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SUBJECT INDEX

ownership – The Suits do not suffer from the deficiency of non-disclosure of cause of action.

Ms. Phonographic Performance Ltd* v. *Arthur's Plur and Others ***908-A***

Code of Criminal Procedure, 1973 – S. 125 (4) – Living in Adultery – If there is constant insinuation and allegation about the character of the wife without substance and in such circumstances, if the wife leaves the matrimonial house, it cannot be said that there is no sufficient reason for the wife to refuse to live with her husband – Merely because Sachin Rai was in the bedroom of the Respondent in a house where two daughters of the parties were staying, it cannot be said that the Respondent had committed adultery with him. Even if for the sake of argument it is accepted that the Respondent had committed adultery, then also there is no evidence of a continuous course of conduct demonstrating that the Respondent was living in adultery.

Suk Bir Chettri* v. *Jamuna Chettri ***796-A***

Constitution of India – Article 226 – It may well be recalled that it is established law that the body conducting the examination cannot change the course midway – Nevertheless the Appellant instead of protesting the Computer Skills Test at the relevant time on grounds as raised in the Writ Petition, chose to undergo the test and protested only on his failure on the overall tests conducted, although admittedly he passed the Computer tests – The Appellant cannot turn around to challenge the examinations once he has participated there in and emerged unsuccessful, therefore this objection is of no consequence and falls flat.

Rajendra Prasad* v. *Sikkim University and Others ***777-C***

Constitution of India – Article 226 – From the reports and affidavits of the Respondents, it appears that after this Court had taken up this *suomotu* PIL, the Respondents had engaged their attention for welfare of the yaks and some steps have been taken to that effect. It is categorically stated that there will be no dearth of feed to feed yaks in the event of a natural calamity and that the Respondents are fully prepared to meet any challenge. It is noticed that a Yak Healthcare and Rapid Action Team had been formed which will be supported by the District level and State level Disaster Management Team. A multi-purpose Bolero Camper had also been provided to attend to emergency veterinary need of the yak herders. Two dedicated staff had been posted in Muguthang and Lashyar valley to act as an

interface of the administration with the yak herders for dissemination of information. It is noticed that assistance and help of ITBP would be sought for obtaining first hand information relating to prevailing weather conditions and the respondents had also taken the Metrological Department on board – While some steps have been taken, it will be necessary for the Respondents to be vigilant and they must take immediate rear-guard action with no loss of time by implementing the decisions in the field – The State respondents are directed to implement in letter and spirit the decisions taken and steps contemplated, as indicated in the reports and the affidavits.

In Re: 300 Yaks Starve to Death in North Sikkim* v. *State of Sikkim and Others ***876-A***

Constitution of India – Article 226 – An effective remedy is available to an aggrieved person before the DRT and that the SARFAESI Act is a code unto itself. The Hon'ble Supreme Court also sounded a note of caution that High Courts should exercise their discretion to exercise jurisdiction under Article 226 of the Constitution of India in matters relating to right of Banks and other financial institutions to recover their dues with greater caution, care and circumspection – No case is made out for exercise of power under Article 226 of the Constitution of India, as the case presented by the petitioners do not come within the exceptions curved out which alone enable the Court to exercise discretionary power under Article 226 despite availability of statutory alternative remedy.

M/s Bluefern Ventures (P) Ltd. and Others* v. *Union of India and Others ***896-A***

Constitution of India – Article 226 – Prospectus of Sikkim University for the year 2018-19 – Clause 41.8 spells out that the written test will be of 50 marks. The syllabus of the examination indicates that questions to the extent of 50 % of the total marks shall be in respect of research methodology and the rest 50% in respect of subject specific – Clause 41.8 finds place immediately after the schedule for written test for M.Phil/Ph.D where subject of "Law" is only indicated as a programme for Ph.D. In the above context, there is no scope to accept the contention of the petitioner that the questions in respect of subject specific ought to have been on "Business Law"and not on "Law" – No merit in the writ petition that setting of the question paper was in violation of Clause 41.8 of Prospectus 2018-19.

Preeti Sharma* v. *Sikkim University and Another ***903-A***

Constitution of India – Article 227 – Code of Civil Procedure, 1908 – O. XI R. 14 – Production of Documents – The Court must be certain about the possession or power of the documents with the party against whom the order is sought before exercising the power under Order XI Rule 14, C.P.C. When the Court is not clear about the factum, no order under the said provision can be passed – The applications filed by the Petitioners does not reflect any reason whatsoever for which they seek a direction upon the Respondent No. 3 as well as SiddharthRasaily to produce the originals of the said documents – The Petitioners have not pleaded the expediency, justness and relevancy of the original documents to the matters in issue in the suits. The applications in the circumstances were rightly rejected by the learned District Judge. The rejection of the applications by the impugned orders dated 20.03.2019 does not reflect any serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if this Court does not interfere, a grave injustice would remain uncorrected. It cannot be held that the finding is so perverse, that no reasonable person can possibly come to such a conclusion – The prayers of the petitioners are not within the scope and ambit of exercise of power and jurisdiction under Article 227 of the Constitution of India.

Shri Ong Tshering Bhutia* v. *Shri Naresh Subba and Another ***929-A***

Copyright Act, 1957 – Owners of Copyright – Learned trial Court also went on to discuss the provisions of S. 33 of the Act and concluded that the Appellant was not a Copyright Society but did not specify as to what consequences followed thereto. So far as non-compliance of S. 61 of the Act is concerned this would arise only after the learned trial Court had examined the documents and arrived at the finding as to whether the Appellant was either the owner of the copyright or not. Dismissal of the Suit on this ground would only arise consequent thereto – Application of the provisions of Ss. 30 and 30A of the Act would also only have arisen subsequent to the finding of the Court as to whether the Appellant was indeed the owner of the copyright after examining the provisions of Ss.18 and 19 of the Act based on the documents relied on by the Appellant – Impugned Orders set aside – Both Suits remanded to the Trial Court.

Ms. Phonographic Performance Ltd* v. *Arthur's Plur and Others ***908-B***

Indian Evidence Act, 1872 – Use of a Statement of Witness Made in a Different Proceeding – Permissibly – In a criminal trial an accused

person is considered innocent until proven guilty. It is for the prosecution to establish its case beyond all reasonable doubt – Each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision – Even in Civil cases it could not be done unless the party agree that the evidence in one case may be treated as evidence in the other but in Criminal cases it would be impermissible (*In Re: Mitthulal v. State of Madhya Pradesh referred*) – The fact that DW-1 recorded the statement of the eyewitness in which she stated that the victim had tried to immolate herself must be given credence. However, whether what DW-1 heard and the eyewitness stated before DW-1 in her statement was the truth could have been found only if she had been produced as a witness and subjected to cross-examination. The evidence of DW-1 is therefore hearsay to that extent – The statement of the eyewitness regarding what actually transpired on that day cannot be used by the Appellant is his favour as it was not recorded in the criminal trial – Hearsay statement cannot be pressed by an accused to create doubt about the prosecution story.

Deepen Pradhan* v. *State of Sikkim ***946-A***

Indian Evidence Act, 1872 – Ss. 65A and 65B – Electronic Evidence – Electronic evidence is admissible and provisions of Ss. 65A and 65B of the Evidence Act are by way of clarification and are procedural provisions – If electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity, and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under S. 65B(h) (*In Re.: Shafhi Mohammad v. State of Himachal Pradesh cited*) – In the instant case where except for tendering a CD as an exhibit since no attempt was made by the Appellants to prove its contents as well as its authenticity, the CD cannot be held to have established the alleged conversation between the Appellant No. 2 and Respondent No.1 wherein Respondent No.1 purported to have admitted her pre-existing condition of Hypothyroidism.

Smt. Chandrawati Devi and Another* v. *Smt. Sharda Gupta and Others ***838-B***

Indian Penal Code, 1860 – S. 376 – In the instant case, neither the victim nor the family members of the victim had lodged the F.I.R – No doubt, PW-1 had stated that the Appellant had committed rape on her. However, in the totality of the facts and circumstances as appearing on the evidence

on record, we are of the considered opinion that the prosecution had not been able to establish the guilt of the appellant beyond reasonable doubt – Appellant entitled to the benefit of doubt.
Mahindra Shanker (Bishwarkarma)* v. *State of Sikkim ***804-A***

Indian Penal Code, 1860 – S. 361 – Kidnapping from Lawful Guardianship – This section seems as much to direct the minor children from being seduced for improper purposes as to protect the right of privileges of guardians having lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in the section, out of the keeping of the lawful guardian without the consent of such guardian. The use of the word 'keeping' connotes the idea of charge, protection, maintenance and control; further, the guardian's charge and control are compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. The consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent, that would take a case out of the purview of the section. It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section (*In Re.: State of Haryana v. Raja Ram cited*) – Evidence on record demonstrates that the appellant had called over the victim to meet him at Singtam and had asked the victim to board a Taxi. Even if it is to be taken that victim had consented to go along with the appellant, such consent would be immaterial and the materials on record, taken as a whole, would be indicative of the fact that the victim was persuaded to go with the appellant. The appellant had introduced the victim as his wife to PW-3 and PW-15 and on such assertion he was provided a bed to be shared by him and the victim. It demonstrates that the appellant had the intention that the victim would be seduced to illicit intercourse – Conviction under S. 366, I.P.C does not warrant any interference.
Sanjay Rai* v. *State of Sikkim ***851-B***

Indian Penal Code, 1860 – S. 376 – What emerges from the evidence of the victim is that the Appellant "had sex" with her. It is however unclear what the victim's understanding was of the words "had sex with me". The victim has failed to describe what the word "sex meant, neither has she described the actual act perpetrated on her by the Appellant – It is also

stated that the Appellant used to "sexually assault" her – The words "sexual assault" finds no definition in the I.P.C, thus for guidance we may look into the definition of the said words as found in the POCSO Act, 2012 under S. 7 – Considering that she has only claimed that there was "sexual assault" the Court cannot arrive at a hasty conclusion that when she used the words "sexually assault" or "had sex with me" it would necessarily mean or imply penetrative sexual assault – Imperative for the Prosecution to have extracted from the victim during her deposition the actual act that was committed on her considering that the Prosecution is under the mandate of proving its case beyond all reasonable doubt and cannot leave its case to ambiguities thereby leading to erroneous conclusions – It was incumbent not only upon the Prosecution but also the Learned Trial Court by exercising its powers under S. 165 of the Indian Evidence Act, 1872 to reach the crux of the matter when the victim was being examined.

Tshering Tempa Sherpa* v. *State of Sikkim ***821-A***

Indian Penal Code, 1860 – S. 415 – Cheating –A perusal of S. 415, I.P.C goes to show that this Section has two parts. While the first part of the definition relates to property, the second part need not necessarily relate to property. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property, in the second part, the person should "intentionally"induce the complainant to do or omit to do a thing. In order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was given. The explanation to the Section also provides that a dishonest concealment of facts is a deception within the meaning of the Section.

Smt. Chandrawati Devi and Another* v. *Smt. Sharda Gupta and Others ***838-A***

Limitation Act, 1963 – Article 113 – While deciding the question of limitation which is held to be involving both facts and law it is important that the Court examines the facts as well as the law. When a claim for payment of professional fees have been made giving details of the dates of engagement, the quantum of fees payable and the work done it was incumbent upon the learned District Judge to examine each of these claims even to decide whether the same were barred by limitation – The pleading in the plaint does give a clear impression that the issue of limitation was an issue of both fact and law. When the learned District Judge on 16.08.2017 had taken a view that the question of limitation involved both facts and law and therefore, it would be proper if the question of limitation is heard and

decided along with the other main issues at the final stage of the suit on receiving the evidence – This was not a case in which the issue of limitation was taken up as a preliminary issue on a pure question of law. This was a case in which the trial had been concluded and evidence led by the parties. Thus, it was incumbent upon the learned District Judge to render its judgment on all the issues arising in the suit.

Ms. Dinku Khati and Another* v. *Smt. Kamal Kumari Subba and Another ***939-A***

The Motor Vehicles Act, 1988 – Whether the Insurance Co. could be held to be liable to pay the compensation on the basis of an insurance policy which the Insurance Co. claim to be fake? – It was only before the date fixed for the Appellant's evidence that they discovered that the insurance policy was not genuine. Immediately the Appellant moved an application bringing this fact on record and seeking a prayer to file additional written statement with additional documents which was partly turned down. No opportunity was granted to the Appellant to allege and prove that the insurance policy was fake. Consequently, the Tribunal could not come to a definite conclusion as to whether the insurance policy was genuine or fake. The contractual liability of the Appellant can be determined only through the insurance policy. When admittedly the Tribunal could not determine its genuineness it may not be correct to fasten liability upon the Appellant without giving them an opportunity to assert and prove the allegation made in the application dated 05.04.2018 and in the evidence on affidavit of the Branch Manager of the Appellant – Held: Had the learned Tribunal permitted the Appellant to file additional written statement on this limited aspect allowing them to lead evidence,cross-examination would have churned the truth – Impugned judgment on the aspect of the genuineness of the insurance policy is incorrect and liable to be set aside – Although, the Appellant has not challenged the order dated 11.05.2018 passed by the Tribunal, High Court of the view that the said order is an impediment towards the search for truth and therefore, the Appellant must be given an opportunity to allege and prove what they assert in the application dated 05.04.2018 – The file restored before the learned Tribunal and the case remanded back – Tribunal to determine the question of genuineness of the insurance policy and on the liability of the compensation payable to Respondent No.1 and 2.

The Branch Manager, The New India Assurance Company Ltd* v. *Tshering Doma Tamang and Others ***829-A***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –Evidence of parents with regard to date of birth of a child is the best evidence when such evidence is backed by unimpeachable document. In the instant case, PW-2 deposed that his daughter was aged about 14 years when the offence was committed. The Birth Certificate goes to show that the victim had not completed 15 years on the date of occurrence – Having regard to the evidence on record, there is no escape from the conclusion that the victim was a minor and below 15 years on the date of occurrence.

Sanjay Rai* v. *State of Sikkim ***851-A***

Protection of Children from Sexual Offences Act, 2012 – S. 5 – Aggravated Penetrative Sexual Assault – Medical evidence does not give any indication of penetrative sexual assault on either of the victims. However, we must remain conscious of the fact that the medical examinations of the victims were conducted at least seven months after the first sexual assault and at least after a month of the last such assault. In such circumstances, no physical evidence would be traceable on the body of the minor victims unless the hymen had been ruptured – The younger victim deposed that the Appellant had put his penis on her vagina on several occasions – Both S. 3(b) of the POCSO Act and S. 375(a) of the I.P.C provide that penetration to any extent into the vagina amounts to penetrative sexual assault under the POCSO Act and rape under the I.P.C. It is settled in medical jurisprudence that every penetration of the penis into the vagina may not necessarily lead to rupture of the hymen. Although, even a slight penetration may satisfy the ingredient of the offence charged, it may not necessarily lead to rupture of the hymen.

P. K.* xxxx *(name withheld)* v. *State of Sikkim ***863-B***

Protection of Children from Sexual Offences Act, 2012 – S. 5 (m) – The F.I.R was lodged by PW-4 on 08.08.2017. On the same day, PW-1 and PW-2 were medically examined. The medical reports proved by PW-11confirms the evidence of PW-1 and PW-2 and the fact that the appellant had inserted his finger in their vagina. The fact that the injury and the erythema were visible even after a week of the incident reflects the extent to which the appellant had violated PW-1 and PW-2 – The F.I.R lodged by PW-4 immediately after she was informed by PW-1 and PW-2 that the appellant had inserted his finger in their vagina corroborate this fact. Both PW-1 and PW-2 had clearly stated to the learned Magistrate that the appellant had put his hand "in" their vagina. Therefore, their statements

recorded under S. 164 Cr.P.C. also corroborate the fact that the appellant had in fact committed penetrative sexual assault on PW-1 and PW-2.
Santa Bahadur Sarki @ Santay* v. *State of Sikkim ***813-A***

Protection of Children from Sexual Offences Act, 2012 – S. 5 (m) – Both PW-1 and PW-2 were below 8 (eight) years when they deposed before the Court. Their evidence must thus be appreciated keeping in mind their tender age, the lapse of time between the date of the incident, i.e. a week before 08.08.2017 and the time of recording the depositions, i.e. 01.03.2018 and other evidences produced. It is quite obvious that due to their tender age, PW-1 and PW-2 did not articulate their depositions keeping in mind the legal ramifications. The discrepancy pointed out by the learned Counsel for the appellant can be satisfactorily explained on the basis of the medical evidence produced by the prosecution. Their depositions read with the medical evidence clearly establish that both the victims were subjected to penetrative sexual assault as defined by section 3(b) of the POCSO Act.
Santa Bahadur Sarki @ Santay* v. *State of Sikkim ***813-B***

Protection of Children from Sexual Offences Act, 2012 – S. 27 (2) – Medical Examination of a Child – We notice that the minor victims, both female, have been medically examined by male Doctors. This is in violation of S. 27(2) of the POCSO Act. The State must ensure that adequate women Doctors are available to examine children of the female gender.
P. K.* xxxx *(name withheld)* v. *State of Sikkim ***863-A***

Sikkim University Act, 2006 – The Appellant slept over his rights, deigned it fit not to take steps although aware of the alleged illegalities and rose to defend his rights rather belatedly on his failure in the interview. Indeed, it is a case of sour grapes for the Appellant – There was no requirement for the learned Single Judge to have dwelt on the provisions of the Statutes and justified the actions of the Respondent No.1 or the First Academic and First Executive Council as it is evident that the Appellant neglected to act when required – In other words, he chose not to strike when the iron was hot and by filing the Writ Petition, sought to take remedial measures for his non-action which without a doubt is frowned upon by law.
Rajendra Prasad* v. *Sikkim University and Others ***939-A***

Sikkim University Act, 2006 – Government of India Office Memorandum No. F.3-9/97-Desk(U) dated 11.06.2001 – Guidelines for invocation of emergency powers of the Vice Chancellor – The learned Single Judge held that an extraordinary situation obtained in the Respondent University, which fell within the exception carved out in the Memorandum *supra*, hence there was no violation thereof – In our considered opinion and as already pointed out *supra*, the Appellant had adequate time to address this issue prior to the interview. He has not denied knowledge of the exercise of such powers. It was incumbent upon him to take steps immediately which he failed to do. He cannot now be heard to cry foul on his failure in the interview.

Rajendra Prasad* v. *Sikkim University and Others ***939-B***

SLR (2019) SIKKIM 777

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

WA No. 02 of 2015

Rajendra Prasad ….. APPELLANT

Versus

Sikkim University and Others ….. RESPONDENTS

Appellant in person.

For Respondent 1-2: Mr. R.K. Dev Choudhury, Advocate.

For Respondent No.3: Mr. Thinlay Dorjee Bhutia, Advocate.

For Respondent No.4: Ms. Pollin Rai, Assistant Government Advocate.

None for Respondent No. 5-7.

Date of decision: 2nd November 2019

A. Sikkim University Act, 2006 – The Appellant slept over his rights, deigned it fit not to take steps although aware of the alleged illegalities and rose to defend his rights rather belatedly on his failure in the interview. Indeed, it is a case of sour grapes for the Appellant – There was no requirement for the learned Single Judge to have dwelt on the provisions of the Statutes and justified the actions of the Respondent No.1 or the First Academic and First Executive Council as it is evident that the Appellant neglected to act when required – In other words, he chose not to strike when the iron was hot and by filing the Writ Petition, sought to take remedial measures for his non-action which without a doubt is frowned upon by law.

(Para 17)

B. Sikkim University Act, 2006 – Government of India Office Memorandum No. F.3-9/97-Desk(U) dated 11.06.2001 – Guidelines for invocation of emergency powers of the Vice Chancellor – The learned Single Judge held that an extraordinary situation obtained in the Respondent University, which fell within the exception carved out in the Memorandum *supra*, hence there was no violation thereof – In our considered opinion and as already pointed out *supra*, the Appellant had adequate time to address this issue prior to the interview. He has not denied knowledge of the exercise of such powers. It was incumbent upon him to take steps immediately which he failed to do. He cannot now be heard to cry foul on his failure in the interview.

(Para 18)

C. Constitution of India – Article 226 – It may well be recalled that it is established law that the body conducting the examination cannot change the course midway – Nevertheless the Appellant instead of protesting the Computer Skills Test at the relevant time on grounds as raised in the Writ Petition, chose to undergo the test and protested only on his failure on the overall tests conducted, although admittedly he passed the Computer tests – The Appellant cannot turn around to challenge the examinations once he has participated there in and emerged unsuccessful, therefore this objection is of no consequence and falls flat.

(Para 21)

Chronological list of cases cited:

1. Dr. Suresh Chandra Verma and Others v. The Chancellor, Nagpur University and Others, (1990) 4 SCC 55.
2. R.K. Sabharwal and Others v. State of Punjab and Others, (1995) 2 SCC 745.
3. University of Delhi v. Raj Singh and Others, 1994 Supp (3) SCC 516.
4. Dr. G. Sarana v. University of Lucknow and Others, (1976) 3 SCC 585.
5. Madan Lal and Others v. State of J&K and Others, (1995) 3 SCC 486.

6. Manish Kumar Shahi v. State of Bihar and Others, (2010) 12 SCC 576.

7. Ramesh Chandra Shah and Others v. Anil Joshi and Others, (2013) 11 SCC 309.

8. Rakhi Ray and Others v. High Court of Delhi and Others, (2010) 2 SCC 637.

9. Parshotam Lal Dhingra v. Union of India, (1958) 1 SCR 828.

10. Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) and Others, (2013) 10 SCC 324.

11. Roop Singh Negi v. Punjab National Bank and Others, (2009) 2 SCC 570.

Appeal dismissed.

JUDGMENT

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

1. Dissatisfied with the finding of the learned Single Judge in WP(C) No. 12 of 2012, by which the Writ Petition was dismissed, the Appellant as sails the Judgment dated 17.04.2015.

2. In the Writ Petition, the prayers of the Petitioner (the Appellant herein) were for quashing of the entire recruitment process under the two Appointment Notices, one dated 29.04.2010 (Annexure P-1) and the second dated 28.04.2011(Annexure R/2-17), on the basis of which the Respondent No.2 issued appointments to vacant posts in its teaching faculty. That, the private Respondents No.5, 6 and 7 in the Writ Petition being appointees to the posts of Assistant Professors, be allowed to remain in service on temporary basis until fresh recruitment process is concluded in terms of the rules and regulations. He also sought the quashing of the Termination Order dated 16.03.2012, by which his services were terminated and reinstatement into service with continuity and back wages. The learned Single Judge having discussed the points raised by the Appellant in the Writ Petition, concluded as follows in the impugned Judgment;

> ***"7****. The substantive prayers in the Writ Petition are for quashing (i) the selection process and, (ii) the order of termination of the Petitioner.*

In so far as the first prayer is concerned, it has already been held that there was no illegality committed by the Respondents No.1 and 2 in the recruitment process as alleged by the Petitioner and also that the Petitioner having acquiesced in the position, had waived his right to question the selection process. As regards the second prayer also, it has been held that the order of termination of the Petitioner was issued in due compliance of the procedure laid down in the relevant Statutes and Act of the Sikkim University and was not arbitrary. It would also be significant to note that the Petitioner was a contractual employee the term of which expired on 31-03-2012. Therefore, the prayer for reinstatement of the Petitioner in service with back wages could not have been allowed. Although the termination was effective from 16-03-2012, the salary for the remaining period also had been paid to him and was issued with an experience certificate sought for by him by orders of this Court details of which shall be stated hereafter.

***8**. The Writ Petition thus fails on account of both its merit and its maintainability.*

***9**. In the result, the Writ Petition is dismissed.*

***10**. However, before parting, it is observed that quite apparent from the records, the Petitioner was terminated from his service on 16-03-2012 when his contractual tenure was to end 15 (fifteen) days later, i.e., on 31-03-2012. The Petitioner was paid for the entire period till 31-03-2012 by order of this Court dated 25-02-2013 in CM Appl No.18 of 2013 and experience certificate was also issued pursuant to subsequent order dated 16-07-2013 in CM Appl No.31 of 2013. In view of this and in view of the fact that*

*the Petitioner is a young person with aspirations for future employment, in the interest of justice, the Respondent University shall consider converting the order of termination of his contractual service dated 16-03-2012 as termination simplicitor by deleting the last words "on grounds of misconduct".***"**

3. The facts in the Writ Petition are necessarily to be delved into for clarity in the matter. Vide Order dated 23.09.2008 the Appellant was appointed on contract w.e.f. 01.10.2008 as an Assistant Professor, in the Respondent No.2 University in the "Department of Peace and Conflict Studies and Management," for a period of six months on consolidated salary, which post he joined accordingly. On completion of the contractual period, on submission of fresh application, he was reappointed in the same post, the last letter of appointment on contract having been issued to him on 02.01.2012 employing him up to 31.03.2012.

4. In the meanwhile, on 29.04.2010, the Respondent No.2 issued advertisements in various local, national newspapers and the website of the University, advertising vacancies in regular teaching positions. The Appellant applied for the post of Assistant Professor in the "Department of Peace and Conflict Studies and Management" and was required to and appeared for the interview on 15.02.2012 at New Delhi. When the results were declared he emerged unsuccessful. Aggrieved, the Appellant submitted a written representation on 27.02.2012 before the Second Executive Council of the Respondent No.2, complaining of gross violation of the Sikkim University Act, 2006 (for short "Act of 2006") and Statutes of the Act of 2006 (hereinafter, "Statutes") and serious lapses on the part of the University in the recruitment process. However, pursuant to the submission of the representation, the Appellant and three others were issued Show Cause Notice by the Respondent No.2. By the second meeting of the Second Executive Council held on 16.03.2012, the services of the Appellant and another contractual faculty member were dispensed with allegedly on grounds of misconduct, sans opportunity to defend the accusation, thereby allegedly violating Clause 26 of the Statutes. The Appellant averred that the results of the interview were neither published in the newspapers nor affixed in the Notice Board or the website of the Respondent No.2 but letters offering appointment were issued to the private Respondents, while he learnt

of his failure only on enquiry from the University. That, although the regular posts were sanctioned by the University Grants Commission (for short "UGC Regulations") during the year 2008-2009, the advertisements thereto were published only on 29.04.2010, while the interview came to be conducted later between 10.01.2012 and 17.02.2012 in the absence of both the Executive and the Academic Council. Besides, the University failed to adhere to the provisions of Clause 18(1) and (2) of the Statutes which prescribes details of members who are to constitute the Selection Committee. Instead the members of the Selection Committee were selected by the Respondent No.1, usurping powers endorsed to the Executive and the Academic Council to facilitate selection of his own candidates to the vacant posts. This was done despite the Memorandum No.F.3-9/97-Desk(U), dated 11.06.2001, of the Government of India which explicitly prohibits Vice Chancellors from exercising emergency powers. That, the first Executive Council demitted Office on 03.04.2011 and the first Academic Council on 24.08.2011. Thereafter the first meeting of the Second Executive Council was held on 22.02.2012 but interviews were conducted in the intervening period as mentioned *supra* during the absence of both Councils. In the said meeting of 22.02.2012 recommendations of the Selection Committee were endorsed and appointment letters issued to the private Respondents however, the Executive Council meeting lacked the minimum requisite quorum of seven members as only six members were present as evident from a response to an RTI query. The interview was held at Delhi away from the Gangtok Head Office. The Respondent No.2 also conducted a test for Computer Skills with no notice of such test either in the advertisement or call letter. That, the roster reservation policy was not implemented in both the impugned advertisements, neither was any representative of the SC, ST or OBC communities included in the Selection Committee against the mandate of Section 5.1.1 [a(6)] of the UGC Regulations, dated 30.06.2010. A copy of the Certificate issued by the concerned Authority declaring the Appellant to be from the Other Backward Class was also annexed. Assailing the entire selection process as surreptitious, arbitrary, *mala fide* and in violation of the provisions of the Statutes, the Appellant sought the reliefs in the Writ Petition as extracted *supra.*

5. The Respondents No.1 and 2, while *inter alia* admitting in their response that the impugned interview took place on 15.02.2012, stated that the Appellant participated in the interview without protest along with other

applicants and is now estopped from challenging the selection process. The results of the interview were sealed in an envelope on 15.02.2012 itself, by the Selection Committee and on 22.02.2012, at the first meeting of the Second Executive Council held at Gangtok, Sikkim, the results were opened and declared. Consequently, the Respondents No.5, 6 and 7 being successful, came to be appointed as Assistant Professors in the Department of Peace and Conflict Studies and Management. Admittedly, the aggrieved Appellant having failed, along with his colleagues submitted a representation dated 27.02.2012 before the members of the Second Executive Council, but instead of awaiting the decision, the Appellant on 28.02.2012 went to the Press making false allegations and insinuations against the authorities of the University. Consequent thereto on 06.03.2012, the Respondent No.2 with the approval of the Respondent No.1, sought an explanation from the Appellant for his act of breach of privilege. Instead of showing cause, the Appellant questioned the competence of the Respondent No.2 to issue the said letter. That, on 16.03.2012, the Associate Professor, Department of Peace and Conflict Studies and Management, reported to the Respondent No.2 that the Appellant was abstaining from routine activities of the Department and had not taken classes. In the second meeting of the Second Executive Council held at New Delhi, on 16.03.2012, following discussions the services of the Appellant and another faculty member were terminated from the same afternoon on grounds of misconduct. The Respondents No.1 and 2 also denied the allegation of procedural lapses in the recruitment process or flouting of Clause 18(1) and 2 of the Statutes in the constitution of the Selection Committee. That, Block Roster Reservation Policy was followed and there was no *mala fide* exercise of emergency powers by the Vice Chancellor who acted on the directions and authorisation of the First Executive Council and the First Academic Council in their meeting held on 03.04.2011 and 20.08.2011 respectively, to nominate the required number of members to the Selection Committee. Denying that the Respondent University fell under the provisions of Section 5.1.1 of the UGC Regulations, dated 30.06.2010, it was asserted that they are governed by the provisions of Clause 18(2) of the Statutes. That, no procedure is prescribed for the University to declare results of the interview in accordance with the suggestions of the Appellant and the practice is to telephonically inform the successful candidates, followed by issuance of appointment letters to them. That, the principles of natural justice and Clause 26 of the Statutes were not flouted as the services of the Appellant being contractual was regulated by the terms of the contract, which, at Clause 10

specifies that his services may be terminated without notice if he was found guilty of violation of one or more of the terms set out in the letter. Besides, the Selection Committee constituted of many eminent experts and public figures. Explaining as to why the recruitments were made during the period pointed out, it was submitted that the UGC had sanctioned teaching posts against its "XI Plan allocation" and the recruitments were to be concluded during the said Plan period. However, the interviews could not be conducted during the existence of the First Executive Council and First Academic Council due to the absence of visitor's nominee and also the time entailed for carrying out the essential shortlisting and other procedures, including finalising of the dates of interview, duly considering the availability of the visitor's nominee and other Selection Committee members. That, the Second Executive Council in its first meeting held on 22.02.2012 fulfilled the requisite six members in terms of Clause 11(3) of the Statutes contrary to the Appellant's allegation, as two-third of the existing members of the Executive Council comprise the quorum. The interviews were conducted at Delhi as per the suggestions of the visitor's nominee and other Selection Committee members who came from different parts of the country, for which the candidates were paid TA/DA and the date of interview was intimated to the Appellant two months prior to the interview i.e. on 20.12.2011. That, the Computer Skills Test was conducted by the University to assess the knowledge of computers of the applicants as a mandatory qualification before participants appear for the interview. The recruitment process was carried out in absolute adherence to the Act of 2006 and the Statutes and hence the Writ Petition be dismissed.

6. The Respondent No.3 in the Writ Petition was proceeded *ex parte* vide Order dated 16.10.2012 therein. Similarly, Respondents No.5 and 6 were proceeded *ex parte* vide Order dated 29.06.2012 and Respondent No.7 was proceeded *ex parte* vide Order dated 03.09.2012. Respondent No.4 had no Counter-Affidavit to file.

7. In Rejoinder, the Appellant mostly reiterated the averments made in the Writ Petition.

8. In Appeal the Appellant assailed the Judgment in the Writ Petition and reiterated the points raised in the Writ Petition. The Respondents No.1 and 2 while supporting the impugned Judgment, reiterated the grounds put forth by them in their respective averments.

9. We have heard the rival contentions of the Appellant and the learned Counsel for the Respondents No.1 and 2 at length and have carefully considered all documents on record and perused the impugned Judgment. The citations made at the Bar have also been carefully considered.

10. In the impugned Judgment, the learned Single Judge first took up the question of violation of the Reservation Policy by the Respondent University and after verbose discussions concluded that reservation to various posts appear to have been complied as prescribed by the UGC and hence there is no violation of the Government of India Office Memorandum No.36012/ 2/96-Estt.(Res), dated 02.07.1997, issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training).

11. Assailing the said finding, the Appellant relying on the decision of the Hon'ble Supreme Court in ***Dr. Suresh Chandra Verma and Others*** vs. ***The Chancellor, Nagpur University and Others***[1] and ***R. K. Sabharwal and Others*** vs. ***State of Punjab and Others***[2] postulated that the scheme for reservations was to be applied post wise, i.e. subject wise and not block reservations as done by the Respondents No.1 and 2. It was contended that the learned Single Judge also ignored the fact that no records of the Selection Committee were furnished, no roster was produced and no attempt was made to disclose as to which candidate was appointed against which roster point and why no OBC candidate was appointed. The only fact disclosed to the High Court was the ultimate result of the chosen candidates. Thus, the learned Single Judge was in error in holding that the reservations had been applied as prescribed by the UGC when infact the Office Memorandum of 1997 *supra* was clearly flouted. That, in the concerned Department, from three vacancies two were assigned to the general category while one went to the Scheduled Tribe sans reasons, which adversely affected the results.

12. The Respondents No.1 and 2 resisting the contentions of the Appellant held that block roster reservation had been adopted in the advertised posts and therefore due adherence given to the reservation policy. Moreover, at the relevant time the Appellant had failed to vent his grievance on this count and instead chose to appear for the interview thereby waiving his rights, apart from which he is estopped from raising such contentions

[1] (1990) 4 SCC 55
[2] (1995) 2 SCC 745

belatedly. In this context, the learned Single Judge while arriving at his finding gave prolix reasons which, in our considered view, was not necessary for the following reasons; it is evident that the advertisement to the vacant posts was issued on 29.04.2010 wherein the details of the roster were reflected. It is clear that the interview was held between 10.01.2012 and 17.02.2012. Thus, the Appellant had more than adequate time to object to the non-adherence of reservation of roster points if any, if he was so aggrieved and was of the opinion that the directions as laid down in ***Dr. Suresh Chandra Verma*** (*supra*) and ***R. K. Sabharwal*** (*supra*) were not being complied with. The bogey of non-compliance of roster reservation policy has been raised by the Appellant only after he emerged unsuccessful in the interview, having failed to do so in the time between the issuance of the advertisement and the interview which he willingly participated in. This ground therefore merits no consideration clearly being an afterthought.

13. The next point taken up for consideration in the assailed Judgment was the allegation of violation of Clause 18(1) and (2) of the Statutes and thereby constitution of the Selection Committee. The learned Single Judge held that the first Executive Council and the first Academic Council vide their meetings held on 03.04.2011 and 20.08.2011 respectively, authorised the Vice Chancellor to nominate the required members of the Selection Committee to initiate the interview process. That, the Vice Chancellor had been authorised to exercise his emergency powers to select the required number of experts from the panel of names recommended by the House and constitute the Selection Committee and proceed with the recruitment action. Thus, emergency powers were resorted to by the Respondent No.1 on the authorisation and the resolution of the first Academic Council but not suo moto. The act of the Respondent No.1 was in conformity with Clause 42 of the Statutes.

14. Disagreeing with the finding the Appellant urged that the learned Single Judge also held that the Vice Chancellor had acted under Section 12(3) of the Act of 2006 which relates to emergency powers, when no requirement infact existed for invoking such powers as the Respondent No.1 could have during the existence of the first Academic Council, between 2008 to 2011 sought for the panel of names, which he failed to do, thus raising doubts of *mala fides*. That, no reserved category nominee existed in the Selection Committee and though the point was argued, the learned Single Judge did not deal with this issue at all. That, choosing expert

members for the Selection Committee in several Departments cannot be dealt with by one person as done by the Respondent No.1 as it requires expertise, this has led to several discrepancies as apparent from the copy of the Minutes of the meeting of the Executive Council dated 22.02.2012, one example being that in the Department of International Relations/Politics the Respondent No.1 chose a Professor of Geography as the expert while in the Department of Peace and Conflict Studies and Management, two members did not have the requisite specialization as also in the Department of Ethno Botany and Social Medicine Studies, Department of Psychology Studies and Department of Journalism and Mass Communications. That, the authorization of the First Executive Council vide its meeting dated 03.04.2011 is not legal neither is the selection and the exercise of emergency power by the Respondent No.1 illegal. That, it is now well settled by the ratio in ***University of Delhi*** vs. ***Raj Singh and Others***[3], that, the UGC Regulations apply to all Universities in the country which includes the Respondent University and hence the parameters prescribed therein ought to have been given compliance by the Respondents No.1 and 2. *Per contra*, the arguments advanced by Respondents No.1 and 2 was that the Respondent No.1 had acted as per directions of the Councils as observed in the impugned Judgment. That, no *mala fides* emanated in the act of the Respondent No.1 or Respondent No.2.

15. Evidently, the First Executive Council demitted Office on 03.04.2011 and the Academic Council on 24.08.2011. It is not the case of the Appellant that he was unaware of the provisions of the Act of 2006 or the Statutes as he himself has pointed out to the non-adherence of Clause 18(1) and (2) of the Statutes and Section 5.1.1 of the UGC Regulations of 2010. At the same time it is noticed that the Appellant has failed to clear the air on which of the two provisions *supra* he relies on considering that the composition of the Selection Committee under the different provisions are not identical as Clause 18(1) and (2) of the Statutes makes no provision for representative of any specific community. It is also not his case that he was debarred by any authority from raising any objection on any count at any time. Assuming that the constitution of the Selection Committee was incorrect or that the Vice Chancellor had invoked his emergency powers under Clause 12(3) of the Act of 2006 contrary to the norms laid down, it is apposite to notice that the Appellant failed to take steps when he had the

[3] 1994 Supp (3) SCC 516

time to do so. As can be culled out from the submissions and records before us the interview was conducted on 15.02.2012, the Second Executive Council in its meeting on 22.02.2012 opened the results. Although the Appellant claims that he learnt of his failure on enquiry from the Respondent No.2, he has not ventured to disclose the date of such knowledge. We however find that on 27.02.2012 he filed the representation before the Second Executive Council. He could well have raised the issue of the constitution of Selection Committee during the interim period, when the First Executive Council and Academic Council demitted Office in the year 2011 on the various dates detailed above and the date of interviews held between 10.01.2012 to 17.02.2012, he chose not to do so.

16. On this count, we may beneficially refer to the ratio in ***Dr. G. Sarana*** vs. ***University of Lucknow and Others***[4] where the Petitioner consequent to his appearance for an interview for the post of Professor having been unsuccessful contended that the experts were biased. The Hon'ble Supreme Court would observe as follows;

> **"15.** We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. .....…**"**

This observation is indeed apt for the purposes of the matter at hand as well. Similarly, in ***Madan Lal and Others*** vs. ***State of J & K and Others***[5] the Petitioners assailed the viva voce test and the method that was conducted after emerging unsuccessful in the same. The Hon'ble Supreme Court held as follows;

[4] (1976) 3 SCC 585
[5] (1995) 3 SCC 486

> **"9.** ..... Thus the petitioners took a chance to get themselves selected at the said oral interview. **Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted**. .....…**"**
>
> [emphasis supplied]

In this context, useful reference can also be made to the ratio in ***Manish Kumar Shahi*** vs. ***State of Bihar and Others***[6] wherein the Hon'ble Supreme Court pronounced as under;

> **"16.** ..... **Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.**"
>
> [emphasis supplied]

Further, in ***Ramesh Chandra Shah and Others*** vs. ***Anil Joshi and Others***[7] after the Petitioners took part in the process of selection and were unsuccessful in the interview, they challenged the method of recruitment. The Hon'ble Supreme Court was of the considered view as follows;

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[6] (2010) 12 SCC 576
[7] (2013) 11 SCC 309

> **"24.** In view of the propositions laid down in the abovenoted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.**"**

17. Considering the facts as related by the Appellant and on examination of all relevant documents, it needs no reiteration that the Appellant slept over his rights, deigned it fit not to take steps although aware of the alleged illegalities and rose to defend his rights rather belatedly on his failure in the interview. Indeed, it is a case of sour grapes for the Appellant. In our considered opinion there was no requirement for the learned Single Judge to have dwelt on the provisions of the Statutes and justified the actions of the Respondent No.1 or the First Academic and First Executive Council as it is evident that the Appellant neglected to act when required. In other words, he chose not to strike when the iron was hot and by filing the Writ Petition, sought to take remedial measures for his non-action which without a doubt is frowned upon by law.

18. The next point that was considered was whether the action of the Respondent No.1 was in conflict with the Government of India Office Memorandum No.F.3-9/97-Desk(U), dated 11.06.2001 which contained guidelines for invocation of emergency powers of the Vice Chancellor. The learned Single Judge held that an extraordinary situation obtained in the Respondent University, which fell within the exception carved out in the Memorandum *supra*, hence there was no violation thereof. Repelling the finding, it was vehemently canvassed by the Appellant that the Selection Committee in terms of the provisions of the Statutes ought to have comprised of the persons enumerated therein. Contrary thereto, the Respondent No.1 constituted the Selection Committee by usurping powers endorsed to the Executive Council and the Academic Council in violation of the Office Memorandum *supra* of the Government of India, thus flouting the mandate of the provisions of the Act of 2006. The Memorandum explicitly

prohibits the Vice Chancellor of the Central Universities from executing emergency powers for routine appointments. That, infact there was no emergency as a Vice Chancellor could have well asked for the panel of names from the first Academic Council during the years 2008 to 2011 which he clearly avoided. In our considered opinion and as already pointed out *supra*, the Appellant had adequate time to address this issue prior to the interview. He has not denied knowledge of the exercise of such powers. It was incumbent upon him to take steps immediately which he failed to do. He cannot now be heard to cry foul on his failure in the interview. Besides, this question has already been dealt with *supra* and needs no further discussions.

19. The learned Single Judge next dealt with the allegation that there was undue delay in holding the interview and observed that this allegation does not appear to be justified in view of the explanation given by the University. The learned Single Judge also considered the point raised by the Appellant that the results were declared neither by publication in the newspaper nor was it put up on the website or Notice Board of the Respondent University and concluded that this does not by itself indicate any massive malpractice in the recruitment process. These findings not having been assailed in Appeal and hence do not require to be addressed.

20. On the issue of additional tests being held in Computer Skills it was concluded that no prejudice at all appears to have been caused and found the objection to be of no consequence. In Appeal, the Appellant assailing this finding contended that the insertion of the Computer Skills Test without notice is contrary to the law laid down by the Hon'ble Supreme Court in ***Rakhi Ray and Others*** vs. ***High Court of Delhi and Others***[8], wherein it was held that once the selection process starts, it is not permissible to change the criteria in the midst of the selection process. That, based on the performance in the said test the mind of the members of the Selection Committee could have been prejudiced. To the contrary, it was contended by the Respondents No.1 and 2 that the Computer Skill Test is a mandatory qualification before participants appear for the interview.

21. It may well be recalled that it is established law that the body conducting the examination cannot change the course midway, or for that

[8] (2010) 2 SCC 637

matter as the proverb credited to Abraham Lincoln goes "Don't change horses in midstream", nevertheless the Appellant instead of protesting the Computer Skills Test at the relevant time on grounds as raised in the Writ Petition, chose to undergo the test and protested only on his failure on the overall tests conducted, although admittedly he passed the Computer tests. In view of the observations of the Hon'ble Supreme Court in the decisions cited hereinabove, the Appellant cannot turn around to challenge the examinations once he has participated therein and emerged unsuccessful, therefore this objection is of no consequence and falls flat. The finding of the learned Single Judge that the objection was of no consequence is not being differed with.

22. The Appellant's challenge to his termination was next taken up for consideration and the learned Single Judge held that it was to be determined whether or not the procedure by which the services of the Appellant was terminated satisfies the requirement of the provisions of the Act of 2006. Clause 26 of the Statutes and the Sub-Clauses thereunder were discussed and it was concluded that the requirements therein were fulfilled as Show Cause Notice was issued to him. That, the Appellant instead of taking the opportunity to defend himself chose to adopt a confrontationist attitude by replying to the Show Cause questioning the authority of the Respondent No.2. The Appellant in Appeal advanced the argument that contrary to the finding of the learned Single Judge infact it was not established before the Executive Council meeting held on 16.03.2012 as to who had issued the Press Release. The Respondent No.2 without responding to the lapses pointed out in the Appellant's representation dated 27.02.2012, terminated him. That, the learned Single Judge had observed that the Appellant was involved in acts of misconduct and therefore no illegality obtained in his order of termination, when infact, no departmental enquiry was conducted. That, the Appellant and others similarly situated, preferred a complaint before the Sikkim State Human Rights Commission with regard to dismissal on grounds of misconduct and vide its Order dated 27.09.2012 the Commission made a recommendation in favour of the Appellant and others. That, Clause 26(4) of the Statutes provides that no member of the academic staff or other employee shall be removed under Sub-Clause (2) or Sub-Clause (3) of Clause 26 unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. That, the Hon'ble Supreme Court has laid down in a catena of decisions that if an employee either permanent or temporary was

terminated on grounds of misconduct and if such termination was found illegal then reinstatement with back wages is a normal remedy to meet the ends of justice. These arguments were fortified with the ratio in ***Parshotam Lal Dhingra*** vs. ***Union of India***[9], ***Deepali Gundu Surwase*** vs. ***Kranti Junior Adhyapak Mahavidyalaya (D. ED.) and Others***[10] and ***Roop Singh Negi*** vs. ***Punjab National Bank and Others***[11]. The Respondents No.1 and 2 contradicted this argument by reiterating the submissions put forth in their averments and submitting in sum and substance that no errors emanated in his dismissal, the Appellant being a contractual employee and not covered by Clause 26 of the Statutes. In our considered opinion the application of the Clause *supra* is a moot question, the Appellant being a contractual employee and thereby bound by the terms of the contract. However, a Show Cause Notice had indeed been issued to the Appellant informing him that two newspapers from Gangtok being "Sikkim Now" and "Samay Dainik" published the Press Release given by him on 28.02.2012, making false allegations and insinuations against the Respondent University and its authorities. The notice explained that the act was a serious violation of both the basic norms of the University and the Code of Conduct by the Appellant. He was required to show cause as to why action should not be initiated against him for the breach of privilege. He was also required to respond within forty eight hours of the issue of Notice failing which the Respondent University would be free to take any action against him. Instead of responding to the allegations held out against him in the Show Cause Notice and thereby putting up an adequate defence for his actions, he proceeded to question the competence of the Respondent No.2 to issue the Notice thereby waiving his right to take further steps in this context, leading to the grounds of waiver and estoppel as raised by the Respondents No.1 and 2.

23. The learned Single Judge also addressed the consequence of the non-impleadment of the Respondents No.1 and 2 against whom allegations of *mala fides* were made and concluded that the Writ Petition suffers from the vice of non-joinder of necessary parties including non-joinder of those persons who had been successful in the recruitment process. On this count, the Appellant relied on the ratio of ***Dr. Suresh Chandra Verma*** (*supra*) at Paragraph 16 wherein it was stated that **"***When, therefore, services of the*

[9] (1958) 1 SCR 828
[10] (2013) 10 SCC 324
[11] (2009) 2 SCC 570

*appellants are to be terminated in view of the change in the position of law and not on the account of demerits and misdemeanor of individual candidates, it is not necessary to hear the individual before their services are terminated. The rule of audi alterem partem does not apply in such cases and therefore there is not breach of the principle of natural justice.***"** How the aforestated observation is of any assistance to the Appellant is unfathomable. However, on consideration of the reasoning in the impugned Judgment and the averments and submissions before us, it appears that the Respondents No.5, 6 and 7 were the parties that the Appellant had a grievance against in view of their selection to the coveted posts in the Department of Peace and Conflict Studies and Management which was the Department that the Appellant had also applied to. It is only their appointments which would be affected in the event that reliefs were found justifiable to the Appellant. Therefore, it is evident that an error stares us in the face in the assailed Judgment on this count and we are in disagreement with the conclusion of the learned Single Judge on this aspect.

24. The learned Single Judge further delved into the want of quorum of the Executive Council held on 22.02.2012 and concluded that on this count the Appellant appears to be clearly misconceived. That, only six members were required to fulfil the quorum in the Executive Council Meeting and not seven as can be deduced from Clause 11(3) of the Act of 2006, which provides that twelve members out of total of twenty or two-third of the existing members of the Executive Council shall form a quorum. It was argued by the Appellant that the quorum ought to have comprised of seven members and there is no provision which requires further ratification to include the nominated members of the UGC as members of the Executive Council. The Respondents No.1 and 2 would support the finding of the learned Single Judge. On this aspect, Clause 11 of the Statutes provides that seven members of the Executive Council shall form a quorum for a meeting of the Executive Council. However, neither Clause 11 or any other Clause of the Statutes lays down the repercussions or consequences of non-fulfilment of quorum. This can be juxtaposed with Clause 18 of the Statutes which deals with composition of a Selection Committee and provides specifically that unless the provisions as detailed in Clause 18(*3*)(*a*) and (*b*) are complied with the proceedings of the Selection Committee shall not be valid. Thus, in the absence of any specific consequence of non-formation of the quorum, added to the contention being raised only on the failure of the

Appellant, no merit arises in the objection of the Appellant which is accordingly discarded.

25. It is also evident from the assailed Judgment that although the Appellant was terminated from his services on 16.03.2012 when his contractual tenure was to end on 31.03.2012, the Appellant was paid for the entire period till 31.03.2012 vide Orders of the Court dated 25.02.2013 in CM Appl. No.18 of 2013 in WP(C) No.44 of 2012. An Experience Certificate was also issued to the Appellant pursuant to an Order dated 16.07.2013 in CM Appl. No.31 of 2013 in WP(C) No.44 of 2012. Both the said Applications were of the year 2013. The Respondent No.2 was also to consider converting the order of termination dated 16.03.2012 as "termination simplicitor" by deleting the last words "on grounds of misconduct."

26. It thereby concludes that the Appellant after being unsuccessful in the interview sought to challenge it on the grounds discussed above. It is pertinent to notice here that it is not the Appellant's case that he was a better candidate than the Respondents No.5, 6 and 7 and that therefore his non-selection was unfair and *mala fide*. His contention pivots around the formation of the Selection Committee the quorum of the Executive Council and the points already discussed hereinabove. It is submitted by the Appellant that he is now appointed elsewhere indicating that no prejudice was caused to him in terms of his future appointment.

27. For the reasons enumerated hereinabove, the Writ Appeal being devoid of merit deserves to be and is accordingly dismissed.

28. No order as to costs.

SLR (2019) SIKKIM 796

(Before Hon'ble the Chief Justice)

RP (FAM.C.T.) No. 02 of 2019

Suk Bir Chettri ….. PETITIONER

Versus

Jamuna Chettri ….. RESPONDENT

For the Revisionist: Ms. Gita Bista, Advocate.

For the Respondent: Mr. Tashi Norbu Basi, Legal Aid Counsel.

Date of decision: 8th November 2019

A. Code of Criminal Procedure, 1973 – S. 125 (4) – Living in Adultery – If there is constant insinuation and allegation about the character of the wife without substance and in such circumstances, if the wife leaves the matrimonial house, it cannot be said that there is no sufficient reason for the wife to refuse to live with her husband – Merely because Sachin Rai was in the bedroom of the Respondent in a house where two daughters of the parties were staying, it cannot be said that the Respondent had committed adultery with him. Even if for the sake of argument it is accepted that the Respondent had committed adultery, then also there is no evidence of a continuous course of conduct demonstrating that the Respondent was living in adultery.

(Paras 18 and 24)

Petition dismissed.

Chronological list of cases cited:

1. Smt. Mala Rai v. Bal Krishna Dhamala, RP (FAM.CT.) No. 02 of 2015.
2. M.P. Subramaniyam v. T.T. Ponnakshiammal, 1958 Cri.L.J 397.

3. Laxman Naik v. Nalita @ Lalita Naik, 2002 Cri.L.J 3418.

4. Naranath Thazhakuniyil Sandha v. Kottayat Thazhakuniyil, 1999 Cri.L.J 1963.

JUDGMENT

Arup Kumar Goswami, CJ

1. Heard Ms. Gita Bista, learned counsel for the petitioner and Mr. Tashi Norbu Basi, learned Legal Aid counsel appearing for the respondent.

2. In this Revision Petition under Section 19 (4) of the Family Courts Act, 1984, for short, 'the Act', the petitioner has put to challenge the order dated 28.06.2019 passed by the learned Judge, Family Court, East Sikkim at Gangtok in F.C. (Crl.) Case No. 37 of 2018, whereby, on a petition filed by the respondent under Section 125 of the Code of Criminal Procedure, 1973, for short, 'Cr.P.C.', the learned Court below directed the petitioner herein to pay monthly maintenance allowance of Rs.8,000/- only to the respondent with effect from the month of July, 2019.

3. The marriage between the parties herein was solemnized in the year 1989 and three daughters, namely, Apsana Chettri, Asha Chettri and Anisha Chettri were born out of the wedlock. The eldest daughter had completed her course in Civil Engineering, the second daughter had completed her course in Computer Engineering and the third daughter was studying in Class VII when the petition under Section 125 Cr.P.C. came to be filed. The petitioner, at the time of filing of the petition, was serving as a Constable with Sikkim Police drawing a salary of Rs.50,931/-. It appears from the evidence of the petitioner as DW1 that he was working as a Head Constable when he deposed.

4. The case set out in the petition under Section 125 Cr.P.C. is that the petitioner used to physically and mentally torture her after the birth of their first daughter. The petitioner was in the habit of making false allegations about the respondent that she was having extra-marital affairs with other persons including having an illicit relationship with one Sachin Rai. It is alleged that the petitioner with the help of the second daughter (name is wrongly indicated as Anisha Chettri instead of Asha Chettri) threw her out of her matrimonial home as a result of which she was compelled to reside

with her brother. It is further stated that the petitioner had filed an FIR before the Soreng Police Station on the basis of which Sachin Rai was arrested and a letter dated 27.05.2018 was prepared by the brother of the petitioner stating that from that day onwards the respondent would be the wife of Sachin Rai and that Sachin Rai was forced to sign the said document. The respondent was also called by the Station House Officer of Soreng Police Station to sign the aforesaid document and when she came to learn about the contents of the said letter from the Station House Officer, Soreng Police Station, she refused to sign the same and she had also refused to be present before the area Panchayat when she was called upon to appear before it based on the aforesaid letter dated 27.05.2018.

5. The petitioner had filed written statement, wherein, while admitting the marriage between the parties, it is pleaded that at the time of filing of the petition, respondent was not his legally married wife. While denying that he physically and mentally tortured the respondent, it is stated that on 25.05.2018, Asha Chettri had lodged an FIR before Soreng Police Station and on the basis of the said FIR, Sachin Rai was arrested by Soreng police, who, later on, released him on bail of Rs.5,000/-. It is further stated that an undertaking (Exhibit-C) was given by Sachin Rai on 27.05.2018 stating that as he and the respondent were found to be sleeping together and the respondent, on her free will, had eloped with him, it was his responsibility to look after the respondent. It is stated that 'Zari' was demanded by the petitioner in view of the fact that Sachin Rai and the respondent had eloped during the subsistence of marriage between the parties and in that context it is denied that he, with the help of the second daughter, had thrown out the respondent from the house. It is also stated that he was drawing a salary of Rs.30,000/-. It is averred that the petitioner had taken a loan of Rs.15 lakhs and out of the said amount, Rs.2 lakhs as well as 5 tolas of gold were stolen by the respondent. Accordingly, prayer was made to dismiss the petition.

6. During the course of trial, the respondent had examined herself as PW1 and had adduced the evidence of her brother as PW2. The petitioner herein had examined himself as DW1 and Asha Chettri had deposed as DW2.

7. The learned court below had framed the following points for determination:

"(1) Whether the Respondent despite having sufficient means has been neglecting or rejecting to maintain the Petitioner? (OPP)

(2) Whether the Petitioner had eloped with one Sachin Rai or had inappropriate relations with him thereby disentitling her from claiming maintenance from the Petitioner? (OPR)

(3) Whether the Petitioner had herself left the Respondent and as such had refused/has been refusing to live with him? (OPR); and

(4) Whether the Respondent can avoid his liability to pay maintenance to the Petitioner on the above grounds or any other ground? (OPR)"

The petitioner and respondent referred to hereinabove, is the respondent and the petitioner, respectively, in the present case.

8. On consideration of materials on record including the documents exhibited by the parties, point nos. 2 and 3 were decided in the negative. While coming to the aforesaid decision, the learned trial court had observed that there were material contradiction in deposition of DW2 and that her evidence does not inspire confidence and can be accepted, at the most, to the extent that the respondent and Sachin Rai were together in a room on 25.05.2018, which, by itself, does not lead to an assumption that they were committing adultery. It was opined that the evidence of DW2 does not go to show that the respondent had eloped with Sachin Rai or she had left with Sachin Rai at any point of time. Exhibit-C, a Kararnama Patra, („undertaking as stated in the written statement), stated to have been executed by Sachin Rai, was not relied upon as none of the witnesses in Exhibit-C was examined to prove that the statement of Sachin Rai was voluntary as Sachin Rai could have easily been pressurized by the petitioner being the Sub-Inspector of the same Police Station. It is, however, apposite to place on record at this juncture that the observation that the petitioner was the Sub-Inspector of Soreng Police Station where Sachin Rai was called and where he had executed Exhibit-C is not correct. It was concluded that the fact that Sachin Rai was in the room of the respondent on a particular night is not sufficient to hold that respondent was living in adultery with Sachin Rai. The point nos. 2 and 3 having been decided in negative, the point no. 4 was also decided in the negative.

9. With regard to point no. 1, the learned court below observed that the respondent was totally dependent on her brother and that the respondent had been forced out of her matrimonial home. It is noted that there was no basis for the petitioner to say that he was drawing only Rs.30,000/- when the computer generated salary voucher showed his monthly salary was about Rs.50,000/-.

10. Ms. Bista, learned counsel for the petitioner submits that evidence of DW2 goes to show that Sachin Rai was found inside the bedroom of her mother at night and this fact itself demonstrates that the respondent had committed adultery and, therefore, the learned court below was not justified in directing the petitioner to grant maintenance to the respondent. There is no reason as to why the daughter should depose falsely against her own mother and the learned court below was, thus, not justified in not wholly relying upon her testimony. It is submitted by her that there is no acceptable evidence on record to hold that the petitioner had neglected or refused to maintain the respondent and on the contrary, it is borne out of the evidence that it was the respondent, who had left the husband on her own volition and had refused to live with him and therefore, the findings recorded by the court below are not sustainable in law. She has relied upon a decision rendered by this Court in the case of ***Smt. Mala Rai vs. Bal Krishna Dhamala [RP (FAM.CT.) No. 02 of 2015]*** decided on 22.09.2016.

11. Mr. Tashi Norbu Basi, on the other hand, has submitted that the judgment of the learned court below does not warrant interference. It is contended by him that evidence of DW2 was not accepted in its entirety by the learned court below as in Exhibit-A, which is an FIR lodged by DW2, there is no reference to the allegations attributed against the respondent and Sachin Rai in her deposition. He has submitted that committing of adultery by the respondent has not been proved and placing reliance upon Section 125 (4) Cr.P.C., he submits that wife can be denied maintenance only if she is living in adultery, which is not the same thing as a single lapse from virtue. He relies upon the decisions in the cases of ***M.P. Subramaniyam vs. T.T. Ponnakshiammal***, reported in ***1958 CriLJ 397***, ***Laxman Naik vs. Nalita @ Lalita Naik,*** reported in ***2002 CriLJ 3418*** and ***Naranath Thazhakuniyil Sandha vs. Kottayat Thazhakuniyil,*** reported in ***1999 CriLJ 1963***, in support of his contentions.

12. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

13. A perusal of Exhibit-A goes to show that the second daughter of the parties had filed an FIR on 25.05.2018 stating that, at night around 2.00 am, the respondent and Sachin Rai were found in the room and he took away the respondent. No case was registered on the basis of said FIR or on the basis of a Missing Entry Report (Exhibit-B) given by the petitioner on 25.05.2018 to the Soreng Police Station. In this context it is relevant to note that the petitioner in his Missing Entry Report had stated that his wife was missing since the previous evening. The same is in contradiction with the stated version in the FIR, Exhibit-A. It is also not on record which information was prior in point of time. However, there appears to be no dispute that Sachin Rai was called to the police station. Exhibit-C was, admittedly, executed in the police station by Sachin Rai on being summoned by police without registration of any case. As no witness to the said document had been examined, the learned trial court was justified in not placing any reliance on the said Exhibit-C.

14. In her evidence as DW2, she had stated that though she had knocked at the door of the respondent couple of times as she was suffering from stomach pain, the door was not opened and the same aroused a suspicion that Sachin Rai, with whom her mother had an affair before, might be in the bedroom. Significantly, in her evidence, the DW2 does not mention any time. When she forced the respondent to open the door, according to her, she found her mother and Sachin Rai naked in the room. It is highly improbable that if a mother opens the door after persistent knocking of the daughter she would come out naked and allow any other person in the room to remain in a naked condition. The learned Family Court rightly did not rely upon that part of the evidence of DW2. It is relevant to note in this context that though in Exhibit-A it was stated that Sachin Rai had gone away with the respondent, the DW2 was conspicuously silent on this aspect in her evidence.

15. PW2 had deposed that the petitioner had ill-treated the respondent and the petitioner had sought to emphasize the fact that he was a police personnel. He had also deposed that the petitioner was spreading rumours about the respondent having extra-marital affairs with other persons including one Sachin Rai and the petitioner had not spared even his brothers including

himself while making such allegations. This evidence of PW2 had remained un-impeached.

16. In the written statement the petitioner had gone on say that the respondent had stolen Rs. 2 lakhs and also 5 tolas gold. No documentary evidence has been led to establish that the petitioner had taken a loan of Rs.15 lakhs, out of which Rs. 2 lakhs had been stolen. In his evidence, DW 1 had stated that on the relevant day, the respondent and Sachin Rai were planning to elope along with the cash and ornaments. In his cross-examination, DW1 had categorically stated that he did not witness anything which he had stated in his examination in chief. That apart, though he has referred to complaints against the respondent, he has not even indicated who had raised issues or complaints against the respondent.

17. From the evidence of PW1, it appears that she used to sell liquor in a shop which was opened by the petitioner at Dodok and the petitioner used to link her with the customers of the shop also.

18. If there is constant insinuation and allegation about the character of the wife without substance and in such circumstances, if the wife leaves the matrimonial house, it cannot be said that there is no sufficient reason for the wife to refuse to live with her husband.

19. In the written statement, the petitioner had stated that the respondent was no longer his married wife. It is not the case of the petitioner that they had been divorced. In his evidence as DW1, though he had not taken the stand that the respondent is no longer his wife, a stand was taken that as the respondent was maintaining extra-marital affairs, she is not entitled to any maintenance allowance from him.

20. In ***M.P. Subramaniyam (supra),*** the Karnataka High Court was considering the term "living in adultery" appearing in clause (4) of Section 488 of Cr.P.C., 1898. It is to be noted that Section 125 (4) of the present Cr.P.C. also uses the very same expression. The Division Bench of the Karnataka High Court, relying on judgments of various High Courts, had observed that it is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband; but it is a course of continuous conduct on her part by which it can be called that she is living an adulterous life that takes away her right to claim maintenance. It was

emphasized that the wording of Section 488 (4) of Cr.P.C. is not "if she commits adultery" but "if she is living in adultery".

21. In ***Laxman Naik (supra)***, the Orissa High Court has also taken the same view when it held that the allegation with regard to a single instance of adultery will not be sufficient to refuse maintenance under Section 125 Cr.P.C.

22. In ***Naranath Thazhakuniyil Sandha (supra)***, Kerala High Court, on consideration of various judgments referred to therein had held that phrase "living in adultery" used in Section 125 (4) of the present Cr. P.C. and in Section 488 (4) of the Cr.P.C.1898 contemplates a continuous course of conduct on the part of the wife with the adulterer or the paramour, as the case may be, and a single act of unchastity or a few lapses from virtue will not disentitle the wife from claiming maintenance from her husband under Section 125 of the Cr. P.C.

23. I am in complete agreement with the view taken in the aforesaid judgments.

24. Merely because Sachin Rai was in the bedroom of the respondent in a house where two daughters of the parties were staying, it cannot be said that the respondent had committed adultery with him. Even if for the sake of argument it is accepted that the respondent had committed adultery, then also there is no evidence of a continuous course of conduct demonstrating that the respondent was living in adultery.

25. In ***Mala Rai (supra)***, this Court, while dismissing the appeal preferred against refusal to grant maintenance by the learned Family Court, had relied upon a decision rendered in the divorce case in between the same parties wherein it was held that the petitioner therein was in an adulterous relationship, which is not the case herein and therefore, the aforesaid judgment does not advance the case of the petitioner.

26. In view of the above discussion, I find no merit in this application and accordingly, the same is dismissed.

27. Registry will send back Lower Court Record.

SLR (2019) SIKKIM 804

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

Crl. A. No. 26 of 2018

Mahindra Shanker (Bishwakarma) ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Gita Bista, Legal Aid Counsel.

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

Date of decision: 8th November 2019

A. Indian Penal Code, 1860 – S. 376 – In the instant case, neither the victim nor the family members of the victim had lodged the F.I.R – No doubt, PW-1 had stated that the Appellant had committed rape on her. However, in the totality of the facts and circumstances as appearing on the evidence on record, we are of the considered opinion that the prosecution had not been able to establish the guilt of the appellant beyond reasonable doubt – Appellant entitled to the benefit of doubt.

(Para 35)

Appeal allowed.

Case cited:

1. State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550.

JUDGMENT (ORAL)

The Judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

Heard Ms Gita Bista, learned Legal Aid Counsel and Mr. S.K. Chettri, learned Assistant Public Prosecutor, Sikkim.

2. This appeal is directed against the Judgment dated 11.07.2018 and the order on sentence dated 12.07.2018 passed by the learned Judge, Fast Track Court, East and North Sikkim at Gangtok in Sessions Trial (F.T.) Case No. 02 of 2017, whereby the appellant was convicted under Section 376(2) (j), 376 (2)(l) and 451 IPC and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.3,000/- under Section 376(2)(j) IPC, in default, to undergo simple imprisonment for a period of three months; to undergo rigorous imprisonment for a period of ten years and to pay a fine to Rs.3,000/- under Section 376(2)(l) IPC, in default, to undergo simple imprisonment for a period of three months; and to undergo simple imprisonment for a period of one year and to pay a fine of Rs.1,000/- under Section 451 IPC, in default, to undergo simple imprisonment for a period of one month. All the sentences are to run concurrently.

3. The First Information Report (for short, "FIR") (Exhibit-1) was lodged by one 'A' (name withheld), a Member of Ward Panchayat, before the Pakyong Police Station on 20.08.2016 at 03.30 p.m. stating that she had received a telephone call at around 10 a.m. from one 'X' (name withheld), informing her that at around 7 p.m. of the previous night, rape was committed by the appellant upon 'Y' (name withheld), hereinafter referred to as the victim, at her residence.

4. On receipt of the information, Pakyong Police Station Case No. 18 of 2016 under section 376 IPC was registered. Subsequently, on completion of investigation, charge sheet being Charge Sheet no.13 dated 05.01.2017 under section 376 IPC was submitted.

5. The case being exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, East at Gangtok, vide Order dated 13.01.2017 committed the case to the Court of the learned Sessions Judge, East Sikkim at Gangtok who transferred the case to the Court of Judge, Fast Track Court, East and North Sikkim wherein Sessions Trial (F.T.) Case No. 02 of 2017 was registered.

6. Upon hearing the learned counsel for the parties, the learned Trial Court Judge framed charges against the appellant under sections 376(2)(j), 376(2)(l) and under section 451 IPC. The same being read over and explained to the appellant in Nepali language, the language he understood, the appellant pleaded not guilty and claimed to be tried.

7. During trial, prosecution examined 17 (seventeen) witnesses. Defence adduced no evidence. The statement of the appellant was recorded under section 313 Cr.P.C, where a plea of denial was taken by the appellant.

8. The victim was examined as PW-1. The informant was examined as PW-2. The husband and son of the victim were examined as PW-8 and PW-9, respectively. X, who was stated to have given the information to PW-2, was examined as PW-11. PW-5 is the Doctor who had examined the victim on 20.08.2016 and PW-6 is the Doctor who had examined the appellant on 22.08.2016. PW-14 is the Medical Officer who had examined the appellant on 20.08.2016. PW-4 is a child witness, aged about 13 (thirteen) years and PW-3 is the mother of PW-4 and an eye witness. PW-7 is the Scientific Officer of Regional Forensic Science Laboratory (RFSL), Saramsa. PW-10 is a witness to the rough sketch map (Exhibit-6) of the place of occurrence and a seizure (Exhibit-7) witness of a boxer pant (Material Object-IV) stated to be of the appellant. PW-12 is the Judicial Officer who recorded the section 164 Cr.P.C. statement (Exhibit-11) of the victim. PW-13 is the Station House Officer of Pakyong who registered the Pakyong P.S Case No.18/2016. PW-15 is a neighbour of the victim and who met PW-3 immediately after the incident. PW-16 is the seizure witness of the "lungi" worn by the victim (Material Object-I) of the victim and the boxer pant of the appellant**.** PW-17 is the Investigating Officer of the case.

9. Ms Bista submits that there is no evidence on record to hold that the appellant had committed the offences as alleged and that the prosecution had miserably failed to prove the guilt of the appellant beyond reasonable doubt. She contends that even if it is accepted for the sake of argument that the appellant had sexual intercourse with PW-1, having regard to the facts and circumstances of the case, the same cannot be construed to be rape but a consensual act.

10. Mr. S.K. Chettri, learned Assistant Public Prosecutor, on the other hand, supports the impugned Judgment and also places reliance on a

judgment of the Honble Supreme Court in the case of ***State of Maharashtra vs. Chandraprakash Kewalchand Jain*** reported in ***(1990) 1 SCC 550***, with particular reference to paragraph 16 thereof.

11. We have considered the submissions of the learned Counsel for the parties and have perused the evidence and materials on record.

12. PW-1 is a differently-abled person being partially deaf and dumb and was about 51 years of age, when she deposed in the month of April, 2017. The learned Trial Court had recorded that PW-1 had partial speech and hearing impairment but she was capable of communicating through words and gestures. She had stated that on the day of occurrence she was alone at home as her husband, PW-8, was in the hospital since he was suffering from fever. The appellant had come to her house and had made inquiries about whereabouts of her husband. On being told that he had gone to the hospital, the appellant had caught hold of her hands and had committed rape on her. She further stated that when the appellant caught hold of her hands, she had bitten him. She also stated that she had informed about the incident to her husband.

13. In her cross-examination as well as her statement under section 164 Cr.P.C., PW-1 had stated about biting the appellant in his hands. She had also stated therein that appellant had also bitten her in her stomach and as the appellant had pushed her, she sustained head injuries. In her cross-examination, she stated that the appellant was fully drunk and was not in a position to stand and that she did not shout for help.

14. While recording deposition of PW-1, the learned Trial Court observed that PW-1 had, in words and with hand gestures, demonstrated the act committed by the appellant.

15. Evidence of PW-14 goes to show that when the appellant was examined by him on being forwarded at about 06.00 p.m. of 20.08.2016, he was found to be under the influence of alcohol and smell of alcohol in breath was present.

16. The evidence of PW-2, i.e., the informant, is to the effect that she came to know about the occurrence on receipt of a phone call from PW-11. On getting to know of the incident, she had called PW-11 and the

"mother" and "daughter" who had witnessed the incident and based on their reporting, she had lodged the FIR. It appears from her evidence that scribe of FIR was one Shivji Gupta, who, incidentally, was not examined. PW-2 had made it very clear that she did not know the names of the mother and daughter duo.

17. Before discussing the evidence of PW-3, it will be appropriate to take note of the evidence of PW-4. PW-4, in her deposition, stated that she had gone to the victims house and when she had reached the house, she had seen the appellant inside the kitchen, pushing the victim towards the bed which was there in the kitchen. Though the victim was shouting, she could not understand what she was saying and having witnessed the same, she went to PW-4 and narrated the incident to her. In her cross-examination, she stated that that it being dark, a kerosene lamp was lit in the house of the victim. She also stated that she had no apparent reason to visit the house of the victim.

18. PW-3, i.e., mother of PW-4, elucidated that the house of PW-1 is next to hers. She corroborated the statements made by PW-4 to the effect that PW-4 had told her that she had seen the appellant pushing the victim. She stated that on hearing the same, she ran to the victims house and saw the appellant committing rape on the victim in her kitchen and when the appellant saw her, he fled away pulling his pants. She stated that her shout for help was heard by "Kamals wife" and she had informed her about the incident.

19. Kamals wife, referred to by PW-3, was examined as PW-15. PW-15 stated that she is a neighbour of the victim and hearing some noise coming from the victims house, had gone to see what had happened. She heard the PW-3 saying "Mahendra" "Mahendra" (the appellant) and PW-3 told her that he had gone down towards the jungle. She, however, did not notice anybody. It has come out of her deposition that, thereafter, she, along with PW-3 and others, had gone to the house of the uncle of the appellant and had informed him that the appellant had done "naramro" (behaved indecently).

20. PW-11 stated that one lady of the village had informed her that the appellant had committed sexual assault on the victim and therefore, she had inquired about the same from the victim and on being indicated by hand

gestures she had informed the same to the Ward Panchayat. Who is that lady from whom she had got the information is not clear from her evidence in chief. However, from her cross-examination, it appears that she had heard about the incident from one Januka Shanker, who is the owner of the house of the victim.

21. PW-10 acknowledged seizure of Material Object-IV in his presence and affixing of his signature in rough sketch map, Exhibit-6. Evidence of PW-16 goes to show that a "lungi" of victim was seized vide Exhibit-8 in his presence. In his cross-examination he stated that he also signed on another document at the police station after one or two days. He proved his signature appearing in Exhibit-7 by which, Material Object-IV was seized. It appears that the boxer pant was not seized in his presence.

22. Exhibit-6 shows that distance between the house of the victim and PW-3 is about 300 feet approximately. The house of PW-15 is not reflected in Exhibit-6.

23. Evidence of PW-7 goes to show that blood, semen or any other human body fluid could not be detected in BIO 232A (Material Object-III), which is a small glass vial containing vaginal wash of PW-1. Her evidence goes to show that blood group of the victim is A+. Human blood of blood group AB was detected in green coloured boxer with black and white strips (Material Object-IV), allegedly belonging to the appellant. Human body fluid, which gave positive test for blood group A was detected in the blue and purple coloured "lungi" (Material Object-I) said to be belonging to the victim marked in laboratory as BIO 232C. From the above, it is clear that laboratory test do not advance the case of the prosecution.

24. It is also relevant to note that there is no evidence that the appellant was wearing the boxer pant (Material Object-IV) at the time of the occurrence. In her section 164 Cr.P.C statement, P.W-1 had stated that she was wearing a saree. It is not understood why a "lungi", which is distinct from saree, was seized.

25. PW-8, who was aged about 81 years on the date of giving evidence in the month of November, 2017, had, however, stated that it was his son, PW-9, who had informed him about the sexual assault on his wife.

26. PW-9, aged about 43 years, stated that he had accompanied his father, PW-8, to the hospital and when he returned home in the morning, his co-villager Hira Lal Shanker had informed him of the sexual assault on the victim, who is his step-mother.

27. In the evidence of PW-17, some portion of evidence of PW-16 is wrongly reflected. It appears from his evidence that in the year 2001 appellant was convicted for an offence under section 304 Part II IPC along with two others and he had produced a Court Disposal Form as document-B.

28. Consideration of the evidence of PW-1, PW-8 and PW-9 goes to show that there is no corroboration of the assertion of PW-1 that she had reported about the incident of the sexual assault by the appellant to P.W-8. While PW-8 stated that he came to know about the incident from his son, PW-9. In cross-examination, he admitted that he did not state before the police that he had come to know about the incident from Hira Lal Shanker. He also stated that he had not stated before the police that he had informed about the incident to PW-8. How PW-8 or PW-9 came to know about the alleged incident is not clear. Prosecution has not also examined Hira Lal Shanker.

29. PW-1 was examined by PW-5 on 20.08.2016 at around 7:12 p.m, which is about two days after the occurrence. PW-5 deposed that there was no perineal injury and there was also no active bleeding in her vagina. He also proved Exhibit-2, the medical report of the victim, which indicates that no bodily injuries were seen on the victim. In his cross-examination, he stated that there are chances of perineal injuries if there was recent forceful intercourse. It is worthwhile to recapitulate that in her section 164 Cr.P.C statement PW-1 had stated that she had suffered head injuries and she was also bitten on her belly. Conspicuously, medical evidence belies the aforesaid assertion.

30. The evidence of PW-6, the doctor who examined the appellant on 21.08.2016 proved Exhibit-3, the medical examination report, and the same discloses that there were no injuries on the body of the appellant though PW-1 had stated that she had bitten appellant in his hand.

31. In her cross examination, PW-3 stated that she did not tell police that she had shouted for help. She also stated that as the door of the room

was open she could see the incident. She also stated that during sexual intercourse, the victim did not raise any hue and cry. She also stated that she did not narrate anything about the incident to any person. The evidence of PW-15 would also indicate that PW-3 did not tell her that she had witnessed the appellant committing any sexual assault of the kind that is stated by PW-3 in her deposition. It is to be noted that in terms of the evidence of PW-3, PW-15 was the first person she had come in contact with. It is difficult to accept that if PW-3 had witnessed a rape, she would not have told about it to PW-15 whom she met almost immediately after the alleged occurrence. It is also significant to note that uncle of the appellant was not reported about a rape committed but of indecent behaviour by the appellant. In the circumstances, we find it difficult to accept the testimony of PW-3 that she had witnessed a rape being committed by the appellant.

32. Januka Shanker, from whom PW-11 stated to have learnt about the incident was not examined by the prosecution. The evidence of PW-1 does not indicate that she had narrated the incident to PW-11. PW-11 also does not say that she had any occasion to talk to PW-3 and PW-4 before informing PW-2 about the occurrence. PW-3 also does not say that she had talked about the incident to PW-11.

33. PW-13, who had registered the Police case, in his cross-examination had stated that the victim had also come to lodge the FIR along with PW-2. It is significant to note that evidence of PW-1 and PW-2 does not disclose that PW-1 had accompanied PW-2 to the Police Station.

34. In ***Chandraprakash Kewalchand Jain*** (supra), the Hon ble Supreme court had laid down that a prosecutrix of a sex offence cannot be at par with an accomplice. If a prosecutrix is an adult of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. It the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

35. In the instant case, neither the victim nor the family members of the victim had lodged the FIR. No doubt, PW-1 had stated that the appellant had committed rape on her. However, in the totality of the facts and circumstances as appearing on the evidence on record as discussed

hereinabove, we are of the considered opinion that the prosecution had not been able to establish the guilt of the appellant beyond reasonable doubt. We are of the opinion that the appellant is entitled to benefit of doubt.

36. Taking that view, we set aside the impugned Judgment. Resultantly, the appeal stands allowed. The appellant shall be released forthwith, if not required in any other case.

37. Lower Court records be sent back. Copy of this order be sent to the learned Trial Court.

SLR (2019) SIKKIM 813

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

Crl. A. No. 30 of 2018

Santa Bahadur Sarki @ Santay ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms K.D. Bhutia, Advocate (Legal Aid Counsel).

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

Date of decision: 8th November 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 5 (m) – The F.I.R was lodged by PW-4 on 08.08.2017. On the same day, PW-1 and PW-2 were medically examined. The medical reports proved by PW-11confirms the evidence of PW-1 and PW-2 and the fact that the appellant had inserted his finger in their vagina. The fact that the injury and the erythema were visible even after a week of the incident reflects the extent to which the appellant had violated PW-1 and PW-2 – The F.I.R lodged by PW-4 immediately after she was informed by PW-1 and PW-2 that the appellant had inserted his finger in their vagina corroborate this fact. Both PW-1 and PW-2 had clearly stated to the learned Magistrate that the appellant had put his hand "in" their vagina. Therefore, their statements recorded under S. 164 Cr.P.C. also corroborate the fact that the appellant had in fact committed penetrative sexual assault on PW-1 and PW-2.

(Para 16)

B. Protection of Children from Sexual Offences Act, 2012 – S. 5 (m) –Both PW-1 and PW-2 were below 8 (eight) years when they deposed before the Court. Their evidence must thus be appreciated keeping in mind their tender age, the lapse of time between the date of the incident,

i.e. a week before 08.08.2017 and the time of recording the depositions, i.e. 01.03.2018 and other evidences produced. It is quite obvious that due to their tender age, PW-1 and PW-2 did not articulate their depositions keeping in mind the legal ramifications. The discrepancy pointed out by the learned Counsel for the appellant can be satisfactorily explained on the basis of the medical evidence produced by the prosecution. Their depositions read with the medical evidence clearly establish that both the victims were subjected to penetrative sexual assault as defined by section 3(b) of the POCSO Act.

(Para 17)

Appeal dismissed.

JUDGMENT

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

1. The appeal is against the judgment dated 30.07.2018 convicting the appellant under section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') for commission of aggravated penetrative sexual assault on two minor victims (PW-1 and PW-2) and under section 448 of the Indian Penal Code, 1860 (for short „IPC) for house-trespass.

2. On the basis of the final report dated 03.11.2017 submitted by the prosecution the learned Special Judge on 02.02.2018 framed two charges both under Section 5(m) of the POCSO Act against the appellant for commission of aggravated penetrative sexual assault on PW-1, PW-2 and PW-3 on 02.08.2017 and also during the year 2017. Charge for house-trespass under Section 448 of the Indian Penal Code (for short 'IPC') and for entering Sikkim - a restricted area without valid permit under Section 14A of the Foreigners Act, 1946 were also framed against the appellant as he was a foreigner.

3. During the trial, fifteen witnesses including three minor victims (PW-1, PW-2 and PW-3) were examined. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and on his declining to lead any defence evidence, the parties were heard and the impugned judgment rendered on 30.07.2018.

4. The learned Special Judge held that the evidence of PW-1 and PW-2 were corroborated by the evidence of Dr. Meenakshi Dahal (PW-11), the Medical Officer and the medical reports, i.e., Exhibit-3 and Exhibit-7 of PW-1 and PW-2. As the medical evidence relating to PW-3 and deposition of her mother (PW-5) did not support the evidence of PW-3, the learned Special Judge held that her uncorroborated evidence cannot be taken to be proved.

5. The learned Special Judge convicted the appellant under Section 5(m) of the POCSO Act, 2012 and under Section 448 of the IPC in respect of the offence committed on PW-1 and PW-2. However, the learned Special Judge held that the prosecution failed to establish that the appellant had committed any offence against PW-3 under the POCSO Act or had violated Section 14A of the Foreigners Act, 1946.

6. On 07.08.2017, when PW-4 came to learn that her daughter (PW-1) and her friend, i.e., PW-2, had been sexually assaulted by the appellant, she lodged the First Information Report (for short „FIR) (Exhibit-1) dated 08.08.2017 before the Jorethang Police Station, alleging that PW-1 and PW-2 had been violated by the appellant by putting his finger in their private parts.

7. PW-1, PW-2 and PW-3 were all medically examined on 08.08.2017 by PW-11. PW-11 found superficial healing abrasion below the urethral opening of PW-1 who was crying, uncooperative and complaining of burning sensation on urination. There was no active bleeding but there was tenderness on dressing the area. Clinical examination of PW-1 showed injury to the perineal region and therefore PW-11 opined that it may be due to fingering. The examination of PW-2 reflected that there was mild erythema and swelling below the labia minora. There was no tear or active bleeding but localised pain on dressing the lesion. PW-2 was also crying, uncooperative and complained of burning sensation on urination. PW-11 opined that the mild erythema may be due to fingering.

8. The learned Judicial Magistrate (PW-13) recorded the statement of PW-1, PW-2 and PW-3 under Section 164 Cr.P.C. on 01.09.2017. PW-1 stated that the appellant had put his hands in her vagina and he did that four times. PW-2 also stated that the appellant had put his hands in her vagina.

9. Heard Ms K.D. Bhutia, learned Legal Aid Counsel for the appellant and Mr. S.K. Chettri, learned Assistant Public Prosecutor for the respondent. Learned Counsel for the appellant did not dispute determination of age of the victims nor the fact that both of them were below the age of 12 (twelve) years. She, however, submitted that the evidence produced by the prosecution does not establish the ingredients of the offence charged and even if one were to ignore the discrepancies in the evidence, the offence made out may fall under Section 7 and not under Section 5(m) of the POCSO Act, 2012. The discrepancies pointed out by the learned Counsel for the appellant shall be examined hereafter. The learned Assistant Public Prosecutor on the other hand submitted that the prosecution has been able to lead cogent evidence to establish both the offences and as such the impugned judgment is unassailable.

10. As the State has not preferred any appeal against the impugned judgment absolving the appellant for commission of offence on PW-3 as well as the offence alleged under the Foreigners Act, 1964, we shall examine the impugned judgment only to the extent of the commission of offence under Section 5(m) of the POCSO on PW-1 and PW-2 and for commission of offence under Section 448 IPC.

11. The identification of the appellant is certain. PW-1 and PW-2 identified him as the perpetrator of the crime. PW-2, PW-3, PW-4 (mother of PW-1), PW-5 (mother of PW-3), PW-6 (elder minor sister of PW-3), PW-12 (father of PW-2) and PW-14 (minor elder sister of PW-2 and PW-1 s cousin) also identified him as their co-villager.

12. PW-1 deposed that on the relevant day when her parents and younger brother were not at home, the appellant came to her house and touched her vagina.

13. PW-2 deposed that the appellant had come to PW-1s house and touched her vagina.

14. Both PW-1 and PW-2 also deposed that on the relevant day the parents of PW-1 were not at home and this fact was corroborated by PW-4. The cross-examination of both the victims did not yield any evidence in favour of the defence.

15. PW-4 proved that she had lodged the FIR (Exhibit-1) after her daughter, i.e., PW-1, disclosed about a week after the incident that the appellant had inserted his finger into her private part. PW-4 confirmed that on the relevant day she had gone to Church and her husband to work. She deposed that when she returned PW-1 was watching television and did not complain about the incident. However, a week thereafter, PW-1 complained to her about burning sensation while urinating. On examining PW-1, PW-4 noticed some redness in her private part. After that PW-1 disclosed to PW-4 that the appellant had inserted his finger in her private part. According to PW-4, she also enquired from PW-1s friends (PW-2 and PW-3) both of similar age as PW-1 who used to reside near her house. They also disclosed that they were sexually abused by the appellant on the same day with PW-1 by inserting his finger into their private parts.

16. The FIR was lodged by PW-4 on 08.08.2017. On the same day, PW-1 and PW-2 were medically examined. The medical reports (Exhibit-3 and Exhibit-7) proved by PW-11 confirms the evidence of PW-1 and PW-2 and the fact that in fact the appellant had inserted his finger in their vagina. The fact that the injury and the erythema were visible even after a week of the incident reflects the extent to which the appellant had violated PW-1 and PW-2. The FIR lodged by PW-4 immediately after she was informed by PW-1 and PW-2 that the appellant had inserted his finger in their vagina corroborate this fact. Both PW-1 and PW-2 had clearly stated to the learned Magistrate that the appellant had put his hand “in” their vagina. Therefore, their statements recorded under section 164 Cr.P.C. also corroborate the fact that the appellant had in fact committed penetrative sexual assault on PW-1 and PW-2.

17. The learned counsel for the appellant submitted that there were discrepancies in the statements given to the learned Magistrate by PW-1 and PW-2 and in their depositions. PW-1 and PW-2 had deposed that the appellant had touched their vagina although in their statements to the learned Magistrate they had stated that the appellant had put his hand in their vagina. Therefore, it was argued that the evidence of the two minor victims made it apparent that the appellant was not guilty of having committed aggravated penetrative sexual assault. Both PW-1 and PW-2 were below 8 (eight) years when they deposed before the Court. Their evidence must thus be appreciated keeping in mind their tender age, the lapse of time between the date of the incident, i.e., a week before 08.08.2017 and the time of

recording the depositions, i.e., 01.03.2018 and other evidences produced. It is quite obvious that due to their tender age PW-1 and PW-2 did not articulate their depositions keeping in mind the legal ramifications. The discrepancy pointed out by the learned counsel for the appellant can be satisfactorily explained on the basis of the medical evidence produced by the prosecution. Their depositions read with the medical evidence clearly establish that both the victims were subjected to penetrative sexual assault as defined by section 3(b) of the POCSO Act. Insertion of the appellants finger, to any extent into the vagina amounts to penetrative sexual assault. As admittedly, both PW-1 and PW-2 were below 12 (twelve) years of age, the commission of penetrative sexual assault on them amounts to aggravated penetrative sexual assault as per section 5(m) of the POCSO Act.

18. The learned Counsel for the appellant submitted that there was discrepancy in the version of PW-4 and PW-5 about the incident. PW-5 deposed that PW-3 told her that she had seen the appellant inserting his finger into the private parts of both PW-1 and PW-2 when she peeped into the hole and looked inside the room where he had taken them. According to PW-5, PW-3 also told her that the appellant had not done anything to her. PW-3 on the other hand had deposed that the appellant had touched her vagina when she had gone to his house. It is clear that PW-1 and PW-2 were deposing about another incident which transpired in PW-1s house and not in the appellants. PW-3 did not depose about being an eye witness to the said incident where she allegedly saw the appellant inserting his finger into the vagina of PW-1 and PW-2 as deposed by PW-5. Although there is no explanation by the prosecution on this aspect, we are of the view that this discrepancy does not destroy the substratum of the evidence of PW-1 and PW-2 which is amply corroborated by the medical evidence.

19. The learned Counsel for the appellant submitted that the deposition of PW-14 is doubtful as she had admitted she had not stated to the police about what she had witnessed. PW-14 deposed that when she had gone to the house of PW-1 she saw the appellant closing the door and witnessed the appellant fingering the private parts of PW-1 and PW-2 while PW-3 was also present. During cross-examination, she admitted that she had not stated to the police that she had seen the appellant fingering the private parts of PW-1 and PW-2. Besides PW-14, even PW-6 had deposed that he had seen the appellant touching the private parts of PW-1 and PW-2 while PW-3 was sitting on the bed. Their depositions does not conflict with

the deposition of PW-1 and PW-2 on the crucial aspect of the appellants heinous acts. Even if the evidence of PW-6 and PW-14 are ignored, the evidence of PW-1 and PW-2 confirmed by the medical evidence led by the prosecution clearly establishes the ingredients of the offence of aggravated penetrative sexual assault committed by the appellant on PW-1 and PW-2.

20. The punishment prescribed for aggravated sexual assault under section 6 of the POCSO Act is rigorous imprisonment for a term which shall not be less than 10 (ten) years but may extend to imprisonment for life and shall also be liable to fine. The learned Special Judge has used her discretion to impose the minimum sentence of 10 years prescribed along with a fine of Rs.2000/- (Rupees two thousand).

21. Section 448 IPC prescribes punishment for house-trespass which is defined under section 442 IPC. Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place of worship, or as a place for the custody of property, is said to commit house-trespass. Criminal trespass is defined in section 441 IPC. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass.

22. PW-1 deposed that the appellant had come to her house and committed the crime. PW-2 corroborated the evidence of PW-1. The appellant used to reside above the house of PW-4 and sometimes used to visit their house and watch television as per the deposition of PW-4. Therefore, although the initial entry into the house of PW-4 may have been lawful, his remaining there and thereafter committing aggravated penetrative sexual assault upon PW-1 and PW-2 brings the act clearly within the fold of section 448 IPC. The learned Special Judge has sentenced the appellant to undergo simple imprisonment for a term of six months for the said offence, although she could have sentenced to a maximum of one year and fined him Rs.1000/- (Rupees one thousand) for the offence committed.

23. We are of the considered view that the conviction and sentence of the appellant, both under section 5(m) of the POCSO Act and under

section 448 IPC, need no interference. Resultantly, the appeal must fail and is accordingly, dismissed. The impugned Judgment and Order on Sentence are upheld.

24. The appellant is presently lodged at Central Prison, Rongyek, Gangtok, East Sikkim. He shall continue to be there and shall serve out the rest of the sentence as imposed by the learned Special Judge.

25. The crime was committed in the year 2017, on which date the Sikkim Compensation to Victims or his Dependents Amendment Schemes, 2016 had already been enforced. As per the said Scheme, the maximum limit of compensation which may be given to a victim of rape is Rs.3,00,000/- (Rupees three lakhs). Insertion of finger to any extent into the vagina of a victim and made punishable under section 6 of the POCSO Act as aggravated penetrative sexual assault also amounts to rape as defined in section 375(b) of the IPC. The learned Special Judge has directed payment of compensation of Rs.1,00,000/- (Rupees one lakh) to each of the victim. We are of the considered view, keeping in mind the nature of offence and the tender age of the victims, that this is a fit case where the maximum compensation permissible should be given to rehabilitate them. Accordingly, we direct the Sikkim State Legal Services Authority (for short 'SSLSA') to pay compensation of Rs.3,00,000/- (Rupees three lakhs) to each of the victims, i.e., PW-1 and PW-2. The said amounts shall be kept in a fixed deposit in the account of PW-1 and PW-2 payable on their attaining majority. If PW-1 and PW-2 do not have any savings account, the SSLSA shall render assistance to the victims to do so.

26. Copy of this Judgment be transmitted to the Court of the learned Special Judge, POCSO Act, 2012, South Sikkim at Namchi.

27. Copy be made over to the learned Member Secretary, SSLSA, for information and compliance.

SLR (2019) SIKKIM 821

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

Crl. A. No. 5 of 2018

Tshering Tempa Sherpa ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Thupden Youngda, Additional Public Prosecutor.

Date of decision: 12th November 2019

A. Indian Penal Code, 1860 – S. 376 – What emerges from the evidence of the victim is that the Appellant "had sex" with her. It is however unclear what the victim's understanding was of the words "had sex with me". The victim has failed to describe what the word "sex meant, neither has she described the actual act perpetrated on her by the Appellant – It is also stated that the Appellant used to "sexually assault" her – The words "sexual assault" finds no definition in the I.P.C, thus for guidance we may look into the definition of the said words as found in the POCSO Act, 2012 under S. 7 – Considering that she has only claimed that there was "sexual assault" the Court cannot arrive at a hasty conclusion that when she used the words "sexually assault" or "had sex with me" it would necessarily mean or imply penetrative sexual assault – Imperative for the Prosecution to have extracted from the victim during her deposition the actual act that was committed on her considering that the Prosecution is under the mandate of proving its case beyond all reasonable doubt and cannot leave its case to ambiguities thereby leading to erroneous conclusions – It was incumbent not only upon the Prosecution but also the Learned Trial Court by exercising its

powers under S. 165 of the Indian Evidence Act, 1872 to reach the crux of the matter when the victim was being examined.

(Para 9)

Appeal partially allowed.

JUDGMENT

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

1. The Prosecution case against the Accused Tshering Tempa Sherpa (Appellant herein) commenced on a First Information Report (FIR), Exhibit 5, lodged against him, by P.W.12, the victim s mother. A Charge-Sheet came to be submitted against him under Section 376 of the Indian Penal Code, 1860 (hereinafter, IPC) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act, 2012). The Learned Trial Court framed Charges against the Appellant under Sections 5(l) and 5(k) punishable under Section 6 of the POCSO Act, 2012 and Sections 376(2)(n), 376(2)(i) and 376(2)(l) of the IPC. On the Appellant pleading "not guilty", the Prosecution examined fifteen witnesses and on consideration thereof the Learned Trial Court convicted the Appellant of the offences under Section 376(2)(l) and 376(2)(n) punishable under Section 376(2) of the IPC, but acquitted him of the offences under Section 5(l), 5(k) of the POCSO Act, 2012 and 376(2)(i) of the IPC.

2. Dissatisfied with the finding, the Appellant is before this Court. He assails the impugned Judgment on the grounds that although the victim alleged that he had sexually assaulted her on several occasions she did not complain of it to either her parents or anyone else. That, according to her, she continuously had sex with the Appellant for three months prior to the lodging of Exhibit 5 but this evidence is uncorroborated. The victim (P.W.9) also complained that the Appellant used to frequent her home and sexually assault her when she was alone and she had narrated the incident to P.W.5, who however failed to endorse this evidence of P.W.9. Contrarily P.W.1 has deposed that the Appellant told him that the victim had lured him to have sexual intercourse with her. Besides, the aforestated points the minority of the victim stood unestablished and the Learned Trial Court in the absence of any evidence opined that the victim was not a minor. Hence, the Appellant be acquitted of the Charges.

3. Refuting the contention raised by the Appellant, Learned Additional Public Prosecutor argued that although the Prosecution had furnished Birth Certificate of the victim before the Learned Trial Court in the absence of supporting documents it was not considered. That, infact the said document Exhibit 1 was never contested by the Appellant which therefore was an acceptance of the fact that the victim was a minor, her date of birth having been recorded as "03-06-2000" and the offence having occurred on 30-03-2016, thereby making her short of sixteen years of age. Relying only on the statement of the victim, it was contended that she has specifically stated that the Appellant had requested her to have sex with him holding out the promise that her deformities would be cured if she consented and acted on the consent. Thereafter, he frequently visited her house and sexually assaulted her repeatedly for two months. That, P.W.12 the victims mother has corroborated the evidence of the P.W.9 as she has stated that on the relevant day her child, the victim come crying and running to her shop and told P.W.12 that the Appellant had entered their house, forcibly laid her on the bed, taken off her lower garment and rubbed his penis on her vagina. When she shouted for help the Appellant let go. Hence, the conviction handed out by the Learned Trial Court and the consequent penalty ought to be upheld as no error emanates therein.

4. The rival submissions of Learned Counsel have been heard at length and duly considered, all evidence and documents as also the impugned Judgment have been perused and considered.

5. The facts as can be gauged from the documents on record are that, on 31-03-2016, at around 1730 hours, P.W.12 the victims mother lodged an FIR, Exhibit 5, informing therein that the Appellant had sexually assaulted her daughter the victim P.W.9 at her house on 30-03-2016, at around 1530 hours. Based on the FIR, the case was registered at the Ravangla P.S., South Sikkim and investigation taken up which revealed that the Appellant 68, years of age at the relevant time, was a widower employed as a cowherd by P.W.1 and residing with him. P.W.12 sold farm produce by the road side while P.W.9 being physically challenged assisted her with household chores. On 30-03-2016 P.W.9 went to the shop of her mother and complained to her that the Appellant had sexually assaulted her. Pursuant thereto, P.W.12 went to the house of P.W.1 the employer of the Appellant and informed him of the sexual acts perpetrated by the Appellant on her child. Consequent thereto, Exhibit 5 came to be lodged. The victim

had also informed her aunt P.W.5 of the incident who advised her to inform P.W.12. Charge-Sheet thus came to be submitted against the Appellant under the aforestated provisions of law.

6. While discussing the age of the victim the Learned Trial Court in the impugned Judgment has *inter alia* held that **"**……. *Therefore, although the birth certificate marked Exhibit-1 is not disputed by the defense, in the absence of register maintained by Registrar, Births & Deaths and such other evidence on record to establish the authenticity of Exhibit-1, same cannot be safely considered in evidence to establish the age of the victim girl. Thus, it can be concluded that the prosecution has miserably failed to prove the age of the victim girl.***"** It is evident from the extract *supra* that although Exhibit 1 the Birth Certificate was not contested by the Appellant the Learned Trial Court chose to ignore it in the absence of supporting documents. However, the Prosecution failed to raise any question on this finding of the Learned Trial Court, consequently Exhibit 1 cannot be taken into consideration by this Court at the appellate stage. It thus follows that the age of the victim has not been established.

7. We may now relevantly examine the evidence of P.W.6 the Gynaecologist who examined the victim on 31-03-2016. No external injuries were noticed on the person of the victim neither were injuries found on her private part. He recorded that her hymen was lax and proceeded to elucidate that if the hymen is lax it is an indication of repeated sexual intercourse or that the person is habituated to sexual intercourse. The Urine Pregnancy Test was negative. P.W.7 the Medical Officer at the District Hospital, Namchi who also examined the victim on 31-03-2016 noticed some scratches on her left hand, apart from which no other injuries were seen on the victim. While considering the evidence of P.W.6 it is clear that the witness has not explained as to whether the laxity of the hymen was a result of the occurrence of the alleged incidents or whether the hymen was lax prior to the incidents or for that matter whether medical science can at all point to the age of the laxity enabling the Court to draw a correct conclusion. In the absence of any categorical and cogent statement of P.W.6 in this context and in the absence of any fresh injuries on the genital or person of the victim the Medical Report is of no assistance to the Prosecution case neither can we foist the offence on the Appellant.

8. That having been said, the Appellant was convicted that under Section 376(2)(n) and 376(2)(l) of the IPC the offence of rape is described in Section 375 of the IPC which *inter alia* requires penetration of the perpetrators penis to any extent, into the vagina, mouth, urethra or anus of the victim or he makes her to do so with him or any other person or that he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person. Rape would also occur if the accused manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person or the accused applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person. These acts must necessarily be against the will of the victim, sans her consent and if her consent is obtained by putting her in fear of death or hurt or any of the seven descriptions enumerated in Section 375 of the IPC.

9. In view of the provision as discussed hereinabove, the evidence of the victim is to be analysed, she has stated as follows;

> **"**..... The accused requested me to have sex with him and if I have sex with him my fingers of the hand would get straight and cured. ..... After some days the accused again came our house and at that time my sisters had gone to school and my mother had gone to collect "*ninguro*" in the forest. Finding me alone the accused made me lie down on the bed and had sex with me. I screamed for help but nobody was in and around.
>
> The accused, thereafter, used to frequently visit when there was no one in the house and used to sexually assault me. The accused sexually assaulted me repeatedly for about a period of two months. ....."

Assuming that her consent was given, it was not by putting her in fear of death or hurt. What emerges from the evidence of the victim is that

the Appellant "had sex" with her. It is however unclear what the victims understanding was of the words "had sex with me". The victim has failed to describe what the word 'sex' meant, neither has she described the actual act perpetrated on her by the Appellant. It is also stated that the Appellant used to "sexually assault" her, the term so utilised is also nebulous. The words "sexual assault" finds no definition in the IPC, thus for guidance we may look into the definition of the said words as found in the POCSO Act, 2012 under Section 7, which is as follows;

> **"7.** Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.**"**

Considering that she has only claimed that there was "sexual assault" the Court cannot arrive at a hasty conclusion that when she used the words "sexually assault" or "had sex with me" it would necessarily mean or imply penetrative sexual assault. It was imperative for the Prosecution to have extracted from the victim during her deposition the actual act that was committed on her considering that the Prosecution is under the mandate of proving its case beyond all reasonable doubt and cannot leave its case to ambiguities thereby leading to erroneous conclusions. It was thus incumbent not only upon the Prosecution but also the Learned Trial Court by exercising its powers under Section 165 of the Indian Evidence Act, 1872 to reach the crux of the matter when the victim was being examined. These observations are being verbalised in view of the fact that not only has the victim failed to specify the offence but P.W.12 the victims mother has in her evidence stated as follows;

> **"**……. In the afternoon, at about 3-3.30 p.m, while I was in my shop my victim daughter came running to the shop crying and told me that the accused entered into the house, forcibly laid her on the bed, took off her **lower garments and rubbed his penis on her vagina**. ……..**"**

Thus, this act of the Appellant does not satisfy the ingredients of Section 375 of the IPC which requires that there has to be penetration of the Appellants genital to any extent into the vagina, mouth, urethra or anus of a woman. The other ingredients of Sections 375, viz., Section 375(b), (c) and (d) are also not fulfilled. Assuming that the act was against her consent it is clear that the offence is not one under Section 375 punishable under Section 376 of the IPC but would be covered by provisions of Section 354A(1)(i) of the IPC, which is punishable with rigorous imprisonment for a term which may extend to three years or with fine or with both.

10. In view of the entire evidence before us, we are of the considered opinion that the Learned Trial Court erred in arriving at the finding that the Appellant committed the offence under Section 376(2)(n), 376(2)(i) and 376(2)(l) of the IPC. We are of the considered opinion that the offence is one under Section 354A(1)(i) of the IPC.

11. The Appellant is accordingly convicted under Section 354A(1)(i) of the IPC and sentenced to undergo rigorous imprisonment for a period of two years and fine of Rs.1,000/- (Rupees one thousand) only, duly setting off the period of imprisonment already undergone by him both as undertrial prisoner and convict.

12. Since the punishment prescribed under Section 354A(1)(i) of the IPC is lesser than Sections 376(2)(l) and 376(2)(n) punishable under Section 376(2) of the IPC, there is no requirement for a fresh hearing on sentence.

13. In view of the finding that the offence perpetrated on the victim was under Section 354A(1)(i) of the IPC, the victim is granted compensation of Rs.50,000/- (Rupees fifty thousand) only, in terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, which is to be made over to the victim by the Sikkim State Legal Services Authority (for short “SSLSA”).

14. The Appeal is allowed to the extent above.

15. No order as to costs.

16. Copy of this Judgment be forwarded to the Learned Trial Court along with records of the case.

17. A copy also be sent to the Member Secretary, SSLSA forthwith for information and compliance.

SLR (2019) SIKKIM 829

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

MAC App. No. 12 of 2018

The Branch Manager,
The New India Assurance Company Ltd. ….. APPELLANT

Versus

Tshering Doma Tamang (Minor)
and Others ….. RESPONDENTS

For the Appellant: Mr. Sudesh Joshi, Advocate.

For Respondent 1-2: Mr. Tarun Choudhary, Advocate.

For Respondent 3-4: Mr. Ajay Rathi, Legal Aid Counsel.

Date of decision: 12th November 2019

A. The Motor Vehicles Act, 1988 – Whether the Insurance Co. could be held to be liable to pay the compensation on the basis of an insurance policy which the Insurance Co. claim to be fake? – It was only before the date fixed for the Appellant's evidence that they discovered that the insurance policy was not genuine. Immediately the Appellant moved an application bringing this fact on record and seeking a prayer to file additional written statement with additional documents which was partly turned down. No opportunity was granted to the Appellant to allege and prove that the insurance policy was fake. Consequently, the Tribunal could not come to a definite conclusion as to whether the insurance policy was genuine or fake. The contractual liability of the Appellant can be determined only through the insurance policy. When admittedly the Tribunal could not determine its genuineness it may not be correct to fasten liability upon the Appellant without giving them an opportunity to assert and prove the allegation made in the application dated 05.04.2018 and in the evidence on affidavit of the Branch Manager of the Appellant – Held: Had the learned Tribunal permitted the Appellant to file additional written statement on this

limited aspect allowing them to lead evidence,cross-examination would have churned the truth – Impugned judgment on the aspect of the genuineness of the insurance policy is incorrect and liable to be set aside – Although, the Appellant has not challenged the order dated 11.05.2018 passed by the Tribunal, High Court is of the view that the said order is an impediment towards the search for truth and therefore, the Appellant must be given an opportunity to allege and prove what they assert in the application dated 05.04.2018 – The file restored before the learned Tribunal and the case remanded back – Tribunal to determine the question of genuineness of the insurance policy and on the liability of the compensation payable to Respondent No.1 and 2.

(Paras 11, 12 and 14)

Appeal allowed.

Case cited:

1. Silli Man Subba v. Man Bahadur Subba, MANU/SI/0073/2014.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The present appeal preferred by the Appellant raises a singular question as to whether the Appellant could be held to be liable to pay the compensation as determined by the Motor Accident Claims Tribunal (in short "the learned Tribunal") on the basis of an insurance policy (exhibit-6) which the Appellant claim to be fake? The Appeal does not question the determination of the learned Tribunal that the Respondent Nos. 1 and 2 were entitled to compensation and the extent of compensation granted. This Court shall therefore, examine only the singular issue raised by the Appellant without disturbing the determination on other issues.

2. Mr. Sudesh Joshi, learned Counsel for the Appellant submitted that the impugned judgment and award both dated 30.06.2018 on the aforesaid aspect are not sustainable as the learned Tribunal could not determine whether the insurance policy (exhibit-6) exhibited by Respondent Nos. 1 and 2 was genuine or not and that the Appellant ought to have been given an opportunity to allege and prove that it was fake. Mr. Tarun Choudhary, learned Counsel for Respondent Nos. 1 and 2 submits that although, the

insurance policy (exhibit-6) had been filed along with the claim petition the Appellant had failed to question the genuineness of the said document in its written objection and as such they were precluded from raising the issue belatedly. Mr. Ajay Rathi, learned Legal Aid Counsel for Respondent Nos. 3 and 4 submit that it is settled principle of law that a person who asserts a particular fact is required to affirmatively establish the same and since it was the Appellant who had asserted that the insurance policy (exhibit-6) was fake their failure to prove the fact would enure in favour of the Respondent Nos. 3 and 4.

3. The basic facts before the learned Tribunal for the effective determination of the present appeal were that on 29.03.2016 First Information Report (in short "the FIR") was lodged by Vaishali Thapa stating that her sister Tshering Doma Tamang (Respondent No.1) studying at Assangthang School was hit by a vehicle No.WB-76-8185 near Helipad, Namchi on 29.03.2016, she had sustained serious injuries on her left foot and evacuated to Namchi Hospital. On 14.11.2016 a claim petition was filed by Respondent No.1-a minor aged 8 years and her mother Hem Rupa Manger (Respondent No.2) before the learned Tribunal. The opposite parties were the Branch Manager, Darjeeling, New India Assurance Company Limited (Appellant), the owner of the vehicle-Mohan Sotang (Respondent No.3) and the driver of the vehicle-Subed Loksam (Respondent No.4).

4. In the claim petition filed by the Respondent Nos. 1 and 2 the name of the Respondent No.3 was given as the owner of the vehicle and the Appellant as the insurer of the vehicle. Amongst the various documents filed by Respondent Nos. 1 and 2 in the claim petition a photocopy purporting to be certified to be true copy of insurance policy bearing policy no.51230531130200000868 of the vehicle allegedly issued by the Appellant was sought to be relied upon. The claim petition did not disclose how the insurance policy (exhibit-6) was obtained by Respondent Nos.1 and 2.

5. The Appellant filed written objection on 04.08.2017. In paragraph 8 thereof the Appellant stated *"The policy if found would be considered subject to its validity terms and conditions, stipulations, restriction and limitation."* In paragraph 10 the Appellant had submitted *"The insured may kindly be directed to produce the original insurance policy before the Hon'ble Tribunal, failing which, this answering respondents shall*

produce the copy of the policy which may kindly be exhibited and read in evidence." In paragraph 23 the Appellant sought leave to file additional and amended written objection if necessary.

6. The Respondent Nos.3 and 4 appeared before the learned Tribunal on 25.05.2017 through an Advocate who undertook to file Vakalatnama. The said Advocate appeared on their behalf on 23.06.2017 as well, but on 04.08.2017 they were marked as absent. On 29.08.2019 they continued to be marked absent and on that date the learned Tribunal framed three issues. The order dated 08.09.2017 records that the Respondent Nos. 3 and 4 were absent on that date as well and proceeded ex-parte. Thereafter, they did not appear before the learned Tribunal nor file any written objection to the claim. Consequently, the Respondent No.3-the owner of the vehicle did not confirm or deny the insurance policy (exhibit-6) filed by the Respondent Nos. 1 and 2. On 07.10.2017 evidence on affidavit of Respondent No.2, her witnesses-Arjun Rai and Suresh Rai were filed. Their evidences were authenticated and the said witnesses were cross-examined on 04.11.2017. On the request of the Respondent Nos. 1 and 2 summonses were issued to Dr. Deokota and Dr. Mohpal pursuant to which they were examined on 02.12.2017. Thereafter, one Bishnu Kant Sharma was examined on behalf of the Respondent Nos.1 and 2 on 15.02.2018 and 16.03.2018 was set for evidence of the Appellant.

7. On 05.04.2018 the Appellant filed an application under Order VIII Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (in short "the CPC"). It was averred that recently while scrutinising the documents the officials of the Appellant learnt that the insurance policy (exhibit-6) as furnished and exhibited by the Respondent Nos. 1 and 2 was a fake policy and as such it was prayed that the Appellant may be permitted to file additional written statement and the relevant documents. Although time was granted to Respondent Nos. 1 and 2 to file a reply the order dated 30.04.2018 reflects that the Respondent Nos. 1 and 2 submitted that they do not desire to file a reply. The matter was heard on the said application and order dated 11.05.2018 was passed.

8. The learned Tribunal vide order dated 11.05.2018 however, rejected the application but allowed additional documents to be produced by the Appellant. Pursuant thereto, on 20.05.2018 Sonam Tshering Sherpa, Branch Manager of the Appellant at Namchi filed his evidence on affidavit. Sonam

Tshering Sherpa deposed that on verification it was found that the Appellant had issued insurance policy to one Depen Rai for a motor cycle bearing the same policy number of the insurance policy (exhibit-6) produced by the Respondent Nos. 1 and 2. He filed certified copy of the insurance policy (exhibit-A). He categorically deposed that the insurance policy (exhibit-6) exhibited by the Respondent Nos. 1 and 2 was fake and gave details as to why it was so. Sonam Tshering Sherpa also exhibited the investigation report (exhibit-B) of one Rupa Dhakal which reported that the insurance policy (exhibit-6) filed by Respondent Nos. 1 and 2 did not have QR code and thus found to be fake.

9. On 30.06.2018 the learned Tribunal rendered its judgment. It was held that the Respondent Nos. 1 and 2 are entitled to the compensation claimed by them. The plea of the Appellant that the insurance policy (exhibit-6) produced by the Respondent Nos. 1 and 2 being fake was rejected by the learned Tribunal on several grounds. It was held that Respondent Nos. 1 and 2 had produced the insurance policy (exhibit-6) believing it to be genuine; the Appellant had filed the insurance policy (exhibit-A) at a belated stage of trial i.e. after filing their written objection, after settlement of issues and after examination of Respondent No. 2 and their witnesses; the Appellant failed to examine the Branch Manager of the Darjeeling Branch who had purportedly issued the insurance policy (exhibit-6) and Rupa Dhakal the investigator; the Appellant had not filed any complaint against the Respondent No. 3 for obtaining fake insurance; It was unbelievable that the Respondent No.3 (the insured) would obtain a fake certificate by paying premium at his risk and cost. The learned Tribunal held that on perusal of the insurance policy (exhibit-6) filed by the Respondent Nos. 1 and 2 and the insurance policy (exhibit–A) filed by the Appellant it is difficult to identify which was fake and which genuine.

10. An insurance policy is a policy obtained by the insured from the insurer on payment. In the present case vis-a-vis the insurance policy (exhibit-6) the insured is purportedly Respondent No.3. The insurer is the Appellant. The Appellant has given evidence that the insurance policy (exhibit-6) is fake. The Respondent No.3 has chosen not to give his version before the learned Tribunal and he was proceeded ex-parte. The Respondent No.2 exhibited a photocopy purporting to be certified to be true copy of the insurance policy (exhibit-6). During her cross-examination she admitted that she was unaware about the documents and the insurance

policy of the vehicle. There is no evidence at all of the purported insured i.e. Respondent No.3 with regard to the insurance policy (exhibit-6). Respondent Nos. 1 and 2 are not privy to either of the insurance policies (exhibit-6 and exhibit-A). The evidence of Respondent Nos.1 and 2 with regard to the genuineness or otherwise of insurance policy (exhibit-6) is immaterial as they were not privy to it. The mere fact that the Respondent Nos. 1 and 2 had produced the insurance policy (exhibit-6) believing it to be genuine would not thus turn the table against the Appellant. The records reveal that the Appellant realized that the insurance policy (exhibit-6) was not genuine only at the time when they were required to give evidence before the learned Tribunal. Thus, filing of the insurance policy (exhibit-A) along with the application dated 05.04.2018 cannot be termed belated as it is trite that limitation for alleging fraud or forgery would arise from the date of knowledge. In any case records reveal that on 05.04.2018 when the Appellant filed the application only the Respondent Nos.1 and 2 and their witnesses had been examined and the said witnesses would not have, ordinarily, any knowledge about the genuineness of insurance policy (exhibit-6). The learned Tribunal has held that the Appellant failed to examine the Branch Manager of the Darjeeling Branch who had purportedly issued the insurance policy (exhibit-6). The learned Tribunal failed to appreciate that had it allowed the application dated 05.04.2018 of the Appellant to file additional written statement; additional evidence may have been led. Instead, the learned Tribunal permitted the Appellant to file additional documents only. Thus, the failure of the Appellant to examine the Branch Manager of the Darjeeling Branch of the Appellant cannot be held against the Appellant. The learned Tribunal has also held that it was unbelievable that the Respondent No.3 would obtain a fake certificate by paying premium at his risk and cost. However, the learned Tribunal did not consider that the Respondent No.3 had not even bothered to file a written statement and assist it in arriving at the truth. It is unclear as to how the learned Tribunal came to the conclusion that Respondent No.3 had paid premium for the said insurance policy (exhibit-6). Although, the Respondent Nos. 3 and 4 had chosen not to appear before the learned Tribunal pursuant to the summonses issued by this Court they have appeared through Mr. Ajay Rathi, learned Legal Aid Counsel. They have chosen to remain silent even at this stage and argue only on the various discrepancies in the evidence led by the Appellant before the learned Tribunal.

11. A perusal of the application dated 05.04.2018 filed by the Appellant makes it evident that it was only before the date fixed for the Appellant's evidence that they discovered that the insurance policy (exhibit-6) was not genuine. Immediately the Appellant moved an application bringing this fact on record and seeking a prayer to file additional written statement with additional documents which was partly turned down. No opportunity was granted to the Appellant to allege and prove that the insurance policy (exhibit-6) was fake. Consequently, the learned Tribunal could not come to a definite conclusion as to whether the insurance policy (exhibit-6) was genuine or fake. The contractual liability of the Appellant can be determined only through the insurance policy (exhibit-6). When admittedly the learned Tribunal could not determine its genuineness it may not be correct to fasten liability upon the Appellant without giving them an opportunity to assert and prove the allegation made in the application dated 05.04.2018 and in the evidence on affidavit of Sonam Tshering Sherpa, the Branch Manager of the Appellant. The judgment of this Court in re: ***Silli Man Subba v. Man Bahadur Subba***[1] relied upon by Mr. Tarun Choudhary is distinguishable. In the said case the insurance company had not denied that the policy was issued by its employee. The evidence produced by the Appellant in this regard *prima-facie* does reflect that it needs to be examined during trial. Had the learned Tribunal permitted the Appellant to file additional written statement on this limited aspect allowing them to lead evidence, cross-examination would have churned the truth. The fact that the accident occurred as a result of which the Respondent No.1 suffered injuries is not questioned. The fact that a Tata Sumo vehicle (silver colour) bearing registration No.WB-76-8185 owned by Respondent No.3 and driven by Respondent No.4 in a rash and negligent manner is not disputed. As a result of the accident Respondent No.1 was permanently disabled and her foot had to be amputated is not disputed. The fact that Respondent No.3 is the owner of the said vehicle is not disputed. If the vehicle was in fact insured with the Appellant through the insurance policy (exhibit-6) found to be genuine then it would be the Appellant who would be bound to indemnify the liability of the Respondent No.3. The Appellant however, asserts that the insurance policy (exhibit-6) is fake. Only a photocopy of the insurance policy (exhibit-6) was filed by Respondent No.1 and 2. The said photocopy of the insurance policy (exhibit-6) bears the seal of Namchi police station only and is not certified copy as claimed by the Respondent No.1 and 2 in

[1] MANU/SI/0073/2014

the list of documents. The original would have been with Respondent No.3 if it was genuine. Respondent No.3 did not produce the original of the insurance policy (exhibit-6) if it existed or depose as to how he procured it. The only question which requires determination is whether the insurance policy (exhibit-6) is fake. The silence maintained by the Respondent Nos. 3 and 4 throughout the proceedings before the learned Tribunal also does not assist the Court in arriving at the truth. In the circumstances, this Court is of the considered view that the impugned judgment on the aspect of the genuineness of the insurance policy (exhibit-6) is incorrect and liable to be set aside. Although, the Appellant has not challenged the order dated 11.05.2018 passed by the learned Tribunal, this Court is of the view that the said order is an impediment towards the search for truth and therefore, the Appellant must be given an opportunity to allege and prove what they assert in the application dated 05.04.2018. Consequently, the findings of the learned Tribunal on the aspect of genuineness of the insurance policy (exhibit-6) and the liability of the Appellant to pay the compensation determined in the impugned judgment and award both dated 30.06.2018 are set aside.

12. The file in MACT Case No. 10 of 2016 is restored before the learned Tribunal. The learned Tribunal shall permit the Appellant to file additional written statement along with any document they seek to prove in support of their allegation that the insurance policy (exhibit-6) is fake. The Respondents shall be at liberty to file their response if they so desire and if the Appellant chooses to lead oral and documentary evidence (on this limited aspect) the learned Tribunal shall give opportunity to the Respondents to counter the same as per law including permitting them to lead additional evidence. On completion the learned Tribunal shall fix the liability for payment of compensation in the light of the evidence available before it.

13. The Supreme Court vide order dated 10.07.2019 had directed the Appellant to deposit the entire award amount along with accrued interest before the learned Tribunal and on such deposit being made an amount of Rs.5 lakhs be disbursed to the guardian of Respondent No.1. The rest of the amount was directed to be invested in a fixed deposit till the appeal is decided by this Court so that the deposit may enure the benefit in favour of the succeeding party. An affidavit of compliance was filed by the Appellant. Mr. Tarun Choudhary, learned Counsel for Respondent Nos.1 and 2 also confirmed receipt of Rs.5 lakhs on behalf of Respondent No.1. In the

circumstances, this Court is of the view that the amounts invested in a fixed deposit should continue until the final determination on the question of liability for payment of compensation by the learned Tribunal. The fixing of the liability for payment of compensation between the Appellant and the Respondent No.3 would also determine who would ultimately have to bear the payment of Rs.5 lakhs made to the Respondent Nos. 1 and 2 as per the order dated 10.07.2019 passed by the Supreme Court.

14. The learned Tribunal is requested to determine the question of genuineness of the insurance policy (exhibit-6) and render its judgment on the liability of the compensation payable to Respondent Nos.1 and 2 at the earliest convenience.

15. The appeal stands allowed as indicated above. The impugned judgment and award both dated 30.06.2018 are set aside to this limited extent and the matter remanded for determination on the question of genuineness of the insurance policy (exhibit-6) and for fixing the liability of the compensation payable.

16. The observations of this Court on the insurance policies (exhibit-6 and exhibit-A) have been made for determination of the present dispute. The learned Tribunal shall not be bound by any such observation and determine the questions solely based on the evidence led by the parties.

17. A copy of the judgment shall be forwarded to the Court of the learned Tribunal, South Sikkim at Namchi.

SLR (2019) SIKKIM 838

(Before Hon'ble the Chief Justice)

Crl. A. No. 13 of 2018

Smt. Chandrawati Devi and Another ….. APPELLANTS

Versus

Smt. Sharda Gupta and Others ….. RESPONDENTS

For the Appellants: Mr. Jorgay Namka and Ms. Panila Theengh, Advocates.

For Respondent 1-2: Mr. N.B. Khatiwada, Senior Advocate and Ms. Gita Bista, Legal Aid Counsel.

For Respondent No.3: Mr. Santosh Kumar Chettri, Assistant Public Prosecutor**.**

Date of decision: 13th November 2019

A. Indian Penal Code, 1860 – S. 415 – Cheating –A perusal of S. 415, I.P.C goes to show that this section has two parts. While the first part of the definition relates to property, the second part need not necessarily relate to property. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property, in the second part, the person should "intentionally"induce the complainant to do or omit to do a thing. In order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was given. The explanation to the section also provides that a dishonest concealment of facts is a deception within the meaning of the section.

(Para 13)

B. Indian Evidence Act, 1872 – Ss. 65A and 65B – Electronic Evidence – Electronic evidence is admissible and provisions of Ss. 65A and 65B of the Evidence Act are by way of clarification and are procedural provisions – If electronic evidence is authentic and relevant the same can

certainly be admitted subject to the Court being satisfied about its authenticity, and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under S. 65B(h) (*In Re.: Shafhi Mohammad v. State of Himachal Pradesh cited*) – In the instant case where except for tendering a CD as an exhibit since no attempt was made by the Appellants to prove its contents as well as its authenticity, the CD cannot be held to have established the alleged conversation between the Appellant No. 2 and Respondent No.1 wherein Respondent No.1 purported to have admitted her pre-existing condition of Hypothyroidism.

(Para 26)

Appeal dismissed.

Case cited:

1. Shafhi Mohammad v. State of Himachal Pradesh, (2018) 5 SCC 311.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. Jorgay Namka, learned counsel for the appellants, Mr. N.B. Khatiwada, learned Senior Counsel for respondents nos.1 and 2 and Mr. Santosh Kumar Chettri, learned Assistant Public Prosecutor, Sikkim for respondent no. 3.

2. This appeal is preferred against the judgment dated 03.04.2017 passed by the learned Judicial Magistrate First Class, Chungthang Sub-Division, North Sikkim at Gangtok in Private Complaint Case No.08 of 2013 dismissing the complaint filed by the appellants against the present respondents nos.1 and 2. Shri Chandrika Sah, father of respondent no.1 and Shri Ankit Gupta, who is brother of respondent no. 1 and son of respondent no.2, were also arrayed as accused persons in the complaint. However, they were discharged by an order dated 19.10.2015. Appellant no.1 is the mother of appellant no.2, her son.

3. The case set out in the complaint petition, in short, is that the marriage between appellant no.2 with the present respondent no.1 was solemnized on 30.04.2012 at Siliguri, West Bengal and marriage reception

function was held on 03.05.2012 at Singtam, East Sikkim. The marriage was an arranged marriage and the process was initiated by ShRi Chandrika Sah. The appellants had enquired about the education, health and other related issues of respondent no.1 before finalizing the engagement and they were informed that the respondent no.1 does not suffer from any ailment and is in good health. However, soon after marriage, it became apparent that the respondent no.1 was not a physically and mentally fit person even to undertake day to day chores as a result of which they felt let down and betrayed at the concealment of various ailments such as extreme case of Thyroid and Abscess from which the respondent no.1 was suffering from prior to marriage. It also came to light that the respondent no.1 was under regular supervision of doctors at New Delhi. When confronted with the above revelation, the respondent no.1 informed the appellant no.2 over telephone that the fact of her true medical condition was not divulged as she had feared that if the disclosure was made, the appellant no.2 would not marry her. It is also stated in the complaint that the said conversation was recorded. When questions were raised about the health issues pertaining to respondent no.1, Shri Ankit Gupta came down to Singtam and took away the respondent no.1 stating that she would be taken to New Delhi for her treatment. Immediately on reaching New Delhi, the respondent no.1, along with the other accused persons named in the complaint, started threatening the complainants with dire consequences and not only that, the respondent no.2 and the maternal aunt of the respondent no.1, with the objective of ruining the marital relationship of the sister of appellant no.2, namely, Smt. Asha Prasad, went to the place of her in-laws at Chapra, Bihar and started complaining about the appellants to the father-in-law of Smt. Asha Prasad. When Smt. Asha Prasad tried to intervene in the matter, she was threatened, abused and insulted in presence of her father-in-law and others. It is stated that a complaint was also lodged against the accused persons before the Officer in-Charge, Singtam Police Station as well as State Women Commission at Gangtok, besides issuing a legal notice dated 13.02.2013.

4. On the basis of the said complaint, Complaint case No.08/2013 was registered. Thereafter, on perusal of the complaint petition along with the documents as well as considering the evidence adduced by appellants as well as a witness, namely, Shri Sushil Lepcha, under Section 202 Code of Criminal Procedure, 1973 (for short, Cr.P.C), the learned Magistrate took cognizance of the offences under Sections 406/418/506/34 of Indian Penal

Code,1860 (for short, IPC) against all the persons named in the complaint petition. 5. Subsequently, after hearing the learned counsel for the complainants as well as the accused persons, by an order dated 19.10.2015, while discharging accused no.2 and 4, namely, Shri Chandrika Sah and Shri Ankit Gupta, substance of accusation was prepared against accused Nos.1 and 3, namely, Smt. Sarada Gupta and Smt. Laxmi Saha, who are respondents Nos.1 and 2 herein, under Section 417/506/34 IPC.

6. During trial, appellants examined four witnesses, namely, appellant no.1, appellant no.2, Shri Sushil Lepcha and Smt. Asha Prasad. In their examination under Section 313 Cr. P.C., the respondents no.1 and 2 denied the allegations made against them. They also examined themselves along with Shri Chandrika Sah and Shri Ankit Gupta.

7. On consideration of the materials on record and after hearing the learned counsel for the parties, the learned trial court opined that the complainants had failed to establish the ingredients of the offences under Section 417/506/34 IPC against the respondents and accordingly, had acquitted them.

8. Mr. Jorgay Namka, learned Counsel for the appellants has submitted that the learned Trial Court below erred in law as well as in facts in acquitting the respondents and therefore, the impugned judgment of acquittal is liable to be set aside and quashed. He has submitted that the respondents had dishonestly concealed material facts and intentionally deceived the appellant by not divulging the fact of the respondent no.1 suffering from serious illness before the engagement had taken place, that too, despite the fact that the appellants had sought for details with regard to health conditions of the respondent no.1, and it was only because of the fact that it was made to believe that the respondent no.1 was not having any illness, the appellants had agreed to solemnize the marriage of appellant no.2 with respondent no.1. He has submitted that Exhibit-13, a legal notice issued on behalf of respondents by way of a reply, clearly demonstrates that the respondent no.1 had a pre-existing condition of Hypothyroidism. It is contended that respondent no.1 had admitted vide Exhibit-A11 that before the marriage also she had undergone test for Thyroid and therefore, the learned Trial Court was clearly in error in acquitting the appellants of the offence of cheating. He has also contended that learned Trial Court did not even consider Exhibit-11, which is a CD, wherein conversation between the

appellant no.2 and respondent no.1, in which the respondent no.1 had admitted that the pre-existing condition of Hypothyroidism had not been disclosed on the apprehension that if the same had been disclosed the appellant no.2 would not have consented to marry the respondent no.1, was recorded. He also submitted that the respondent no.1 had also disclosed to Dr. S. Sen about being under medication for Hypothyroidism prior to marriage. However, this aspect of the matter was also not considered by the learned Trial Court, he submits. He relies on a decision of the Hon ble Supreme Court of India in the Case of *Shafhi Mohammad versus State of Himachal Pradesh*, reported in *(2018) 5 SCC 311*.

9. Mr. N.B Khatiwada, learned Senior Counsel appearing for respondent no.1 & 2, on the other hand, contends that the appellants had miserably failed to establish the ingredients of the offences alleged and therefore, the learned Trial Court was wholly justified in acquitting the respondents. He submits that no documentary evidence had been placed on record by the appellants to demonstrate that respondent no.1 was suffering from Hypothyroidism prior to marriage. While admitting that issues relating to education, health, etc. were discussed prior to formalizing the engagement, as respondent no.1 was not suffering from any disease including Hypothyroidism, it was so stated and therefore, there was no suppression of any material fact. Appellants had merely exhibited the CD without giving any transcription of the same and therefore, the contents and authenticity of the CD are not proved and in that view of the matter, there is no merit in the contention advanced that non consideration of Exhibit-11 has vitiated the impugned judgment, he submits. He also contends that there is no admission in Exhibit-13 that the respondent no.1 was suffering from various illnesses prior to marriage. With regard to Exhibit-A11, he has contended that a receipt for thyroid test does not in any way establish that the respondent no.1 had been suffering from Hypothyroidism. He has also submitted that no reliance can be placed on the alleged disclosure of pre-existing medical condition to Dr. S. Sen, as he was not examined. Mr. Khatiwada further submitted that there is no acceptable evidence with regard to criminal intimidation.

10. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

11. The substratum of the complaint case is that there was dishonest concealment of pre-existing condition of Hypothyroidism despite specific enquiries made and that the appellants were threatened with dire consequences and with filing of false cases.

12. Cheating is defined in Section 415 of the IPC which provides as under:-

> "415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

13. A perusal of Section 415 IPC goes to show that this Section has two parts. While the first part of the definition relates to property, the second part need not necessarily relate to property. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property, in the second part, the person should "intentionally" induce the complainant to do or omit to do a thing. In order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was given. The explanation to the Section also provides that a dishonest concealment of facts is a deception within the meaning of the Section. Section 417 provides that whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

14. Criminal intimidation is defined under Section 503 IPC and Section 506 IPC provides for punishment for criminal intimidation. Section 503 IPC reads as follows:-

> "503. Criminal intimidation.-Whoever threatens another with any injury to his person, reputation or

property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section."

15. In order to appreciate the contentions advanced in the light of the legal provisions as noticed hereinabove, it will be apposite to, broadly, take note of the evidence on record.

16. In her evidence, the appellant no.1 stated that the accused persons were introduced by her son-in-law Dr. S.B. Gupta by forwarding an e-mail received from Shri Chandrika Sah to her younger son Shri Ashok Prasad. The e-mail contained two attachments being the photograph and bio-data of respondent no.1 and that being impressed by the bio-data of respondent no.1, they wanted to consider the proposal for marriage with appellant no.2, who is a B. Tech in Electrical and Electronic Engineering and who was working on contractual temporary basis in Aircel. A meeting was, accordingly, held on 10.02.2012 at the Guest House of Central Water Commission, Tadong, which was attended to by the prospective groom and bride along with their family members. They had shared and exchanged information regarding education, health and other issues and it was impressed upon by the accused persons that the respondent no.1 was not under medication for any illness. Accordingly, the appellants and their family members decided to hold an engagement ceremony on 11.02.2012 at Gangtok and finally, marriage was solemnized at Siliguri in between the appellant no.2 and the respondent no.1 on 30.04.2012 and for the marriage ceremony, all arrangements were made by the appellants in view of the request made by Shri Chandrika Sah, the father of the prospective bride, as he was based in New Delhi. The respondent no.1 was seemingly physically and mentally unfit and was unable to perform day to day house hold work which was noticed by all. The respondent no.1 was taken to New Delhi by her father on 02.06.2012 to perform certain rituals. The appellant no.2 had also gone to New Delhi to bring back the respondent no.1 on 07.07.2012

and both of them came back together to Singtam on 12.07.2012. She started complaining of fatigue very frequently and had developed abscess under her arm requiring immediate medical attention and accordingly, she was taken to Medica North Bengal Clinic, Siliguri by the appellant no.2 for treatment where she was attended to by Dr. Shantanu Kar, who suggested surgery. She was also examined by another Doctor, namely, Dr. S. Sen and during the course of interaction with him, respondent no.1 disclosed that she had been a patient of Hypothyroidism for last many years and was also under medication. She had also disclosed about the irregular menstrual cycles she was suffering from for many years. The test conducted showed her TSH (Thyroid Stimulating Hormone) was 6.92 as against expected normal range of 0.27-4.2. One more Doctor, namely, Dr. V. Sarkar was also consulted to manage her abscess. On being queried as to why the medical condition existing prior to marriage was not disclosed, the respondent no.1 had responded that she had apprehension that if the same was disclosed, the appellant no.2 would not have married her. It was deposed by the appellant no.1 that the foundation of marriage was laid by the accused persons by concealing material facts and by resorting to falsehood and misrepresentation with dishonest intention. On 12.9.2012, Shri Ankit Gupta came to their residence and made a request to let the respondent no.1 visit her uncle at Chapra. The request being acceded to, they left for Chapra on 15.09.2012. It transpired that, thereafter, they had left for New Delhi on 19.09.2012 and since then respondent no.1 had been residing in New Delhi where she took treatment for her ailment of Hypothyroidism at VMMC and Safdarjung Hospital. She had sent her medical report of October, 2012 via e-mail which showed TSH value at 6.92 (Exhibit-9) and another report showing TSH level at 10.73 as on 05.10.2012. On receipt of the aforesaid reports, the appellant no.2 had consulted doctors who indicated that there would be medical complication during pregnancy and that the children born will have physical as well as mental abnormality. When confronted with such revelation, the respondent no.1 disclosed that she was apprehensive that if her medical condition was disclosed, the appellant no.2 would not have married her. Thereafter, the accused persons started threatening them over telephone stating that false case of dowry and torture would be filed against the appellants. The appellant no.1 also deposed in tune with the statements made in the complaint petition regarding the visit to the house of the father-in-law of Smt. Asha Prasad and what transpired there. She also deposed that in a reply dated 21.03.2013, Exhibit-13, sent through a lawyer, in response to a

legal notice dated 13.02.2013 issued on behalf of the appellants, while leveling false allegations against them it was admitted that the respondent no.1 had been suffering from Hypothyroidism prior to her marriage,

17. In her cross-examination, the appellant no.1 admitted that a case under domestic violence and a case under Section 498 A IPC were filed by respondent no.1 and that on 31.12.2012, the respondent no.1 had filed a complaint before Delhi Women Commission and that they were asked to appear on 17.04.2013. She admitted in her cross-examination that they had not filed any medical documents to affirm that there existed any pre-existing history of Thyroid before marriage. She, however, denied the suggestion regarding demand of dowry and inflicting of mental and physical torture on respondent no.1.

18. The evidence of appellant no.2 is almost identical with the evidence of appellant no.1. The cross-examination is also more or less on the same lines. He admitted that the authenticity of the conversation recorded in Exhibit-11 was not verified from the laboratory.

19. In his evidence, Shri Sushil Lepcha, who is a friend of the appellant no.2, had deposed that he had attended the marriage of appellant no.2 and was aware that the appellants had made due enquires about education, health and other related issues of respondent no.1 before finalizing the marriage. After marriage whenever he visited the house of the appellants, he found the respondent no.1 sick and unwell and one day he had seen the brother of respondent no.1 taking her away with luggage. He was also told by the appellant no.2 that his in-laws had committed breach of trust by concealing the ailment of the respondent no.1 and that the accused persons were consistently threatening them with filing of false criminal cases against them.

20. The evidence of Smt. Asha Prasad is also more or less in the same line as that of appellant nos.1 and 2. In addition, she had deposed that her father who retired from service as Headmaster passed away in the year 2006. She is a permanent employee of Sikkim Government being a Graduate Teacher (Science). It is stated that before marriage when specific information regarding education, health and other related issues of the respondent no.1 was sought for, they were informed that everything about her health was good and she was not under any medication for any illness

and on the basis of such positive assertion only, marriage was solemnized. Immediately after the marriage, it was found that she was physically unfit and was unable to perform simple tasks and without make-up she appeared to be pale. The subject of her illness was brought to the notice of father of the respondent no.1, when he had visited them to take respondent no.1 to New Delhi and even then he had assured that there was nothing to worry about. She stated that they had left on 22.12.2012. She further deposed that after filing of the complaint, the respondent no.1, in connivance with the parents and brother, lodged a false domestic violence case in August 2013 and a false case of demand of dowry in the year 2014 and extorted a sum of Rs.3,30,000/-.

21. Her cross-examination was in line with the cross-examination of the appellants and response was also similar. She had, in her cross-examination, admitted that there is no documentary proof of payment of Rs.3,30,000/- by way of demand draft. She also stated that she was not aware of any complaint being lodged against her by respondent no. 1.

22. In her evidence, respondent no.1 stated that she was not suffering from any illness prior to her marriage. She deposed that she was made to work day and night in the matrimonial home and was never allowed to take any rest and even when she was suffering from abscess, there was no respite. The appellants and family members always taunted her. She was beaten and slapped many times by complainants and their family members. She was treated for abscess at Siliguri, where she was advised to check her Thyroid and for the first time Thyroid was checked on 27.8.2012 and then only she came to learn that she was having Hypothyroidism. She had never given any statement to doctors at Siliguri that she had Thyroid problem for many years and that she was under medication for Hypothyroidism. Demand for dowry was also made repeatedly after marriage and the situation became worse after her return from consultations with the doctors at Siliguri. Her brother was compelled to come and she was forced to leave with her brother on 15.09.2012 to stay at her native place for some months. The appellant no.2 who had accompanied them to Siliguri had told her that he would come to New Delhi and take her back, but he did not come. She further stated that though she used to call the appellant no.2 and her in-laws to take her back to Singtam and such request was also made by family members, it was informed that only if their demands were met, they would take her back and left with no other option, she had filed a complaint

before the Delhi Women Commission on 31.12.2012 (Exhibit-7) in which summons were issued directing the appellants and other family members to appear on 17.04.2013 and as a counter-blast, the complaint case was filed by the appellants on 13.06.2013. It is stated that the appellant no.2 had sent her original educational certificates through the husband of Smt. Asha Prasad and her mother, along with an aunt, had gone to Chapra, Bihar only to collect the educational documents and not to destroy the matrimonial relationship of Smt. Asha Prasad.

23. In her cross examination, the respondent no.1 stated that she had sent the Exhibits 9 and 10 to the complainant. She also admitted the receipt dated 12.01.2011 for test for Thyroid issued by Hindlabs New Delhi (Exhibit-A11). She admitted that before marriage there were specific talks about her health and as she had no health issues and was healthy and not suffering from any disease, it was stated accordingly. 24. Evidence of Smt. Laxmi Sah, Shri Chandrika Sah and Shri Ankit Gupta are also in similar line. The cross-examination is in similar direction and the responses are also in the same line as given by the respondent no. 1.

25. In the complaint petition, Exhibit-20, date of occurrence was shown on 30.12.2012 at around 12.00 hours. However, it is striking that neither in the complaint nor in the deposition of the witnesses of the appellants there is any reference to what transpired on 30.12.2012. However, it has come on record that one day later, on 31.12.2012, the respondent no.1 had filed a complaint before the Delhi Woman Commission.

26. In *Shafhi Mohammad (supra)*, the Honble Supreme Court had observed that electronic evidence is admissible and provisions of Section 65A and 65B of the Evidence Act are by way of clarification and are procedural provisions. It is held that if the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h). In the facts of the instant case where except for tendering a CD as an Exhibit, namely, Exhibit-11, since no attempt was made by the appellants to prove its contents as well as its authenticity, the CD cannot be held to have established the alleged conversation between the appellant no.2 and respondent no.1 wherein respondent no.1 purported to have admitted her pre-existing condition of

Hypothyroidism. The respondent no.1 was stated to have told Dr. S. Sen about her pre-existing medical condition of Hypothyroidism prior to marriage. Dr. Sen would have been a disinterested witness and his evidence could have thrown much light. However, the appellants chose not to examine him.

27. Exhibit-13 is a reply given by learned Advocate on behalf of the accused persons named in the complaint petition to the legal notice dated 13.02.2013 issued on behalf of the appellants. Much reliance is placed on Exhibit-13 by Mr. Namka to contend that there is an admission with regard to pre-existing condition of Hypothyroidism. That enquiries were made by the appellants prior to engagement ceremony with regard to educational, health and other related issues of the respondent no.1 is an admitted position. A perusal of Exhibit-13 goes to show that there is a categorical assertion in Paragraph 7 that the accused persons did not conceal anything including any disease suffered by the respondent no.1 and that since the dowry demands made could not be fulfilled, allegations of cheating are leveled. It is also stated in Paragraph 'e' that the situation turned for the worse after the appellants had learnt about the respondent no.1 suffering from Hypothyroidism. However, at the same time, it was stated in Paragraph '2' that the appellants had responded positively to the disease as curable one and not a serious issue. Though there is some inconsistency, it cannot be deduced from Exhibit-13 that the same established beyond all reasonable doubt that the respondents had concealed a pre-existing disease. It is to be noted that the respondent no.1 was taken to Siliguri for medical attention as an abscess had developed under her arm and during the process of investigation, it was detected that the respondent no.1 was suffering from Hypothyroidism. The respondent no.1, who was working as a Web Designer and had obtained 88.8% of marks in M.Sc (Environmental Science) from Benaras Hindu University, had stated that she was surprised when she came to know that she was suffering from Hypothyroidism. There is no evidence that after marriage the respondent no.1 was taking any medicine. It is, however, admitted by the respondent no.1 in her cross-examination that Exhibit-A11, which is dated 12.01.2011, i.e., prior to marriage, relates to her. Exhibit-A11 is marked as a report. A perusal of Exhibit-A11 goes to show that it is a receipt for test of Thyroid panel-I and not a report. A test conducted for Thyroid Panel-I does not mean that one is suffering from a Thyroid disease as the report may either indicate evidence of parameters being outside the normal range from which attending

doctor may diagnose that the patient is suffering from some Thyroid disorder, or the parameters being within range. Exhibit-A11 does not, by itself, establish a pre-existing disease relating to Thyroid. The appellants did not examine any witness from Hindlabs, the diagnostic centre which had issued the receipt Exhibit-A11, for bringing on record the test report of Thyroid Panel-I test. There is no documentary evidence demonstrating in categorical terms that the respondent no.1 was suffering from Hypothyroidism or was taking medicine since before marriage. In that context, though the respondent no.1 in her evidence had stated that for the first time Thyroid was checked on 27.08.2012, which is in contradiction to Exhibit-A11, the same will not have any material bearing in the facts and circumstances of the case.

28. Though allegations of dowry and torture have been deposed to by the respondents, this Court has refrained from making any observation on that aspect as cases in relation to such allegations are pending and such issues have not fallen for consideration in this case. Whether aforesaid cases had been filed falsely or without any basis is for the Court adjudicating such cases to determine. Filing of a case, per se, cannot come within the purview of criminal intimidation. The father-in-law of Smt. Asha Prasad was also not examined by the appellants to lend credence to the allegation that Smt. Asha Prasad was threatened in his presence.

29. In view of the above discussion, I find no merit in this appeal and accordingly, the appeal stands dismissed.

30. Registry will send back Lower Court Record.

SLR (2019) SIKKIM 851

(Before Hon'ble the Chief Justice)

Crl. A. No. 39 of 2017

Sanjay Rai ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. William Tamang, Legal Aid Counsel.

For the Respondent: Ms. Pollin Rai, Assistant Govt. Advocate.

Date of decision: 15th November 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –Evidence of parents with regard to date of birth of a child is the best evidence when such evidence is backed by unimpeachable document. In the instant case, PW-2 deposed that his daughter was aged about 14 years when the offence was committed. The Birth Certificate goes to show that the victim had not completed 15 years on the date of occurrence – Having regard to the evidence on record, there is no escape from the conclusion that the victim was a minor and below 15 years on the date of occurrence.

(Paras 28 and 29)

B. Indian Penal Code, 1860 – S. 361 – Kidnapping from Lawful Guardianship – This Section seems as much to direct the minor children from being seduced for improper purposes as to protect the right of privileges of guardians having lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in the section, out of the keeping of the lawful guardian without the consent of such guardian. The use of the word 'keeping' connotes the idea of charge, protection, maintenance and control; further, the

guardian's charge and control are compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. The consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent, that would take a case out of the purview of the section. It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section (*In Re.: State of Haryana v. Raja Ram cited*) – Evidence on record demonstrates that the appellant had called over the victim to meet him at Singtam and had asked the victim to board a Taxi. Even if it is to be taken that victim had consented to go along with the appellant, such consent would be immaterial and the materials on record, taken as a whole, would be indicative of the fact that the victim was persuaded to go with the appellant. The appellant had introduced the victim as his wife to PW-3 and PW-15 and on such assertion he was provided a bed to be shared by him and the victim. It demonstrates that the appellant had the intention that the victim would be seduced to illicit intercourse – Conviction under S. 366, I.P.C does not warrant any interference.

(Paras 36 and 37)

Appeal dismissed.

Chronological list of cases cited:

1. Md. Imran Khan v. State (Govt. of NCT Delhi), (2011) 10 SCC 192.
2. Kantilal Chandulal v. State of Maharashtra, (1969)3 SCC 166.
3. Anant Prakash Sinha v. State of Haryana, (2016)6 SCC 105.
4. State of Haryana v. Raja Ram, (1973) 1 SCC 544.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

Heard Mr. William Tamang, learned Legal Aid Counsel for the petitioner and Ms. Pollin Rai, learned Assistant Public Prosecutor, Sikkim for the respondent.

2. This appeal is directed against the judgment and order dated 28.02.2017 passed by the Court of learned District Judge, Protection of Children from Sexual Offences, 2012, East Sikkim at Gangtok in Sessions Trial (POCSO) No.14/2015 convicting the accused/appellant under Section 366 IPC and Section 4 of Protection of Children from Sexual Offences, 2012, for short, POCSO Act, and sentencing him to simple imprisonment of seven years and to pay a fine of Rs.,1000/- only, for commission of the offence under Section 4 of the POCSO Act, in default of payment of fine, to undergo further imprisonment for a period of one month and simple imprisonment of five years and to pay a fine of Rs.1,000/- only, in default of payment of fine, to undergo further imprisonment of one month, for the commission of offence under Section 366 IPC. It was directed that both the sentences will run concurrently.

3. The father of the victim lodged a Missing Entry Report before the Singtam Police Station on 14.03.2015 and based on the same, FIR (Exhibit-2) No.93/SPS under Section 363 IPC was registered. It is stated in the FIR that his daughter, hereinafter referred as "X or victim", aged about 14 years, had been missing since 11.03.2015 and that after searching her in many places, in the morning of 14.03.2015 at 08.10 am, they came to learn that the appellant had taken her to his aunts house at "Y" (place name withheld).

4. During trial, prosecution had examined 17 witnesses including the Investigating Officer. Defence did not examine any witness. The appellant was examined under Section 313 Cr.PC where the plea taken was that of denial.

5. The learned Trial Court relied on the evidence of PW-1, PW-2, PW-3, PW-4, PW-6, PW-8, PW-15, PW-16 and PW-17 to come to the conclusion that the victim was taken out by the appellant to Darjeeling and to "Y" without the consent of victims lawful guardian.

6. The learned Trial Court relied on the evidence of PW-8 as well as Birth Certificate, marked as Exhibit-4, to hold that the victim was minor at the time of commission of the offence. Apart from the evidence of PW-1, the learned Trial Court placed reliance on the evidence of PW-12 to come to the conclusion that the prosecution has been able to prove beyond reasonable doubt that the appellant had committed penetrative sexual

intercourse as defined under Section 3 (a) of the POCSO Act. At the same time, the learned Trial Court had observed that sexual act could have been committed with the consent of the victim, which, however, would be of no consequence as consent, even if there be any, would be irrelevant, as the victim was minor.

7. Mr. Tamang submits that prosecution had miserably failed to prove the ingredients of Section 366 IPC as well as Section 4 of the POCSO Act and therefore, the impugned judgment is not sustainable in law. He submits that there is contradiction between RFSL report (Exhibit-10) as well as Exhibit-12, which is the medical report of the victim, and therefore, in absence of any corroboration, in the attending facts and circumstances of the case, no reliance can be placed on the sole testimony of PW-1 (victim) to arrive at the finding that appellant had committed sexual intercourse with the victim. In this context Mr. Tamang has also submitted that no reliance can be placed in the statement of the victim under Section 164 Cr.PC (Exhibit-1) in view of the assertion of PW-1 in her cross-examination that she was unaware of what she had stated in her such statement. He has also drawn the attention of the Court to Exhibit-15, the questionnaire for preliminary examination of PW-1 before her statement was recorded under Section 164 Cr.P.C with Special reference to answers given to question no.2 and 6, to contend that statements made by PW-1 under Section 164 Cr.PC is not voluntary.

8. It is further submitted by him that evidence on record would also go to show that PW-1 had voluntarily accompanied the appellant and therefore, she was a willing partner and therefore, prosecution miserably failed to prove the ingredients of Section 366 IPC. Learned Counsel submits that even if charges are held to be proved, having regard to the fact and circumstances of the case, sentence imposed may be appropriately reduced. In this connection, he places reliance on the judgment of the Honble Supreme Court in the case of *Md. Imran Khan versus State (Govt. of NCT Delhi)*, reported in *(2011) 10 SCC 192.*

9. Per contra, Ms. Pollin Rai has supported the impugned judgment. She submits that charge under Section 4 POCSO Act has been proved beyond reasonable doubt. According to her, kidnapping of victim is established and in that view of the matter, even if it is held that ingredients of section 366 IPC has not been established beyond reasonable doubt, then

also the victim having been taken out from the lawful guardian, appellant can be convicted for the offence under Section 363 IPC. In support of her contention that there is ample power of the Court to alter or amend the charge, whether by the Trial Court or by the Appellate Court, she has placed reliance on the judgment of the Honble Supreme Court in the case *of Kantilal Chandulal versus state of Maharashtra,* reported in *(1969) 3 SCC 166* well as in the case of *Anant Prakash Sinha versus State of Haryana, reported in (2016) 6 SCC 105.*

10. I have considered the submissions of the learned Counsel for the parties and have perused the evidence as well as materials on record.

11. In her statement under Section 164 CrPC, it is stated by PW-1 that she knew the appellant from her childhood being a co-villager and a distant relative. The appellant had called her to Singtam on 11.03.2015. As she was already late for her school, she went to Singtam and met the appellant. On being asked to board a vehicle she had boarded a vehicle, for which two tickets had already been purchased by him. She was not aware where she was going to and was later on told that they were travelling to Darjeeling, where she was taken to the house of an aunt of the appellant where they stayed for two days. Thereafter, they came to the house of another aunt at „Y where they stayed for one day and while they were there, her father and one co-villager had come along with police and they were taken to Singtam Police Station. She stated that the appellant had indicated on 08.03.2015 that they should get married, though earlier he had never said anything of that kind. She had responded by saying that she was like his sister but he did not want to realize the same. She stated that in Darjeeling they have slept together and had sexual intercourse and earlier also they used to have sexual intercourse.

12. In her deposition, PW-1 had stated that she had gone to Singtam as she was late for School and as the appellant had called her and on being asked to board a Savari Taxi, she boarded the vehicle, tickets for which had already been purchased for the journey. She was not informed where the appellant was taking her but vehicle headed towards Darjeeling. On reaching Darjeeling taxi stand, another taxi was taken to go to another place. The name of the place she did not know. The place was at a distance of about 40 minutes from the place where they had alighted from the taxi. They had shared the same bed and the appellant had committed

sexual act on her on both the nights. After two days they had gone to the house of another aunt at "Y" and there also they slept together but no sexual assault was committed.

13. PW-2, father of the victim, stated that the victim was aged about 14 years and was studying in Class VIII during the relevant period. He stated that his wife was informed by wife of one his relatives that the appellant had called her up saying that he had taken PW-1. Coming to know about that, he, along with his neighbour, had made some searches including at the house of the aunt of the appellant at Darjeeling but could not find them. He also proved the Birth Certificate (Exhibit-4) of the victim, wherein date of birth was recorded as 10.06.2000.

14. PW-3 stated in his examination that the appellant had brought the victim girl stating her to be his wife and accordingly, they had stayed for one night in his house in a room with one bed. It is stated that on the next day, parents of the victim along with police had come and had taken the victim as well as appellant to the police station at Singtam.

15. PW-4 had deposed that he had accompanied the father of the victim to the house of the aunt of the appellant where both the victim and the appellant were found. He also deposed that the police had seized the Birth Certificate of the victim girl from her father and that he was a witness to Exhibit-5, Seizure Memo, by which the Birth Certificate, Exhibit-4 was seized.

16. PW-5 is a witness to the Seizure Memo (Exhibit-5) by which Birth Certificate (Exhibit-4) was seized. PW-6 is also a witness of Seizure Memo (Exhibit-5). PW-7 is a witness of seizure of Exhibit-6 by which vaginal wash sample in a glass container and undergarment of the victim were seized. PW-8 is the Chief Medical Officer of the District Hospital, Singtam who had issued the Verification Report (Exhibit-7) of the Birth Certificate as requested by police.

17. PW-9 is a Medico Legal Specialist of STNM Hospital who had stated that he was of the opinion (Exhibit-9) that there was nothing to suggest that the appellant was not capable of sexual intercourse.

18. PW-10 had prepared the Forensic Examination Report (Exhibit-10). She had stated as follows:

"The Case Exhibits were packed and sealed in a cardboard box when the same were received at RFSL, Saramsa from the SDPO, Rangpo, East Sikkim. Following were the Exhibits received:

1. One blue coloured underwear said to belong to the accused marked as Exbt.A by the Police and marked in the Laboratory as BIO-124 A (MO II shown to me in the Court today).

2. Penile swab of the accused collected in bottle still in wet condition marked as Exbt. B by the Police and marked in the Laboratory as BIO 124 B. (MO III shown to me in the Court today).

3. Blood Sample of the accused collected in a filter paper marked as Exbt. C by the Police and marked in the Laboratory as BIO 124 C (MO IV shown to me I the Court today).

4. One dirty light green coloured underwear of the victim containing suspected blood stain along with one sanitary napkin marked as Exbt. D by the Police and marked in the Laboratory as BIO 124 D (MO V (collectively) shown to me in the Court today).

5. One glass vial containing vaginal wash of the victim marked as Exbt. E by the Police and marked in the Laboratory as BIO 124 E (MO I shown to me in the Court today)

6. One syringe containing vaginal swab collected in a cotton gauze marked as Exbt.F by the Police and marked in the Laboratory as BIO 124 F (MO VI shown to me in the Court today).

The above Exhibits were examined by using Serological Techniques and based on these examinations, the results were obtained as:

1. Exbt. BIO 124 (MO II) gave positive test for the presence of human semen. However, Blood Group could not be ascertained.

2. Sample Blood bearing Exbt. BIO 124 C (MO IV) gave positive test for Blood Group AB.

3. Human blood could be detected in Exbt. BIO 124 D (MO V) and it gave positive test for Blood Group A.

4. Human semen could be detected in Exbt. BIO 124 E (MO I) and Exbt. BIO 124 F (MO VI). However, Blood Group could not be ascertained.

5. Human semen or any other body fluid could not be detected in Exbt. BIO 124 B (MO III)."

19. She stated in her cross-examination that she could not ascertain blood group in any of the Exhibits apart from the sample Blood MO IV and MO V. She also stated that she could not come to the conclusion as to whether semen found in MO I and MO VI belongs to the appellant.

20. PW-11 is the Station House Officer who had endorsed the FIR for investigation.

21. PW-12 is the Doctor who had examined the victim on 14.03.2015 at 11.30 am. He deposed that vaginal wash report showed numerous non motile spermatozoa in the multiple samples examined. He also deposed that based on his examination and vaginal sample report he was of the opinion that there had been sexual intercourse with the patient within a period of five days from the date of examination. In his evidence he had also stated that there is an old tear present in the hymen at 5 and 7 O clock position. In cross-examination, he stated that such tear could be two months old. He also stated that presence of non motile spermatozoa indicates sexual intercourse with the patient within a span of five days, though, in Exhibit-12, it was not indicated that the victim had sexual intercourse within a period of five days from the date of examination. He also stated that victim did not tell him the name of the person with whom she had sexual intercourse although it was recorded that according to the victim, she had sexual intercourse. It is also indicated in Exhibit-12 that numerous non motile spermatozoa were seen in the multiple samples examined.

22. PW-13 is the father of the appellant and nothing hinges on his evidence.

23. PW-14 is the Medical Officer at Singtam District hospital who had examined the appellant on 14.03.2015 at 03.00 pm. He had deposed that there was no visible external sign of injury and that smegma was absent. It is also stated that in order to determine whether the individual was capable of performing sexual intercourse or not, he was referred to Medico Legal Specialist at STNM Hospital, Gangtok. It is already noticed that PW-9 had examined the appellant at STNM Hospital.

24. PW-15 is the aunt of the appellant in Darjeeling where the appellant had stayed for two nights. She deposed that the appellant had introduced the victim as his wife and therefore, a single bed was arranged for them to sleep in a separate room.

25. PW-16 is the Chief Judicial Magistrate who had recorded Section 164 Cr.PC statement of the victim.

26. PW -17 is the Investigating Officer who deposed with regard to the steps taken by him during the course of the investigation.

27. A consideration of the evidence as noted hereinabove would go to show that that Exhibit-4, original Birth Certificate of the victim, was seized from PW-2, father of the victim, at Singtam Police Station. The Birth Certificate shows date of registration as 20.06.2000 and date of birth is reflected as 10.06.2000.

28. Evidence of parents with regard to date of birth of a child is the best evidence when such evidence is backed by unimpeachable document. In the instant case, PW-2 deposed that his daughter was aged about 14 years when the offence was committed. The Birth Certificate goes to show that the victim had not completed 15 years on the date of occurrence.

29. Having regard to the evidence on record, there is no escape from the conclusion that PW-1, i.e. the victim, was a minor and below 15 years on the date of occurrence.

30. There is categorical evidence of PW-1 having sexual intercourse with the appellant during the two nights they had stayed together in Darjeeling. Though in Section 164 Cr.PC statement she had stated that earlier also they had sexual intercourse, she had not stated so in her evidence. Statement

made under Section 164 Cr.PC is not a substantive piece of evidence and the same may be used only for contradiction or corroboration. Even if the statement made under Section 164 Cr.PC is discarded, it is to be noticed that evidence of PW-1 is not impeached in any manner.

31. That the victim and the appellant were found in the residence of PW-3 is an established fact. Though PW-2 had stated that he had lodged FIR (Exhibit-2) on 14.03.2015 at around 08.10 am before proceeding to Darjeeling, it appears that the same is not correct as it was indicated in the said FIR that he had found out that the appellant had taken the victim to his aunts house at Y. However, above discrepancy will have no bearing in the facts of the case. Evidence of PW-3 as well as PW-15 demonstrates that the victim was introduced by the appellant as wife because of which they were put together in a room. It is, however, to be noticed that the victim, at no point of time, put any resistance or controverted the assertion of the appellant.

32. Evidence of PW-12 along with Exhibit-12 demonstrated that vaginal wash showed numerous non motile spermatozoa in the multiple samples examined. Even if the opinion that the victim had sexual intercourse within a period of five days from the date of examination was not recorded by PW-12, there is no suggestion that his opinion as stated before the Court is incorrect or false. That apart, the facts remain that the victim was taken to the District Hospital, Singtam immediately on being recovered on 14.03.2015 and that the victim was with the appellant all along. Defence had not brought any evidence to indicate that PW-1 was accompanied by any other person who could have had sexual intercourse with her. In the instant case, defence had adduced no evidence. It is also to be noted that there is a presumption attached under Section 29 of the POCSO Act to the effect that where any person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. In the background of above circumstances, even though it could not be ascertained as to whether semen found in MO-I i.e., glass containing vaginal wash of the victim or MO-VI, syringe containing vaginal swab collected in cotton gauze, belong to the appellant or not, the same is of no consequence.

33. On the basis of evidence available on record, I am of the opinion that prosecution was able to prove the offence under Section 3(a) POCSO Act and therefore, the learned Trial Court did not commit any error in convicting the appellant under Section 4 of the POCSO Act.

34. Section 359 IPC provides that Kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship. Section 361 provides that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

35. Section 366 IPC provides that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment as indicated therein and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punished as indicated therein.

36. In the case of *State of Haryana versus Raja Ram*, reported in *(1973) 1 SCC 544*, in the context of Section 361 IPC, the Honble Supreme Court had observed that the section seems as much to direct the minor children from being seduced for improper purposes as to protect the right of privileges of guardians having lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in the section, out of the keeping of the lawful guardian without the consent of such guardian. The use of the word 'keeping' connotes the idea of charge, protection, maintenance and control; further, the guardian's charge and control are compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. The consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent, that would take a case out of the purview of the

section. It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.

37. Evidence on record demonstrates that the appellant had called over the victim to meet him at Singtam and had asked the victim to board a Taxi. Even if it is to be taken that victim had consented to go along with the appellant, such consent would be immaterial and the materials on record, taken as a whole, would be indicative of the fact that the victim was persuaded to go with the appellant. The appellant had introduced the victim as his wife to PW-3 and PW-15 and on such assertion he was provided a bed to be shared by him and the victim. It demonstrates that the appellant had the intention that the victim would be seduced to elicit intercourse and it is already held that the prosecution has been able to establish that the appellant had sexual intercourse with the victim. In that view of the matter, I am of the considered view that the conviction of the appellant under Section 366 IPC does not warrant any interference.

38. The decision cited by Mr. William Tamang in the case of *Md. Imran Khan (supra)* cannot be pressed into service in the facts of the present case. In that case, the appeal before the High Court was pending for ten years and the victim was more than 15 years of age. The appellants were also young boys and in such circumstances, sentence was imposed which was less than statutorily prescribed. In the present case, the incident took place in 2015 and the appeal is pending for less than two years before this Court. The appellant was sentenced with minimum imprisonment prescribed by law and, therefore, no occasion arises for this Court to consider reduction of sentence less than statutorily prescribed.

39. In view of the above discussions, I find no merit in this appeal and, accordingly, the same is dismissed.

40. In terms of the above, all pending Interlocutory applications, if any, stand disposed of.

41. Lower Court records be sent back.

SLR (2019) SIKKIM 863

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

Crl. A. No. 34 of 2017

P. K. xxxx (name withheld) ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

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

For the Respondent: Mr. Thupden Youngda, Addl. Public Prosecutor.

Date of decision: 26th November 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 27 (2) – Medical Examination of a Child – We notice that the minor victims, both female, have been medically examined by male Doctors. This is in violation of S. 27(2) of the POCSO Act. The State must ensure that adequate women Doctors are available to examine children of the female gender.

(Para 17)

B. Protection of Children from Sexual Offences Act, 2012 – S. 5 – Aggravated Penetrative Sexual Assault – Medical evidence does not give any indication of penetrative sexual assault on either of the victims. However, we must remain conscious of the fact that the medical examinations of the victims were conducted at least seven months after the first sexual assault and at least after a month of the last such assault. In such circumstances, no physical evidence would be traceable on the body of the minor victims unless the hymen had been ruptured – The younger victim deposed that the Appellant had put his penis on her vagina on several occasions – Both S. 3(b) of the POCSO Act and S. 375(a) of the I.P.C provide that penetration to any extent into the vagina amounts to penetrative

sexual assault under the POCSO Act and rape under the I.P.C. It is settled in medical jurisprudence that every penetration of the penis into the vagina may not necessarily lead to rupture of the hymen. Although, even a slight penetration may satisfy the ingredient of the offence charged, it may not necessarily lead to rupture of the hymen.

(Paras 24 and 25)

Appeal partly allowed.

Chronological list of cases cited:

1. B.C. Deva alias Dyava v. State of Karnataka, (2007) 12 SCC 122.
2. Aman Kumar and Another v. State of Haryana, (2004) 4 SCC 379.

JUDGMENT

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

1. The year was 2016. The appellant is a resident of a village in West Sikkim. He made sickle, etc., for a living. The appellant s wife is dead. He lived in a small hut along with his four minor children. He borrowed money from the villagers to provide for himself and his children. He often came home drunk and physically abused his children. This is the setting for the commission of the heinous acts of sexual crimes perpetrated by the appellant upon his two minor school going daughters in the same hut which they considered 'home'. This act of absolute depravity stands proved by the appellants conviction and sentence by the learned Special Judge, (POCSO) South Sikkim at Namchi (for short „the learned Special Judge) vide judgment and order on sentence dated 31.08.2017 in Sessions Trial (POCSO) Case No. 07 of 2016. Resultantly, the appellant is lodged in the Central Prison while the two minor victims and one of their minor brother 'M' (name withheld) in "Mxxx" (hereinafter referred to as 'the short stay home'). Where lives now PW-14, the other minor brother, barely twelve years of age, cannot be gathered from the records of this case.

2. The formal accusation against the appellant, the biological father of the two minor victims, originated after the First Information Report (for short 'FIR') (Exhibit-1) dated 11.02.2016 filed by PW-1, Secretary of the short stay home. In the FIR, it was stated that the appellant had surrendered

three children before the Child Welfare Committee (for short 'CWC') on 13.01.2016 as he could not afford the expenses of food, education, clothes and other logistic matters for the children due to his poor economic condition. It was stated that among the children surrendered were – the younger victim (PW-11), a ten year old female child studying in class III, the elder victim (PW-6), a fourteen year old female child also studying in Class-III and Master 'S' (name withheld), an eight year old male child studying in Class-I. It was stated that the CWC had given shelter order for the children at the short stay home vide order dated 13.01.2016. The FIR alleged that during the counselling the minor victims revealed that both were "sexually assaulted" by their biological father, i.e., the appellant, a widower, several times since 15.08.2015.

3. PW-1 deposed that sometime during January 2016, the appellant surrendered three children before the CWC owing to his poor economic condition and his inability to take care of them. The CWC contacted him for lodging the children in the short stay home and accordingly, they were admitted there. On 09.02.2016, the In-Charge (PW-12) of the short stay home informed PW-1 that the two minor victims had revealed to her about repeated sexual assault on them by the appellant. Accordingly, on 10.02.2016, PW-1 went to the short stay home and verified from the minor victims about the matter. They told him that they used to be repeatedly subjected to sexual assault/abuse by the appellant while they were staying together. PW-1, thereafter, lodged the FIR.

4. According to PW-12, on 13.01.2016, one volunteer of the short stay home brought three minor children including the two minor victims and handed them over to her with a shelter order of the CWC on which basis she kept the children. PW-12 deposed that they were shabbily dressed and appeared to be traumatic. During the counselling, she came to learn that the two minor victims were sexually abused by their father sometime in the month of August 2015. PW-12 informed this fact to PW-1 who filed the FIR. Immediately thereafter, the police came to the short stay home and took the minor victims for medical examination.

5. The Chairperson of the Child Welfare Committee (PW-15) deposed that Sub-Inspector Sithoshna Sharma (PW-18) submitted an application requesting her to record the statements of the minor victims. She identified the application (Exhibit-25) and her signature thereon. According to PW-15,

she recorded the minor victims statement who stated that they were sexually assaulted by the appellant. PW-15 deposed that elder victim (PW-6) had told her that she had reported this matter to her school teacher who counselled the appellant but despite the same the appellant committed similar acts upon her. In her cross-examination, PW-15 admitted that she did not have any authority or power to record the statements of the minor victims. Sithoshna Sharma (PW-18) confirmed the recording of the statements of the victims by PW-15.

6. On the strength of the FIR, Case No. 04/2016 dated 11.02.2016 under section 376 of the Indian Penal Code, 1860 (for short 'IPC') read with section 4/8 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') was registered against the appellant and taken up for investigation. The investigation resulted in the prosecution alleging the commission of the said offences by the appellant on the two minor victims in the final report.

7. On 25.06.2016, the learned Special Judge framed charges under sections 5(l), 5(n) of the POCSO Act, sections 376(2)(n), 376(2)(f), 376(2)(i) of the IPC against the appellant for commission of the offences on the elder victim (PW-6). Charges were also framed under sections 5(l), 5(n), 5(m) of the POCSO Act, sections 376(2)(n), 376(2)(f) and 376(2)(i) of the IPC for commission of the offences on the younger victim (PW-11).

8. The appellant pleaded innocence and claimed trial. During the trial, 18 witnesses including the two investigating officers were examined by the prosecution. The appellant was thereafter examined under section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') in which he pleaded that he was falsely implicated in the case by the teachers of the school. He alleged that the teachers of the school were asking for his children and as he refused to give them he was falsely implicated.

9. The impugned judgment was rendered on 31.08.2017 convicting the appellant for commission of offence under sections 5(l)/5(n) and 9(l)/9(m)/9(n) of the POCSO Act. He was also convicted under sections 376(2)(n)/376(2)(f)/376(2)(i)/354/354 of the IPC. On the same day by the impugned order on sentence, the appellant was convicted in the following manner:-

(i) Rigorous imprisonment of 10 years under section 5(l) punishable under section 6 of the POCSO Act.

(ii) Rigorous imprisonment of 12 years under section 5(n) punishable under section 6 of the POCSO Act.

(iii) Rigorous imprisonment of 5 years under section 9(l) punishable under section 10 of the POCSO Act.

(iv) Rigorous imprisonment of 6 years under section 9(m) punishable under section 10 of the POCSO Act.

(v) Rigorous imprisonment of 6 years under section 9(n) punishable under section 10 of the POCSO Act.

(vi) Rigorous imprisonment of 12 years under section 376(2)(i) of the IPC punishable under section 376(2) of the IPC.

(vii) Simple imprisonment of 3 years under section 354 of the IPC.

(viii) Simple imprisonment of 3 years under section 354 of the IPC.

(ix) Although the appellant was convicted under section 376(2)(n)/376(2)(f) of the IPC in view of section 42 of the POCSO Act, separate sentence was not imposed upon him.

(x) The sentences were directed to run concurrently and the period of imprisonment already undergone by the appellant was set off against the period of imprisonment imposed.

10. The solitary ground urged by Mr. K.T. Tamang, learned legal Aid Counsel for the appellant, is that the medical evidence completely belies the oral testimony of the two minor victims.

11. The elder victim (PW-6) was examined on 19.08.2016. She deposed that she was 14 years old and studying in the fourth standard. She identified the appellant as her father and deposed that she had one younger sister and two younger brothers. According to her, all of them stayed in a small hut. Their mother had expired. The appellant used to come home drunk and started sexually assaulting her and her younger sister since August 2015. According to her, the appellant used to come home drunk and put his

hands all over her and her younger sister s body including her private parts. On many occasions, he put his penis into her vagina. Later, both the minor victims started sleeping outside the hut. She deposed that when the appellant brought them to Namchi, they narrated about the incident to some uncle and aunty. She identified her statement recorded under section 164 Cr.P.C. (Exhibit-8) and her initials therein. During her cross-examination, she admitted that after the demise of her mother the appellant used to look after her and her siblings. The appellant was the only earning member of the family. He used to take loan from the villagers to meet their expenses and in fact, it was the appellant who brought them before the CWC. She admitted that she had not made any complaints regarding the incidents of sexual assault.

12. The younger victim (PW-11) deposed on 24.10.2016. She stated that she was ten years old and studying in third standard in her school. She also identified the appellant as her father. According to her, she had one elder sister [elder victim (PW-6)] and two minor brothers, i.e., PW-14 and another. Her mother had expired long ago. Before they were brought to the short stay home, they were staying with their father. The younger victim (PW-11) deposed that the appellant used to sexually abuse her and her elder sister in the night whenever he used to come drunk. According to her, the appellant sexually assaulted her five times. According to her, her younger brother (PW-14) often saw the appellant sexually abusing them and therefore, reported the incident to their school teacher after which the appellant stopped sexually abusing them. The incidents occurred during the time of 15th August 2015. She also identified her statement recorded under section 164 Cr.P.C. (Exhibit-13) as well as her signatures therein. During cross examination, she admitted that after the death of their mother, the appellant used to look after and maintain them. It was the appellant who had brought them to the short stay home. She admitted that she had not told anyone about the incident immediately after it happened. She also admitted that the appellant used to sexually assault them only when he used to come home drunk. She admitted that the appellant had taken loan from the villagers to maintain them as his income from his profession of making sickle, etc., was not sufficient.

13. The defence did not cross-examine the minor victims on their statement recorded under section 164 Cr.P.C. although both the minor victims deposed that it was recorded. In her statement, the elder victim

(PW-6) stated to the learned Magistrate that the appellant started assaulting her and the younger victim (PW-11) around 15.08.2015. According to this statement, the appellant would open his trousers and first have sex „chara garthyo with her younger sister and thereafter with her. She had told him that the police would get him but he would slap her. The appellant sexually assaulted them at least five times during the night. The appellant would do so only when he was drunk. He would not give them their meals and not buy rice regularly. They got so scared that when the appellant would go out to drink they would cook their dinner early, eat, take their blankets, stay out of the house in the night and sleep outside hiding behind the squash plant. As the place was haunted they would get scared. The assault ended when they were brought to the short stay home.

14. The younger victim (PW-11) informed the Magistrate that she was studying in Class IV. Her mother had died last year. According to her statement recorded under section 164 Cr.P.C. on 04.03.2016, the appellant started sexually assaulting her and her sister around 15.08.2015. She stated that the appellant assaulted them many times. When her brother (PW-14) came to know of it and told the appellant that he would tell the police the appellant stopped the assault. Thereafter, they were brought to the short stay home.

15. PW-14 deposed that he was twelve years old. He identified the appellant as his father. According to him, they were four siblings and the minor victims were his sisters, one elder and the other younger. He confirmed that the appellant used to come home drunk sometimes and beat them with his stick. Their mother had passed away when he was small and after her death they were residing with the appellant. According to him, one night when they were sleeping he heard his elder sister telling the appellant to go away from the bed but he did not see anything else. PW-14 was declared hostile. He was cross-examined by the learned Special Public Prosecutor. He denied all the suggestions put to him. During his cross-examination by the defence, he admitted that the appellant used to beat them only when he was drunk otherwise he used to love them.

16. Both the minor victims confirmed that they were medically examined. Doctor Rajiv Gurung (PW-5) was the Medical Officer who examined the minor victims on 11.02.2016. He did not find any visible injury on their person and referred them for gynaecological consultation. The Gynaecologist

(PW-13) at the STNM Hospital examined the minor victims on 23.02.2016. According to him, both the minor victims told him that they were sexually assaulted by the appellant on five occasions since 15.08.2015 and the last sexual assault was on 09.01.2016. On their examination, no injuries were seen around the vulva, vagina and anal region. Their hymens were intact. The vulva, vaginal swab and wash samples were obtained and sent to pathological laboratory for evidence of spermatozoa. The vulva and vaginal swab reports dated 23.02.2016 (Exhibit-11 and Exhibit-12) did not show any evidence of motile or non-motile spermatozoa. The Gynaecologist (PW-13), therefore, opined that the clinical findings and laboratories reports were not suggestive of recent forceful vulval, vaginal or anal penetration.

17. We notice that the minor victims, both female, have been medically examined by male doctors. This is in violation of section 27(2) of the POCSO Act. The State must ensure adequate women doctors are available to examine children of the female gender.

18. The learned Special Judge had concluded that the elder victim (PW-6) was below fifteen years of age and the younger victim (PW-11) was below twelve years of age at the time of commission of offence. The appellant has not questioned the findings of the learned Special Judge on this aspect in the present appeal. The minority and age of the minor victims have been established by their own evidence as well as the evidence of the headmaster (PW-3) of their school who proved their transfer certificates (Exhibit-3 and Exhibit-4).

19. The learned Special Judge has concluded that the evidence led by the prosecution does not prove that the appellant had committed penetrative sexual assault or raped the younger victim (PW-11) and thus, could not be convicted under sections 5(l)/5(n)/5(m) of the POCSO Act and under sections 376(2)(n)/376(2)(f)/376(2)(i) of the IPC. The learned Special Judge, however, held that the act of the appellant would fall under section 9(l), 9(m) and 9(n) punishable under section 10 of the POCSO Act as well as under section 354 of the IPC.

20. The learned Special Judge also held that the evidence of the prosecution proved beyond reasonable doubt that the appellant had committed aggravated penetrative sexual assault upon the elder victim (PW-

6) as defined under section 5(l)/5(n) punishable under section 6 of the POCSO Act and under section 376(2)(n)/376(2)(f)/376(2)(i) of the IPC.

21. Both the minor victims deposed about the incident that transpired around August 2015. The FIR got to be registered only on 11.02.2016. The minor victims were medically examined on 23.02.2016. The younger victim (PW-11) deposed about being sexually abused or sexually assaulted. She did not depose about how she was sexually abused or sexually assaulted. It is quite evident that the words "sexual abuse" and "sexually assaulted" were words used by the learned Special Judge while recording the evidence of the younger victim (PW-11) after hearing her testimony. It would have been better if the learned Special Judge had written the English translation of exactly what the younger victim (PW-11) had deposed. The elder victim (PW-6) was, however, categorical in deposing that the appellant had put his penis into her vagina. The learned Legal Aid Counsel emphasised on this deposition and submitted that the medical evidence completely destroys the oral testimony of the elder victim (PW-6). *Per contra*, the learned Additional Public Prosecutor drew the attention of this Court to two judgments of the Supreme Court.

22. In ***Re: B.C. Deva alias Dyava vs. State of Karnataka***[1], the Honble Supreme Court held that;

> **"18.** The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

23. In ***Re: Aman Kumar and Another vs. State of Haryana***[2]**,** the Honble Supreme Court while examining a case of rape held that;

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[1] (2007) 12 SCC 122
[2] (2004) 4 SCC 379

> "**7.** ..... To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under section 376 IPC."

24. The medical evidence does not give any indication of penetrative sexual assault on either of the victims. However, we must remain conscious of the fact that the medical examinations of the victims were conducted at least seven months after the first sexual assault and at least after a month of the last such assault going by the evidence of the Gynaecologist (PW-13). In such circumstances, no physical evidence would be traceable on the body of the minor victims unless the hymen had been ruptured.

25. The younger victim (PW-6) deposed that the appellant had put his penis on her vagina on several occasions. She did not give any further gory details of the heinous act. Both section 3(b) of the POCSO Act and section 375(a) of the IPC provide that penetration to any extent into the vagina amounts to penetrative sexual assault under the POCSO Act and rape under the IPC. It is settled in medical jurisprudence that every penetration of the penis into the vagina may not necessarily lead to rupture of the hymen. Although, even a slight penetration may satisfy the ingredient of the offence charged, it may not necessarily lead to rupture of the hymen. The accusation made by the minor victims, first before PW-12 then to PW-1 and thereafter, to the learned Magistrate (PW-8) and finally before the learned Special Judge, has been substantially consistent. The appellants defence that he had been falsely implicated (which is not only devoid of any evidence but completely unbelievable) by the teacher of the minor victims does not answer why the two minor victims would make up such a spine chilling story against their own biological father. We have no hesitations in believing the testimonies of the minor victims.

26. The younger victim (PW-11) had deposed that she was sexually assaulted at least five times. Sexual assault has been defined in section 7 of the POCSO Act. Whoever, with sexual intent touches the vagina, penis,

anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. The deposition of the younger victim (PW-11) adequately corroborated by her own statement recorded under section 164 Cr.P.C. leads us to conclude that the appellant had in fact sexually assaulted her on several occassions. Whoever commits sexual assault on the child more than once or repeatedly is said to have committed aggravated sexual assault. The evidence of the younger victim (PW-11) satisfies the ingredients of section 9(l) of the POCSO Act. Section 9(m) of the POCSO Act provides whoever commits sexual assault on a child below 12 years is said to commit aggravated sexual assault. The appellants conviction under section 9(m) of the POCSO Act cannot thus be faulted. As it has been proved beyond reasonable doubt that the appellant was the biological father of the younger victim (PW-11), section 9(n) of the POCSO Act is also attracted as sexual assault had been committed on her by her own father, i.e., the appellant.

27. The deposition of the elder victim (PW-6) is cogent. She deposed that the appellant had on many occasions put his penis into her vagina. Whoever commits penetrative sexual assault on a child more than once or repeatedly is said to have committed aggravated penetrative sexual assault as defined under section 5(l) of the POCSO Act. Whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child commits penetrative sexual assault on such a child is said to have committed aggravated penetrative sexual assault as defined under section 5(n) of the POCSO Act. Whoever being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman is made punishable under section 376(2)(f) of the IPC. Whoever commits rape repeatedly on the same woman is made punishable under section 376(2)(n) of the IPC. Section 6(10) of the IPC defines „woman as a female human being of any age. The prosecution has been able to satisfy the ingredients of the offences alleged to have been committed on the elder victim (PW-6) beyond reasonable doubt. The learned Special Judge has correctly not sentenced the appellant under section 376(2)(n) and 376(2)(f) of the IPC in view of section 42 of the POCSO Act.

28. The sentence of the appellant under section 354 IPC in the given circumstances was not necessary in view of section 71 of the IPC and, therefore, is set aside. We are of the considered view that the rest of the impugned judgment of conviction and order on sentence need no interference and are accordingly upheld.

29. The appeal is partly allowed. The appellant is presently serving his sentence at the Central Prison, Rongyek. He shall continue there and serve out the rest of his sentence.

30. Although, the learned Special Judge has convicted the appellant for commission of heinous offence of aggravated penetrative sexual assault and rape of his own daughter, i.e., elder victim (PW-6) and for sexual assault upon his other daughter, i.e., younger victim (PW-11), he has not granted any compensation to the minor victims. In the circumstances, considering that the minor victims were sexually violated by their own biological father at the tender age of fourteen and twelve; the trauma the victims must have and continues to undergo; that they are completely deprived of parental care as their mother has expired and the appellant would be serving the sentence imposed, we are of the considered view that the Sikkim State Legal Services Authority (for short „SSLSA) should grant the elder victim (PW-6) and the younger victim (PW-11) compensation of an amount of Rs.3,00,000/- (Rupees three lakhs) and Rs.50,000/- (Rupees fifty thousand) respectively, as per the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended. The said amounts shall be deposited in fixed deposit in the name of the minor victims, separately, payable on their attaining majority. If the minor victims do not have any bank account, the SSLSA shall render assistance to the minor victims to do so. For the said purpose, the SSLSA is further directed to identify the guardian of the minor victims and if no guardian has been appointed to take all such steps to assist the minor victims for the appointment of their guardian.

31. The sordid saga questions the moral fabric of our society and must necessarily alarm each of us to examine its festering underbelly to take corrective measures forthwith. However, as the story unfolded, we see a glint of hope in the alertness of the citizenry and the social workers of our society who have been able to unearth the offences which may have been left buried in the deep mental wounds of the minor victims.

32. We direct the Registry to transmit a copy of this judgment to the Court of the learned Special Judge, (POCSO) South Sikkim at Namchi and another to the learned Member Secretary, SSLSA for compliance.

33. Records of the learned trial Court be returned forthwith.

SLR (2019) SIKKIM 876

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

WP (PIL) No. 08 of 2019

In Re: 300 Yaks Starve to Death in North Sikkim

Versus

State of Sikkim and Others ….. RESPONDENTS

Amici Curiae: Mr. Jorgay Namka and Ms. Tashi Doma Sherpa, Advocates.

For the Respondents: Dr. Doma T. Bhutia, Addl. Advocate General, Mr. Thinlay Dorjee Bhutia and Mr. Thupden Youngda, Government Advocates, Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates.

Date of decision: 26th November 2019

A. Constitution of India – Article 226 – From the reports and affidavits of the Respondents, it appears that after this Court had taken up this *suo motu* PIL, the Respondents had engaged their attention for welfare of the yaks and some steps have been taken to that effect. It is categorically stated that there will be no dearth of feed to feed yaks in the event of a natural calamity and that the Respondents are fully prepared to meet any challenge. It is noticed that a Yak Healthcare and Rapid Action Team had been formed which will be supported by the District level and State level Disaster Management Team. A multi-purpose Bolero Camper had also been provided to attend to emergency veterinary need of the yak herders. Two dedicated staff had been posted in Muguthang and Lashyar valley to act as an interface of the administration with the yak herders for dissemination of information. It is noticed that assistance and help of ITBP would be sought for obtaining first hand information relating to prevailing weather conditions and the respondents had also taken the Metrological

Department on board – While some steps have been taken, it will be necessary for the Respondents to be vigilant and they must take immediate rear-guard action with no loss of time by implementing the decisions in the field – The State respondents are directed to implement in letter and spirit the decisions taken and steps contemplated, as indicated in the reports and the affidavits.

(Paras 17, 19 and 20)

JUDGMENT

The Judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

The 12th May, 2019 publications of The Hindu, Himalayan Mirror, Sikkim Express, हाम्रो प्रजाशक्ति (Humro Prajashakti), Summit Times and The Telegraph, all daily newspapers, reported death of around 300 yaks due to starvation. It is necessary, at the very outset, to take note of the headlines:

> Summit Times - "Around 300 yaks starve to death in North Sikkim"
>
> Himalayan Mirror – "300 yaks starve to death in North Sikkim"
>
> Sikkim Express – "Unrelenting snowfall trap yaks since December, scores found starved to death in North Sikkim"
>
> The Telegraph - "300 STARVE TO DEATH IN SIKKIM SINCE DECEMBER.
>
> Melting snow bares yak tragedy"
>
> Humro Prajashakti "भारि हिमपातको कारण लगभग तीन सय चौंरीको मृत्यु"
>
> (rough translated version)
>
> Death of about 300 yaks because of heavy snowfall"
>
> The Hindu – "300 Himalayan yaks starve to death in Sikkim"

2. The headlines noted above eloquently and poignantly encapsulated the enormity of the event due to which this Court considered it appropriate to take up the issue *suo-moto* on the judicial side and accordingly, this instant Public Interest Litigation (PIL) was registered on 10.06.2019.

3. Mr. Jorgay Namka and Ms. Tashi Doma Sherpa, learned counsel practising in this Court, were requested to be Amici Curiae and they had readily consented to contribute to the proceedings. They have filed a report dated 19.10.2019 and also placed suggestions in the form of an affidavit dated 04.11.2019.

4. From the materials on record it is noticed that yak is a large member of the cattle family. They thrive at higher altitude and in cold weather and are prone to suffer from heat exhaustion above 15°C (59°F) as they have a thick layer of subcutaneous fat and as functional sweat glands are almost absent. Yaks consume the equivalent of 1% of its body weight daily and it crunches on ice or snow as a source of water. Lack of winter feed leads to heavy weight loss to the extent of 25% to 30% overall during that period, requiring recovery and weight gain during the summer months. According to the report of the Amici Curiae, yak population in the Indian Himalayan region, which is on the decline, is estimated to be over 76,000 and yak rearing states of India are Arunachal Pradesh, Sikkim, Uttar Pradesh, Himachal Pradesh and Union Territory of Jammu & Kashmir. Yaks can survive up to minus 40°C (- 40°C). Yak rearing is an eco-friendly livelihood for nomads who migrate to higher altitude during summer and return to lower altitude of about 3000 meters above mean sea level during winter. In Sikkim, yaks are now found only in Lachen and Lachung regions of North Sikkim, under two types of transhumance migration pattern. Yaks in Lachen region are generally of Tibetan yak variety which normally stays away from human settlement and they move higher up towards colder region as winter sets in. There are about 7 to 9 families of herders each having about 100 to 150 yaks. The base of the herders of Lachen region is stated to be Thangu and while some of them move towards Muguthang region, some move towards Gurudongmar/Tso Lhamo region. LHO yak is predominantly found in Lachung region and they remain in contact with human settlement and it moves down from colder region during winter towards its base at Yakshey and Domang. There are about 8 to 10 families of herders each having 80 to 100 yaks of LHO yak variety.

5. Though the report of the Amici Curiae deals with certain other aspects like breeding, diseases and socio-economic causes for decline of yak population, having regard to the issue for which this PIL was registered, we are not dealing with those aspects of the matter in the present PIL. It is, however, noted that in the report dated 19.10.2019, the learned Amici Curiae mentioned that local population of North Sikkim depend to a huge extent on Army personnel stationed at different regions of North Sikkim and that the State Government should be in touch with the Army so that they can assist the local people and the administration in times of need.

6. In the report filed on 06.07.2019 by the Principal Director, Department of Department of Animal Husbandry Livestock, Fisheries & Veterinary Services (for short, A.H.L.F.&V.S.), Government of Sikkim, it is stated that in the month of February, 2019, verbal report of prolonged and heavy snowfall was received from the local Pipon and herders who were residing in the valley of Lachung, Lachen, Muguthang and Phalung. Arrangements were made for averting feed and fodder shortage by distributing feed to the yak herders. Relief items consisting of chaffed hay/ kutti and crushed maize/bhus were distributed to yak herders of Lachen and Lachung in the first week of March. However, road transportation to Muguthang was cut-off due to a thick blanket of snow, as a result of which, relief materials could not be delivered to the yak herders in those areas. The areas near about Muguthang and Lashyar Valley could be accessed only in the first week of May, 2019 and then only, the loss of yak lives came to light. The information was shared with the District Collector, North. Veterinary Officers and Paravets along with officials from B.A.C., Chungthang were deputed to provide necessary relief and treatment to the surviving weak and ailing animals and also to ascertain the actual loss. Annexure-R1 to the said report goes to show that a note was prepared by the Additional Director (North), Department of A.H.L.F.&V.S., indicating that local Pipons had reported, which was confirmed from the sub-divisional level officers and area field functionaries, that the nomadic herders as well as their animals were passing through a very stressful climatic condition without adequate feed and fodder, leaving both the livestock and the herders at the mercy of nature and that some young calves and few ailing animals had died due to starvation. The note proceeds to say that timely and requisite relief items in the form of feed, fodder and other essential items are to be provided to the herders to see them through the crisis. It is also seen that by a letter dated 23.02.2019 issued by the District Collector, North to

the Commanding Officer, 13 Battalion, ITBP, Lingdong, request was made for supply of 50 bags of Atta and 50 bags of Mustard oil cake to the yak herders. It was indicated in the said letter that it was reported to him that there had been unprecedented snowfall in the higher regions of North Sikkim and due to such heavy snowfall, the yak herders were unable to find fodder and grass for their yaks and as snowfall had been continuing for more than a month, lack of fodder had led to high mortality among the yaks. It was also indicated in the said letter that though fodder was procured by District Administration, as the road transportation had been cut-off due to the blanket of snow, the same could not be delivered to the yak herders. It is also indicated that one Sita Ram would be in touch with the Army stationed at Muguthang.

7. A report, which is not dated but which covers a period from January to April, 2019, prepared by the Additional Director (North), A.H.L.F&V.S. Department, was also enclosed wherein it is stated that there was a blanket cover of over 4 feet or 5 feet height of snow all over the available pasture lands and most of the herders decided to abandon their herd and they proceeded to the permanent habitats for safety, fearing depletion of their winter stock of ration, as a result of which the yaks were exposed to the wrath of nature. However, 5 members of nomadic herders stayed back despite inclement weather and they were able to provide some care and assistance to the yaks with the aid of the Indian Army and I.T.B.P. personnel stationed in that area. As a result, lives of about 800 numbers of yaks had been saved. It is also stated in the said report that the team of Animal Husbandry Department could gain access to the area in the first week of May, 2019 and the report published in the social media, etc. regarding the death of yaks was based on the WhatsApp message forwarded by Additional Director (North), A.H.L.F&V.S. Department to the District Collector. The report dated 06.07.2019 also discloses that a total of 51 households had been affected and ex-gratia of Rs.45.90 lakh was payable to the affected households.

8. It is seen from Annexure-R1 to the affidavit dated 16.08.2019 that construction of ITBP road from Lugnak-La to Muguthang was awarded to the successful tenderer at an amount of Rs.48,0037,185.24 (Rupees Forty Eight crore Thirty Seven thousand One hundred Eight Five and Paise Two Four) only by an order dated 07.06.2018 and the time of completion of 24 (Twenty Four) months would be reckoned from 22nd day from 07.06.2018.

From the Annexure-R2 letter dated 10.11.2016 to the said affidavit, it is seen that notice to proceed with the work was issued to a Government Contractor for execution of work "RCR from NSH to Yak farm Denga and 2 other works Package 8/Phase XI in North Sikkim, amounting to Rs.1,175.93 lakh by Rural Management & Development Department, Government of Sikkim. Materials on record, however, do not indicate if there is any progress in the construction of the roads, in question.

9. By an order dated 18.09.2019, this Court had directed the State-respondents to inform the Court, by way of a report, the budget set aside for the welfare of the yaks and the steps taken by the Department for the yaks for the ensuing winter season. This Court also directed the Department to acquire readymade feed from the Indian Council of Agriculture Research (ICAR) - a National Research Centre (NRC) on Yak, Dirang, Arunachal Pradesh and to make available the same to all yak owners and herders. In view of it, a report dated 30.09.2019 was filed before this Court on 01.10.2019. However, this Court by an order dated 04.10.2019, observed that the report was grossly inadequate, and accordingly, the Government was directed to submit a detailed report as to how the yaks are going to be fed and sheltered during the winter and how medical assistance would be given to protect and prevent repetition of the tragedy of the death of 300 yaks last winter. This Court also noted that the breed of the yak and other considerations, which had been highlighted in the report, are irrelevant for the purpose in hand.

10. In the affidavit dated 01.10.2019 filed by the Chief Secretary to the Government of Sikkim, it is stated that an amount of Rs.26,09,000/- (Rupees Twenty Six lakh and Nine thousand) only had been kept aside in the financial year 2019-2020 for the welfare of yaks and that the said fund would be utilised for purchase of feed and fodder (complete feed block) and also for purchase of ambulance, medicines & equipment, procurement of tents & other contingency expenditure. As an interim relief, a fund to the tune of Rs.18,10,000/- (Rupees Eighteen lakh and Ten thousand) only has been arranged, out of which Rs.9,20,000/- (Rupees Nine lakh and Twenty thousand) only is to be used for purchase of complete feed block for 20 MT and a sum of Rs.8,89,000/- (Rupees Eight lakh and Eighty Nine thousand) only is to be used for purchase of an ambulance. It is stated that the Planning and Development Department has committed to provide fund in the supplementary budget. Dealing with the steps taken by the Department

for yaks for the ensuing winter season, it is stated that the Department of A.H.L.F&V.S., Government of Sikkim had organised an interactive meeting on 20.09.2019 with the concerned stakeholders, primarily, the yak herders, yak owners and Pipon of Lachen Dzumsa wherein they had been requested to make optimum use of the available infrastructures like Hay Godown and Yak Shelter. It is stated that 10 nos. of Hay Godown-cum-Yak Shelters at Lachung, Talam-Lachen, Denga-Lachen, Lachen, Samdong-Lachen, Rabum-Lachen, Yakthang-Lachen, Tsangtha-Lachen, Zeema Busty-Lachen and ongoing work at Byamzi-Lachen had been constructed and two Yak centres at Chopta and Zema in Lachen have also been established under the yak conservation programme. The ICAR – NRC on Yak, Dirang, Arunachal Pradesh, in collaboration with Department of A.H.L.F&V.S., Government of Sikkim on 27.09.2019 had distributed concentrated yak feed, complete feed block, chelated mineral mixture, etc. to the yak herders. The ICAR was also requested to supply 20 MT ready-made complete feed blocks in order to mitigate the feed and fodder scarcity for the coming winter months and for this purpose budget provision has been kept. The Department of A.H.L.F&V.S., Government of Sikkim in collaboration with International Centre for Integrated Mountain Development and ICAR – NRC on Yak, Dirang, Arunachal Pradesh had undertaken periodical exposure tour of yak herders and they had been taken to Dirang - Arunachal Pradesh, Nepal, Bhutan and China to make them aware of scientific methods and good practices of yak rearing, management, feeding methods, prevention and treatment of diseases. While the construction of permanent shelters for the population of yaks was not considered to be practical and feasible, it is stated that for care and management of weak, pregnant, mulching and young yaks, the herders built semi-confined areas (Kraal) along their migration routes. It is further stated that having regard to large number of death of yaks that had occurred in the winter of this year, the Department was exploring the possibilities of constructing paddock and providing other essential items, such as tents, etc. Annexure-R1 of the said affidavit goes to show that the Managing Director, Sikkim Motors was requested to arrange to supply one number of Bolero Camper PS 4 WD for use as ambulance for welfare of yaks in North Sikkim by the Director (Piggery & Yak Development), Department of A.H.L.F&V.S., Government of Sikkim by letter dated 28.09.2019.

11. The Minutes of the Meeting with the local residents of Lachen and yak herders of Lachen on 20.09.2019 goes to show that fodder could not

be carried to the pasture area where yaks were stranded during heavy snowfall. The yaks (Tibetan variety) were taken upwards anticipating that snowfall would be as usual each and every year, which was not so and because of such heavy snowfall, ground was not exposed for yaks to graze, as a result of which the animals had died of starvation.

12. In the affidavit filed by the Chief Secretary on behalf of the respondent no. 1, the State of Sikkim, dated 19.10.2019, which was filed pursuant to the direction of this Court dated 04.10.2019, it is stated that as per latest survey and enumeration conducted by the A.H.L.F.&V.S., Government of Sikkim in the second week of October, 2019, there are 79 yak herding households under North District with a total yak population of 3230 numbers of which 1184 are male, 1585 are female and 461 are young calves. It is also indicated in Annexure-R2 of the said affidavit that there are six yak rearing zones in North Sikkim, which are -(1)Muguthang Valley (Lachen Dzumsa), (2) Lashyar Valley (Lachen Dzumsa), (3)Yumthang /Yumesamdong (Lachung Dzumsa), (4) Sebu/Domang (Lachung Dzumsa), (5) Chyakhung (Naga Forest) and (6) Tholung (Upper Dzongu). The maximum numbers of yak herding households are in Muguthang Valley with 48 nos., followed by Lashyar Valley with 30 nos. of yak herding households. Migration pattern of yak rearing in Muguthang Valley and Lashyar Valley is shown to be towards higher altitude during winter. The migration of yaks in yak rearing zones such as Yumthang/Yumesamdong (Lachung Dzumsa), Sebu/Domang (Lachung Dzumsa), Chyakhung (Naga Forest) and Tholung (Upper Dzongu) is towards lower altitude during winter. The numbers of yak herding households in Yumthang/Yumesamdong (Lachung Dzumsa), Sebu/Domang (Lachung Dzumsa), Chyakhung (Naga Forest) and Tholung (Upper Dzongu) are 7, 8, 2 and 1 respectively. It will be relevant to quote paragraphs 3, 5 and 6 of the said affidavit:

> **"3. <u>PROVISON OF FEED & FODDER DURING THIS COMING WINTER MONTH:</u>**
>
> i) For feeding Yaks in a critical winter season, adequate feed in terms of Complete Feed Block has been arranged, already 9375 Kgs and 1000 Kgs of Chelated Mineral mixture have already been distributed to the Yak herders. There would be no dearth of feed to feed yak in the event of the calamities. Department have made full preparation to

meet the challenges in order to prevent the repetition of tragedy.

ii) The feed & fodder assistance package as aid from the Government has been so planned, assuming the ground reality that the package shall focus on the feed requirement of the vulnerable animal group, in particular. The stakeholders (Yak owners) have also agreed to arrange for timely stock of local dry doffer and feed as a participatory contribution from their end and store them in the hay go-downs built by the Government at different locations for community utility purpose. The Department of Animal Husbandry and Veterinary Services has already issued the supply order for 20 M.T (Metric ton) of Complete Feed Blocks (CFB weighing 1.8 Kg each/block) to the National Research Center on Yaks, ICAR, Dhirang-Arunachal Pradesh, which is likely to be delivered by the 1st week of November 2019 in two consignments. This consignment of CFB, along with the herders contribution of local feed & dry fodder and buffer stock of recent distribution programme would adequately suffice the much needed balanced and subsistence diet.

iii) Also, a buffer stock of feed & fodder procurement fund will also be set aside under Natural Calamity fund of D.C (North) as a contingency plan to ensure that such unprecedented strategy as witnessed last winter, is not repeated in future, duly honouring the directives of the Honble High Court.

iv) That during the last meeting held on 20/09/2019 with Lachen Pipon, Yak Owners and Yak herders, it was expressed that traditionally the Yak owners and the Yak herders conserve the fodder in the form of hay starting from the month of November, which is primarily the main source of diet during lean season apart from grazing. It was also expressed by some herders that the hay from the previous season is still in stock.

XXX XXX XXX XXX

5. CONSTRUCITON OF PERMANENT SHELTER FOR YAK HERDERS & YAKS:

Majority of the Yak herders in North Sikkim do not possess any plot of land registered against their name in the highland Yak rearing areas and hence they have since resided in the temporary stone walled dwellings, guarding their flock of animals in the vicinity. However, as submitted in our earlier affidavit, the department has indeed made an earnest effort thus far, by constructing 7 Nos. of Hay storage go-downs at different locations under Lachen & Lachung Dzumsa and 3 Nos. of Cold community Yak shelter cum Feed & Fodder Storage Go-downs at Lachen & Lachung in Community/ Departmental lands to provide shelter to the milking/old/ young calves and ailing animals mainly during winter months. Nevertheless, the Government shall explore all possible ways and means to address this pertinent issue as desired by the Honble High Court of Sikkim.

The detailed list of Cold community Yak shelter-cum-Feed & Fodder Storage Go-downs at different locations under Lachen & Lachung Dzumsa may kindly be seen below:

Sl. No.	Type of Infrastructure	Location	No.	Status of Land	Jurisdiction of Dzumsa
1.	Hay storage Godown	Rabum	1	AH&VS Deptt.	Lachen Dzumsa
2.	Hay storage Godown	Dengna	1	Community land	Lachen Dzumsa
3.	Hay storage Godown	Temchi	1	AH&VS Deptt.	Lachen Dzumsa
4.	Hay storage Godown	Samdong	1	Community land	Lachen Dzumsa
5.	Community Yak shelter	Talam	1	Community land	Lachen Dzumsa
6.	Community Yak shelter	Byamzey	1	Community land	Lachen Dzumsa
7.	Hay storage Godown	Thangu	1	Community land	Lachen Dzumsa

8.	Hay storage Godown	Muguthang	1	Community land	Lachen Dzumsa
9.	Community Yak shelter	Namdosa	1	AH&VS Deptt.	Lachung Dzumsa
10.	Hay storage Godown	Leema	1	Community land	Lachung Dzumsa

The photograph depicting the ongoing construction of community yak shelter-cum-Feed & Fodder Storage Infrastructure at Byamzey under Lachen Dzumsa, North Sikkim is annexed and marked herewith as Annexure-R-2.

The Department of Animal Husbandry and Veterinary Services has proposed to construct inter-connected animal grazing paddocks built in M.S pipes with R.C.C supported posts in between with M.S bolt system gates interconnecting each grazing paddock/enclosures to the other. The department intends to take up this pilot venture at the departmental land located at Zeema-II in Lachen for which a proposal is under active consideration in the Planning & Development Department.

6. PROVISION OF VETERINARY AID & HEALTH CARE TO YAK:

The Animal Husbandry & Veterinary Services Department under the technical supervision of Veterinary Officer, Sub-divisional Veterinary Hospital, Chungthang, Livestock Inspector and technical field assistants posted under Lachen & Lachung Veterinary dispensaries have been conducting health care services from time to time. This year also, the North district administration has already set aside a fund of Rs.40,000/- (Rupees forty thousand) only from the fund provided by the Sikkim Livestock Development Board (SLDB) Cell of the Department to conduct 4 Nos. of such Health Camps at the Yak Herder s Backyard in 4 different locations under Lachen and Lachung area. The Department has also constituted a medical team of North Sikkim to provide treatment and care to the yaks during the time of exigency.

> Additionally, one Bolero Camper PS4 WD is getting ready at the workshop which will have accessory items such as Siren & Loud speaker. The nomenclature of the vehicle would be „Highlanders S.O.S Vehicle which would bear the Contact Nos. of the Head of District (H.O.D), concerned area Veterinary Officer & Livestock Inspector. The second seat provision in the vehicle provides ample scope for a team of 4-5 departmental officials to move as a Task force/ QRT, while the open dickey at the back aids in transportation of medicines, feed/fodder and other essential relief items. The siren and loud speaker fitted in the vehicle will enable the QRT to transmit/convey message of their arrival to the distressed herders scattered across different location in the valleys. Availability of such a vehicle would greatly help in saving valuable time and render quick delivery of services at the nick of time.

13. The order of this Court dated 23.10.2019 indicates that the learned Additional Advocate General had submitted that the affidavits filed so far on behalf of the State Government had not addressed certain issues, such as how and what manner the information of any natural calamity would percolate down to the District Administration or to the State functionaries, which is the first step that would propel initiation of remedial measures and, accordingly, her prayer for filing an additional affidavit was accepted. This Court observed that as the winter season has almost set in, it is time that the State Government comes out with a detailed affidavit so that this Court may make appropriate consideration at an early date. Subsequent thereto, an affidavit dated 11.11.2019 was filed by the Secretary, Department of A.H.&V.S., Government of Sikkim. It is stated therein that in normal circumstances, the available pasture in up-migration route and fodder reserves for vulnerable animals used to be sufficient during winter months. It will be relevant to quote paragraphs 4 and 5 on the issues of (i) percolation of information of any natural calamity to the District Administration and State functionaries and (ii) remedial measures for upcoming winter respectively.

> **“4. PERCOLATION OF INFORMATION OF ANY NATURAL CALAMITY TO THE DISTRICT ADMINISTRATION AND STATE FUNCTIONARIES:**

A. North District Administration/District Disaster Management Authority and Sub-divisional Administration/ Disaster Management committee have been activated for the preparedness of up-coming winter season.

B. The Department of Animal Husbandry & Veterinary Services, North District Administration has communicated to Indo Tibetan Border Police (I.T.B.P.) for relay of first-hand information on the prevailing weather condition of the high-altitude areas for effective monitoring of the health of the animals. The Paramilitary forces particularly ITBP were very helpful during the crises in April-May 2019. The Yak Harders will be in constant touch with the I.T.B.P. in the event of inclement weather and possible calamity.

A copy of letter written to the Commanding Officer/ Commandant, 13 Battalion, I.T.B.P., Lingdum, Ranka in regards to communication of prevailing weathe condition in high altitude areas of North Sikkim & acknowledgment letter from I.T.B.P. are annexed and marked herewith as Annexure-R-1 (colly).

B. In the event of disaster, the I.T.B.P. will communicate directly to the North District Administration/District Disaster Management Authority and Sub-divisional Administration/ Disaster Management committee and vice-versa.

C. The Sub-Divisional Magistrate of Chungthang Sub-division has also been instructed to devise a protocol for suitable mechanism for such situations. An inter-disciplinary meeting was held on 9th November 2019.

E. For the weather forecast, the Department sought a short and long-term weather forecast especially on Snowfall from Metrological Department. The Metrological Department has provided the local webside (www.imdsikkim.gov.in) and for further interpretation of the information, they will be in constant touch with the Department. The information will be relayed further on to the concerned District and Sub-divisional functionaries.

A copy of letter from Metrological Department alongwith various data is annexed and marked herewith as Annexure-R-2 (colly).

F. Apart from aforementioned communication arrangement, the Department of Animal Husbandry and Veterinary Services has also posted two dedicated staff in Muguthang and Lashyar Valley (Gurudongmar) who will be stationed with the Herders for dissemination of information and first-aid. The names of the staff are – Mr. Tshering Ongyal Lachenpa for Muguthang and Mr. Tamding Chewang Bhutia for Lashyar Valley (Gurudongmar).

5. REMEDIAL MEASURES FOR UP-COMING WINTER:

A. FEED & FODDER ASSISTANCE PACKAGE FROM THE GOVERNMENT:

Yaks are semi-wild animals, thrifty and hardy by nature which requires human assistance for their continued existence. They have the ability to survive under stressful environmental conditions, without food and water for over 15 days period. However, unlike the agile

and normally healthy adult male Yaks, the female Yaks which are either in pregnancy/ nursing stage, old/senile animals, young growing calves and ailing animals are in most instances lie vulnerable to the unexpected winter climatic conditions, particularly during the upward migration period.

Various photographs of Muguthang Valley/ I.T.B.P camp & Lonak La Pass (Muguthang Pass) are annexed and marked herewith as Annexsure-R-3 (colly).

Considering the frequency of heavy and prolonged snowfall and the information/s gathered from the locals, it has been learnt that such event like last incident had occurred approximately after a gap of twenty-five long years and has not been observed annually. Thus, taking into account of location viz land-locked nature of Muguthang region which has been identified as most vulnerable area, the Department has estimated and made provision of stocking of Feed and Fodder for sixty days at the rate of 1.5 kg per animal for 933 nos. of Yaks of Muguthang area which comes to 84 M.T. In the Muguthang region (Tsangtha) the Department has a storing facility (Hay Godown) with a plinth area of 31 ft x 31 ft which can store 36 Metric Ton. For storage of remaining stock, the Herders have already been communicated by the Sub-divisional officials and found to have enough storing facility.

B. Of the total requirement of 104 M.T of Feed and Fodder, the I.C.A.R-National Research on Yak, Dirang, Arunachal Pradesh is able to supply only 34 M.T within the end of November. The remaining stock will be

procured locally as per the formulation prepared by I.C.A.R-National Research on Yak.

C. For the provision of Feed and Fodder for other areas in the event of any calamity, a buffer stock of 20 M.T has been provisioned at Rabum, North Sikkim which is centrally located for both Lachen and Lachung axis.

D. Apart from Feed and Fodder assistance from the State Government, the stakeholders (Yak owners) have also communicated through their Pipon stating that there are some fodder reserves at their disposal.

A copy of correspondence from Pipon, Lachen Dzumsa and Yak Herders on routine and traditional practices and availability of fodder is annexed and marked herewith as Annexure-R-4.

E. In the event of such calamity and insufficiency of Feed and Fodder provision made by the Department, for the back-up, the required assistance will be provided from the N.C fund of D.C (North) as a contingency plan by any means.

F. ARRANGEMENT OF SPS UTILITY VEHICLE:

One dedicated multi-purpose Bolero Camper has already been provided to the Sub-division Veterinary Hospital, Chungthang which is fitted with fog lights and siren and requisite fabrication, as a means of distress signal to attend to emergency veterinary need of the yak herders. The said vehicle is equipped with all necessary medicines and equipment for on-the spot Veterinary treatment. Monitoring and patrolling of all Yak herding areas have already started.

Photographs showing patrolling and monitoring by the team is annexed and marked herewith as Annexure-R-5 (colly).

G. The Sub-division Veterinary Hospital, Chungthang under the Department of Animal Husbandry and Veterinary Services has also formed a Yak Health Care and Rapid Response Team (RRT) which would consist of the following members: 1 Veterinary Officer, 1 Livestock Inspector, 1 Junior Stockman (Para-veterinarian) and additional ten Sub-ordinate staff. The team will be supported by District level and State level Disaster Management Team. This team will have a range of duties and powers primarily for preventive and curative health management, relief, rescue and rehabilitation during calamities. The RRT team shall also be responsible for pre-emptive measures prior to any calamity. A WhatsApp group of local R.R.T has also been created.

A copy of office order dated 11/11/2019, constitution of Rapid Response Team at the Field level is annexed and marked herewith as Annexure-R-6.

H. PROVISION OF VETERINARY AIR & HEALTH CARE TO YAKS:

As is the routine practice, the AH&VS department under the technical supervision of Veterinary Officer, Sub-divisional Veterinary Hospital Chungthang, Livestock Inspector and technical field assistants posted under Lachen & Lachung Veterinary dispensaries have been conducting vaccination programmes as per schedule mainly against the Foot & Mouth Disease (FMD) to which Yaks are found to

> be most susceptible. Basic health care facilities and other necessary services are also extended to the herders from time to time as per reports and verbal appraisals. The department has also been organizing ambulatory clinics annually in the month of November-December, which involves reaching out to the grievances and treatment of different Yaks ailments and de-worming programs at the Yak herders backyard including training and awareness camps. Over the years, it has been seen and observed that this programme has been widely appreciated by the yak herders. In addition, the team from NRC on Yaks-ICAR has also been gracious enough to visit the area and distribute Yak First-Aid Kits to the Yak herders."

14. The affidavit in the form of suggestions has also been placed on record by the Amici Curiae. In paragraph 3 of the said affidavit, it is stated that around 1000 yaks along with its herders will be in and around Muguthang region and approximately same number of yaks will be in and around Gurudongmar and, therefore, the State Government should immediately make provision to supply complete feed block and chelated mineral mixture fodder enough to last for 3 months (approximately 1,80,000 kg) to the yak herders at Muguthang and Gurudongmar, which should be taken as a short term measure and the same should be done before the end of November, 2019. They also suggest use of local materials, such as stones and wood, for any construction to be made with regard to yak related activities.

15. Complete Feed Block Technology is a latest development of feed technology to exploit the potential of locally available animal feed resources besides using non-conventional feed resources in a better way that makes livestock farming an economically viable enterprise. Complete feed block is an intimate mixture of processed ingredients including roughages and concentrates designed as the sole source of feed in compressed form. In an article "Indigenous Traditional Knowledge of Yak Rearers" published by the

Director, NRC on Yak, Dirang, Arunachal Pradesh in August 2009, in the context of seasonal migration and grazing pattern, it is stated that the seasonal migration and grazing pattern is based on yak keepers traditional knowledge which takes into account thermo neutral zone for yaks and gives time for growth of grass. Traditional yak husbandry system involves migration in search of better pasture. In India and other neighbouring countries like Nepal and Bhutan, the farmers practice two pasture utilization strategy. During the summer, yaks are taken to higher altitude alpine pasture (4,500 m and above) and in winter, they return to pockets nearer to the villages located at mid altitude (3,000 m above mean sea level). Grazing in summer pasture is from May to September while in December to February, winter pastures are utilized and the rest of the period is spent on transit from winter pasture to summer pasture.

16. From the materials on record, it has emerged that there had been an unprecedented snowfall in the higher regions of North Sikkim and the same had occurred after a gap of about 25 years. As such a phenomenon is not an annual event, the administration as well as the yak herders were caught off guard and were least prepared to deal with the situation. It is also noticed that Muguthang region has been identified as the most vulnerable area. Though relief materials were collected, the same could not reach Muguthang and Lashyar Valley because the areas remained inaccessible.

17. From the reports and affidavits of the respondents, it appears that after this Court had taken up this Suo Motu PIL, the respondents had engaged their attention for welfare of the yaks and some steps have been taken to that effect. It is categorically stated that there will be no dearth of feed to feed yaks in the event of a natural calamity and that the respondents are fully prepared to meet any challenge. It is noticed that a Yak Healthcare and Rapid Action Team had been formed which will be supported by the District level and State level Disaster Management Team. A multi-purpose Bolero Camper had also been provided to attend to emergency veterinary need of the Yak herders. Two dedicated staff had been posted in Muguthang and Lashyar Valley to act as an interface of the administration with the Yak herders for dissemination of information. It is noticed that assistance and help of ITBP would be sought for obtaining first hand information relating to prevailing weather conditions and the respondents had also taken the Metrological Department on board.

18. Though Hay Godown-cum-Yak Shelters numbering 10 are stated to have been constructed, it does not appear that any such facility has been constructed in Muguthang and Lashyar area. To avert a situation of the kind which was witnessed in the last winter, should there be snowfall like the previous year, respondents shall consider whether it will be advisable to set up a couple of such facilities in those two areas as the past experience had shown that neither the yaks can come down nor relief materials can reach when it is most needed because of thick blanket of snow. As stated in the affidavit dated 01.10.2019, the respondent shall take a decision with regard to construction of paddock and supply of essential items, such as tents.

19. In a matter of the present nature, it is the State which has to adopt and formulate strategies to combat a disaster. As indicated earlier, the Court had to step in because of the calamity and to nudge the respondents to come up with appropriate measures to tackle the situation should there be a recurrence of unprecedented snowfall for a prolonged period. While some steps, as noted hereinabove, have been taken, it will be necessary for the respondents to be vigilant and they must take immediate rear-guard action with no loss of time by implementing the decisions in the field.

20. We also notice that some decisions such as the decision to set up a buffer stock of feeder and fodder procurement under the Natural Calamity Fund of Dy. Commissioner, North, as a contingency plan, has not actually been implemented. The State respondents are directed to implement in letter and spirit the decisions taken and steps contemplated, as indicated in the reports and the affidavits.

21. We further notice from the affidavit dated 06.07.2019 that ex-gratia of Rs.45.90 lakh, though stated to be payable on account of death of Yaks due to starvation, the same does not appear to have been paid to the rightful recipients of the amount. The respondents are directed to disburse the aforesaid amount within a period of four months from this date.

22. With the above observations and directions, the PIL is disposed of.

SLR (2019) SIKKIM 896

(Before Hon'ble the Chief Justice)

WP (C) No. 18 of 2018

M/s Bluefern Ventures (P) Ltd. and Others ….. PETITIONERS

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioners: Mr. Jorgay Namka and Mr. Simeon Subba, Advocates.

For Respondent No.1: None.

For Respondent No.2: Mr. Santosh Kumar Chettri, Assistant Government Advocate.

For Respondent 3-4: Mr. Sudesh Joshi, Advocate.

Date of decision: 27th November 2019

A. Constitution of India – Article 226 – An effective remedy is available to an aggrieved person before the DRT and that the SARFAESI Act is a code unto itself. The Hon'ble Supreme Court also sounded a note of caution that High Courts should exercise their discretion to exercise jurisdiction under Article 226 of the Constitution of India in matters relating to right of Banks and other financial institutions to recover their dues with greater caution, care and circumspection – No case is made out for exercise of power under Article 226 of the Constitution of India, as the case presented by the petitioners do not come within the exceptions curved out which alone enable the Court to exercise discretionary power under Article 226 despite availability of statutory alternative remedy.

(Paras10 and 14)

Chronological list of cases cited:

1. United Bank of India v. Satyawati Tondon and Others, (2010) 8 SCC 110.
2. Authorised Officer, State Bank of Travancore and Another v. Mathew K.C., (2018) 3 SCC 85.
3. Agarwal Tracom Private Ltd. v. Punjab National Bank and Others, (2018) 1 SCC 626.
4. Commissioner of Income Tax and Others v. Chhabil Dass Agarwal, (2014) 1 SCC 603.

Petition dismissed.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

Heard Mr. Jorgay Namka, learned counsel appearing for the petitioners. Also heard Mr. Sudesh Joshi, learned counsel appearing for respondent nos.3 and 4 as well as Mr. S.K. Chettri, learned Assistant Government Advocate, Sikkim appearing for respondent no.2. None appears for Union of India, respondent no.1.

2. By filing this petition under Article 226 of the Constitution of India, the petitioners pray for setting aside a notice dated 18.01.2017 issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"), a notice dated 19.12.2017 issued under Section 13(4) of SARFAESI Act and a possession notice dated 16.01.2018 issued by the Authorised Officer under Section 13(12) of SARFAESI Act read with Rule 9 of Security Interest (Enforcement) Rules, 2002, for short, the Rules. Prayers are also made for a direction to respondent no.1 to set up a Debt Recovery Tribunal (DRT) at Gangtok, Sikkim and in the interim, to assign the DRT, Siliguri to deal with the cases pertaining to the State of Sikkim as well as for a probe against the Branch Manager, respondent no.3, for making the loan accounts of the petitioners as Non Performing Assets (NPA).

3. It is averred in the petition that notice under Section 13 (2) was not served upon the petitioners and they came to learn about the aforesaid

notice in the month of December 2017 when petitioner no.2 was served with the notice under Section 13(4) of the SARFAESI Act.

4. Perusal of the averments made in the writ petition goes to show that symbolic possession of land and building, as indicated in the possession notice, had been taken over.

5. It is contended by Mr. Namka that issuance of notice dated 18.01.2017 under Section 13(2) is not maintainable in view of Section 31(j) of the SARFAESI Act, as the amount due from the petitioners is less than 20% of the principal amount and the interest thereon. Therefore, availability of alternative remedy under Section 17 of the SARFAESI Act against the notice under Section 13(4) shall not come in the way of entertaining this petition under Article 226 of the Constitution of India. It is submitted by Mr. Namka that provision of Rule 8(1) of the Rules was also not followed.

6. By relying upon the judgments of the Hon'ble Supreme Court in the cases of (i) ***United Bank of India vs. Satyawati Tondon and Ors.***, reported in ***(2010) 8 SCC 110***, (ii) ***Authorised Officer, State Bank of Travancore & Anr. Vs. Mathew K.C.***, reported in ***(2018) 3 SCC 85*** and (iii) ***Agarwal Tracom Private Ltd. vs. Punjab National Bank & Ors.***, reported in ***(2018) 1 SCC 626***, Mr. Joshi has submitted that in view of alternative statutory remedy available to the petitioners, this Court may not exercise its jurisdiction under Article 226 of the Constitution of India. It is submitted by him that the account of the petitioners was rightly declared to be NPA. He contends that the argument of Mr. Namka that the notice under Section 13(2) is not maintainable in view of Section 31(j) is wholly fallacious as the Statement of Account demonstrates that amount due from the petitioners is far in excess of 20% of principal amount and interest thereon. In any view of the matter, if petitioners have any grievance with the same or any action taken by the Bank under the SARFAESI Act, they may avail remedy in accordance with law under Section 17 of the SARFAESI Act, he submits.

7. Mr. Joshi also submits that the DRT set up at Siliguri has jurisdiction to entertain applications under Section 17 of the SARFAESI Act pertaining to the State of Sikkim. This submission is disputed by Mr. Namka.

8. The notice under Section 13(2) was issued by respondent no.4 in respect of two loans taken by M/s Bluefern Ventures (P) Ltd., petitioner no. 1, which are indicated as TL-1 and TL-2. Sanctioned amount in respect of TL-1 was Rs.1033.00 lakhs (Rupees Ten crores thirty three lakhs) and sanctioned amount in respect of TL-2 was Rs.1861.00 lakhs (Rupees eighteen crores sixty one lakhs).Outstanding in respect of TL-1 and TL-2 was shown as Rs.9,02,56,238.00 and Rs.19,02,96,114.31, respectively, totaling Rs.28,05,52,352.31.

9. In ***Satyawati Tondon*** (supra), the Hon'ble Supreme Court at paragraphs 28, 43 and 55 observed as follows:

> "**28.** This Court in *Mardia case* [(2004) 4 SCC 311] then held that the borrower can challenge the action taken under Section 13(4) by filing an application under Section 17 of the SARFAESI Act and a civil suit can be filed within the narrow scope and on the limited grounds on which they are permissible in the matters relating to an English mortgage enforceable without intervention of the court. In para 81 of the judgment, the Court observed as under: (SCC p. 362)
>
> > "*81*. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. *The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and*

welfare of the people in general which would subserve the public interest."

(emphasis supplied)

x x x

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

x x x

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

10. A perusal of above judgment goes to show that an effective remedy is available to an aggrieved person before the DRT and that the SARFAESI Act is a code unto itself. The Hon'ble Supreme Court also sounded a note of caution that High Courts should exercise their discretion to exercise jurisdiction under Article 226 of the Constitution of India in matters relating to right of banks and other financial institutions to recover their dues with greater caution, care and circumspection.

11. In ***Authorized Officer, State Bank of Travancore*** (supra), the Hon'ble Supreme Court reiterated the judgment of ***Satyawati Tondon*** (supra) and had disapproved the approach of the High Court in entertaining the writ petition. The Hon'ble Supreme Court further held that normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in ***Commissioner of Income Tax and Ors. vs. Chhabil Dass Agarwal***, reported in ***(2014) 1 SCC 603***.

12. In paragraph 15 of the ***Chhabil Dass Agarwal*** (supra), the Hon'ble Supreme Court observed as follows:

> "**15.** Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case* [AIR 1964 SC 1419] , *Titaghur Paper Mills case* [*Titaghur Paper Mills Co. Ltd.* v. *State of Orissa*, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a

> mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

13. In ***Agarwal Tracom*** (supra), the Hon'ble Supreme Court held that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower.

14. On due consideration, I find that no case is made out for exercise of power under Article 226 of the Constitution of India, as the case presented by the petitioners do not come within the exceptions curved out which alone enable the Court to exercise discretionary power under Article 226 of the Constitution of India despite availability of statutory alternative remedy.

15. Accordingly, this writ petition is disposed of, granting liberty to the petitioners to approach the jurisdictional DRT for redressal of their grievances, if so advised. If any such approach is made by the petitioners within a period of 45 days from today, the jurisdictional DRT will decide the same on its merit without raising the question of limitation. It is made clear that this Court has expressed no opinion on merits and all contentions are left open to be decided by the DRT.

16. Before parting with the records, this Court further observes that this Court has not gone into the question as to whether a direction is to be given to the authorities for setting up of a DRT at Gangtok, Sikkim, inasmuch as such a prayer is made collaterally to the challenges made to the notices under Section 13(2), 13(4) of the SARFAESI Act and the possession notice dated 16.01.2018, which are the fundamental assailments in this petition.

17. No costs.

SLR (2019) SIKKIM 903

(Before Hon'ble the Chief Justice)

WP (C) No. 29 of 2018

Preeti Sharma ….. PETITIONER

Versus

Sikkim University and Another ….. RESPONDENTS

For the Petitioner: Mr. Korah Joy, Advocate.

For the Respondents: Manish Kumar Jain.

Date of decision: 27th November 2019

A. Constitution of India – Article 226 – Prospectus of Sikkim University for the year 2018-19 – Clause 41.8 spells out that the written test will be of 50 marks. The syllabus of the examination indicates that questions to the extent of 50 % of the total marks shall be in respect of research methodology and the rest 50% in respect of subject specific – Clause 41.8 finds place immediately after the schedule for written test for M.Phil/Ph.D where subject of "Law" is only indicated as a programme for Ph.D. In the above context, there is no scope to accept the contention of the petitioner that the questions in respect of subject specific ought to have been on "Business Law"and not on "Law" – No merit in the writ petition that setting of the question paper was in violation of Clause 41.8 of Prospectus 2018-19.

(Paras 12, 13 and 14)

Petition dismissed.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

Heard Mr. Korah Joy, learned Counsel for the petitioner and Mr. Manish Kumar Jain, learned Counsel for the respondents.

2. The petitioner took Ph.D written test, 2018, conducted by Sikkim University on 04.06.2018 on the subject of "Law". The result of written test was declared on that very day and the petitioner did not come out successful. The petitioner belongs to general category. Prospectus of Sikkim University for the year 2018-19 indicates that Ph.D courses will be offered in "Business Law", being the broad area of specialization. Total intake was indicated as four seats, out of which two seats were reserved for general candidates, one for OBC candidate and one for SC candidate.

3. The contention advanced in the writ petition is that setting of the question paper was in violation of Clause 41.8 of Prospectus 2018-19. It is, primarily, on the aforesaid grievance, the writ petition was filed with the following prayers:

> "12. In the light of above submissions, this Honble Court may graciously be pleased to:
>
> a. Issue an appropriate writ(s), in the nature of *Mandamus* directing the Respondents herein to stay the furtherance of the procedures of entrance exam 2018-19 and publication of results until this court thinks it fit to do so;
>
> b. Issue such other order as this court deem fit and an order to quash the Ph.D entrance examination conducted by Respondent No.2 on 4th of June, 2018 by issuing a writ in the nature of Certiorari to hold the exam void.
>
> c. Issue such other appropriate writ(s), including a Writ of Continuing Mandamus to organize reexamination in accordance with the provisions of the Prospectus 2018-19 in due course of time, or any other order this court will deem fit and proper, in the facts and circumstances of the case.
>
> d. Call for the records in this case and more particularly the examination rules set by the Respondent 1 and 2 for the entrance examination 2018-19, including the minutes of the meetings of the Ph.D committee of Respondent 2 to prove the Petitioners assertions.

> e. The Petitioner also humbly prays before this court to set up an independent court monitored enquiry into the admissions 2018-19 of the university.
>
> f. Order payment of costs to the Petitioner for having driven her to litigation to seek relief, and
>
> g. Pass such further or other order(s) as this court may deem fit and proper for the ends of justice."

4. During the course of the hearing today, Mr. Joy submits that prayers made in a, b, c have been rendered infructuous because of efflux of time.

5. It is submitted by Mr. Joy that when the Ph.D course is offered for "Business Law", questions ought to have been set for 50% out of the total marks of the written test on "Business Law" in terms of Clause 41.8 of the Prospectus. However, no question was asked from the subject of "Business Law" and questions were set on "Constitution Law' and 'Jurisprudence" and therefore, manifestly, question paper was not in accordance with the Prospectus.

6. On a query of the Court, Mr. Joy submits that the petitioner is now pursuing Ph.D from Inter University Centre for Intellectual Property Rights Studies, Cochin University of Science and Technology.

7. Mr. Jain, on the other hand, submits that as the prayers a, b and c have been rendered infructuous as submitted by Mr. Joy, necessarily, it must be construed that the entire writ petition has been rendered infrucutuous as prayers c, d, e and f cannot be considered in isolation. He has further submitted that candidates selected, pursuant to the written test in which the petitioner had also participated but had not succeeded, having not been made parties to the present proceeding, the writ petition, even otherwise, is liable to be dismissed on the ground of non-joinder of necessary parties.

8. It is submitted by Mr. Jain that pursuant to the order of this Court dated 19.09.2019, the respondents had filed an interlocutory application i.e. I.A No.01/2019, amongst others, placing the question paper in question. He submits that though the contention of Mr. Joy is fortified from a reading of the question paper that it consisted of questions in "Constitution" and "Jurisprudence", there is no infirmity in the setting of the question paper and

the same is in accord with Clause 41.8. When the written test was in the subject of "Law", in absence of any requirement to that effect in the Prospectus, it is not necessary or incumbent or essential that the questions had to be set on the subject of "Business Law", though "Business Law" was being offered for the programme of Ph.D. Accordingly, he submits that the writ petition is liable to be dismissed.

9. Having considered the submissions of the learned Counsel for the parties and on perusal of the materials on record, I am inclined to agree with the submission of Mr. Jain that as prayers a, b and c had been rendered infructuous as per submission of the learned Counsel for the petitioner himself and as the selected candidates had not been made parties to the proceeding, no further adjudication with regard to prayers d, e and f is really called for. Having said that, I also find that the contention advanced by Mr. Joy that the question paper was set in contravention of Clause 41.8 of the Prospectus is without any merit.

10. Clause 41 of the Prospectus deals with the admission procedure of M.Phil/Ph.D programme. After Clause 41.7, a chart showing schedule for written test for M.Phil/Ph.D, indicating date, programme, Departments/ Subjects for M.Phil/Ph.D programmes, finds place and the same reads as follows:

SCHEDULE FOR WRITTEN TEST FOR M.Phil/Ph.D

Date	Programme	Departments/ Subjects
4th June 2018 (Monday)	M.Phil.	Anthropology, Chemistry, Economics, English, Geography, Hindi, History, International Relations, Law, Mass Communication, Mathematics, Microbiology, Nepali, Peace and Conflict Studies and Management, Physics, Political Science, Psychology, Sociology, Tourism.
	Ph.D	Anthropology, Botany, Chemistry, Chinese, Commerce, Computer Applications, Economics, Education, English, Geography, Geology, Hindi, History, Horticulture, Law,

		Management, Mass Communication, Micro-biology, Music, Nepali, Peace and Conflict Studies and Management, Physics, Political Science Psychology, Tourism, Zoology.

11. Clause 41.8 reads as follows:

> "41.8 The written examination shall be of one hour duration from 11:00 AM to 12:00 Noon and will be held at respective department. The written examination shall be of 50 marks. The syllabus of written examination consists of 50% research methodology and 50% subject specific. List of selected candidates in written test shall be displayed in respective departmental notice boards."

12. Clause 41.8 spells out that the written test will be of 50 marks. The syllabus of the examination indicates that questions to the extent of 50 % of the total marks shall be in respect of research methodology and the rest 50% in respect of subject specific.

13. Clause 41.8 finds place immediately after the schedule for written test for M.Phil/Ph.D where subject of "Law" is only indicated as a programme for Ph.D. In the above context, there is no scope to accept the contention of the petitioner that the questions in respect of subject specific ought to have been on "Business Law" and not on "Law".

14. In view of the above discussions, I find no merit in the writ petition and, accordingly, the same is dismissed. No costs.

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SLR (2019) SIKKIM 908

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

RFA No. 8 of 2017

M/s. Phonographic Performance Ltd. ….. APPELLANT

Versus

Arthur's Plur and Others ….. RESPONDENTS

For the Petitioner: Mr. Sayantan Basu, Mr. Sudesh Joshi and Mr. Tanmoy Roy, Advocates.

For Respondent 1-2: Mr. K.T. Bhutia, Senior Advocate with Ms. Tashi Doma, Advocate.

For Respondent No. 3: Mr. Ajay Rathi and Mr. Tashi Norbu Basi, Advocates.

For Respondent No. 4: None.

With

RFA No. 9 of 2017

M/s. Phonographic Performance Ltd. ….. APPELLANT

Versus

Tara Palace Hoteland Others ….. RESPONDENTS

For the Petitioner: Mr. Sayantan Basu, Mr. Sudesh Joshi and Mr. Tanmoy Roy, Advocates.

For Respondent 1-2: Mr. K.T. Bhutia, Senior Advocate with Ms. Tashi Doma, Advocate.

For Respondent 3-4: None.

Date of decision: 28th November 2019

A. Code of Civil Procedure, 1908 – O. VII R. 11 – Copyright Act, 1957 – Ss 18, 19, 30A and 61 – Learned trial Court ought to have allowed the Appellant an opportunity of leading evidence pertaining to the documents so as to establish whether the necessary details as mandated by the provisions of the Act were forthcoming in the documents filed by it. The claim of ownership of the copyright could have been either established or disproved by way of allowing the documents to be examined and juxtaposing it with the relevant provisions of the Act. Of course the documents would have to pass the strict rigours of proof as laid down in the Indian Evidence Act, 1872 – Appellant had averred that there was an infringement of their rights by the Respondents who failed to obtain licence to exploit the sound recordings owned by them. They claim ownership of the sound recordings on the bedrock of assignment vide documents filed by them. It is not the Appellant's case that they are licensees or agents of any Company. The documents of the Appellant were therefore also required to be examined in terms of the provisions of Ss. 18 and 19 of the Act as also the related provisions agitated by the Appellant. Without considering the documents, the Suits could not have been thrown out at the threshold – As the learned trial Court had allowed additional documents under O. VII R. 14(3) of the CPC, the documents so allowed ought to have been tested by evidence instead of holding that there was non-disclosure of the cause of action or non-compliance of Ss. 61, 19 and 30A of the Act when the claim was of ownership – The Suits do not suffer from the deficiency of non-disclosure of cause of action.

(Para 18)

B. Copyright Act, 1957 – Owners of Copyright – Learned trial Court also went on to discuss the provisions of S. 33 of the Act and concluded that the Appellant was not a Copyright Society but did not specify as to what consequences followed thereto. So far as non-compliance of S. 61 of the Act is concerned this would arise only after the learned trial Court had examined the documents and arrived at the finding as to whether the Appellant was either the owner of the copyright or not. Dismissal of the Suit on this ground would only arise consequent thereto – Application of the provisions of Ss. 30 and 30A of the Act would also only have arisen subsequent to the finding of the Court as to whether the Appellant was indeed the owner of the copyright after examining the provisions of Ss.18 and 19 of the Act based on the documents relied on by the Appellant – Impugned Orders set aside – Both Suits remanded to the Trial Court.

(Para 19, 22 and 24)

Chronological list of cases cited:

1. Saregama Ltd. v. New Digital Media and Others, 2018 AIR CC 3171 (Cal).
2. International Confederation of Societies of Authors and Composers (ICSAC) v. Aditya Pandey and Others, (2017) 11 SCC 437.
3. Phonographic Performance Ltd. v. Hotel Gold Regency and Others, AIR 2009 (Del) 11.
4. A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem, (1989) 2 SCC 163.
5. Saleem Bhai and Others v. State of Maharashtra and Others, (2003) 1 SCC 557.

Appeals allowed.

JUDGMENT

Meenakshi Madan Rai, J

1. This common Judgment disposes of the assailed Orders, both dated 19.06.2017, in RFA No.08 of 2017 and RFA No.09 of 2017 arising out of IPR Suit No.2 of 2015 *(M/s. Phonographic Performance Ltd. v. Tara Palace Hotel and Others)* and IPR Suit No.1 of 2016 *(M/s. Phonographic Performance Ltd. v. Arthur's Plur and Others)* respectively, (hereinafter referred to as IPR Suit No.2 and IPR Suit No.1).

2. Before delving into a discussion on the merits of the instant Appeal, it is pertinent to mention here for clarity that in the impugned Order dated 19.06.2017, in IPR Suit No.2 the following applications came to be decided;

1. Order VII Rule 14(3) read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter the CPC);
2. Order XXXIX Rule 2A read with Section 151 of the CPC;
3. Order VII Rule 11 of the CPC; and
4. Order XXXIX Rule 4 of the CPC, 1908.

(a) While dealing with the application under Order VII Rule 14(3) read with Section 151 of the CPC, the learned trial Court held in the impugned

Order that, in view of the nature of the additional documents filed by the Appellant, they were necessary for effective adjudication of the case and allowed the additional documents to be filed.

(b) While deciding the application under Order XXXIX Rule 2A read with Section 151 of the CPC filed by the Appellant against the Respondent No.1, for violation of injunction order dated 21.12.2015, it was observed that the Respondent No.1 had paid the Licence Fee to the Appellant and the application under Order XXXIX Rule 2A, read with Section 151 of the CPC not being pressed by the Appellant was disposed of accordingly.

(c) Considering the application under Order XXXIX Rule 4 of the CPC filed by the Respondent No.1, the learned trial Court took into consideration the discussions which had ensued in the application filed under Order VII Rule 11 of the CPC filed by the Respondent No.1 (which shall be discussed later hereinbelow) and observed that there was no necessity to pass any order in the said petition.

(d) It may relevantly be noted that the records reveal that an application was filed by the Appellant under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC on 21.12.2015. Vide the Order dated 24.03.2016, the learned trial Court recorded *inter alia* that *the Order dated 21.12.2015 stands confirmed"* and the application was disposed of, however the final order did not make a mention of this application.

3. In IPR Suit No.1, the following applications were decided by the learned trial Court;

1. Order XXXIX Rule 2A read with Section 151 of the CPC;
2. Order VII Rule 11 of the CPC; and
3. Order XXXIX Rules 1 and 2 of the CPC, 1908.

(a) The learned trial Court while disposing of the application under Order XXXIX Rule 2A read with Section 151 of the CPC rejected it on grounds that the Appellant had failed to establish violation of the Order of injunction of the learned trial Court dated 07.03.2016.

(b) Although an application under Order XXXIX Rules 1 and 2 had been filed, however only the application under Order VII Rule 11 of the CPC was taken up for hearing. In the impugned Order, it was concluded

that there was no necessity to pass any order on the petition filed by the Respondents No.1 and 2 under Order XXXIX Rules 1 and 2 of the CPC.

4. While considering the application under Order VII Rule 11 of the CPC in both IPR Suit No.2 and IPR Suit No.1, the learned trial Court took to discussing the provisions of Section 33 of the Copyright Act, 1957 (for short the Act) and observed that the contents of the Plaint and the documents filed by the Appellant establish that the Appellant was *"conceived, incorporated and is carrying on the business of issuing and granting licences in respect of literary, dramatic, musical and artistic works incorporated in cinematograph films or sound recordings as contemplated under Section 33 of the Act.* That prior to the year 2013, the Appellant was registered as a copyright society under Section 33 of the Act and involved in the business of issuing and granting licences, however Annexure B of the Appellant's document clarified that the Appellant was not as of date registered under Section 33 of the Act and thereby concluded that the Appellant was not a copyright society as contemplated under Section 33 of the Act.

(a) Section 19, Section 30 and Section 30A of the Act were taken up together for discussion wherein it was observed that the Appellant was to have produced ownership documents. That, Annexure B a Deed of Partial and Limited Assignment of Rights in Sound Recordings is between Universal Music India Pvt. Ltd. and the Appellant, both registered under the Companies Act, 1956. That, the Appellant had averred that Universal Music India Pvt. Ltd. had assigned their rights to the Appellant and that Annexure E disclosed the owners of copyright of the sound recordings. However, it was observed that to maintain a Suit for infringement it was to be filed by the owner or the exclusive licensee of the copyright. If it is filed by the latter (as was the Appellant purportedly) then the owners of the copyright *viz.* Universal Music India Pvt. Ltd. was necessarily to be impleaded as Defendants, which the Appellant has failed to do, thereby failing to comply with the provisions of Section 61 of the Act. That, the Appellant has levelled allegations of infringement of copyright without material particulars or cogent evidence of such infringement and thereby concluded that the Suit was liable to be dismissed for not disclosing the cause of action and also for non-compliance of Section 61, Section 19 and Section 30A of the Act. The petitions under Order VII Rule 11 of the CPC came to be thus dismissed.

5. The Suits *(supra)* before the learned trial Court was for declaration, permanent injunction and consequential reliefs. The Appellant claimed to be the owner of the copyright in sound recordings having obtained exclusive assignment of copyright in the sound recordings from the assignors. Vide Annexure B the Deed of Assignment with Universal Music India Pvt. Ltd., Annexure II to Schedule A of the Plaint and Annexure E this claim was sought to be buttressed. It was also averred that a list of more than 250 music labels have granted assignment to the Appellant and a list of the assignor music labels was available on its website. That, if the sound recordings so assigned are to be exploited by any user for commercial purposes, they can do so only on obtaining licence from the Appellant, who is entitled to issue or grant licences and collect Licence Fees from such users. That the Respondents No.1, 2 and 3 are communicating the sound recordings of the Appellant without obtaining such a valid licence in wilful infringement of copyright subsisting therein. The reliefs prayed for by the Appellant before the learned trial Court *inter alia* were as follows;

> *"(a) Declaration that the plaintiff is exclusively entitled to administer the copyright in respect of their and/or defendant no. 4's sound recordings and the defendants have no right to exploit/use the sound recordings as shown in Annexure-E without a valid license from the Plaintiff;*
>
> *(b) A Decree of permanent injunction restraining the defendant nos. 1, 2 and 3 and their men, agents and assigns from communicating sound recordings, as shown in Annexure-E music video of the plaintiff without obtaining a licence from the plaintiff;*
>
> *(c) A Decree of permanent injunction restraining the defendant nos. 1, 2 and 3 and their men, agents and assigns from infringing the copyright in the sound recordings, music video of the members of the plaintiff as shown in Annexure-E without obtaining a license from the plaintiff; …"*

6. (a) Raising the argument before this Court that the rejection of the Plaint on grounds given in the Order was wholly perverse, it was contended by learned Counsel for the Appellant that despite allowing the application of the Appellant under Order VII Rule 14(3) of the CPC, wherein the Deed of Assignment executed between the relevant parties was accepted, the learned trial Court erroneously concluded that the Appellant was a Licensee. In fact the Deed of Assignment was executed by and between the Appellant and the erstwhile owners of the sound recordings, by virtue of which the Appellant stepped into the shoes of the original owners. That, an error emanated in rejecting the Plaint on the ground of Section 19 of the Act after the Deed of Assignment was taken on record and not declared to be null and void. The learned trial Court failed to take into consideration the list of sound recordings of the assignors which form part of Schedule A, and specifically mentions that past, present and future sound recording works owned by the Universal Music India Pvt. Ltd. are assigned to the Appellant. Reasoning that the Suit was filed in the manner of a *quia timet* action and/ or apprehensive infringements to be committed by the Respondents, it was canvassed that the learned trial Court erroneously concluded that insufficient evidence was furnished in the Plaint to indicate infringement by the Respondents but failed to consider that documents accompanying the Plaint were to be tested at the time of trial. That, the impugned Order while alleging non-compliance by the Appellant of Section 30 of the Act is devoid of reasons.

(b) That, consideration was also not extended to the grievance of the Appellant pertaining to wrongful exploitation of the sound recordings by the Respondents despite relevant details having been disclosed in the documents relied upon by the Appellant. That, the Appellant as owner of the copyright was entitled to issue Licence to third parties if the said parties sought to exploit the sound recordings of the Appellant but sans Licence such exploitation would tantamount to infringement. Although notices were issued to the Respondents to obtain Licence for use of the assigned sound recordings, these were ignored and the learned trial Court paid scant attention to this aspect, nor did the Respondents undertake not to exploit the sound recordings of the Appellant. Drawing the attention of the Court to the verification clause in the application filed by the Respondent No.1 under Order VII Rule 11 of the CPC, it was submitted that it was verified by one Gauranga Dalal and not by the Respondent No.1, hence the application itself is defective.

(c) That, literary, dramatic, musical and artistic works are works which can be distinguished from a work of sound recording under Section 2(y)(iii) of the Act. That, Section 33 of the Act in effect restricts any agent or third party from issuing Licences for other copyright works without disclosing the name of the original author and/or owner of such copyright to prevent wrong appropriation of Licence Fees, however in the instant case such a question does not arise as the Appellant himself is the owner of the copyright and is claiming Licence Fees from the Respondents for exploiting and/or intending to exploit such sound recordings of the Appellant. The learned trial Court opined that the Appellant is not a Copyright Society as contemplated under Section 33 of the Act, when in fact this Section protects the rights of the owners of copyright including the sound recordings of which the Appellant is the owner and can exercise rights under Section 30 of the Act, therefore there was an inability to distinguish between Section 33 and Section 30 of the Act. The learned trial Court dealt with the matter as if it was that of a Licensee when in fact it pertains to an assignee. That, although Section 33 of the Act was discussed in the impugned Order, the learned trial Court did not dismiss the suit as being barred by law under Section 33 of the Act. As the Respondents failed to prefer any cross appeal against this observation, they cannot urge this issue in Appeal. It was also contended that without assigning reasons as to how Section 30A of the Act suffered from non-compliance, the Plaint was rejected. That the learned trial Court was also in error in dismissing the Suit for non-compliance of Section 61 of the Act since the Appellant is the owner by way of assignment thereby rendering nugatory the necessity of impleading the assignors. That apart, Respondent No.4 Sony Music Entertainment India Pvt. Ltd. has been made a party in terms of Section 61 of the Act as the said Company had only licensed its rights in sound recordings to the Appellant. While asserting their ownership rights on the sound recordings as an assignee, reliance was placed on the provisions of Section 2(d)(v) of the Act as also Section 2 (uu), Section 2 (y)(iii), Section 13(1)(c), Section 17, Section 18 and Section 19 of the Act. These submissions were fortified by the ratio in ***Saregama Ltd. v. New Digital Media and Others***[1] and ***International Confederation of Societies of Authors and Composers (ICSAC) V. Aditya Pandey and Others***[2] followed by the prayer that the impugned Order be set aside.

[1] 2018 AIR CC 3171 (Cal)
[2] (2017) 11 SCC 437

7. Learned Senior Counsel for the Respondent No.1, in vehement repudiation, raised the contention that the reasons for dismissal of the Suit under Order VII Rule 11 of the CPC was three pronged *viz.* the Suit did not disclose a cause of action; secondly, it was barred by Section 33 of the Act and thirdly by Section 61 of the Act in view of the non-joinder of the necessary parties being Universal Music India Pvt. Ltd. That, the reliefs prayed for by the Appellant before the learned trial Court are bereft of indications that there was an infringement by the Respondents, hence the reliefs prayed for cannot be granted. Referring to Section 19 of the Act, learned Senior Counsel contended that although the Appellant submits that the copyright of the works was assigned to them, however when one peruses Schedule A to the Plaint, it is clear that the details of the songs assigned to the Appellant has not been given. That, although Annexure E details the sound recordings, however it has not been signed by the assignor and the Schedule is blank and hence cannot be relied upon by the Appellant to establish its case. Thus, there is a clear non-compliance of Section 19(2) of the Act which requires that the assignment of copyright in any work shall identify such work and shall specify the rights assigned, the duration and territorial extent of such assignment. Referring to Section 30 of the Act, he put forth the argument that this Section requires that the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by Licence in writing or by his duly authorized agent, but the Appellant has no such rights. That the provisions of Section 33 of the Act which deals with registration of Copyright Society is to be considered along with Section 17 to Section 19 and Section 14(e)(iii) of the Act. That, a reading of the Sections *supra* would clearly indicate that the right granted to the Appellant is only under Section 14(e)(iii) of the Act *viz.* to communicate the sound recording, it does not authorize the Appellant to grant Licence which is reserved for the owner of the copyright and is to be done in his individual capacity as envisaged in the proviso to Section 33 of the Act. This emanates from the fact that the Appellant is not the original owner. The pleadings before the learned trial Court clearly indicate that prior to amendment of the Copyright Act, 1957, the Appellant was a Performing Rights Society and after the 2012 Amendment and consequent to the new Copyright Rules, the Appellant started working as a Company and has been fixing tariffs at random for use of the sound recordings. Section 51 of the Act provides for consequences when a copyright is infringed, therefore if the Appellant had a grievance of infringement of copyright, they ought to have brought an

infringement Suit and not demanded money as made out in their prayers. That, by skillful drafting, the Appellant has avoided showing infringement but has actually brought a Suit for collection of Licence Fees. It was further submitted that the learned trial Court has correctly held that the owner ought to have been impleaded as a party, in the absence of which, the Suit was not maintainable, having failed to comply with the provisions of Section 61 of the Act as the Appellant is not the owner of the copyright. Consequently, the law prohibits the Appellant from licensing so the question of paying tariff to them for the sound recordings does not arise. Reliance was placed on ***Phonographic Performance Ltd. v. Hotel Gold Regency & Ors.***[3].

8. While placing arguments in IPR Suit No.1, learned Counsel Mr. Ajay Rathi and Mr. Tashi Norbu Basi for the Respondent No.3 submitted that in sum and substance they endorse and adopt the arguments canvassed by learned Senior Counsel Mr. K.T. Bhutia for the Respondents No.1 and 2.

9. The submissions of learned Counsel for the parties have been considered and all documents on record, the impugned Order and the citations relied on by learned Counsel for the parties have been carefully perused.

10. The discontent of the Appellant pivots around the dismissal of their Suit under Order VII Rule 11 of the CPC on grounds of non-disclosure of cause of action and for noncompliance of Section 61, Section 19 and Section 30A of the Act. Hence, the limited question that falls for consideration of this Court is whether the impugned Orders can sustain.

11. Order VII Rule 11 of the CPC *inter alia* provides that the Plaint shall be rejected if it does not disclose a cause of action, is undervalued, insufficiently stamped or the Suit appears to be barred by law, where the Plaint is not filed in duplicate or for non-compliance of the provisions of Order VII Rule 9 of the CPC. In the instant matters the provisions nudged into service before the learned trial Court by the Respondents were under Order VII Rule 11 (a) of the CPC 'failure to disclose cause of action' and Order VII Rule 11 (d) of the CPC 'where the Suit appears to be barred by any law.' Appositely, what constitutes a cause of action may be mulled over. In ***A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem***[4] it was held as follows;

[3] AIR 2009 (Del) 11
[4] (1989) 2 SCC 163

> **"12.** A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

In ***Saleem Bhai and Others v. State of Maharashtra and Others***[5] the Hon'ble Supreme Court while considering the provisions of Order VII Rule 11 of the CPC, observed as under;

> **9.** A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (*a*) and (*d*) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, ...

[5] (2003) 1 SCC 557

12. In this context, the observation of the learned trial Court is to the effect that for the purpose of obtaining a relief, the facts averred are to be stated and proved but not the evidence, consequently the Appellant's petition under Order VII Rule 14(3) of the CPC which requires the Plaintiff to produce documents on which the cause of action is based, was allowed. Thus, Annexure E came to be filed. Admittedly, Annexure B i.e. the purported Deed of Partial and Limited Assignment of Rights in Sound Recordings, executed between the Appellant and Universal Music India Pvt. Ltd. and Annexure II to Schedule A of the Plaint had already been filed. The unequivocal claim of the Appellant in the Suits filed is that it is the owner of the copyright of the sound recordings by way of assignment vide the documents *supra*, which are being exploited by the Respondents without licence from the Appellant. The claim of ownership by way of assignment is sought to be substantiated by the documents enumerated *supra*. They do not claim to be licensees nor do they claim to be agents on behalf of any other copyright owners, hence their unflinching claim that as owners of the copyright they can take steps in terms of the Act while issuing or granting licences and connected matters thereto. As the Appellant does not hold out any claims of being a copyright society as contemplated under Section 33 of the Act, it thereby contends that the prohibitions engrafted therein are not applicable to it.

13. "Assignment" as per Black's Dictionary, Tenth Edition, Page 142 is as follows;

> **"1**. The transfer of rights or property <assignment of stock options>. **2**. The rights or property so transferred.
>
> "An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is effected. In these senses the word is variously applied in law. Alexander M. Burrill, A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors 1, at 1 (James Avery Webb ed., 6th ed. 1894). …

An assignee, *(ibid supra)* is defined as under;

> **"1**. One to whom property rights or powers are transferred by another. Use of the term is so widespread that it is difficult to ascribe positive meaning to it with any specificity. Courts recognize the protean nature of the term and are therefore often forced to look to the intent of the assignor and assignee in making the assignment – rather than to the formality of the use of the term assignee – in defining rights and responsibilities. – Also termed assign.

14. In light of the above observations of the Hon'ble Supreme Court in the context of cause of action and discussions which have emanated *supra* we may usefully refer to Section 18 of the Act which *inter alia* provides that the owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations for the whole of the copyright or any part thereof. The first proviso elucidates that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence. The second proviso details that no such assignment shall be applied to any mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made unless the assignment specifically refers to such mode of exploitation of the work. Section 18(2) of the Act provides that where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee in respect of the rights so assigned and the assignor in respect of the rights not assigned, shall be treated for the purpose of this Act as the owner of the copyright and the provisions of this Act shall have effect accordingly. Section 18(3) of the Act provides that the expression assignee in respect of the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

15. The mode of assignment of copyright is described in Section 19 of the Act which lays down that no assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent. Section 19(2) of the Act provides that the assignment of copyright in any work shall identify such work and shall specify the rights

assigned, the duration and the territorial extent of the assignment. That apart, in terms of Section 19(3) of the Act, the assignment of copyright in any work shall also specify the amount of royalty to the author or his legal heirs during the currency of the assignment which shall also be subject to revision, extension or termination on terms mutually agreed upon by the parties. Section 19(4) of the Act states with clarity that if the assignee does not exercise the rights assigned to him under any of the Sub-Sections of this Section within a period of one year, his rights will lapse unless otherwise mentioned in the assignment. The assignment shall be deemed to be for a period of five years if the period of assignment is not provided, this is provided in Section 19(5) of the Act. The territorial extent if not specified, shall be presumed to extend to the whole of India in terms of Section 19(6) of the Act. These provisions however shall not be applicable to assignment made before the Copyright (Amendment) Act, 1994. Section 19(8) of the Act renders void the assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member. Section 19(9) of the Act deals with assignment of copyright in any work and lays down that no such assignment to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any other form other than for communication of the work to the public along with the cinematograph film in a cinema hall. Section 19(10) of the Act provides that no assignment of the copyright in any work to make a sound recording which does not form part of any cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable for any utilization of such work in any form.

16. Licences is however discussed in Chapter VI of the Act. Section 30 of the Act provides that the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right, by licence, in writing by him or by his duly authorized agent. The proviso to Section 30 of the Act is concerned with licence relating to copyright in any future work and lays down that such licence shall take effect only when the work comes into existence. The explanation therewith is that if a person to whom such a licence relating to copyright in any future work is granted dies before the work sees the light of day, his legal representatives shall be entitled to the benefit of the licence provided there is no provision to the contrary in the licence.

17. On the anvil of the provisions of Section 18 and Section 19 of the Act *supra*, a cursory look at Annexure B *inter alia* reveals as under:

> "This Deed (Deed) is being entered into by and between,
>
> Universal Music India Pvt. Ltd., a Company registered under the Companies Act 1956, and having its registered/main office at Samir Complex, St. Andrews Road, Bandra West, Mumbai-100050 hereinafter referred to as the Music Label (which expression shall unless repugnant to the context include its successors and assigns) of the FIRST PART; and
>
> Phonographic Performance Limited, a company registered under the Companies Act, 1956 and having its registered/main office at Crescent Towers, 7th floor, B-68, Veera Estate, off New Link Road, Andheri West, Mumbai 400053 hereinafter referred to as PPL (which expression shall unless repugnant to the context include its successors and assigns) of the SECOND PART.
>
> .....
>
> 1. Partial and Limited Assignment of Rights in Sound Recordings exclusively to PPL:
>
> 1.1 **The Music Label hereby exclusively assigns, for the Territory, the rights provided below, in respect of belowlisted modes and mediums (without any limitation as to format or style or mechanics or process or method of storage) in its Music Catalogue (of existing and future sound recordings), in favour of PPL for the term of this Deed, subject to earlier determination of this Deed by the Music Label, and PPL accepts such assignment. This Deed is an assignment of rights u/s 18 and 19 of Copyright Act. It is clarified that the rights exclusively assigned hereby are on ownership**

basis, with full rights for monetization and forenforcement, including by way of legal/court litigation and police authorities.

(emphasis supplied)

Rights exclusively licensed with respect to the Sound Recordings in the Music Catalogue:

1.1.1 Public performance/Communication to Public in the following modes/mediums in the Territory and during the term of this Deed:

(a) by way of 'background' music, i.e., right to perform the Sound Recordings comprising the Music Catalogue, in public, in the background, including in, by way of example, any transport vehicle, hotels, shops, restaurants, offices, community centers, and amusement centers, and other public places and establishments;

(b) by way of performing the Sound Recordings at events, shows, concerts, and other events,

(c) by way of radio-broadcasting, with respect to terrestrial, A.I.R., FM, AM, and satellite; and

(d) by way of mobile telephony, namely: (a) music messaging over IVR – all telcos and aggregators – only Indian sound recordings. The parties agree that all other telecom related rights (i.e. except the rights granted herein) with respect to the Music Catalogue are retained by the Music Label.

.....

1.4 It is clarified that all rights and interests in and to copyright in the Sound Recordings of the Music Catalogue, save and except for the limited and partial assignment as provided for in above-named modes and mediums of monetization, continue to vest with the Music Label.

2. Definitions

"Music Catalogue" shall mean all past, present and future Sound Recordings, published or unpublished in which Copyright subsists, including derivatives or variations or portions or embodiments thereof, together with associated meta-data, art-work, images, promotional and ancillary material, which are owned by the Music Label and/or controlled by the Music Label through exclusive licensing/contractual arrangements and in respect of which the Music Label has lawful, un-encumbered and effective rights to enter into this Deed.

(emphasis supplied)

Without affecting the generality of the foregoing, the Music Label agrees to provide detailed particulars of the Sound Recordings, comprising the Music Catalogue to PPL in full, as per prescribed format and submit the same to PPL within 7 days from the date of execution of this Deed, by way of Schedule A Music Catalogue to this Deed. The same shall be sent from official email id or by way of data stored in CD; if sent in any other manner (eg hard-copy printout), the same shall require (physical or digital) signature by both parties. The Music Label hereby agrees and undertakes to inform PPL in writing about any additions/deletions from time to time and the same shall form part of Schedule A Music Catalogue, as and when particulars of such additions/deletions are received from the Music Label by PPL.

.....

6.4 **PPL warrants that it is entitled to grant licences u/s 30 of the Copyright Act. PPL confirms and undertakes to institute appropriate legal proceedings against infringers of copyright in the Music Catalogue in order to protect the**

> **rights granted to PPL herein, at all times during the subsistence of this Deed**.
>
> **(emphasis supplied)**
>
> 7. Miscellaneous
>
> 7.1 The Music Label agrees that PPL is entitled to grant licences u/s 30 of Copyright Act, on ownership basis (as covered by sub-Section 18(2) of Copyright Act).
>
> 7.2 Music Label recognises that PPL has full authority, with prior intimation to the Music Label, to take all steps as may be necessary for the purpose of protecting the assigned rights from infringement in any manner whatsoever, including the filing or defending of any litigation or proceeding before a Court or tribunal or police, giving undertakings, settling or withdrawing any actions instituted for this purpose either by or against PPL and generally to take all steps as PPL may deem fit for the purpose of giving substantial and complete effect to these presents. Music Label recognises and agrees that PPL has the right to send notices and to initiate or defend legal proceedings for infringement of the assigned rights, copyright disputes, money recovery, etc., in its own name, without naming the Music Label as a party to the litigation or proceedings. The Music Label ratifies all past acts done by PPL, including existing, on-going litigations in any Court of law or tribunal or police, both civil and criminal. …

18. On the touchstone of what assignment means and in view of the details set out in Annexure B *supra* as also the signatures which are affixed on various documents relied on by the Appellant, the learned trial Court in my considered opinion ought to have allowed the Appellant an opportunity of leading evidence pertaining to the documents so as to establish whether the necessary details as mandated by the provisions of the Act were forthcoming in the documents filed by it. The claim of ownership of the copyright could have been either established or disproved by way of

allowing the documents to be examined and juxtaposing it with the relevant provisions of the Act. Of course the documents would have to pass the strict rigours of proof as laid down in the Indian Evidence Act, 1872. The Appellant had averred that there was an infringement of their rights by the Respondents who failed to obtain licence to exploit the sound recordings owned by them. They claim ownership of the sound recordings on the bedrock of assignment vide documents filed by them. It is not the Appellant's case that they are licensees or agents of any company. The documents of the Appellant were therefore also required to be examined in terms of the provisions of Section 18 and Section 19 of the Act as also the related provisions agitated by the Appellant. Without considering the documents the Suits could not have been thrown out at the threshold. As the learned trial Court had allowed additional documents under Order VII Rule 14(3) of the CPC, the documents so allowed ought to have been tested by evidence instead of holding that there was non-disclosure of the cause of action or non-compliance of Section 61, Section 19 and Section 30A of the Act when the claim was of ownership. Consequently, I find that the Suits do not suffer from the deficiency of nondisclosure of cause of action.

19. It may appositely be pointed out that the learned trial Court also went on to discuss the provisions of Section 33 of the Act and concluded that the Appellant was not a copyright society under Section 33 of the Act but did not specify as to what consequences followed thereto. So far as non-compliance of Section 61 of the Act is concerned this would arise only after the learned trial Court had examined the documents and arrived at the finding as to whether the Appellant was either the owner of the copyright or not. Dismissal of the Suit on this ground would only arise consequent thereto. With regard to Respondent No.4 (Sony Music Entertainment India Pvt. Ltd.), it is an admitted position that they are licensees of the rights in sound recordings to the Appellant and in terms of Section 61 of the Act have been impleaded as a Respondent. In the same thread, the application of the provisions of Section 30 and Section 30A of the Act would also only have arisen subsequent to the finding of the Court as to whether the Appellant was indeed the owner of the copyright after examining the provisions of Section 18 and Section 19 of the Act based on the documents relied on by the Appellant. At this stage, I refrain from examining the provisions of Section 30, Section 30A and Section 61 of the Act, lest it be construed as touching upon the merits of the controversy, which would consequently prejudice either of the parties in the Suit.

20. The finding that the allegations of infringement were not fortified by cogent evidence is undoubtedly premature for the above stated reasons. If there was a dichotomy in the averments of the Appellant pertaining to licensee and assignee, the contradictory claims if any, ought to have been examined by evidence. The Suits were dismissed as if the final hearing had concluded when in fact the Court did not have the benefit of examining and considering the documents on the basis of which the claim of the Appellant emanated.

21. To address the contention of the Appellant that the verification clause in the Affidavit in the application under Order VII Rule 11 of the CPC was defective, on perusal thereof it is clear that the deponent has stated that he was authorized to swear the Affidavit. Nothing further remains for decision thereof.

22. In view of the foregoing discussions and reasons enumerated, the impugned Orders of the learned trial Court are set aside.

23. Appeals in RFA No.08 of 2017 arising out of IPR Suit No.2 and RFA No.09 of 2017 arising out of IPR Suit No.1 are allowed.

24. Both Suits are remanded to the learned trial Court with the following directions;

(i) in IPR Suit No.2, the learned trial Court shall consider the matter after the stage of Order VII Rule 14(3) of the CPC as documents sought to be filed by the Appellant vide this petition have already been allowed;

(ii) in IPR Suit No.1, the matter shall be considered from the stage of hearing of the petition under Order XXXIX Rules 1 and 2 of the CPC;

(iii) the matters be disposed of as per law.

25. Consequently, both the Suits be restored to their respective original numbers in the Register of the learned District Judge, East Sikkim at Gangtok.

26. This Judgment is not and shall not be construed as observations on the merits of the matter.

27. Copy of this Judgment be sent to the learned trial Court, for information and compliance.

28. Lower Court records be remitted forthwith.

SLR (2019) SIKKIM 929

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

WP (C) No. 4 of 2019

Shri Ong Tshering Bhutia ….. PETITIONER

Versus

Shri Naresh Subba and Another ….. RESPONDENTS

With

WP (C) No. 5 of 2019

M/s. Balchand Udairam ….. PETITIONER

Versus

Shri Naresh Subba and Another ….. RESPONDENTS

With

WP (C) No. 6 of 2019

M/s Ramjilal Tarachand ….. PETITIONER

Versus

Shri Naresh Subba and Another ….. RESPONDENTS

For the Petitioners: Mr. Sudesh Joshi and Mr. Ganesh Man Chettri, Advocates.

For Respondent 1-2: Mr. A. Moulik, Senior Advocate with Ms. Panila Theengh and Mr. Simeon Subba, Advocates.

For Respondent No.3: Ms. Kunzang Choden Lepcha and
Ms. Neetu Tamang, Advocates.

Date of decision: 30th November 2019

A. Constitution of India – Article 227 – Code of Civil Procedure, 1908 – O. XI R. 14 – Production of Documents – The Court must be certain about the possession or power of the documents with the party against whom the order is sought before exercising the power under Order XI Rule 14, C.P.C. When the Court is not clear about the factum, no order under the said provision can be passed – The applications filed by the Petitioners does not reflect any reason whatsoever for which they seek a direction upon the Respondent No. 3 as well as Siddharth Rasaily to produce the originals of the said documents – The Petitioners have not pleaded the expediency, justness and relevancy of the original documents to the matters in issue in the suits. The applications in the circumstances were rightly rejected by the learned District Judge. The rejection of the applications by the impugned orders dated 20.03.2019 does not reflect any serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if this Court does not interfere, a grave injustice would remain uncorrected. It cannot be held that the finding is so perverse, that no reasonable person can possibly come to such a conclusion – The prayers of the petitioners are not within the scope and ambit of exercise of power and jurisdiction under Article 227 of the Constitution of India.

(Paras 17 and 19)

Chronological list of cases cited:

1. Meera Devi and Others v. Jitender and Others, MANU/DE/1900/2016.
2. Estralla Rubber v. Dass Estate (P) Ltd., (2001) 8 SCC 97.
3. Basanagouda v. Dr. S.B. Amarkhed and Others, (1992) 2 SCC 612.

Petitions dismissed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This common judgment is passed in Writ Petition (C) No.04 of 2019, Writ Petition (C) No. 05 of 2019 and Writ Petition (C) No. 06 of 2019 assailing impugned orders dated 20.03.2019 in three Eviction Suits No. 08 of 2015, 09 of 2015 and 10 of 2015 (collectively referred to as 'the suits') pending adjudication before the learned District Judge. The suits have been filed by the respondent nos.1 and 2 against the petitioners for their eviction. The respondent no.3 was substituted for the original defendant no.2 after his death. It is the case of the respondent nos. 1 and 2 that they have purchased the suit properties from the original defendant no.2 who was the owner. They assert that the original defendant no.2 had built the structures on the land which was leased by the then Government to his father-late Martam Topden and the petitioners have been tenants in the suit properties.

2. Paragraph 5 of the plaints is identical. It is central to the issue raised by the petitioners and therefore, is extracted herein below:

> ***"5.*** *That vide a letter dated 09.07.1971, Late Martam Topden, the original permanent lessee had applied to the lessor/the Bazar Department for transfer of rights & ownership of various premises owned by him in the name of his sons including defendant No.2 which was allowed vide Bazar Department letter no. 1302/B dated 05.10.1971 duly recording, interalia, that schedule A property mentioned at Serial No.1 had been recorded in the name of Shri Karma Tenzing Topden, the Defendant No.2. A copy of the letter dated 05.10.1971 issued by the Executive Officer, Bazar Department and original letter dated 06.10.1971 marked to the defendant No.2's brother are filed and marked Annexure-P1 (collectively).***"***

3. The petitioners have filed their written statements in the suits. Paragraphs 14 of the written statements which are also identical is reproduced below:

> **"** *That the father of the Defendant No.2 Late Martam Topden constructed a three storied wooden house sometimes in early 1930 on a plot of land gifted to him by the then Maharaja of Sikkim. The words which fell from the mouth of the then Maharaja of Sikkim who was the sovereign ruler became law during those days and the gifting of the said land measuring 64' x 34' situated at Old Market (as it was called those days) became absolute and the late Martam Topden became the absolute owner of the said plot of land.***"**

4. In the written statements the petitioners have averred that immediately after late Martam Topden finished constructing the three storied wooden structure, various portions of it were rented out to the father of the petitioner in W.P. (C) No. 04 of 2019, the petitioner in W.P. (C) No.05 of 2019 and to Ramjilal Kashiram which was later on changed to Ramjilal Tarachand in W.P. (C) No. 06 of 2019 on monthly rentals. The petitioners have however, contested the respondent nos. 1 and 2's claims that they had purchased the suit properties.

5. The reply to paragraph 5 of the plaints in the written statements is the following:

> **"***That with reference to the statement and claims made by the Plaintiffs at paragraph 4 of the plaint is concerned, the same are denied as false and the Plaintiffs are put to strict to thereof. The Plaintiffs have time and again referred to late Martam Topden as "permanent lessee" without any lease deed having been annexed in the plaint which proves the falsity of their claim that late Martam Topden was the lessee of Bazar Department. It is denied that Martam Topden was a permanent lessee in respect of the plot of land*

*measuring 64' x 34' gifted to him by the Maharaja of Sikkim on which he had built three storied wooden house measuring 64' x 34' situated at Old Bazar, Gangtok. The purported letter of Bazar Department, Govt. of Sikkim bearing No.1302/B dated 05/10/1971 merely shows that the Bazar Department had recorded in the concerning register the properties distributed and transferred by Martam Topden as its owner in favour of the Defendant No.2 and not as its lessee. Thus, recording in the concerned register of the Bazar Department was that of the transfer of ownership of the concerned property in favour of the Defendant No.2 and not the transfer of any lease.***"***

6. Applications under Order XI Rule 14 CPC (for short 'the application') were filed by the petitioners on 07.03.2019 in the suits. The applications were signed by the learned Counsel on behalf of the petitioners. It was not supported by any affidavit. The applications prayed for a direction to respondent no.3 and Siddharth Rasaily (D.W.5) to produce the originals of the two letters.

7. Written objections to the applications were filed by the respondent nos.1 and 2 on 16.03.2019. The written objections were verified by respondent no.1 and it was supported by his affidavits. It was submitted that the petitioners had never raised any doubt about the two letters and was doing so after a lapse of four years. Objection to the form of the applications, both in fact and in law, was also taken. It was contended that the applications were not maintainable and was made only to delay the suits. Various contentions on the merits of the two letters were also made.

8. Respondent no.3 also filed his written objections to the applications on 16.03.2019. It was filed through his power of attorney supported by his affidavit. The respondent no.3 stated that he did not live with his father; he did not personally deal with the matter then and hence was not aware of the location of the two letters.

9. The learned District Judge rejected the applications by the impugned orders dated 20.03.2019. The learned District Judge held that the

petitioners could not challenge the title of the original defendant no.2 or the ownership of his father. It was held that the lease deed document was found to be duly registered and it bears more evidentiary value. The learned District Judge held that Siddharth Rasaily was only a witness and not a party to the suit and as such he could not be ordered to produce the documents under Order XI Rule 14 CPC. The learned District Judge held that the two letters were not relevant for the adjudication of the suits.

10. The petitions seek to invoke the jurisdiction under Article 227 of the Constitution of India to assail impugned orders dated 20.03.2019.

11. Heard Mr. Sudesh Joshi, learned Counsel for the petitioners, Mr. A. Moulik, learned Senior Counsel for the respondent nos. 1 and 2 and Ms. Kunzang Choden Lepcha, learned Counsel for respondent no.3.

12. Mr. Sudesh Joshi submitted that the records reveal that the power of attorney holder of respondent no.3 had deposed that the respondent no.3 was in possession of the originals of the two letters and was fully aware about the filing of the applications by the petitioners on 07.03.2019 when he was cross-examined on 12.03.2019. Mr. Sudesh Joshi contends that the suits are collusive between the respondent nos.1, 2 and 3 to evict the petitioners. The petitioners contend that they had objected to the acceptance of the two letters when they were marked Exhbit-P1 and P2. They further contend that respondent nos.1 and 2 laid no foundation as required under the law for exhibiting certified copies of the two letters. Mr. Sudesh Joshi relied upon a Delhi High Court judgment in re: ***Meera Devi & Ors. v. Jitender & Ors.***[1] which emphasizes on the duty of the Courts to ascertain the truth.

13. The respondent nos. 1 and 2 contested the writ petitions by filing counter-affidavits. It is their case that the applications were devised to delay the proceedings; the writ petitions are not maintainable; since the petitioners admit that they are tenants of the original defendant no.2 they could not dispute his title which originated either through the two letters or otherwise; the provision cannot be applied to direct Siddharth Rasaily who was a witness and not a party to the suit; as the original documents are not found and the fact had been notified to the learned District Judge, no direction could be passed for their production and no ground is made out to invoke the provision.

[1] MANU/DE/1900/2016

14. In re: ***Estralla Rubber v. Dass Estate (P) Ltd.,***[2] the Supreme Court examined the scope of Article 227 of the Constitution of India and held:

> ***"6****. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."*

15. In re: ***Basanagouda v. Dr. S. B. Amarkhed & Ors.***[3] the Supreme Court while examining the provisions of Order XI Rule 14 CPC held that:

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[2] (2001) 8 SCC 97
[3] (1992) 2 SCC 612

> ***"7.*** *The Court, therefore, is clearly empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power relate to any matter in question in the suit provided the court shall think right that the production of the documents are necessary to decide the matter in question. The court also has been given power to deal with the documents when produced in such manner as shall appear just. Therefore, the power to order production of documents is coupled with discretion to examine the expediency, justness and the relevancy of the documents to the matter in question. These are relevant consideration which the court shall have to advert to and weigh before deciding to summoning the documents in possession of the party to the election petition……..***"**

16. The suits have been filed by respondent nos. 1 and 2 as a purchaser/lessee in the suits properties from the original defendant no.2 who as per the petitioners was the original owner. Whether respondent nos. 1 and 2 are in fact the purchaser/lessee of the suit properties and therefore had a right to evict the petitioners would be ultimately decided in the suits. The two letters are documents relied upon by the respondent nos. 1 and 2 in the plaints and they have been produced. The effect of the two letters would be decided by the learned District Judge. The failure of the respondent nos.1 and 2 to produce the primary evidence and exhibiting secondary evidence without laying the foundation for it, as alleged, would have its own consequences. It is seen that the witnesses of the respondent nos. 1 and 2 have been extensively cross-examined on this aspect by the petitioners.

17. The Court must be certain about the possession or power of the documents with the party against whom the order is sought before exercising the power under Order XI Rule 14 CPC. When the Court is not clear about the factum no order under the said provision can be passed. Both the letters appear to be addressed to late Martam Topden written in the year 1971. The power of attorney for respondent no.3 who substituted the

original defendant no.2 had on 12.03.2019 admitted during his cross-examination that the originals are in the possession of defendant no.2, Kunzang Namgyal Topden and Karma Sonam Topden. Subsequently, however, in the written objections to the applications filed by the respondent no.3 dated 16.03.2016 the same power of attorney holder stated on affidavit that the respondent no.3 did not live with his father; he did not personally deal with the matter and hence was not aware of the location of the two letters.

18. The learned Counsel for the parties submit, and it is also found, that the observation of the learned District Judge in the impugned orders dated 20.03.2019 that *"it is also seen that the witness who has certified the copy of the said document have already cross-examined extensively by the Ld. Counsel of the petitioner/defendant no.1."* is incorrect. However, the records reveal that Siddharth Rasaily has been cross-examined thereafter on 01.04.2019.

19. The applications filed by the petitioners does not reflect any reason whatsoever for which they seek a direction upon the respondent no. 3 as well as Siddharth Rasaily to produce the originals of the said documents. The applications only state that the respondent no.1 and 2 have not filed the originals but certified copies; the respondent no.3 has not produced it either; as the two letters are purportedly addressed to the grandfather of respondent no.3, he must be ordered to produce the originals and as Siddharth Rasaily had certified the copies of the two letters he must also be asked to produce the originals. The petitioners have not pleaded the expediency, justness and relevancy of the original documents to the matters in issue in the suits. The applications in the circumstances were rightly rejected by the learned District Judge. The rejection of the applications by the impugned orders dated 20.03.2019 does not reflect any serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if this Court does not interfere, a grave injustice would remain uncorrected. It cannot be held that the finding is so perverse, that no reasonable person can possibly come to such a conclusion. This Court is of the view that the prayers as prayed for by the petitioners are not within the scope and ambit of exercise of power and jurisdiction under Article 227 of the Constitution of India.

20. Consequently, the petitions are dismissed. No orders as to cost. The interim orders dated 20.08.2019 passed by this Court in I.A. No. 01 of 2019 stands vacated. The learned District Judge may proceed with the hearing of the suits.

SLR (2019) SIKKIM 939

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

RFA No. 7 of 2018

Ms. Dinku Khati and Another ….. APPELLANTS

Versus

Smt. Kamal Kumari Subba and Another ….. RESPONDENTS

For the Appellant: Ms. Gita Bista, Legal Aid Counsel.

For Respondent No.1: Mr. Vivek Anand Basnett and Ms. Mina Bhusal, Advocates.

For Respondent No. 2: Ms. Sashi Raiand Ms. Lhamu Bhutia, Advocates.

Date of decision: 30th November 2019

A. Limitation Act, 1963 – Article 113 – While deciding the question of limitation which is held to be involving both facts and law it is important that the Court examines the facts as well as the law. When a claim for payment of professional fees have been made giving details of the dates of engagement, the quantum of fees payable and the work done it was incumbent upon the learned District Judge to examine each of these claims even to decide whether the same were barred by limitation – The pleading in the plaint does give a clear impression that the issue of limitation was an issue of both fact and law. When the learned District Judge on 16.08.2017 had taken a view that the question of limitation involved both facts and law and therefore, it would be proper if the question of limitation is heard and decided along with the other main issues at the final stage of the suit on receiving the evidence – This was not a case in which the issue of limitation was taken up as a preliminary issue on a pure question of law. This was a case in which the trial had been concluded and evidence led by the parties. Thus, it was incumbent upon the learned District Judge to render its judgment on all the issues arising in the suit.

(Para 10)

B. Code of Civil Procedure, 1908 – O. XIV R. 2 – O. XX R. 5 – Order XIV Rule 2 requires that a Court must decide all issues even if the case can be disposed of on a preliminary point except where a pure question of law relating to jurisdiction or bar to suit is involved – Order XX Rule 5 provides that in suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon anyone or more of the issue is sufficient for the decision of the suit – It is incumbent upon the Court to render its finding or decision with reasons on each of the issues. An exception is carved out for the Court when it is found and held that the finding upon anyone or more of the issue is sufficient for the decision of the suit – Order XX Rule 5 must be complied with keeping in mind the issues framed under Order XIV Rule 1 and the mandate of Order XIV Rule 2.

(Para 11)

Chronological list of cases cited:

1. Dharmarth Trust, Jammu and Kashmir, Jammu and Others v. Dinesh Chander Nanda, (2010) 10 SCC 331.
2. Baroda Kant Sen v. Court of Wards, AIR 1931 All 752 (2).
3. Kakodonga Tea Estate v. J.N. Saikia, AIR 1973 Gau 27.
4. M/s Fomento Resorts and Hotels Ltd., v. Gustavo Ranato da Cruz Pinto and Others, AIR 1985 SC 736.

Appeal allowed.

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

1. The present appeal assails the judgment and decree both dated 29.10.2018 passed by the learned District Judge, (Special Division-II) East Sikkim at Gangtok in Money Suit No.09 of 2016 (for short 'the suit') filed on 26.04.2016.

2. The case of the appellant in the suit is that she is a practicing Advocate who had been engaged by the respondents to appear before the Debt Recovery Tribunal at Guwahati, the Appellate Tribunal at Kolkata as

well as the High Court of Guwahati. In the plaint the appellant has given a detailed history of how she was engaged by them from the year 2009 onwards. The appellant has also averred the details of the various professional engagements from 08.05.2012 till 18.07.2014. The averments in the plaint contours through the period 2009 to 2014 and how the respondents had sought time to pay her professional fees due to their poor financial condition assuring her that it would be done when their financial condition improved. According to the appellant a total amount of Rs.10,75,000/- was payable on account of her professional engagements over the period by the respondents. The details of the appellant's professional engagements with specified dates have been mentioned in paragraphs 20 and 21 of the plaint. In paragraph 31 the appellant averred that the cause of action first arose on 26.03.2012, next on 20.04.2012, thereafter on 21.04.2012 and 03.05.2012 and finally when she demanded her fees through the legal notice. The legal notice is dated 02.06.2014.

3. The respondents filed their written statements. The respondent no.1 contested the suit on the ground that the fact about the appellant's professional engagement was not known to her. The respondent no.2 however, admitted the appellant's professional engagement. The respondent no.2 stated that Rs. 5,000/- per day as legal fees besides accommodation was agreed upon; however, due to financial problems the respondent no.2 could not even pay her travel and accommodation charges; immediately on settlement of the case, the respondent no.1 in collusion with another received huge amounts of money and as a result the legal fees could not be settled. The respondent no.2 confirmed that the appellant had appeared and rendered her legal service as mentioned in paragraph 20 of the plaint. With regard to the averments made by the appellant in paragraph 21 of the plaint the respondent no.2 had an issue about the quantum of fees payable but not on the fact that she had been engaged professionally.

4. On 13.09.2017 one issue was framed. The said issue was *"whether the defendant no.1 is liable to pay the sum of Rs.10,75,000/- to the plaintiff as her legal fees?"*

5. On 16.08.2017 the learned District Judge held *"after considering the submissions made by the parties as well as the contents of plaint and documents filed by the plaintiff, in my view, the question of*

limitation in the instant suit involves both facts and law. Therefore, it is proper if the question of limitation is heard and decided along with the other main issues at the final stage of the suit on receiving the evidence. Let the question of limitation be one of the issues of this suit." The learned District Judge while holding as above rejected the application filed by the respondent no.1 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short 'the CPC').

6. The appellant filed her evidence on affidavit dated 14.10.2017 along with 13 documents in support thereof. On 20.03.2018 the appellant confirmed her evidence on affidavit and marked the documents as exhibit-1 to 13. The appellant was cross-examined by the respondent no.1 and respondent no.2. The respondent no.1 filed her evidence on affidavit dated 11.04.2018 and confirmed the same on 19.06.2018 exhibiting 5 documents as exhibit-D1-A to exhibit-D-1-F. The respondent no.1 was cross-examined by the appellant as well as the respondent no.2. The respondent no.2 filed his evidence on affidavit on 11.04.2018 and confirmed it on 22.09.2018. He was cross-examined by the appellant as well as by the respondent no.1.

7. On 29.10.2018 the learned District Judge rendered the impugned judgment and decree. The learned District Judge non suited the appellant on the ground of limitation and did not decide the first issue as to whether the respondent no.1 was liable to pay a sum of Rs.10,75,000/- to the appellant as her legal fees. The learned District Judge examined the provision of Section 3 of the Limitation Act, 1963 and the averments made in paragraph 31 of the plaint regarding the cause of action. The learned Counsel for the appellant relied upon Article 18 of the Limitation Act, 1963 before the learned District Judge. The learned District Judge held that Article 18 was not applicable to aid the appellant. The learned District Judge held that the cause of action for the plaintiff accrued on 26.03.2012 and therefore, the same was barred by limitation under Article 19 of the Limitation Act, 1963.

8. Heard Ms. Gita Bista, learned Counsel for the appellant, Mr. Vivek Anand Basnet, learned Counsel for the respondent no.1 and Ms. Sashi Rai learned Counsel for the respondent no.2.

9. At the outset Ms. Gita Bista submits that she had inadvertently drawn the attention of the learned District Judge to Article 18 of the

Limitation Act, 1963 although it now seems quite evident that it is not Article 18 but Article 113 which is applicable. To support her contention she relied upon the judgment of the Supreme Court in re: ***Dharmarth Trust, Jammu and Kashmir, Jammu & Ors. v. Dinesh Chander Nanda***[1]. The Supreme Court examined whether a suit filed by an architect is covered under Article 56 or Article 119 of the Jammu and Kashmir Limitation Act, 1995 (for short 'the JK Act'). Article 56 and Article 119 of the JK Act is similar to Article 18 and Article 113 of the Limitation Act, 1963. The Supreme Court held that the term *"price of work done"* in Article 56 of the JK Act cannot be made applicable to professions where the professionals merely provide service for a *"fee"*. While holding so the Supreme Court agreed with the ratio laid down by the Allahabad High Court in re: ***Baroda Kant Sen v. Court of Wards***[2] and the High Court of Gauhati in ***Kakodonga Tea Estate v. J. N. Saikia***[3]. The High Court of Gauhati had held that *"a suit to recover unpaid professional fees by a chartered accountant falls under Article 113 and not under Article 18 or Article 55 ….."*

10 While deciding the question of limitation which is held to be involving both facts and law it is important that the Court examines the facts as well as the law. When a claim for payment of professional fees have been made giving details of the dates of engagement, the quantum of fees payable and the work done it was incumbent upon the learned District Judge to examine each of these claims even to decide whether the same were barred by limitation. The learned District Judge did not do so. The pleading in the plaint does give a clear impression that the issue of limitation was an issue of both fact and law. When the learned District Judge on 16.08.2017 had taken a view that the question of limitation involved both facts and law and therefore, it would be proper if the question of limitation is heard and decided along with the other main issues at the final stage of the suit on receiving the evidence this Court sees no reason as to why the learned District Judge failed to do so while passing the impugned judgment. This was not a case in which the issue of limitation was taken up as a preliminary issue on a pure question of law. This was a case in which the trial had been concluded and evidence led by the parties. Thus, it was incumbent upon the learned District Judge to render its judgment on all the issues arising in the suit.

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[1] (2010) 10 SCC 331
[2] AIR 1931 All 752 (2)
[3] AIR 1973 Gau 27

11. Order XIV and Order XX of the CPC would be relevant. Order XIV CPC relates to settlement of issues and determination of suit on issues of law or on issues agreed upon. Order XIV Rule 2 of the CPC requires that a Court must decide all issues even if the case can be disposed of on a preliminary point except where a pure question of law relating to jurisdiction or bar to suit is involved. Order XX relates to judgment and decree. Order XX Rule 5 of the CPC provides that in suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon anyone or more of the issue is sufficient for the decision of the suit. Even under Order XXII Rule 5 of the CPC it is incumbent upon the Court to render its finding or decision with reasons on each of the issues. An exception is carved out for the Court when it is found and held that the finding upon anyone or more of the issue is sufficient for the decision of the suit. Order XXII Rule 5 of CPC must be complied with keeping in mind the issues framed under Order XIV Rule 1 and the mandate of Order XIV Rule 2 of CPC. The exception under Order XIV Rule 2 was not available to the learned District Judge in the facts of the present suit.

12. At this juncture it may be apposite to draw the attention to the opinion of the Supreme Court in re: ***M/s Fomento Resorts and Hotels Ltd., v. Gustavo Ranato da Cruz Pinto & Ors***[4]. The Supreme Court held that:

> ***"27.*** *In a matter of this nature where several contentions factual and legal are urged and when there is scope of an appeal from the decision of the Court, it is desirable as was observed by the Privy Council long time ago to avoid delay and protraction of litigation that the Court should, when dealing with any matter dispose of all the points and not merely rest its decision on one single point.***"**

13. This Court is therefore, constrained to interfere with the impugned judgment and decree without deciding the case on merits as the learned District Judge has rendered no finding on it.

14. The appeal is allowed and the matter is remitted to the learned District Judge for its disposal by pronouncing opinion on all issues in accordance with law.

15. Resultantly, the judgment and decree passed by the learned District Judge is hereby set aside. In the facts and circumstances of the present case, the parties are directed to bear their own costs.

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[4] AIR 1985 SC 736

SLR (2019) SIKKIM 946

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

Crl. A. No. 18 of 2018

Deepen Pradhan ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. R.C. Sharma, Legal Aid Counsel.

For the Respondent: Mr. Thupden Youngda, Addl. Public Prosecutor.

Date of decision: 30th November 2019

A. Indian Evidence Act, 1872 – Use of a Statement of Witness Made in a Different Proceeding – Permissibly – In a criminal trial an accused person is considered innocent until proven guilty. It is for the prosecution to establish its case beyond all reasonable doubt – Each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision – Even in Civil cases it could not be done unless the party agree that the evidence in one case may be treated as evidence in the other but in Criminal cases it would be impermissible (*In Re: Mitthulal v. State of Madhya Pradesh referred*) – The fact that DW-1 recorded the statement of the eyewitness in which she stated that the victim had tried to immolate herself must be given credence. However, whether what DW-1 heard and the eyewitness stated before DW-1 in her statement was the truth could have been found only if she had been produced as a witness and subjected to cross-examination. The evidence of DW-1 is therefore hearsay to that extent – The statement of the eyewitness regarding what actually transpired on that day cannot be used by the Appellant is his favour as it was not recorded in the criminal trial – Hearsay statement cannot be pressed by an accused to create doubt about the prosecution story.

(Paras 23, 28 and 29)

Appeal dismissed.

Chronological list of cases cited:

1. State of Madhya Pradesh v. Kanha, (2019) 3 SCC 605.
2. Gentela Vijayavardhan Rao v. State of A.P., (1996) 6 SCC 241.
3. Ranjit Singh v. State of M.P., (2011) 4 SCC 336.
4. Mitthulal and Another v. The State of Madhya Pradesh, (1975) 3 SCC 529.

JUDGMENT

Bhaskar Raj Pradhan, J

1. P.W.1 lodged First Information Report (for short „the FIR) (exhibit-1) before the Sadar Police Station, Gangtok on 17.05.2014 complaining that her sister i.e. the victim (P.W.12) was burnt and "bitten" by the appellant in front of Sneha Gurung (referred to as the „eye witness) at approximately 2 p.m. The FIR stated that the victim was at the STNM hospital. (for short „the hospital).

2. Sadar Police Station Case No. 146/2014 dated 17.05.2014 under Section 307 of the Indian Penal Code, 1860 (for short „the IPC) was registered against the appellant and case endorsed to Umesh Pradhan (P.W.14) for investigation.

3. On completion of the investigation charge-sheet was filed. On 10.08.2015 the learned Sessions Judge, East Sikkim at Gangtok (for short 'the learned Sessions Judge') framed a charge under Section 307 IPC and on the plea of "not guilty" the trial commenced.

4. During the trial fourteen prosecution witnesses were examined. The learned Sessions Judge examined the appellant under Section 313 of the Code of Criminal Procedure, 1973 (for short „the Cr.P.C.) on 20.11.2017. The appellant either denied the material against him as false or took the plea that he did not know about it. When asked to explain the evidence of the

victim (P.W.12) that on 17.05.2014 she was with the appellant and the eyewitness in her house, the appellant stated that it was false. The appellant also stated that the evidence of the victim (P.W.12) that the appellant had picked up the kerosene jar, poured kerosene oil over her and burnt her with the match box was also false. The appellant desired and examined P. Dewan (D.W.1) as his defence witness.

5. On 27.12.2017 the learned Sessions Judge delivered the impugned judgment holding the appellant guilty as charged. On the same day an order of sentence was passed sentencing the appellant to undergo simple imprisonment for three years and to pay a fine of Rs.5000/-. In default of payment of fine appellant was required to undergo further simple imprisonment for a period of two months. The learned Sessions Judge directed that the amount of fine, if recovered, shall be made over to the victim as compensation and further that an amount of Rs.1 lakh be paid to the victim under the Sikkim Compensation to Victims (Amendment) Schemes, 2013.

6. The learned Sessions Judge held that the statement of the victim (exhibit-3) recorded as the dying declaration by the Sub-Divisional Magistrate-Karma Loday Lepcha (P.W.3) in the presence of Dr. D. B. Bista (P.W.4) has no relevance as she survived and deposed before the Court. She found evidence to show that the victim and the appellant were together that day. She held that if the cumulative effect of the injuries endangers a human life it would amount to an offence under Section 307 IPC. She held that intention coupled with overt is sufficient for conviction. She found evidence to establish that the victim had sustained burn injuries on her body and taken to the hospital. She found evidence that even the appellant had sustained scratch marks on his antero chest wall. She found evidence that the victims sister i.e. P.W.1 had seen her at the hospital and noticed the severe burn injuries all over the body after which she had lodged the FIR. The learned Sessions Judge held that the evidence of the victim was reliable. She rejected the defence version and questioned the truthfulness of the statement made by the eyewitness in the disciplinary

proceedings. She held that the appellant would have had the knowledge that such an act committed by him would cause death of the victim and therefore, liable under Section 307 IPC.

7. The present appeal challenges the conviction and sentence.

8. Heard Mr. R. C. Sharma, learned Counsel for the appellant and Mr. Thupden Youngda, learned Additional Public Prosecutor for the State-respondent.

9. The victim gave a detailed account of what transpired on 17.05.2014. According to her, the appellant, who she was in live in relationship with, had a fight with her at her rented accommodation. Thereafter, he started damaging the furniture with a *"bamphok"* in her house after which she called the police. The appellant picked up the kerosene jar, poured kerosene oil over her and burnt her after lighting a match box. The eyewitness tried to douse the fire by putting water and thereafter took the victim to hospital. The appellant told them that they should say that the victim got injured when the stove burst. The eyewitness requested the appellant to come along but he did not. However, he reached 10-15 minutes after they reached the hospital. At the hospital the victim was treated and the police came and made inquiries. According to the victim, her face, hands, legs and upper part of her body over her waist had been burnt. During her cross-examination the defence alleged that she had pressurised the appellant to marry him and so they had a discussion and in a fit of anger, poured kerosene upon herself, lighted a matchbox and set herself on fire. The suggestion was however, denied by the victim.

10. The fact that the victim and the appellant were known to each other and living together at the place where the incident took place has been established by her sisters-P.W.1 and P.W.5 and her landlord-P.W.8.

11. Dr. Simmi Rasaily (P.W.13) who examined the victim on the same day at the hospital found burn injuries on her hands, back, abdomen, inner

thigh and face and accordingly made her medico-legal-examination report (exhibit-19) in which she recorded that there was kerosene smell on her body. This corroborates the victim s deposition that she suffered burn injuries on her face, hands, legs and upper part of her body as a result of the incident. The learned Counsel for the appellant drew attention of this Court to the admission made by Dr. Simmi Rasaily (P.W.13) that she had not mentioned the nature of injury sustained in her examination report (exhibit-19). The learned Additional Public Prosecutor submitted that it is of no consequence. In re: ***State of Madhya Pradesh v. Kanha***[1] the Supreme Court held that proof of grievous or life threatening hurt is not a *sine qua non* for the offence under Section 307 IPC and that intention of the appellant can be ascertained from the actual injury, if any, as well as from surrounding circumstances. As rightly contended by the learned Additional Public Prosecutor the failure to mention the nature of injuries does not obliterate the injuries sustained.

12. Dr. Kaden Zangmu (P.W.6) who examined the appellant the next day also found scratch marks on the appellants antero chest wall. Sub-Inspector Anupa Gurung (P.W.11) confirmed that the victim had in fact called the police station after she was beaten by the appellant and had sought police assistance on 17.05.2014. The victims landlord (P.W.8) and her sister (P.W.5) proved the seizure of the broken laptop which was lying on the floor at the place of occurrence as well as the *"bamphok"* vide seizure memo (exhibit-7) on 18.05.2014. The Investigating Officer (P.W.14) confirmed the seizure of the laptop in a broken condition and with the imprint of a shoe on the back cover at the relevant time as well as the *"bamphok"* from the bedroom. These evidences corroborate the evidence of the victim about their fight.

13. The victims landlord (P.W.8) and her sister (P.W.5) also proved the seizure of her burnt and wet clothes, transparent bottle with „happy dent written on it containing 25 ml of blue coloured liquid, grey coloured jar containing approximately 200 ml of blue coloured liquid, red coloured bed sheet/carpet partially wet found on the floor of the victims house and the

[1] (2019) 3 SCC 605

cotton pieces dabbed on the floor of the kitchen and the bathroom from the place of occurrence. The seizure took place on 18.05.2014. Seizure memos (exhibit-6) and (exhibit-7) were accordingly prepared by the Investigating Officer (P.W.14).

14. Deo Kumar Basnet (P.W.2) proved the seizure of the uniform of the appellant on 18.05.2014 at the Sadar Thana. The seizure Memo (exhibit-2) has been proved by the Investigating Officer (P.W.14).

15. Sangay Doma Bhutia (P.W.7) the Analyst–cum-Assistant Examiner in the chemistry division of the Regional Forensic Science Laboratory (RFSL), Saramsa examined the seized articles. The victims burnt and wet wearing apparels, the appellants uniform, the jar and the bottle both containing blue coloured liquid and the bed sheet/carpet gave positive test for presence of kerosene. Traces of kerosene were found in the cotton pieces obtained from the floor of the place of occurrence.

16. P.W.1-the victims elder sister proved that she had lodged the FIR after she had visited the victim at the hospital where she witnessed the burn injuries on her body and learnt that the appellant was responsible for it.

17. At this juncture it would be relevant to examine the statement of the victim (exhibit-3) recorded by the Sub-Divisional Magistrate, Karma Loday Bhutia (P.W.3) in the presence of Dr. D.B. Bista (P.W.4). The learned Sessions Judge has held that it has no relevance as she survived and deposed before the Court. In re: ***Gentela Vijayavardhan Rao v. State of A.P.***[2] the Supreme Court held :

> ***"17.*** *Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony*

[2] (1996) 6 SCC 241

in court under Section 157 of the Evidence Act which permits such use, being a statement made by the witness "before any authority legally competent to investigate". The word „investigate has been used in the section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Section 164(1) would cover such a statement also. Vide Maqsoodan v. State of U.P. [(1983) 1 SCC 218 : 1983 SCC (Cri) 176 : AIR 1983 SC 126] However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker."

18. In re: ***Ranjit Singh v. State of M.P.***[3] the Supreme Court held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high decree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under Section 157 of the Indian Evidence Act, 1872.

19. The statement (exhibit-3) made by the victim on 17.05.2014 at the hospital could have been used to corroborate or contradict the deposition of the victim and in the manner provided under Section 157 of the Indian Evidence Act, 1872 but for the fact that she admitted in cross-examination that the Sub-Divisional Magistrate did not take her statement about this case.

20. During investigation the learned Chief Judicial Magistrate (P.W.9) had recorded the statement of the eyewitness under Section 164 Cr.P.C.

[3] (2011) 4 SCC 336

(exhibit-14) on 21.05.2014. The prosecution seeks to rely upon it. The statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of the truth of the facts. It may be used for contradiction or corroboration of the witness who made it but not for contradicting other witnesses. As the prosecution could not produce the eyewitness the statement could not be used by the prosecution to prove the facts stated therein. The fact that the statement of the eyewitness was recorded under Section 164 Cr.P.C. had been proved by the learned Chief Judicial Magistrate (P.W.9) who recorded the statement. The truth or veracity of the statement made by the witness before him cannot be considered in the present trial.

21. The deposition of the victim is however, adequately corroborated by both oral and material evidence save on the aspect of whether it was the appellant who was responsible for the act alleged or it was the victim who tried to immolate herself. It is evident that the victim suffered multiple burn injuries due to the burning of the kerosene poured on her body. The discrepancies pointed out by the appellant are minor and does not shake the foundational facts. The admission made by Deo Kumar Basnet (P.W.2) that he could not smell kerosene on the wearing apparels of the appellant cannot demolish the fact that Sangay Doma Bhutia (P.W.7), the expert, did find evidence of kerosene in them. The failure of P.W.1 to give certain details about her visit to see the victim at the hospital does not also dislodge the fact that she had lodged the FIR after visiting the victim. The inability of P.W.5 to say whether the articles were tampered during the night would also not help the defence as there is no evidence of its possibility. The only issue raised by the learned Counsel for the appellant which requires examination is the alleged failure of the prosecution to produce the eyewitness.

22. It is the prosecutions case the appellant poured kerosene on the victim in the presence of the eyewitness. Out of the three persons who would know what transpired on 17.05.2014 the appellant was an accused and exercised his right of silence. The victim deposed before the Court and supported the prosecution case. The eyewitness was cited as a prosecution

witness in the charge-sheet filed on 20.10.2014 but was subsequently dropped.

23. In a criminal trial an accused person is considered innocent until proven guilty. It is for the prosecution to establish its case beyond all reasonable doubt. However, the appellant has chosen to lead defence evidence. The question therefore, is whether the evidence led by the defence makes probable his innocence. Has the defence been able to create enough doubt in the mind of the Court to defeat the prosecution case?

24. The appellant is a police officer. The appellant had produced the eyewitness before the disciplinary authority but chose not to produce her as his defence witness. The appellant produced P. Dewan (D.W.1) in his defence.

25. P. Dewan (D.W.1) was examined as the sole defence witness. According to him he was posted as SDPO, Pakyong when he received a letter from the department to conduct a departmental inquiry against the appellant. During the course of the inquiry he examined the eyewitness and recorded her statement (exhibit-D) dated 08.12.2014. He identified his signature and the signatures of the eyewitness and the appellant in the said statement (exhibit-D). According to P. Dewan (D.W.1) the eyewitness had stated that on 17.05.2014 the victim (P.W.12) had discussion with the appellant; after which she had set herself on fire; this was witnessed by her and thereafter the victim was evacuated to the hospital by her and the appellant. During his cross-examination P. Dewan (D.W.1) admitted that the eyewitness was the only witness who had given her statement before him for the appellant. He also admitted that during the departmental inquiry the appellant was on bail.

26. The statement of the eyewitness (exhibit-D) reflects that the department did not cross-examine her. Opportunity to cross-examine her was offered by P. Dewan (D.W.1) only to the appellant and not to the department. No other witness was examined by P. Dewan (D.W.1) in the departmental inquiry.

27. Admittedly, there was one eyewitness to the incident. The eyewitness was dropped by the prosecution after obtaining permission from the learned Sessions Judge as they failed to locate her. The appellant also gave his no objection for dropping the eyewitness.

28. In re: ***Mitthulal & Anr. v. The State of Madhya Pradesh***[4] the Supreme Court held that it is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. The Supreme Court further held that even in civil cases it could not be done unless the party agree that the evidence in one case may be treated as evidence in the other but in criminal cases it would be impermissible.

29. The deposition of P. Dewan (D.W.1) that he had recorded the statement of the eyewitness during the departmental inquiry must be given credence. The fact that P. Dewan (D.W.1) recorded the statement of the eyewitness in which she stated that the victim had tried to immolate herself must also be given credence. However, whether what P. Dewan (D.W.1) heard and the eyewitness stated before P. Dewan (D.W.1) in her statement (exhibit-D) was the truth could have been found only if she had been produced as a witness and subjected to cross-examination. The evidence of P. Dewan (P.W.1) is therefore hearsay to that extent. In the given facts it cannot be saved within its exceptions as well. The statement of the eyewitness (exhibit-D) regarding what actually transpired on that day cannot be used by the appellant is his favour as it was not recorded in the criminal trial. Therefore, there is no credible evidence led by the defence to create enough doubt in the mind of the Court to defeat the prosecution case. Hearsay statement cannot be pressed by an accused to create doubt about the prosecution story. This Court is therefore, of the view that the defence evidence does not make probable his innocence in view of the overwhelming evidence led by the prosecution. The learned Sessions Judge was right in rejecting the defence evidence in the facts and circumstances of this case.

[4] (1975) 3 SCC 529

30. The deposition of the victim cannot be doubted. She is an injured victim. Her testimony has its own significance. It is vital and more reliable than an injured witness. It has to be relied upon unless there is compelling reasons for rejecting it. The prosecution has been able to establish its case that it was the appellant and the appellant alone who had poured kerosene over the victim, lit a matchstick and burnt her with the knowledge that if he by that act caused death, he would be guilty of murder and consequently, by such an act, the victim was hurt. Being a police officer the appellant would have known the consequence of his act. There is no evidence whatsoever to reject the testimony of the victim as unreliable.

31. The appeal is therefore, rejected. Resultantly, the judgment of conviction and order on sentence both dated 27.12.2017 passed by the learned Sessions Judge, East Sikkim are upheld.

32. Certified copies of the judgment shall be furnished free of cost to the appellant and also sent to the Court of the learned Sessions Judge, East Sikkim at Gangtok. The lower Court records may be sent back.

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