paragraph 36 of the impugned Judgment.

18. The contention that the Appellate Court ignored Exhibits C-1 to C-5, meets the same fate as above, since Paragraph 41 of the impugned Judgment discusses these documents.

19. Exhibit C-3, which is a 'Khatiyan', reveals that an area measuring .0780 hectare in Plot No. 329 is recorded in the name of the Appellant, it may be pointed out that undeniably the transaction between Phip Raj Limboo and the Appellant took place on 22.11.1983. If this be so then the endorsements on the document Exhibit C-3, which reads variously as, "Tailed (sic, Tallied)", "Retelied (sic, Retallied)" and "Copied by" different officials, i.e., Surveyors, purportedly of the office of the Sub-Divisional Magistrate, Soreng on 18.6.1981, defies logic. It is indeed baffling as to how the property came to be recorded in the name of the Appellant in 1981, as reflected in Exhibit C-3, when the sale transaction took place two years later in 1983. I cannot help but remark that the situation in Exhibit C-3 is identifiable to the limerick of a "Young lady named Bright". I refrain from reproducing the same herein but it is evident that Exhibit C-3 reflects registration of the land in the Appellant's name, prior to him having purchased it, which goes without saying is an incongruous situation. In this context, we may also peruse Exhibit D-1-1, the Sale Deed executed between Phip Raj Limboo and the Appellant, which fortifies the position that the sale transaction actually took place on 22.11.1983, which is also the date of cash payment. The document was presented for registration on 28.1.1985 and registered compulsorily on 20.12.1986. It is indeed unfathomable as to how Exhibit C-3 could indicate the Appellant's ownership in 1981, two years before the purchase of the land by him, from Phip Raj Limboo. Besides, both Courts below have reached a concurrent

finding that the plot number on Exhibit D-1-1 has been altered from Plot No. 250 to Plot No. 329 and the area from 0.15 decimals to 0.0780 hectare, but no one has been able to enlighten the Courts as to on whose behest the alterations were inserted or who scribed the alterations and why no witness was examined in this regard to clarify the matter. Further, I do not find any error in the conclusion of both Courts below that the mandate of the Sikkim State Rules, Registration of Document, 1930 have not been complied with. The Sikkim State Rules, Registration of Document, 1930 at Rule 10 lays down that;

> "**10**. All interlineations, erasures or alterations appearing in the document must be attested by the parties to it with their signatures before the said documents could be accepted for registration."

Clearly, this has not been complied with in Exhibit D-1-1 and there are no signatures of the parties after the alterations were made, raising a doubt about the motive of such alterations, the records being devoid of any details in this context. The Appellant, in his evidence, has admitted that he is unaware as to who made the fresh insertions pertaining to the Plot Number and area of the Suit land after deleting the original insertions. The argument of the Appellant that the said Rules would not apply to cases which have already been accepted for registration is not tenable, nor backed by any legislation.

20. We may pertinently refer to Exhibit 5, which is a Notice dated 19.12.1978, issued by the Registrar, West District, Gyalshing, giving Notice to all concerned that Til Bahadur Limboo of Tharpu Block was selling his land bearing Plot No.250 measuring 0.15 decimals situated at Tharpu Block to Phip Raj Limboo of the same place for Rs.2600/- (Rupees twenty-six hundred) only. This Notice dispels all doubts with regard to the measurement of the land in dispute, since Phip Raj Limboo evidently purchased 0.15 decimals from Til Bahadur Limboo and obviously he could not have sold an area more than what he had purchased. Besides, Exhibit 6, which is a Note-Sheet of the Sub Divisional Officer, Soreng Sub-Division, West Sikkim, is clear that the land sold out by Til Bahadur Limboo to Phip Raj Limboo was 0.15 decimals vide copy of Registration No. 84 dated 03.03.1979 in the old Land Records, before the general survey operation of 1981 commenced. The disputed land was resold to the

Appellant by Phip Raj Limboo, vide copy of Registration Book No. A, Vol. No. II and Item No. 164 dated 19.12.1986, wherein an area of 0.15 decimals, dry land has been mentioned on the Sale Deed document, from the newly recorded Plot No. 329 pertaining to the disputed plot of land.

21. As Exhibit C-3 cannot be relied on, as a corollary the question of Exhibit C-4, vide which an area of 0.0700 hectares is purported to be mutated in the name of the Pro-forma Respondent from the Appellant is an unbelievable document. Although, it is submitted that Exhibits C-1 to C-2 are true copies of the 'Khatiyan' but in the absence of explanation to the entries in Exhibit C-3, the two documents have to be taken with a pinch of salt. It was alleged that the Appellant was not at the spot during verification, a careful perusal of the evidence on record more especially of P.W.4, would reveal that no question was put to the witness on this count. Contrary to the allegation of the Appellant, it is also relevant to point out that the learned District Judge has in fact not considered the statement of the witnesses before the Sub-Divisional Magistrate, Paragraph 36 of his Judgment would stand testimony to this. The said Paragraph reads as;

> *"36. However, I agree with Learned Counsel for the appellant that it was not proper for the Learned trial Court to rely in the statement of PW-2 (Dhan Maya Subba) and 3 (Bhim Bahadur Nimbang), reportedly made before the Sub-Divisional Magistrate, Soreng. As the statement of PW-2 and PW-3 were not tested under cross-examination and as the plaintiff had dropped the said witnesses (vide Order dated 17.05.2012), Learned trial Court should not have relied in their statement (marked Exhibit-14 and Exhibit-15) respectively. Nevertheless, as it is clear that the area of land sold by the plaintiff's father to Phip Raj Limboo was 0.15 acre or 0.060 hectare, I do not find that dropping PW-2 and PW-3 by the plaintiff would cause any impact in the merits of the case."*

22. The findings of the learned Appellate Court that the Appellant has not been able to make out a case for adverse possession, suffers from no infirmity. The Appellant's claim on the Suit property is based on title, on the basis of documents as already discussed. The concept of adverse possession is in opposition to a claim under title, the two claims cannot either be parallel or simultaneous.

23. With regard to the records of 1951 not being valid, we may peruse Notification No. 991/D.D.L.R. dated 17th January, 1984, which reads as follows;

> "……
> ……...It is hereby notified for the information of general public that the old Land Records of 1951 which was in existence in the state of Sikkim shall cease to be in operation and new Land Record shall come into force with immediate effect.
> ……"

The Land Records prior to 1984, was in acres and subsequently on converting the measurements to hectares, this Notification fell in place. However, it does not mean that the Land Records of 1951 have been shut out for the purposes of corroborating the possession of property held by different individuals, the subsequent records can be verified from the 1951 Land Records.

24. Keeping in view the aforesaid facts and discussions, no other conclusion emerges, save that, the Judgment of the First Appellate Court has not ignored the material evidence on record. I, therefore, find no reason to hold differently from the findings of the learned Trial Court and the First Appellate Court, finding no infirmity therein.

25. Appeal dismissed.

26. No order as to costs.

27. Copy of this Judgment be sent to the Court of the learned District Judge, East Sikkim at Gangtok.

28. Records be remitted forthwith.

SLR (2017) SIKKIM 53

(Before Hon'ble the Chief Justice)

W.P. (C) No. 42 of 2016

Mr. Mandeep Sunwar and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Sr. Advocate with Ms. K.D. Bhutia and Mr. Ranjit Prasad, Advocates.

For the Respondents: Mr. J.B. Pradhan, Addl. Advocate General with Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Government Advocates, and Ms. Rita Sharma, Advocate for the State-Respondents.

Date of decision: 15th July 2017

A. Constitution of India – Article 226 – The constitutional philosophy of employment is enshrined in Article 14 read with Article 16 of the Constitution of India – Public employment has to be made after a proper competition among qualified persons on the basis of invitation through wide publicity, enabling all eligible candidates to make applications for the same – Selection is required to be made in accordance with statutory provisions, on merit, in the spirit of constitutional mandate of equality of opportunity without discrimination on the ground of sex, caste, place of birth, residence and religion. (Para 6)

B. Constitution of India – Article 226 – No material has been produced by both the parties to establish that the appointment of the petitioners was made in accordance with the constitutional scheme – It is difficult to hold that the appointment of the petitioners was made strictly in accordance with the constitutional scheme of employment – No positive direction can be issued to the State Government to regularize the petitioners only on the sole ground that they have

been working for last 10 to 15 years – However, in view of Circular dated 20.08.2014 which remains unchallenged and by which benefits was given to other similarly placed employees – State Government is obligated to consider cases of the petitioners in accordance with the Circular dated 20.08.2014 expeditiously within three months.

(Para 13 and 14).

Petition allowed.

Chronological list of cases cited:

1. Secretary, State of Karnataka & Others v. Umadevi and Others, (2006) 4 SCC 1
2. Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mani Parisha and Others, (2006) 7 SCC 684
3. Official Liquidator v. Dayanand, (2008) 10 SCC 1
4. Nand Kumar v. State of Bihar and Others, (2014) 5 SCC 300
5. Amarkant Rai v. State of Bihar and Others, (2015) 8 SCC 265

JUDGMENT

Satish K. Agnihotri, CJ

The petitioners, working as temporary employees in Group C and D category in the various departments of the State Government, have come up with this petition, seeking a direction to the respondent-State to regularise their services under the regular establishment from the date of initial appointment on muster roll basis and also consequential seniority.

2. The facts, in brief, as projected by the petitioners, are that the petitioners were initially appointed as muster roll employees in different departments of the Government of Sikkim. The petitioners possess requisite qualifications as required for the posts. The petitioners, thereafter, were appointed on temporary basis after completion of 10 (ten) years against the sanctioned posts created for the same vide Notification dated 22.02.2014 (Annexure R-4). Now, the petitioners are working as temporary employees. It is further stated that the petitioners have completed more than 10 to 15 years in service and have the requisite qualifications for the posts. Thus, the State Government may be directed to regularise them on completion of 10 (ten) years in service with effect from the initial date of appointment with consequential benefit.

3. Mr. A. Moulik, learned Senior Counsel appearing for the Petitioners, would contend that after sanction of the posts, the petitioners have been appointed on temporary basis. The State Government is in need of the petitioners' services as they are working against the sanctioned posts. Thus, the petitioners are entitled to be regularised on the posts as they possess the requisite qualifications. Referring to Circular dated 20.08.2014 (Annexure-A1) whereby the Government has decided to regularise the services of the temporary employees, who have completed 15 years and more as on 31.01.2013 working under various departments, Mr. Moulik would submit that as on date, all the petitioners have completed 15 years service and as such the petitioners are entitled to regularisation as per the Circular (supra).

4. Contrasting the submission put forth by learned Senior Counsel for the petitioners, Mr. J. B. Pradhan, learned Additional Advocate General, would contend that the petitioners are not entitled to regularisation under law. Mere working on the post for a long time, subsequently on temporary basis, does not confer any right on the petitioners to claim regularisation as a matter of right. Thus, the petition does not merit any consideration. However, the State Government has decided to consider the case of the petitioners who have completed 15 years and more of service as on 31.01.2013 only against a vacancy, being available as per Circular dated 20.08.2014.

5. Considered the contentions advanced by learned Senior Counsel appearing for the parties, perused pleadings and documents, appended thereto.

6. It is no longer *res integra* that in normal circumstances, the Court cannot direct regularization, particularly, when the appointment, made on temporary, ad-hoc, casual basis, is not in accord with the constitutional scheme of the employment. The constitutional philosophy of employment is enshrined in Article 14 read with Article 16 of the Constitution of India. It contemplates that the public employment has to be made after a proper competition among qualified persons on the basis of invitation through wide publicity, enabling all eligible candidates to make applications for the same. The selection is required to be made in accordance with statutory provisions, on merit, in the spirit of constitutional mandate of equality of opportunity without discrimination on the ground of sex, caste, place of birth, residence and religion. In the case on hand, no party has placed any material on record to establish that the appointment of the petitioners was made through proper selection on the public notice, inviting applications from all the candidates. In such a situation, it is difficult to hold that the

appointment of the petitioners was made strictly in accordance with the constitutional scheme of employment.

7. At this stage, it is pertinent to refer to the observations made by the Supreme Court in various cases, on this issue.

8. A Constitution Bench of the Supreme Court in ***Secretary, State of Karnataka & Ors.*** v. ***Umadevi (3) & Ors.***[1], propounded the proposition of law as under:-

> **"43.** Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. …….. **"**

[1] (2006) 4 SCC 1

9. In ***Surinder Prasad Tiwari*** v. ***U.P. Rajya Krishi Utpadan Mani Parisha & Ors.***[2], reiterating the constitutional philosophy as observed hereinabove, the Supreme Court held as under:-

> **" 37.** Our constitutional scheme clearly envisages equality of opportunity in public employment. The Founding Fathers of the Constitution intended that no one should be denied opportunity of being considered for public employment on the ground of sex, caste, place of birth, residence and religion. This part of the constitutional scheme clearly reflects strong desire and constitutional philosophy to implement the principle of equality in the true sense in the matter of public employment.
>
> **38.** In view of the clear and unambiguous constitutional scheme, the courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the courts to give directions for regularization of services of the person who is working either as daily-wager, *ad hoc* employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public employment.**"**

10. Yet, in ***Official Liquidator*** v. ***Dayanand***[3], the Supreme Court observed as under:-

> " *68.* The abovenoted judgments and orders encouraged the political set-up and bureaucracy to violate the soul of Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoils system which prevailed in the United States of America in the sixteenth and seventeenth centuries got a firm foothold in this country. Thousands of persons were employed/ engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the

[2] (2006) 7 SCC 684
[3] (2008) 10 SCC 1

employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system. …"

11. In ***Nand Kumar*** v. ***State of Bihar & Ors.***[4], considering regularization of the daily wagers, the Supreme Court held as under:-

> **" 26.** In these circumstances, in our considered opinion, the regularisation/absorption is not a matter of course. It would depend upon the facts of the case following the rules and regulations and cannot be dehors the rules for such regularisation/absorption.**"**

12. The afore-stated principle was further exposited in ***Amarkant Rai*** v. ***State of Bihar & Ors.***[5], wherein the Supreme Court, referring to para 53 of ***Umadevi (3)*** *(supra),* held as under:-

> **" 13.** In our view, the exception carved out in para 53 of *Umadevi (3)3* is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1-1-2010.**"**

13. In the light of well settled principle of law, as afore-stated, no positive direction can be issued to the State Government to regularize the petitioners only on the sole ground that they have been working for last 10 (ten) to 15 (fifteen) years. The indisputable facts, involved in the case on hand, are that the petitioners were initially appointed on muster roll.

[4] (2014) 5 SCC 300
[5] (2015) 8 SCC 265

Thereafter, after completion of about 10 (ten) years, the Government granted a sanction for creation of posts in various departments exclusively for appointment on temporary basis, belonging to Group-C and Group-D, wherein the petitioners herein have been working, as is manifest from the Notification dated 22.02.2014 (Annexure R-4). Accordingly, the petitioners were appointed on temporary basis. The State Government has further taken decision to regularize the temporary employees, who have been working against sanctioned posts in accordance with guidelines laid down in Circular dated 20.08.2014. As observed hereinabove that no material has been produced by both the parties to establish that the appointment of the petitioners was made in accordance with the constitutional scheme.

14. There is no challenge to the said Circular dated 20.08.2014 and as such I am not inclined to go into the validity of the Circular at this stage. The State Government, as pleaded by the parties, has granted benefit of the Circular to other employees similarly placed. In such view of the matter, the State Government is obligated to consider cases of the petitioners in accordance with the said Circular dated 20.08.2014 expeditiously as early as possible, preferably, within 3 (three) months.

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

SLR (2017) SIKKIM 60
(Before Hon'ble the Chief Justice)

W.P. (C) No. 46 of 2016

Dr. C. P. Rai and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Sr. Advocate with Ms. K.D. Bhutia and Mr. Ranjit Prasad, Advocates.

For the Respondents: Mr. J.B. Pradhan, Addl. Advocate General with Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Government Advocates.

Date of decision: 18th July 2017

A. Constitution of India – Article 226 – Writ Petition – On analysis of the charge framed against the petitioners and also the so called admission, it is not established that the petitioners have admitted participation of any political meeting knowingly in unequivocal and clear terms. Held, enquiry finding is without any basis on no evidence. Enquiry Report was based on no evidence, and as such, it is perverse. The Court has competent jurisdiction to interfere with such Enquiry Report and set right the injustices meted out to the Government employees.

(Paras 29, 33 and 39)

B. Sikkim Government Servants' Conduct Rules, 1981 – If the admission of guilt is ambiguous and conditional, enquiry is mandatory before holding the employee guilty of charges – The petitioners have not admitted their participation in the said meeting knowingly that the meeting was organized by political leaders. The petitioners, except second petitioner, have further stated that they have gone for picnic and wherein they found that there was a meeting attended by some known leaders, they were simply present without speaking or organizing or taking active participation in the meeting – The said

statement cannot fall within the ambit of admission of charges, as required within the requisites of Rule 6 of the Sikkim Government Servants' Conduct Rules, 1981.

(Paras 27 and 32)

C. Sikkim Government Servants' Conduct Rules, 1981 – Charge of misconduct is that the petitioners have participated in a meeting organized by political leaders, which was duly published earlier and as such willingly took active participation – There is no allegation that the petitioners are member of or associated with any political party, or any organization which takes part in political movement or activity – There is no allegation that there is any participation in aid of or assisting in any manner, any movement or activity which is or tends directly, or indirectly to be, subversive of the Government as by law established – There is also no allegation of canvassing or otherwise interfering with, or using the influence in connection with or taking part in an election to any legislature or local authority – Held, mere attendance may not come within the mischief of knowingly participating in a public meeting or either speaking, or taking active/ prominent part in organizing or comducting such meeting. These aspects have not been examined in the Enquiry Report as required under the charge against the petitioners – The Enquiry Report held as perverse and on no evidence, and therefore, quashed.

(Paras 43 and 47)

Petition allowed. Chronological list of cases cited:

1. Jagdish Prasad Saxena v. The State of Madhya Bharat, AIR 1961 SC 1070
2. Channabasappa Basappa Happali v. The State of Mysore, AIR 1972 SC 32
3. Kuldeep Singh v. Commissioner of Police and Others, (1999) 2 SCC 10
4. Union of India v. H.C. Goel AIR 1964 SC 364
5. Chairman, Life Insurance Corporation of India and Others, v. A. Masilamani (2013) 6 SCC 530
6. Union of India and Others v. P. Gunasekaran, (2015) 2 SCC 610

JUDGMENT

Satish K. Agnihotri, CJ

Assailing the correctness and legality of the Final Report dated 21st November 2015 holding the petitioners guilty of the charges and the consequential order dated 11th July 2016, whereby the punishment of reduction of three annual increments to the lower stage in the time scale of pay for a period of three years with cumulative effect was imposed, the instant petition is filed. The petitioners, stated to be working on regular establishment of different departments under the Government in various capacities, were served with memorandum of charge-sheet on 04th February, 2010 alleging that the petitioners have participated in a programme organized by political leaders at Rolu, South Sikkim on 21st December 2009 and as such the same was violative of provisions of Rule 3(i) (c) of the Sikkim Government Servants (Conduct) Rules, 1981 (hereinafter referred to as "the Conduct Rules"). The petitioners submitted their replies separately on 19.02.2010 (Annexure P-21), 30.03.2016 (Annexure P-22), 20.02.2010 (Annexure P-23), 08.09.2010 (Annexure P-24), 19.03.2016 (Annexure P-25), 10.03.2016 (Annexure P-26), 26.02.2010 (Annexure P-27), 18.02.2010 (Annexure P-28), 03.03.2010 (Annexure P-29), 25.02.2010 (Annexure P-30), 24.02.2010 (Annexure P-31), 20.02.2010 (Annexure P-32), 03.03.2010 (Annexure P-33), dated nil (Annexure P-34), 12.03.2016 (Annexure P-35), dated nil (Annexure P-36), 26.02.2016 (Annexure P-37) and 20.02.2016 (Annexure P-38) respectively. The third respondent was appointed as the Enquiry Officer and recorded the deposition of all the petitioners. Considering the deposition, held the petitioners as guilty on the basis that "there is an admission in his deposition of having met political personalities (MLA, Shri P.S. Golay) who was present at the political gathering, it is amply clear that the Charged Official came there to meet him and therefore, by implication despite his denial it has been proved by his own admission that he met the political personalities," supported by an intelligence report. The appointing authority, accepting the Enquiry Report, imposed penalty, as aforestated, by impugned order dated 11th July 2016.

2. Mr. Moulik, learned Senior Counsel appearing for the petitioners submits that the petitioners have been held guilty of misconduct of being unbecoming of a Government servant without proving the allegation of

charge. It is further submitted that the petitioners have not admitted any misconduct of having participated in a political meeting knowingly with intention. It is further contended that the petitioners have been there as had gone for a picnic on a holiday, when they noticed that there was a meeting, some of the leaders were known to them and as such they met them. The petitioners were not aware that there was a political gathering/meeting. Their presence was neither intentional nor was there any active participation in the meeting. They are not a member of any political party. The Enquiry Officer had held the petitioners guilty after long about five years without examining the allegation made against them. Rule 6 of the Conduct Rules prohibits taking part in politics and election. Note 3 appended to the aforestated Rule clearly provides that attendance at meetings organized by a political party would be construed as contravening if all the three conditions, stated therein, are satisfied, namely, the meeting was a public meeting and not in any sense a private or restricted meeting; the meeting was not held contrary to any prohibitory order or without permission where permission was needed and the Government servant in question does not himself speak at, or take active or prominent part in organizing or conducting the meeting. Even if the petitioners have participated unknowingly, there is no proof that the petitioners had either spoken in the meeting or taken active part in organizing and conducting the meeting. In such view of the matter, it was wrongly held that the petitioners have taken part in political meeting which is unbecoming of a Government servant under Rule 3 (i) (c) of the Conduct Rules.

3. Mr. Moulik would further contend that the Enquiry Officer has held the petitioners guilty on the basis of alleged admission which was never done without examining the relevant witnesses on a conjuncture, stating therein that there was an intelligence report which was neither referred to nor examined and a copy of the same was also not furnished to the petitioners affording an opportunity of hearing, before holding the petitioners guilty. Mr. Moulik would also contend that the respondent-authorities had adopted pick and choose policy. Certain government employees, namely, Man Bahadur Tamang, Teacher, Bimal Kharel, Teacher, C.K. Rai, Teacher, Milan Rai, Teacher, M.N. Sherpa, LDC, Tarka Man Tamang, Constable, were also served show-cause notices for the same charge and without imposing any punishment, they were permitted to retire voluntarily. Other persons, namely, M.K. Subba and Basant Kumar Rai, who in fact participated in the meeting under the banner of opposite political party

repeatedly and spoke against the Government, they were, without any enquiry, promoted to the superior post. This conduct of the Government authorities clearly speak of biased attitude towards the petitioners. In such view of the matter, the Enquiry Report deserves to be quashed and the consequential order of punishment be also set aside.

4. Expostulating the aforestated contention, Mr. J.B. Pradhan, learned Additional Advocate General appearing for the respondents, submits that the Enquiry Officer has examined the intelligence report wherein it was clearly found that the petitioners actively participated and also addressed the gathering. A copy of the said report could not be given, as it was confidential. The Enquiry Officer satisfied himself on the basis of the intelligence report, coupled with admission by the petitioners, to prove the charges. There is no infirmity or perversity in the Enquiry Report. Mr. Pradhan would further contend that the newspaper reports were produced before the Enquiry Officer, wherein it was clearly stated that wide publicity was given to holding of the meeting on the relevant date i.e. 21st December 2009 by the political leaders. The said fact was also corroborated by examining editors of some of the newspapers. Further contention of the respondents is that the petitioners were well aware of the nature of the meeting and they have participated in the meeting deliberately and also had taken active participation in the meeting. The said conduct of the petitioners come within the definition of unbecoming of a Government servant as prohibited under Rule 6 of the Conduct Rules. The punishment imposed on the petitioners was in accordance with the gravity of the offence committed by the petitioners. Thus, the petition deserves to be rejected.

5. I have carefully examined the contentions put forth by the learned counsel for the parties, analyzed pleadings and evidence brought before the Enquiry Officer as well as other documents appended to the petition herein.

6. Indisputably, the petitioners were Government employees, working in the different departments, as described in the cause title, of the State Government. It is alleged that the petitioners participated in the meeting held on 21st December 2009. Accordingly, they were charged for attending such political gathering held in the guise of picnic at Rolu, South Sikkim, knowing well that the said gathering was organized by a few political functionaries for political purpose. The charge framed against them reads as under:

> "…… attended a political gathering held in the guise of picnic at Rolu, South Sikkim on 21.12.2009, though it was well known through the local media and otherwise that the said gathering was organized by a few political functionaries for political purposes, and the announcement about the said gathering at Rolu on 21.12.2009 had been made by one of the said political personality at the launching of a web site against the Government on 07.12.2009, during which he had also made accusation against the democratically elected State Government and launching of a movement for political change.
>
> 2. The above act of Dr. C.P. Rai, amounts to an act unbecoming of a Government servant in violation of rules 3(i)(c) of Sikkim Government Servants' Conduct Rules, 1981."

7. The list of documents along with charge-sheet and also a list of three witnesses, namely Smt. Sonam Wangmu Shenga, District Information Officer (East), Information and Public Relation Department, Shri Prem Vijay Basnet, Deputy Director, Information Technology Department, NK Shyam Bdr. Rai, Sikkim Police, was served on 04th February, 2010. The petitioners replied to the show-cause notice, on different dates, on almost in same line, denying their active participation and also stated that they were not aware of the political meeting as they do not subscribe any local newspaper, wherein the news was purportedly published that the political parties were organizing a political meeting on 21st December 2009.

8. The first petitioner in his reply stated as under:

> "1. That between 17.12.2009 and 21.12.2009 we had religious worship (nag puja & graha shanti) at our home i.e. Namchi, South Sikkim. On the concluding day of the puja as is customary and ritualistic, we went to rolu mandir and to the near by river with offerings and the statues to immerse in the flowing stream/river with the direction of the priest chanting mantras (lamas) at around 9.30 am.
>
> 2. That while returning home we chanced upon the sitting MLA and Chairman and since we had some extra khadas we decided to pay our respects to him and so offered the khada and moved on."

9. The second petitioner, in her reply, stated that she has not attended any meeting on that date.

10. The third petitioner in his reply stated as under:

> "1. That 20.12.2009 & 21.12.2009 also being Lossong i.e. a Government holiday, I had gone to visit my sister at her residence at Jorethang. On my way home the next day i.e. 21.12.2009 I attended a picnic party at Rolu, South Sikkim as I had been verbally invited by some acquaintance. I was not informed nor did I know that it was a "political gathering" as alleged. I did not attend the said function in my official capacity but in my personal capacity. The said gathering to the best of my understanding was not a political gathering and it comprised of mostly non-political people."

11. The fourth petitioner in his reply stated as under:

> "1. That 21.12.2009 being a state holiday i.e. Lossong I attended a picnic party during held at Rolu, South Sikkim on invited from an acquaintance. Neither the invitation card nor the person who invited me indicated that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant since an acquaintance had invited me. I left the picnic program soon after some politician arrived and thereafter I have no idea what happened."

12. The fifth petitioner in his reply stated as under:

> "1. That I had admitted only to the fact that I had attended the picnic organized at Rolu upon receiving invitation from my cousin. This fact does not automatically prove that I had attended a political function. Moreover, I even produced the invitation card of the said picnic and witnesses which clearly proves that I had attended a picnic."

13. The sixth petitioner in his reply stated as under:

> "1. That I had admitted only to the fact that I had attended the picnic organized at Rolu upon receiving invitation from the organizers thereof who were my acquaintance. This fact does not automatically

prove that I had attended a political function. Moreover, I even produced the invitation card of the said picnic and witnesses which clearly proves that I had attended a picnic."

14. The seventh petitioner in his reply stated as under:

"1. That I was given an invitation card by the organizers of "Lossong and Christmas Celebration Organising Committee" to attend a picnic programme at Rolu on 21.12.2009. The same being a state holiday i.e. Lossong I went and attended the said picnic program. The said invitation card nowhere indicated nor was I informed by the person who gave me the invitation that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant. The said gathering to the best of my understanding was not a political gathering and it comprised of mostly non-political people."

15. The eighth petitioner in his reply stated as under:

"That 21.12.2009 being a state holiday i.e. Lossong I went and attended the picnic programme organized by the "Lossong and Christmas Celebration Organising Committee" at Rolu on an invitation which did not indicate any where that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant. The said gathering to the best of my understanding was not a political gathering and it comprised of mostly non-political people."

16. The ninth petitioner stated in his reply as under:

"1. That I did not attend the alleged private political function on 7.12.2009 nor was I aware of the fact that such a meeting had been conducted as alleged since 7.12.2009 was a working day and I was very much present at my work place.

2. That I was given an invitation to attend a picnic program at Rolu on 21.12.2009 by some organizer of the "Lossong and Christmas Celebration Organising Committee". The said invitation card nowhere indicated that it was a political gathering as alleged. Since 21.12.2009 was a stated holiday i.e. Lossong I went and attended the

said picnic program on my personal capacity and not in the capacity of a Government servant. I left the picnic programme soon after some politician arrived and thereafter I have no idea what happened."

17. The tenth petitioner stated in his reply as under:

"That 21/12/2009 was a State holiday and I went and attended a picnic organized by the "Lossong and Christmas Celebration Organising Committee" at Rolu on an invitation by a friend who was a member of the Organising Committee of the said picnic. The invitation card did not indicate in any manner that the said picnic was a political gathering. Having fallen on a government holiday, I had attended the said picnic bonafide, believing that the same was a social function and on my personal capacity. The said gathering to the best of my understanding was not a political gathering and it comprised of the mostly non-political people."

18. The eleventh petitioner in his reply stated as under:

"1 That I was given an invitation card by one of the organizers of "Lossong and Christmas Celebration Organising Committee" to attend a picnic programme at Rolu on 21.12.2009. The same being a state holiday i.e. Lossong I went and attended the said picnic program. The said invitation card nowhere indicated that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant. The said gathering to the best of my understanding was not apolitical gathering and it comprised of mostly non-political people."

19. The twelfth petitioner in his reply stated as under:

"That 21.12.2009 being a state holiday i.e. Lossong I attended a picnic party at Rolu, South Sikkim organized by some of my friends. The person who invited me or the invitation card which I received did not indicate that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant. The said gathering to the best of my understanding was not a political gathering and it comprised of mostly non-political people."

20. The thirteenth petitioner stated in his reply as under:

"1 That I was given an invitation card by some of the organizers of "Lossong and Christmas Celebration Organising Committee" to attend a picnic programme at Rolu on 21.12.2009. On that day I was scheduled to go to Kalimpong to visit my children at my in-laws residence. Since I received the invitation I though it may not be proper for me not to visit even for a short while. Therefore, on my way to Kalimpong I dropped in, stayed for a while and left for Kalimpong. During my stay in the picnic there was no political talk or speeches made by anybody. The said invitation card nowhere indicated nor was I informed by the persons who gave me the invitation that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant."

21. The fourteenth petitioner stated in his reply as under:

"1. That I had admitted only to the fact that I had attended the picnic organized at Rolu upon receiving invitation from the organizers thereof who were my acquaintance. This fact does not automatically prove that I had attended a political function. Moreover, I even produced the invitation card of the said picnic and witnesses which clearly proves that I had attended a picnic."

22. The fifteenth petitioner stated in his reply as under:

"1. That I had admitted only to the fact that I had attended the picnic organized at Rolu upon receiving invitation from the organizers thereof who were my acquaintance. This fact does not automatically prove that I had attended a political function. Moreover, I even produced the invitation card of the said picnic and witnesses which clearly proves that I had attended a picnic."

23. The sixteenth petitioner stated in his reply as under:

"That 21/12/2009 was a State holiday and I went and attended a picnic organized by the "Lossong and Christmas Celebration Organising Committee" at Rolu on an invitation. The invitation card did not indicate in any manner that the said picnic was a political gathering. Having fallen on a government holiday, I had attended the

said picnic bonafidely believing that the same was a social function and on my personal capacity. The said gathering to the best of my understanding was not a political gathering and it comprised of the mostly non-political people."

24. The seventeenth petitioner stated in her reply as under:

"1. That I was invited by my cousin to attend the picnic at Rolu on 21.12.2009. Since 21.12.2009 was a state holiday i.e. Lossong I decided to attend the same. The said invitation card nowhere indicated that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant. The said gathering to the best of my understanding was not a political gathering and it comprised of mostly non-political people."

25. The eighteenth petitioner in his reply stated as under:

"3. That 21.12.2009 being a state holiday i.e. Lossong I went and attended the picnic program organized by the "Lossong and Christmas Celebration Organizing Committee" at Rolu on an invitation which did not indicate any where that it was a political gathering as alleged. I attended the said picnic on my personal capacity and not in the capacity of a Government servant since some of my neighbours invited me. I left the picnic program soon after some politician arrived and thereafter I have no idea what happened. "

26. On receipt of the response, the third respondent was notified as Enquiry Officer. On perusal of the documents, it appears that the Enquiry Officer has examined four other witnesses, besides the delinquent employees. Pema Wangchuk Dorjee, the Editor and Publisher of local daily, Sikkim Now, deposed that the news of the meeting held on 21st December 2009 at Rolu, wherein P.S. Tamang (Golay) was speaking for the first time, was published and he openly spoke against the SDF. The said statement, according to him, was made on the basis of report of the reporter. There is no mention of presence of any petitioner, except some Government employees. Smt. Sonam Wangmu Sherpa, deposed that the different newspapers have published the news on different dates. Mr. Shyam Bdr. Rai, Head Constable stated that he has processed the report regarding attendance of picnic by Government employees and others. The report only

indicated about attending by political personalities. Other witness, namely, Prem Vijay Basnet also did not state anything about presence of the petitioners. One more witness, K.K. Pradhan, O/C of the Special Branch deposed that presence of Government employees and others without specifying the name of any employee. Presence and participation of any petitioner was not stated by any of the witnesses, as above referred.

27. The Enquiry Officer in his report found the petitioners guilty on the basis of intelligence report coupled with the admission of charge. The Enquiry Office has neither dealt with intelligence report nor discussed any statement made by any party, holding that it was a case of circumstantial evidence.

28. The disciplinary authority accepted the report and imposed punishment of reduction of three annual increments to the lower stage in the time scale of pay for a period of three years with cumulative effect, vide order dated 11th July, 2016, which is impugned in this writ petition.

29. On analysis of the charge framed against the petitioners and also the so called admission, it is not established that the petitioners have admitted participation of any political meeting knowingly in unequivocal and clear terms and as such it can safely be held that the enquiry finding is without any basis on no evidence.

30. A Constitution Bench of the Supreme Court in ***Jagdish Prasad Saxena vs. The State of Madhya Bharat***[1], wherein the appellant, permanently employed as distillery inspector, was furnished with a charge-sheet on the basis of alleged admission, the Supreme Court held as under: -

> "(11) …… In such a case, even if the appellant had made some statements which amounted to admission it is open to doubt whether he could be removed from service on the strength of the said alleged admissions without holding a formal enquiry as required by the rules. But apart from this consideration, if the statements made by the appellant do not amount to a clear or unambiguous admission of his guilt, failure to hold a formal enquiry would certainly constitute a serious infirmity in the order of dismissal passed against him. Under Art. 311(2) he was entitled to have a reasonable opportunity of meeting the charge framed against him, and in

[1] AIR 1961 SC 1070

> the present case, before the show-cause notice was served on him he has had no opportunity at all to meet the charge. After the chargesheet was supplied to him he did not get an opportunity to cross-examine Kethulekar and others. He was not given a copy of the report made by the enquiry officers in the said enquiries. He could not offer his explanation as to any of the points made against him; and it appears that from the evidence recorded in the previous enquiries as a result of which Kethulekar was suspended an inference was drawn against the appellant and show-cause notice was served on him. In our opinion, the appellant is justified in contending that in the circumstances of this case he has had no opportunity of showing cause at all, and so the requirement of Art. 311 (2) is not satisfied."

31. This proposition of law was further reaffirmed in ***Channabasappa Basappa Happali vs. The State of Mysore***[2], held as under:

> "5. It was contended on the basis of the ruling reported in R. v. Durham Quarter Sessions; Ex parte Virgo (1952 (2) QBD 1) that on the facts admitted in the present case, a plea of guilty ought not to be entered upon the record and a plea of not guilty entered instead. Under the English law, a plea of guilty has to be unequivocal and the court must ask the person and if the plea of guilty is qualified the Court must not enter a plea of guilty but one of not guilty. The police constable here was not on his trial for a criminal offence. It was a departmental enquiry, on facts of which due notice was given to him. He admitted the facts. In fact his counsel argued before us that he admitted the facts but not his guilt. We do not see any distinction between Admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing less. ……"

32. From the above, it is discernible that the statement made by the delinquent employee admitting the guilt must be clear, unambiguous and unconditional to dispense with holding of a proper enquiry. In other words, if

[2] AIR 1972 SC 32

the admission is ambiguous and conditional, the enquiry is mandatory before holding the employee as guilty of charges. Applying the well-settled principle of law to the facts of the case, it is manifest that the petitioners have not admitted their participation in the said meeting knowingly that the meeting was organized by political leaders. The petitioners, except second petitioner, have further stated that they have gone for picnic and wherein they found that there was a meeting attended by some known leaders, they were simply present without speaking or organizing or taking active participation in the meeting. The said statement cannot fall within the ambit of admission of charges, as required within the requisites of Rules 6 of the Conduct Rules. Thus, the purported admission, not being clear, unequivocal or unconditional, cannot form the basis to hold the petitioners guilty of the charge.

33. In so far as the so-called intelligence report is concerned, seemingly the same was not produced before the Enquiry Officer, as he has not adverted to in his Enquiry Report. It is not disputed that neither the contents of the said intelligence report was disclosed to the delinquent employees nor a copy of the same was furnished to them to meet with the same. In such circumstances, I have no hesitation to hold that the Enquiry Report was based on no evidence and as such it is perverse.

34. The Supreme Court in ***Kuldeep Singh vs. Commissioner of Police and others***[3], relied by Mr. A. Moulik, examining the ambit of perverse finding, held as under:

> "7. In *Nand Kishore vs. State of Bihar* : (1978) 3 SCC 366, it was held that the disciplinary proceedings before a domestic Tribunal are of quasi-judicial character and, therefore, it is necessary that the Tribunal should arrive at its conclusions on the basis of some evidence, that is to say, such evidence which, and that too, with some degree of definiteness, points to the guilt of the delinquent and does not leave the matter in a suspicious state as mere suspicion cannot take the place of proof even in domestic enquiries. If, therefore, there is no evidence to sustain the charges framed against the delinquent, he cannot be held to be guilty as in that event, the findings recorded by the Enquiry Officer would be perverse.

[3] (1999) 2 SCC 10

8. The findings recorded in a domestic enquiry can be characterised as perverse if it is shown that such findings are not supported by any evidence on record or is not based on the evidence adduced by the parties or no reasonable person could have come to those findings on the basis of that evidence. This principle was laid down by this Court in *State of A.P. v. Rama Rao* : AIR 1963 SC 1723, in which the question was whether the High Court, under Article 226, could interfere with the findings recorded at the departmental enquiry. This decision was followed in *Central Bank of India Ltd. v. Prakash Chand Jain* : AIR 1969 SC 983 and *Bharat Iron Works v. Bhagubhai Balubhai Patel* : (1976) 1 SCC 518. In *Rajinder Kumar Kindra v. Delhi Admn.* (1984) 4 SCC 635, it was laid down that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be rejected as perverse. It was also laid down that where a quasi-judicial tribunal records findings based on no legal evidence and the findings are his mere ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

35. Mr. J.B. Pradhan emphatically submitted that the jurisdiction of this Court in dealing with departmental enquiry is limited. The finding recorded by the Enquiry Officer be not interfered with lightly and as such the petition be rejected.

36. In response, it was submitted that in normal course, the court may not interfere with the finding of the Enquiry Officer, however, if the enquiry

is based on no evidence or it is perverse, the Court has competent jurisdiction to interfere with the Enquiry Report and consequential order.

37. A Constitution Bench of the Supreme Court in ***Union of India vs. H.C. Goel***[4], examining the jurisdiction of the High Court under Article 226 of the Constitution of India in case of departmental enquiry, elucidated the proposition of law as under:

> "(20) ……. It is a conclusion which is perverse and, therefore, suffers from such an obvious and patent error on the face of the record that the High Court would be justified in quashing it. In dealing with writ petitions filed by public servants who have been dismissed, or otherwise dealt with so as to attract Art. 311 (2), the High Court under Art. 226 has Jurisdiction to enquire whether the conclusion of the Government on which the impugned order of dismissal rests is not supported by any evidence at all. It is true that the order of dismissal which may be passed against a Government servant found guilty of misconduct, can be described as an administrative order; nevertheless, the proceedings held against such a public servant under the statutory rules to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings and there can be little doubt that a writ of certiorari, for instance, can be claimed by a public servant if he is able to satisfy the High Court that the ultimate conclusion of the Government in the said proceedings, which is the basis of his dismissal, is based on no evidence. ……"

38. In ***Kuldeep Singh*** (supra), the Supreme Court further reaffirmed as under: -

> "6. It is no doubt true that the High Court under Article 226 or this Court under Article 32 would not interfere with the findings recorded at the departmental enquiry by the disciplinary authority or the Enquiry Officer as a matter of course. The Court cannot sit in appeal over those findings

[4] AIR 1964 SC 364

and assume the role of the Appellate Authority. But this does not mean that in no circumstance can the Court interfere. The power of judicial review available to the High Court as also to this Court under the Constitution takes in its stride the domestic enquiry as well and it can interfere with the conclusions reached therein if there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictates of the superior authority.

9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny."

39. Keeping in view the fact that the Enquiry Report is based on no evidence, this Court has jurisdiction to interfere with this Enquiry Report and set right the injustice meted to the Government employees.

40. Mr. Moulik has attempted to submit that there was a bias against the petitioners, as some officers namely, Man Bahadur Tamang, Teacher, Bimal Kharel, Teacher, C.K. Rai, Teacher, Milan Rai, Teacher, M.N. Sherpa, LDC, Tarka Man Tamang, Constable, were charge-sheeted for participating in the same meeting, but they were permitted to take voluntary retirement, under what circumstances those officials were voluntarily retired is not on record. It is further submitted that one M.K. Subba and Basant Kumar Rai, also participated in several political meetings but they were promoted. In this case also no materials have been produced as to how they participated, whether it was proved and under what circumstance they were promoted. The said persons have not been impleaded as party-respondents, herein. Thus, I am not inclined to go into the allegation made against them.

41. Presuming it is correct, in that event also, it does not make out a case of bias against the petitioners, as alleged, as bias has to be proved strictly and against the individuals and not against the whole Government. There is no specific allegation against any persons and as such allegation of bias is noted to be rejected.

42. Let me now proceed to examine the relevant provisions of the Conduct Rules. Rule 3 (i) (c) provides that every Government Servant shall at all times do nothing which is unbecoming of a Government Servant. Rule 6 forbids taking part in politics and election, which reads as under: -

> "**6. Taking part in politics and election.-**
>
> (i) No Government Servant shall be a member of, or be otherwise associated with, any political party or any organization which takes part in political movement or activity.
>
> (ii) It shall be the duty of every Government Servant to endeavour to prevent any member of his family from taking part in, subscribing in aid of or assisting in any other manner, any movement or activity which is, or tends directly or indirectly to be, subversive of the Government as by law established and where a Government Servant is unable to prevent a member of his family from taking part in, or subscribing in aid of or assisting in any other manner, any such movement or activity, he shall make a report to that effect to the Government.
>
> (iii) If any question arises whether any movement or activity falls within the scope of sub-rule (i), the decision of the Government thereon shall be final.
>
> (iv) No Government Servant shall canvas or otherwise interfere with, or use his influence in connection with or take part in, an election to any Legislature or Local Authority:
>
> Provided that –
>
> (a) a Government servant qualified to vote as such election may exercise his right to vote, but where he do so, he shall give no indication of the manner in which he proposes to vote or has voted.
>
> (b) a Government Servant shall not be deemed to have contravened the provisions of this sub-rule by reason only that he assists in the conduct of an election in the due

performance of a duty imposed on him by or under any law for the time being in force.

Explanation.-The display by a Government Servant on his person, vehicle or residence of any electoral symbol shall amount to using his influence in connection with an election within the meaning of this sub-rule.

Note 1.- A Government Servant who has reason to believe that attempts are being made to induce him to break the provisions of this rule by or on behalf of an official superior or superiors shall report the fact to the Chief Secretary to the Government.

Note 2.- Proposing or seconding the nomination of a candidate at an election or acting as a Polling Agent shall be deemed as an active participation in the election.

Note 3.- Attendance at meetings organized by a political party shall be construed as contravening this rule unless all the following conditions are satisfied: -

(a) that the meeting is a public meeting and not in any sense a private or restricted meeting.

(b) that the meeting is not held contrary to any prohibitory order or without permission where permission is needed.

(c) that the Government Servant in question does not himself speak at, or take active or prominent part in organizing or conducting the meeting."

43. Charge of misconduct, as alleged against the petitioners, is that the petitioners have participated in a meeting organized by political leaders, which was duly published earlier and as such willingly they took active participation. There is no allegation that the petitioners are member of, or be otherwise associated with, any political party or any organization which takes part in political movement or activity. It is also not the allegation that there is any participation in aid of or assisting in any manner, any movement or activity which is, or tends directly or indirectly to be, subversive of the Government as by law established. There is no allegation of canvassing or

otherwise interfering with, or using the influence in connection with or taking part in, an election to any Legislature or Local Authority. The allegation of participation in the meeting is explained in Note 3, which provides that attendance at meetings organized by a political party shall be construed as contravening this rule i.e. Rule 6, unless all the following conditions are satisfied. There are three conditions - (i) that the meeting is a public meeting and not in any sense a private or restricted meeting; (b) that the meeting is not held contrary to any prohibitory order or without permission where permission is needed; and (c) that the Government Servant in question does not himself speak at, or take active or prominent part in organizing or conducting the meeting. Mere attendance may not come within the mischief that he knowingly participated in a public meeting and also either speaks or take active or prominent part in organizing or conducting the meeting. These aspects have also not been examined in the Enquiry Report, as required under the charge made against the petitioners. In such view of the matter, the Enquiry Report is to be held as perverse and on no evidence.

44. The last contention put forth by Mr. Pradhan is that in the event it is found that the enquiry was not properly conducted, the disciplinary authority be permitted to conduct the enquiry afresh from the point to be vitiated. He relies on an observation made by the Supreme Court in ***Chairman, Life Insurance Corporation of India and others vs. A. Masilamani***[5] and ***Union of India and others vs. P. Gunasekaran***[6].

45. In ***Chairman, Life Insurance Corporation of India*** (supra), the Supreme Court held as under: -

> "16. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee. It must remit the concerned case to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide: *ECIL v. B. Karunakar* : (1993) 4 SCC 727; *Hiran Mayee Bhattacharyya v. S.M. School for Girls* : (2002) 10 SCC 293; *U.P. State Spg. Co. Ltd. v. R.S. Pandey* : (2005) 8 SCC 264 and *Union of India v. Y.S. Sadhu* : (2008) 12 SCC 30)."

[5] (2013) 6 SCC 530
[6] (2015) 2 SCC 610

46. In ***Union of India and others vs. P. Gunasekaran*** (supra), it was held that if the enquiry is conducted in accordance with the law, the High Court cannot venture into re-appropriation of evidence or interfere with the conclusion in enquiry proceedings; further the punishment may also not be interfered with. In the case on hand, the enquiry is found not having been conducted in accordance with law and it is perverse and as such interference is necessitated. The punishment imposed on the petitioners cannot be permitted to continue till the charge made against them is found proved and the petitioners are found guilty. The charge was not found proved and as such the enquiry is liable to be quashed and the consequential punishment also deserves to be set aside.

47. Considering the entire factual matrix, as aforestated, in its proper prospective, it is unhesitatingly held that the Enquiry Report was perverse on the basis of no evidence and as such it is quashed. The consequential order of imposition of punishment, vide order dated 11th July, 2016, is also quashed and set aside. However, in the facts and circumstances of the case, the State-respondents are at liberty to initiate fresh enquiry, if so advised, from the stage of submission of response by the petitioners and may take appropriate action, in accordance with law.

48. Resultantly, the petition is allowed. No order as to costs.

SLR (2017) SIKKIM 81

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

I.A No. 01 of 2016 in R.F.A No. 18 of 2016

Shri Taktuk Bhutia @ T.T. Bhutia ….. APPELLANT

Versus

M/s. Pure Coke & Others ….. RESPONDENTS

For the appellant: Mr. Jorgay Namka, Legal Aid Counsel.
For Respondent 1 to 3: Mr. Sudesh Joshi with Mrs. Manita Pradhan and Mr. Sujan Sunwar, Advocates.
For Respondent No.4: Mr. Sudhir Prasad, Advocate.
For Respondent No.5: Mr. Megh Nath Dhungel, Advocate.

Date of decision: 20th July 2017

Limitation Act, 1963 – S.5 – Delay – Extension of prescribed period– The appellant is required to satisfy the Court that he has "sufficient cause" for not preferring the appeal or making the petition within the period prescribed. (Para 9)

Petition and Appeal dismissed.

Chronological list of cases cited:

1. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649
2. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81
3. Shri Tara Kumar Pradhan v. Shri Yuba Kumar Pradhan, I.A. No.01 of 2016 in RFA No.16 of 2016 decided on 19.04.201

ORDER

Meenakshi Madan Rai, J.

1. The instant Petition under Rules 16, 17 and 18 of the Sikkim High Court (Practice and Procedure) Rules, 2011 (for short "P. P. Rules"), purports to be a Petition for condonation of fifty-one days delay, in filing the Regular First Appeal (RFA).

2. The facts relevant for the disposal of this Petition are that, on 07-10-2015, the Defendants No.1 to 3 (the Respondents No.1 to 3 herein), filed an Application under Order VII Rule 11, read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC"), before the Learned District Judge, East Sikkim, at Gangtok, in Money Suit No.06 of 2015, *Taktuk Bhutia* vs. *M/s. Pure Coke and Others*. The Application was allowed vide the impugned Order dated 12-05-2016, *inter alia*, with the finding that the Suit was barred by limitation and the Court had no jurisdiction in the matter, thereby dismissing the Suit of the Plaintiff (the Appellant herein).

3. Assailing the impugned Order for the first time before this Court on 09-08-2016, the Appellant filed a First Appeal from Order (FAO), according to the Appellant, within the period of limitation, but was not listed before the Court, due to defects pointed out therein. On 15-10-2016, the FAO was re-filed after curing of defects. The Registry declined to place the matter before the Court for a second time as the Counsel for the Appellant lacked a specific letter from the Sikkim State Legal Services Authority (SSLSA), appointing him as Counsel for appearance in the matter before the High Court. Consequent thereupon, the SSLSA was approached, necessary letter obtained and the FAO re-filed on 10- 11-2016. Following the above events, the Appellant again withdrew the FAO No.03 of 2016 on 15-11-2016 and on being so advised, filed the present RFA on 16-11-2016, leading to, according to him, a total delay of fifty-one days. That, the delay occurred due to non-availability of the Appellant and also due to the ensuing festive season. That, the Appellant shall suffer irreparable loss and injury, if the Appeal is not allowed, hence, the Petition be allowed condoning the delay on the grounds put forth.

4. In response, it was contended by Learned Counsel for the Respondents No.1 to 3 that, firstly, the Appellant has not come to the Court with clean hands, as the Plaint reveals that the contract was awarded to the North-East Group of Engineers Private Limited and not to the Petitioner by name, i.e., Taktuk Bhutia. The contract being between two Companies, it is evident that he is filing the Suit in a representative capacity, being the Managing Director of the Company. But he has obtained free Legal Aid, because he is a Tribal, which he is not entitled to in terms of Section 12 of the Legal Services Authorities Act, 1987 (in short "Legal Services Act") and Regulation 30(6) of the Sikkim State Legal Services Authority Regulation, 1998 (in short "SSLSA Regulation"), in view of the foregoing circumstance, thereby misleading the Court. In the next leg of his argument, it was contended that the delay infact is not of "fifty-one days", but of "one hundred days" inasmuch the impugned Order having been pronounced on 12-05-2016, the limitation expired on 10-08-2016 and the appeal was admittedly filed on 16- 11-2016. The Appellant's ground for delay having occurred on account of the filing of the FAO is not a *bona fide* ground, as two months were evidently taken to rectify defects. That, although the Appellant attributed the delay also to the lack of appointment letter from SSLSA, no correspondence was placed before the Registry to substantiate this point. Thus, the Petition is frivolous and deserves dismissal. Reliance was placed on the decisions of ***Esha Bhattacharjee*** vs. ***Managing Committee of Raghunathpur Nafar Academy and Others***[1] and ***Basawaraj and Another*** vs. ***Special Land Acquisition Officer***[2].

5. The Respondent No.5 in his Written Response averred that the grounds furnished for the delay do not reveal "sufficient cause" as required under Section 5 of the Limitation Act, 1963 (for short "the Limitation Act"). That, the errors committed by the Appellant while filing the present Appeal are not *bona fide* mistakes and are no grounds for condoning the delay. Moreover, this Court vide Order dated 15-11-2016 passed in FAO No.03 of 2016 had allowed the Appellant to withdraw the FAO with liberty to file afresh, but had not condoned the delay. That, the delay of fifty-one days is deliberate and unexplained, and thereby ought to be dismissed.

6. No verbal submissions were placed by Learned Counsel for Respondents No.4 and 5.

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[1] (2013) 12 SCC 649
[2] (2013) 14 SCC 81

7. Anxious consideration was given to the rival contentions of Learned Counsel for the parties and the impugned Order dated 12-05-2016 perused.

8. Although the Petition purports to be one for condonation of delay, the provisions under Rules 16, 17 and 18 of the P. P. Rules, have been erroneously invoked, instead of the provisions of Section 5 of the Limitation Act. The said rules are being reproduced hereinbelow for convenience;

> **"16. Court's Power to dispense with compliance with the Rules:-** The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules and may give such directions in matters of practices and procedure as it may consider just and expedient.
>
> **17. Power of Court to make appropriate orders:-** An application to be excused from compliance with the requirements of any of the rules shall, in the first instance, be placed before the Registrar who may without interfering or dispensing with any mandatory requirements of the rule shall place before the Court for appropriate order thereon, on a convenient day.
>
> **18. Inherent power of the Court not affected:-** Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.**"**

A bare reading of the aforesaid provisions would indicate that the Court is not clothed with powers to waive statutory provisions.

9. Be that as it may, even if, this Court for the purpose of doing real and substantial justice between the parties, is to presume that the Petition is one under Section 5 of the Limitation Act, the Appellant under the said provision is required to satisfy the Court that he has "sufficient cause" for not preferring the Appeal, or making the Petition within the period prescribed.

10. In the light of the above principle, we may examine whether the facts placed before this Court, discussed in *seriatim*, would establish "sufficient cause".

(i) The impugned Order having been issued on 12-05-2016, the period of limitation would end on 10-08-2016, being ninety days, in terms of Article 116 of the Limitation Act. The FAO was filed on 09-08-2016, which was evidently not placed before the Court on account of defects pointed out. After the defects were cured, the FAO was filed for the second time on 15-10-2016, but remained unlisted due to dearth of letter of appointment of Legal Aid Counsel from the SSLSA. Rectifications were made as per requisites of the Registry and the FAO once again filed on 10-11-2016. Thereafter, the appellant withdrew the FAO, registered as FAO No.03 of 2016, on 15-11-2016, and on 16-11-2016 filed the RFA along with the instant Petition seeking condonation of delay.

(ii) Simple calculations would reveal a total delay of ninety-eight days instead of the fifty-one days sought to be erroneously projected by the Petitioner. As per the Petitioner, a delay of twenty-seven days occurred between 09-08-2016 and 15-10-2016 which is clearly a wrong calculation. That, from 15-10-2016 to 10-11- 2016, a delay of twenty-four days occurred, this is also erroneous. What the Appellant seeks to submit by stating that he came to learn of "the above anomalies only on 21-10-2016" is anyone's guess, considering the events and dates that have already been unfolded above.

(iii) This Court in ***Shri Tara Kumar Pradhan vs. Shri Yuba Kumar Pradhan***[3] has pointed out that an Application or RFA cannot be deemed to be filed, unless all defects are cured, the same observation holds good for the facts and circumstances herein.

(iv) The paucity of a letter from the SSLSA was the other ground listed for the delay, but compliance thereafter took more than twenty-six days. What ensued in the twenty-six days is not forthcoming from the Petitioner.

(v) Pertinently, it may be observed here that the grant of free Legal Aid to the Petitioner is a matter which can be considered by the SSLSA

[3] I.A. No.01 of 2016 in RFA No.16 of 2016 decided on 19-04-2017

and if after scrutiny the requisite conditions are unfulfilled in terms of Section 12 of the Legal Services Act and Regulation 30(6) of the SSLSA Regulation, the free Legal Aid is liable to be withdrawn.

(vi) The ground of non-availability of the Appellant is indeed absurd. If the Appellant was so interested, he could have made himself available to enable his Counsel to take steps. Furthermore, the reasons and grounds of such non-availability have not been elucidated. Nothing prevented the Appellant from approaching the Registry during the festive season, apart from which the dates of such festivities have not been disclosed.

11. In this context, this Court is aware that Courts should avoid a pedantic approach while making technical considerations for the delay, in order to have a justice-oriented approach and mete out substantial justice. At the same time, one cannot lose sight of the fact that no presumption can be attached to deliberate causes of delay, such as gross negligence as exhibited hereinabove. In this regard, reference can be made to the decision in ***Esha Bhattacharjee***[1] wherein it was held as follows;

> **"21.** .....
>
> **21.9.** (*ix*) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
>
> **21.10.** (*x*) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.
>
> **21.11.** (*xi*) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.
>
> **21.12.** (*xii*) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of

judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (*xiii*) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (*a*) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (*b*) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (*c*) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (*d*) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchallant manner requires to be curbed, of course, within legal parameters.**"**

The parameters of consideration have been succinctly set forth, the grounds put forth by the Petitioner do not merit consideration as it is evident that no attention has been paid to the drafting, the delay calculated is erroneous and above all, no reasons even on week to week basis for the delay have been placed before the Court, giving the impression that the Court is being taken for granted. The Petition obviously cannot be dealt with in a routine manner as the interest of not only the Petitioner, but the Opposite party has also to be borne in mind.

12. The grounds for delay taken by the Petitioner fall short of the requirement of Law, as "sufficient cause" for not taking steps on time is sadly devoid in the instant case.

13. Resultant, the grounds put forth deserve no consideration. Consequently, the Petition is dismissed, as also the Appeal.

14. Copy of this Order be sent to the Learned Trial Court along with Records of the Court, and to the Member Secretary, SSLSA forthwith for information and compliance.

SLR (2017) SIKKIM 89

(Before Hon'ble Mr Justice Bhaskar Raj Pradhan)

F.A.O. No. 02 of 2015

State of Sikkim ….. APPELLANT

Versus

Keshab Prasad Pradhan ….. RESPONDENT

For the Appellant: Mr. J.B Pradhan, Addl. Advocate General with Ms. Pollin Rai, Asstt. Government Advocate.

For the Respondent: Mr. B. Sharma, Sr. Advocate with Ms. Navtara Sarda, Advocate

Date of decision: 25th July 2017

A. Code of Civil Procedure, 1908 – Order VII Rule 10 – Return of plaint – Factors to be taken into consideration at the stage of – Held, nature of the suit and its purpose must be determined by reading the plaint as a whole – it is vital to appreciate the plaint set out by the Plaintiff in a meaningful manner to find out the real intention behind the suit. (Para 9)

B. Code of Civil Procedure, 1908 – Ss. 16 and 20 – Relative scope and applicability – Significances of words "determination of any other right to or interest in immovable property" in S. 16(d) – Held, even if the prayers prayed for is for a money decree, the essential, integral and germane facts without which the money decree cannot be passed by the Court is the determination of any other right to or interest in immovable property situated outside the territorial jurisdiction of the Courts of Sikkim – Only if the said suit does not fall under the parameter of S. 16 of C.P.C can the question of examining if the plaintiff be entitled to file the suit as per the provisions of S. 20 of C.P.C would arise – S. 20 of C.P.C which starts with the words "*subject to the limitation aforesaid*" and thus a residuary provision to Ss. 15 to 19 of C.P.C has no application in the present case. The

said suit ought to have been filed by the Plaintiff as per the provision of S. 16 (d) of C.P.C in the Court within the local limits of whose jurisdiction the immovable property is situated as the said suit clearly involved "the determination of any other right to or interest in immovable property." (Paras 14, 17, 23)

C. Code of Civil Procedure, 1908 – S. 20 - Other suits to be instituted where defendants reside or cause of action arises – Words and phrases – "Cause of action" – S. 16 does not use the words 'cause of action' which is integral to S. 20 CPC. A suit would not survive without a cause of action - 'cause of action' is a bundle of essential facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to judgment in his favour. 'Cause of action' thus, gives occasion for and forms the foundation of the suit. If therefore there is no 'cause of action' the plaint has to be dismissed (Para 20)

D. Code of Civil Procedure, 1908 – Order VIII Rule 6A – The *ratio decidendi* of the judgment in re: Jag Mohan Chawla (supra) inapplicable, 'Territorial jurisdiction' and 'cause of action' are two different concepts of law – the scheme of the C.P.C is clear. Suits must necessarily be instituted in the Court that had territorial jurisdiction as provided under S. 16 – S. 20 being a residuary provision covers only those cases not falling within the limitation of Ss. 15 to 19 – Once the suit has been instituted as provided above, written statement, set-off or counter claim has to be filed in that suit – Allowing set-offs and counter-claims to be filed in the suit in which the defendants are to file written statement in its defence is to avoid multiplicity of litigation. (Para 32, 39 and 41)

E. Code of Civil Procedure, 1908 – Ss. 16, 17, 20 and 120 – By virtue of S. 120 C.P.C, Ss. 16, 17 and 20 shall not apply to the High Court in the exercise of its original civil jurisdiction. (Para 35)

F. Order VIII Rule 6-C – Exclusion of counter-claim – where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an "independent suit", the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the

Court for an order that such counter-claim may be excluded – Court may, on the hearing of such application make such order as it thinks fit. (Para 43)

G. Code of Civil Procedure, 1908 –Order VIII Rule 6C – The key words in Order VIII Rule 6C of C.P.C are "independent suit". If the Court is of the view, in an application made by the plaintiff at any time before the issues are settled in relation to the counter-claim, that the counter-claim ought to be disposed of by way of an "independent suit" the Court is empowered to make such orders as it thinks fit – "independent suit" need to be instituted in the Court within the local limits of whose jurisdiction the property is situate in terms of Section 16 of C.P.C – Counter-claim of Defendant No. 3 and 4 seeks declaration of eviction of the Plaintiff from immovable property situate in Siliguri, West Bengal outside the terretorial jurisdiction of the Courts in Sikkim – Such counter-claim squarely falls within Section 16 of C.P.C and liable to be rejected if it were to be filed as an "independent suit". Held, application filed by the Plaintiff under Order VIII Rule 6C for exclusion of counter-claim was maintainable. This interpretation would avoid any embarrasement to the Court in passing any judgment in a counter-claim which it could not have passed being beyond its territorial jurisdiction. (Para 44)

H. Code of Civil Procedure, 1908 – Order VIII Rule 6C – As the suit filed by the Plaintiff ought to have been filed as per the provisions of Section 16 (d) of C.P.C in the Court within the local limits of whose jurisdiction the property is situate, the plaint filed by the Plaintiff must necessarily be returned to be presented to the Court in which the said suit should have been instituted under Order VII Rule 10 of C.P.C – Counter-claim would also have to be filed before the same Court as per the provision of Order VIII Rule 6A of C.P.C. Order VIII Rule 6C of C.P.C. would not apply in the facts of the present case. In such circumstances, if the counter-claim of Defendant No. 3 and 4 were to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situated, Order VIII Rule 6C of C.P.C would not apply. (Para 45)

I. Code of Civil Procedure, 1908 - Order VIII Rule 6C of C.P.C to be presented to the Court in which the suit have been instituted.

As a counter-claim shall be treated as a plaint and governed by the rules applicable to plaints under the provision of Order VII Rule 10 of C.P.C, the counter-claim filed by the Defendants No. 3 and 4 must also be returned to be presented to the Court in which the said counter-claim should be filed consquently, the Court fee paid by the Defendants No 3 and 4 for the counter-claim is also liable to be returned to the Defendants No. 3 and 4. (Para 46)

Appeal dismissed.

Chronological list of cases cited:

1. Begam Sabiha Sultan v. Nawab Mohd. Mansur Ali Khan, (2007) 4 SCC 343
2. Indira Rai v. Bir Singh, 2010 SCC Online Del 4095
3. Harshad Chimanlal Modi v. D.L.F Universal Ltd, (2005) 7 SCC 791
4. Moolji Jitha and Co. v. Khandesh Spg. and Wvg. Mills Co. Ltd, AIR 1950 FC 83
5. Sumer Builders Pvt. Ltd. v. Narendra Gorani, (2016) 2 SCC 582
6. State of Rajasthan v. Swaika Properties, (1985) 3 SCC 217
7. ABC Laminarts (P) Ltd. and Another v. A.P Agencies, Salem, (1989) 2 SCC 163
8. Alchemist Ltd. & Anr. v. State of Sikkim, (2007) 11 SCC 335
9. Smt. Sheela Adhikari v. Rabindra Nath Adhikari, AIR 1988 Cal 273
10. Jag Mohan Chawla v. Dera Radha Swami Satsang, (1996) 4 SCC 699
11. Barthels & Luders Gambh v. M.V. Dominique, 1988 Mh. L.J. 728: AIR 1988 Bombay 380
12. T.K.V.S. Vidyapoornachary Sons v. M.R. Krishnamachary, AIR 1983 Madras 291
13. Griendtoveen v. Hamlyn and Co, (1892) VIII T.L.R. 231
14. Jindal Vijaynagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd., (2006) 11 SCC 521
15. Ajay Kumar Saraff v. Sushil Kumar Agarwal, 2015 SCC online Cal 732: 2015 AIR CC 1953
16. Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350

JUDGMENT

Bhaskar Raj Pradhan. J.

1. On the rival submissions of the learned Senior Counsels appearing for the parties hereto and so well articulated, four important issues merits judicial determination in the present case. Primarily, the meaning of the words *"determination of any other right to or interest in immovable property"* in Section 16 (d) of the Code of Civil Procedure, 1908 (C.P.C). Secondly, whether counter-claim under Order VIII Rule 6A of C.P.C could be filed even if the subject matter of the counter-claim was beyond the territorial jurisdiction of the Court. Thirdly, the ambit and scope of Order VIII Rule 6C of C.P.C to exclude counter-claim if the Court was of the view that the claim ought to be raised in an independent suit? Finally and consequently, whether the Principal District Judge was right in returning the plaint under the provision of Order VII Rule 10 of C.P.C? All the above issues are taken together and sought to be determined by this Court.

2. The Order dated 25.03.2015 (the impugned order) passed by the learned Principal District Judge, East Sikkim at Gangtok (the Learned Principal District Judge) in Money Suit no. 21 of 2014 (the said suit) filed by the Appellant, the State of Sikkim (the Plaintiff) against Respondent no. 1, Keshab Pd. Pradhan (the Defendant no. 1), Respondent no. 2, Pushpa Pd. Pradhan (the Defendant no. 2), Respondent no. 3, Dibya Pd. Pradhan (the Defendant no. 3) and Respondent no. 4, Hirendra Pd. Pradhan (the Defendant no. 4) is impugned in the present F.A.O No. 02 of 2015 (the present appeal).

3. The impugned order while disposing of a petition under Order VIII Rule 6 (C) of the Civil Procedure Code, 1908 (C.P.C), filed by the Plaintiff for exclusion of the counter-claim put forth by the Defendants returned the plaint of the Plaintiff.

4. The learned Principal District Judge held:-

(a). the counter-claim filed by the Defendants seeking a decree declaring that the Plaintiff is in illegal occupation of the suit property; a declaration of eviction of the Plaintiff from the portion of the landed property covered by plot no. 291 and other reliefs are related to the

immovable property situated in Pradhan Nagar, Siliguri, West Bengal and beyond the jurisdiction of the Court of the learned Principal District Judge and thus, barred by Section 16 (d) of the C.P.C.

(b). The said suit filed by the Plaintiff on careful perusal of the pleadings and the issue framed for settlement revealed that there were unresolved questions with regard to title between the parties and thus, it was not merely a suit for recovery of money but also for determination of the rights of the parties with regard to the suit land and thus, the said suit filed by the Plaintiff also fell under Section 16 (d) of the C.P.C. and beyond the territorial jurisdiction of the Court of the Learned Principal District Judge and thus, the plaint was liable to be returned.

(c). In any event from the residential addresses of the Defendants furnished by the Plaintiff, it was clear that the Defendants are all residents of Pradhan Nagar, Siliguri.

(d). That the four cheques received in the name of the four Defendants were all received by the Defendant no. 3 at Turuk Kothi, Turuk, South Sikkim and thus the Court of the learned Principal District Judge had no territorial jurisdiction to try either the said suit or the counter-claim.

5. Mr. J.B. Pradhan, the learned Additional Advocate General for the State of Sikkim, the Plaintiff herein would argue that the plaint filed by the Plaintiff was purely a money suit and therefore, outside the purview of the Section 16 C.P.C and squarely falling under the purview of Section 20 in as much as it has been specifically pleaded in the plaint that the part of the cause of action i.e. payment of Rs. 34,50,000/-, having been received by the Defendants at Gangtok had arisen within the jurisdiction of the Court of the learned Principal District Judge. The learned Additional Advocate General would argue that, therefore, the impugned order to the extent that the learned Principal District Judge returned the plaint under the provision of Order VII Rule 10 of CPC is illegal. The learned Additional Advocate General would also submit that the present case was a case in which the reliefs sought can be entirely obtained through the personal obedience of the Defendants. The learned Additional Advocate General would further contend that in so far as the impugned order allowing the Plaintiff s petition under Order VIII Rule 6C of CPC is concerned it is correct and the Plaintiff has no grievance. The learned Additional Advocate General would fairly concede, at the outset, that no formal application would be necessary for the Court to return the plaint under the provision of Order VII Rule 10 of C.P.C.

6. *In Contra*, Mr. B. Sharma, learned Senior Advocate appearing for the Defendants would argue that if this Court were to hold that the return of the plaint of the Plaintiff was not correct then in view of the provision of Order VIII Rule 6A of C.P.C the counter-claim filed by the Defendants was perfectly maintainable as he would argue that from the language of Order VIII Rule 6A of C.P.C it is clear that there is no restriction regarding territorial jurisdiction of the Court.

7. The Plaintiff, in the said suit preferred on 06.03.2016 for recovery of money amounting to Rs. 38,78,283 with interest and cost, made the following prayers:-

> "*i. for a decree directing the defendants jointly and severally to pay to the plaintiff an amount of Rs. 38,78,283/- (Rupees Thirty eight lakhs seventy eight thousand two hundred and eighty three);*
> *ii. for a decree directing the defendants jointly and severally to pay to the plaintiff pendentelite interest on the principal amount of Rs. 34,50,000/- (Rupees Thirty four lakhs fifty thousand);*
> *iii. for a decree directing the defendants to pay to the plaintiff the entire cost of the suit.*
> *iv. for any other relief or reliefs which the plaintiff may be found entitled to in the facts and circumstances of the case."*

8. *In re:* ***Begam Sabiha Sultan v. Nawab Mohd. Mansur Ali Khan***[1] the Apex Court held:-

> *" Although at the stage of consideration of the return of the plaint under Order 7 Rule 10 of CPC, what is to be looked into is the plaint and the averments therein it is also necessary to read the plaint in a meaningful manner to find out the real intention behind the suit."*

9. Thus, it is vital to appreciate the plaint set out by the Plaintiff in a meaningful manner to find out the real intention behind the suit. In so doing, the story of the Plaintiff as pleaded in the plaint is that vide a lease deed dated 21.07.1953 registered in the office of the District Sub-Registrar, Darjeeling the lessor Punya Pd. Pradhan, late father of the Defendants

[1] (2007) 4 SCC 343

granted lease of 2 & 1/2 bighas and 23.33 kothas of land situated at Pradhan Nagar, Siliguri to the 'Sikkim Darbar', for a period of 51 years for a salami of Rs. 9415/- and rent @ Rs. 147 per annum. Sikkim became the 22nd State of India in April, 1975. By virtue of the adaptation of Sikkim Laws (No. 1) Order, 1975 on and from the 26th day of April, 1975 the expression 'Sikkim Darbar' in the said lease deed stood substituted by the expression 'State Government' and accordingly the State Government of Sikkim assumed the position of the owner in respect of the demised premises. After taking possession of the demised premises the Plaintiff constructed 3 RCC buildings over a portion of the demised premises. With the enforcement of West Bengal Estates Acquisition Act, 1953 in the State of West Bengal the rights of the lessor had extinguished and as such, on and from the date from which the West Bengal Estate Acquisition Act, 1953 came into force in the State of West Bengal the lessor had no subsisting interest in the demised premises. The lessor, Punya Pd. Pradhan, expired leaving behind four sons, the Defendants in the said suit as legal heirs and successors. The implication of the West Bengal Estate Acquisition Act, 1953 on the rights of the lessor in respect of the demised premises having not been brought to its notice, the Plaintiff on the repeated insistence of the Defendants, expressed its desire to purchase the demised premises from the legal heirs and representatives of the deceased lessor. Negotiations were accordingly carried out and the Plaintiff agreed to purchase the demised premises for a consideration of Rs. 69,00,000/-. Towards the said consideration, an amount of Rs. 34,50,000/- was paid to the Defendants as advance vide four separate cheques on 09.09.2002. All the above cheques were received by Defendant no. 3 for self and on behalf of Defendant no. 1, 2 and 4 at Gangtok. The said cheques have been encashed by the respective payees. In view of the provisions of West Bengal Estate Acquisition Act, 1953, the rights of the intermediary had got extinguished and the lessor had no subsisting interest in the demised premises. Hence, the negotiation between the sons of the deceased lessor (i.e. the Defendants) is illegal, invalid and improper. The payment of Rs. 34,50,000/- made by the Plaintiff to the Defendants as 50% payment towards demised premises is also illegal and the said amount is liable to be recovered from the Defendants. When the error of payment of the public money by the Plaintiff to the Defendants came to the knowledge of the Plaintiff on 27.05.2003 through the Accountant General, Sikkim, the Plaintiff requested the Defendants to refund the payment of Rs. 34,50,000/-. In response to the said request the Defendants vide an application dated 25.02.2005 admitted

the mistake of receiving the amount from the Plaintiff and expressed their willingness to refund the entire amount, after which the Defendant no. 1 and 2 sought further time vide application dated 28.04.2005. Vide application dated 16.06.2005 addressed to the Transport Department, Government of Sikkim, Defendant no. 1 asserted the right of the Defendants on the demised premises. Thereafter, in spite of repeated reminders the Defendants failed to fulfil their commitment of refunding the amount and hence the said suit.

10. It is pleaded in the said plaint that the cause of action for the said suit arose on 16.06.2005 when the Defendants demurred to refund the amount received by them.

11. The Plaintiff further pleaded that the payment of Rs. 34,50,000/- having been received by the Defendants at Gangtok the Court of the District Judge, East Sikkim at Gangtok (the District Judge) had both pecuniary as well as territorial jurisdiction to try the said suit. It is on the basis of this averment and this averment alone that the learned Additional Advocate General would submit that part of the cause of action having arisen in Gangtok, the Court of the Principal District Judge had territorial jurisdiction as contemplated under Section 20 of C.P.C.

12. The learned Additional Advocate General in support of his contention would rely upon a Judgment of the Delhi High Court in re: ***Indira Rai v. Bir Singh***[2]. The said case related to a suit for recovery of money. The facts set out in the said judgment reveals that an agreement to sale was signed between the plaintiff and the defendant therein and the plaintiff had paid a sum of money to the defendant as sale consideration for a land in Faridabad. The defendant therein in turn agreed to handover vacant possession of the land to the plaintiff therein by a specified date. A sale deed was thereafter executed but the defendants failed to handover possession of the said land. The plaintiff therein rescinded the agreement and asked for refund. The defendant therein having failed to refund the sale consideration the plaintiff sought the recovery of money by filing a suit. The defendant took out a preliminary objection that the Delhi Court has no territorial jurisdiction. The defendant also denied execution of the agreement to sale claiming it to be forged and further denied having received any amount from the plaintiff. The defendant also pleaded that he is not the

[2] 2010 SCC Online Del 4095

owner of the said land. In replication the plaintiff did not dispute the averments of the defendants that he is not the owner of the said land.

13. The Delhi High Court while examining the issue regarding its territorial jurisdiction held that the agreement to sell set up the plaintiff therein purports to have been executed in Delhi. Hence, part of the "cause of the action" claimed by the plaintiff, arose in Delhi and consequently, the suit could be filed in Delhi. The Delhi High Court further held that the suit is not suit for specific performance of the Contract in respect of an immovable property. The Delhi High Court also held that it was not a suit for possession of an immovable property nor was it a suit for injunction in respect of immovable property and that it was a suit for refund of sale consideration alleged to have been paid by the plaintiff to the defendant on the ground that due to non-performance of the agreement by the defendant, plaintiff had rescinded the transaction and thus the suit was not covered in any of the clauses of Section 16 of C.P.C.

14. It is trite that the ratio of the case is to be deduced from the facts involved in the case. In re: ***Indira Rai (supra)*** was a case in which the agreement for sale was executed in Delhi. The cause of action for the said suit had arisen on the failure of the defendant therein to refund the sale consideration paid by the plaintiff therein on the ground that due to the non-performance of the agreement by the defendant the plaintiff had rescinded the transaction. On such facts the Delhi High Court had held that the suit was not covered in any of the clauses of Section 16 of C.P.C. This Court is of the view that this was not a case which involved *"determination of any other right to or interest in immovable property."*

15. Section 16 (d) of C.P.C provides:-

"16. ***Suits to be instituted where subject-matter situate.-*** *subject to the pecuniary or other limitation prescribed by any law, suits, -*

(a)…… ……..
(b)……..……..
(c)……..……
(d). for the determination of any other right to or interest in immovable property,
(e)……..……..
(f)……..……..

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries own business, or personally works for gain.

Explanation.- in this section "property" means property situate in India."

16. In ***Harshad Chimanlal Modi v. D.L.F Universal*** **Ltd.**[3] *the Apex Court held :-*

*"**16**. Section 16 thus recognises a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interest in such property. In other words, a Court has no jurisdiction over a dispute in which it cannot give an effective judgment. The proviso to Section 16, no doubt, states that though the Court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on a well-known maxim "equity acts in personam", recognised by the Chancery Courts in England. The Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situate abroad through personal obedience of the defendant. The principle on which the maxim was based was that the Courts could grant reliefs in suits respecting immovable property situate abroad by enforcing their judgments by process in personam i.e. by arrest of defendant or by attachment of his property."*

"21. A plain reading of section 20 of the Code leaves no room for doubt that it is residuary provision and covers those cases not falling within the limitations of Section 15 to 19. The opening

[3] (2005) 7 SCC 791

words of the section, "subjection to the limitation aforesaid" are significant and make it abundantly clear that the section takes within its sweep all personal actions. A suit falling under section 20 thus, may be instituted in a court within whose jurisdiction the defendant resides, or carries on business, a personally work for gain or cause of action wholly or partly arises."

17. In view of the clear provision of Section 16 of C.P.C and the Judgment rendered by the Apex Court in re: ***Harshad Chimanlal Modi (supra)*** it has become imperative to examine whether the said suit filed by the Plaintiff would fall within the parameters of Section 16 (d) of C.P.C, or rather, whether the said suit entails "*determination of any other right to or interest in immovable property.*" It is only if the said suit does not fall under the parameter of Section 16 of C.P.C can the question of examining if the plaintiff be entitled to file the suit as per the provisions of Section 20 of C.P.C would arise.

18. It is well settled that the nature of the suit and its purpose must be determined by reading the plaint as a whole. In ***Moolji Jitha and Co. V. Khandesh Spg. and Wvg. Mills Co. Ltd.***[4] the Federal Court held (AIR p.92, para 25):-

"the inclusion or absence of a prayer is not decisive of the true nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint on which relieves asked in the prayers are based."

19. The Apex Court in ***Sumer Builders Pvt. Ltd. V. Narendra Gorani***[5] also examined the assertions made in the application along with the relief clause, *"read in entirety and appreciated in a holistic manner"* and came to the conclusion that the core dispute pertains to possession of land.

20. Section 16 of C.P.C does not use the words 'cause of action' which is integral to Section 20 of C.P.C. A suit would not survive without a cause of action. In a money suit the cause of action sufficient to justify the plaintiff to sue to obtain the money decree must be pleaded and proved. Any transaction pleaded must be an integral part of the cause of action sufficient

[4] AIR 1950 FC 83
[5] (2016) 2 SCC 582

to clothe the Court with jurisdiction to entertain the suit. As is well settled a cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendants. Although, the expression 'cause of action' has not been defined in the C.P.C, the Apex Court has in a number of decisions held that it is a bundle of essential facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to Judgment in his favour. 'Cause of action' thus, gives occasion for and forms the foundation of the suit. If therefore there is no 'cause of action' the plaint has to be dismissed. (Vide ***State of Rajasthan V. Swaika Properties***[6]; ***ABC Laminarts (P) Ltd. and Another v. A.P Agencies, Salem***[7]; ***Alchemist Ltd. & Anr. V. State of Sikkim***[8]).

21. From a reading of the plaint the following essential facts pleaded by the Plaintiff would be required to be proved before the Plaintiff can obtain the money decree as prayed for:-

(i.) Rs. 34,50,000/- was paid by the Plaintiff to the Defendants which was received at Gangtok by Defendant No. 3 for the purchase of the immovable property situated at Pradhan Nagar, Siliguri, West Bengal.

(ii.) The said money sought to be realised by the Plaintiff is the 50% payment paid towards the purchase of the said immovable property.

(iii.) The said money sought to be realised was money paid by mistake by the Plaintiff to the Defendants as the implications of and enforcement of the West Bengal Estate Acquisition Act, 1953 on the rights of the lessor to the lease deed dated 21.07.1953 not been brought to the notice of the Plaintiff the negotiation between the Plaintiff and Defendants were illegal, invalid and improper in the eyes of the law.

(iv.) As a result of the enforcement of the West Bengal Estate Acquisition Act, 1953, the rights of the lessor of the lease deed dated 21.07.1953 had extinguished and had no subsisting interest in the demised premises and consequently the Defendants as the sons and legal heirs of the lessor also did not have any rights in the said immovable property.

22. From the pleadings in the plaint it is absolutely clear that the Plaintiff would not be entitled to a money decree of Rs. 38,78,283/- and the

[6] (1985) 3 SCC 217
[7] (1989) 2 SCC 163
[8] (2007) 11 SCC 335

interest and cost as prayed for in the said suit without examining any other right to or interest of the Defendants in the immovable property, admittedly situated outside the jurisdiction of the Courts in Sikkim in the State of West Bengal. A perusal of the plaint makes it evident that the Plaintiff has not pleaded as to where the negotiations and agreement to purchase the said immovable property for a consideration value of Rs. 69,00,000/- took place. In fact, the only averment in the plaint by which the Plaintiff seeks to invoke the jurisdiction of the Court of the District Judge, is that the cheques referred to in paragraph 10 of the plaint were received by Defendant no. 3 at Gangtok, for and on behalf of the Defendant no. 1, 2 and 4.

23. This Court is of the view, reading the plaint as a whole, that although the prayers prayed for by the Plaintiff is for money decree, the essential, integral and germane facts without which the money decree cannot be passed by the Court is the determination of the right to or interest of the Defendants in the immovable property situated at Pradhan Nagar, Siliguri, West Bengal and beyond the territorial jurisdiction of the Courts in Sikkim. As such, Section 20 of C.P.C which starts with the words *"subject to the limitation aforesaid"* and thus a residuary provision to Sections 15 to 19 of C.P.C has no application in the present case. Thus, the said suit ought to have been filed by the Plaintiff as per the provision of Section 16 (d) of C.P.C in the Court within the local limits of whose jurisdiction the immovable property is situate as the said suit clearly involved *"the determination of any other right to or interest in immovable property."*

24. The learned Additional Advocate General would also submit that the present case was a case in which the relief sought can be entirely obtained through the personal obedience of the Defendants. The proviso to section 16 of C.P.C makes it abundantly clear that even where the relief sought can be entirely obtained through the defendants personal obedience in a suit to obtain relief respecting, or compensation for wrong to, immovable property held by and on behalf of the defendant, the suit could be instituted either in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. As per the plaint the Defendants are all residents of Pradhan Nagar, Siliguri, West Bengal. Material pleadings essential to determine where the Defendants carries on business, or personally works for gain is missing from the plaint. Thus, even the proviso to Section 16 of C.P.C does not further the case of the Plaintiff.

25. The learned Additional Advocate General would then argue that even if some of the prayers were not maintainable being outside the territorial jurisdiction of the Court of the District Judge, those prayers within the jurisdiction ought to have been entertained and those outside the jurisdiction struck out. Reliance was placed on the judgment of a Division Bench of the Calcutta High Court in re: ***Smt. Sheela Adhikari v. Rabindra Nath Adhikari***[9]**.** The present case is not a case where some of the cause of actions united in the plaint are arising within the territorial jurisdiction of the Court of the District Judge where the suit has been filed, while other causes of action joined therein are not triable by it for want of such jurisdiction as in the Calcutta case. However, it is pertinent to note that the Division Bench of the Calcutta High Court has clearly held that the Rules in First Schedule of CPC cannot override or outweigh the Sections in the body of CPC and further :-

> *"the result, therefore, is that though under the provisions of Order 2, Rule 3 any number of causes of action may be united in one suit against the same defendant, yet because of the provisions of Section 16-20 of the Code, the Court in which suit is filed must have territorial jurisdiction in respect of all such causes of action."*

26. The Plaintiff having filed the said suit before the Court of the District Judge on 06.03.2006, the Defendant no.1 filed his written statement on 20.07.2006; the Defendant no. 3 and 4 on 22.07.2006 and Defendant No.2 on 25.11.2006. The Court of the District Judge framed 5 issues on 14.02.2007. On 02.09.2008 the Defendant no. 3 and 4 preferred an application under Order VI Rule 17 r/w Section 151 of C.P.C. for amendment of their joint written statement. This was objected to by the Plaintiff vide written objection dated 27.11.2008. On 30.07.2009, the Court of the District Judge rejected the prayer of the Defendant No. 3 and 4 to amend their written statement. The order dated 30.07.2009 of the District Judge was assailed before this Court. This Court vide Judgement and order dated 12.08.2010 set aside the order dated 30.07.2009 of the District Judge and allowed the Defendant No. 3 and 4 to amend their written statement. Consequently, on 06.10.2010 amended written statement was filed on behalf of the Defendant no. 3 and 4. The said amended written statement filed by Defendant No. 3 and 4 on 06.10.2010 also made the following counter-claims against the Plaintiff:-

[9] AIR 1988 Cal 273

"28-F. The Defendants therefore claim the following reliefs by way of counter claim-
(i). a decree declaring that the Plaintiff is in occupation of the suit property illegally:
(ii). a decree declaring that the Defendants are entitled for declaration for the eviction of the Plaintiff from the portion of landed property covered by Plot No. 291;
(iii). a decree declaring that the Defendants are entitled to a sum of Rs. 2,500/- per day as measne profits since 20th June 2004; and
(iv). any other relief or reliefs for which the Defendants are entitled to under the law."

27. The Plaintiff filed its written statement dated 28.12.2010 to the counter-claim filed by the Defendant no. 3 and 4. In the said written statement the Plaintiff also pleaded that this Hon ble Court lacks the territorial jurisdiction to entertain the counter-claim setup by the Defendants.

28. Ex facie, the reliefs sought for in the counter-claim filed by the Defendant no. 3 and 4 are beyond the territorial jurisdiction of the Court of the District Judge as barred by Section 16 of C.P.C. Nevertheless, Mr. B Sharma, learned Senior Advocate for the Defendants would submit that in view of the provision of Order VIII Rule 6A of C.P.C, the only limitation being pecuniary, the counter-claim filed with the afore quoted reliefs even if beyond the territorial jurisdiction of the Court of the District Judge is entertainable by the said Court as the said suit having been filed before the Court of the District Judge.

29. Order VIII Rule 6A of C.P.C provides:-

"**6A. Counter-claim by defendant.-** *(1) A defendant in a suit may, in addition to his right of pleadings a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:*

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

30. Mr. B. Sharma, learned Senior Advocate in support of his aforesaid submission would cite in re: ***Jag Mohan Chawla v. Dera Radha Swami Satsang***[10] **;** and ***Barthels & Luders Gambh v. M.V. Dominique***[11]**.**

31. In ***Jag Mohan Chawla (Supra),*** the Apex Court while answering the question *"whether in a suit for injunction, counter-claim for injunction in respect of the same or a different property is maintainable? Whether counter-claim can be made on different cause of action?"* held:-

> *"**5.....** Rule 6-A(1) provides that a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damage or not. A limitation put in entertaining the counter-claim is as provided in the proviso to sub-rule (1), namely, the counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court. Sub-rule (2) amplifies that such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. The plaintiff shall be given liberty to file a written statement to answer the counter-claim of the defendant within such period as may be fixed by the court. The counter-claim is directed to be*

[10] (1996) 4 SCC 699
[11] 1988 Mh. L.J. 728: AIR 1988 Bombay 380.

treated, by operation of sub-rule (4) thereof, as a plaint governed by the rules of the pleadings of the plaint.

..... In sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit....."

32. The Apex Court in re: ***Jag Mohan Chawla (supra)*** was not examining "territorial jurisdiction" but the issue whether in a suit for injunction, counter-claim for injunction in respect of the same or a different property was maintainable and whether counter-claim can be made on different cause of action. It is in that context that the Apex Court held the language is so couched with words of wide width as to enable the parties

to bring its own independent cause of action. Similarly, the Apex Court in the same context i.e. 'cause of action' held that the only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. Thus, the *ratio decidendi* of the judgment in re: ***Jag Mohan Chawla (supra)*** would not lend support to the argument of Mr. B. Sharma, learned Senior Advocate that Order VIII Rule 6A of C.P.C does not have any limitation of territoriality. 'Territorial jurisdiction' and 'cause of action' are two different concepts of law.

33. In re: ***Barthels & Luders Gambh (supra)*** the Bombay High Court was examining the Chamber Summons taken out by the plaintiff therein to the suit and the defendant therein to the counter-claim for excluding from the suit the counter-claim filed by the defendants therein. The Bombay High Court held that the High Court had been set up as a Court of Admiralty under the Colonial Courts of Admiralty (India) Act, 1891 and that the counter-claim by the defendant therein did not strictly fall within the Admiralty jurisdiction of the High Court. However, it held that the counter-claim under the provisions of Order VIII Rule 6A of C.P.C was maintainable.

34. The Bombay High Court in re: ***Barthels & Luders Gambh (supra)*** held that the only restriction as set out in the proviso to Order VIII Rule 6A of C.P.C is that the counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. The Bombay High Court took support for the aforesaid view from the judgment of the Madras High Court in re: ***T.K.V.S. Vidyapoornachary Sons v. M.R. Krishnamachary***[12] which held that Rule 6C of Order VIII of C.P.C emphasizes by implication that a general rule a suit claim and a counter-claim ought properly to be regarded as constituting a unified proceeding and a counter-claim, therefore, between the same party needs to be only within the pecuniary jurisdiction of the Court where it is filed. The Bombay High Court also relied upon an English judgment rendered by Lord Coleridge in re: **Griendtoveen v. Hamlyn and Co.**[13] and further held that under Order VIII Rule 6A of C.P.C, once the suit is within the jurisdiction of the Court, the defendant is entitled to file a counter-claim provided the counter-claim is within the four corners of Order VIII Rule 6A of C.P.C and further that there is no provision under this Order that the counter-claim must also comply with the requirement as to territorial jurisdiction.

[12] AIR 1983 Madras 291
[13] (1892) VIII T.L.R. 231

35. The Bombay High Court in re: ***Barthels & Luders Gambh (supra)*** was not called upon to examine the provision of Section 16 of the C.P.C regarding territorial jurisdiction. By virtue of Section 120 of C.P.C, Section 16, 17 and 20 shall not apply to the High Court in the exercise of its original civil jurisdiction. This being the legal position ***Barthels & Luders Gambh (supra)*** cannot be held to be an authority on the proposition sought to be canvassed by Mr. B. Sharma, Senior Advocate as "*neither the C.P.C nor its principles can be made applicable to the Letters patent qua Section 16, 17 and 20, CPC." (*vide ***Jindal Vijaynagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.***[14] paragraph 52).

36. The Madras High Court and the Calcutta High Court are also chartered High Courts and have original Civil Jurisdiction. Section 120 of C.P.C is also applicable to the said High Courts. In re : **A*jay Kumar Saraff v. Sushil Kumar Agarwal***[15] the Calcutta High Court was examining a counter-claim relating to recovery of possession of immovable property lying and situated outside the ordinary original civil jurisdiction of the Calcutta High Court. Relying upon ***Barthels & Luders Gambh (supra)*** it was contended that a counter-claim could be lodged by the defendant therein which directly relates to the same cause of action as made out in the plaint.

37. The Calcutta High Court in re: ***Ajay Kumar Saraff (supra)*** however, distinguished the judgment of the Bombay High Court in re: ***Barthels & Luders Gambh (supra)*** by holding, intera-alia:-

> *"The suit premises involved in the present case is Premises No. 344, Canal Street, Kolkata-700048. The suit property is situate outside the territorial jurisdiction of this Court. If the defendant wanted to file a suit with the reliefs as sought for in its counterclaim in respect of such immovable property, the suit would not have been maintainable before this Court.*
> *Rule 12 of Chapter IX of the Original Side Rules states that a counterclaim shall be treated as a plaint and be governed by the rules applicable to plaints. In terms of Rule 12 of Chapter IX of the Original Side Rules treating a counterclaim to be a plaint, the relief of possession in respect of immovable property admittedly lying and situate outside the territorial jurisdiction of this Court cannot be entertained. The provisions of Order 8*

[14] (2006) 11 SCC 521
[15] 2015 SCC online Cal 732: 2015 AIR CC 1953

Rules 6A to 6G of the Code of Civil Procedure, 1908 do not assist the defendant in sustaining a counterclaim before this Court when this Court does not have the territorial jurisdiction to entertain the counterclaim made in the written statement of the defendant.

Rule 6C Order 8 of the Code of Civil Procedure, 1908 allows a plaintiff to raise an issue that the claim raised in the counterclaim ought not to be disposed of by way of a counterclaim. In the present case, the plaintiffs have not appeared at the hearing of the suit. However, the counterclaim made in the written statement of the defendant is such that the counterclaim cannot be entertained by this Court due to lack of territorial jurisdiction of this Court.

Barthels and Luders GmbH (supra) relates to an admiralty suit. The Bombay High Court considered Order 8 Rules 6A to 6G of the Code of Civil Procedure, 1908 and found that since the counterclaim related to the same repairs as that which was the subject matter of the plaint, it was found not to be fair to drive a defendant to a separate suit in a different Court. The factual situation in the instant case is different. The defendant has sought for relief with regard to an immovable property situate admittedly outside the territorial jurisdiction of this Court in its counterclaim. The defendant could not have filed an independent suit seeking the same relief as that of the counterclaim in this Court. It would not be proper to allow the defendant to invoke the jurisdiction of this Court when this Court does not possess such jurisdiction by reason of the reliefs sought for in respect of immovable property lying and situate outside its territorial jurisdiction.

In such circumstances, no relief can be granted to the defendant in the counterclaim due to the lack of territorial jurisdiction of this Court to entertain the counterclaim of the defendant."

38. Section 16 of C.P.C relates to 'suits' when it provides that suits to be instituted where subject matter is situate. Section 16 of C.P.C falls within Part I of C.P.C under the heading 'Suits in General' . Counter-claims falls under the First Schedule of C.P.C which contains 'Orders' . Order VIII Rule 6A of C.P.C deals with counter-claim. Under Order VIII Rule 1 of

C.P.C the defendant is required to file 'written statement of his defence' on receipt of the summons issued under Order V Rule 1 of C.P.C in the suit instituted. Under Order VIII Rule 6 of C.P.C 'set-off' is required to be given in the written statement filed in defence of the suit. Under Order VIII Rule 6 (2) of C.P.C the written statement shall have the same effect as a 'plaint' in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off.

39. Order VIII Rule 6A of C.P.C deals with counter-claim by the defendant. A 'defendant in a suit' in addition to his right of 'pleading a set-off' under Order VIII Rule 6A of C.P.C, set-up 'by way of counter-claim against the claim of the plaintiff', any right or claim in respect of 'a cause of action' accruing to the defendant against the plaintiff. Under the proviso thereto, the counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. Under Order VIII Rule 6A (2) of C.P.C such counter-claim shall have the same effect as a 'cross-suit' so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. The plaintiff is entitled to file a written statement in answer to the counter-claim of the defendant under Order VIII Rule 6A (3) of C.P.C and under Order VIII Rule 6A (4) the counter-claim shall be treated as a 'plaint' and governed by the 'rules' applicable to plaints. 'Rules' has been defined under Section 2 (18) of C.P.C to mean Rules and forms contained in the First Schedule or made under Section 122 or Section 125 of C.P.C. Order VII Rule 1 is part of the First Schedule of C.P.C. Order VII Rule 1 (f) provides that the plaint shall contain the facts showing the Court has jurisdiction.

40. The Defendant No. 3 and 4 has filed a composite amended written statement and a counter-claim. Para 1 to 27 thereof are the averments of the said amended written statement. Para 28 consisting of para 28-A to 28-F in the said amended written statement is the counter claim. There is no separate averment in the counter-claim on facts showing the Court has jurisdiction. However, para 27 of the said amended written statement categorically states: "this Hon ble Court has no jurisdiction to try the present case, as the suit premises is situated within the jurisdiction of West Bengal." This being the statement in the amended written statement, the Defendant No. 3 and 4 may not be able to contend otherwise in the counter-claim.

41. The scheme of the C.P.C is clear. Suit must necessarily be instituted in the Court that has territorial jurisdiction as provided under Section 16 of C.P.C. Section 20 of C.P.C being a residuary provision covers only those cases not falling within the limitations of Section 15 to 19 of C.P.C. Once the suit has been instituted as provided above, written statement, set-off or counter claim has to be filed in that suit. The counter-claim so filed need to comply with the provisions of Order VIII Rule 6A of C.P.C. In Order VIII Rule 6A (1) of C.P.C "the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject matter of an independent suit." (vide ***Jag Mohan Chawla (supra)***). It must be straightaway noticed that in re: ***Jag Mohan Chawla (supra)*** the Apex Court has used the words "an independent suit" preceded by the words "the subject matter of" clearly holding that under Order VIII Rule 6A of C.P.C a defendant could bring an independent cause of action relating to a subject matter of an independent suit by way of counter-claim. Allowing set-offs and counter-claims to be filed in the suit in which the defendants are to file written statement in its defence is to avoid multiplicity of litigation. In re: ***Ramesh Chand Ardawatiya v. Anil Panjwani***[16] it has been held by the Apex Court that the purpose of the provision enabling the filing of a counter-claim is to avoid multiplicity of judicial proceedings and saving of the Court s time as also to exclude inconvenience to the parties by enabling claims and counter-claim, that is, permitting all disputes between the same parties to be decided in the course of the same proceedings.

42. However, there could be cases when a counter-claim may have to be excluded as provided under Order VIII Rule 6C of C.P.C. In fact the impugned order was passed while considering the Plaintiff s application under Order VIII Rule 6C of C.P.C for exclusion of the counter-claim filed by the Defendant no. 3 and 4 on the ground that the prayer for a declaration of eviction against the Plaintiff from the immovable property situated in Siliguri, West Bengal was beyond the territorial jurisdiction of the Courts in Sikkim.

43. Order VIII Rule 6C of C.P.C deals with exclusion of counter-claim. Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an 'independent suit' , the plaintiff may, at any time before

[16] (2003) 7 SCC 350

issues are settled in relation to the counter-claim, apply to the court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application makes such order as it thinks fit.

44. The key words in Order VIII Rule 6C of C.P.C are 'independent suit'. If the Court is of the view, in an application made by the plaintiff at any time before the issues are settled in relation to the counter-claim, that the counter-claim ought to be disposed of by way of an 'independent suit' the Court is empowered to make such orders as it thinks fit. An 'independent suit' need to be instituted in the Court within the local limits of whose jurisdiction the property is situate in terms of Section 16 of C.P.C. The counter-claim filed by the Defendant No. 3 and 4 seeking a prayer for declaration of eviction of the Plaintiff from the immovable property in possession of the Plaintiff situate in Sliguri, West Bengal outside the territorial jurisdiction of the Courts in Sikkim squarely falls within Section 16 of C.P.C and would be liable to be rejected if it were to be filed as an 'independent suit'. As such, this Court is of the view that the application filed by the Plaintiff under Order VIII Rule 6C of C.P.C for exclusion of counter-claim was maintainable. This interpretation would avoid any embarrassment to the Court in passing any judgment in a counter-claim which it could not have passed being beyond its territorial jurisdiction. To the said extent the application of the Plaintiff under Order VIII Rule 6C of C.P.C filed on 19.06.2014 for exclusion of the counter-claim of the Defendant no. 3 and 4 was maintainable and rightly held in favour of the Plaintiff by the learned Principal District Judge in the impugned order holding that the Court had no jurisdiction to adjudicate upon the counter-claim of the Defendants.

45. Be that as it may, as this Court has held that the said suit filed by the Plaintiff ought to have been filed as per the provisions of Section 16 (d) of the C.P.C in the Court within the local limits of whose jurisdiction the property is situate the plaint filed by the Plaintiff must necessarily be returned to be presented to the Court in which the said suit should have been instituted under Order VII Rule 10 of C.P.C as held by the learned Principal District Judge. In such an event the counter-claim would also have to be filed before the same Court as per the provision of Order VIII Rule 6A of C.P.C. The counter-claim as filed by the Defendant No. 3 and 4 in the said suit, if it were to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situate, Order VIII Rule 6C of C.P.C would not apply in the facts of the present case.

46. In view of the aforesaid, the impugned order dated 25.03.2015 passed by the learned Principal District Judge, in Money Suit no. 21 of 2014 is upheld and Appeal dismissed. The said plaint must be returned under the provision of Order VII Rule 10 of C.P.C to be presented to the Court in which the suit should have been instituted. As a counter-claim shall be treated as a plaint and governed by the Rules applicable to plaints under the provision of Order VII Rule 10 of C.P.C the counter-claim filed by the Defendant No. 3 and 4 must also be returned to be presented to the Court in which the said counter-claim should be filed. Consequently, the Court fee paid by the Defendant No. 3 and 4 for the counter-claim is also liable to be returned to the Defendant No. 3 and 4. It is accordingly ordered. In view of the final order the interim order shall cease to operate.

47. No order as to cost.

SLR (2017) SIKKIM 114

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

R.F.A No. 04 of 2015

Smt. Ratna Pradhan ….. APPELLANT

Versus

Shri Krishna Deo Thakur ….. RESPONDENT

For the Appellant: Mr. Ajay Rathi, Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates.

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

Date of decision: 26th July 2017

A. Rent Control and Eviction – Bona fide requirement of landlord – Rule 2 of the Notification No. 6326-600- H&W-B dated Gangtok the 14th April, 1949 deals with regulation "letting and sub-letting" of premises, controlling rents and to prevent unreasonable eviction of tenants – spirit behind the Notification is to prevent vagrancy till such time as scarcity of accommodation prevails in Sikkim, and to prevent harassment to the tenants on account of such scarcity – three grounds enumerated for eviction are (i) if the premises are required for personal occupation, (ii) overhauling and (iii) failure on the part of the tenant to pay rent for four months – Landlord is required to establish a genuine need of the premises – Defendant is to confine his case to the property in question and it is not his place to enquire into the number of properties owned by the Plaintiff.

(Para 12 and 13)

B. Tenant cannot dictate terms to the landlord – Landlord has to be able to indicate a real and genuine need for the suit premises. (Para 15)

C. Indian Evidence Act, 1872 – S. 103 – Burden of proof as to any particular fact lies on that person who wishes the Court to believe in it existence, unless, it is provided by any law that the proof of that fact shall lie on any particular person – An assertion made has to be substantiated by the person who makes the assertion. (Para 16)

D. General Clauses Act, 1897 – S. 27 – Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post – Section importantly lays down that letter is to be "properly addressed" – Held, it is clear that in absence of any cogent proof to establish dispatch of the house rents and refusal of payment by the Plaintiff, no other conclusion can be arrived at, save the fact that the Defendant failed to pay the rents and hence defaulted. (Paras 18 and 19)

Appeal allowed.

Chronological list of cases cited:

1. Puwada Venkateswara Rao v. Chidamana Venkata Ramana, (1976) 2 SCC 409: AIR 1976 SC 869
2. Harcharan Singh v. Shivrani, (1981) 2 SCC 535: AIR 1981 SC 1284
3. Sunil Kumar Sambhudayal Gupta (Dr.) and Others v. State of Maharashtra, (2010) 13 SCC 657
4. D. Devaji v. K. Sudarashana Rao, 1994 Supp (1) SCC 729
5. P. Ramachander Rao v. K. Dayanand, (2005) 13 SCC 159

6. N. Eswari, w/o Adinarayana v. K. Swarajya Lakshmi, w/o Late K.V.L.N.A. Sastry, (2009) 9 SCC 678

7. Damodar Sharma and Another v. Nandram Deviram, AIR 1960 MP 345

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

9. P.S. Nirash and Another v. Smt. Mintok Dolma Kazini and Another, AIR 1984 Sikkim 1

JUDGMENT

Meenakshi Madan Rai, J.

1. The challenge in this Appeal is to the Judgment and Decree, dated 30-06-2015, of the Learned District Judge, South Sikkim, at Namchi, in Eviction Suit No.14 of 2013, *"Ratna Pradhan vs. Kishan Deo Thakur"*. The Learned Trial Court vide the impugned Judgment held that the Plaintiff was not entitled to the reliefs prayed for by her and dismissed the Eviction Suit.

2. The facts leading to the dispute are that, the Plaintiff/Appellant (hereinafter "Plaintiff") is the owner of a four storied RCC building measuring 20' x 30' in Jorethang Bazaar, South Sikkim. The Defendant/ Respondent (hereinafter "Defendant") has been a tenant since 1997, in a portion of the ground floor of the building, measuring approximately 16' x 12' and running a Barbershop. The rent in 1997 was fixed at Rs.900/- (Rupees nine hundred) only, per month, and thereafter, from 2010 onwards at Rs.2,000/- (Rupees two thousand) only, per month, to be paid by the Defendant within the 10th day of each month, as per letter of the Plaintiff dated 05-07-2013, Exhibit 6. That, from the month of November 2012 the Defendant failed to pay the monthly rent, without assigning any reason, till the filing of the Suit, in December 2013. Around the month of March/April 2013, the Plaintiff received a Money Order from the Defendant, which she refused, being unaware of its purpose. That, even if, the Money Order was for rent, she had every right to refuse it, as the Defendant had failed to pay rent for the previous four months and was, therefore, in arrears of rent. In March 2013, she directed the Defendant to vacate the suit property on account of

default of payment of rent, in vain. Besides, she has an unemployed son, a Graduate, who seeks to run a Computer Training Centre, but has not been able to acquire suitable accommodation. Hence, the prayers, *inter alia,* for directing the Defendant to hand over vacant possession of the suit property to the Plaintiff, as he was a wilful defaulter in payment of rent and she bona fide required the suit premises for her son.

3. Resisting the contentions of the Plaintiff, the Defendant denied default in rent payment or the requirement of the Plaintiff's son. That, the Plaintiff infact refused to accept the monthly rent from November 2012 including the rents despatched by Money Orders. The said refusal, according to him, was a ruse to evict him, as in the month of September 2012 she had informed him of the sale of the suit building to one Arun Ghatani. Moreover, the location of the said premises was not suitable for running a Computer Training Centre, besides which other tenants were in occupation of larger areas in the same building and the Plaintiff has several other RCC buildings located in various parts of Sikkim, where her son can be accommodated, hence, the Suit be dismissed.

4. The Learned Trial Court settled the following issues for determination;

(1) Whether the Suit is maintainable? (OPP)

(2) Whether the suit/demised premises are required by the Plaintiff and/or her son for her/their bona fide requirement? (OPP)

(3) Whether the Defendant has defaulted in payment of the concerned rent for the suit premises with effect from November, 2012? (OPP)

(4) Whether the Suit has been filed only to evict the Defendant without any basis? (OPD)" RFA No.04 of 2015 4 Smt. Ratna Pradhan vs. Shri Kishan Deo Thakur

(5) Whether the Plaintiff is entitled to the reliefs prayed for by her? (OPP)

5. In support of her case the Plaintiff examined herself and her son Rishi Pradhan, while the Defendant examined himself and the Postman of the Naya Bazaar Post Office, located at Jorethang. Though the wife of the Defendant had filed her Evidence-onAffidavit, which was confirmed before the Learned Trial Court, but she was later dropped as a witness by the Defendant.

6. Taking up Issue No.3 first for discussion the Learned Trial Court reached a finding that the Plaintiff failed to prove that the Defendant had defaulted in payment of monthly rent, since November 2012. Issue No.2 was next discussed and it was concluded that the Plaintiff/her son did not require the suit premises. In Issue No.4, the Learned Trial Court found that the Suit had been filed for the purpose of evicting the Defendant without any basis. Ultimately, Issues No.1 and 5 were taken up together and it was concluded that the Suit was not maintainable, as, the grounds on which it had been filed were not substantiated and found to be false, thus, dismissing the Suit.

7. Aggrieved thereby, before this Court it was argued by Learned Counsel for the Appellant that, the Learned District Judge erred in not considering the legal position, that, under Notification No.6326-600-H&W-B., dated 14-04-1949, issued by the Health and Works Department, Government of Sikkim, the Appellant is only required to establish one of the grounds for eviction. That, the Appellant requires the suit premises for bona fide and personal occupation, as is evident from the Trade Licence, Exhibit 7, issued in the name of her son, who is unemployed and seeks to run a Computer Training Centre from the suit premises. That, the Money Order Receipts marked Exhibit 'A' (collectively) are only attested copies, which ought not to have been admitted in evidence. That, the Postman serving the Money Orders was not examined and the Money Order Acknowledgment Card does not contain the signature of the Plaintiff. That, no proof of sale of building by the Plaintiff to one Arun Ghatani has been furnished, besides which the Plaintiff was not confronted with Exhibit 'B' a letter purportedly written by her to the Defendant at the time of her cross-examination. Hence, the prayers for setting aside the Judgment and Decree of the Learned Trial Court.

8. The contra argument of the Respondent was that the Defendant had dispatched rent up to the month of March/April 2013 by Money Orders with no default, which the Plaintiff under crossexamination has admitted, but

that she had refused the same. That, infact, the building has been sold to one Arun Ghatani for which efforts were on to evict the Defendant. That, although the Money Order receipts are attested documents, the Money Order Acknowledgment Cards containing the endorsement "refused" are in original and bear the seal of the concerned Post Office and each of the Money Order Acknowledgment Card contains an endorsement of refusal. That, Exhibit 'A' (collectively), has been proved by D.W.2, the witness of the Defendant, the Postman, who used to hand over the Acknowledgment Card and the money, which was unaccepted by the Plaintiff, to the Defendant. Pointing to the provisions of Section 27 of the General Clauses Act 1897 (for short "General Clauses Act") it was urged that, if documents are sent through the Post Office and the same is refused, it is deemed that the same has been served on the addressee and that Section 114(f) of the Indian Evidence Act, 1872, also lays down a similar provision. Reliance was placed on **Puwada Venkateswara Rao** vs. **Chidamana Venkata Ramana**[1], **Harcharan Singh** vs. **Shivrani and Others**[2] and **Sunil Kumar Sambhudayal Gupta (Dr.) and Others** vs. **State of Maharashtra**[3] to fortify his submissions.

9. It was next contended that the question of bona fide requirement for the son does not arise, as the Plaintiff has deposed that she has many houses including houses at better locations than the suit premises, where business can flourish. It is also her admission that the Suit was filed on the Defendant's refusal to enter into a Lease Agreement. Moreover, there are sixteen vacant rooms in the suit building, besides the tenanted premises occupied by the Defendant and it is an admitted fact that the Computer Training Centre of her son can be opened in any of those vacant rooms. The Trade Licence, Exhibit 7, issued to the Plaintiff's son is not for the suit premises, but for her building located at Majhigaon, and the Trade Licence Rules of Sikkim mandates that no business can be started in a house other than that mentioned in the body of the Trade Licence. Moreover, P.W.2, her son, has admitted that he is only interested in evicting the Defendant from the suit premises and hence, there is no bona fide requirement. That, in **D. Devaji** vs. **K. Sudarashana Rao**[4] it was held that, if a landlord had similar other residential building in town wherein business can be started, mere convenience of the Plaintiff or suitability of the premises cannot be

[1](1976) 2 SCC 409
[2](1981) 2 SCC 535
[3](2010) 13 SCC 657
[4]1994 Supp (1) SCC 729

looked into. In **P. Ramachander Rao** vs. **K. Dayanand**[5] it was held that, if the landlord has some other accommodation to start a tailoring shop, the tenant cannot be evicted. In **N. Eswari, w/o Adinarayana** vs. **K. Swarajya Lakshmi, w/o Late K.V.L.N.A. Sastry**[6]**,** the Hon'ble Supreme Court declined the landlady's prayer of residence at Vijaywada, because she was living with her children at Hyderabad in one of her two houses. Thus, based on the touchstone of the above pronouncements, the decision of the Learned Trial Court requires no interference.

10. I have heard Learned Counsel at length and carefully considered their submissions, perused the pleadings, the evidence on record, appended documents and the impugned Judgment.

11. What arises for consideration before this Court is, Whether the Learned Trial Court was correct in reaching a finding that the Plaintiff had no bona fide requirement of the suit premises and there was no default in payment of rent by the Defendant?

12. For clarity in the matter, we may refer to the relevant Notification invoked by the Plaintiff;

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

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

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

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

[5](2005) 13 SCC 159
[6](2009) 9 SCC 678

landlords may be permitted to evict the tenant on due application to the Chief Court.

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

4. Any person acting in contravention of this Notification will be liable to prosecution under para 4 of notification No.1366-066-G, dated the 28th July, 1947.

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

These rules will come into force with immediate effect.

By order of his Highness the Maharaja of Sikkim.

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

Thus, the Notification deals with regulation "letting and subletting" of premises, controlling rents and to prevent unreasonable eviction of tenants. The spirit behind the Notification is to prevent vagrancy till such time as scarcity of accommodation prevails in Sikkim, and to prevent harassment to the tenants on account of such scarcity. The three grounds enumerated for eviction are (i) if the premises are required for personal occupation (ii) overhauling (iii) failure on the part of the tenant to pay rent for four months. The grounds urged herein by the Plaintiff are for bona fide requirement and default in payment of rent for four months by the Defendant.

13. Firstly, taking up the question of bona fide requirement, it may pertinently be stated here that the Plaintiff is required to establish a genuine need of the premises. In **Damodar Sharma and Another** vs. **Nandram Deviram**[7] while culling out a distinction between the expressions "genuinely requires" and "reasonably requires", it was held as follows;

[7]AIR 1960 MP 345

> "(27) ……..…….....……..... It is wrong to say that "genuinely requires" is the same as "reasonably requires". There is a distinction between the two phrases. The former phrase refers to a state of mind; the latter to an objective standard. "Genuine requirement" would vary according to the idiosyncrasy of the individual and the time and circumstances in which he live and thinks. Reasonable requirement belongs to the "knowledge of the law" and means reasonable not in the mind of the person requiring the accommodation but reasonable according to the actual facts. In my opinion, in this part of Sec. 4(g), the landlord is made the sole arbiter of his own requirements but he must prove that he, in fact, wants and genuinely intends to occupy the premises. His claim would no doubt fail if the Court came to the conclusion that the evidence of "want" was unreliable and that the landlord did not genuinely intend to occupy the premises."
>
> ……."

14. It is not disputed that the son of the Plaintiff is an unemployed Graduate. For his livelihood, he seeks to open a Computer Training Centre and although he made enquiries for space at Jorethang Bazaar, he was unable to obtain any accommodation commensurate with his financial resources. It has been consistently argued by the Defendant that the Plaintiff is the owner of several properties in and around Sikkim and that P.W.2 himself has admitted this fact. That, should he run his business in Jorethang, it would be illegal, the Licence having been obtained for carrying out business in Majhigaon. It would be appropriate to remark here that penalty for contravening the relevant Rules of the Urban Development and Housing Department pertaining to Licences would be cancellation of Licence and is a matter entirely between P.W.2 and the Urban Development and Housing Department, Government of Sikkim, for which no interference is expected from the Defendant. Besides the Defendant is to confine his case to the property in question and it is not his place to enquire into the number of properties owned by the Plaintiff. However, the above observations aside, the Plaintiff under cross-examination has admitted that the suit building consists of four floors and sixteen rooms therein are vacant. It is also her admission that the Computer Training Centre can be opened by her son in the vacant rooms in their possession.

15. In **Sait Nagjee Purushotham & Co. Ltd.** vs. **Vimalabai Prabhulal and Others**[8] it was held that;

> **"4.** …….. It is true that the landlords have their business spreading over Chennai and Hyderabad and if they wanted to expand their business at Calicut it cannot be said to be unnatural thereby denying the eviction of the tenant from the premises in question. It is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. It is not the tenant who can dictate the terms to the landlord and advise him what he should do and what he should not. It is always the privilege of the landlord to choose the nature of the business and the place of business. However, the Trial Court held in favour of the tenant-appellant. But the appellate court as well as the High Court after scrutinizing the evidence on record reversed the finding of the trial court and held that the need of establishing the business at Calicut by the landlords cannot be said tobe lacking in bona fides."

In the aforesaid case, the bona fide requirement of the landlord was established. While it has been laid down that a tenant cannot dictate terms to the landlord, at the same time the landlord has to be able to indicate a real and genuine need for the suit premises. While examining the case at hand, although it is not for the Defendant to dictate what the Plaintiff's son should do, nevertheless, it is clear from the evidence furnished that bona fide need has not been established by the Plaintiff, for the reasons discussed supra, consequently, on this ground, no right accrues to the Plaintiff.

16. Before embarking on a discussion on default of payment of rent, I consider it essential to clear the air with regard to the alleged sale of the building to one Arun Ghatani. Exhibit 'B' was relied on by the Defendant, a hand written notice, purportedly scribed by the Plaintiff herself. Although there is no basis in the evidence of the Defendant to conclude that Exhibit 'B' was in the hand of the Plaintiff and Exhibit 'B(a)' was her signature, but it is noticed that no cross-examination in this regard was conducted and hence, the Learned Trial Court has taken this evidence into consideration. Nevertheless, Exhibit 'B' nowhere reveals that the building was sold to Arun

[8](2005) 8 SCC 252

Ghatani, although the Defendant has asserted that the Plaintiff has sold the suit building to Arun Ghatani was not a false statement. An assertion made has to be substantiated by the person who makes the assertion. Section 103 of the Evidence Act clearly lays down that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless, it is provided by any law that the proof of that fact shall lie on any particular person. Infact, Exhibit 'C' would go to show that he is interested in purchasing the shop in his occupation being a tenant thereof for the last 18 years, which appears to be his staunch reason for not vacating. Thus, in the absence of any credible evidence, this Court is not inclined to rely on the version of the Defendant that the Plaintiff seeks to evict him to hand over vacant possession to Arun Ghatani.

17. That, having been settled, the afore-extracted Notification, it may be reiterated, provides for eviction of a tenant if default in payment of rent occurs for four months. Although the Plaintiff vehemently asserts default by the Defendant, the Defendant is equally vehement in his denial. According to the Defendant, the Plaintiff in her evidence has stated that the Defendant was 'presently' sending the rent of the suit premises, but she had refused it. It has to be noted that her evidence was recorded on 16-02-2015 and the word 'presently' would have to be interpreted in that context. The Defendant has not enlightened this Court as to whether he had been delivering the rent to her personally and how she suddenly declined to accept rent for the month of November 2012. How the refusal transpired, whether he had personally gone to deliver the rent for that month or was it sent through someone else? These are shrouded in mystery. Apart from which, perusal of Exhibit 'A' (collectively) would indicate that, the Money Order Acknowledgement Card bears the name and address of the Defendant and are in original, but the receipts allegedly addressed to the Plaintiff are in photocopy. No reasons have been put forth for non-production of the original as per the requirement of law. The Defendant has admitted that the Money Orders which form part of Exhibit 'A' (collectively), do not contain the signatures or endorsements of the Plaintiff indicating her refusal. He also admitted to having no personal knowledge as to whether the Money Orders, part of Exhibit 'A' (collectively), were tendered for delivery to the Plaintiff and that she had refused it. The evidence of the Postman, the witness of the Defendant in no way strengthens his case as in the first instance no proof of him being a Postman

was ever furnished. He is unaware as to who was responsible for delivery of the Money Orders to the address or who had endorsed the refusal on the Money Order Acknowledgment Cards. He was not able to throw light on whether the Postman of Gangtok Head Post Office actually went to the house of the Plaintiff to deliver the Money Orders.

18. The further argument of the Defendant was that Section 27 of the General Clauses Act lays down that, where any Central Act or Regulation made after commencement of the Act authorizes or requires any document to be served by post, wherever the expression "server" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Pausing here for a moment, the Section importantly lays down that the letter is to be "properly addressed". The receipts filed by the Defendant would indicate that it was addressed to "Ratna Pradhan (Gangtok) Gangtok - 737101". This address is indeed peremptory and how the Post Office is to recognize this individual, being bereft of a detailed address defies logic, nor is its brevity explained by the Defendant. That apart, the Money Order Acknowledgment Card does not bear the stamp of the Gangtok Post Office to establish receipt at the said Post Office and the endorsement "Refuse by Payee hence Rtn to Sender" (sic), too is devoid of the stamp of the Gangtok Post Office, thereby failing to indicate that it was ever received in the Gangtok Post Office at any point of time. In **P. S. Nirash and Another** vs. **Smt. Mintok Dolma Kazini and Another**[9] this Court held that, "Exhibit D-3 appears to be a refused Money Order of Rs.140/- only and, apart from the fact that, as rightly pointed out by the District Judge, the refusal having been denied by P.W.1 on oath, the endorsement "refused" on the said Money Order could not, by itself and without the evidence of postal peon, lead to any presumption that the same was tendered to the addressee and was refused by him." The situation is similar herein as the Defendant insists that the Money Orders were dispatched, but there is no proof whatsoever to establish that the Money Order was indeed addressed to the Plaintiff, or received at the Post Office, delivered to her, and refused by her except for the month of March 2013 as admitted by her. No Postman of Gangtok was examined to establish

[9] AIR 1984 Sikkim 1

such refusal nor does the signature of the Plaintiff appear on such alleged refusal.

19. In view of the above discussions, it is clear that in the absence of any cogent proof to establish dispatch of the house rents and refusal of payment by the Plaintiff, no other conclusion can be arrived at, save the fact that the Defendant failed to pay the rents and hence defaulted. On this count, I am in disagreement with the Learned Trial Court, who after examining the evidence found that the Money Order Acknowledgement Cards, Exhibit 'A' (collectively) was sans details of the addressee, despite which he went on to conclude that the Defendant was indeed sending the monthly rent on a regular basis.

20. Consequently, the findings of the Learned Trial Court on Issue Nos.1, 3, 4 and 5 are set aside. The Plaintiff having established default in payment of rent by the Defendant from November 2012, the Plaintiff is entitled to the relief on this ground, i.e., eviction of the Defendant from the suit premises.

21. Resultant, Appeal is allowed in part.

22. The Defendant shall vacate the suit premises on or before 31-10-2017 and hand over vacant possession to the Plaintiff.

The Defendant shall also pay the arrears in rent from the month of November 2012, till the time that he hands over vacant possession of the suit premises to the Plaintiff as ordered herein.

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

24. No order as to costs.

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

SLR (2017) SIKKIM 127

(Before Hon'ble the Chief Justice)

Crl. M.C.No.11 of 2017

Shri Sanjay Prasad and Another ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENTS

For the Petitioners : Mr. Yadev Sharma and Mr. Dilip Kumar Tamang, Advocates.

For the Respondent: Mr. Santosh Kr. Chettri, Asstt. Public Prosecutor.

Date of decision: 28th July 2017

Criminal Procedure Code, 1973 – S. 482 – Relative scope – Extraordinary powers of High Court under S. 482 to quash FIR/ criminal proceeding involving non-compoundable offence in view of compromise arrived at between the parties – Penal Code, 1860 – Ss. 498-A, 352 and 323 – Quashing of FIR – Joint application made on behalf of parties for quashing of FIR – State has no objection – FIR and consequential proceedings quashed – Petition allowed, "to protect and preserve the sanctity of family life and also for proper development of the child,..." (Paras 6 to 11)

Petition allowed.

Chronological list of cases cited:

1. Manoj Sharma v. State and Others, (2008) 16 SCC 1: (2010) 4 SCC (Cri) 145
2. Sushil Suri v. Central Bureau of Investigation and Another, (2011) 5 SCC708: AIR 2011 SC 1713
3. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 30: AIR 2012 SC Supp 838

4. Ashok Sadarangani and Another v. Union of India and Others, (2012) 11 SCC 321: AIR 2012 SC 1563

5. Yogendra Yadav and Others v. State of Jharkhand and Another, (2014) 9 SCC 653: AIR 2014 SC 3055

ORDER

Satish K. Agnihotri, CJ

This is a petition preferred by the husband and wife to quash the FIR, bearing No. 261/2015 dated 05th October 2015, lodged by the wife against the husband and consequential criminal case pending on the file of the Chief Judicial Magistrate, East Sikkim at Gangtok.

2. The brief facts, as narrated by the petitioners, are that the second petitioner was legally married wife of the first petitioner and living together at M.G. Marg, below Hotel Bayul, Gangtok. As stated in the FIR, the first petitioner used to torture, harass and beat the second petitioner regularly. On 4th October 2015 at about 10.30 PM, she was beaten and her neck was throttled which might have led to her death. Further, the first petitioner picked up a kitchen knife and also attempted to stab her. Cognizance of the report was taken and a criminal case, being GR Case No. 109 of 2016, was registered against the first petitioner under Sections 498A/352/323 of the Indian Penal Code, 1860 (for short, "IPC"). As required, proper investigation was done before filing the charge-sheet on 27.04.2016. The petitioners have jointly stated that after the said incident, both of them started living peacefully in the same house and nurturing the sole child, a son of 9 years of age. It is contended by the learned counsel appearing for the petitioners that keeping in view the peace and betterment of the family and the child, the second petitioner along with the first petitioner have entered into a compromise, which was duly executed on 20th February 2016, giving a quietus to the case in the interest of family and the society. Learned counsel would further contend that the FIR and the consequential criminal case be quashed for the benefit and growth of the family in the society.

3. Supporting the case of the petitioners, learned State counsel would submit that though the charge is serious in nature, but for benefit of the family fabric, the case may be considered for quashment of the FIR as

well as the criminal case against the first petitioner pending before the Chief Judicial Magistrate.

4. Heard learned counsel for the parties. Examined the pleadings and also the relevant documents appended hereto.

5. Indisputably, the first and second petitioners are lawfully wedded husband and wife. It has also come on record that they are blessed with one son of 9 years of age. The family comprises of husband, wife and the child. It is necessary for the well being of the family fabric that every constituent must make contribution and also compromise in the interest of other family members. There is no dispute that the first petitioner, under the mistaken belief, tried to exercise dominion over the wife, by show of his muscular might. This inexorable act of the first petitioner falls within the ambit of crime. A person who commits a crime against the basic norms of the society, is not entitled to live in the society, and as a retributory and ameliorative measure, he is to be removed from the society and kept in captivity. A fine may also be imposed as punishment to mend his ways and make himself suitable to be a part of the society. If the charges framed against the first petitioner are proved that will entail a punishment. The second petitioner feels that in the interest and well being of the family and the sole child, one more opportunity be given to the first petitioner. If the criminal case filed by the second petitioner is allowed to complete its course, this may lead to the destruction and desecration of the family life. It is noticed that both the petitioners are living happily, thus, it is necessary for this Court to exercise its extraordinary jurisdiction in the case under the provisions of Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code").

6. In the case of ***Manoj Sharma*** vs. ***State & Ors***[1], wherein the question involved was as to whether a first information report under Sections 420/468/471/34/120-B IPC deserves to be quashed either under Section 482 of the Code or under Article 226 of the Constitution, when the accused and the complainant have compromised and settled the matter between themselves. The Supreme Court speaking through Hon'ble Mr. Justice Altamas Kabir (as he then was), observed as under:

> **"8.** In our view, the High Court's refusal to exercise its jurisdiction under Article 226 of the Constitution for quashing the criminal proceedings cannot be supported. The first

[1] (2008) 16 SCC 1

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

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

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

7. In yet another case, ***Sushil Suri*** *vs.* ***Central Bureau of Investigation & Anr.***[2], while further examining the scope, ambit and extent of Section 482 of the Code, the Supreme Court held as under:-

> **"16**. Section 482 CrPC itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely, *(i)* to give effect to an order under CrPC; *(ii)* to prevent an abuse of the process of court; and *(iii)* to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provisions is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito

[2] (2011) 5 SCC 708

justitiae to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdictionunder Section 482 CrPC. Though it is emphasized that exercise of inherent powers would depend on the facts and circumstances of each case, but the common thread which runs through all the decisions on the subject is that the Court would be justified in invoking its inherent jurisdiction where the allegations made in the complaint or charge-sheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged.**"**

8. A larger Bench of Supreme Court in ***Gian Singh*** vs. ***State of Punjab & Anr.***[3], summed up the correct proposition of law in this respect as under: -

> **"57**. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the end of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment**.**
>
> **58**. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not

[3] (2012) 10 SCC 30

> compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. ……."

9. Subsequently, in ***Ashok Sadarangani & Anr.*** vs. ***Union of India & Ors.***[4], referring to earlier decision rendered by it, the Supreme Court observed as under:

> "24. Having carefully considered the facts and circumstances of the case, as also the law relating to the continuance of criminal cases where the complainant and the accused had settled their differences and had arrived at an amicable arrangement, we see no reason to differ with the views that had been taken in *Nikhil Merchant case* or *Manoj Sharma case* or the several decisions that have come thereafter. It is, however, no coincidence that the golden thread which runs through all the decisions cited, indicates that continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimate, may conclude in a decision which may be of any consequence to any of the other parties."

10. In ***Yogendra Yadav and others vs., State of Jharkhand and another***[5], wherein the accused was charge-sheeted for an offence committed, *inter alia*, under Section 307 IPC, which is non-compoundable, the Supreme Court held as under:

> "4. Now, the question before this Court is whether this Court can compound the offences under Sections 326 and 307 IPC which are non-compoundable? Needless to say that offences which are non-compoundable cannot be compoundable by the court. Courts draw the power of compounding offences from Section 320 of the Code. The said provision has to be strictly followed (*Gian Singh v.*

[4] (2012) 11 SCC 321
[5] (2014) 9 SCC 653

> *State of Punjab : (2012) 10 SCC 303)*. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve more turpitude, grave offences like rape, murder, etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace."

11. Applying the well-settled principles of law to the facts of the case, as stated hereinabove, I am of the considered view that to protect and preserve the sanctity of family life and also for proper development of the child, the petition deserves to be allowed.

12. Resultantly, FIR bearing No. 261/2015 dated 05th October 2015 and the consequential proceedings in GR Case No. 109 of 2016 (State of Sikkim Versus Shri Sanjay Prasad) pending on the file of the Court of Chief Judicial Magistrate, East Sikkim at Gangtok, are quashed.

13. Thus, this petition is allowed. No order as to costs.

SLR (2017) SIKKIM 134
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan

Criminal Appeal No. 14 of 2015

Kaziman Gurung ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Ajay Rathi, Mr. Rahul Rathi, Mr. Aditya Makkhim, Ms. Pema Wongmu Bhutia, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri, Legal Aid Counsels.

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

Date of decision: 26th July 2017

A. Criminal Procedure Code, 1973 – S. 154 – FIR –being lodged by someone who did not witness the crime-non-mentioning of the name of the Appellant in FIR is not of much significance – FIR although not a substantive piece of evidence, however, reassures the Court and corroborates the oral testimony. (Paras 28 and 46)

B. Evidence Act, 1872 – S. 60 – Evidence of a witness of a fact which could be heard being direct evidence – Admissible. Truth of what was heard by that witness – not admissible not being direct unless the person from whom the witness heard about the fact is examined as 'best evidence'. (Para 31, 35, 37, 53 and 60)

C. Criminal Trial – Appreciation of evidence – Discrepancy as to time of incident – On facts, discrepancy of time of incident is not considered as such a discrepancy that would render the evidence inadmissible. Considering human conditioning, it is difficult to expect witnesses to remember every little detail with mathematical precision, especially of events which have transpired much earlier. There is a need for completion of effective investigation and filing of charge sheet before good evidence is lost due to lapse of time and faded memory. (Para 42)

D. Evidence Act, 1872 – S. 114 illustration (a) – Presumption of facts – Court may presume that the Appellant who was found in possession of the stolen bag along with its contents belonging to the victim and which bag was found by the wife in the possession of the Appellant soon after the incident is the person who is the thief. (Para 58)

E. Criminal Trial – Witnesses – Injured victim – Testimony of – Evidentiary value – Held, an injured person in the natural course of events would not implicate an innocent person and let go the real culprit – identification of the Appellant by the victim in Court, although after one year eleven months is without any hesitation and unblemished – Appellant had been seen by the victim from close quarters categorically identified the Appellant as the assailant – Victim's evidence is truthful and clear and needs no corroboration – Eye witness account of the victim who was injured with a deep cut injury on the neck could have easily seen the face of the Appellant assaulting him and his appearance and identity would well remain imprinted in his mind – Evidence of an injured victim, if truthful need no corroboration. (Paras 28 and 67)

F. Criminal Trial – Identification – Identification of accused – Dock identification vis-a-vis Test Identification Parade –Failure to hold Test Identification Parade does not make the evidence of identification in Court inadmissible – Identification in Court is a substantive piece of evidence – Test Identification Parade if conducted, would corroborate the same – Failure to do so does not make the evidence of identification in Court inadmissible – Held, that the Investigating Officer not conducting Test Identification Parade, in the facts and circumstances of the case, is not fatal. – Defence cannot take advantage of an unknowing error committed by a witness unfamiliar to Trial Court procedure – Justice may not be served if the Defence were to be allowed to steal a march by an innocuous act of the victim to accompany his wife to Court. (Paras 59, 65, 66, 68)

G. Criminal Procedure Code, 1973 – S.102 – Powers upon the Police officer to seize property suspected to be stolen, or found under circumstances which creates suspicion of the commission of any offence – Investigation Officer is a police officer and as such, authorised to exercise the power under S. 102 Cr.P.C. – No such

inflexible proposition of law that there ought to be independent witnesses associated with the seizure – Police Officer in the course of investigation can seize any property if such property alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has a direct link with the commission of offence – Failure of the Prosecution to explain how certain items were seized from the house of the victim does not shake the foundational facts of the case. Held, the Court has a duty to ensure that truth prevails. In material particulars the fact being well established, this Court is of the view that the said discrepancy does not shake the foundational facts of the present case. (Paras 71, 72, 80 and 81)

H. Criminal Trial – Identification mark – The fact that the Appellant had inflicted a deep cut injury in the front of the neck of the victim by a sharp edged weapon having been proved, the failure to clinchingly identify the weapon of offence by the seizure witnesses, although categorically identified by the Investigation Officer, is irrelevant – The failure of the Investigating Officer to affix identification mark on material objects for proper identification is improper – However, in the present case, the failure of the Investigating Officer to do so thereby allowing confusion to the mind of the seizure witnesses does not detract the case of the Prosecution which has otherwise been proved by congent evidence. (Para 75)

I. Evidence Act, 1872 – Ss. 60, 64 and 65 – Best Evidence Rule – Wound Certificate of the victim – Certificate of injury of the Appellant – Doctor who conducted the examination of the victim and the Appellant – not examined – Wound Certificate and Certificate of injury not admissible. (Paras 82 and 83)

J. Criminal Procedure Code, 1973 – S. 162 – Sketch map prepared by IO – Admissibility in evidence – Contents of rough sketch map prepared by Investigating officer is admissible except the identification of the place of occurrence marked "P.O" as same is hit by the provision of S. 162 Cr.P.C - No witness came forward and deposed that the place of occurrence was shown to the Investigation Officer. (Para 86)

K. Indian Penal Code, 1860 – S. 307 – Attempt to murder – Nature of Injury – "Hurt" – In order to attract S. 307, injury need not be on a vital part of body – Held, Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section – It has been found that the victim was inflicted a deep cut injury in the front of his neck, a vital part of his body, which injury is more grievous than a hurt – premeditation which is discernible in the act of the Appellant – Appellant knew what he was doing – Appellant committed the heinous act, unprovoked – time, place and manner of the commission of the crime are indicative of the motive. (Paras 87, 88, 90, 92)

L. Indian Penal Code, 1860 – Ss. 392 and 390 – Punishment for robbery – Theft is an ingredient of robbery – Felonious taking from the person of another or in his presence against the persons will, by violence or putting him in the form of injury elevates theft to robbery – Essential ingredients of robbery: (1) accused committed theft; (2) accused voluntarily caused or attempted to cause (i) death, hurt or wrongful restraint, (ii) fear of instant death, hurt or wrongful restraint; (3) accused did either act for the end (i) to commit theft; (ii) while committing theft, (iii) in carrying away or in the attempt to carry away property obtained by theft – Held, evidence of victim and Seema Singhal read with other evidence on record clearly brings the act of the Appellant within the parameters of S. 392 and amounts to 'robbery' as defined therein. (Para 98, 99, 102)

M. Criminal Procedure Code, 1973 – S. 31 – Sentence in cases of conviction of several offences at one trial – When the prosecution is based on single transaction where it constitutes two or more offences, sentence are to run concurrently. Held, award of sentence on the Appellant to run consecutively was not correct and it ought to run concurrently – Penal Code, 1860, S. 392 – does not grant any discretion vis-a-vis Sentence – When found guilty of offence of robbery under S, 392, IPC it was incumbent to sentence the Appellant with 'rigorous' imprisonment.

(Paras 111, 113, 114 and 115)

N. Criminal Trial – Sentencing policy – Heavenly retribution – Incapacitation, in the present case, also seems to have been achieved

by the heavenly retribution. Both the offences committed by the Appellant being heinous offences the deterrence theory as a rationale for punishing the Appellant were more relevant, without anything more – Act of discouraging criminality may perhaps have been partially achieved by the paraplegic incapacitation – When the offender suffered serious physically injury in a bid to escape after the crime and in the process physically incapacitated himself, this fact relevant for sentencing. (Para 116 and 117)

O. Human Rights – Appellant suffers from disability – prison authorities would keep in mind the diaability, on being so satisfied and protect his human rights, which is paramount. (Para 118)
Appeal dismissed.

Chronological list of cases cited:

1. Girija Shankar v. State of U.P, (2004) 3 SCC 793
2. Dudh Nath Pandey v. State of U.P., (1981) 2 SCC 166 : AIR 1981 SC 911
3. Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283: AIR 1997 SC 322
4. Jumni and Others v. State of Haryana, (2014) 11 SCC 355 : (2014) 3 SCC (Cri) 380: 2014 Cri LJ 1936
5. Jodhan v. State of Madhya Pradesh, (2015) 11 SCC 52: 2015 Cri LJ 3291
6. Rehmat v. State of Haryana, 1996 (3) Crimes 238
7. Noorahmmad and Others v. State of Karnataka, (2016) 1 R.C.R. (Criminal) 961
8. Mukesh & Another v. State for NCT of Delhi and Others, (2017) 6 SCC 1
9. State of Madhya Pradesh v. Mohan and Others, (2013) 14 SCC 116: AIR 2013 SC 3521: 2013 Cri LJ 4007
10. Anjani Kumar Chaudhary v. State of Bihar and Another, (2014) 12 SCC 286: AIR 2014 SC 2740
11. Girija Shankar v. State of U.P, (2004) 3 SCC 793: AIR 2004 SC 1808 : 2004 Cri LJ 1388

12. Venu *alias* Venugopal and Others v. State of Karnataka, (2008) 3 SCC 94: AIR 2008 SC 1199
13. O.M. Cherian v. State of Kerala, (2015) 2 SCC 501: AIR 2015 SC 303: 2015 Cri LJ 593
14. Kuldeep Singh v. State of Haryana and Others, Manu/SC/1546/2016
15. State of Himachal Pradesh v. Nirmala Devi, 2017 SCC online SC 374

JUDGMENT

Bhaskar Raj Pradhan, J

1. A Trial of the offences under Section 307 and Section 392 IPC conducted by the Learned Session Judge, East Sikkim at Gangtok (hereinafter the learned Session Judge) resulted in the conviction of the Appellant on both the charges after examining 17 witnesses. The Appellant is aggrieved by the Judgment of the Learned Session Judge dated 24.07.2015 (hereinafter the impugned Judgment) and the order on sentence dated 27.07.2015 (hereinafter the impugned sentence). The present Criminal Appeal No. 14 of 2015 (hereinafter the present Appeal) seeks to assail both the impugned Judgment and impugned sentence.

2. On 23.07.2013, Dr. Sangeeta Pradhan, Medical Officer in Sir Thutob Namgyal Memorial Hospital (hereinafter the STNM Hospital), Gangtok, examined a patient, one Suresh Agarwal, found a deep cut injury in front portion of his neck and lodged an FIR with the Sadar Police Station.

3. Around the same time Sub Inspector (S.I.), Rinku Wangmu Bhutia of Sadar Police Station, Gangtok received a telephonic information from Bhim Bahadur Basnett, former Superintendent of Police about the incident, on the basis of which FIR number 182/2013 dated 23.07.2013 under Section 307, Indian Penal Code, 1860 (hereinafter the IPC) was registered at 2010 hrs against unknown person(s) and investigation taken up.

4. On completion of investigation, the Prosecution filed a charge-sheet No. 199 dated 01.10.2013 (hereinafter the charge-sheet) u/s 307 and 392 of the IPC.

5. A supplementary charge-sheet was also filed on 17.10.2013 on receipt of forensic report from the Regional Forensic Science Laboratory (hereinafter RFSL), Saramsa, Ranipool.

6. On 30.05.2014 the Court of the Principal Session Judge, East Sikkim, Gangtok, framed two charges as under:-

> *"**Firstly** – That you on 23.07.2013 at around 8 p.m at Diesel Power House Road, Gangtok, East Sikkim under the jurisdiction of Sadar P.S., East Sikkim, did an act, to wit, you used a knife to cut the throat of the victim Suresh Agarwal with such knowledge that under such circumstances that if by that act you had caused the death of the said Suresh Agarwal, you would have been guilty of murder and by the said Act you caused hurt to Suresh Agarwal and thereby committed an offence punishable under Section 307 of the IPC, 1860, and within my cognizance.*
>
> ***Secondly**- that you on the same date, day , time and place as above committed robbery by taking a bag belonging to the victim Suresh Agarwal, containing a sum of Rs. 4,840/- (Rupees four thousand, eight hundred and forty) only, which was the property of the said Suresh Agarwal and in his possession and which you robbed him of in the Diesel Power House Road, Gangtok, East Sikkim at about 8 p.m. and thereby committed an offence under Section 392 of the IPC, 1860, and within my cognizance."*

7. The Appellant having pleaded not guilty the case was put to trial.

8. The Prosecution examined 17 witnesses.

9. After the Prosecution closed its evidence, examination of the Appellant u/s 313 of the Code of Criminal Procedure, 1973 (hereinafter the Cr.P.C) was recorded on 10.06.2015 by the learned Session s Judge.

10. Although an opportunity to enter his defence was granted to the Appellant, the Appellant declined.

11. On 24.07.2015 the learned Session Judge rendered the impugned Judgement holding, inter-alia, that the Prosecution had proved its case

against the Appellant u/s 307 and 392 of the IPC, beyond all reasonable doubt and thus, the Appellant stands convicted and liable to be sentenced in accordance with law.

12. On 27.07.2015, the Learned Session Judge sentenced the Appellant to undergo (i) simple imprisonment for one year and six months and a fine of ₹ 10,000/- under Section 307 IPC and in default of fine to undergo further imprisonment for six months; (ii) imprisonment for one year and six months along with fine of ₹ *10,000/-* under Section 392 IPC and in default of fine to undergo further imprisonment for six months. The sentences were to run consecutively. The period of imprisonment already undergone by the Appellant during investigation and trial would be set off against this sentence. The amounts of fines if recovered were to be made over to the victim as compensation under Section 357 Cr.P.C..

13. This Court has heard Mr. Ajay Rathi, Learned Counsel for the Appellant (hereinafter the learned Counsel for the Appellant) as well as Ms. Pollin Rai, learned Assistant Public Prosecutor (hereinafter the learned APP) for the Respondent-State.

The Appellant's case.

14. The learned Counsel for the Appellant would argue that the Prosecution case suffers from material discrepancies which have rendered the case of the Prosecution improbable. The learned Counsel for the Appellant for the aforesaid purpose would draw the attention of the Court to the cross-examination of the various Prosecution witnesses and highlight, what according to him, were the material discrepancies. It was also argued that Seema Singhal (PW 6), the wife of Suresh Kumar Singhal, (PW 16) (hereinafter the victim (PW 16) who is said to have gone down to the 'jhora' and taken the bag from the assailant could not also identify the Appellant. The learned Counsel for the Appellant would argue that there is no eye witness in the present case. He would further argue that the victim (PW 16) had in cross-examination deposed that:- "*it is true that I had not seen the accused injured after he jumped from the "jhora". I heard from others that the accused had been injured*". The learned Counsel for the Appellant would point out that Deven Bajaj (PW 2), Sharavan Kumar Sharma (PW 3) and Pradeep Singhal (PW 4) also could not identify the accused. Infact, it was argued, that Shravan Kumar Sharma (PW 3) who

had stated that he had seen the assailant running could not identify the Appellant. Besides, the learned Counsel for the Appellant would also draw the attention of this Court to the discrepancy in the statement of Tashi Wangchuk Rana (PW9), Jigme Bhutia (PW 10), Dadiram Chettri (PW 13). The learned Counsel for the Appellant would emphasise on the fact that the victim (PW 16) had not named the Appellant to the Doctor at both the STNM hospital as well as the Central Referral Hospital, Tadong and would thus argue that the identification of the Appellant in Court could not be considered. The learned Counsel for the Appellant would draw the attention of the Court to the statement recorded under Section 313 Cr.P.C to question no. 82 wherein the Appellant had stated that on the relevant night he was going to his Aunt s house for dinner on her invitation when he heard people shouting 'chor chor' and saw a man running away and thus he too started chasing the said man because of which he had fallen down into the 'jhora' and that the actual assailant had jumped across the 'jhora' and run away and argue that, therefore, it was a case of mistaken identity and that the Appellant had provided adequate explanation. The learned Counsel for the Appellant would also question the alleged recovery and seizure of material objects. It was also argued that the prosecution could not stand in the leg of the defence and it would have to prove its case beyond reasonable doubt and that the chain of circumstances has not been established to sustain a conviction. The learned Counsel for the Appellant would also argue that human blood could not be detected in the 'rambo knife' (MO II) and thus it could not be connected to the crime. The learned Counsel for the Appellant would also argue that Test Identification Parade having not been conducted the identification of the Appellant in Court would have no value. He would also argue that there was personal enmity between the Appellant and the victim (PW 16) as the Appellant owed Rs. 70,000/- to the victim (PW 16) which fact was available in the statement recorded of the Appellant to question no. 75 and 81 of the Section 313 of the Cr.P.C statement.

15. *In contra,* the learned APP would contend that the present case is a case of direct evidence of the victim (PW 16) and not circumstantial evidence as argued by the learned Counsel for the Appellant. The learned APP would also argue that to justify the conviction under Section 307, IPC it is not essential that bodily injury capable of causing death should have been inflicted and although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the

accused, such intention may also be deducted from other circumstance, and may even, in some cases, be ascertained without any reference at all to actual wounds. She would rely upon the Judgment of the Apex Court in ***Girija Shankar Vs. State of U.P***[1] for the said purpose. The learned APP would also argue that it is sufficient to justify a conviction under Section 307, IPC if there is present an intent coupled with some overt act in execution thereof. The learned APP would argue that the presence of the accused in the place of occurrence has been adequately proved by Seema Singhal (PW 6), Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10). Learned APP would also argue that Test Identification Parade was not required as the victim (PW 16) himself was a witness and that the plea of alibi taken by the Appellant is proved to be false. Learned APP would rely upon the ***Dudh Nath Pandey v. State of Uttar Pradesh***[2], ***Binay Kumar Singh v. State of Bihar***[3] **and** ***Jumni and Others v. State of Haryana***[4]. The learned APP should also argue that the ingredient of Section 392 IPC i.e. robbery had been fully satisfied. Learned APP would thus argue that the impugned Judgment and sentence needs no interference.

Consideration:-

16. Raju Ghosh (PW 5) who works in an online lottery shop situated near hotel Hungry Jack, National Highway, Gangtok, East Sikkim as a money collector does not remember the date but sometime in the month of July 2013 he remembered that their customer, the victim (PW 16) who is a lottery agent had come to their shop at around 07.00 to 07.15 pm and deposited some amount and thereafter left the shop. In cross-examination, he stated that:- *"it is true that I was not in office on the relevant day."* The learned Counsel for the Appellant would submit that therefore the evidence of Raju Ghosh (PW 5) is unreliable. This Court would not consider the evidence of Raju Ghosh (PW 5).

The evidence of the injured victim (PW 16).

17. The victim (PW 16), a resident of Diesel Power House Road (hereinafter the DPH Road), Gangtok, East Sikkim owned an online lottery shop near Denzong Cinema Hall, opposite Super Market, Gangtok. On

[1] (2004) 3 SCC 793
[2] (1981) 2 SCC 166
[3] (1997) 1 SCC 283
[4] (2014) 11 SCC 355

23.07.2013 at around 07.00 pm he closed his shop and started returning to his residence carrying Rs. 70,000/- in a bag. *En route*, he made payment to the lottery manager for purchasing the lottery tickets from him. When he reached DPH road, at around 07.30 pm he was called from the back by a person who put his hand over his shoulder. When he turned the said person assaulted him with a sharp weapon over his neck and started snatching his bag which had around Rs. 4,000/- in it. The victim (PW 16) protested but the said person cut the handle of his carry bag with the said weapon and snatched his bag containing money and a water bottle. In the process, the victim (PW 16) also kicked the said person. On his kick the weapon fell down. He ran after the said person shouting *„thief thief* and saw him jumping over the *„jhora* (the word „jhora is in nepali. Translated it means deep drain). Since he was injured and blood was oozing out from his neck he proceeded to STNM hospital. On reaching the Emergency ward of the STNM hospital, the hospital personnel informed the police. Police came to the STNM hospital and enquired about the matter. Thereafter, the Doctor of STNM hospital sutured his wounds and on the same day he was referred to Central Referral Hospital, Tadong and discharged after three days of the incident.

18. The victim (PW 16) also identified and exhibited the following material objects :-

1. MO I – the bag the Appellant had snatched from him on the relevant night.
2. MO VII- the water bottle that he was carrying in the bag MO I.
3. MO VIII – money amounting to Rs. 4840/- the Appellant had stolen from him on the relevant night.
4. MO VI- the blood stained T-shirt that he was wearing during the relevant time which was seized by the police.
5. MO IX- the pant he was wearing at the relevant time which was also seized by the police.

19. The victim (PW 16), could not identify (MO II)-the knife, as it was dark when he was assaulted by the Appellant.

20. The victim (PW 16), however, categorically identified the Appellant, as the assailant. In his examination-in-chief, the victim (PW 16) stated :-

> *"I know the accused person (identified) as he is the person who had assaulted me on that day."*

21. In his cross-examination, the victim (PW 16) on being led stated:-

> *"it is true that I was able to speak when I reached Emergency Ward at STNM hospital after the alleged incident. It is true that the Doctors did not record my statement at Emergency Ward. (Volunteers to say that the Doctors advised me not to talk since there was injury on my neck and my condition would deteriorate)*
> *..... It is true that I did not mention the name of the accused to the Doctors at STNM hospital or at Central Referral Hospital, Tadong."*

22. The victim (PW 16) also admitted in his cross-examination that, he cannot correctly identify the currency note marked (MO VIII) as the same currency note which was carried by him because he had not affixed any identification marks on it.

23. Perhaps, it may be almost impossible to identify currency notes unless one records the numbers thereon seals the sense and leaves identification marks to identify the currency notes. The Investigating Officer (PW 17) ought to have done so. The failure of the victim (PW 16) to identify the unmarked currency notes however, also, reassures this Court of his truthfulness to the identification of the Appellant in Court.

24. Although there was no identification mark on the bag (MO I) and the water bottle (MO VII), the victim (PW 16) reiterated that he could still identify the said articles as the said articles belonged to him. (MO VII) was his water bottle, (MO I) was his bag which was snatched by the Appellant. Of course, the victim (PW 16) would be able to identify the material objects even without the identification mark. As correctly held by the learned Session Judge, the victim (PW 16), in fact, was a truthful witness.

25. The learned Counsel for the Appellant would contend that inspite of the fact that the victim (PW 16) knew the Appellant he did not name the Appellant to the Doctor at the STNM hospital, Dr. Sangeeta Pradhan (PW 1) and identified the Appellant only in Court. The learned Defence Counsel, however, has not put a single question to the victim (PW 16) to demolish the identification of the Appellant in Court. In fact, there is not even a denial of the identification of the Appellant in Court by the victim (PW 16).

26. The learned Counsel for the Appellant would argue, based on certain answers to the questions put to the Appellant under Section 313, Cr.P.C, that the victim (PW 16) had falsely identified the Appellant in Court as the said Appellant owed the victim (PW 16) certain sums of money. The learned Counsel for the Appellant would also argue, again based on, certain answers to the questions put to the Appellant under Section 313 Cr.P.C, that in fact the Appellant was going to his aunt s house for dinner as she had invited the Appellant and while on his way near DPH road he heard people shouting *„chor chor* and saw a man running away after which he also started chasing the said person but slipped and fell down in the *'jhora'*.

27. It was not the case of the Prosecution that the Appellant owed money to the victim (PW 16). It was also not the case of Prosecution that the Appellant was going to his aunt s house for dinner on invitation when the incident happened. Both the aforesaid facts were the defence of the Appellant. Although the Learned Session Judge, having given the opportunity to lead defence evidence, the Appellant did not. It is difficult to accept the said defence.

28. An injured person in the natural course of events would not implicate an innocent person and let go the real culprit. The identification of the Appellant by the victim in Court, although after one year and 11 months is without any hesitation and unblemished. In the present case, the victim (PW 16), although in the night, had seen the Appellant, from close proximity. The FIR having been lodged by Dr. Sangeeta Pradhan (PW 1) and not by the victim (PW 16), the non mention of the name of the Appellant in the FIR (Exhibit 1) is not of much significance.

29. The Apex Court in re: ***Jodhan v. State of Madhya Pradesh***[5] has held as under :-

> ***"28.*** *..... Additionally, we may note with profit that these witnesses had sustained injuries and their evidence as we find is cogent and reliable. A testimony of an injured witness stands on a higher pedestal than other witnesses. In Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] , it has been observed that: (SCC p.*

[5] (2015) 11 SCC 52

271, para 28) "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone." It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion was expressed by placing reliance upon Ramlagan Singh v. State of Bihar [Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881 : 1973 SCC (Cri) 563] , Malkhan Singh v. State of U.P. [Malkhan Singh v. State of U.P., (1975) 3 SCC 311 : 1974 SCC (Cri) 919] , Vishnu v. State of Rajasthan [Vishnu v. State of Rajasthan, (2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Balraje v. State of Maharashtra [Balraje v. State of Maharashtra, (2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] and Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] .

***29.** From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge."*

30. Deven Bajaj (PW 2), a resident of Paljor Stadium road, Gangtok, East Sikkim and who runs a business of electrical goods there, at around 07.00 to 07.30 pm of 23.07.2013, while watching a program on television in his house, situated on the third floor of a building, suddenly heard people shouting "*chor chor*" below his house on the road side. He came out of

his house to find out what was the commotion about and he saw people gathered at the said place of occurrence.

31. Deven Bajaj (PW 2) in his deposition also stated that :- *"I learn that the victim Suresh Kumar Agarwal has been looted and assaulted by a person on the same roadside"*. The fact that Deven Bajaj (PW 2) heard that the victim (PW 16) has been looted and assaulted by a person on the same roadside is admissible under Section 60 of the Indian Evidence Act, 1872 (hereinafter the Evidence Act) but the truth of what Deven Bajaj (PW 2) heard is not admissible unless the person who told him so is brought to the witness box since the „best evidence has not been put up.

32. Similarly, Sharavan Kumar Sharma (PW 3), a resident of DPH road, Gangtok, East Sikkim, in the ground floor of a building owned by T. T. Tamang, at exactly the same time (07.00 pm to 7.30 pm) on 23.07.2013 also heard some people shouting *"chor chor"* from the road side. When he went out to find out what happened he saw a person running towards Norkhil Hotel and a few persons chasing him. In cross-examination, the said witness, Sharavan Kumar Sharma (PW 3) admitted that the victim (PW 16) used to reside in the upper floor of the same building where he resided.

33. Both Deven Bajaj (PW 2) and Shravan Kumar Sharma (PW 3) corroborates the testimony of the victim (PW 16) to the extent that both heard someone shouting 'chor chor' at the same time the victim (PW 16) shouted the said words, after the incident and started chasing the Appellant.

34. Bhim Bahadur Basnett (PW 12), a retired Senior Superintendent of Police, who was residing at DPH complex at the relevant time, also heard noises below his house and some persons shouting that a thief had fallen into a '*jhora*' while escaping on 23.07.2013 at around 07.00 pm to 07.30 pm. He came out of his house and went to check. He saw a group of people near the house of Additional DGP, T.T Tamang in the same colony. On enquiry he was told that one 'marwari' had been assaulted by a knife by a person after which the said 'marwari' had been evacuated to STNM hospital and the assailant had fallen into a „jhora . He looked into the '*jhora*' and saw a man lying therein. He could not see the face of the assailant as it was dark. He telephoned and informed the duty officer and directed him to depute police personnel to the spot. After about 10-15 minutes, 2-3 police personnel arrived at the spot and went into the '*jhora*'

after he told them to check if the man had broken bones and whether he was still alive. He was informed by the police personnel inside the '*jhora'* that the assailant was still breathing. Thereafter, he returned home.

35. The fact that Bhim Bahadur Basnett (PW 12) made an enquiry and he was told that one 'marwari' had been assaulted by a knife by a person after which the said 'marwari' had been evacuated to STNM hospital and the assailant had fallen into a '*jhora'* , is admissible. The truth about what Bhim Bahadur Basnett (PW 12) heard is not, unless, the person who told him so was brought to the witness box. The rest of his evidence is clear and acceptable.

36. Dadiram Chettri (PW 13), a resident of DPH complex, Gangtok, East Sikkim was also watching television at around 07.30 to 08.00 pm in the year 2013 (he does not remember the date or month when he deposes on 26.03.2015 after nearly a year and seven months after the incident) when he heard some noise below his house. He went out and saw a group of person gathered there. Amongst the people gathered, he saw the retired Senior Superintendent of Police, Bhim Bahadur Basnett (PW 12) there. He went to where the crowd was. There he learnt that one Suresh Kumar Singhal (PW 16) had been assaulted with a knife by an unknown person who while escaping after the assault, fell into the 'jhora' behind Norkhil hotel, Gangtok. After sometime 3-4 police personnel came there and evacuated the assailant to the hospital in a police vehicle. As he was quite far from the '*jhora'* he could not see the face of the assailant.

37. The fact that Dadiram Chettri (PW 13) learnt that one Suresh Kumar Singhal (PW 16) has been assaulted with a knife by an unknown person who while escaping after the assault fell into the '*jhora'* behind Norkhil Hotel, Gangtok, is admissible. However, the truth about what he learnt is not, unless, the person from whom he learnt was brought to the witness box.

38. Dadiram Chettri s (PW 13) evidence corroborates the testimony of Bhim Bahadur Basnett (PW 12) both on the factum of his presence at the place of occurrence and police personnel reaching there and evacuating the assailant from the 'jhora' to the hospital.

39. Rinku Wangmu Bhutia (PW 11) was the police personnel who received the telephonic information from Bhim Bahadur Basnett (PW 12). On receipt

of the information he directed Constable Tashi Wangchuk Rana (PW 9), who was on beat duty, to go to the place of occurrence and verify the facts. On verification, Tashi Wangchuk Rana (PW 9), informed him that the Appellant was inside the '*jhora*' having fallen after he had made a bid to escape and that the Appellant may have broken his back. Thereafter, he directed Tashi Wangchuk Rana (PW 9), to take the Appellant to the STNM hospital.

40. Rinku Wangmu Bhutia (PW 11) corroborates the testimony of Bhim Bahadur Basnett (PW 12) about the call made by him and giving information to the police station about the incident. Rinku Wangmu Bhutia (PW 11) also corroborates the testimony of both Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) about finding the Appellant inside the 'jhora' immediately after the occurrence with a suspected broken back.

41. Tashi Wangchuk Rana (PW 9), a police personnel on patrolling duty, on 23.07.2013, received information from Sadar Police Station on his walkie-talkie that one person after assaulting a man and while running away had fallen into a '*jhora*' near Norkhil hotel and that they should bring the person who had fallen to the Sadar Police Station. As directed they had gone to the place and found the Appellant inside the '*jhora*' in an unconscious state. Thereafter, he reported the matter to Sadar Police Station and took the Appellant to the STNM hospital. The said witness also identified the Appellant in Court on 18.03.2015.

42. The said witness, Tashi Wangchuk Rana (PW 9), in his examination-in-chief stated that he received the information about the assault on 23.07.2013 at around 05.30 pm to 6.30 pm. The learned Counsel for the Appellant would contend that it is a serious discrepancy. The learned APP would contend that it is but a minor inconsistency. This Court does not consider this as such a discrepancy that would render the evidence inadmissible. Considering human conditioning, it is difficult to expect witnesses to remember every little detail with mathematical precision, especially of events which have transpired much earlier. There is a need for completion of effective investigation and filing of charge sheet before good evidence is lost due to lapse of time and faded memory.

43. Jigme Bhutia (PW 10), a home guard, was also on patrolling duty along with Tashi Wangchuk Rana (PW 9) when Tashi Wangchuk Rana (PW 6) received a call on the wireless set from Sadar Police Station while on

patrolling duty to the effect that one person was assaulted by a thief with a knife and the assailant had run away after snatching a bag from the victim (PW 16) and while running away the assailant fell into a drain near the Norkhil Hotel. They were directed over the wireless set to bring the assailant to the Police station. Jigme Bhutia (PW 10) correctly states the time of receipt of the information as 07.15 pm on 23.07.2013. He, after Tashi Wangchuk Rana (PW 9) received the information on his wireless set about the assault, accompanied Tashi Wangchuk Rana (PW 9) also to the drain (in nepali "*jhora*") and saw the Appellant person lying in semi conscious state and moaning in pain. The Appellant was not in a position to talk and stand by himself. They informed the Sadar Police Station of the situation over the wireless set. A vehicle was sent from the Sadar Police Station in which the Appellant was put and taken to the STNM hospital with a driver. Tashi Wangchuk Rana, (PW 9) accompanied the Appellant. Jigme Bhutia (PW 10) could not, as the Appellant had to be kept in lying position.

44. The testimony of Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10), both police personnel, reassures this Court and corroborates the identification of the Appellant in Court by the victim (PW 16). Their depositions also makes it evident that it was the Appellant and Appellant alone who was lying fallen into the same 'jhora' where the victim (PW 16) testified the Appellant had fallen after he tried to escape. Their depositions also corroborate the evidence of Bhim Bahadur Basnet (PW 12).

45. On 23.07.2013, Dr. Sangeeta Pradhan (PW 1), Medical Officer, STNM hospital, Gangtok, East Sikkim received a patient, the victim (PW 16), a 55 year old male, with a history of having been assaulted by an unknown person. On examination she found a deep cut injury in front of his neck. Thereafter, she sent an information to the Sadar Police Station vide a Exhibit 1. Dr. Sangeeta Pradhan (PW 1) was the Doctor who examined the victim (PW 16) at the STNM Hospital and found a deep cut injury in front of his neck. She wrote the fact about the victim (PW 16), being found with a deep cut injury is front of his neck in the FIR (Exhibit 1) too, immediately on examining the victim (PW 16). She deposed about the said fact once again in Court. The deep cut injury in the front portion of the neck of the victim (PW 16) stands proved.

46. The said F.I.R (Exhibit 1) although not a substantive piece of evidence, however, reassures the Court and corroborates the oral testimony of Dr. Sangeeta Pradhan (PW 1).

47. In cross-examination, Dr. Sangeeta Pradhan (PW 1) admitted that she had not mentioned that the injury was sufficient to cause death in the F.I.R (Exhibit 1). There was no requirement for her to do so. F.I.R (Exhibit 1) was only the first written information to the Sadar Police Station given by the said Dr. Sangeeta Pradhan (PW 1). The medical report of the victim (PW 16) strangely, has not been produced by the Investigating Officer (PW 17). He ought to have done so.

48. The learned Counsel for the Appellant would argue that the failure to name the Appellant to the Doctor was fatal and would rely upon the Judgment of the Apex Court in re: ***Rehmat v. State of Haryana***[6]**.** The Apex Court had held that "*ordinarily, in a medico-legal case, the doctor is supposed to write down the history of the injured but admittedly in this case medical papers of Padam Singh (PW.4) do not indicate the name of the assailant*." In the present case the medical papers of STNM hospital is not on the record. What is on record is the First Information Report (Exhibit 1) filed by the Doctor, who examined the victim (PW 16), at the STNM hospital.

49. Sonam Rinzing Shenga (PW 14), who was the Station House Officer, Sadar Police Station, Gangtok received an information on 23.07.2013 at around 08.10 pm from the Medical Officer, Emergency Ward, STNM hospital, Gangtok to the effect that they had received the patient who had been assaulted by an unknown person and a patient had a deep cut injury in his neck. He was also informed that the name of the patient is Suresh Agarwal, (PW 16) aged about 55 years and a resident of Diesel Power House, Gangtok. On receipt of the said information he registered Sadar P.S Case No. 182/2013 dated 23.07.2013 under Section 307 IPC and endorsed the case to the Investigating Officer (PW 17) for further investigation.

50. Sonam Rinzing Shenga (PW 14) identified the FIR (Exhibit 1), by Dr. S. Pradhan, (PW 1), Medical Officer, STNM hospital, Gangtok. He also identified and exhibited the formal FIR, (Exhibit 4) and his signature thereon at (Exhibit 4 (a)).

51. Sonam Rinzing Shenga (PW 14) corroborates the testimony of Dr. Sangeeta Pradhan **(PW 1)** that she lodged the FIR (Exhibit 1).

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[6] 1996 (3) Crimes 238

52. Pradeep Singhal (PW 4), brother of the victim (PW 16), on 23.07.2013 at around 07.00 pm to 07.30 pm, received a telephonic call from one Birju, a friend of his brother, who had in turn received a call from his friend, Imtiaz of Diesel Power house (DPH) informing him that his brother had been assaulted by someone and had been evacuated to the STNM Hospital and that he should reach the hospital immediately.

53. The fact that Pradeep Singhal (PW 4) received a call from Birju and he heard what Birju told him is admissible. The truth of what Birju told him is not admissible as both Birju and Imtiaz were not brought to the witness box.

54. On reaching the hospital Pradeep Singhal (PW 4) met his brother, the victim (PW 16) in the emergency ward of the STNM Hospital. Thereafter, he went to Sadar Police Station and verbally lodged a complaint to the effect that his brother had been assaulted with a knife by an unknown person. Pradeep Singhal (PW 4) also deposed that his brother was operated upon at the STNM Hospital after which they shifted him to the Central Referral Hospital, Manipal, Tadong.

55. In cross-examination, the said witness, Pradeep Singhal (PW 4), on being led, admitted that his verbal complaint was reduced to writing by police personnel at Sadar Police Station. The verbal complaint reduced to writing is not on record. The learned Counsel for the Appellant would contend that this fact is a serious discrepancy. The factum of Pradeep Singhal (PW 4) having gone to the Sadar Police Station and lodging a verbal complaint which was reduced to writing has not been proved. This, however, does not affect the fundamental and foundational facts of the present prosecution.

56. Pradeep Singhal (PW 4) also stated in cross-examination, that at the relevant time he was not aware as to who had assaulted his brother and that he still does not know the Appellant. The identification of the Appellant by the victim (PW 16) and by Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) being clear and without any hesitation, Pradeep Singhal (PW 4) stating in cross-examination that he did not know and still does not know the assailant does not demolish the identification of the Appellant by the victim (PW 16), Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10).

57. Seema Singhal (PW 6), wife of the victim (PW 16), at around 07.30 to 08.00 pm on 23.07.2013, also heard people shouting below her house and went to the road. On reaching the road she was informed that her husband had been assaulted with a knife by someone and evacuated to the hospital. On the way to the hospital she met her mother-in-law, Radha Devi Singhal, who informed her that one thief had taken the cash bag that her husband was carrying at the relevant time and while doing so the thief had fallen. She went to see the thief and found her husband s bag with him. The assailant had fallen into the *'jhora'* next to her house. She took the bag from the possession of the said thief by going to the place where he had fallen from the path along and inside the *'jhora'* . Thereafter, she went to the STNM hospital where her house had been hospitalised. The following day the police came to her house and seized the bag from her brother-in-law, Pradeep Singhal (PW 4). She identified the bag (MO I) and as the one her husband was carrying at the time of the incident. She could not identify the person who assaulted her husband and took away the money bag. In cross-examination she admitted that she had come to the Court along with her husband and he was present in Court.

58. This Court may presume that the Appellant who was found in possession of the Bag (Mo I) belonging to the victim (PW 16) with Rs. 4840/- (MO VIII) in it along with a water bottle (MO VII) by Seema Singhal (PW 6) soon after the incident is the person who is the thief u/s 114 illustration (a) of the Evidence Act.

59. It was but natural for the wife, Seema Singhal (PW 6) to be accompanied by her husband to the Court. The learned Defence Counsel, although got recorded the fact that the husband of Seema Singhal (PW 6) was present in Court on 05.03.2014 when her deposition was recorded, did not put any question regarding the same to the victim (PW 16) when he was subjected to intense cross-examination by the learned Counsel for the Appellant on 04.06.2015. The learned Defence Counsel cannot, therefore, take advantage of an unknowing error committed by a witness unfamiliar to Trial Court procedure. The learned Defence Counsel was well within his right to desire that the victim (PW 16) be not present in Court while recording the deposition of his wife Seema Singhal (PW 6). The learned Counsel for the Appellant, however, did not do so. Justice may not be served if the Defence were to be allowed to steal a march of an innocuous act of the victim (PW 16) to accompany his wife, Seema Singhal (PW 6) to Court.

60. Seema Singhal's (PW 6) mother-in-law, Radha Devi Singhal was not produced as a witness. The truth of what Radha Devi Singhal told Seema Singhal (PW 6) when she met her on her way to the hospital is not admissible.

Identification in Court and Test Identification Parade

61. The learned Counsel for the Appellant would contend that it was strange that inspite of Seema Singhal (PW 6) having gone to the 'jhora' and taken the bag from the possession of the thief, she could not identify the Appellant. The learned Counsel for the Appellant would also contend that the identification of the Appellant, in Court by the victim (PW 16) would therefore be doubtful since the Prosecution had failed to conduct a Test Identification Parade and the victim (PW 16) had already seen the Appellant when he had accompanied his wife, Seema Singal (PW 6) to Court.

62. The learned Counsel for the Appellant submits that since it is the Prosecution s case that the Appellant and the victim (PW 16) were known to each other he ought to have named the accused to the Doctor at the STNM Hospital and failure to do so makes the identification of the Appellant in Court doubtful. More so, when admittedly no Test Identification Parade was conducted in the present case. A thorough examination of the materials on record makes it evident that Prosecution case was only to the extent that the Appellant would visit the victim s (PW 16) lottery shop, time to time for playing lottery. It was not the Prosecution s case that they were known to each other or that the victim (PW 16) knew the name of the Appellant. The reasoning that the victim (PW 16) gave that the Doctors advised him not to talk since there was injury on the neck and his condition would deteriorate on being cross-examined regarding his ability to speak at the STNM Hospital is plausible and thus acceptable.

63. The learned Counsel for the Appellant would rely upon the Judgment of the Hon ble Supreme Court in re: ***Noorahmmad and Ors. v. State of Karnataka***[7] to submit that since the Test Identification Parade was not held in the present case, the Appellant was entitled to an acquittal.

64. In re: ***Noorahmmad (supra)*** the facts were different. In the said case, the evidence on record clearly highlighted material contradictions and discrepancies in the Prosecution evidence. In the F.I.R which was registered,

[7] (2016) 1 R.C.R (Criminal) 961

allegations were made against four unknown persons and not against the Appellants therein despite the fact that the complainant knew the name of the accused, Noorahmmad, which fact became clear when the complainant therein deposed before the Trial Court.

65. The Apex Court in ***Mukesh & Another v. State for NCT of Delhi & Ors.***[8] *decided by a three Judges Bench* held that Test Identification Proceedings corroborate and lend assurance to the dock Identification of accused and that TIP does not constitute substantive evidence. The Apex Court referred to its previous Judgments which held, inter-alia, that an identification test is primarily meant for the purpose of helping the investigation agency with an assurance that the progress with the investigation of an offence is proceeding on the right line; Identification can only be used as corroborative of the statement in Court; Identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating Agencies to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be for the Courts of fact; substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of witness in Court, if required; identification of accused either in test identification parade or in Court is not a sine quo non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence; and the proposition of law is quite clear that even if there is no previous TIP, the Court may appreciate the dock identification as being above board and more than conclusive.

66. The law with regard to the importance of Test Identification Parade and identification in Court is well settled. Failure to hold Test Identification Parade does not make the evidence of identification in Court inadmissible. Identification in Court is a substantive piece of evidence. Test Identification Parade, if conducted, would corroborate the same. Failure to do so does not make the evidence of identification in Court inadmissible.

[8] (2017) 6 SCC 1

67. In the present case it was the victim who identified the Appellant in Court. The Appellant who had been seen by the victim (PW 16) from close quarters categorically identified the Appellant as the assailant. His evidence is truthful and clear and needs no corroboration. The eye witness account of the victim (PW 16) who was injured with a deep cut injury on the neck could have easily seen the face of the Appellant assaulting him and his appearance and identity would well remain imprinted in his mind. As a result of the Appellant trying to escape after the assault he fell into a nearby *'jhora'* from where he was picked up by the Police, Tashi Wangchuk Rana (PW 9), a police personnel on patrolling duty and Jigme Bhutia (PW 10), a home guard also on patrolling duty and taken to the hospital. The evidence of Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) who also categorically identified the Appellant in Court further corroborates the evidence of the victim (PW 16).

68. This Court is of the view that the Investigating Officer (PW 17) not conducting Test Identification Parade, in the facts and circumstances of the case, is not fatal.

MO II - 'rambo knife' and MO III – its sheath.

69. The Investigating Officer (PW 17) has proved the recovery and seizure of the 'rambo knife' (MO II) and its sheath (MO III) from the said *'jhora'*.

70. The Defence has not been able to demolish the Investigating Officer (PW 17) on the said seizure. The seizure of the 'rambo knife' (MO II) and its sheath (MO III) from the 'jhora' as deposed to by the Investigating Officer (PW 17) has not even been denied in cross-examination by the Defence.

71. The seizure of the 'rambo knife' (MO II) and the sheath (MO III) was effected by the Investigating Officer (PW 17) vide a property seizure memo (Exhibit 2) under the provisions of Section 102 Cr.P.C. This Section confers powers upon the police officer to seize property suspected to be stolen, or found under circumstances which creates suspicion of the commission of any offence. The Investigating Officer (PW 17) is a police officer and as such, authorised to exercise the power under Section 102 Cr.P.C.

72. There is no such inflexible proposition of law that there ought to be independent witnesses associated with the seizure. Section 102 Cr.P.C does not require it. When the police is not going in for the purpose of search for any specified object but for investigation emergently into a case of alleged attempt to murder and robbery there is no requirement of searching for respectable citizens to be witnesses. The police officer in the course of investigation can seize any property if such property alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has a direct link with the commission of offence. However, the Investigating Officer (PW 17), has examined two witnesses to prove the seizure. In such circumstances, it has become imperative to examine the evidence of the search witnesses also.

73. Kunj Bihari Agarwal (PW 7), a resident of Tadong, East Sikkim and who runs an electrical hardware shop, opposite police headquarter, Gangtok is a witness to the seizure and corroborated that the said knife and sheath were seized from the '*jhora*' in his presence vide a seizure memo (Exhibit 2). Kunj Bihari Agarwal (PW 7) exhibited the seizure memo (Exhibit 2) and identified his signature thereon as (Exhibit 2a). The said witness also identified (MO II) as the „rambo knife and (MO III) as the cover of the said knife recovered and seized by the police under property seizure memo (Exhibit 2).

74. During cross-examination, Kunj Bihari Agarwal (PW 7), on being led, admitted "*it is true that since no identification mark was affixed on MO II, the knife shown in the Court room may not be the seized knife also*." The learned Counsel for the Appellant therefore, contends that the Prosecution has failed to prove and connect the „rambo knife to the crime. The learned Session Judge found it unsafe to hold that the 'rambo knife' (MO II) was the weapon of offence. Rightly so, because even the second witness to the seizure, Abhijit Saha Sardar (PW 8) could not state definitely as to whether the 'rambo knife' (MO II) and its sheath (MO III) shown to him in the Court room on 12.03.2015 were the same articles which was seized by the police under seizure memo (Exhibit 2) due to lapse of time. Further there being no certainty as to where the said 'rambo knife' (MO II) was seized from.

75. The learned Session Judge was, however, of the view that this would not absolve the Appellant since non recovery of weapon of offence by itself

cannot be a reason to reject the testimony of the witnesses which are reliable. The fact that the Appellant had inflicted a deep cut injury in the front of the neck of the victim (PW 16) by a sharp edged weapon having been proved, the failure to clinchingly identify the weapon of offence by the seizure witnesses, although categorically identified by the Investigation Officer (PW 17), is irrelevant. The failure of the Investigating Officer (PW 17) to put identification mark on material objects for proper identification is improper. The Investigating Officer (PW 17) ought to have done so. In the present case, however, the failure of the Investigating Officer (PW 17) to do so thereby allowing confusion to the mind of the seizure witnesses does not detract the case of the Prosecution which has otherwise been proved by cogent evidence.

Material objects- MO I – the bag, MO VII- the water bottle, MO VIII – money amounting to Rs. 4840/-, O VI- the blood stained T-shirt, MO IX- the pants.

76. Item No. 1, 2 and 3 in the list of properties of seizure memo (Exhibit 3) proved by the Investigating Officer (PW 17) were the wearing apparels of the victim (PW 16) containing blood stains. Item no. 8 was cash amount totalling to Rs. 4840/- belonging to the victim (PW 16). As per the seizure memo (Exhibit 3) item no. 4, 5, 6 and 7 are suspected to belong to the Appellant.

77. As stated earlier, the victim (PW 16) also identified and exhibited, Exhibit (MO I) – the bag, the Appellant had snatched from him on the relevant night; Exhibit (MO VII)- the water bottle that he was carrying in the bag Exhibit (MO I); Exhibit (MO VIII) – money amounting to Rs. 4840/- the Appellant had stolen from him on the relevant night; Exhibit (MO VI)- the blood stained T-shirt that he was wearing during the relevant time which was seized by the police and Exhibit (MO IX)- the pants which he was wearing at the relevant time which was also seized by the police. Pooja Lohar (PW 15), a forensic expert from RFSL, Saramsa clearly stated both in the Forensic Report (Exhibit 5) as well as in her deposition that human blood of group AB was detected in the dried blood sample (MO IV), vest (MO V) and T-shirt (MO VI) belonging to the victim further corroborating the fact that in fact the victim (PW 16) was injured due to the assault on the relevant day.

78. The learned Counsel for the Appellant would submit that the failure of the prosecution to explain how the said items no. 4, 5, 6 and 7 of the seizure memo (Exhibit 3) suspected to belong to the Appellant, were seized vide seizure memo (Exhibit 3) and found in the bag of the victim (PW 16) would create adequate doubt about the Appellant being falsely prosecuted.

79. A perusal of the seizure memo (Exhibit 3) would show ten items were seized. Item 1, 2 and 3 were wearing apparels said to belong to the victim (PW 16) containing blood stains. Item No. 4, 5, 6 and 7 of the said seizure memo (Exhibit 3) were found in a cream colour bag which were said to belong to the Appellant. Item no. 8, 9 and 10 of the seizure memo were cash amount of Rs. 4,840/-, one dark blue colour bag and one water bottle said to belong to the victim (PW 16). The dark blue colour bag seized vide a seizure memo (Exhibit 3) was infact the bag (MO I) of the victim (PW 16). The Investigating Officer (PW 17) states that (MO I) is the blue coloured bag. The said (MO I) has been identified by the victim (PW 16) and his wife Seema Singhal (PW 6). The said items nos. 4- Grey colour shirt, 5- Brown colour wallet with Rs. 200/- in it, 6- ATM Card of State Bank, 7- two numbers of passport photo were infact found in another cream colour bag which was stated to belong to the Appellant as would be clear from the seizure memo (Exhibit 3). The Defence has not given a suggestion to the Investigating Officer (PW 17) that said articles 4, 5, 6 and 7 of the seizure memo (Exhibit 3) were planted. The items 4, 5, 6 and 7 of the seizure memo (Exhibit 3) were all personal items of the Appellant. The Investigating Officer (PW 17) ought to have explained why those items were seized from the house of the victim (PW 16). Whether the said items were picked up by Seema Singhal (PW 6) from the place of occurrence or it was collected by the Police officers immediately after the incident remains unanswered.

80. The failure of the Prosecution to explain how items no. 4, 5, 6 and 7 of the seizure memo (Exhibit 3) were seized from the house of the victim (PW 16) does not in any way, however, create any doubt of the seizure of the bag (MO I) of the victim (PW 16) along with the seizure of the money (MO VIII) amounting to Rs. 4840/- and the water bottle (MO VI).

81. The Court has a duty to ensure that truth prevails. In material particulars the fact being well established, this Court is of the view that the said discrepancy does not shake the foundational facts of the present case.

Exhibit 9-Wound Certificate of the Victim (PW 16).

82. The Investigating Officer (PW 17) also collected the medical report of the victim (PW 16) from the Central Referral Hospital and exhibited the Wound Certificate issued by the Central Referral Hospital under the signature of Dr. Tarpan Limboo. The Investigating Officer (PW 17) identified and exhibited the said Wound Certificate as (Exhibit 9) and Dr. Tarpan Limboo s signature as (Exhibit 9 (a)), identifying the signature as he prepared the Wound Certificate in his presence and signed it. The said wound Certificate records the following injuries on the victim (PW 16) :-

> *"(1). Sutured cut injury at the level of upper border of thyroid cartilage extending from (R) anterior border of SCM to left posterior border of SCM."*

83. The learned Counsel for the Appellant would submit that the Wound Certificate (Exhibit 9) is not admissible in evidence. The fact that the Investigating Officer (PW 17) obtained the said Wound Certificate (Exhibit 9) under the signature of Dr. Tarpan Limboo from the Central Referral Hospital is admissible. However, as Dr. Tarpan Limboo was not brought to the witness box, the contents of the wound certificate (Exhibit 9) are inadmissible as the 'best evidence' of Dr. Tarpan Limboo has not been brought on record.

Exhibit 10 – certificate of Injury of the Appellant.

84. The Investigation Officer (PW 17) also collected the Certificate of Injury sustained by the Appellant from Central Referral Hospital as he was shifted to Central Referral hospital from STNM Hospital. He exhibited the said Certificate of Injury as (Exhibit 10). He collected the certificate from the counter of Central Referral hospital, Tadong, Gangtok. The said Certificate of injury reflected that the Appellant was admitted to Central Referral Hospital, Tadong, on 26.07.2013 for spinal injury and paraplegia and he was operated on 01.08.2013. A perusal of Certificate of Injury (Exhibit 10) reflects that it is signed by one Dr. P.R.K Prasad. The said Doctor was not examined. The contents of the said Certificate of Injury (Exhibit 10) also stands not proved.

Exhibit 11- the Arrest Memo.

85. The Investigating Officer (PW 17) proved the arrest memo dated 25.07.2013 of the Appellant and identified his signature at Exhibit 11 (a), 11 (b) and 11 (c) as the signature of the relative of the Appellant. The said arrest memo (Exhibit 11) would show the Appellant was arrested on 25.07.2013 at 14.00 hrs at STNM hospital where he was under treatment.

Exhibit 12- the rough sketch map.

86. The Investigating Officer (PW 17) also exhibited a rough sketch map (Exhibit 12) prepared by him. The contents of the rough sketch map prepared by the Investigating Officer (PW 17) 24.07.2013 is admissible except the identification of the place of occurrence marked "P.O" as the same is hit by the provisions of section 162 Cr.P.C. No witness has come forward and deposed that the place of occurrence was shown to the Investigating Officer (PW 17) by him / her. The rough sketch map (Exhibit 12) would however and importantly show that *'jhora'* was 24 x24 6" (dimension). This fact totally improbablises the defence of the Appellant given in answer to question no. 82 of the Section 313 Cr.P.C statement of the Appellant that the actual assailant who the Appellant also chased, jumped across the *'jhora'* and ran away. An act, perhaps humanly impossible.

Section 307 IPC- Attempt to murder.

87. The Appellant has been charged under the provision of Section 307 I.P.C. Section 307 reads as under:-

> ***" Attempt to murder.-*** *whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment to life, or to such punishment as is herein before mentioned."*

88. The Apex Court in re: ***State of Madhya Pradesh v. Mohan and Ors***[9]. : has held that :-

> *"14. ..... In order to attract Section 307, the injury need not be on the vital parts of the body. In order to attract Section 307, causing of hurt is sufficient. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word "hurt" which has been explained in Section 319 IPC and not "grievous hurt" within the meaning of Section 320 IPC. Therefore, in order to attract Section 307, the injury need not be on the vital part of the body." (**emphasis supplied**)*

89. *A similar view has been reiterated by the Apex Court in re:* ***Anjani Kumar Chaudhary v. State of Bihar & Ano.***[10].

90. The Appellant called the victim (PW 16) from the back, put his hand on his shoulder and when the victim (PW 16) turned around assaulted him on his neck, a vital part of his body, with a sharp edged weapon an inflicted a deep cut injury. A deep cut injury in front of the neck caused by a sharp edged weapon inflicted by the Appellant on the victim (PW 16) is more than a 'hurt' . The intention and knowledge is clear. The Appellant, obviously, would have known that a deep cut injury in front of the neck by a sharp edged weapon would definitely cause death and he would be guilty of murder. There is premeditation which is discernible in the act of the Appellant. The Appellant knew what he was doing. The Appellant committed the heinous act, unprovoked. The time, place and manner of the commission of the crime are indicative of the motive of the Appellant.

91. The learned Session Judge has held thus:-

> *"43. The nature of injuries sustained by the victim was "deep cut injury" on the front portion of neck which PW-1 (Dr. Sangeeta Pradhan) has clearly testified and about which the victim has elaborated. It is therefore, manifest that the victim had been assaulted by the accused with a sharp edged weapon on a vital part of the body (neck). Though it is uncertain whether the knife (marked M.O –II) was the same*

[9] (2013) 14 SCC 116
[10] (2014) 12 SCC 286

weapon of offence. It is however, unmistakable that the accused had used a sharp edged weapon to inflict the injury on the victim."

92. This Court is of the view that the learned Session Judge has correctly come to the finding as quoted above. The learned Session Judge has correctly relied upon the Judgment of the Apex Court in re: ***Girija Shankar v. State of U.P***[11] which held that to justify a conviction under Section 307, IPC the Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section.

93. In view of the aforesaid the impugned Judgment convicting the Appellant under Section 307, IPC is upheld.

Section 392 IPC-robbery

94. The Appellant has also been charged under Section 392 IPC and convicted by the learned Session Judge. Section 392 IPC reads as under: -

*"**392. Punishment for robbery.** – Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."*

95. Robbery has been defined in Section 390 IPC which reads as under: -

*"**390. Robbery.-** in all robbery there is either theft or extortion. **When theft is robbery.-** Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carrying away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful strained, or fear of instant death or of instant hurt or of instant wrongful restraint…….. ……..

Explanation.- the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."*

[11] (2004) 3 SCC 793

96. The second clause of Section 390, IPC, relating to "when extortion is robbery" is not attracted in the present case. Therefore, it is important to examine what is 'theft'.

97. "Theft" has been defined in Section 378, IPC which reads as under:-

> "**378. Theft.-** *whoever, intending to take dishonestly any movable property of the possession of any person without that person s consent, moves that property in order to such taking, is said to commit theft."*

98. The basis of the offence of robbery under Section 390, IPC is either theft or extortion committed under the circumstances specified therein. In the present case, extortion is not an issue. Theft is an ingredient of robbery. The felonious taking from the person of another or in his presence against the persons will, by violence or putting him in the form of injury elevates theft to robbery. For the Section to apply it is necessary that the accused should have from the very start, the intention to deprive complainant of the property and should for that purpose either hurt him. As distinguished from theft, robbery consists in the causing or attempting to cause death, hurt, or wrongful restraint, or fear of instant death, hurt or wrongful restraint.

99. In re: ***Venu alias Venugopal and others v. State of Karnataka***[12], the Apex Court held:

> *"8. Section 392, IPC provides for punishment for robbery. The essential ingredients are as follows:*
> 1. *Accused committed theft.*
> 2. *Accused voluntarily caused or attempted to cause.*
> *(i) death , hurt or wrongful restraint;*
> *(ii) fear of instant death, hurt or wrongful restraint.*
> 3. *He did either act for the end*
> *(i) to commit theft;*
> *(ii) while committing theft;*
> *(iii) in carrying away or in the attempt to carrying away property obtained by theft."*

100. The victim (PW 16) has categorically deposed :-

"On 23.07.2013 at around 7 p.m. I closed my shop and started

[12] (2008) 3 SCC 94

returning back to my residence carrying ₹ 70,000/- in a bag. En route I made payment to Lottery Manager for purchasing the lottery tickets from him .When I reached DPH road, it was around 7.30 p.m where I was called from the back by a person and he put his hand over my shoulder. When I turned back, he assaulted me with a sharp weapon over my neck and started snatching my bag where around ₹ 4,000/- was there. I protested but the accused cut the handle of my carry bag with the said weapon and snatched my bag containing my money and a water bottle. In the process I kicked him. I know the accused person (identified) as he is the person who had assaulted me on that day. On my kick, the weapon carried by the accused fell down. I ran after him shouting "thief thief" and saw him jumping over the "jhora". Since I was injured and blood was oozing out from my neck, I proceeded to STNM hospital. On my reaching the Emergency Ward of the hospital, the hospital personnel informed the police. Police came to STNM hospital and enquired about the matter. Thereafter the Doctor of STNM hospital sutured my wounds and on the same day I was referred to Central Referral Hospital, Tadong."

101. Seema Singhal (PW 6), the wife of the victim (PW 16) has deposed that on hearing the thief had taken away the cash bag (MO I), the victim (PW 16), her husband, was carrying she went into the 'jhora' and took the said bag (MO I) from the possession of the said thief and the following day the said bag (MO I) was seized from her house from her brother, Pradeep Singhal (PW 4). The fact that the bag (MO I) had been seized from the house of Seema Singhal (PW 6) has been proved. The seizure memo (Exhibit 3) also record so. It is not the Appellant s case that the money Rs. 4840/- (MO VIII) found in the bag (MO I) which was taken from the possession of the Appellant from the 'jhora' by Seema Singhal (PW 6) was not found inside the bag (MO I) which was identified by the victim (PW 16). Seema Singhal (PW 6) also identified the bag (MO I) as the bag, her husband, the victim (PW 16), was carrying at the time of incident. The presence of the Appellant has been continuously established by the evidence of the prosecution witnesses as held above.

102. The evidence of the victim (PW 16) and Seema Singhal (PW 6) read with other evidence on record clearly brings the act of the Appellant within

the parameters of the Section 392, IPC and amounts to 'robbery' as defined therein.

103. This Court is of the view that the Prosecution has been able to discharge the burden of proof which lay on it to prove the charge under Section 307 and 392 IPC, proving all the ingredients of the offence, beyond all reasonable doubt leaving no uncertainty that it is the Appellant and the Appellant alone who committed the said offences and no other.

Sentence

104. The learned Counsel for the Appellant would finally argue that if this Court was to uphold the conviction then the sentences may be directed to run concurrently and not consecutively as has been done by the learned Session Judge.

105. The object and purpose of imposing adequate sentence as held by the Apex Court time and again is to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. The sentence imposed ought to reflect the conscience of the society. Sentence without considering its effect on the social order may not serve the avowed object.

106. This Court has perused the impugned sentence passed by the learned Session Judge. A person found guilty of offence under Section 307, IPC is liable for punishment with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment, as provided in the first part of the said Section.

107. In the present case, it has been found that the victim (PW 16) was inflicted a deep cut injury in the front of his neck, a vital part of his body, which injury is more grievous than a hurt.

108. Similarly a person found guilty of offence under Section 392, IPC is liable for rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. In the present case, the Appellant has also been found guilty of the offence of robbery.

109. For the purpose of examining whether the learned Session Judge was right in directing the sentences to run consecutively, it is important to examine Section 31 of Cr.P.C.

110. Section 31 of Cr.P.C provides :-

> ***"31. Sentence in cases of conviction of several offences at one trial.*** *- **(1)** When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.*
>
> ***(2)** In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-*
> *(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;*
> *(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.*
> ***(3)** For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."*

111. The Apex Court in re: ***O.M. Cherian v. State of Kerala***[13], held as under:-

> ***"10.*** *Section 31 CrPC relates to the quantum of punishment which may be legally passed when there is (a) one trial, and (b) the accused is convicted of "two or more offences". Section 31*

[13] (2015) 2 SCC 501

CrPC says that subject to the provisions of Section 71 IPC, the court may pass separate sentences for two or more offences of which the accused is found guilty, but the aggregate punishment must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC. In Section 31(1) CrPC, since the word "may" is used, in our considered view, when a person is convicted for two or more offences at one trial, the court may exercise its discretion in directing that the sentence for each offence may either run consecutively or concurrently subject to the provisions of Section 71 IPC. But the aggregate must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC, that is; (i) it should not exceed 14 years; and (ii) it cannot exceed twice the maximum imprisonment awardable by the sentencing court for a single offence.

11. *The words "unless the court directs that such punishments shall run concurrently" occurring in sub-section (1) of Section 31, make it clear that Section 31 CrPC vests a discretion in the court to direct that the punishment shall run concurrently when the accused is convicted at one trial for two or more offences. It is manifest from Section 31 CrPC that the court has the power and discretion to issue a direction for concurrent running of the sentences when the accused is convicted at one trial for two or more offences. Section 31 CrPC authorises the passing of concurrent sentences in cases of substantive sentences of imprisonment. Any sentence of imprisonment in default of fine has to be in excess of, and not concurrent with, any other sentence of imprisonment to which the convict may have been sentenced.*

12. *The words in Section 31 CrPC*

"… sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct"

indicate that in case the court directs sentences to run one after

the other, the court has to specify the order in which the sentences are to run. If the court directs running of sentences concurrently, order of running of sentences is not required to be mentioned. Discretion to order running of sentences concurrently or consecutively is judicial discretion of the court which is to be exercised as per the established law of sentencing. The court before exercising its discretion under Section 31 CrPC is required to consider the totality of the facts and circumstances of those offences against the accused while deciding whether sentences are to run consecutively or concurrently."

Then further at Page 510:

*"**16.** When the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. So far as the benefit available to the accused to have the sentences to run concurrently of several offences based on single transaction, in V.K. Bansal v. State of Haryana [(2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , in which one of us (T.S. Thakur, J.) was a member, this Court held as under: (SCC p. 217, para 16)*

"16. … we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor."

Then further at Page 511:

*"**19.** As pointed out earlier, Section 31 CrPC deals with quantum of punishment which may be legally passed when there is (a) one trial; and (b) the accused is convicted of two or more offences. The ambit of Section 31 is wide, covering not only a single transaction constituting two or more offences but also offences arising out of two or more transactions. In the two*

judgments in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and Manoj [(2014) 2 SCC 153 : (2014) 1 SCC (Cri) 763] , the issue that fell for consideration was the imposition of sentence for two or more offences arising out of the single transaction. It is in that context, in those cases, this Court held that the sentences shall run concurrently.

20. *Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically.*

21. *Accordingly, we answer the reference by holding that Section 31 CrPC leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the court may direct. We also do not find any conflict in the earlier judgment in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and Section 31 CrPC."*

112. A perusal of the impugned sentence makes it evident that the sentences against the Appellant has been directed to run 'consecutively', however, the learned Special Judge has failed to specify the order in which the sentences are to run which is the mandate of the law.

113. The learned Session Judge has held that: *"the intention of the accused was to rob the victim of his money bag and in the process, he had attacked him with a sharp weapon on a vital part of the body (i.e. front portion of the neck) though the victim survived, the circumstances would show that the accused had sufficient knowledge that the consequence of such murderous attack would result in the victim s death."* It is evident that the commission of attempt to murder was in pursuit of the act of robbery. As held by the Apex Court in re: ***O.M Cherian (supra)*** when the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. Although, the facts constituting the offence of attempt to murder and robbery are distinct and different. The Apex Court in re: ***Kuldeep Singh v. State of Haryana and Ors.***[14] was examining the sentence imposed to run consecutively for offences under Section 307 and Section 148 read with Section 149 of the IPC. While doing so, the Apex Court held:-

> *"5. Since the occurrence is the same, and the punishment is under different provisions of the IPC, for the same incident, we are satisfied that the sentence awarded under the different provisions of the IPC ought to have been ordered to run concurrently, specially keeping in mind the facts and circumstances of the present case. Ordered accordingly."*

114. In the circumstances, it is held that the award of sentence on the Appellant to run consecutively was not correct and it ought to run concurrently as held by the Apex Court as above.

115. When the learned Session Judge found the Appellant guilty of the offence of robbery u/s 392, IPC it was incumbent upon him to sentence the Appellant with 'rigorous' imprisonment. Section 392 IPC does not grant any discretion there. The impugned sentence u/s 392, IPC is, therefore, required to be converted to 'rigorous' imprisonment for one year and 6 months, keeping the rest of the sentence as awarded by the learned Session Judges as it is. In re: ***State of Himachal Pradesh v. Nirmala Devi***[15]. the Apex Court held that:-

[14] Manu/SC/1546/2016
[15] 2017 SCC online SC 374

"15. .....

In an appeal from conviction, if the conviction is maintained, the Appellant Court has the power to alter the nature or the extent, or the nature and extent, if the sentence (though it cannot enhance the same). However, such a power has to be exercised in terms of the provisions of Indian Penal Code etc. for which the accused has been convicted. Power to alter the sentence would not extend to exercising the powers contrary to law."

116. Evidently this is also a case of heavenly retribution. The Appellant, as per the impugned sentence passed by the learned Session Judge, suffers from paralysis of the lower half of the body as it appears from his appearance and requires help in performing daily chores. Incapacitation, in the present case, also seems to have been achieved by the heavenly retribution. Both the offences committed by the Appellant being heinous offences the deterrence theory as a rationale for punishing the Appellant were more relevant, without anything more.

117. The act of discouraging criminality may perhaps have been partially achieved by the paraplegic incapacitation. When the Appellant, the offender, suffered serious physical injury in a bid to escape after the crime and in the process physically incapacitated himself, this fact, would be relevant for sentencing specially if there are long lasting consequences. Although the present case involves heinous crimes committed by the Appellant, in the present case, in the peculiar facts, the learned Special Judge has passed the impugned sentence keeping in mind both the aggravating as well as mitigating circumstances.

118. *G*iving this Courts anxious consideration to the facts and peculiar circumstances of the present cas*e* and the law laid down by the Apex Court, this Court is of the view that the cause of criminal justice would be purposefully and adequately served if the sentences imposed by the learned Session Judge is directed to run concurrently and not consecutively. At the same time the sentence imposed for the offence of robbery under Section 392 by the learned Session Judge is changed from simple imprisonment to rigorous imprisonment as per the law. As the learned Counsel for the Appellant claims that the Appellant suffers from disability it is hoped that the

prison authorities would keep in mind the disability, on being so satisfied, and protect his human rights, which is paramount.

119. In view of the above, the Appeal is partly allowed. The sentences under Section 307 and 392 IPC are directed to run concurrently. The sentence imposed under Section 392 IPC is to be rigorous imprisonment. The rest of the sentences, fines and directions passed by the learned Session Judge is upheld

120. Copy of this judgment be remitted to the Court of learned Session Judge forthwith along with records of the Court for compliance.

121. The Appellant is on bail he shall surrender before the Court of learned Session Judge on 28.07.2017 to undergo sentence as pronounced.

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