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(Page 1105 to 1268)

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Contents

Contents	Pages
TABLE OF CASES REPORTED	i
EQUIVALENT CITATION	ii
SUBJECT INDEX	iii - xv
REPORTS	1105-1268

TABLE OF CASES REPORTED IN THIS PART

Sl.No.	Case Title	Date of Decision	Page No.
1.	Shri Mahesh Kumar Trivedi v. Kamala Prasad and Others	04.09.2018	1105-1166
2.	Dipendra Adhikari v. State of Sikkim and Others	07.09.2018	1167-1172
3.	The Branch Manager, Shriram General Insurance Co. Ltd. v. Dik Bir Damai and Others	17.09.2018	1173-1179
4.	Mr. Shrish Khare v. Mr. C. B. Basnett and Another	18.09.2018	1180-1215
5.	Michael Kami v. State of Sikkim	24.09.2018	1216-1223
6.	Shri Narendra Kumar Chettri v. Shri Ashok Kumar Pradhan and Another	25.09.2018	1224-1244
7.	Himalaya Distilleries Limited v. State of Sikkim and Others	26.09.2018	1245-1268

EQUIVALENT CITATION

Sl.No.	Case Title	Equivalent Citation	Page No.
1.	Shri Mahesh Kumar Trivedi v. Kamala Prasad and Others	2018 SCC OnLine Sikk 184	1105-1166
2.	Dipendra Adhikari v. State of Sikkim and Others	–	1167-1172
3.	The Branch Manager, Shriram General Insurance Co. Ltd. v. Dik Bir Damai and Others	2018 SCC OnLine Sikk 190	1173-1179
4.	Mr. Shrish Khare v. Mr. C. B. Basnett and Another	2018 SCC OnLine Sikk 188	1180-1215
5.	Michael Kami v. State of Sikkim	2018 SCC OnLine Sikk 197	1216-1223
6.	Shri Narendra Kumar Chettri v. Shri Ashok Kumar Pradhan and Another	2018 SCC OnLine Sikk 198	1224-1244
7.	Himalaya Distilleries Limited v. State of Sikkim and Others	–	1245-1268

SUBJECT INDEX

Code of Civil Procedure, 1908 – In view of the settle position of law that an altogether new case cannot be set up which is inconsistent with the defence taken in the written statement and that no amount of evidence contrary to the pleading can be relied on or accepted, it was not permissible for Late Kamala Prasad to have taken the plea of joint ownership of the suit property in spite of the clear plea taken by him in his written statement that he was in fact the owner of the said suit property having become the owner through a family partition – Held, the learned District Judge erred in travelling beyond the pleadings and rendering findings based on surmises and conjectures.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others ***1105-J***

Code of Civil Procedure, 1908 – Order VIII Rule 6A – Counter-claim by Defendant – The plea of the Appellant that eviction suit cannot be in the form of a counter-claim in a suit for specific performance of contract has no legal basis in view of the provision of Order VIII 6A CPC which provides that a Defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of a Plaintiff, "any right or claim in respect of a cause of action accruing to the defendant against the plaintiff …" – The language of Order VIII 6A CPC is wide enough to include a counter- claim for eviction and arrears of rent.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others ***1105-F***

Code of Civil Procedure, 1908 – Order XIV Rule 1 – Framing of Issues – While framing issues it must be kept in mind that issues are framed when one party asserts a fact which is denied by the other. While framing issues the Court must necessary fix the burden of proof of the specific issue on the party who asserts it. The findings rendered thereon must always be based on the evidence adduced.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others ***1105-E***

Code of Civil Procedure, 1908 – Order XLI Rule 1 and 2 – It is the duty of the Appellate Court to appreciate the entire evidence and arrive at its own independent conclusions, for reasons assigned, either of affirmation or difference. The jurisdiction of the First Appellate Court while hearing the

First Appeal is very wide like that of the trial Court. It is the final Court of fact, ordinarily, and therefore, the parties are entitled to an independent consideration of all points on both facts and law.

Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others ***1105-A***

Code of Criminal Procedure, 1973 – S. 197 – Prosecution of Public Servants – Whether on the allegations made against Respondent No.1 and 2, sanction as mandated under S. 197 Cr.P.C. was required – Allegations made in the complaint against Respondent No.1 shows that the same were allegedly done "acting or purporting to act in the discharge of his official duty." – There is an elementary difference between public servant committing a criminal act *per se* and the doing of an act in his official duty or purporting to be in his official duty which may and could be construed as a criminal act – Perusal of the complaint as well as the pre-summoning deposition of the petitioner as well as his witnesses does not even *prima facie* indicate any conspiracy between Respondent No. 1, 2 and accused No. 3 – A criminal accusation is a serious thing. Not only the accusation must be specific but *prima facie* material must be brought on record. If no such material is available the Court is fully within its jurisdiction to discharge the accused and if it is done there would be no reason for the Revisional Court or the High Court in exercise of its inherent powers to interfere with such an order of discharge – Even if in doing their official duty, Respondent No.1 and 2 acted in excess of their duty, but there is a reasonable connection between the act and the performance of the official duty, the excess would not be a sufficient ground to deprive them of the protection as they were admittedly public servants.

Shrish Khare* v. *Mr. C.B. Basnett and Another ***1180-E***

Code of Criminal Procedure, 1973 – S. 197 – Prosecution of Public Servants – S. 245 – Discharge of Accused – The application filed by Respondent No. 1 and 2 is under S. 197 Cr.P.C which mandate that no Court shall take "cognizance" if the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is done by a person who is a public servant not removable from his office save by or with the sanction of the Government – The procedure to be followed in a complaint case for trial of warrant cases after the process under S. 204 Cr.P.C. is provided in Ss. 244 and 245 Cr.P.C. The application seeking dismissal of the complaint on the ground of lack of

sanction filed by Respondent No.1 and 2 ought to have invoked the provision of S. 245 Cr.P.C – Merely because Respondent No. 1 and 2 failed to specify the source of power i.e. S. 245 (2) Cr.P.C. or for that matter even if a wrong provision had been invoked would not disentitle the Court to exercise the power it had to render justice. The learned Chief Judicial Magistrate may have not used the appropriate word by holding "the complaint against accused nos. 1 and 2 stands quashed for want of sanction under Section 197, Cr.P.C., 1973" but the very fact that the learned Chief Judicial Magistrate decided to proceed against the accused No. 3 in the same complaint makes it evident that in effect Respondent No. 1 and 2 had been discharged.
Shrish Khare* v. *Mr. C.B. Basnett and Another ***1180-C***

Code of Criminal Procedure, 1973 – S. 203 – Dismissal of Complaint – The applications of Respondent No. 1 and 2 sought for dismissal of the complaint under S. 197 Cr.P.C. The learned Chief Judicial Magistrate instead "quashed" the complaint – There is a fundamental difference between dismissal and quashing. To dismiss would imply to terminate without further hearing and to quash would mean to annul or make void.
Shrish Khare* v. *Mr. C.B. Basnett and Another ***1180-B***

Code of Criminal Procedure, 1973 – S. 203 – Dismissal of Complaint – S. 254 – Discharge of Accused – On 25.05.2016 the learned Chief Judicial Magistrate would examine the complaint and register a private complaint case and list it for examination of the complainant – On 09.06.2016 the complainant would be examined – On 07.07.2016 and 22.07.2017 the complainant witnesses would be examined – From the records of the order passed by the learned Chief Judicial Magistrate, it would be evident that the proceeding under S. 204 Cr.P.C. had been completed and summons to the accused issued – On 05.09.2016 the learned Counsel for Respondent No.1 and 2 would file applications under S. 197 Cr.P.C. which was heard on 04.10.2016 and order reserved. On 25.10.2016, the impugned order would be passed by the learned Chief Judicial Magistrate *"quashing"* the Criminal complaint for lack of sanction under S. 197 Cr.P.C – Being dissatisfied with the impugned order dated 25.10.2016, a revision would be preferred before the Sessions Court by the Petitioner. The learned Sessions Judge vide impugned order dated 29.08.2017 would decline to interfere with the order passed by the learned Chief Judicial Magistrate – The question for consideration is whether the

impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate *"quashing"* the complaint filed by the Petitioner would amount to a discharge under S. 245 (2) Cr.P.C. – In re: *Iris Computers Ltd.* the Supreme Court would opine that Cr.P.C. does not provide for any provision affording opportunity to the accused until the issuance of process to him under S. 204 Cr.P.C. Before issuing summons under S. 204 Cr.P.C. the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a *prima facie* case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Ss. 200 and 202 Cr.P.C. The first stage of dismissal of the complaint before the issuance of process arises under S. 203 Cr.P.C., at which stage the accused has no role to play. After the issuance of process, the question of the accused approaching the Court by making an application under S. 203 Cr.P.C. for dismissal of the complaint is impermissible because by then the stage of S. 203 is already over and the Magistrate has proceeded further to S. 204 stage – Held, the impugned order of the Chief Judicial Magistrate dated 25.10.2016 amounts to an order of discharge against Respondent No. 1 and 2 under S. 245(2) Cr.P.C. for want of sanction under S. 197 Cr.P.C.
***Shrish Khare* v. *Mr. C.B. Basnett and Another* 1180- A**

Indian Contract Act, 1872 – S. 10 – What Agreements are Contracts – An agreement to sell is necessarily a bilateral contract as there must be a meeting of mind between the seller and the purchaser. The seller must agree to sell and the purchaser must agree and be willing to purchase for a lawful consideration. There must be free consent of the parties. Only those agreements which are enforceable by law are contracts.
***Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others* 1105-I**

Indian Evidence Act, 1872 – S. 17 – Admission – The word "statement" appearing in S. 17 of the Indian Evidence Act, 1872 not being defined the ordinary dictionary meaning is required to be applied. Thus, "statement" would mean something that is stated. An admission must be clear and unambiguous to permit waiver of the requirement of proof.
***Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others* 1105-G**

Indian Evidence Act, 1872 – S. 58 – Deals with admissions during trial i.e. "at or before the hearing." Proof of such facts is not required for the

reason that facts admitted require no proof. S. 58 deals with judicial admission. The Section governs admission by pleadings. Admission in the manner contemplated under this Section is a substitute for evidence and a waiver or dispensation with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true – The proviso to S. 58 of the Indian Evidence Act, 1872 however, provides for discretion upon the Court to require even the facts admitted to be proved otherwise than by such admissions.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others **1105-H**

Limitation Act, 1963 – Article 54 – Provides the period of limitation for specific performance of a contract to be three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. Exhibit-1 provided that if Late Kamala Prasad is unable to register sale deed within 04 years then the Appellant can institute legal action against him and have full right over the said land and the shop. It is seen that the Exhibit-1 is dated 02.11.1999. Four years from 02.11.1999 would be 02.11.2003. Admittedly, no sale deed relating to Exhibit-1 was registered on or before 02.11.2003. The cause of action for filing the suit for a specific performance would thus arise only on the expiry of the four years period on 02.11.2003.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others **1105-D**

Motor Vehicles Act, 1988 – S. 140 – A bare reading of S. 140 reflects that without a determination about the factum of "*death*" or "*permanentdisablement*" resulting from an accident arising out of the use of a motor vehicle, the "*owner*" of the vehicle cannot be held liable to pay compensation in respect of such "*death*" or "*permanent* disablement" in accordance with the provisions of the said section. The determination as to who is the "*owner*" of the said motor vehicle is also imperative – To attract the liability of the "*owner*" under S. 140, all that is required is an accident arising out of the use of a motor vehicle leading to "*death*" or "*permanent disability*" of any person. The liability of the "*owner*" is without fault but the fact of ownership of the motor vehicle is also required to be determined. The inquiry to award the compensation under S. 140 is limited but the inquiry is a must – Without determining whether the "*death*" or "*permanent disablement*" has been caused as a result of an accident arising out of the

use of the motor vehicle or motor vehicles and is owned by the "*owner*" no order under S. 140 may be passed.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-F***

Motor Vehicles Act, 1988 – S. 140 – No Fault Liability – The no fault liability of the owner is absolute under S. 140. Between the owner and owners of the motor vehicle or motor vehicles, the liability is also joint and several. However, when the owner claims to have been indemnified by the insurer against the said liability under S. 140 the Claims Tribunal is required to issue notice upon the insurer, if not already done, hear the claimant, owner and the insurer to determine if no fault liability of the owner has in fact been indemnified by the insurer by execution of the policy following the procedure laid down. In that event it would be open to the insurance company to plead and prove that it is not liable at all.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-D***

Motor Vehicles Act, 1988 – S. 140 – The order to be passed under S. 140 must be passed urgently but cautiously to meet the requirement of the law i.e. to award compensation to the person who has suffered due to the accident without determination of any fault or negligence – An order passed under S. 140 without following the procedure prescribed would have no sanctity in the eyes of law – The impugned order dated 23.2.2018 does not reflect that the Claims Tribunal had even *prima facie* determined the ingredients of S. 140 *vis-à-vis* the facts of the present case. The Claims Tribunal records that a perusal of the FIR dated 23.4.2016 reveal that the Claimant sustained "*severe injuries*". Whether the severe injuries resulted in "*death*" or "*permanent disablement*", which is the *sine-qua-non* of S. 140 is not reflected in the impugned order.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-G***

Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – **Sikkim Motor Vehicles Rules, 1991** – S. 169 makes it abundantly clear that an inquiry is required to be held under S. 168 of the said Act. While doing so, subject to any rules that may be made in this behalf, summary procedure as the Claims Tribunal thinks fit is required to be followed – In exercise of the powers conferred by the said Act, the State Government made the Sikkim Motor Vehicles

Rules, 1991 – Chapter VIII of the said Rules relates to the establishment of Claims Tribunal – Rules 247 to 265 of the said Rules govern an application for compensation under S. 166 of the said Act – An application in the case of a claim under Chapter X of the said Act, which includes a claim under S. 140 is however, governed by Rules 268 to 275 of the said Rules – Summary trial procedure as per the Code of Criminal Procedure, 1973 is required to be followed for the purpose of adjudicating and awarding a claim under Chapter X of the said Act.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-A***

Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – Sikkim Motor Vehicles Rules, 1991 – Even for determination of the liability under S. 140 of the said Act the procedure prescribed for coming to a conclusion must be undertaken by the Claims Tribunal before awarding the claim or rejecting it. The procedure for the determination of a claim under S. 140 of the said Act is not as exhaustive as a claim under S. 166 of the said Act. Although the procedure prescribed provides for a summary procedure under the Cr.P.C. the orders which need be passed is not of conviction or acquittal but for determining whether the claimant is entitled to the award under S. 140 of the said Act. The claim under Chapter X of the said Act is of civil nature although the said Rules prescribe a summary trial procedure applicable in criminal cases.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-B***

Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – Sikkim Motor Vehicles Rules, 1991 – The expression "*subject to*" conveys the idea of the said Rules yielding place to the "*summary procedure*" as the Claims Tribunal "*thinks fit*." This was the procedural law which was required to be followed by the Claims Tribunal while determining whether or not the Claimant was entitled to an "*award*" under S.140 – When the Rules provide for the procedure to be followed to determine the claim under S. 140, it was incumbent upon the Claims Tribunal to have followed the said procedure.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-E***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of delay beyond 90 Days in Entertaining Appeal – The cardinal point in condoning

delay is that the Court ought to be satisfied that the Appellant was prevented by sufficient cause in preferring the Appeal on time – The Appellant has to put forth *bona fide* grounds for the delay besides establishing that there was no negligence on their part in initiating steps. The length of the delay is not the consideration while exercising discretion by the Courts, in certain circumstances, a delay of one day may not be condoned lacking acceptable explanation, whereas in other cases inordinate delays can be condoned if the explanation afforded is satisfactory – Each case is distinguishable from the next and must exhibit some *bona fides* and grounds for exercise of discretion by the Court tilted in favour of the Appellant/ Petitioner – In a plethora of Judgments, the Hon'ble Supreme Court has held that sufficient cause should be given a liberal interpretation to ensure that substantial justice is done, but that is only so long as negligence, inaction or lack of *bona fides* cannot be imputed to the party concerned. While considering a Petition for condonation of delay it is relevant to bear in mind that the expiration of the period of limitation prescribed for making an Appeal gives rise to a right in favour of the decree-holder. This right which has thus accrued should not be lightly disturbed on account of a lapse of time.
The Branch Manager, Shriram General Insurance Co. Ltd* v. *Dik Bir Damai and Others **_1173-A_**

Motor Vehicles Act, 1988 – S. 173 (1) – The legislation invoked by the Respondents is benevolent and for the welfare of the family/dependents of the deceased/victim and should not be kept in limbo for the inaction of the Appellant manifesting as injustice to the Respondents-Claimants when compensation for the loss of a member of the family has been computed and granted – Petitions have been filed with a nonchalant attitude reflecting negligence, inaction and lack of *bona fides* and being devoid of merit do not deserve the indulgence of this Court.
The Branch Manager, Shriram General Insurance Co. Ltd* v. *Dik Bir Damai and Others **_1173-B_**

Protection of Children from Sexual Offences Act, 2012 – S. 42 – Alternate Punishment – S. 42 of the POCSO Act, 2012 provides that where an act or omission constitute an offence punishable under POCSO Act, 2012 and also under S. 354B, I.P.C, amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the I.P.C as provides for punishment which is

greater in degree – The impugned sentence dated 30.09.2016 sentencing the Appellant under S. 354B, I.P.C is thus liable to be set aside in view of the clear provision of S. 42 of the POCSO Act, 2012 – The learned Special Judge has punished the Appellant for the offence under S. 354, I.P.C for the same act falling under the definitions of the provisions of S. 7 and 9 (m) the POCSO Act, 2012 which was not permissible in view of S. 71, I.P.C – The learned Special Judge had also found the Appellant guilty of the offence under S. 354B/511, I.P.C. Since the learned Special Judge had held the Appellant guilty under S. 354B, I.P.C the question of punishing the Appellant for an attempt to commit the said offence as well did not arise. Thus, the conviction and sentence of the Appellant under S. 354B/511, I.P.C is also not sustainable and liable to be set aside.
Michael Kami* v. *State of Sikkim **1216-A**

Sikkim Compensation to Victims or his Dependents Schemes, 2011 – Learned Special Judge even while holding the Appellant guilty for sexual assault and aggravated sexual assault upon the victims has failed to consider that the victims were liable to be compensated under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. Accordingly, the Sikkim State Legal Services Authority is directed to pay an amount of ₹ 50,000/- each to the victims as compensation. The said amount of ₹ 50,000/- shall be kept in fixed deposit in the name of each of the victims payable to them on their attaining majority.
Michael Kami* v. *State of Sikkim **1216-B**

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – Necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding – The relief is claimed against the State of Sikkim, the SPSC, Department of Personnel, Administrative Reforms, Training & Public Grievances and Respondent No.4, who had been appointed as Under Secretary and they are all arrayed as Respondents. The said Respondents are the necessary parties to be impleaded against whom the reliefs are sought and in whose absence no effective decision can be rendered by this Court.
Dipendra Adhikari* v. *State of Sikkim and Others **1167-A**

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – All the candidates who have passed the

written examination and obtained certain percentage of marks would have a legitimate expectation to be selected for the interview based on the marks obtained. The selection of the candidate against each vacant post must be purely on the basis of merit of their performance in the written examination as well as viva-voce. It is in these circumstances that the computation of marks obtained by each of these candidates would have a direct bearing on the ultimate selection – Any person who may be adversely affected by the grant of the reliefs prayed for by the Petitioner must be impleaded as party because in his absence an effective order may be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.
Dipendra Adhikari* v. *State of Sikkim and Others ***1167-B***

Sikkim Motor Vehicles Rules, 1991 – Claims Tribunal must always remember that procedural and substantive laws need to work together to ensure that justice is not only done but also seen to be done. Following the prescribed procedure ensures fairness and avoids arbitrariness in the process of determination. Procedural law engrafted in Rules 268 to 275 of the said Rules would ensure due process which is fundamental to justice dispensation – Procedural due process is a right of the parties who may be affected by the award passed under S. 140. Procedural due process embodies the notion of legal fairness. It is equally important to keep in mind that the fundamental facts, as laid down above, being the ingredients of S. 140 must be determined before passing an award under the said provision even if it is interim in nature.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-H***

Sikkim Motor Vehicles Rules, 1991 – **Rule 274** – It provides that the Claims Tribunal, before whom an application for compensation liability arising out of the provisions of Chapter X has been made, shall dispose of such application within 45 days from the date of receipt of such application. The mandate of the Rule 274 must be strictly followed – The afore-quoted Rules provide "*summary procedure*" for determining the liability under S. 140 of the said Act.
Shri Narendra Kumar Chettri* v. *Shri Ashok Kumar Pradhan and Another ***1224-C***

Sikkim State Rules Registration of Document Rules, 1930 – Rule 7 – Procedure for Presenting Elucidated – (1) On execution of deeds, the

person(s) executing the deed or his or their authorised representative with one or more witnesses to the execution of the deed is to attend the Registrar's Office – (2) These persons are required to prove by solemn affirmation before the Registrar the due execution of the deed – (3) Upon such affirmation the Registrar shall cause an exact copy of the deed to be entered in the proper register– (4) After the copy is carefully compared with the original, the Registrar shall attest the copy with his signature – (5) He shall also cause the parties or their representatives in attendance to subscribe their signatures to the copy – (6) The Registrar shall then return the original with a certificate under his signature endorsed therein specifying the date on which such deed was so registered – (7) For this purpose reference has to be made to the book containing the registration thereof, and the page and number under which the same shall have been entered therein.
***Himalaya Distilleries Limited* v. *State of Sikkim and Others* 1245-A**

Sikkim State Rules Registration of Document Rules, 1930 – Rule 7 – Procedure for Presenting – Rule 7 nowhere prescribes that the copies of the deed shall contain the details, *viz*., serial number, book number or date of registration – Those details are to be entered in the original Deed – Rule 7 mandates that a copy is to be attested by the Registrar with his signature. He is required to cause the parties or representatives to subscribe their signatures on the copy – Annexure P-1 is a "certified to be true copy" of the original Sale Deed. The original is allegedly untraceable. The reverse of the document records "CERTIFIED TO BE TRUE COPY", below which an illegible signature appears and bears the stamp of the "Registration Clerk" and the date 05.12.1984 – The specific requirement of Rule 7 pertaining to copies of deeds is that the Registrar shall attest the copy with his signature and not that of the "Registration Clerk" as appears to have been done in the instant matter. In absence of the Registrar's signature, a niggling doubt ensues as to the authenticity of the document. The document also ought to bear the signature of the parties or their authorised representative(s) which are non-existent on Annexure P-1 – Does not fulfill any of the requirements as envisaged by Rule 7.
***Himalaya Distilleries Limited* v. *State of Sikkim and Others* 1245-B**

Sikkim State Rules Registration of Document Rules, 1930 – Makes express provisions for registration of documents in the State of Sikkim – The Registering Authority is debarred from making an enquiry into title, this falls in the domain of the Civil Courts.
***Himalaya Distilleries Limited* v. *State of Sikkim and Others* 1245-C**

Sikkim State Rules Registration of Document Rules, 1930 – Rule 20 – Rule 20 specifically lays down that the period of limitation within which the document is to be produced for registration is four months from the date of execution thereof and six months at the maximum, this too subject to deposit of penalty as prescribed in the Rules – The original document is alleged to have been presented in 1983 – The Petitioner has approached the Sub-Divisional Magistrate/Sub-Registrar in the year 2009, no reasons have been given for the delay in approaching the Registering Authority. No explanation issues on what transpired between 1983 to 2009 and why necessary steps as envisaged by Rule 20 were not taken up by the Petitioner. The argument that the Petitioner learnt of the transfer of land to other persons in 2009 when they went to pay land taxes is rather frail apart from the argument of payment of taxes being non-existent in the pleadings.
Himalaya Distilleries Limited* v. *State of Sikkim and Others **1245-D**

Specific Relief Act, 1963 – S. 16 – Personal Bars to Relief – It is trite that the averments in the plaint must be read as whole and not isolated sentences to understand the nature of the pleadings – Appellant has failed to plead in the Appeal that he was ready and willing to pay the entire consideration amount as agreed vide Exhibit-1. In fact even in the written submission filed by the Appellant on 05.07.2018 before this Court, the aforesaid pleading regarding readiness and willingness to pay the remaining amount after adjustment of ₹ 58,501/- is reiterated. Held, the conduct of the Appellant having regard to the entirety of the pleadings as also the evidences brought on record, that the readiness and willingness of the Appellant if at all was conditional and therefore in terms of S. 16(c) of the Specific Relief Act, 1963, specific performance of Exhibit-1 even if it was to be considered to be an "agreement" could not be granted in favour of the Appellant.
Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others **1105-C**

Specific Relief Act, 1963 – S. 20 – Discretion as to Decreeing Specific Performance – S. 20 of the Specific Relief Act, 1963 provides that the relief for specific performance is discretionary and is not given merely because it is lawful to do so. The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal – When the Appellant who seeks specific performance waivers on the most crucial aspect i.e. the ownership of the suit property which he desires to own by seeking specific

performance of Exhibit-1, the discretionary relief as contemplated by the Specific Relief Act, 1963 cannot be granted to the Appellant.
***Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others* 1105-C**

Specific Relief Act, 1963 – S. 21 – Learned District Judge would opine that neither the Appellant nor the Respondents are entitled to any relief or the relief prayed for although the learned District Judge had given the option to the Appellant to take appropriate proceedings for the money advanced by him to Late Kamala Prasad and to the Respondents to seek eviction of the Appellant before the appropriate Court which option in effect would amount to granting reliefs not prayed for to the Appellant as well as the Respondents – The impugned order to the extent it grants liberty to initiate appropriate proceedings for the money advanced by him to Late Kamala Prasad in pursuance of Exhibit-1 against the property left behind by him is also not permissible as no specific relief for realization of money advanced has been sought for in the plaint.
***Shri Mahesh Kumar Trivedi* v. *Kamala Prasad (since deceased and substituted by LRs) and Others* 1105-K**

SLR (2018) SIKKIM 1105

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

R.F.A. No. 02 of 2014

Shri Mahesh Kumar Trivedi ..... APPELLANT

Versus

Kamala Prasad (since deceased and substituted by LRs) and Others ..... RESPONDENTS

with

C.O. No. 02 of 2015

Shri Mahesh Kumar Trivedi ..... APPELLANT

Versus

Smt. Nanda Rani Devi and Others ..... RESPONDENTS

For the Appellant: Mr. A. K. Upadhayaya, Senior Advocate with Ms. Aruna Chettri, Ms. Hemlata Sharma and Mr. Sonam Rinchen Lepcha, Advocates.

For the Respondents: Mr. B. Sharma, Senior Advocate with Mr. Sudhir Prasad, Advocate.

Date of decision: 4th September 2018

A. Code of Civil Procedure, 1908 – Order XLI Rule 1 and 2 – It is the duty of the Appellate Court to appreciate the entire evidence and arrive at its own independent conclusions, for reasons assigned, either of affirmation or difference. The jurisdiction of the First Appellate Court while hearing the First Appeal is very wide like that of the trial Court. It is the final Court of fact, ordinarily, and therefore, the parties are entitled to an independent consideration of all points on both facts and law.

(Para 8)

B. Specific Relief Act, 1963 – S. 16 – Personal Bars to Relief – It is trite that the averments in the plaint must be read as whole and not isolated sentences to understand the nature of the pleadings – Appellant has failed to plead in the Appeal that he was ready and willing to pay the entire consideration amount as agreed vide Exhibit-1. In fact even in the written submission filed by the Appellant on 05.07.2018 before this Court, the aforesaid pleading regarding readiness and willingness to pay the remaining amount after adjustment of ₹ 58,501/- is reiterated. Held, the conduct of the Appellant having regard to the entirety of the pleadings as also the evidences brought on record, the readiness and willingness of the Appellant if at all was conditional and therefore in terms of S. 16(c) of the Specific Relief Act, 1963, specific performance of Exhibit-1 even if it was to be considered to be an "agreement" could not be granted in favour of the Appellant.

(Paras 15 and 22)

C. Specific Relief Act, 1963 – S. 20 – Discretion as to Decreeing Specific Performance – S. 20 of the Specific Relief Act, 1963 provides that the relief for specific performance is discretionary and is not given merely because it is lawful to do so. The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal – When the Appellant who seeks specific performance waivers on the most crucial aspect i.e. the ownership of the suit property which he desires to own by seeking specific performance of Exhibit-1, the discretionary relief as contemplated by the Specific Relief Act, 1963 cannot be granted to the Appellant.

(Paras 24 and 26)

D. Limitation Act, 1963 – Article 54 – Provides the period of limitation for specific performance of a contract to be three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. Exhibit-1 provided that if Late Kamala Prasad is unable to register sale deed within 04 years then the Appellant can institute legal action against him and have full right over the said land and the shop. It is seen that the Exhibit-1 is dated 02.11.1999. Four years from 02.11.1999 would be 02.11.2003. Admittedly, no sale deed relating to Exhibit-1 was registered on or before 02.11.2003. The cause of action for filing the suit for a specific performance would thus arise only on the expiry of the four years period on 02.11.2003.

(Para 28)

E. Code of Civil Procedure, 1908 – Order XIV Rule 1 – Framing of Issues – While framing issues it must be kept in mind that issues are framed when one party asserts a fact which is denied by the other. While framing issues the Court must necessary fix the burden of proof of the specific issue on the party who asserts it. The findings rendered thereon must always be based on the evidence adduced.

(Para 41)

F. Code of Civil Procedure, 1908 – Order VIII Rule 6A – Counter-claim by Defendant – The plea of the Appellant that eviction suit cannot be in the form of a counter-claim in a suit for specific performance of contract has no legal basis in view of the provision of Order VIII 6A CPC which provides that a Defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of a Plaintiff, "any right or claim in respect of a cause of action accruing to the defendant against the plaintiff …" – The language of Order VIII 6A CPC is wide enough to include a counter- claim for eviction and arrears of rent.

(Paras 44 and 45)

G. Indian Evidence Act, 1872 – S. 17 – Admission – The word "statement" appearing in S. 17 of the Indian Evidence Act, 1872 not being defined the ordinary dictionary meaning is required to be applied. Thus, "statement" would mean something that is stated. An admission must be clear and unambiguous to permit waiver of the requirement of proof.

(Para 65)

H. Indian Evidence Act, 1872 – S. 58 – Deals with admissions during trial i.e. "at or before the hearing." Proof of such facts is not required for the reason that facts admitted require no proof. S. 58 deals with judicial admission. The Section governs admission by pleadings. Admission in the manner contemplated under this Section is a substitute for evidence and a waiver or dispensation with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true – The proviso to S. 58 of the Indian Evidence Act, 1872 however, provides for discretion upon the Court to require even the facts admitted to be proved otherwise than by such admissions.

(Paras 67 and 68)

I. Indian Contract Act, 1872 – S. 10 – What Agreements are Contracts – An agreement to sell is necessarily a bilateral contract as there must be a meeting of mind between the seller and the purchaser. The seller must agree to sell and the purchaser must agree and be willing to purchase for a lawful consideration. There must be free consent of the parties. Only those agreements which are enforceable by law are contracts.

(Para 78)

J. Code of Civil Procedure, 1908 – In view of the settle position of law that an altogether new case cannot be set up which is inconsistent with the defence taken in the written statement and that no amount of evidence contrary to the pleading can be relied on or accepted, it was not permissible for Late Kamala Prasad to have taken the plea of joint ownership of the suit property in spite of the clear plea taken by him in his written statement that he was in fact the owner of the said suit property having become the owner through a family partition – Held, the learned District Judge erred in travelling beyond the pleadings and rendering findings based on surmises and conjectures.

(Paras 93 and 112)

K. Specific Relief Act, 1963 – S. 21 – Learned District Judge would opine that neither the Appellant nor the Respondents are entitled to any relief or the relief prayed for although the learned District Judge had given the option to the Appellant to take appropriate proceedings for the money advanced by him to Late Kamala Prasad and to the Respondents to seek eviction of the Appellant before the appropriate Court which option in effect would amount to granting reliefs not prayed for to the Appellant as well as the Respondents – The impugned order to the extent it grants liberty to initiate appropriate proceedings for the money advanced by him to Late Kamala Prasad in pursuance of Exhibit-1 against the property left behind by him is also not permissible as no specific relief for realization of money advanced has been sought for in the plaint.

(Paras 113 and 114)

Appeal and cross-objection dismissed.

Chronological list of cases cited:

1. Inderchand Jain (DEAD) THROUGH LRS. v. Motilal (DEAD) THROUGH LRS., (2009) 14 SCC 663.

2. Ganesh Shet v. C.S.G.K. Setty (Dr), (1998) 5 SCC 381.
3. Aloka Bose v. Parmatma Devi and Others, (2009) 2 SCC 582.
4. Baldev Singh v. Manohar Singh, (2006) 6 SCC 498.
5. Pt. Shamboo Nath Tikoo v. S. Gian Singh, 1995 Supp (3) SCC 266.
6. Rajendra Pratap Singh v. Rameshwar Prasad, (1998) 7 SCC 602.
7. Ramesh Kumar and Another v. Furu Ram and Another, (2011) 8 SCC 613.
8. Krishan Dayal v. Chandu Ram, 969 SCC OnLine Del 134.
9. Vidyawati v. Man Mohan and Others, (1995) 5 SCC 431.
10. Banarsi and Others v. Ram Phal, (2003) 9 SCC 606.
11. Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The judgment passed by the learned District Judge dated 13.09.2013 (the impugned judgment) in Title Suit No. 02 of 2010 (the suit) dismissing the suit filed by the Appellant-the Plaintiff in the suit as well as the counter-claim preferred by late Kamala Prasad-the sole Defendant in the suit has led to the Appellant as well as the Respondents-the substituted Defendants preferring R.F.A. No. 02 of 2014 and C.O. No. 02 of 2015 respectively. Both the Regular First Appeal and the Cross Objection are taken up together for disposal.

2. The Appellant had filed the suit for specific performance and consequential reliefs on 22.06.2004 against late Kamala Prasad basing his claim of ownership on a document (Exhibit-1) purportedly an agreement to sell praying for the following reliefs:

> "(i) *For specific performance of the contract of sale of the Schedule "A" property in favour of the plaintiff for which the defendant may be directed to execute the sale deed in respect of the Schedule "A" property in favour of the plaintiff, do the needful for registration of the*

same and to accept the remaining sum of consideration value as per agreement dated 02.11.1999.

(ii) *In the event the defendant fails or refuses to execute the sale deed in respect of the Schedule "A" property then order compulsory registration of the sale deed after executing the sale deed in respect of the Schedule "A" property by and through this Hon'ble Court and upon direction to the defendant to accept the remaining consideration value as per the agreement dated 02.11.1999;*

(iii) *Recovery of possession of the Schedule "C" property from the defendant by evicting the defendant, his agents, servants etc. from the Schedule "C" premises; in favour of the plaintiff;*

(iv) *In the event it is found that the defendant is not the exclusive owner of Schedule "A" property by virtue or partition then to declare that the defendant shall execute the sale deed and cause registration of the same as and when he becomes the owner of the Schedule "A" property by partition or otherwise;*

(v) *Declaring that the plaintiff is the owner of the Schedule "A" property having right title and interest on it;*

(vi) *Cost of all the proceedings;*

(vii) *Any other decree, relief or reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

3. Exhibit-1 is in Hindi and titled "*Kararnama*" which means agreement to sell. The said Exhibit-1 translated reads as under:

"Kararnama" (AGREEMENT) **Exhibit-1**

"I Kamal Pd. S/o Lt Ram Das Ram, R/o Gram Num Nagar, P.O. Jalalpur Bazar, Zilla Saran (Bihar).

Am executing this agreement on this 2/11/1999, Tuesday, on the following terms and condition.

My Lt. Father Shri. Ram Das Ram and his younger brother Lt. Shri Ram Fal Ram have their land and house situated at Gangtok, Singtam and Rangpo Bazars, out of which the land situated at Singtam Bazar measuring an area of 40x62 has been transferred to me by my brothers and panchayat vide a document. Out of the said area of land I and Mahesh Kumar Trivedi have orally agreed for the sale of half of the land and house measuring 20x62 feet which is under occupation of Trivedi Stores being his shop and residence since 1963. It has been agreed that the sale price of the land, house, wood and entire property is ₹ 3,21,000/- (Three Lakhs Twenty One Thousand) out of which payment of half amount would be made at the time of registration of the land and the remaining half amount within six months thereof on installment has been agreed upon.

2. I have received the amount ₹ 5,501/- (Five Thousand Five Hundred One) as and by way of advance. The said amount will be deducted from the total amount to be paid. I have signed on this agreement after reading it and in full consciousness, on the advice and in the presence of my eldest son Rabi Prasad and other witnesses, so that there may not be any dispute in future. If I be unable to register sale deed within four years then Mahesh Kr. Trivedi can take legal action against me and he shall have full right over the said land and on the shop.

<u>*Witnesses.*</u>

		Kamala Prasad
1.	*Shiv Shanker Singh*	*Thumb impression*
	Sd/- Ext- 1/E	*(Ext-1/B(colly))*
		Thumb impression
		(Ext-1/B (colly))
2.	*Shri Ram Prasad*	*Thumb impression*
	Sd/- Ext- 1/F	*(Ext-1/B (colly))*

Ravi Kumar Prasad (Ext-1/C (colly)

4. Exhibit-1 has not been signed by the Appellant. It purports to contain the thumb impression of late Kamala Prasad and signed by his son Ravi Kumar Prasad in the presence of two witnesses Shiv Shankar Singh and Ram Prasad (P.W.2). It is a hand written document. The recital reflects that there was an agreement between the Appellant and late Kamala Prasad for sale of *"Land"* and house measuring 20'x 62' for an amount of ₹ 3,21,000/-(Rupees three lakhs twenty one thousand) only. It also reflects that it is a document evidencing payment of ₹ 5,501/- (five thousand five hundred one) only as advance.

5. Late Kamala Prasad filed a written statement alleging forgery of the purported agreement to sell dated 02.11.1999 and alternatively of being taken advantage of being an alcoholic but admitting nevertheless that he was the owner of the said suit property. Issues would be framed. Since late Kamala Prasad had raised no dispute regarding ownership of the suit property no issue regarding ownership would been framed. There is therefore no documentary proof of ownership of the scheduled property. After the completion of the recording of the evidence of the Appellant and his two witnesses the evidence in affidavit of late Kamala Prasad would be filed and authenticated. However, he would pass away before his cross-examination and therefore substituted by the present Respondents as Defendants. Their attempt to file an independent written statement contrary to the written statement filed by late Kamala Prasad and be impleaded as defendants under Order 1 Rule 3 of the Code of Civil Procedure, 1908 (CPC) would be declined by the learned District Judge and thus the Respondent No.1 would file a written statement which was directed to be

not in conflict with the written statement filed by late Kamala Prasad. No evidence would be produced at the time of filing the application under Order 1 Rule 3 read with Section 94 and Section 151 CPC to *prima facie* reflect that their claim of joint ownership was *prima facie* true. The order passed declining the application would also not be assailed. The written statements originally filed by late Kamala Prasad as well as the one filed by Respondent. No.1 who substituted him along with other Respondents makes a counter claim for eviction of the Appellant from the scheduled property as well as claim arrears of rent so does the written statement filed by the Respondent No.1.

6. Heard Mr. A.K. Upadhyaya, learned Senior Advocate for the Appellant and Mr. B. Sharma, learned Senior Advocate for the Respondents and the Cross Objector. The issues framed by the learned District Judge during the trial are taken as points for determination in the present Appeal and Cross Objection upon consent. The said issues were:-

1) Whether the suit is maintainable in its present form?

2) Whether the suit is barred by law of Limitation?

3) Whether the plaintiff is entitled to decree of specific performance of the contract of sale of the schedule 'A' property in his favour?

4) Whether the plaintiff is liable to be evicted as prayed for by the defendant?

5) To what relief or reliefs, if any, is the plaintiff entitled?

6) Whether the plaintiff is a tenant in the suit property? If so, whether the plaintiff is liable to pay the arrear house rent as claimed by the defendant?

7) Whether the document dated 2.11.1999 executed by the defendant in favour or the plaintiff is a valid document and enforceable in law?

8) To what relief or reliefs the defendant is entitled?

7. It is seen that the burden of proof for issue nos.1), 2) and 3) lay with the Appellant and for issue nos. 6), 7) and 8) with the Respondents.

8. It is the duty of the Appellate Court to appreciate the entire evidence and arrive at its own independent conclusions, for reasons assigned, either of affirmation or difference. The jurisdiction of the First Appellate Court while hearing the First Appeal is very wide like that of the trial Court. It is the final Court of fact, ordinarily, and therefore, the parties are entitled to an independent consideration of all points on both facts and law.

9. Each of the issues are taken up, the correctness of the opinion and the decision of the learned District Judge examined and this Court's decision on each of the said issues along with the reasons are given hereunder.

10. The learned District Judge would examine issue nos.1, 3 and 7 together in this manner:

> ***"48.*** *The whole case of the Plaintiff is based on the agreement dated 02.11.1999 (Exhibit 1). He has categorically pleaded in his pleadings and later deposed on oath before the Court that the original Defendant having come to own the Schedule-A property pursuant to a family partition executed the said agreement on 02.11.1999 (as an agreement for sale) whereby he sold the said property to the Plaintiff at a consideration value of ₹ 3,21,000/-. The said agreement was executed in front of the concerned witnesses namely Ram Prasad (PW 2) and Shiv Shanker Singh. Though the original Defendant (since deceased) denied the above claims of the Plaintiff I find that so far as the execution of Exhibit 1 is concerned the Plaintiff has been able to substantiate the same. PW 2 Ram Prasad and PW 3 Jeetendra Singh have corroborated the Plaintiff's evidence above so far as the execution of Exhibit 1 (in two pages) is concerned. According to PW 2, the above agreement was entered into between the*

original Defendant as the seller and the Plaintiff as the purchaser. He has categorically identified Exhibits 1/A (collectively) on the two pages of Exhibit 1 as the initials/signatures of the original Defendant Kamala Prasad. Apart from that he has also identified Exhibits 1/B (collectively) as the thumb impressions of the original Defendant on both pages of Exhibit 1; Exhibits 1/C (collectively) as the signature/initials of the son of the original Defendant (Ravi Kumar Prasad-also deceased); and Exhibit 1/D on the front page of Exhibit 1 as the thumb impression of Ravi Kumar Prasad. PW 2 has also identified his signature on Exhibit 1 as Exhibit 1/F. Further, as per him Exhibit 1/E is the signature of the other witness Shiv Shanker Singh. He has empathetically deposed that Exhibit 1 was executed/signed in his presence. On the same day, he claims, the original Defendant also took ₹ 5,501/- as advance against the consideration value. Similarly, PW 3 Jeetendra Singh has also deposed regarding the execution of Exhibit 1 by the original Defendant. He too has identified the signature/initials/thumb impressions of the original Defendant and his son Ravi Kumar Prasad (deceased) on Exhibit 1. The evidence of the Plaintiff, PWs 2 and 3 to the above extent have not been demolished during their respective cross-examinations by the concerned Defendant(s). A conjoint reading of their evidence makes it amply clear that Exhibit 1 was executed by the original Defendant. So far as the validity and enforceability of Exhibit 1 are concerned the same shall be considered hereinafter.

49. *It may also be mentioned here that though PW 3 is not a signatory/attesting witness to Exhibit 1 nevertheless his evidence clearly establishes that he was present while it was being executed and signed. As regards PW 2, it may be*

mentioned that though during his cross-examination he admitted that he did not remember 'exactly' as to what is written in Exhibit 1, his evidence (when read as a whole) is clear that he knows what Exhibit 1 purports to.

50. *The original Defendant took contradictory pleas as regards Exhibit 1. At one place he would say that he has not signed Exhibit 1. Again in the same breath he would claim that if at all he had executed it the same was under the influence of alcohol and without understanding the contents thereof. It is quite astounding to note that between 02.11.1999 (date when the document was executed) and 22.06.2004 (date when the present suit was instituted) the original Defendant made no attempts to challenge and/or have the concerned document/agreement set aside (by approaching appropriate forums). So far as the substituted Defendants are concerned, as mentioned earlier above they have claimed ignorance about the said document.*

51. *The question of validity and enforceability of Exhibit 1 as well as the question of the Plaintiff's entitlement to specific performance of Exhibit 1 shall be considered now.*

52. *As mentioned above, it is admitted position that the original Defendant came to possess the Schedule-A property pursuant to a family partition (original Defendant has admitted this). It has, however, not been mentioned specifically if the partition was under Hindu Law and if the Defendant(s) are governed by the Mitakshara School of Hindu Law or the Dayabagha School of Hindu Law. Since the original Defendant and the substituted Defendants are Hindus it has to be necessarily presumed that*

the concerned partition was under the Hindu Law. Again, it not clear as to when the partition took place. Neither the Plaintiff nor the original Defendant has cared to explain or highlight as to when the concerned partition actually took place. Going by the facts and circumstances of the case, it is at least not the case of the Plaintiff that the concerned partition was between the original Defendant and his five sons who would be coparceners along with him (if Mitakshara Hindu) in relation to the Schedule-A property which obviously was inherited by the original Defendant and became ancestral in his hands as regards him and his sons (the concerned property is still standing in the names of the father of the original Defendant late Ram Das Ram and his late uncle late Ram Phal Ram). If the Defendant(s) are governed by the Dayabhaga School of Hindu Law in that case every adult coparcerner, whether male or female, would be entitled to a share on partition. If the partition had taken place after the birth of the sons (and daughters in case of Dayabhaga Hindu) of the original Defendant then he could have only taken the Schedule-A property per stirpes as regards every other branch in the family and per capita as regards himself and his sons (and daughters in case of Dayabhaga Hindu). In that case, the original Defendant would have been entitled only to 1/6th or 1/10th, as the case may be, of the Schedule-A property (as he had five sons and four daughters). As the exact date of partition is not clear even if it is assumed that one or two sons or one or two daughters of the original Defendant were not born when the partition took place even then he would only be entitled to certain limited share i.e., much less as compared to the whole chunk of the Schedule-A property. By no stretch of imagination can he be regarded as

being the owner of the whole of Schedule-A property so as to be competent or having the requisite title over it to transfer ownership over it in favour of the Plaintiff.

53. *The question which now arises here is whether it would be equitable and just to hold/ declare that the Plaintiff is entitled to the specific performance of Exhibit 1. I am afraid, the answer here would be in the negative. It is well-settled that specific performance of contract/agreement is an equitable relief and where the grant of such relief is likely to be iniquitous the Court would not be obliged to grant the relief. As the original Defendant had no more right than his limited share over the schedule-A property he could not have entered into the concerned agreement to sell off the whole of it. The Plaintiff cannot also seek remedies under Section 53-A of the Transfer of Property Act, 1882 as Exhibit1 has not been signed by all the other co-sharers/co-parceners. At the most, the Plaintiff can institute a fresh suit for general partition of the schedule-A property amongst the Defendants and the alienation by the original Defendant would be valid to the extent of his limited share alone.*

54. *The above discussions and observations would also make it clear that the suit as framed is not maintainable.*
The issues no.7), 3) & 1) are, accordingly, decided in the negative against the Plaintiff. It is, however, made clear that the Plaintiff shall be at liberty to initiate appropriate proceedings for the money advanced by him to the original Defendant in pursuance of Exhibit 1 against the property left behind by the latter. "

> **1) Whether the suit is maintainable in its present form?**
>
> **3) Whether the plaintiff is entitled to decree of specific performance of the contract of sale of the schedule 'A' property in his favour?**

11. Both the issue nos. 1) and 3) can be taken up and decided together. The Appellant filed a suit for specific performance of a contract and consequential reliefs. The learned District Judge would hold that the suit was not maintainable and that the Appellant was not entitled to specific performance.

12. The learned District Judge would examine this issue and hold that the suit was not maintainable. However, this Court is not in agreement with the reasoning of the learned District Judge on the said issue which reasoning shall be dealt with appropriately later.

13. The Appellant has sought the reliefs prayed for in the plaint based Exhibit-1 dated 02.11.1999 only. During the hearing a question was raised by this Court as to whether the suit was maintainable and whether the Appellant was entitled to specific performance of Exhibit-1 in view of the specific pleadings made by the Appellant in the plaint and specifically paragraph 4 thereof as it suggest that the readiness and willingness to perform the essential terms of Exhibit-1 which are to be performed by the Appellant was conditional even if one was to consider it as an *"agreement"*. Mr. A. K. Upadhyaya would contend that this was a plea not taken by the Respondents and therefore it was not permissible for this Court to examine it. This submission of the learned Counsel is not tenable on the face of the provision under which the Appellant has preferred the present Appeal. The Appeal preferred by the Appellant is under Order XLI, Rules 1 and 2 of the CPC. The said Order XLI, Rule 2 of the CPC provides:

> ***2. Grounds which may be taken in appeal.-*** *The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of*

appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

(Emphasis supplied)

14. In the written statement filed by Late Kamala Prasad as well as the Respondent No.1 herein, maintainability of the suit would be one of the preliminary objections raised. The Appellant was given an opportunity to examine and make submission on the maintainability of the suit in view of Section 16 (c) of the Specific Relief Act, 1963. Mr. A. K. Upadhyaya would contend that the readiness and willingness of the Appellant to perform the essential terms of Exhibit-1 could not be termed as conditional. He would refer to paragraph 14 of the plaint in which the Appellant had averred:

"14. *That the Plaintiff is always ready and willing to pay the remaining sum of consideration value to the defendant and to act as per the agreement after he executed the sale deed in favour of the plaintiff and also do the needful for completing the registration. The plaintiff is ready and willing to complete the sale deed as per the agreement dated 2.11.1999."*

15. It is trite that the averments in the plaint must be read as whole and not isolated sentences to understand the nature of the pleadings.

16. Section 16 (c) of the Specific Relief Act, 1963 provides:

"16. Personal bars to relief.*-Specific performance of a contract cannot be enforced in favour of a person-*

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

17. The Appellant had filed a suit for specific performance and consequential reliefs in which it was also averred:

*"**4.** That the said agreement was prepared in presence of witnesses. After receipt of ₹ 5501/- the defendant again took ₹ 2000/- on 13.3.2000 towards consideration value. Thereafter he again took ₹ 3203/- in cash against consideration value; including this amount of ₹ 3203/- the plaintiff spent ₹ 25,500/- Rupees twenty five thousand and five hundred) on account of transportation fare, house repairing etc. Apart from this the defendant did not pay ₹ 25,500/- towards license fee from March, 2001 and also mesne profit till January, 2004 amounting to ₹ 25,500/-. Thus altogether a sum of ₹ 58,501/- (Rupees fifty eight thousand five hundred and one) was spent by the plaintiff in the account of the defendant as consideration value,*

transportation, cash amount paid etc. Adjusting ₹ 58,501/- from ₹ 3,21,000/- the plaintiff has now to pay a sum of ₹ 2,62,499/- to the defendant towards consideration value; which he is ready and willing to pay at any time to the defendant.”

[Emphasis supplied]

18. The Appellant thereafter authenticated his evidence in affidavit in which he deposed :

> **“5.** *That the said agreement was prepared in presence of witnesses. After receipt of Rs.5501/- the defendant again took Rs.2000/- on 13.3.2000 towards consideration value. Ext.2 is the said Money Receipt and Ext.2/A is the signature of the defendant and Ext.2/B is the signature of witness, Jeetendra Singh. Thereafter he again took Rs.3203/- in cash against consideration value; including this amount of Rs.3203/- I spent Rs.25,500/- Rupees twenty five thousand and five hundred) on account of transportation fare, house repairing etc. Apart from this the defendant did not pay Rs.25,500/- towards license fee from March, 2001 and also mesne profit till January, 2004 amounting to Rs.25,500/-. Thus altogether a sum of Rs.58,501/- (Rupees fifty eight thousand five hundred and one) was spent by me in the account of the defendant as consideration value, transportation, cash amount paid etc. Adjusting Rs.58,501/- from Rs.3,21,000/- I have now to pay a sum of Rs.2,62,499/- to the defendant towards consideration value; which I am ready and willing to pay at any time to the defendant.”*

[Emphasis supplied]

19. Reading the paragraph 4 and 14 of the plaint in a wholesome manner with the Appellant's statement in paragraph 5 of the evidence in affidavit there is no room for doubt that the Appellants readiness and willingness was to pay only the residue of the amount of consideration payable i.e. ₹ 3,21,000/- (Rupees three lakhs twenty one thousand) only after deduction of the amount of ₹ 58,501/- (Rupees fifty eight thousand five hundred one) only as claimed.

20. In re: ***Inderchand Jain (DEAD) THROUGH LRS. v. Motilal (DEAD) THROUGH LRS.***[1] the Supreme Court would hold:

> *"**15.** Section 16(c) of the Specific Relief Act, 1963 mandates that the discretionary relief of specific performance of the contract can be granted only in the event the plaintiff not only makes necessary pleadings but also establishes that he had all along been ready and willing to perform his part of the contract. Such readiness and willingness on the part of the plaintiff is not confined only to the stage of filing of the plaint but also at the subsequent stage viz. at the hearing. It has been so held in Umabai v. Nilkanth Dhondiba Chavan [(2005) 6 SCC 243] in the following terms: (SCC p. 256, paras 30-31)*
>
> > *"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard*

[1] (2009) 14 SCC 663

to the entirety of the pleadings as also the evidences brought on records.

31. In terms of Forms 47 and 48 appended to Appendix A of the Code of Civil Procedure, the plaintiff must plead that 'he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice' or 'the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant'. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfil the requirements of law."

21. A perusal of Exhibit-1 quantifies the consideration amount for the sale of the suit property at ₹ 3,21,000/- (Rupees three lakhs twenty one thousand) only. An amount of ₹ 5,501/- (Rupees five thousand five hundred one) only as advance was acknowledged by late Kamala Prasad being paid to him. No further amount was quantified or acknowledged in Exhibit-1. It is Exhibit-1 which the Appellant seeks specific performance of. However, in the plaint as well as in the evidence of the Appellant he seeks adjustment of various amounts which did not form part of Exhibit-1 and it is the specific case of the Appellant that:

"adjusting ₹ 58,501/- from ₹ 3,21,000/- the plaintiff has now to pay a sum of ₹ 2,62,499/- to the defendant towards consideration value; which he is ready and willing to pay at any time to the defendant."

22. The Appellant has also failed to plead in the Appeal that he was ready and willing to pay the entire consideration amount as agreed vide Exhibit-1. In fact even in the written submission filed by the Appellant on 05.07.2018 before this Court the aforesaid pleading regarding readiness and willingness to pay the remaining amount after adjustment of ₹ 58,501/- (Rupees fifty eight thousand five hundred one) only is reiterated. The conduct of the Appellant judged having regard to the entirety of the pleadings as also the evidences brought on record this Court has no

hesitation to hold that the readiness and willingness of the Appellant if at all was conditional and therefore in terms of Section 16(c) of the Specific Relief Act, 1963, specific performance of Exhibit-1 even if it was to be considered to be an *"agreement"* could not be granted in favour of the Appellant.

23. Section 20 of the Specific Relief Act, 1963 provides:

> ***"20. Discretion as to decreeing specific performance**.—(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.*
>
> *(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—*
>
> *(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*
>
> *(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or*
>
> *(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.*

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

24. The circumstances referred to in sub-section 2 to 4 are not exhaustive in regard to exercise of discretion for granting a decree for specific performance. Section 20 of the Specific Relief Act, 1963 provides that the relief for specific performance is discretionary and is not given merely because it is lawful to do so. The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

25. In re: ***Ganesh Shet v. C.S.G.K. Setty (Dr)***[2] the Supreme Court would hold:

> *"13. It is again well settled that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain."*

26. The case of the Appellant in the plaint was that late Kamala Prasad was the owner of the suit property. Specific performance of Exhibit-1 was sought for by the Appellant on the ground that late Kamala Prasad was the owner of the suit property. Exhibit-1 also records that late Kamala Prasad is the owner of the suit property. However, in the written statement filed by the Appellant to the counter claim for eviction and arrears of rent preferred by late Kamala Prasad as well as the Respondents in the same proceedings he would deny that late Kamala Prasad was the owner of the suit property. Similarly in the counter claim to the written statement filed by the Respondent No.1 the Appellant would deny that the Respondents are the joint owners of the suit property. When the Appellant who seeks specific performance waivers on the most crucial aspect i.e. the ownership of the suit property which he desires to own by seeking specific performance of Exhibit-1, the discretionary relief as contemplated by the Specific Relief Act, 1963 cannot be granted to the Appellant.

27. Consequently, it is held that the Appellant was not entitled to specific performance of Exhibit-1 and further that the suit as framed was not maintainable.

(2) Whether the suit is barred by law of Limitation?

28. The learned District Judge would hold that the suit was not barred by limitation as it was filed on 22.06.2004 within one year of the expiry of the time stipulated in Exhibit-1. Article 54 of the Limitation Act, 1963 provides the period of limitation for specific performance of a contract to be three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. Exhibit-1 provided that if late Kamala Prasad is unable to register sale deed within 04 years then the Appellant can institute legal action against him and have full

[2] (1998) 5 SCC 381

right over the said land and the shop. It is seen that the Exhibit-1 is dated 02.11.1999. Four years from 02.11.1999 would be 02.11.2003. Admittedly no sale deed relating to Exhibit-1 was registered on or before 02.11.2003. The cause of action for filing the suit for a specific performance would thus arise only on the expiry of the four years period on 02.11.2003. As per Article 54 of the Limitation Act, 1963 the limitation for filing a suit for specific performance of Exhibit-1 dated 02.11.1999 would be three years from 02.11.2003. The suit was admittedly filed on 22.06.2004 within the three years limitation period as such no interference is required to be made with the judgment of the learned District Judge with regard to the said issue.

4) Whether the plaintiff is liable to be evicted as prayed for by the defendant?

6) Whether the plaintiff is a tenant in the suit property? If so, whether the plaintiff is liable to pay the arrear house rent as claimed by the defendant?

29. These two issues relate to the counter-claim made by the Respondents and therefore, the burden of proof lay on the Respondents.

30. Order VIII Rule 6A CPC provides:

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

> *(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.*
>
> *(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.*
>
> *(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."*

31. Late Kamala Prasad would, in the written statement, seek a counter-claim for a decree declaring the Appellant as a defaulter with respect to the suit property and a decree of eviction on the ground of default. In the written statement filed on 20.10.2004 late Kamala Prasad would categorically admit the assertion made by the Appellant that he was the owner of the suit property and that he had acquired it through family partition. In the counter claim filed by late Kamala Prasad he would assert that he is the owner of the suit property; the Appellant is a tenant thereof at a monthly rate of ₹ 700/- (Rupees seven hundred) only and that the Appellant has defaulted to pay rent of the suit property and thus liable to be evicted.

32. The Appellant filed a written statement on 22.04.2005 to the said counter-claim. He denied the ownership of late Kamala Prasad of the suit property although in the plaint he had asserted that late Kamala Prasad was the owner thereof. The Appellant also denied that he is a tenant under late Kamala Prasad. The Appellant denied that he had defaulted in paying rent for the suit property as he had become the owner of the suit property on and from 02.11.1999 on the execution of Exhibit-1. The Appellant would also deny that he was a tenant under late Kamala Prasad at a monthly rent of ₹ 700/- (Rupees seven hundred) only and that he had defaulted in paying the said rent from the year 1999.

33. On 19.02.2011 late Kamala Prasad filed his evidence in affidavit. In his evidence late Kamala Prasad however, took a turn on his claim of

ownership of the suit property and stated instead the he could not transact the suit property on the ground that other legal heirs and successors of late Ram Phal Ram and his own sons and daughters have claim in the said suit property. The evidence of late Kamala Prasad to the extent that it is in conflict with the written statement filed by late Kamala Prasad cannot be considered as no amount of evidence contrary to the pleading can be relied on or accepted.

34. Late Kamala Prasad also asserted that it was the brother of the Appellant one Ramesh Trivedi who was a tenant in the suit property and that the Appellant had been posing himself to be the tenant thereof. Late Kamala Prasad authenticated his evidence in affidavit on 22.02.2011. Late Kamala Prasad, however, died on 22.05.2011 and thereafter the learned District Judge permitted the substitution of late Kamala Prasad by his legal heirs, the Respondents herein.

35. In the written statement filed by Respondent No.1 on 19.09.2012 she would simply deny the assertion made by the Appellant of late Kamala Prasad's ownership of the suit property due to lack of knowledge. It was asserted that the Appellant was a tenant in the suit property. It was also asserted that the Appellant has made himself liable for eviction due to default. It was asserted that late Kamala Prasad was co-owner of the suit property and that the Respondents are also co-owners of the suit property. The Respondent No.1 also asserted that the Appellant was a tenant in the suit property at a monthly rent of ₹ 700/- (Rupees seven hundred) only and that he defaulted in payment of rent. The Respondent No.1 therefore sought a counter claim for a decree for eviction of the Appellant on the ground of default in payment of rent and a decree for realization of arrears of rent from 02.11.1999 till date together with interest @ 9%.

36. On 03.12.2012 a written statement would be filed by the Appellant against the counter-claim. In the said written statement it would be denied that late Kamala Prasad along with others is the joint owner of the suit property and that the Appellant was tenant thereof. It was once again claimed that the Appellant became the owner by virtue of the sale transaction of the suit property. The Appellant admitted that before execution of Exhibit-1 he was a tenant. It was denied that he was a tenant with respect to the suit property at a monthly rent of ₹ 700/- (Rupees seven hundred) only and that he had defaulted.

37. The learned District Judge would examine these two issues at paragraph 55, 56 and 60 of the judgment dated 13.09.2013. Paragraphs 55 and 56 of the judgment dated 13.09.2013 which deals with issue nos. 6 are extracted below:

> ***"55**. The issue no.6) shall be taken up now.*
> *"6) whether the Plaintiff is a tenant in the suit premises. If so, whether the Plaintiff is liable to pay the arrear house rent as claimed by the Defendant?"*
>
> ***56.** Going by the plea set up by the Plaintiff it is noted that as per him after 02.11.1999 (i.e., when the concerned agreement was executed by the original Defendant) he has become the owner of the Schedule-A property. I am afraid, the same is not the case. It is well-settled that an agreement to sell does not convey any right, title or interest in the property. It creates only an enforceable right between he parties. So far as the validity/ enforceability of Exhibit 1 and the right of the Plaintiff to have the concerned agreement enforced are concerned this Court has already given its findings in that regard above. By no stretch of imagination can the Plaintiff be regarded as the owner of the suit property on and after 02.11.1999. He can only be regarded as the tenant of the suit premises. Now, it has been pleaded by the Defendant(s) that the Plaintiff has failed to pay the rent from the year 1999 onwards. The same has not been refuted by the Plaintiff who, on his part, had his own justification for not paying the rent. Be that as it may, it can only be concluded that the Plaintiff is still a tenant of the suit premises/Schedule-A property and as such liable to pay the arrears of rent as claimed by the Defendant(s)."*
>
> *(Emphasis supplied)*

38. The learned District Judge would thus hold this issue in favour of the Respondents. The learned District Judge would hold that the Appellant was a tenant in the suit premises and that he was liable to pay the arrears of house rent as claimed by the Respondents. The learned District Judge would hold so on mere consideration of the Appellant plea regarding his claim of ownership on execution of Exhibit-1 without examining the evidence adduced.

39. The learned District Judge would also examine issue no.4 i.e. *"Whether the plaintiff is liable to be evicted as prayed for by the defendant?"* and hold thus:

> *"**60.** The original Defendant/substituted Defendants in their Counter-claim have pleaded that since the Plaintiff has failed to pay the rent (of ₹ 700/- per month) for the Schedule-A premises after executing Exhibit 1 and since he has also disputed the ownership of his landlord(s) he is liable to be evicted from the Schedule-A premises on those grounds. So far as the non-payment of rent is concerned neither the original Defendant nor any of the substituted Defendants has cared to explain if the aforesaid amount of rent is as per the rents prevailing in the locality/standard rent. Further, there is nothing to indicate that the rent (arrears) was ever demanded by the Defendant(s) at any point of time. Even otherwise, in view of the Rent Law applicable to the concerned property i.e., the Notification No.6326-600-H&W-B dated 14.04.1949 of the Health & Works Department, Government of Sikkim (Old Law of Sikkim) which provides that the landlord may be permitted to evict the tenant on 'due application' to the appropriate Court (District Court) and also considering that the matter needs to be gone into detail in the appropriate eviction proceedings, it would be appropriate if the Defendant(s) approach the Court concerned under the concerned Rent Law on duly presenting an application as required. So far as*

> *the other ground is concerned, Ld. Senior Advocate Shri B. Sharma had contended that in view of Section 116 of the Indian Evidence Act, 1872 the Plaintiff being the tenant is estopped from denying the ownership-title of his landlord(s). I am afraid the submissions of Shri Sharma are not legally sound as Section 116 would only be applicable if the Plaintiff had been put into possession by the Defendant(s). In the present case the Plaintiff was in possession of the concerned tenanted premises/ Schedule-A properties even before the Defendant(s) came to possess/own it. It is trite that the Rule of Estoppel above only applies to cases in which the tenants are put into possession of the concerned property by the persons to whom they have attorned and not to cases in which the tenants have previously been in possession.*
>
> *The substituted Defendants shall however be free to initiate eviction proceedings, if so advised.*"

40. Even while holding issue no.6 in the affirmative i.e. the Appellant is a tenant in the suit property and that the Appellant was liable to pay arrears of rent as claimed by the Respondents the learned District Judge in the decree passed on 13.09.2013 dismissed the counter-claim of the Respondents. The Appeal filed by the Appellant makes no specific grievance against the finding recorded by the learned District Judge in the judgment dated 13.09.2013 with regard to issue no. 6. In the synopsis of argument submitted by the Appellant it is submitted that this issue is to be decided under the Rent Control Act of the State and not in a suit for specific performance of contract and that under the Rent Control Act of Sikkim specific eviction suit is to be filed by depositing specific amount of court fee for eviction of a tenant before the Principal Civil Court of original jurisdiction and as such eviction suit cannot be in the form of counter-claim in a specific performance of a contract.

41. While framing issues it must be kept in mind that issues are framed when one party asserts a fact which is denied by the other. While framing

issues the Court must necessary fix the burden of proof of the specific issue on the party who asserts it. The findings rendered thereon must always be based on the evidence adduced.

42. The learned District Judge would refer to Notification No.6326-600-H&W-B dated 14.04.1949 which deals with the rent law applicable to the rest of Sikkim beside Gangtok which is governed by the Gangtok Rent Control and Eviction Act, 1956. The said Notification No.6326-600-H&W-B dated 14.04.1949 is extracted below:

"GOVERNMENT OF SIKKIM

***Health and works department**.*

Notification No.6326-600-H&W-B

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

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

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

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

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

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

These rules will come into force with immediate effect.

By order of His Highness the Maharaja of Sikkim.

R.B. Singh,

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

43. A perusal of the afore-quoted notification makes it evident that the said notification was meant to control rents and unreasonable eviction of tenants as the scarcity of housing accommodation still existed in Sikkim. Clause 2 of the said notification provides for the grounds on which a landlord could eject a tenant. So long as the scarcity of housing accommodation lasts the landlord cannot eject the tenant save on the grounds provided. When whole or part of the premises are required for their personal occupation or for thorough over-hauling the premises or on failure by the tenants to pay rent for four months the landlords *"may be permitted"* to evict the tenant on due application to the Chief Court. As per clause 5 *"tenant"* means those persons in actual possession and *"landlord"* means owner of the premises. The Respondents sought eviction of the Appellant for non-payment of rent. Therefore, the Respondents were required to prove that they were the owners of the said property; the Appellant was a tenant thereof; that there was a failure on the part of the Appellant to pay rent for at least four months. On proving the aforesaid facts the discretion was with the Court to evict the Appellant.

44. The plea of the Appellant that eviction suit cannot be in the form of a counter-claim in a suit for specific performance of contract has no legal basis in view of the provision of Order VIII 6A CPC quoted above with

provides that a Defendant in a suit may, in addition to his right of pleading a set of under Rule 6, set up, by way of counter-claim against the claim of a Plaintiff, *"any right or claim in respect of a cause of action accruing to the defendant against the plaintiff ……… ."*

45. The language of Order VIII 6A CPC quoted above is wide enough to include a counter claim for eviction and arrears of rent.

46. In view of the written statement filed by late Kamala Prasad admitting the assertion of the Appellant regarding his ownership to the suit property no issues would be framed and consequently no evidence adduced. Resultantly no authoritative finding as to who is the owner of the suit property would be pronounced by the learned District Judge. As held above no amount of oral evidence led by the Respondent No.1 could be relied upon which was in conflict with the pleadings in the written statement filed by late Kamala Prasad. The counter claim was filed by the Respondents and therefore the burden of proof lay upon them.

47. Late Kamala Prasad unfortunately, passed away before he could be cross examined on his evidence in affidavit. Late Kamala Prasad's evidence in affidavit filed on 19.02.2011 curiously did not take the stand taken by him in his written statement that he was the owner of the said property. He deposed that:

> *"I cannot transact the suit property firstly on the ground that other legal heirs and successors of late Ramdas Ramphal Ram and my sons and daughter have claim in the suit property."*

48. Respondent No.1 does not claim ownership of the said property in her evidence in affidavit. In cross-examination she admits that she has filed no documents to prove that the suit property or that the landed properties in the State of Sikkim are recorded in the name of late Ram Das Ram Phal Ram. In fact in cross-examination she volunteered to state that there was no partition of the ancestral property. Regarding the issue of rent claimed by her in her counter claim she in fact categorically admitted in cross-examination that:

> *"It is true that I am entitled to no rent from the plaintiff."*

49. The Respondents examined Kamlesh Kumar as their witness. He also did not elucidate further on the ownership of the suit property of the Respondents. Therefore it is evident that the Respondents failed to assert even ownership of the suit property leave alone establish it.

50. Respondent No.1 would claim in her evidence in affidavit that it was the brother of the plaintiff Shri Ramesh Trivedi who was a tenant in the suit property.

51. Respondent No.1 would claim in her evidence in affidavit that:

> *"the plaintiff has not paid the rent for the suit premises either to me or to other members of Ram Das Ram Ram Phal Ram since November, 1999, as such the plaintiff is liable to be evicted from the suit premises and the shop premises occupied by him on the ground of default. That I categorically state that plaintiff as a defaulter in payment of rent and as such, I may be granted relief as made in the counter-claim."*

52. Respondent No.1 would however, admit in cross-examination that:

> *"I know Ramesh Trivedi who is now dead. It is true that Ramesh Trivedi was not a tenant in the suit premises …… I cannot say whether the plaintiff is a defaulter or not. I also do not understand the meaning of the word 'Default'."*

53. It is clear that the Respondents have failed to establish neither their ownership to the suit property nor the fact that the Appellant was a tenant thereof. In fact the evidence of Respondent No.1 oscillates between asserting that it was in fact the Appellant's brother late Ramesh Trivedi who was a tenant of the suit property in her evidence in affidavit and thereafter accepting the suggestion of the Appellant's Counsel that late Ramesh Trivedi was in fact not a tenant of the suit property.

54. However, Mr. B. Sharma would submit that the counter-claim was liable to be granted in favour of the Respondents on the basis of the averment made by the Appellant in the plaint itself clearly admitting the factum of the Appellant being a tenant prior to 02.11.1999 and paying rent thereof and thereafter not paying the rent in view of his claim of ownership on execution of Exhibit-1.

55. In the present case no judgment was sought on admission by either of the parties. A perusal of the pleadings before the learned District Judge as well as the judgment dated 13.09.2013 it is evident that the learned Counsel for the Respondents has sought to raise the issue of the Appellant's admission for the first time at the hearing of this Appeal and cross objection. In fact even the amended cross objection filed by the Respondent No.2 on 09.03.2018 does not contain a single ground regarding the admission purportedly made by the Appellant.

56. Besides the pleadings of the respective parties to the suit the evidence adduced by them is also available in the records. Both the parties have taken conflicting position in the suit as well as the counter-claim.

57. The Appellant would aver in paragraph 12 of the plaint:

> *"**12.** That as stated above before the sale agreement dated 2.11.1999 was executed; the plaintiff was occupying the Schedule "A" premises as a tenant under the defendant. Initially as per instructions of the defendant and the members of his family the plaintiff used to pay monthly rent to Shri. Kailash Prasad who is the son of elder brother of Kamala Prasad. However, through a letter Shri. Rajiv Prasad, son of Shri Kailash Prasad informed the plaintiff that the Schedule "A" property had fallen in the share of the defendant who has become its owner and therefore, the plaintiff should pay monthly rent to the defendant himself. After receipt of the said letter, the plaintiff started paying rent to the defendant and accordingly rent was paid in the hand of the defendant upto October 1999. However, from 2.11.1999 as the defendant had sold out the Schedule "A" property to the plaintiff therefore, there was no question of payment of rent to the defendant as the plaintiff became the owner by virtue of the agreement dated 2.11.1999."*

58. The Appellant in his evidence in affidavit would state:

> *"**13.** That as stated above before the sale agreement dated 2.11.1999 was executed; I was occupying the Schedule "A" premises as a tenant under the defendant. Initially as per instructions of the defendant and the members of his family I used to pay monthly rent to Shri Kailash Prasad who is the son of elder brother of Kamala Prasad. However, through a letter Shri. Rajiv Prasad, son of Shri Kailash Prasad informed me that the Schedule "A" property had fallen in the share of the defendant who has become its owner and therefore, I should pay monthly rent to the defendant myself. After receipt of the said letter, I started paying rent to the defendant and accordingly rent was paid in the hand of the defendant upto October 1999. Ext.5 is the said letter and Ext.5/A is the signature of Rajiv Prasad. However, from 2.11.1999 as the defendant has sold out the Schedule "A" property to me therefore, there was no question of payment of rent to the defendant as I became the owner by virtue of the agreement dated 2.11.1999."*

59. The admission by the Appellant was that he was a tenant in the suit property under late Kamala Prasad till 02.11.1999 from which date he became the owner thereof. The Appellant further admits that he paid rent till October 1999 to late Kamala Prasad. With regard to the question of payment of rent after 02.11.1999 the Appellant states that from 02.11.1999 as late Kamala Prasad had sold out the schedule *"A"* property to him there was no question of payment of rent to him.

60. The admission by the Appellant in the plaint as well as in his evidence in affidavit regarding the tenancy is that till 02.11.1999 he was a tenant under late Kamala Prasad. The Appellant has admitted in the plaint as well as in evidence in affidavit that he has paid rent to late Kamala Prasad till October, 1999. Mr. B. Sharma, seeks to press the admission of the Appellant as waiver of proof required to establish the ingredients of

Clause 2 of Notification No.6326-600-H&W-P dated 14.04.1949. As held above the Respondents were required to prove that they were the owners of the said suit property; the Appellant was a tenant thereof and that there was failure on the part of the Appellant to pay rent for at least four months. Regarding ownership the Appellant's admission in the plaint as well as in the evidence of affidavit is only to the extent that late Kamala Prasad was the owner of the suit property. The Appellant has in his evidence in affidavit admitted that he was a tenant till 02.11.1999 under late Kamala Prasad. The Appellant has stated that on and from 02.11.1999 after the execution of Exhibit-1 there was no question of paying rent to late Kamala Prasad as he has become the owner thereof. The statement of the Appellant may be considered as implied admission of the fact that on and from 02.11.1999 he did not pay rent to late Kamala Prasad for the tenancy. However, as stated above both late Kamala Prasad as well as Respondent No.1 adduced evidence in Court. In the said evidences in affidavit late Kamala Prasad as well as the Respondent No.1 categorically stated that it was the brother of the Appellant i.e. Ramesh Trivedi who was the tenant in the suit premises.

61. Section 101 of the Indian Evidence Act, 1872 provides:

> *"**101. Burden of proof**.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

62. Section 102 of the Indian Evidence Act, 1872 provides:

> *"**102. On whom burden of proof lies**.—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*

63. The burden of proof that the Respondents were the owner of the suit property, the Appellant was the tenant thereof and that the Appellant had failed and neglected to pay rent for a period of at least four months for the purpose of the counter-claim lay on the Respondents.

64. Section 17 of the Indian Evidence Act, 1872 defines admission in this manner:

> *“**17. Admission defined.**-An admission is a statement, oral of documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.”*

65. The word *“statement”* appearing in Section 17 of the Indian Evidence Act, 1872 not being defined the ordinary dictionary meaning is required to be applied. Thus *“statement”* would mean something that is stated. An admission must be clear and unambiguous to permit waiver of the requirement of proof.

66. Section 58 of the Indian Evidence Act, 1872 provides:

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

67. Section 58 of the Indian Evidence Act, 1872 deals with admissions during trial i.e. *“at or before the hearing.”* Proof of such facts is not required for the reason that facts admitted require no proof. Section 58 deals with judicial admission. The section governs admission by pleadings. Admission in the manner contemplated under this section is a substitute for evidence and a waiver or dispensation with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true.

68. The proviso to Section 58 of the Indian Evidence Act, 1872 however, provides for discretion upon the Court to require even the facts admitted to be proved otherwise than by such admissions.

69. The Respondent No.1 has failed to even assert the factum of ownership of the suit property or that the Appellant was a tenant thereof in the evidence in affidavit of Respondent No.1 to support the averments in her written statement leave alone tender evidence to the said effect. Even if the averment of the Appellant is considered as an admission it could only help the Respondents as evidence to prove what they assert. The admission was to the effect that late Kamala Prasad was the owner of the suit property. However, the failure of the Respondent No.1 to assert the said facts in her evidence in affidavit would disentitle the Respondents to take advantage of the averments made by the Appellant in the plaint or the statement made by the Appellant in his affidavit in evidence at this stage.

70. Although there was a clear admission of the Appellant in the plaint as well as in the evidence in affidavit that he was a tenant in the suit property the Respondent No.1's statement in her evidence in affidavit that in fact it was the brother of the Appellant i.e. Ramesh Trevedi who was the tenant would disentitle the Respondents to take advantage of the judicial admission made by the Appellant at this stage. The Respondents have thus failed to prove that the Appellant was the tenant in their suit property.

71. Notification No.6326-600-H&W-B dated 14.04.1949 grants a discretion to the Court to permit the eviction of the tenant on failure by the tenant to pay rent four months. The counter claims however, are vague. In the counter claim by late Kamala Prasad it is pleaded:

> *"V. That the plaintiff is a tenant under the defendant with respect to the suit premises at a monthly rate of Rs.700/-. The plaintiff has defaulted to pay the rent of the suit premises admittedly from the year 1999 and as such is liable to be evicted from the said premises."*

72. The counter claim filed by the Respondent No.1 pleads:

> *"V. That the plaintiff is the tenant in the premises at a monthly rent of Rs.700/-. The plaintiff has defaulted to pay the rent of the suit is liable to be evicted from the said premises."*

73. From the counter claim filed by the Respondent No.1 it is simply impossible to tell the period of non-payment of rent. It is also pleaded that the cause of action for the counter claim arose for the first time on

02.11.1999 when purported deed of agreement was alleged to be executed. The Respondents valued the counter claim at ₹ 8,400 (Rupees eight thousand four hundred) only both for the purpose of Court fees and jurisdiction and the Court fees of ₹ 504/- (Rupees five hundred four) only was paid.

74. Order VII Rule 2 CPC mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. From the pleadings in the counter claim of the Respondent No.1 it is impossible to fathom the period of the failure by the Appellant to pay rent totaling to four months or more. The Respondent No.1 is the only Respondent who came as a witness. The Respondent No.1 stated in her evidence in affidavit that the Appellant had not paid rent for the suit premises since November, 1999. However, she also admitted that she could not say whether the Appellant was a defaulter or not and admitted that she was not entitled to any rent from the plaintiff. Even if this Court were to accept the statement of Respondent No.1 that the Appellant had not paid rent for the suit premises since November, 1999 much of the claim for arrears of rent would be barred by limitation. The counter claim was first made by late Kamala Prasad on 28.10.2004. Therefore, the claim of the arrears of rent from November, 1999 till November, 2002 would be barred by limitation under Article 52 of the Limitation Act, 1963 which provides a period of limitation of three years for instituting a suit for arrears of rent from the time when the arrears become due. A claim for arrears of rent from November 1999 till 28.10.2004 at the rate of ₹ 700/- (Rupees seven hundred) only per month would require the Respondents to pay Court fees much higher than ₹ 504/- (Rupees five hundred four) only paid. In any event it is impossible to decree the counter claim for arrears of rent without specific pleadings and specific evidence which would persuade the Court to believe the same. The failure of the Respondent to prove ownership of the suit premises and that the Appellant was the tenant thereof disentitles them on their claim for arrears of rent. In the circumstances it must also be held that the Respondents have failed to prove that the Appellant was liable to pay arrears of house rent to them. Issue nos. 4) and 6) are therefore held against the Respondents.

7) Whether the document dated 2.11.1999 executed by the defendant in favour or the plaintiff is a valid document and enforceable in law?

75. Exhibit-1 has admittedly not been signed by the Appellant as the purchaser. Thus it has become vital to examine whether Exhibit-1 is an agreement at all.

76. Section 2(e) and (h) of the Indian Contract Act, 1872 provides:

> *"(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;"*

> *"(h) An agreement enforceable by law is a contract;"*

77. Section 10 of the Indian Contract Act, 1872 provides:

> ***"10. What agreements are contracts**.-All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*
>
> *Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."*

78. An agreement to sell is necessarily a bilateral contract as there must be a meeting of mind between the seller and the purchaser. The seller must agree to sell and the purchaser must agree and be willing to purchase for a lawful consideration. There must be free consent of the parties. Only those agreements which are enforceable by law are contracts.

79. In re: ***Aloka Bose v. Parmatma Devi & Ors.***[3] the Supreme Court would hold:

> *"**14**. Certain amount of confusion is created on account of two divergent views expressed by two High Courts. In S.M. Gopal Chetty v. Raman [AIR 1998 Mad 169] a learned*

[3] (2009) 2 SCC 582

Single Judge held that where the agreement of sale was not signed by the purchaser, but only by the vendor, it cannot be said that there was a contract between the vendor and the purchaser; and as there was no contract, the question of specific performance of an agreement signed only by the vendor did not arise. On the other hand, in Mohd. Mohar Ali v. Mohd. Mamud Ali [AIR 1998 Gau 92] a learned Single Judge held that an agreement of sale was a unilateral contract (under which the vendor agreed to sell the immovable property to the purchaser in accordance with the terms contained in the said agreement), that such an agreement for sale did not require the signatures of both parties, and that therefore an agreement for sale signed only by the vendor was enforceable by the purchaser.

***15**. We find that neither of the two decisions have addressed the real issue and cannot be said to be laying down the correct law. <u>The observation in Mohd. Mohar Ali [AIR 1998 Gau 92] stating that an agreement of sale is an unilateral contract is not correct.</u> An unilateral contract refers to a gratuitous promise where only one party makes a promise without a return promise. Unilateral contract is explained thus by John D. Calamari and Joseph M. Perillo in The Law of Contracts [4th Edn., Para 2-10(a) at pp. 64-65]:*

> *"If A says to B, 'If you walk across the Brooklyn Bridge I will pay you $100,' A has made a promise but has not asked B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B*

> *must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."*

All agreements of sale are bilateral contracts as promises are made by both — the vendor agreeing to sell and the purchaser agreeing to purchase.

16. *On the other hand, the observation in S.M. Gopal Chetty [AIR 1998 Mad 169] that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.*

17. *Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The*

> *proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid."*
>
> *[Emphasis supplied]*

80. As the Appellant has sought to rely upon Exhibit-1 admittedly signed only by late Kamala Prasad it was incumbent upon the Appellant to establish that there was either an oral agreement between them or that Exhibit-1 was executed by late Kamala Prasad and delivered to the Appellant who accepted it. It was further incumbent upon the Appellant not only to establish the execution of Exhibit-1 by late Kamala Prasad but that he himself had also agreed to purchase the scheduled property for an agreed consideration on agreed terms.

81. Exhibit-1 has been exhibited in the original by the Appellant in the suit. Obviously Exhibit-1 was in the possession of the Appellant. The factum of delivery of Exhibit-1 by late Kamala Prasad to the Appellant has neither been pleaded nor proved save the fact that the Appellant produced the original before the Trial Court.

82. Exhibit-1 records the purported agreement. In the evidence in affidavit of the Appellant, Exhibit-1 is referred to as the agreement between the Appellant and late Kamala Prasad. The Appellant also asserts that the Exhibit-1 bears the thumb impression of late Kamala Prasad and it was prepared in the presence of witnesses and signed by them. It also asserts that Ravi Kumar Prasad, the eldest son of late Kamala Prasad, had also signed it. Exhibit 1 also categorically recites that the executant was willing to sell half of the land devolved upon him from the partition by a document executed by the brothers and Panchayat being 20′ x 62′ which had been in

occupation of Trivedi Stores as house and shop since 1963 and for which the Appellant and the executants had orally agreed.

83. Exhibit-1 is hand written. The Appellant has identified the signatures on the first page of Exhibit-1 marked exhibit-1/A collectively as the signature of late Kamala Prasad and the thumb impressions marked exhibit-1/B collectively as late Kamala Prasad's thumb impression *("L.T.I.")*. The Appellant has also identified the signature of witness Shri Shiv Shankar Singh as exhibit i.e. and witness Ram Prasad as exhibit-1/F. The Appellant has identified the signatures of late Kamala Prasad's son Ravi Kumar Prasad as exhibit-I/C collectively. The Appellant has not identified the handwriting in Exhibit-1. The Appellant in cross-examination has denied that late Kamala Prasad had not written Exhibit-1. There are two witnesses who had purportedly signed in Exhibit-1. In cross-examination the Appellant admitted that one of the said witness Shiv Shankar Singh had been a teacher in Singtam School along with him till he resigned in the year 1984 and that the other witness Ram Prasad was his employee. The Appellant denied that he managed to manufacture Exhibit-1 with the help of his co-teacher and his employee.

84. Ram Prasad in his evidence in affidavit stated that he knew the Appellant and late Kamala Prasad. He stated that through an agreement dated 02.11.1999 entered between them the suit property was sold for a consideration value of ₹ 3,21,000/- (Rupees three lakhs twenty one thousand) only and provided the details of the said agreement. He identified Exhibit-1 as the agreement and the signature and the thumb impression of late Kamala Prasad, the signatures of Ravi Kumar Prasad, the signature of witness Shiv Shankar Singh and his own signature. He also stated that at the time of execution of Exhibit-1 late Kamala Prasad was in his full senses and that he had not consumed alcohol. Ram Prasad asserted that Exhibit-1 was executed in his presence on late Kamala Prasad's free will and that there was no coercion or any undue influence from the Appellant. In cross-examination Ram Prasad admitted that he had been working under the Appellant for last 34 years. He admitted that he did not remember what exactly was written in Exhibit-1 or the date of its execution. He admitted that he did not know what was written in his evidence in affidavit as he did not know English.

85. The other witness Shiv Shankar Singh was not examined. Jitendra Singh in his evidence in affidavit gave an identical evidence as that of Ram

Prasad with regard to the execution of Exhibit-1 and also identified the signatures and thumb impressions thereon. He also stated that at the time of execution Exhibit-1 as well as the money receipt dated 13.03.2000 (exhibit-2) late Kamala Prasad was in his full senses and he had not consumed alcohol. He also stated that the said two documents were executed in his presence by late Kamala Prasad on his free will and there was no coercion or undue influence from the Appellant. In cross-examination he admitted that he was not a witness to Exhibit-1.

86. Late Kamala Prasad however, denied executing Exhibit-1 and alleged forgery. It is trite that one who alleges forgery must prove it. Therefore, it was incumbent upon the Respondents to prove forgery. Late Kamala Prasad also took an alternative plea inconsistent to the plea of forgery that he being an alcoholic the Appellant took undue advantage in his drunken stupor and had Exhibit-1 executed by him. It was also incumbent upon the Respondents to prove the alternative plea that the Appellant took advantage of late Kamala Prasad's drunken stupor and taking undue advantage of it had Exhibit-1 executed by him. The Appellant would contend that this was a mutually exclusive/contradictory stand which was not permissible in law.

87. In re: ***Baldev Singh v. Manohar Singh***[4] the Supreme Court would hold:

> *"**16.** This being the position, we are therefore of the view that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of plaint. In Modi Spg. and Wvg. Mills Co. Ltd. v. Ladha Ram & Co. [(1976) 4 SCC 320] this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in the written statement. Accordingly, the High Court and the trial court had gone wrong in holding that the defendant-appellants are not allowed to take inconsistent pleas in their defence."*

[4] (2006) 6 SCC 498

88. In view of the clear exposition of the law by the Supreme Court that inconsistent or alternative plea can be made in the written statement the Appellant's submission that it is not permissible is not tenable.

89. The defence in the present case was first pleaded by late Kamala Prasad in his written statement in which he admitted that he was the owner of the suit property and that he had become the owner through a family partition. Late Kamala Prasad took a slightly different plea in his evidence on affidavit regarding ownership. He stated that the suit premise is recorded in the name of his father and uncle Ram Das Ram Ramphal Ram. He took the plea that he could not transact the suit property because there were other legal heirs and successors of late Ram Das Ram Ramphal Ram and his sons and daughters who have claim in the suit property.

90. In re: ***Pt. Shamboo Nath Tikoo v. S. Gian Singh,***[5] the Supreme Court would hold:

> *"**20.** No doubt, the finding recorded by the learned third Judge (Farooqi, J.) that two rooms of Dharamshalla had been granted by Maharaja Partap Singh in favour of the Sikh community-defendants, accords with the finding of another learned Judge (Jalal-ud-Din, J.). But, that finding, in our view, becomes wholly unsustainable being altogether a new case made out for the defendants by him, in that, such case is not in any way traceable to the pleas of defence of the defendants set out in their written statements against their ejectment from the said two rooms."*

91. In re: ***Rajendra Pratap Singh v. Rameshwar Prasad***[6] the Supreme Court would hold:

> *"**13.** When the defendant in this case did not dispute in the written statement the fact that the lease was validly made, it is not open to him to raise a contention later, viz., the instrument was not executed by both the lessor and lessee and consequently the lease is void. The High*

[5] 1995 Supp (3) SCC 266
[6] (1998) 7 SCC 602

> *Court, has therefore, rightly confirmed the finding of the courts below that the decree for eviction on the ground under Section 11(1)(e) of the Bihar Act is not liable to be interfered with.”*

92. In re: ***Ramesh Kumar & Anr. v. Furu Ram & Anr.***[7] the Supreme Court would hold:

> *“**33.** It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted. In this case, there is variance and divergence between the pleading and documentary evidence, pleading and oral evidence and between the oral and documentary evidence. It is thus clear that the entire case of the respondents is liable to be rejected. The different versions clearly demonstrate fraud and misrepresentation on the part of the respondents.”*

93. In view of the settle position of law that an altogether new case cannot be set up which is inconsistent with the defence taken in the written statement and that no amount of evidence contrary to the pleading can be relied on or accepted it was not permissible for late Kamala Prasad to have taken the plea of joint ownership of the suit property in spite of the clear plea taken by him in his written statement that he was in fact the owner of the said suit property having become the owner through a family partition.

94. However, late Kamala Prasad died on 22.05.2011 after authenticating his evidence on affidavit on 22.02.2011.

95. In re: ***Krishan Dayal v. Chandu Ram***[8] ***H.R. Khanna, J.*** of the Delhi High Court would hold:

> *“ I have given the matter my consideration and am of the view that the statement of a witness in examination-in-chief, which was admissible at the time it was recorded, cannot become inadmissible by reason of the*

[7] (2011) 8 SCC 613
[8] 1969 SCC OnLine Del 134

> *subsequent death of the witness before cross-examination. The absence of cross-examination would undoubtedly affect the value and weight to be attached to the statement of the witness, but it would not render the statement inadmissible or result in its effacement. So far as the question is concerned as to what weight should be attached to such statement made in examination-in-chief the Court has to keep in view the facts and circumstances of each individual case. Some of the factors which may be borne in mind are the nature of the testimony, its probative value, the status of the witness, his relationship or connection with the parties to the case, a likely anumus which may colour his statement and any other factor touching the credibility of the witness which may emerge on the record. Regard must also be had to the fact that the witness has not been subjected to cross-examination. The Court should see whether there are indications on the record that as a result of cross-examination his testimony was likely to be seriously shaken or his good faith or credit to be successfully impeached. The Court may also adopt a rule not to act upon such testimony unless it is materially corroborated or is supported by the surrounding circumstances. If after applying that rule of caution, the Court decides to rely upon the statement of a witness who was examined in chief, but who died before cross-examination, the decision of the Court in this respect would not suffer from any infirmity.*"

96. In view of the settled position of law as clearly expounded by ***H.R. Khanna, J.*** in his instructive judgment in re: ***Krishan Dayal (supra)*** this Court deems it proper to examine the other facts before coming to a conclusion whether to rely upon the statement of late Kamala Prasad.

97. Ravi Prasad also deposed before the Court as late Kamala Prasad's witness. In his evidence in affidavit he stated that during November 1999,

the Appellant called his father and obtained certain signatures and some thumb impressions in blank papers. He also stated that he was also asked to sign in such papers stating that these were the acknowledgement of payment of rent and his father was also paid some amount which he had paid to a liquor vender. Ravi Prasad also stated that his signature was obtained in the blank paper when he was a minor. Ravi Prasad also took the stand that Exhibit-1 and 2 are manufactured documents. He stated that he knew that his father had not sold the schedule 'A' property nor had he taken any advance as a consideration. On 22.02.2011 Ravi Prasad authenticated and confirmed his evidence in affidavit. Ravi Prasad however could not be cross examined as he passed way in the year 2011.

98. After the death of late Kamala Prasad the present Respondents substituted him. Respondent No.1 examined herself as a witness. She filed her evidence in affidavit in which she took a plea that the suit premises was recorded in the name of her father-in-law's late Ram Das Ram and late Ram Ram Phal Ram. She took a specific plea in her evidence in affidavit to the following effect:

> ***"9**. That in the month November, 1999 the plaintiff had come to meet my husband and he told my husband to put some thumb impression on blank papers and handed my husband some amount. The plaintiff told my husband that he has come to pay the rent and he asked by husband to give the thumb impression as a token of rent receipt. My husband during the drunken state gave some thumb impression on the Blank sheets. My husband used to sign on the documents whenever he used to do any transaction and he never used to sign in Devnagri. As such I state that Exhibit-1 and Exhibit-2 which are false and fabricated documents which the plaintiff took during the drunken state. I have seen the documents i.e. Exhibit-1 (a) collectively and exhibit-1 (b) collectively, after seeing the same I am confident enough to state that the signature and thumb impression appearing are not of my husband.*

However, assuming but not admitting if the thumb impression and signatures are of my husband then the same were obtained on blank papers by means of fraudulent act of the plaintiff, when my husband was in drunken state. When plaintiff obtained the signatures and thumb impression, the plaintiff said that he was taking the same in lieu of rent receipt. My husband accepted some amount in lieu of the rent from the plaintiff and instead of using the said money for house hold goods he used the same to clear his dues in the liquor shop and buy liquor. I am confident enough to state that my husband and other members of my family have not got a single paise for the suit property. My husband had no right title to sell/ transfer the suit property as other members and legal heirs and successors of late Ram Das Ram Ram Phal Ram, myself and my children have claim over the suit property. The suit property which the plaintiff wants to grab through a fraudulent document was/is not his sole property, as admitted above the suit property is still recorded in the name of late Ram Das Ram and Late Ram Phal Ram."

xxxxxxxxxxxx

13. *That my husband was an illiterate person nor could he read and write in English and Devnagri but he could put his signature. I have seen a copy of Exhibit 1 and 2 and was read over the contents and I am sure and confident that the documents are false. I am also confident that the signature appearing on Exhibit 1 and 2 are not of my husband nor the signature is that of my son Late Ravi Prasad. The document are manufactured document for the purpose of this case.*

> ***14.*** *That the statement that Ravi Prasad also signed on Exhibit 1 is also false as during 1999 my eldest son said Ravi Prasad was a minor. The document given by Shri Rajeev Prasad is false and fabricated document and same has not been written and signed by Shri Rajeev Prasad.*
>
> *xxxxxxxxxxxx*
>
> ***16.*** *That my husband and my elder son used to consume heavy amount alcohol which was the cause of their death. I also state that plaintiff has taken advantage of my husband being drunk and accordingly he has taken the thumb impression on the blank sheet for which the plaintiff is liable to prosecuted.*
>
> ***17.*** *That the fact that the suit property is still recorded in the name of Ram Das Ram Ram Phal Ram and even assuming but not admitting my husband has stated that the suit property is a partitioned property this is not correct as no documents has been furnished by the plaintiffs and my husband showing that the suit property is the partitioned property. Assuming but not admitting that the suit property is a partitioned property in that event also the plaintiff cannot file the present suit by virtue of Exhibit 1 and 2 as the property in question has not been recorded in his name and he could not have signed Exhibit 1 and 2, if it is proved that the signatures therein are genuine signature of my husband."*

99. The evidence of Respondent No.1 which seeks to take a stand contrary to the written statement filed by late Kamala Prasad in which he had categorically admitted his ownership of the suit property through a family partition cannot be relied upon or accepted. However, like late Kamala Prasad, Respondent No.1 also took the two alternative pleas of forgery and undue advantage taken by the Appellant of late Kamala

Prasad's drunken stupor and having Exhibit-1 executed by him. As held earlier both these pleas were required to be proved by the Respondents. The Appellant cross-examined the Respondent No.1 regarding her evidence in affidavit. In cross-examination she admitted that she had not filed any document either from the hospital or from the police station in the Court to prove that her husband was an excessive drunkard. She also admitted that she had not filed any complaint either before the Court, in the police station or before the Panchayat alleging that the Appellant had taken thumb impression of her husband in blank papers. To a suggestion put in cross-examination the Respondent No.1 stated that she could not say whether her husband had at any time reported to the police, to the Court or to the Panchayat that the Appellant had taken his thumb impressions on blank papers by practicing fraud. She also admitted that she had not filed any document in the Court to prove that her husband used to sign in *'Devnagiri'*. Respondent No.1 admitted that she had never seen Exhibit-1 or 2 before. She could not say or identify the thumb impressions and the signatures appearing on Exhibit-1 or 2. She could not also say or identify as to whether the said documents bear the signature of her son and the thumb impression and signature of her husband. She admitted that:

> *"It is true that because I had never seen Exhibit 1 and 2 as such I cannot say as to whether the same are false or fabricated documents. I therefore, cannot say whether my husband had put his thumb impressions on the said documents. Neither me nor my husband ever filed any complaint before the police, to the Panchayat or in the Court stating that Exhibit 1 and 2 are false and fabricated and that the same do not bear the thumb impressions of my husband."*

100. The Respondents also examined one Kamlesh Kumar and filed his evidence in affidavit. He stated that he had been staying in Singtam since 1986 and knew the family of the Defendant. He stated that late Kamala Prasad and his son used to consume heavy amount of alcohol. He also stated that late Kamala Prasad used to borrow money from him and other people from Singtam to buy alcohol. Kamlesh Kumar stated that before late Kamala Prasad expired he used to always see him drunk and people used to take advantage of him Kamlesh Kumar also stated that because of his alcoholism late Kamala Prasad never participated in the family affairs and he used to sign any document if he was offered alcohol and the same was his

son late Ravi Prasad's nature. In cross-examination Kamlesh Kumar admitted that he had no evidence to prove that late Kamala Prasad used to consume heavy alcohol. No other evidence was produced by the Respondents.

101. Although oral evidence was led by the Respondents to show that Late Kamala Prasad used to consume alcohol from the above it is evident that the Respondents have failed to prove forgery of Exhibit-1 or the alternative plea that the Appellant had taken undue advantage of late Kamala Prasad's drunken stupor and got Exhibit-1 executed by him without his free consent. The evidence of the Appellant, Ram Prasad and Jitendra Singh with Exhibit-1 does probabalise that Exhibit-1 was executed by late Kamala Prasad. The learned District Judge would also come to the conclusion that Exhibit-1 was executed by late Kamala Prasad. None of the Appellants witness asserts that the contents of Exhibit-1 is in the handwriting of late Kamala Prasad. There is no evidence on record that the handwriting on Exhibit-1 is of late Kamala Prasad. To complicate the issue further in the written statement filed by the Appellant to the counter claim of late Kamala Prasad as well as the Respondent No.1 he denies that late Kamala Prasad was the owner of the suit property. On an application filed before this Court being C.M. Appl. No.250 of 2015 by the Respondents in the present proceedings this Court vide order dated 27.06.2016 would direct the Registry to send the original Exhibit-1 to a handwriting expert and submit a report. Exhibit-1 in the original (two pages) were sent for Forensic Examination to the Regional Forensic Science Laboratory (RFSL), Sikkim Saramsa, Ranipool. An opinion dated 20.07.2016 has been placed on record where the Scientific Officer-cum-Assistant Chemical Examiner, Government of Sikkim, question document division, RFSL, Sikkim has opined that interse examination of the writings therein which were marked as Q1, Q2 and Q3 reveals consistency in handwriting characteristics indicating that they were written by one and the same person. It was also opined that the last three lines of Exhibit-1 giving the options to the Appellant to take legal proceedings on the failure of late Kamala Prasad in registering a sale deed and further the right to the suit property was incorporated subsequently. However, the date and time could not be determined. It was also stated in the opinion that when observed under stereo binocular microscope it was found that the colour and lustre of the said writing was found to be different, their alignments of the writings compressed (squeezed) and smaller in size due to limited space available and that the writings

therein shows slower speed of writing then his usual writing habit. The terminal letter of that portion of Exhibit-1 overlapped the finger impression. The Respondents would not seek expert opinion as to whether Exhibit-1 was in the handwriting of late Kamala Prasad or whether the signature or the thumb impression thereon was his.

102. This Court shall now proceed to examine the issue as to whether Exhibit-1 is a valid document and enforceable in law.

103. As held above the evidence on record does probabalise that Exhibit-1 was executed by late Kamala Prasad. The Appellant asserts that Exhibit-1 is an agreement to sell by which he became the owner of the suit property. Exhibit-1 is not a sale deed or a title deed. The mere execution of Exhibit-1 would not make the Appellant the owner of the suit property as he claims. Section 54 of the Transfer of Property Act, 1882 states that *"sale"* is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. It also provides that such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, can be made only by a registered instrument. Admittedly Exhibit-1 is also not a registered deed. If it is to be considered as an agreement certain requirements are required to be fulfilled. An agreement is always bilateral. Therefore, merely probabilising the execution of Exhibit-1 by late Kamala Prasad would not suffice. It was incumbent upon the Appellant to prove that he had also agreed to pay the consideration and abide by the terms and conditions of Exhibit-1. This Court, while examining the issue of maintainability of the said suit and specific performance of Exhibit-1 has come to the conclusion that the readiness and willingness of the Appellant was conditional and therefore specific performance of Exhibit-1 could not be granted in favour of the Appellant. Exhibit-1 reflects that the consideration amount for the sale of the suit property was ₹ 3,21,000/- (Rupees three lakhs twenty one thousand) only out of which an amount of ₹ 5,501/- (Rupees five thousand five hundred one) only was acknowledged as advance received by late Kamala Prasad. Thus an amount of ₹ 3,15,499/- (Rupees three lakhs fifteen thousand four hundred ninety nine) only was required to be paid by the Appellant as per Exhibit-1. To make Exhibit-1 bilateral the Appellant ought to have been ready and willing to pay the balance amount of ₹ 3,15,499/- (Rupees three lakhs fifteen thousand four hundred ninety nine) only to late Kamala Prasad. However, as held before, this was never the intention of the Appellant and the Appellant would seek adjustment

of various amounts totaling to ₹ 58,501/- (Rupees fifty eight thousand five hundred one) only not forming part of Exhibit-1 and be ready and willing to pay only ₹ 2,62,499/- (Rupees two lakhs sixty two thousand four hundred ninety nine) only to late Kamala Prasad towards consideration value. There was not even a pleading that the said amounts sought to be adjusted had been agreed upon by late Kamala Prasad.

104. That apart in the first contemporaneous document relied upon by the Appellant i.e. notice dated 23.03.2003 (Exhibit-3) the following adjustments were sought. ₹ 5,501/- (Rupees five thousand five hundred one) only as advance. Further amount of ₹ 2000/- (Rupees two thousand) only alleged to have been received by late Kamala Prasad. An amount of ₹ 13,000/- (Rupees thirteen thousand) only on account consumable goods taken by him from the Appellants shop which was to be considered as advance amount too as per the Appellant. Besides the aforesaid it was also asserted in the said notice that the Appellant had incurred an amount of ₹ 1,00,000/- (Rupees one lakh) only for improvement of the condition of the wooden house in furtherance of the contract. However, in the plaint some of those amounts changed. In the plaint it was pleaded that besides the ₹ 5,501/- (Rupees five thousand five hundred one) only paid as advance a further amount of ₹ 2000/- (Rupees two thousand) only was taken by late Kamala Prasad however, without any further details. It was asserted that a further amount of ₹ 3,203/- (Rupees three thousand two hundred three) only in cash against consideration value was also taken by late Kamala Prasad. The Appellant now asserted that including the amount of ₹ 3,203/- (Rupees three thousand two hundred three) only he spent ₹ 25,000/- (Rupees twenty five thousand) only on account of transportation fare, house repairing etc. The Appellant would also plead that late Kamala Prasad did not pay ₹ 25,000/- (Rupees twenty five thousand) only towards license fee from March, 2001 and also mesne profit till January, 2004 which altogether amounted to ₹ 58,501/- (Rupees fifty eight thousand five hundred one) only which was required to be adjusted and that the Appellant was ready and willing pay only an amount of ₹ 2,62,499/- (Rupees two lakhs sixty two thousand four hundred ninety nine) only from the total consideration value payable. The evidence of Jitendra Prasad merely states that late Kamala Prasad again took ₹ 2000/- (Rupees two thousand) only on 13.03.2000 towards consideration value without specifying that the consideration was towards advance for the agreement entered between the Appellant and late Kamala Prasad due to which Exhibit-1 was executed.

105. Thus it is unequivocally certain that there was in fact no *"agreement"* between the Appellant and late Kamala Prasad in terms of Exhibit-1. Exhibit-1 even if executed by late Kamala Prasad was not enforceable in law in the facts of the present case because the Appellant failed to agree and abide by its terms. Exhibit-1 may have been executed by late Kamala Prasad but the said document was neither a sale deed nor a contract of sale. The Appellant's failure to assert or prove that the Appellant was in agreement with the terms and conditions of Exhibit-1 which admittedly was signed only by late Kamala Prasad make it evident that the said Exhibit-1 was not an agreement to sell or that there was any oral agreement to sell between the Appellant and late Kamala Prasad. Mere willingness and desire to acquire an immovable property is not enough. There must be willingness on the part of the Appellant to purchase the same for the consideration on which the late Kamala Prasad is said to be willing to sell the same for.

106. The learned District Judge would hold that a conjoint reading of the evidence produced by the Appellant makes it amply clear that Exhibit-1 was executed by late Kamala Prasad. However, the learned District Judge would come to the conclusion that Exhibit-1 was neither valid nor enforceable. The learned District Judge would come to the conclusion that late Kamala Prasad did not have absolute right in the said property being a Hindu governed either by the Mitakshara or the Dayabagha School of Hindu Law on conjectures and surmises.

107. Whether the Defendant was a Hindu governed by any particular school of Hindu law is a question of fact to be determined by evidence and evidence alone. On examination of the plaint as well as the written statements it is seen that neither the Appellant nor late Kamala Prasad as the sole Defendant had pleaded that the sole Defendant was a Hindu governed by either the Mitakshara School or the Dayabagha School. The affidavit in support of the evidence of late Kamala Prasad as well as Respondent No.1 merely states that they were Hindu by faith. The Respondents who substituted late Kamala Prasad after his death as Defendants stepped into his shoes. Even the Respondents did not so plead. In fact by specific orders of the learned District Judge the Respondents were precluded from taking a stand in conflict with the stand taken by late Kamala Prasad and therefore, when late Kamala Prasad had in the written statement categorically admitted the fact that he was the owner of the suit

property after a family partition the question of examining the partition as well as whether the Mitakshara or the Dayabagha Schools of Hindu Law would govern such partition and the effect thereof on mere conjectures and surmises by the learned District Judge was uncalled for. More so when late Kamala Prasad, the Respondent No.1 or Kamlesh Kumar had not even stated that late Kamala Prasad or the Respondent No.1 were Hindus.

108. The learned District Judge held that the suit filed by the Appellant was not maintainable on presuming a defect in the title of late Kamala Prasad, the original sole Defendant over the suit property. While holding that late Kamala Prasad had a defect in title to the suit property the learned District Judge would ignore two earlier orders passed by the same Court. Order dated 23.04.2012 would decide the objection raised by the Appellant as well as the petition filed by the Respondent No.2 under Order 1 Rule 3 read with Section 94 and 151 Code of Civil Procedure, 1908 (CPC) and hold that a legal representative of a deceased defendant cannot take the plea in a pending suit, inconsistent with the plea taken by the deceased defendant in his written statement. Holding so the learned District Judge would direct that the Respondents shall not file any written statement that raises a contrary view but shall continue the suit on the same cause of action without setting up a new or inconsistent plea. A written statement was however, filed by the Respondents on 28.05.2012. On 20.06.2012 the Appellant would file his reply. On 07.08.2017 the learned District Judge would hear the Appellant as well as the Respondents on the admissibility of the written statement filed by the Respondents. The learned District Judge would rely upon the order passed earlier on 23.04.2012 and disallow certain portions of the written statement being a new and inconsistent plea contrary to the one taken by late Kamala Prasad and permit the filing of the written statement after deletion of the said portions quoted below:

> *Paragraph 7 - "7. It is submitted that as far as the knowledge of the answering defendant goes the suit property originally belongs to M/s Ram Das Ram Ram Phal Ram. The defendants have no personal knowledge of the partition and hence same is denied. The answering defendant was married to the original defendant during 1976 and so far the knowledge of the defendant goes the suit property is a joint property.",*

Paragraph 14 - "14. It is submitted that the defendants are still the co-owner of the suit property and as such they are not required to quit and vacate the suit property in any manner whatsoever and can ever be treated as a trespasser. On the contrary the tenant can never challenge the title of the land lord however defective it may be. The statement of granting permission, license and forcible possession are nothing but false statements and denied by the defendant."

And entire paragraph 23 *"23. That the defendant apart from the above averment made in the Written Statement and counter claim beg to further file her additional written statement and state that original defendant (since deceased) and the late Ravi Kumar Prasad did not have right title and interest over the suit property nor they had any salable rights and thus the suit property is throughout recorded in the name of M/s. Ram Das Ram Ram Phal Ram." ………………………….."*

109. In effect the two orders dated on 23.04.2012 and 07.08.2017 passed by the learned District Judge would preclude the Respondents from taking a stand in conflict to the admission that late Kamala Prasad had taken in his written statement that he was in fact the owner of the suit property acquired through family partition.

110. The order dated 23.04.2012 passed by the learned District Judge would be passed after examining the law and the judgments of the Supreme Court. In re: ***Vidyawati v. Man Mohan & Ors.***[9] the Supreme Court would hold:

> **"3.** *It is seen that the petitioner's claim of right, title and interest entirely rests on the will said to have been executed by Champawati in favour of the first defendant and herself. It is now admitted across the Bar that the first defendant had life interest created under the will executed by Champawati. Therefore, the said interest is coterminous with his demise. Whether the petitioner has independent right, title and interest dehors the claim of the first defendant is a matter to be gone*

[9] (1995) 5 SCC 431

into at a later proceeding. It is true that when the petitioner was impleaded as a party-defendant, all rights under Order 22, Rule 4(2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest, to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the court below has taken rightly.

2. *It is contended for the petitioner that both the plaintiff-first defendant and the petitioner's claims are founded on the will executed by Champawati, where the first defendant had right and interest for life and the petitioner had right thereafter and as such she could raise the plea which Brijmohan Kapoor could have raised in his written statement. The courts below were not right in refusing to permit the petitioner to file additional written statement. In support thereof, the petitioner placed strong reliance on the judgment of this Court in Bal Kishan v. Om Parkash [(1986) 4 SCC 155 : AIR 1986 SC 1952].*

4. *This Court in Bal Kishan v. Om Parkash [(1972) 2 SCC 461 : (1973) 1 SCR 850] has said thus:*

> *"The sub-rule (2) of Rule 4 of Order 22 authorises the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."*

5. *The same view was expressed in Jagdish Chander Chatterjee v. Sri Kishan [(1972) 2 SCC 461 : (1973) 1 SCR 850] wherein this Court said: (SCC pp. 464-65, para 10)*

"... legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

6. *This being the position in law, the view of the court below is perfectly legal. It is open to the petitioner to implead herself in her independent capacity under Order 1, Rule 10 or retain the right to file independent suit asserting her own right. We do not find any error of jurisdiction or material irregularity committed in the exercise of jurisdiction by the court below warranting our interference. The SLP is, accordingly, dismissed."*

111. The order dated 23.04.2012 rejecting the Respondents application under Order 1 Rule 3 read with Section 94 and 151 CPC would not be assailed by the Appellant. Even in the cross objection filed in spite of opportunity granted to amend the original counter claim and taken no ground challenging the said order dated 23.04.2012 has been taken although the Respondents could have done so under the provisions of Section 105 CPC. The said application in any event had not even *prima facie* showed that the suit property was not exclusively owned by late Kamala Prasad.

112. Thus the learned District Judge had erred in travelling beyond the pleadings and rendering findings based on surmises and conjectures.

5) To what relief or reliefs, if any, is the plaintiff entitled?

8) To what relief or reliefs the defendant is entitled?

113. The learned District Judge would opine that neither the Appellant nor the Respondents are entitled to any relief or the relief prayed for although the learned District Judge had given the option to the Appellant to take appropriate proceedings for the money advanced by him to late Kamala Prasad and to the Respondents to seek eviction of the Appellant before the appropriate Court which option in effect would amount to granting reliefs not prayed for to the Appellant as well as the Respondents. In re: ***Banarsi and Ors. v. Ram Phal***[10] the Supreme Court would hold:

> *" In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the court unless it has been specifically claimed in the plaint by the plaintiff."*

114. Thus the impugned order to the extent it grants liberty to initiate appropriate proceedings for the money advanced by him to late Kamala Prasad in pursuance of Exhibit-1 against the property left behind him is also not permissible as no specific relief for realization of money advanced has been sought for in the plaint.

115. In spite of the specific prayer for eviction and arrears of rent prayed for by the Respondents the learned District Judge declining to examine the issue on the ground that the applicable rent law i.e. Notification No.6326-600-H&W-B dated 14.04.1949 provided for the landlord being permitted to evict the tenant on due application to the appropriate Court (District Court) and also considering the matter is required to be gone into in detail in appropriate eviction proceedings was also not correct. As held above the provisions of Order VIII Rule 6A CPC was wide enough to examine the counter claim praying for eviction in terms of the said notification as well as

[10] (2003) 9 SCC 606

for arrears of rent. It was open for the Respondents to file the counter claim which they did. The specific issues relating to the counter claim having been framed and evidence led it was incumbent upon the learned District Judge to pronounce on the said issues. A suit is tried on the issues raised by the parties. In the circumstances the learned District Judge granting liberty to the substituted defendants to initiate eviction proceedings if so advised was also not correct. In re: ***Shiv Kumar Sharma v. Santosh Kumari***[11] the Supreme Court would hold that *"A Civil Court does not grant leave to file another suit. If the law permits, the Plaintiff may file another suit but not on the basis of observations made by a superior Court"*. In view of the aforesaid it is held that the Appellant as well as the Respondents as substituted legal heirs of late Kamala Prasad were also not entitled to any other reliefs too.

116. The conflicting positions taken by the Appellant as well as the Respondents on crucial facts vital to obtain the relief prayed for in such a nonchalant manner with scant respect for truth non suits them. All points of determination stand considered and determined. The Appeal as well as the cross-objection is decided and dismissed.

[11] (2007) 8 SCC 600

SLR (2018) SIKKIM 1167
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

I.A No. 01 of 2018
in
W.P. (C) No. 27 of 2018

Dipendra Adhikari ..... **PETITIONER**

Versus

State of Sikkim and Others ..... **RESPONDENTS**

Mr. Arun Chettri ..... **APPLICANT**

For the Petitioner: Mr. Sangay G. Bhutia and Ms. Mon Maya Subba, Advocate.

For Respondent 1 and 3: Ms. Pollin Rai, Assistant Government Advocate.

For Respondent No. 2: Mr. Bhushan Nepal, Advocate.

For Respondent No. 4: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms. Malati Sharma, Advocates.

For the Applicant: Dr. Doma T. Bhutia and Ms. Preeti Chettri, Advocates.

Date of decision: 7th September 2018

A. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – Necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding – The relief is claimed against the State of Sikkim, the SPSC, Department

of Personnel, Administrative Reforms, Training & Public Grievances and Respondent No.4, who had been appointed as Under Secretary and they are all arrayed as Respondents. The said Respondents are the necessary parties to be impleaded against whom the reliefs are sought and in whose absence no effective decision can be rendered by this Court.

(Paras 7 and 8)

B. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – All the candidates who have passed the written examination and obtained certain percentage of marks would have a legitimate expectation to be selected for the interview based on the marks obtained. The selection of the candidate against each vacant post must be purely on the basis of merit of their performance in the written examination as well as viva-voce. It is in these circumstances that the computation of marks obtained by each of these candidates would have a direct bearing on the ultimate selection – Any person who may be adversely affected by the grant of the reliefs prayed for by the Petitioner must be impleaded as party because in his absence an effective order may be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

(Paras 9 and 14)

Application for impleadment allowed.

Chronological list of cases cited:

1. Vijay Kumar Kaul and Others v. Union of India and Others, (2012) 7 SCC 610.
2. Poonam v. State of Uttar Pradesh and Others, (2016) 2 SCC 779.
3. Vidur Impex and Traders (P) Ltd. v. Tosh Apartments (P) Ltd., (2012) 8 SCC 384.
4. Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd., (2010) 7 SCC 417.
5. Sri Avantika Contractors (I) Ltd. v. Union of India and Others, 2018 SCC OnLine Sikk 47.

ORDER

Bhaskar Raj Pradhan, J

1. The Writ Petition filed by the Petitioner seeks to challenge the selection and subsequent appointment of the Respondent No.4 to the post of Under Secretary in the Government of Sikkim. The Petitioner prays for an expert committee to re-examine the official answer keys for the subject of philosophy for seven questions, re-evaluation of the 'OMR' sheets of the Petitioner for the seven questions on the basis of the answer keys as finalised by the expert committee to be constituted, appointment of the Petitioner to the post of Under Secretary and cancellation of the appointment of the Respondent No.4. The challenge is on two primary grounds. The Petitioner alleges that the Respondent No.4 did not have the Other Backward Class certificate at the relevant time of submission and therefore, his selection was bad in law. The Petitioner also alleges that some of the answer keys provided in the written examination were incorrect due to which he had lost marks. After obtaining information when representation was made to the concerned authorities four marks were added to his total but the Petitioner is certain that he would be entitled to more marks than what he has been given in the written examination on the grounds stated in the Writ Petition.

2. Arun Chettri, belonging to the Other Backward Classes (State list) (OBC (SL)) who had obtained 526.8 marks and positioned 2nd in the said category after the Respondent No.4 who had secured 531 marks and before the Petitioner who had secured 525.1 marks in the same category is seeking to implead himself in the present Writ Petition on the ground that he would be adversely affected by any order passed by this Court in the present Writ Petition.

3. Heard Dr. Doma T. Bhutia, learned Counsel for the Applicant, Mr. Sangay G. Bhutia, learned Counsel for the Petitioner, Mr. N. Rai, learned Senior Advocate for the Respondent No.4, Ms. Pollin Rai, learned Assistant Government Advocate for the Respondent No.1 and 3 and Mr. Bhusan Nepal, learned Advocate for the Respondent No.2.

4. Dr. Doma T. Bhutia would submit that any order passed in the present Writ Petition would adversely affect the Applicant and therefore, the

Applicant is a necessary party. She would rely upon the Judgment of the Supreme Court in re: ***Vijay Kumar Kaul & Others v. Union of India & Others***[1].

5. Mr. Sangay G. Bhutia, *per contra*, would submit that since the Applicant has not challenged the total marks obtained by him, any change in the total marks of the Petitioner on recalculation would not adversely affect the Applicant and that the Petitioner would be granted marks purely on his own merits which has been illigally denied by the State Respondents. He would rely upon the Judgments of the Supreme Court in re: ***Poonam v. State of Uttar Pradesh & Others***[2], ***Vidur Impex & Traders (P) Ltd. v. Tosh Apartments (P) Ltd.***[3], ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd.***[4] as well as the Order passed by this Court in re: ***Sri Avantika Contractors (I) Ltd. v. Union of India & Ors***[5].

6. Mr. N. Rai, learned Senior Advocate would categorically submit that the Respondent No.4 has no objection if the Applicant is arrayed as a Respondent in the present proceeding.

7. Necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

8. In the present proceedings the relief is claimed against the State of Sikkim, the SPSC, Department of Personnel, Administrative Reforms, Training & Public Grievances and Mr. Aswin Nirola (Respondent No.4) who had been appointed as Under Secretary and they are all arrayed as Respondents. The said Respondents are the necessary parties to be impleaded against whom the reliefs are sought and in whose absence no effective decision can be rendered by this Court.

9. The process of selection and appointment of Under Secretaries to the Government of Sikkim seems to entail written examination, viva-voce,

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[1] (2012) 7 SCC 610
[2] (2016) 2 SCC 779
[3] (2012) 8 SCC 384
[4] (2010) 7 SCC 417
[5] 2018 SCC OnLine Sikk 47

computation of statement of marks obtained by the candidates in the written examination for the viva-voce, computation of marks obtained by the candidates in the viva-voce, computation of consolidated marks obtained in written examination and viva-voce, selection and recommendation by the SPSC and thereafter appointment. All the candidates who have passed the written examination and obtained certain percentage of marks would have a legitimate expectation to be selected for the interview based on the marks obtained. All the candidates who have passed the viva-voce after the written examination and obtained certain percentage of marks would have a legitimate expectation to be selected for the post and appointment on the basis of the consolidated marks obtained. The selection of the candidate against each vacant post must be purely on the basis of merit of their performance in the written examination as well as viva-voce. It is in these circumstances that the computation of marks obtained by each of these candidates would have a direct bearing on the ultimate selection.

10. The consolidated statement of marks obtained by the candidates selected for the viva-voce/interview for the post of Under Secretary for the year 2017 forwarded to the Applicant vide communicated dated 24.01.2018 reflects the following position with regard to the OBC (S L):-

ROLL NO.	*NAME*	*F/M*	*Category*	*Marks/ 900*
17510400	*ASWIN NIROLA*	*MALE*	*OBC(SL)*	*531*
17510190	*ARUN CHETTRI*	*MALE*	*OBC(SL)*	*526.8*
17511103	*DIPENDRA ADHIKARI*	*MALE*	*OBC(SL)*	*525.1*

12. It is seen that the Applicant who was in the second position in the original list of merit of candidates selected for viva-voce/ interview for the post of Under Secretary for the year 2017 is now in the third position in the new list.

13. The Applicant submits that the Applicant had challenged the selection and appointment of the Respondent No.4 by filing Writ Petition No.12 of 2018 titled: ***Arun Chettri v. State of Sikkim & Ors.*** pending adjudication before this Court based on the first list of merit of candidates selected for viva-voce/ interview for the post of Under Secretary for the year 2017 as

he was in the second position. If the selection and appointment of the Respondent No.4 was found to be illegal then it would be the Applicant who, due to his position in the merit list just below the Respondent No.4, must be selected and appointed as Under Secretary. It is the contention of the Applicant that even if this Court were to examine only the merit of the performance of the Petitioner due to which he would be entitled to a higher marks the effect may be to relegate the position of the Applicant lower down and thus, adversely effecting the Applicant.

14. Any person who may be adversely affected by the grant of the reliefs prayed for by the Petitioner must be impleaded as party because in his absence an effective order may be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. The grant of the prayers as prayed for by the Petitioner may change the position of the Applicant in the consolidated merit list adversely affecting him.

15. In the circumstances, the Applicant must be held to be a proper party in the present proceeding. Resultantly, the Application for impleadment is allowed.

16. The Applicant is impleaded as party Respondent.

17. The array of Respondents may be accordingly amended. The Applicant as party Respondent is permitted to file counter affidavit, if so desired.

18. I.A No.01 of 2018 stands disposed.

SLR (2018) SIKKIM 1173

(Before Hon'ble the Acting Chief Justice)

I.A. No. 01 of 2018 in **MAC App. No. 08 of 2018**

The Branch Manager,
Shriram General Insurance Co. Ltd. ..... **APPELLANT**

Versus

Dik Bir Damai and Others ..... **RESPONDENTS**

AND

I.A. No. 01 of 2018 in **MAC App. No. 09 of 2018**

The Branch Manager,
Shriram General Insurance Co. Ltd. ..... **APPELLANT**

Versus

Bhoj Kumar Chettri and Others ..... **RESPONDENTS**

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

For the Respondents: Mr. Ashok Pradhan, Advocate for the Respondent-Claimants.
Ms. Pritima Sunam, Advocate for the Respondent-Owner.

Date of decision: 17th September 2018

A. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of delay Beyond 90 Days in Entertaining Appeal – The cardinal point in condoning delay is that the Court ought to be satisfied that the Appellant was prevented by sufficient cause in preferring the Appeal on time – The Appellant has to put forth *bona fide* grounds for the delay besides

establishing that there was no negligence on their part in initiating steps. The length of the delay is not the consideration while exercising discretion by the Courts, in certain circumstances, a delay of one day may not be condoned lacking acceptable explanation, whereas in other cases inordinate delays can be condoned if the explanation afforded is satisfactory – Each case is distinguishable from the next and must exhibit some *bona fides* and grounds for exercise of discretion by the Court tilted in favour of the Appellant/ Petitioner – In a plethora of Judgments, the Hon'ble Supreme Court has held that sufficient cause should be given a liberal interpretation to ensure that substantial justice is done, but that is only so long as negligence, inaction or lack of *bona fides* cannot be imputed to the party concerned. While considering a Petition for condonation of delay it is relevant to bear in mind that the expiration of the period of limitation prescribed for making an Appeal gives rise to a right in favour of the decree-holder. This right which has thus accrued should not be lightly disturbed on account of a lapse of time.

(Para 7)

B. Motor Vehicles Act, 1988 – S. 173 (1) – The legislation invoked by the Respondents is benevolent and for the welfare of the family/ dependents of the deceased/victim and should not be kept in limbo for the inaction of the Appellant manifesting as injustice to the Respondents-Claimants when compensation for the loss of a member of the family has been computed and granted – Petitions have been filed with a nonchalant attitude reflecting negligence, inaction and lack of *bona fides* and being devoid of merit do not deserve the indulgence of this Court.

(Paras 9 and 10)

Petitions and Appeals dismissed.

Case cited:

1. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

ORDER (ORAL)

Meenakshi Madan Rai, ACJ

1. Since the grounds put forth for the delay in the two Petitions are identical and arise out of the same accident they are being disposed of by this common Order. It is pertinent to mention here that the Learned Motor

Accidents Claims Tribunal, West Sikkim, at Gyalshing (for short "Learned Claims Tribunal"), passed two separate Judgments being MACT Case No.36 of 2016 and MACT Case No.33 of 2016, both dated 28-12-2017 as the Respondents-Claimants were different families in the cases *supra*.

2. The Appellant/Applicant is before this Court seeking condonation of fifty days' delay in filing both the Appeals. The grounds being put forth for the delay are *inter alia* as under;

(i) The impugned Judgment was pronounced on 28-12-2017, copies thereof were forwarded to the Appellant-Company through the Learned Claims Tribunal on 29-12-2017 via e-mail. After receiving the said e-mail, the Appellant immediately applied for the certified copies on 03-02-2018, which were ready on 06-02-2018.

(ii) The Kolkata Branch on receipt of the copies thereof forwarded the matter to the Jaipur Head Office for preferring the Appeals.

(iii) As per the internal procedure, the Jaipur Head Office again sent back the Files to the Kolkata Division Office for appointing an Advocate for defending the cases.

(iv) Due to other practical problem, the Files took considerable amount of time to reach the Kolkata Branch and finally the Appellant appointed the Counsel for defending the same.

3. That the reasons assigned constitute sufficient cause and there being no deliberate delay, it is urged that this Court take a liberal approach in condoning the delay. That, it is a settled proposition of law that Government and Government Undertakings have been permitted some flexibility in case of condonation of delay and the Hon'ble Supreme Court as well as High Courts have upheld the said view in condoning delay. That, the Appellant has a good case and will suffer irreparable loss and injury if the delay in filing the Appeals are not condoned.

4. Learned Counsel for the Respondents-Claimants while vehemently objecting to the Petitions would contend that in the first instance although the delay was of "fifty days" the Appellant has in a most negligent manner computed the delay to be of "fifteen days" in the Petitions indicating their

utter callousness in the matter. That, although it is true that the Court can exercise its discretion in condoning delay, nevertheless delay is required to be explained sufficiently as laid down by the provision of law invoked by the Appellant. In the instant matters, the Appellant has failed to put forth any substantial grounds for the occurrence of the delay and has also not specified the dates pertaining to the movement of the Files to enable assessment of the authenticity of the claims. That, in other matters pertaining to the same accident, the Appellant has released the amounts due to the Claimants, but has adopted a merciless attitude in the instant matters shorn of reasons. That, the legislation being beneficial, the Claimants ought not to suffer despite the compensation having been granted to them, and the grounds taken in the Petitions being frivolous, deserve a dismissal.

5. Learned Counsel for the Respondent-Owner advanced no submissions.

6. I have considered the opposing submissions of Learned Counsel for the parties and also perused all documents on record.

7. The cardinal point in condoning delay is that the Court ought to be satisfied that the Appellant was prevented by sufficient cause in preferring the Appeal on time. It is also settled law that the Appellant has to put forth *bona fide* grounds for the delay besides establishing that there was no negligence on their part in initiating steps. The length of the delay is not the consideration while exercising discretion by the Courts, in certain circumstances, a delay of one day may not be condoned lacking acceptable explanation, whereas in other cases inordinate delays can be condoned if the explanation afforded is satisfactory. In other words, each case is distinguishable from the next and must exhibit some *bona fides* and grounds for exercise of discretion by the Court tilted in favour of the Appellant/Petitioner. In a plethora of Judgments the Hon'ble Supreme Court has held that sufficient cause should be given a liberal interpretation to ensure that substantial justice is done, but that is only so long as negligence, inaction or lack of *bona fide*s cannot be imputed to the party concerned. That, while considering a Petition for condonation of delay it is relevant to bear in mind that the expiration of the period of limitation prescribed for making an Appeal gives rise to a right in favour of the decree-holder. That, this right which has thus accrued should not be lightly disturbed on account of a lapse of time.

8. In ***Esha Bhattacharjee*** vs. ***Managing Committee of Raghunathpur Nafar Academy and Others***[1] the Hon'ble Supreme Court while enunciating the principles applicable to an application for condonation of delay would *inter alia* hold as hereinbelow extracted;

> "**21.** From the aforesaid authorities the principles that can broadly be culled out are:
>
> ....
>
> **21.4.** (*iv*) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
>
> **21.5.** (*v*) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
>
> ....
>
> **21.7.** (*vii*) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
>
> ....
>
> **21.9.** (*ix*) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
>
> **21.10.** (*x*) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.
>
> ....

[1] (2013) 12 SCC 649

> **22.** To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:
>
> **22.1.** (*a*) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.
>
> ……………………………………………………………”

9. On the bedrock of the aforesaid principles, we may now examine the grounds put forth by the Appellant. Admittedly, the impugned Judgments were pronounced on 28-12-2017. It is also undisputed that the Judgments were forwarded to the Appellant through the Learned Claims Tribunal on 29-12-2017 via email. Certified copies of the Judgment were however applied for by the Appellant on 03-02-2018, after thirty-five days of pronouncement. No explanation issues for such delay, despite copy being available to the Appellant through email giving them sufficient notice to enable initiation of steps. That having been said, the next ground urged was that the Kolkata Branch Office forwarded the same to the Jaipur Head Office. Pausing here for a moment, it is apparent that no date pertaining to this aspect has been revealed before this Court. Thereafter, according to the Appellant, as per the internal procedure the Files were sent back to the Kolkata Division by the Jaipur Head Office for appointing an Advocate which also took some time. No dates or days are forthcoming herein as well. It is not denied by Learned Counsel for the Appellant that he was representing the Appellant before the Learned Claims Tribunal and was in the know of the facts in dispute, therefore why the delay occurred in engaging a Counsel is inexplicable in the absence of details. The date of appointment of the Counsel has also not been stated. That apart, practical problems that arose on various dates or the number of days that elapsed while taking such steps are devoid in the explanation furnished to this Court. It is not disputed that the impugned Judgments granted compensation to the Respondents-Claimants being the parents and other dependents of the deceased who was earning and was contributing to the family expenses. It is also not denied that the Respondents-Claimants were entitled to

compensation. If the Appellant was aggrieved by the alleged wrong findings of the Learned Claims Tribunal on account of deductions made and addition of future prospects the alternative open to the Appellant was to approach this Court on time, and if done belatedly furnish sufficient and *bona fide* reasons for the delay. Relying on precedents concerning Government Departments appears to be sans reason as the Appellant has not put forth any ground to establish that it is a Government Organisation or a Public Sector Undertaking. By mere fact that it is an unwieldy Organisation and decision-making process cumbersome does not entitle the Appellant to expect the Court to exercise discretion in their favour, when even the Petition which ought to mention delay of "fifty days" has been reflected as "fifteen days" showing haphazard drafting of the Petition with no attention to what is infact the pivotal point. The grounds for delay lack in *bona fides* and do not reveal as to how the Appellant was prevented by sufficient cause in approaching the Court or how the circumstances were beyond the control of the Appellant. Indeed the legislation invoked by the Respondents is benevolent and for the welfare of the family/dependents of the deceased/ victim and, in my considered opinion, should not be kept in limbo for the inaction of the Appellant manifesting as injustice to the Respondents-Claimants when compensation for the loss of a member of the family has been computed and granted.

10. In view of the gamut of facts and circumstances put forth for the delay, it is but relevant to opine that the Petitions have been filed with a nonchalant attitude reflecting negligence, inaction and lack of *bona fides* and being devoid of merit do not deserve the indulgence of this Court. Consequently, I am not inclined to exercise the discretion vested in this Court, in favour of the Appellant.

11. Petitions for condonation of delay are rejected and disposed of as also the Appeals.

12. No order as to costs.

13. Records be remitted forthwith.

SLR (2018) SIKKIM 1180
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. M.C. No. 15 of 2017

Mr. Shrish Khare ….. PETITIONER

Versus

Mr. C. B. Basnett and Another ….. RESPONDENTS

For the Petitioner: Dr. Doma T. Bhutia and Ms. Preeti Chettri, Advocates.

For the Respondents: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chettri, Ms. Malati Sharma and Mr. Suraj Chettri, Advocates.

Date of decision: 18th September 2018

A. Code of Criminal Procedure, 1973 – S. 203 – Dismissal of Complaint – S. 254 – Discharge of Accused – On 25.05.2016 the learned Chief Judicial Magistrate would examine the complaint and register a private complaint case and list it for examination of the complainant – On 09.06.2016 the complainant would be examined – On 07.07.2016 and 22.07.2017 the complainant witnesses would be examined – From the records of the order passed by the learned Chief Judicial Magistrate, it would be evident that the proceeding under S. 204 Cr.P.C. had been completed and summons to the accused issued – On 05.09.2016 the learned Counsel for Respondent No.1 and 2 would file applications under S. 197 Cr.P.C. which was heard on 04.10.2016 and order reserved. On 25.10.2016, the impugned order would be passed by the learned Chief Judicial Magistrate *"quashing"* the Criminal complaint for lack of sanction under S. 197 Cr.P.C – Being dissatisfied with the impugned order dated 25.10.2016, a revision would be preferred before the Sessions Court by the Petitioner. The learned Sessions Judge vide impugned order dated 29.08.2017 would decline to interfere with the order passed by the learned Chief Judicial Magistrate – The question for consideration is whether the

impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate *"quashing"* the complaint filed by the Petitioner would amount to a discharge under S. 245 (2) Cr.P.C. – In re: *Iris Computers Ltd.* the Supreme Court would opine that Cr.P.C. does not provide for any provision affording opportunity to the accused until the issuance of process to him under S. 204 Cr.P.C. Before issuing summons under S. 204 Cr.P.C. the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a *prima facie* case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Ss. 200 and 202 Cr.P.C. The first stage of dismissal of the complaint before the issuance of process arises under S. 203 Cr.P.C., at which stage the accused has no role to play. After the issuance of process, the question of the accused approaching the Court by making an application under S. 203 Cr.P.C. for dismissal of the complaint is impermissible because by then the stage of S. 203 is already over and the Magistrate has proceeded further to S. 204 stage – Held, the impugned order of the Chief Judicial Magistrate dated 25.10.2016 amounts to an order of discharge against Respondent Nos. 1 and 2 under S. 245(2) Cr.P.C. for want of sanction under S. 197 Cr.P.C.

(Paras 8, 11, 16, 20, 27, 28 and 43)

B. Code of Criminal Procedure, 1973 – S. 203 – Dismissal of Complaint – The applications of Respondent No. 1 and 2 sought for dismissal of the complaint under S. 197 Cr.P.C. The learned Chief Judicial Magistrate instead "quashed" the complaint – There is a fundamental difference between dismissal and quashing. To dismiss would imply to terminate without further hearing and to quash would mean to annul or make void.

(Para 29)

C. Code of Criminal Procedure, 1973 – S. 197 – Prosecution of Public Servants – S. 245 – Discharge of Accused – The application filed by Respondent Nos. 1 and 2 is under S. 197 Cr.P.C which mandate that no Court shall take "cognizance" if the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is done by a person who is a public servant not removable from his office save by or with the sanction of the Government – The procedure to be followed in a complaint case for trial of warrant cases after the process under S. 204 Cr.P.C. is provided in Ss. 244 and 245 Cr.P.C. The

application seeking dismissal of the complaint on the ground of lack of sanction filed by Respondent Nos.1 and 2 ought to have invoked the provision of S. 245 Cr.P.C. – Merely because Respondent Nos. 1 and 2 failed to specify the source of power i.e. S. 245 (2) Cr.P.C. or for that matter even if a wrong provision had been invoked would not disentitle the Court to exercise the power it had to render justice. The learned Chief Judicial Magistrate may have not used the appropriate word by holding "the complaint against accused nos. 1 and 2 stands quashed for want of sanction under Section 197, Cr.P.C., 1973" but the very fact that the learned Chief Judicial Magistrate decided to proceed against the accused No. 3 in the same complaint makes it evident that in effect Respondent Nos. 1 and 2 had been discharged.

(Para 31)

E. Code of Criminal Procedure, 1973 – S. 197 – Prosecution of Public Servants – Whether on the allegations made against Respondent Nos.1 and 2, sanction as mandated under S. 197 Cr.P.C. was required – Allegations made in the complaint against Respondent No.1 shows that the same were allegedly done "acting or purporting to act in the discharge of his official duty." – There is an elementary difference between public servant committing a criminal act *per se* and the doing of an act in his official duty or purporting to be in his official duty which may and could be construed as a criminal act – Perusal of the complaint as well as the pre-summoning deposition of the petitioner as well as his witnesses does not even *prima facie* indicate any conspiracy between Respondent Nos. 1, 2 and accused No. 3 – A criminal accusation is a serious thing. Not only the accusation must be specific but *prima facie* material must be brought on record. If no such material is available the Court is fully within its jurisdiction to discharge the accused and if it is done there would be no reason for the Revisional Court or the High Court in exercise of its inherent powers to interfere with such an order of discharge – Even if in doing their official duty, Respondent Nos.1 and 2 acted in excess of their duty, but there is a reasonable connection between the act and the performance of the official duty, the excess would not be a sufficient ground to deprive them of the protection as they were admittedly public servants.

(Paras 32, 40 and 41)

Petition dismissed.

Chronological list of cases cited:

1. Ganesh Narayan Hegde v. S. Bangarappa and Others, 1995 Cri. L.J. 2935.
2. Adalat Prasad v. Rooplal Jindal and Others, (2004) 7 SCC 338.
3. Iris Computers Ltd. v. Askari Infotech (P) Ltd. and Others, (2015) 14 SCC 399.
4. K. M. Mathew v. State of Kerala and Another, (1992) 1 SCC 217.
5. Urmila Devi v. Yudhvir Singh, (2013) 15 SCC 624.
6. Ajoy Kumar Ghose v. State of Jharkhand and Another, (2009) 14 SCC 115.
7. N. Mani v. Sangeetha Theatre and Others, (2004) 12 SCC 278.
8. Inspector of Police and Another v. Battenapatla Venkata Ratnam and Another, (2015) 13 SCC 87.
9. Parkash Singh Badal and Another v. State of Punjab and Others, (2007) 1 SCC 1.
10. P.K. Pradhan v. State of Sikkim, (2001) 6 SCC 704.
11. D. T. Virupakshappa v. C. Subash, (2015) 12 SCC 231.
12. Sankaran Moitra v. Sadhna Das and Another, (2006) 4 SCC 584.
13. Prasob v. State of Kerala, Order dated 08.01.2009 in Crl. Rev. Pet. No. 475 of 2008/ https://indiankanoon.org/doc/129986.
14. Nanjappa v. State of Karnataka, (2015) 14 SCC 186.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Petitioner seeks to invoke the inherent powers of this Court to challenge the impugned order dated 29.08.2016 passed by the learned Sessions Judge, South Sikkim at Namchi in Criminal Revision Case No. 5 of 2016 as well as the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate South Sikkim at Namchi in Private Complaint Case No.03 of 2016.

2. A preliminary issue raised by Mr. N. Rai, learned Senior Advocate for the Respondent regarding the scope of Section 482 Code of Criminal Procedure, 1973 (Cr.P.C.) must necessarily be noted before examining the merits of the case. Relying upon the judgment of the Supreme Court in re: ***Ganesh Narayan Hegde v. S. Bangarappa & ors.***[1] he would emphasise upon paragraph 12 quoted below and submit that:

> ***"12****. While it is true that availing of the remedy of the revision to the Sessions Judge under Section 399 does not bar a person from invoking the power of the High Court under Section 482, it is equally true that the High Court should not act as a second revisional court under the garb of exercising inherent powers. While exercising its inherent powers in such a matter it must be conscious of the fact that the learned Sessions Judge has declined to exercise his revisory power in the matter. The High Court should interfere only where it is satisfied that if the complaint is allowed to be proceeded with, it would amount to abuse of process of Court or that the interest of justice otherwise call for quashing of the charges. …….*"

3. The impugned order dated 29.08.2017 passed by the Sessions Judge would decline to interfere with the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate by which the Criminal Complaint preferred by the Petitioner was *"quashed"* on the ground that sanction as required under Section 197 Cr.P.C. had not been obtained by the Petitioner for prosecuting the Respondents who are police officers.

4. At the outset Mr. N. Rai would draw attention to paragraph 10 of the impugned order dated 29.08.2017 passed by the learned Sessions Judge in which it has been recorded that while concluding the arguments learned Counsel for the Petitioner submitted that he did not intend to press the revision against the Respondent No.2. Dr. Doma T. Bhutia, learned Counsel for the Petitioner would fairly concede and submit that, therefore, she would press the present petition only against the Respondent No.1. The

[1] 1995 CRI L.J. 2935

Respondent No.1, it is urged, at the relevant time was the Station House Officer (SHO) of the Namchi Police Station.

5. On the strength of First Information Report (FIR) filed by one Smt. Rita Pradhan (accused no.3) on 31.12.2012 at about 1250 hrs at the Namchi Police Station against the Petitioner a criminal prosecution case would be launched against the Petitioner. After the judgment rendered by the Court of the Judicial Magistrate dated 30.05.2014 holding that the prosecution had failed to produce any evidence against the Petitioner to establish his guilt under Section 324 and 509 Indian Penal Code, 1860 (IPC) beyond reasonable doubt he would be acquitted. Thereafter, a Criminal Complaint would be filed on 25.05.2016 by the Petitioner. The Criminal Complaint would array the Respondent No. 1 and 2 and accused no. 3 as the accused persons and seek conviction against the Respondent Nos. 1 and 2 under Section 220/120B/500/34 IPC.

6. On examination of the complaint the learned Chief Judicial Magistrate vide order dated 05.08.2016 would take cognizance of the offences under Section 220/120B/500/34 IPC against the Respondent Nos. 1 and 2 and under Section 120B/500/34 IPC against the Respondent No.3 and issue summons to them. On 04.10.2016 after the Respondents would appear before the Court the order of the learned Chief Judicial Magistrate would record that the learned Counsel for the Respondent Nos.1 and 2 had submitted that sanction was required under Section 197 Cr.P.C. as he was merely doing his duty as a public officer. *Per contra* the learned Counsel for the Petitioner would submit before the learned Chief Judicial Magistrate that *prima facie* case had been made out against the Respondent Nos. 1 and 2 and further that Section 197 Cr.P.C. renders protection to public servants who are honestly doing their duty which protections cannot be given to the Respondent Nos. 1 and 2 who have committed the illegal acts.

7. On 25.10.2016 the learned Chief Judicial Magistrate would render the impugned order holding that sanction under Section 197 Cr.P.C. was required in the present case and in view of the fact that sanction had not been obtained the complaint against Respondent Nos. 1 and 2 was liable to be *"quashed"*. The complaint thus stood *"quashed"* for want of sanction under Section 197 Cr.P.C. However, it was directed that the case shall proceed against the accused no. 3.

8. Being dissatisfied with the impugned order dated 25.10.2016 a revision would be preferred before the Sessions Court by the Petitioner. The learned Sessions Judge vide impugned order dated 29.08.2017 would decline to interfere with the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate holding that the Respondent Nos. 1 and 2 were discharging their official duty and their acts were closely connected with the discharge of their official duty and therefore the learned Chief Judicial Magistrate was justified in quashing the proceedings against Respondent Nos. 1 and 2 for want of sanction under Section 197 Cr.P.C.

9. Complaints to Magistrate fall under Chapter XV of Cr.P.C.

10. Section 200 deals with examination of the Complainant. The said section provides that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the Complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the Complainant and the witnesses, and also by the Magistrate. The two provisos to Section 200 Cr.P.C. are not attracted in the present case.

11. On 25.05.2016 the learned Chief Judicial Magistrate would examine the complaint and register a private complaint case and list it for examination of the complainant. On 09.06.2016 the complainant would be examined. On 07.07.2016 and 22.07.2017 the complainant witnesses would be examined.

12. Under Section 202 Cr.P.C. any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 Cr.P.C., may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct and investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

13. Under Section 203 Cr.P.C. if, after considering the statement on oath (if any) of the Complainant and the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of

opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

14. Under Section 204 Cr.P.C. if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be (a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction. In a case instituted upon a complaint made in writing, every summons or warrant issued under sub-section 1 of Section 204 Cr.P.C. shall be accompanied by a copy of such complaint.

15. The learned Chief Judicial Magistrate would record in the order dated 05.08.2016 that:

> *"On a perusal of the evidence of the complainant, his witnesses and the documents prima facie I am satisfied that there is sufficient material under Section 220/120-B/500/34, I.P.C. against accused no. 1 and 2 and under section 120-B/500/34, I.P.C. against accused no.3. Accordingly, this Court takes cognizance. Issue summons to accused no. 1, 2 and 3 returnable by 22.8.2016. To:-22.08.2016. For:-Appearance of accused no. 1, 2 and 3."*

16. From the records of the order passed by the learned Chief Judicial Magistrate it would be evident that the proceeding under Section 204 Cr.P.C. had been completed and summons to the Respondent Nos. 1 and 2 and accused no. 3 had been issued as accused in the said proceedings.

17. Evidently, since the Learned Judicial Magistrate had found "*sufficient material under Section 220/120-B/500/34, I.P.C. against accused no. 1 and 2"* at the time of taking cognizance this was case that would be governed by Chapter XIX of Cr.P.C. for trial of warrant cases by

Magistrates. Chapter XIX of Cr.P.C. is in two parts. Part – A deals with cases instituted on a police report. Since this was a complaint case Part-B of Chapter XIX of Cr.P.C. dealing with cases instituted otherwise than a police report would apply. Section 244 of Cr.P.C. would apply in a warrant case instituted otherwise than a police report after the accused appears or is brought before a Magistrate. Section 244 Cr.P.C. enjoins upon the Magistrate to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. On an application by the prosecution summons may be issued to witnesses directing him to attend or to produce any document or other thing.

18. On 22.08.2016 the Respondent No.1 and accused no. 3 would appear before the learned Chief Judicial Magistrate and bail would be granted to them. On 27.08.2016 the Respondent No. 2 would appear before the learned Chief Judicial Magistrate and he would also be granted bail. The learned Chief Judicial Magistrate would thereafter, fix 05.09.2016 for examination of the complainant, on 07.09.2016 for witnesses Nos. 2 and 3 and on 12.09.2016 for witnesses No. 4 and 5. Evidently, the learned Chief Judicial Magistrate was proceeding under Section 244 Cr.P.C. by fixing 05.09.2016 for examination of complainant on 07.09.2016 and 12.09.2016 for the complainant witnesses.

19. Section 245 Cr.P.C. provides when accused shall be discharged. Section 245 Cr.P.C. is reproduced herein below:

> ***"245. When accused shall be discharged.-*** *(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.*
>
> *(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."*

20. On 05.09.2016 the learned Counsel for the Respondent No.1 and 2 would file applications under Section 197 Cr.P.C. which was heard on 04.10.2016 and order reserved. On 25.10.2016 the impugned order would be passed by the learned Chief Judicial Magistrate quashing the Criminal Complaint for lack of sanction under Section 197 Cr.P.C.

21. Quite clearly the evidence required to be taken under Section 244 Cr.P.C. had not been taken by the learned Chief Judicial Magistrate when on 25.10.2016 the Criminal Complaint was *"quashed"* for lack of sanction under 197 Cr.P.C.

22. Dr. Doma T. Bhutia, learned Counsel for the Petitioner would submit that the learned Chief Judicial Magistrate having taking cognizance and issued the process under Section 204 Cr.P.C. did not have the power to move the clock back and quash the complaint and by doing so would amount to recall of the order issuing process dated 05.08.2016. She would further submit that the only remedy open in such a situation would be to approach this Court under Section 482 Cr.P.C. Dr. Doma T. Bhutia would rely upon the judgment of the Supreme Court in re: ***Adalat Prasad v. Rooplal Jindal & Ors.***[2].

23. In re: ***Adalat Prasad (supra)*** the Supreme Court would hold:

> *"**14.** But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of*

[2] (2004) 7 SCC 338

the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

***15.** It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.*

***16.** Therefore, in our opinion the observation of this Court in the case of Mathew [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that for recalling an*

erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

24. In re: ***Iris Computers Ltd. v. Askari Infotech (P) Ltd.***[3] ***& Ors.***, the Supreme Court would hold:

*"**8.** The point that would fall for our consideration and decision is, whether the learned Magistrate was justified in recalling the order passed by him issuing summons to the respondents upon an application made by them under Sections 202, 203 and 245 of the Code.*

***9.** This Court has dealt with the question of recall of a process issued under Section 204 of the Code in Adalat Prasad case [Adalat Prasad v. Rooplal Jindal, (2004) 7 SCC 338 : 2004 SCC (Cri) 1927] and opined that the Code does not contemplate or provide for any provision affording opportunity to the accused until the issuance of process to him under Section 204. This Court has observed that before issuing summons under Section 204 of the Code the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a prima facie case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Sections 200 and 202 of the Code. The first stage of dismissal of the complaint before the issuance of process arises*

[3] (2015) 14 SCC 399

under Section 203 of the Code, at which stage the accused has no role to play. Subsequent to issuance of process, the question of the accused approaching the court by making an application under Section 203 of the Code for dismissal of the complaint is impermissible because by then the stage of Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

10. *Therefore, the crux of the matter rests into the existence of two different scenarios; the former involving only the complainant's role and the latter introducing the accused. The former constitutes cognizance of the offence on complaint, satisfaction reached by the Magistrate that a prima facie case is made out and thereafter, issuance of process to the accused. It is only after the aforesaid stages are complete; the next stage is triggered enabling the accused to actively participate in the proceedings. The dismissal of complaint by the Magistrate under Section 203 evidently falls into the former stages of proceedings when the Magistrate has to base his opinion as to the existence of sufficient ground for proceeding towards the second stage on the statements of the complainant and the witnesses along with the result of the inquiry conducted under Section 202. It is for obvious reasons that none of the former stages in the Code provide for hearing the summoned accused, the said being only preliminary stages and the stage of hearing of the accused arising at subsequent stages provided for in the latter provisions in the Code. (See Bholu Ram v. State of Punjab [Bholu Ram v. State of Punjab, (2008) 9 SCC 140: (2008) 3 SCC (Cri) 710].)*"

25. In re: ***Adalat Prasad (supra)*** on an application filed by the

Appellant therein under Section 203 Cr.P.C. the Trial Court vide its order dated 28.01.1995 after hearing the parties recalled the summons issued earlier. This order of the learned Trial Judge recalling the summons originally issued by him was challenged before the High Court on the ground that the Magistrate had no jurisdiction to recall summons issued under Section 204 Cr.P.C. The High Court allowed the revision on the ground that the Trial Court did not have the power to review its own order. The Supreme Court would examine its earlier judgment in re: ***K. M. Mathew v. State of Kerala & Anr.***[4] wherein it was held that it was open to the Court issuing summons to recall the same on being satisfied that the issuance of summons was not in accordance with law. The Supreme Court would hold that the observation in re: ***K. M. Mathew (supra)*** that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Cr.P.C. which has not provided for review and prohibits interference at interlocutory stages. The Supreme Court would hold that if a Magistrate take cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Section 200 and 202 Cr.P.C., the order of the Magistrate may be vitiated, but then the relief and aggrieved accused can obtain at that stage is not by invoking Section 203 of the Cr.P.C. because the Cr.P.C. does not contemplate a review of an order. Hence, in the absence of any review power with the Subordinate Criminal Courts, the remedy lies in invoking Section 482 of the Cr.P.C.

26. In re: ***Urmila Devi v. Yudhvir Singh***[5] the Supreme Court would have occasion to explain its judgment in re: ***Adalat Prasad (supra)*** and hold that the revisional jurisdiction under Section 397 Cr.P.C. is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons.

27. In re: ***Iris Computers Ltd. (supra)*** the learned Magistrate returned the complaint filed by the Appellant therein on the grounds of lack of territorial jurisdiction and also recalled the order issuing summons to the Respondents therein on the application filed by the Respondents therein under Sections 202, 203 and 245 Cr.P.C. The Supreme Court would hold that it had dealt with the question of recall of process issued under Section

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[4] (1992) 1 SCC 217
[5] (2013) 15 SCC 624

204 Cr.P.C. in re: ***Adalat Prasad (supra)*** and opined that Cr.P.C. does not contemplate or provide for any provision affording opportunity to the accused until the issuance of process to him under Section 204 Cr.P.C. The Supreme Court would also note that in re: ***Adalat Prasad (supra)*** it had observed that before issuing summons under Section 204 Cr.P.C. the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a *prima facie* case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Section 200 and 202 Cr.P.C. The first stage of dismissal of the complaint before the issuance of process arises under Section 203 Cr.P.C., at which stage the accused has no role to play. Subsequent to the issuance of process, the question of the accused approaching the Court by making an application under Section 203 Cr.P.C. for dismissal of the complaint is impermissible because by then the stage of Section 203 is already over and the Magistrate has proceeded further to Section 204 stage. The Supreme Court would hold that the crux of the matter rests into the existence of two different scenarios; the former involving only the complainant's role and the latter introducing the accused. The former constitutes cognizance of the offence on complaint, satisfaction reached by the Magistrate that a *prima facie* case is made out and thereafter, issuance of process to the accused. It is only after the aforesaid stages are complete; the next stage is triggered enabling the accused to actively participate in the proceedings. The dismissal of complaint by the Magistrate under Section 203 evidently falls into the former stages of proceedings when the Magistrate has to base his opinion as to the existence of sufficient ground for proceeding towards the second stage on the statements of the complainant and the witnesses along with the result of the inquiry conducted under Section 202. It is for obvious reasons that none of the former stages in the Code provide for hearing the summoned accused, the said being only preliminary stages and the stage of hearing of the accused arising at subsequent stages provided for in the latter provisions in the Code.

28. On 22.08.2016 and 27.08.2016 the Respondent Nos. 1 and 2 as well as accused no. 3 would appear as accused persons before the learned Chief Judicial Magistrate. Thus, evidently, as per the scheme of Cr.P.C. as explained by the order of the Supreme Court in re: ***Iris Computers (supra)*** the present case had reached the next stage when the accused was introduced and brought before the learned Chief Judicial Magistrate enabling

the accused persons to actively participate in the proceedings. Evidently again, it is at this stage that the Respondent Nos. 1 and 2 filed the applications dated 05.09.2016 under Section 197 Cr.P.C. and sought dismissal of the complaint filed by the complainant on the ground that the alleged role of the Respondent Nos. 1 and 2 as alleged in the complaint fell within the provisions of Section 197 Cr.P.C. and they being public servants could not be prosecuted without obtaining prior sanction. The question which would therefore arise for consideration in the present case is whether the impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate *"quashing"* the complaint filed by the Petitioner would amount to a discharge under Section 245 (2) Cr.P.C.?

29. No application for recall of summons as was done in re: ***Adalat Prasad (supra)*** as well as ***Iris Computers Ltd. (supra)*** was made before the learned Chief Judicial Magistrate under Section 203 by the Respondent Nos. 1 and 2 in the present case. The applications clearly sought for dismissal of the complaint under Section 197 Cr.P.C. The learned Chief Judicial Magistrate instead *"quashed"* the complaint. There is a fundamental difference between dismissal and quashing. To dismiss would imply to terminate without further hearing and to quash would mean to annul or make void. Section 197 Cr.P.C. provides that when any person who is a public servant not removal from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take *"cognizance"* of such offence except with the previous sanction.

30. In re: ***Ajoy Kumar Ghose v. State of Jharkhand & Anr.***[6] the Supreme Court would hold:

> *"**24.** Now, there is a clear difference in Sections 245(1) and 245(2) of CrPC. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) CrPC.*

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[6] (2009) 14 SCC 115

> *23. Essentially, the applicable sections are Sections 244 and 245 CrPC since this is a warrant trial instituted otherwise than on police report. There had to be an opportunity for the prosecution to lead evidence under Section 244(1) CrPC or to summon its witnesses under Section 244(2) CrPC. This did not happen and instead, the accused proceeded to file an application under Section 245(2) CrPC on the ground that the charge was groundless.*

25. *The situation under Section 245(2) CrPC is, however, different. There, under sub-section (2), the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The words appearing in Section 245(2) CrPC "at any previous stage of the case", clearly bring out this position.*

26. *It will be better to see what is that "previous stage". The previous stage would obviously be before the evidence of the prosecution under Section 244(1) CrPC is completed or any stage prior to that. Such stages would be under Section 200 CrPC to Section 204 CrPC. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a court has made the complaint or further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 CrPC. Under Section 201 CrPC, if the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper court or direct the complainant to a proper court.*

27. *Section 202 CrPC deals with the postponement of issue of process. Under sub-section (1), he may direct the investigation to be made by the police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 202(1)(a) CrPC, the Magistrate cannot give such a direction for such an investigation, where he finds that offence complained of is triable exclusively by the Court of Session. Under Section 202(1)(b) CrPC, no such direction can be given where the complaint has been made by the court.*

28. *Under Section 203 CrPC, the Magistrate, after recording the statements on oath of the complainant and of the witnesses or the result of the inquiry or investigation ordered under Section 202 CrPC, can dismiss the complaint if he finds that there is no sufficient ground for proceeding.*

29. *On the other hand, if the Magistrate comes to the conclusion that there is sufficient ground for proceeding, he can issue the process under Section 204 CrPC. He can issue summons for the attendance of the accused and in a warrant case, he may issue a warrant, or if he thinks fit, a summons, for securing the attendance of the accused. Sub-sections (2), (3), (4) and (5) of Section 204 CrPC are not relevant for our purpose. It is in fact here, that the previous stage referred to under Section 245 CrPC normally comes to an end, because the next stage is only the appearance of the accused before the Magistrate in a warrant case under Section 244 CrPC.*

30. *Under Section 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) CrPC, where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) CrPC, and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.*

> ***31.*** *The situation under Section 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge.*"

31. The application filed by the Respondent Nos. 1 and 2 is under Section 197 Cr.P.C. Section 197 Cr.P.C. is the mandate that no Court shall take *"cognizance"* if the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is done by a person who is a public servant not removable from his office save by or with the sanction of the Government. The procedure to be followed in a complaint case for trial of warrant cases after the process under Section 204 Cr.P.C. is provided in Section 244 and 245 Cr.P.C. The application seeking dismissal of the complaint on the ground of lack of sanction filed by the Respondent Nos.1 and 2 ought to have invoked the provision of Section 245 Cr.P.C. As held by the Supreme Court in re: ***Ajoy Kumar Ghose (supra)*** the learned Chief Judicial Magistrate had the power and jurisdiction to discharge the Respondent Nos. 1 and 2 under the provision of Section 245 (2) Cr.P.C. even before the taking of the evidence of the prosecution. Merely because the Respondent Nos. 1 and 2 failed to specify the source of power i.e. Section 245 (2) Cr.P.C. or for that matter even if a wrong provision had been invoked would not disentitle the Court to exercise the power it had to render justice. The learned Chief Judicial Magistrate may have not used the appropriate word by holding *"the complaint against accused nos. 1 and 2 stands quashed for want of sanction under Section 197, Cr.P.C., 1973"* but the very fact that the learned Chief Judicial Magistrate decided to proceed against the accused no.3 in the same complaint makes it evident that in effect the Respondent Nos. 1 and 2 had been discharged. This Court is inclined to take this view on the strength of the settled proposition reiterated by the Supreme Court in several judgments including in re: ***N. Mani v. Sangeetha Theatre & Ors.***[7] in which it would be held:

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[7] (2004) 12 SCC 278

> ***"9.** It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."*

32. This brings us to the moot issue as to whether on the allegations made by the Petitioner against the Respondent Nos.1 and 2, sanction as mandated under Section 197 Cr.P.C. was required. There is no quarrel that Respondent No.1 or 2 are public servants.

33. Dr. Doma T. Bhutia would rely upon the judgments of the Supreme Court in re: ***Inspector of Police & Anr. v. Battenapatla Venkata Ratnam & Anr.***[8]; ***Parkash Singh Badal & Anr. v. State of Punjab & Ors.***[9]***; P.K. Pradhan v. State of Sikkim***[10] and submit that the allegations in the complaint filed by the Petitioner would suffice to reflect that the alleged act of the Respondent Nos. 1 and 2 were beyond the scope of their official duty and as such no sanction was required to be taken.

34. In re: ***Battenapatla Venkata Ratnam (supra)*** the Supreme Court would hold:

> ***"7.** No doubt, while the respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty". That question is no more res integra. In Shambhoo Nath Misra v. State of U.P. [(1997) 5 SCC 326 : 1997 SCC (Cri) 676] , at para 5, this Court held that: (SCC p. 328)*
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> *"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund, etc. can he be said to have acted in discharge of his official duties. It is not the official duty*

[8] (2015) 13 SCC 87
[9] (2007) 1 SCC 1
[10] (2001) 6 SCC 704

of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

8. *In Parkash Singh Badal v. State of Punjab [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , at para 20 this Court held that: (SCC pp. 22-23)*

"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."

and thereafter, at para 38, it was further held that: (Parkash Singh Badal case [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , SCC p. 32)

"38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

9. *In a recent decision in Rajib Ranjan v. R. Vijaykumar [(2015) 1 SCC 513 : (2015) 1 SCC (Cri) 714] at para 18, this Court has taken the view that: (SCC p. 521)*

> *"18. ... even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."*
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> *(emphasis supplied)*

10. *Public servants have, in fact, been treated as a special category under Section 197 CrPC, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as a shield to protect corrupt officials. In Subramanian Swamy v. Manmohan Singh [(2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] , at para 74, it has been held that the provisions dealing with Section 197 CrPC must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote: (SCC pp. 101-02)*

> *"74. ... Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption.*

11. *The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed*

these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only."

35. *In re:* ***P.K. Pradhan (supra)*** the Supreme Court would hold:

*"**5.** The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government, touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation.*

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***15.** Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of*

the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

36. *Per contra* Mr. N. Rai would submit that the allegation in the complaint taken in its entirety would reflect that all the alleged acts imputed on the Respondent Nos. 1 and 2 would fall squarely within the phrase *"acting or purporting to act in the discharge of his official duty."* He would rely upon the judgment of the Supreme Court in re: ***D. T. Virupakshappa v. C. Subash***[11] ***and Sankaran Moitra v. Sadhna Das & Anr.***[12]**.**

[11] (2015) 12 SCC 231
[12] (2006) 4 SCC 584

37. *In re:* ***D. T. Virupakshappa (supra)*** the Supreme Court would hold:

*“**5.** The question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of inception as held by this Court in Om Prakash v. State of Jharkhand [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] . To quote: (SCC p. 94, para 41)*

“41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea.”

***6**. In the case before us, the allegation is that the appellant exceeded in exercising his power during investigation of a criminal case and assaulted the respondent in order to extract some information with regard to the death of one Sannamma, and in that connection, the respondent was detained in the police station for some time. Therefore, the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 CrPC, in case, the government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary.*

7. *The issue of "police excess" during investigation and requirement of sanction for prosecution in that regard, was also the subject-matter of State of Orissa v. Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104] , wherein, at para 7, it has been held as follows: (SCC pp. 46-47)*

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection

of this section is available if the act falls within the scope and range of his official duty.”

(emphasis supplied)

***8.** In Om Prakash [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] , this Court, after referring to various decisions, particularly pertaining to the police excess, summed up the guidelines at para 32, which reads as follows: (SCC p. 89)*

“32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh [K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104]). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.”

(emphasis supplied)

***9**. In our view, the above guidelines squarely apply in the case of the appellant herein. Going by the factual matrix, it is*

evident that the whole allegation is on police excess in connection with the investigation of a criminal case. The said offensive conduct is reasonably connected with the performance of the official duty of the appellant. Therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government. The High Court missed this crucial point in the impugned order.”

38. In re: ***Sankaran Moitra (supra)*** the Supreme Court would hold:

“22. *Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question.”*

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“25*. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction,*

people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned counsel for the complainant that this is an eminently fit case for grant of such sanction.”**.**

39. With regard to Respondent No.1 the allegations in the complaint were:

“**2.** *That the respondent no.1/accused person no.1 is presently posted as Deputy Commandant, Sikkim Armed Police, Pangthang, East Sikkim. While the respondent no.2/accused no.2 is an ex-police Sub-Inspector of Sikkim police, Government of Sikkim.*

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8. *That the call and the request for seeking police help in order to avoid any law and order problem was received by the respondent no.1/accused no.1, who after some time sent three constables to Nayuma Indane premises in order to pacify and control the respondent no.3/accused no.3 and to avoid any law and order problem.*

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13. *That although a hue and cry massage was already communicated to the respondent no.1/accused no.1 by the complainant and later by the three constables for sending a lady constable to control the respondent no.3/accused no.3 but he remained cool and intentionally did not take any further steps to control the respondent no.3/accused no.3.*

It is stated that the respondent no.1/accused no.1 intentionally did not take any further steps to avoid any criminal acts of the respondent no.3/accused no.3 and also did not maintain any G.D. Entry in the Namchi Police Station concerning the telephonic complaint of the complainant and further request of the three constables for sending a lady constable to control the respondent no.3/accused no.3.

It is stated that if the respondent no.1/accused no.1 would had taken a serious note of the telephonic complaint made by the complainant and the three constables in that situation the respondent no.3/accused no.3 would have not got any chance to collect a mob during her second return and further to enter into the office of the complainant with an intention to assault him and damage the properties therein.

14. *That amazingly, later the respondent no.3/accused no.3 lodged a false complaint against the complainant which was immediately registered by the respondent no.1/accused no.1 as Namchi P.S. Case No.71(12) 12, dated 31/12/12, under section 354/324/294 IPC.*

15. *That in fact the respondent no.3/accused no.3 was the main culprit who without any genuine reason (without any document) and with a criminal intention entered into the premises of Nayuma Indane and Dish T.V. with a purpose to assault the staffs and damage properties therein hence it was felt necessary by the complainant to take a legal remedy against her.*

It is stated that after the respondent no.3/accused no.3 was stopped by the complainant from entering into his office

and further to vandalize the shop premises with the help of the assembled mob, the complainant too made a written FIR against the respondent no.3/accused no.3 before the Namchi Police station but unfortunately the respondent no.1/accused no.1 deliberately did not take any actions on the said complainant/FIR lodged by the complainant which consequently resulted a failure of maintaining justice by a public servant (here the than SHO of Namchi Police Station i.e. the respondent no.1/accused no.1).

***16.** That the respondent no.1/accused no.1 not only denied to register the FIR lodged by the complainant but also did not intentionally take legal actions against the respondent no.3/accused no.3 even after the directions of the senior Superintendent of police, Namchi, South Sikkim.*

***17.** That the false FIR lodged by the respondent no.3/ accused no.3 and the illegal attitude to not to register the FIR lodged by the complainant and further not to take any legal actions against the respondent no.3/accused no.3 resulted an unfortunate illegal detention of the complainant in Namchi Police Station.*
It is stated that the intentions of all the respondents/accused persons was to maliciously prosecute the complainant and to suppress the material facts which were certainly against the respondent no.3/accused no.3.

***18.** That the illegal non cooperative attitude of the respondent no.1/accused no.1 and the harassment caused to the complainant through his illegal detention in Namchi police station resulted a danger to the life of complainant as he was immediately taken to Namchi District Hospital due to a complaint of severe chest pain resulting a mild heart attack.*

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***22**. That due to the false allegation by the respondent no.3/accused no.3 in her FIR and the illegal registration of the said FIR by the respondent no.1/accused no.1 and investigation*

of the said FIR conducted by the respondent no.2/accused no.2 resulted in a harsh injury in the administration of law and order and to the image of the complainant in the society and the public at large. It is stated that the said false FIR not only resulted a false rumor against the complainant but also it resulted as a sizzling news for the local newspapers who without any responsibility took interests in publishing such baseless news and further defaming the complainant throughout the state of Sikkim.

23. *That in the entire process, the respondent no.1/ accused no.1 intentionally and very wickedly did not take any action made by the complainant against the respondent no.3/ accused no.3 despite of the directions given to him by Shri Manoj Tewari i.e. the then Superintendent of Police, Namchi, South Sikkim.*

It is stated that the main objective behind non registration of the FIR lodged by the complainant against the respondent no.3/accused no.3 was solely made for the purpose to confine the complainant in the police custody and further to harass and defame him in the society by way of maliciously prosecuting into a false case.

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26. *That during the trial of the G.R. Case No.14/13 (State of Sikkim versus Shirish Khare) following facts were revealed:-*

i) That the telephonic information which was given by the complainant to the respondent no.1/accused no.1 was not entered in the Namchi Police Station, General diary and later the respondent no.1/accused no.1 did not take any initiative to take any legal action against the respondent no.3/accused no.3 for her criminal intentions against the complainant and the staff of Nayuma Indane and Dish TV.

ii) That despite of the directions of the Senior Superintendent of Police Namchi, South Sikkim, the respondent no.1/accused no.1 intentionally did not register the FIR which was lodged against the respondent no.3/accused no.3 by the complainant on the same day of the incident.

iii) That the statements of the several eye witnesses and the staffs of Nayuma Indane and Dish T.V. were not intentionally recorded under section 161 Cr.P.C. by the investigating officer i.e. respondent no.2/accused no.2.

iv) That the 161 Cr.P.C. statements of several witnesses were intentionally fabricated and twisted against the complainant with a motive to falsely implicate him in a false police criminal case.

v) That during the cross examination the respondent no.2/accused no.2 himself admitted that the respondent no.3/accused no.3 had mislead him during his investigation.

vi) That due to non registration of the FIR lodged by the complainant against the respondent no.3/ accused no.3 and further registration of a false and fabricated FIR lodged by the respondent no.3/accused no.3 and later submission of a false and fabricated FIR resulted a miscarriage of justice and the complainant being an innocent person was dragged in a trial of G.R. Case no. 13/14 and maliciously prosecuted for a period of 2 years.

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***28**. That the submission of a false FIR by the respondent no.3/accused no.3 and later its registration and wrong investigation was done for the purpose to illegally prosecute, harass and defame the complainant. It is stated that since all*

> *the respondents/accused persons acted in a illegal design/ strategy to annoy and insult the complainant and since their such personal intention had no connection with any provisions of law consequently no sanction under section 197 Cr.P.C. is required to prosecute the respondent no.1 and 2/accused no.1 and 2.*"

40. A perusal of the allegations made in the complaint against the Respondent No.1 shows that the same were allegedly done "*acting or purporting to act in the discharge of his official duty.*" The main argument of Dr. Doma T. Bhutia was that the Petitioner had alleged conspiracy and *"even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."*

41. There is an elementary difference between public servant committing a criminal act *per se* and the doing of an act in his official duty or purporting to be in his official duty which may and could be construed as a criminal act. The only allegation in the complaint which according to Dr. Doma T. Bhutia would amount to conspiracy is the allegation made in paragraph 26(iv) and 28 of the complaint quoted above. The allegation "*That the 161 Cr.P.C. statements of several witnesses were intentionally fabricated and twisted against the complainant with a motive to falsely implicate him in a false police criminal case"* is not specific and therefore, this Court is inclined to accept the submission made by Mr. N. Rai that even if the statement is accepted as correct it would imply that it was the Investigating Officer who recorded the statements of several witnesses under Section 161 Cr.P.C. and cannot be attributed upon the Respondent No.1 who was then the Station House Officer. In any case the allegation would not amount to conspiracy as conspiracy necessarily implies meeting of minds of two or more persons. A perusal of the pre-summoning deposition of the Petitioner clarifies that the allegation regarding the recording of the statement under Section 161 Cr.P.C. was specifically attributed to the Investigating Officer i.e. Respondent No. 2 and not the Respondent No. 1. Dr. Doma T. Bhutia would further submit emphasising on the words *"illegal design/strategy"* in paragraph 28 of the complaint that these words used in the said paragraph would imply conspiracy hatched

by the Respondent Nos. 1 and 2 along with accused no. 3. Paragraph 28 does not allege conspiracy. Mere use of the words *"design"* or *"strategy"* would not imply conspiracy. A singular person may have a *"design"* or a *"strategy"* to do any illegal act. An allegation of conspiracy must be specific. The essence of conspiracy is the agreement to do, or cause to be done, an illegal act, or an act which is not illegal by illegal means. A perusal of the complaint as well as the pre-summoning deposition of the Petitioner as well as his witnesses does not even *prima facie* indicate any conspiracy between the Respondent Nos. 1, 2 and accused no. 3. Dr. Doma T. Bhutia would submit that although the complaint may not have specifically alleged conspiracy but based on the allegation made in paragraph 26 and 28 of the complaint if the complaint is proceeded with and evidence taken subsequently enough material to establish conspiracy may come forth during trial.

This Court is afraid that such a procedure is unacceptable in law. A criminal accusation is a serious thing. Not only the accusation must be specific but *prima facie* material must be brought on record. If no such material is available the Court is fully within its jurisdiction to discharge the accused and if it is done there would be no reason for the Revisional Court or the High Court in exercise of its inherent powers to interfere with such an order of discharge. Even if in doing their official duty, the Respondent No.1 and 2 acted in excess of their duty, but there is a reasonable connection between the act and the performance of the official duty, the excess would not be a sufficient ground to deprive them of the protection as they were admittedly public servants. The allegations in the complaint would reflect a reasonable connection with the performance of the official duty of the Respondent Nos.1 and 2.

42. In re: ***P. K. Pradhan (supra)*** the Supreme Court has clearly held that it is well settled that question of sanction under Section 197 Cr.P.C. can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. The same view is found in the judgment of the Supreme Court in re: ***D. T. Virupakshappa (supra)*** in which it was held that the question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of

inception. The High Court of Kerala in re: ***Prasob v. State of Kerala***[13] would examine a similar issue in a complaint case and discharge the accused under Section 245(2) Cr.P.C. for want of sanction under 197 Cr.P.C. The Supreme Court in re: ***Nanjappa v. State of Karnataka***[14] would hold that the question regarding the validity of sanction can be raised at any stage of the proceedings and in case the sanction is found to be invalid the Court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law.

43. In view of the aforesaid it is held that the impugned order of the Chief Judicial Magistrate dated 25.10.2016 amounts to an order of discharge against the Respondent Nos. 1 and 2 under Section 245(2) Cr.P.C. for want of sanction under Section 197 Cr.P.C. So interpreted the impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate and the order dated 29.08.2017 passed by the learned Sessions Judge brook no interference in exercise of the inherent powers of this Court and are accordingly upheld. The petition under Section 482 Cr.P.C. is dismissed.

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[13] Order dated 08.01.2009 in Crl. Rev. Pet. No. 475 of 2008/ https://indiankanoon.org/doc/129986
[14] (2015) 14 SCC 186

SLR (2018) SIKKIM 1216

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

Crl. A. No. 34 of 2016

Michael Kami ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

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

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

Date of decision: 24th September 2018

A. Protection of Children from Sexual Offences Act, 2012 – S. 42 – Alternate Punishment – S. 42 of the POCSO Act, 2012 provides that where an act or omission constitute an offence punishable under POCSO Act, 2012 and also under S. 354B, I.P.C, amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the I.P.C as provides for punishment which is greater in degree – The impugned sentence dated 30.09.2016 sentencing the Appellant under S. 354B, I.P.C is thus liable to be set aside in view of the clear provision of S. 42 of the POCSO Act, 2012 – The learned Special Judge has punished the Appellant for the offence under S. 354, I.P.C for the same act falling under the definitions of the provisions of S. 7 and 9 (m) the POCSO Act, 2012 which was not permissible in view of S. 71, I.P.C – The learned Special Judge had also found the Appellant guilty of the offence under S. 354B/511, I.P.C. Since the learned Special Judge had held the Appellant guilty under S. 354B, I.P.C the question of punishing the Appellant for an attempt to commit the said offence as well did not arise.

Thus, the conviction and sentence of the Appellant under S. 354B/511, I.P.C is also not sustainable and liable to be set aside.

(Paras 14, 16 and 19)

B. Sikkim Compensation to Victims or his Dependents Schemes, 2011 – Learned Special Judge even while holding the Appellant guilty for sexual assault and aggravated sexual assault upon the victims has failed to consider that the victims were liable to be compensated under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. Accordingly, the Sikkim State Legal Services Authority is directed to pay an amount of ₹ 50,000/- each to the victims as compensation. The said amount of ₹ 50,000/- shall be kept in fixed deposit in the name of each of the victims payable to them on their attaining majority.

(Para 21)

Appeal partly allowed.

Chronological list of cases cited:

1. Damber Singh Chettri v. State of Sikkim, 2018 SCC OnLine Sikk 132.
2. Koppula Venkat Rao v. State of A.P., (2004) 3 SCC 602.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The learned Special Judge (POCSO Act, 2012) South Sikkim at Namchi vide impugned judgment dated 30.09.2016 has found the Appellant guilty and convicted him of the offences under Sections 9 (m)/10 and 7/8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012); Section 354 of the Indian Penal Code, 1860 (IPC) on two counts and Section 354B/511 of the IPC. Resultantly, the Appellant has been sentenced vide impugned order on sentence dated 30.09.2016 to undergo:-

(i) simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Section 9(m)/10 of the POCSO Act, 2012 and in default to pay the said fine to undergo simple imprisonment for a period of six months;

(ii) *simple imprisonment of a period of five years and to pay a fine of Rs.10,000/- (Rupees ten thousand) for the offence under Section 354 of the IPC (first count) having default to pay the said fine to undergo simple imprisonment for a further period of six months;*

(iii) *Simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Sections 7/8 of the POCSO Act, 2012 and in default to pay the fine to undergo simple imprisonment for a further period of six months;*

(iv) *Simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Section 354 IPC (second count) and in default to pay the fine to undergo simple imprisonment for a further period of six months; and*

(v) *Simple imprisonment for a period of 3 ½ years and to pay a fine of Rs.10,000/- for the offence under Section 354B/511 IPC and in default to pay the fine to undergo simple imprisonment for a further period of six months. The aforesaid period of imprisonment was directed to run concurrently and the period of imprisonment already undergone by the Appellant was to be set off against the above mentioned period.*

2. Mr. N. B. Khatiwada, learned Senior Advocate and Legal Aid Counsel for the State Respondent would raise a solitary ground of appeal. He would submit that the learned Special Judge had erred in law in not believing the solitary defence witness who had categorically stated:

> *"....... On the night of 27.08.2015 the accused and I were sleeping in the same room i.e., one of the rooms under occupation of the victims' family. We shared one bed. The accused was drunk that night and so far as I can say he did not leave the bed that night. On the following morning I left while the accused stayed back. I did not hear any noise that night. I was not told about any untoward incident by the minor*

victims or their parents on the following morning. I was not examined by the police in connection with this case. I know nothing about the present case against the accused.”

3. The said defence witness in cross-examination had stated:

“....... It is true that I did not wake up that night and as such I cannot say as to what all occurred that night.”

4. The learned Special Judge has disbelieved the defence version on the ground that the plea of the defence witness being present on the relevant night at the place of occurrence was taken for the first time during the Appellant’s statement recorded under Section 313 Cr.P.C. and that in cross examination the said defence witness had categorically
admitted that he did not wake up that night and as such he could not say as to what all occurred that night. The reasoning of the learned Special Judge cannot be faulted.

5. The victims of the crime allegedly committed by the Appellant have both deposed before the Court. Their evidences have not been demolished. It inspires confidence.

6. Minor victim 1, 13 years of age has categorically stated:

“..... When I woke up I found that the accused was on our bed and his hand was on my chest, under my clothes. In the meantime, our parents also woke up. The accused ran away from the house after that. My younger sister told me that the accused had put his tongue inside her mouth and also tried to open her half pant.”.......

7. Minor victim 2, 11 years of age has categorically stated:

“... I suddenly woke up and saw that the accused was on top of me and had put his tongue inside my mouth. His hand was on my chest and he was trying to open my half pant. I screamed on which my parents and sister woke up.”

8. Both the minor victims have identified the Appellant as the aggressor and named him.

9. The ingredients of aggravated sexual assault in terms of Section 9(m) of the POCSO Act, 2012 are:

(i) Commission of sexual assault,

(ii) That sexual assault must be on a child below 12 years.

10. The ingredient of *"sexual assault"* as defined in Section 7 of the POCSO Act, 2012 are:

(i) Sexual intent,

(ii) Touch of the vagina, penis, anus or breast of the child by the accused or making the child touch the vagina, penis, anus or breast of the accused or any other person or doing any other act with sexual intent which involves physical contact without penetration.

11. The evidence of the minor victim 1 who was 13 years of age makes it clear that the Appellant had committed *"sexual assault"* on her as defined under Section 7 and punishable under Section 8 of the POCSO Act, 2012.

12. The evidence of the minor victim 2 who was 11 years of age makes it clear that the Appellant had committed *"sexual assault"* on her as defined under Section 7 and punishable under Section 9 of the POCSO Act, 2012 as *"aggravated sexual assault"* since sexual assault was committed on a child below 12 years of age.

13. Mr. N. B. Khatiwada, would also submit that in view of Section 42 of the POCSO Act, 2012 the sentence under Section 354B IPC is liable to be set aside. He would also submit that the conviction and sentence of the Appellant under Section 511 IPC for attempting to commit the offence of Section 354B IPC was also bad in law.

14. Section 42 of the POCSO Act, 2012 provides where an act or omission constitute an offence punishable under POCSO Act, 2012 and also

under Section 354B, IPC, amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the IPC as provides for punishment which is greater in degree. The impugned sentence dated 30.09.2016 sentencing the Appellant under Section 354B IPC is thus liable to be set aside in view of the clear provision of Section 42 of the POCSO Act, 2012.

15. The learned Special Judge has also convicted and sentenced the Appellant under Section 354 IPC. In re: ***Damber Singh Chettri v. State of Sikkim***[1] this Court has examined an identical situation in which the learned Special Judge had convicted and sentenced the Appellant both under Section 8 of the POCSO Act, as well as Section 354 IPC and held as under:

> *"However, the provision of Section 71 IPC must be taken into consideration which provides where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the offender shall not be punished with the more severe punishment than the Court which tries it could award for any one of such offences. A perusal of the evidence proved by the prosecution makes it amply clear that for the same set of facts the Appellant has been sentenced under Section 8 of the POCSO Act as well as Section 354 IPC which is not permissible."*

16. The learned Special Judge has punished the Appellant for the offence under Section 354 IPC for the same act falling under the definitions of the provisions of Section 7 and 9(m) the POCSO Act, 2012 which was not permissible in view of Section 71 IPC.

17. Section 511 IPC provides:

> ***"511. Punishment for attempting to commit offences punishable with imprisonment***

> ***for life or other imprisonment***.*—Whoever attempts to commit an offence punishable by this Code with 1[imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with 2[imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.”*

18. In re: ***Koppula Venkat Rao v. State of A.P.***[2] the Supreme Court would hold:

> *“**8.** The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the*

[2] (2004) 3 SCC 602

> *injury is not as great as if the act had been committed, only half the punishment is awarded.”*

19. The offence under Section 354B IPC is punishable with imprisonment for a term which shall not be less than 10 years but which may extend to 7 years, and shall also be liable to fine. “*Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections.”* The learned Special Judge had found the Appellant guilty of the offence under Section 354B/511 IPC. Since the learned Special Judge had held the Appellant guilty under Section 354B IPC the question of punishing the Appellant for an attempt to commit the said offence as well did not arise. Thus, the conviction and sentence of the Appellant under Section 354B/511 IPC is also not sustainable and liable to be set aside.

20. In view of the aforesaid the appeal is partly allowed. The punishment imposed on the Appellant under Section 354B IPC 354 IPC, 354B/511 IPC are set aside. The conviction and sentence of the Appellant under Section 9(m) of the POCSO Act, 2012 and Section 8 of the POCSO Act, 2012 is confirmed.

21. The learned Special Judge even while holding the Appellant guilty for sexual assault and aggravated sexual assault upon the victims has failed to consider that the victims were liable to be compensated under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. Accordingly, the Sikkim State Legal Services Authority is directed to pay an amount of Rs.50,000/- (Rupees fifty thousand) only each to the victims as compensation. The said amount of Rs.50,000/- (Rupees fifty thousand) only shall be kept in fixed deposit in the name of each of the victims payable to them on their attaining majority.

SLR (2018) SIKKIM 1224

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

MAC. Appeal No. 06 of 2018

Shri Narendra Kumar Chettri ….. APPELLANT

Versus

Shri Ashok Kumar Pradhan and Another ….. RESPONDENTS

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

For Respondent No.1: Mr. Rinzing Dorjee Tamang, Advocate.

For Respondent No.2: Mr. Thupden G. Bhutia, Advocate.

Date of decision: 25th September 2018

A. Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – Sikkim Motor Vehicles Rules, 1991 – S. 169 makes it abundantly clear that an inquiry is required to be held under S. 168 of the said Act. While doing so, subject to any rules that may be made in this behalf, summary procedure as the Claims Tribunal thinks fit is required to be followed – In exercise of the powers conferred by the said Act, the State Government made the Sikkim Motor Vehicles Rules, 1991 – Chapter VIII of the said Rules relates to the establishment of Claims Tribunal – Rules 247 to 265 of the said Rules govern an application for compensation under S. 166 of the said Act – An application in the case of a claim under Chapter X of the said Act, which includes a claim under S. 140 is however, governed by Rules 268 to 275 of the said Rules – Summary trial procedure as per the Code of Criminal Procedure, 1973 is required to be followed for the purpose of adjudicating and awarding a claim under Chapter X of the said Act.

(Paras 2, 3, 5, 7 and 10)

B. Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – Sikkim Motor Vehicles Rules, 1991 – Even for determination of the liability under S. 140 of the said Act the procedure prescribed for coming to a conclusion must be undertaken by the Claims Tribunal before awarding the claim or rejecting it. The procedure for the determination of a claim under S. 140 of the said Act is not as exhaustive as a claim under S. 166 of the said Act. Although the procedure prescribed provides for a summary procedure under the Cr.P.C. the orders which need be passed is not of conviction or acquittal but for determining whether the claimant is entitled to the award under S. 140 of the said Act. The claim under Chapter X of the said Act is of civil nature although the said Rules prescribe a summary trial procedure applicable in criminal cases.

(Para 15)

C. Sikkim Motor Vehicles Rules, 1991 – Rule 274 – It provides that the Claims Tribunal, before whom an application for compensation liability arising out of the provisions of Chapter X has been made, shall dispose of such application within 45 days from the date of receipt of such application. The mandate of the Rule 274 must be strictly followed – The afore-quoted Rules provide "*summary procedure*" for determining the liability under S. 140 of the said Act.

(Para 16)

D. Motor Vehicles Act, 1988 – S. 140 – No Fault Liability – The no fault liability of the owner is absolute under S. 140. Between the owner and owners of the motor vehicle or motor vehicles, the liability is also joint and several. However, when the owner claims to have been indemnified by the insurer against the said liability under S. 140 the Claims Tribunal is required to issue notice upon the insurer, if not already done, hear the claimant, owner and the insurer to determine if no fault liability of the owner has in fact been indemnified by the insurer by execution of the policy following the procedure laid down. In that event it would be open to the insurance company to plead and prove that it is not liable at all.

(Para 19)

E. Motor Vehicles Act, 1988 – S. 169 – Procedure of Claims Tribunals in holding any inquiry under S. 168 – Sikkim Motor Vehicles Rules, 1991 – The expression "*subject to*" conveys the idea of the said Rules yielding place to the "*summary procedure*" as the Claims Tribunal "*thinks fit*." This was the procedural law which was required to be followed by the Claims Tribunal while determining whether or not the Claimant was entitled to an "*award*" under S.140 – When the Rules provide for the procedure to be followed to determine the claim under S. 140, it was incumbent upon the Claims Tribunal to have followed the said procedure.

(Para 22)

F. Motor Vehicles Act, 1988 – S. 140 – A bare reading of S. 140 reflects that without a determination about the factum of "*death*" or "*permanent disablement*" resulting from an accident arising out of the use of a motor vehicle, the "*owner*" of the vehicle cannot be held liable to pay compensation in respect of such "*death*" or "*permanent* disablement" in accordance with the provisions of the said section. The determination as to who is the "*owner*" of the said motor vehicle is also imperative – To attract the liability of the "*owner*" under S. 140, all that is required is an accident arising out of the use of a motor vehicle leading to "*death*" or "*permanent disability*" of any person. The liability of the "*owner*" is without fault but the fact of ownership of the motor vehicle is also required to be determined. The inquiry to award the compensation under S. 140 is limited but the inquiry is a must – Without determining whether the "*death*" or "*permanent disablement*" has been caused as a result of an accident arising out of the use of the motor vehicle or motor vehicles and is owned by the "*owner*" no order under S. 140 may be passed.

(Paras 24, 25 and 26)

G. Motor Vehicles Act, 1988 – S. 140 – The order to be passed under S. 140 must be passed urgently but cautiously to meet the requirement of the law i.e. to award compensation to the person who has suffered due to the accident without determination of any fault or negligence – An order passed under S. 140 without following the procedure prescribed would have no sanctity in the eyes of law – The impugned order dated 23.2.2018 does not reflect that the Claims Tribunal had even *prima facie* determined the ingredients of S. 140 *vis-à-vis* the facts of the present case.

The Claims Tribunal records that a perusal of the FIR dated 23.4.2016 reveal that the Claimant sustained "*severe injuries*". Whether the severe injuries resulted in "*death*" or "*permanent disablement*", which is the *sine-qua-non* of S. 140 is not reflected in the impugned order.

(Para 26)

H. Sikkim Motor Vehicles Rules, 1991 – Claims Tribunal must always remember that procedural and substantive laws need to work together to ensure that justice is not only done but also seen to be done. Following the prescribed procedure ensures fairness and avoids arbitrariness in the process of determination. Procedural law engrafted in Rules 268 to 275 of the said Rules would ensure due process which is fundamental to justice dispensation – Procedural due process is a right of the parties who may be affected by the award passed under S. 140. Procedural due process embodies the notion of legal fairness. It is equally important to keep in mind that the fundamental facts, as laid down above, being the ingredients of S. 140 must be determined before passing an award under the said provision even if it is interim in nature.

(Para 27)

Appeal allowed.

Chronological list of cases cited:

1. Yallwwa (Smt.) and Others v. The National Insurance Company Ltd. and Another, (2007) 6 SCC 657.
2. Eshwarappa *alias* Maheshwarappa and Another v. C. S. Gurushanthappa and Another, (2010) 8 SCC 620.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This is an appeal filed by the Appellant under Section 173 of the Motor Vehicles Act, 1988 (the said Act) against the order dated 23.02.2018 passed by the Motor Accident Claims Tribunal (Claims Tribunal), East Sikkim at Gangtok directing the Appellant to pay a sum of Rs.25,000/- (Rupees twenty five thousand) as interim relief on account of injuries to the Claimant in view of Section 140 of the said Act in MACT

Case No.26 of 2016. In re: ***Yallwwa (Smt.) & Ors. v. The National Insurance Company Ltd. & Anr.***[1] the Supreme Court would hold that an order of the Claims Tribunal awarding compensation under Section 140 is appealable under Section 173 as it amount to an *"award"* under Section 168 of the said Act. Section 169 of the said Act provides for the procedure and powers of the Claims Tribunal. It reads as under:

> ***"169. Procedure and powers of Claims Tribunals****.—(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.*
>
> *(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).*
>
> *(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."*

2. Section 169 makes it abundantly clear that an inquiry is required to be held under Section 168 of the said Act. While doing so, subject to any rules that may be made in this behalf, summary procedure as the Claims Tribunal thinks fit is required to be followed. The Claims Tribunal also has all the powers of the Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the

[1] 2007 6 SCC 657

discovery and production of documents and material objects and for such other purposes as may be prescribed.

3. In exercise of the powers conferred by Sections 28, 38, 65, 95, 96, 107, 111, 138 and 176 read with Section 211 of the said Act the State Government made the Sikkim Motor Vehicles Rules, 1991 (the said Rules) which was published in the Sikkim Government Gazette on 05.10.1991 on which date it came into force. Chapter VIII of the said Rules relates to the establishment of Claims Tribunal.

4. The said Rules under Chapter VIII prescribe two sets of procedure to examine a claim under Section 166 and a claim under Chapter X of the said Act.

5. Rule 247 to Rule 265 of the said Rules govern an application for compensation under Section 166 of the said Act. Detailed procedure regarding the form of application (Rule 247); examination of the application (Rule 248); summary dismissal of application (Rule 249); notice to parties involved (Rule 250); appearance and examination of parties (Rule 251); summoning of witnesses (Rule 252); appearance of legal practitioner (Rule 253); local inspection (Rule 254); inspection of vehicle (Rule 255); power of summary examination (Rule 256); method of recording of evidence (Rule 257); adjournment of hearing (Rule 258); co-opting of persons during inquiry (Rule 259); framing of issues (Rule 260); determination of issues (Rule 261); maintaining of diary of proceedings (Rule 263); judgment and award of compensation (Rule 263); enforcement of award of the Claims Tribunal (Rule 264); the applicability of the Code of Civil Procedure, 1908 (CPC) in certain cases (Rule 265); form and number of appeals against the decision of Claims Tribunal (Rule 266); and fees payable for preferring the application under Section 166 of the said Act (Rule 267); have been made in Chapter VIII consisting of Rules 247 to 267 of the said Rules.

6. The procedure prescribed by the said Rules for the determination of a claim under Section 166 of the said Act is fairly detailed and elaborate compared to the procedure prescribed under Rules 268 to 275 of the said Rules for determination of a claim under Chapter X of the said Act.

7. An application in the case of a claim under Chapter X of the said Act, which includes a claim under Section 140 is however, governed by

Rules 268 to 275 of the said Rules.

8. Rule 268 of the said Rules provides as under:

> *"**268.** Application for claim.- (I) Every application in the case of claim under Chapter X of Act, shall be made in Form SKV-71*
>
> *(2) Every applicant along with application for claim shall pay a fee of ten rupees."*

9. Rule 269 of the said Rules provides as under:

> *"**269.** Consideration of the claim.- The Claims Tribunal shall follow the procedure of summary trail as contained in the code of Criminal Procedure, 1898, (Central Act 5 of 1974) for the purpose of adjudicating and awarding a claim under Chapter X of the Act."*

10. The summary trial procedure as contained in the Code of Criminal Procedure, 1973 (Cr.P.C.) is required to be followed for the purpose of adjudicating and awarding a claim under Chapter X of the said Act.

11. Rule 270 to Rule 275 of the said Rules is relevant for the purpose of determination of the award of the claim made under Chapter X of the said Act and the basis on which the award of the claim is to be made.

12. Section 262 Cr.P.C. provides that in trials under Chapter XXI Cr.P.C. the procedure specified in Cr.P.C. for the trial of summons case shall be followed. Chapter XX Cr.P.C. provides for trial of summons cases by Magistrates. Section 251 Cr.P.C. provides for substance of accusation; Section 252 Cr.P.C. provides for conviction on plea of guilty; Section 253 Cr.P.C. provides for conviction on plea of guilty in absence of accused in petty cases and Section 254 Cr.P.C. provides for procedure when not convicted. When an application under Section 140 of the said Act is contested Section 254 Cr.P.C. and 255 Cr.P.C. would be relevant. Section 254 Cr.P.C. reads as under:

> ***"254. Procedure when not convicted.****(1) If the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.*
>
> *(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.*
>
> *(3) The Magistrate may, before summoning any witness on such application require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court."*
>
> *(Emphasis supplied)*

13. Section 255 Cr.P.C. reads as under:

> ***"255. Acquittal or conviction.****(1) If the Magistrate, upon taking the evidence referred to in section 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal.*
>
> *(2) Where the Magistrate does not proceed in accordance with the provisions of section 325 or section 360, he shall, if he finds the accused guilty, pass sentence upon him according to law.*
>
> *(3) A Magistrate may, under section 252 or section 255, convict the accused of any offence*

> *triable under this Chapter, which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons, if the Magistrate is satisfied that the accused would not be prejudiced thereby.”*
>
> *(Emphasis supplied)*

14. Section 255 provides for acquittal or conviction upon determination after taking evidence under Section 254 Cr.P.C.

15. Section 169 of the said Act read with the relevant provisions of the said Rules relating to the procedure to be followed in case of a claim under Chapter X of the said Act and the relevant provisions for summary trials in Cr.P.C. makes it unequivocally clear that even for determination of the liability under Section 140 of the said Act the procedure prescribed for coming to a conclusion must be undertaken by the Claims Tribunal before awarding the claim or rejecting it. The procedure for the determination of a claim under Section 140 of the said Act is not as exhaustive as a claim under Section 166 of the said Act. Although the procedure prescribed provides for a summary procedure under the Cr.P.C. the orders which need be passed is not of conviction or acquittal but for determining whether the claimant is entitled to the award under Section 140 of the said Act. The claim under Chapter X of the said Act is of civil nature although the said Rules prescribe a summary trial procedure applicable in criminal cases.

16. Rule 274 of the said Rules provides that the Claims Tribunal, before whom an application for compensation liability arising out of the provisions of Chapter X has been made, shall dispose of such application within 45 days from the date of receipt of such application. The mandate of the Rule 274 must be strictly followed. In the present case the application for claim of compensation under Section 140 of the said Act was preferred on 27.06.2016. The impugned order awarding Rs.25,000/- (Rupees twenty five thousand) to the Claimant was made on 23.02.2018 after one year, seven months and twenty seven days. The afore-quoted Rules provide *“summary procedure”* for determining the liability under Section 140 of the said Act. The perusal of the records, however, reflect that the Claims Tribunal failed to follow the *“summary procedure”* as prescribed and determined the award without even examining the ingredients of Section 140 of the said Act

in the period of one year, seven months and twenty seven days. The very purpose of providing the *"summary procedure"* as well as fixing a time frame to do so was lost in the process.

17. In re: ***Yallwwa (Smt.) & Ors. (supra)*** the Supreme Court would hold:

> ***"9.** It is not in dispute that an award of the Tribunal is to be made in terms of Section 168 of the Act. For the said purpose, the Tribunal is required to issue a notice to the insurer and give the parties an opportunity of being heard. While making an award in terms of Section 168 of the Act, the procedure laid down under Section 166 of the Act is required to be complied with. The proviso appended to Section 168 of the Act, however, lays down that where such application makes a claim for compensation under Section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X of the Act.*
>
> ***10.** Section 140, as noticed hereinbefore, provides for no fault liability. It uses the words "accident arising out of the use of a motor vehicle", "the owner of the vehicle" and when more than two vehicles are involved, "the owners of the vehicles" shall, jointly and severally, be liable to pay compensation. The said provision, therefore, makes the owners of the vehicles liable but not the insurer per se. Irrespective of the fact whether a claim petition is required to be adjudicated under Chapter X or Chapter XII of the Act, it is permissible to raise a defence in*

terms of sub-section (2) of Section 149 of the Act. It is even possible for the owner of the vehicle to raise a contention that his vehicle being not involved in the accident, he is not liable to pay any amount in terms of Section 140 of the Act.

11. *One of the defences available to the insurer is breach of conditions specified in the policy. When such a defence is raised, the Tribunal is required to go into the said question. Section 140 of the Act does not contemplate that an insurance company shall also be liable to deposit the amount while it has no fault (sic obligation) whatsoever in terms of sub-section (2) of Section 147 of the Act.*

12. *There cannot be any doubt that an appeal is a creation of a statute.*

13. *It may be noted that Chapter X of the Act provides for no forum for enforcement of the right under Section 140. The only forum available is in Chapter XII. The right under Section 140 can only be enforced under Section 168 as an award. An appeal, therefore, lies under Section 173 against such an award seeking to enforce the right under Section 140.*

14. *In P. Ramanatha Aiyar's Law Lexicon, 3rd Edn., 2005 at p. 427, it is stated:*

" 'Award' means an arbitration award [Arbitration Act (10 of 1940), Section 2(b)]

'Award' means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under

Section 10-A. [Industrial Disputes Act (14 of 1947), Section 2(f).]"

15. *In Oriental Insurance Co. Ltd. v. Mohiuddin Kureshi [(1994) 1 ACJ 74 : (1994) 1 Pat LJR 79] a Division Bench of the Patna High Court observed: (ACJ pp. 76-77, paras 7, 9 & 11)*

> *"7. Section 140 of the Motor Vehicles Act which is in Chapter X of the said Act provides for liability to pay compensation on the principle of no fault. An owner of a vehicle thus would be liable to pay compensation in case death or permanent disablement to any person has resulted from an accident arising out of use of a motor vehicle or vehicles and the amount of such compensation in terms of Section 140(2) is fixed as Rs 25,000 in case of death and Rs 12,000 in case of permanent disablement.*
>
> *Sub-section (3) of Section 140 postulates that the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which claim was made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.*
>
> ***
>
> *9. Section 141 of the said Act, however, provides that right to claim in terms of Section 140 shall be in addition to any other right under the provisions of the said Act or any other law for the time being in force.*

Sub-sections (2) and (3) of Section 141 of the said Act read thus:

'(2) A claim for compensation under Section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under Section 140 and also in pursuance of any right on the principle of fault, the claim for compensation under Section 140 shall be disposed of as aforesaid in the first place.

(3) Notwithstanding anything contained in sub-section (1), where in respect of the death or permanent disablement of any person, the person liable to pay compensation under Section 140 is also liable to pay compensation in accordance with the right on the principle of fault, the person so liable shall pay the first-mentioned compensation and—

(a) if the amount of the first-mentioned compensation is less than the amount of the second-mentioned compensation, he shall be liable to pay (in addition to the first-mentioned compensation) only so much of the second-mentioned compensation as is equal to the amount by which it exceeds the first-mentioned compensation;

(b) if the amount of the first-mentioned compensation is equal to or more than the amount of the second-mentioned compensation, he shall not be liable to pay the second-mentioned compensation.'

***

11. From a conjoint reading of the aforementioned provisions, there cannot be any doubt that an application under Section 140 of the said Act can be filed separately.

However, Section 166 of the said Act contemplates filing of a composite application, as is evident from the proviso appended to sub-section (2) of Section 166 of the said Act.”

16. *The question which is required to be considered is what would be the meaning of the term “award” when such a contention is raised. Although in a given situation having regard to the liability of the owner of the vehicle, a Claims Tribunal need not go into the question as to whether the owner of the vehicle in question was at fault or not, but determination of the liability of the insurance company, in our opinion, stands on a different footing. When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner although in terms of the insurance policy or under the Act, it would not be liable therefor.*

17. *In a given case, the statutory liability of an insurance company, therefore, either may be nil or a sum lower than the amount specified under Section 140 of the Act. Thus, when a separate application is filed in terms of Section 140 of the Act, in terms of Section 168 thereof, an insurer has to be given a notice in which event, it goes without saying, it would be open to the insurance company to plead and prove that it is not liable at all.*

18. *Furthermore, it is not in dispute that there can be more than one award, particularly*

> *when a sum paid may have to be adjusted from the final award. Keeping in view the provisions of Section 168 of the Act, there cannot be any doubt whatsoever that an award for enforcing the right under Section 140 of the Act is also required to be passed under Section 168 only after the parties concerned have filed their pleadings and have been given a reasonable opportunity of being heard. A Claims Tribunal, thus, must be satisfied that the conditions precedent specified in Section 140 of the Act have been substantiated, which is the basis for making an award.*
>
> ***19.*** *Furthermore, evidently, the amount directed to be paid even in terms of Chapter X of the Act must as of necessity, in the event of non-compliance with directions, has to be recovered in terms of Section 174 of the Act. There is no other provision in the Act which takes care of such a situation. We, therefore, are of the opinion that even when objections are raised by the insurance company in regard to its liability, the Tribunal is required to render a decision upon the issue, which would attain finality and, thus, the same would be an award within the meaning of Section 173 of the Act."*
>
> *[Emphasis supplied]*

18. In the present case along with an application under Section 166 of the said Act for compensation a separate application under Section 140 of the said Act was also preferred before the Claims Tribunal on 27.6.2016. Written objection thereto was filed by the Appellant on 26.12.2016. In the written objection the Appellant claimed that the vehicle was insured with the Respondent No.2 and had valid insurance certificate at the time of the accident covering period of insurance from 22.04.2015 to midnight of 21.04.2016 vide policy certificate no. OG-16-2451-1801-0000003. The Appellant also pleaded that he had no liability towards the claimant as the vehicle was insured and had valid insurance certificate at the time of

accident of the said vehicle. The insurance policy certificate was filed by the Appellant along with his reply to the claim made by the claimant i.e. the Respondent No.1 under Section 166 of the said Act.

19. The no fault liability of the owner is absolute under Section 140 of the said Act. Between the owner and owners of the motor vehicle or motor vehicles the liability is also joint and several. However, when the owner claims to have been indemnified by the insurer against the said liability under Section 140 of the said Act the Claims Tribunal is required to issue notice upon the insurer, if not already done, hear the Claimant, owner and the insurer to determine if no fault liability of the owner has in fact been indemnified by the insurer by execution of the policy following the procedure laid down. In that event it would be open to the insurance company to plead and prove that it is not liable at all.

20. Chapter XI of the said Act deals with insurance of motor vehicles against third party risk. Section 145(c) of the said Act provides that the word *"liability",* wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under Section 140. Section 146 of the said Act mandates that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI of the said Act.

21. Section 147 of the said Act deals with requirements of policies and limits of liability. Section 149 of the said Act provides for the duty of the insurers to satisfy judgments and *"awards"* against persons insured in respect of third party risks. As per Section 149 of the said Act, if, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or *"award"* in respect of any such *"liability"* as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 of the said Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of Section 149, of the said Act, pay to the person entitled to the benefit of the decree any sum not exceeding

the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Section 149(2) of the said Act provides that no sum shall be payable by an insurer under sub-section (1) in respect of any judgment or *"award"* unless, before the commencement of the proceedings in which the judgment or *"award"* is given the insurer had notice through the Court or as the case may be, the Claims Tribunal of the bringing of the proceedings. In such an event the insurer shall be made a party and could defend the action on any of the grounds specified under sub-section (2) of Section 149 of the said Act. The explanation to Section 149 of the said Act provides that for the purpose of the said Section *"award"* means an *"award"* made by that Tribunal under Section 168 of the said Act.

22. This Court has perused the orders passed by the Claims Tribunal from 27.6.2016 till the passing of the impugned order dated 23.2.2018. The orders do not reflect that it satisfied itself of the requirements of Section 140 of the said Act and determined the ingredients thereof. This was a requirement under the substantive law contained in Section 140 of the said Act without fulfilment of which no order under the said section could have been passed. It also does not reflect that the Claims Tribunal followed the said Rules contained in Rule 268 to Rule 275 as mandated by Section 169 of the said Act nor any *"summary procedure"* which is required to be followed to make an inquiry to be satisfied that the claim under Section 140 of the said Act is valid and ought to be granted. The words *"subject to"* before the words *"any rules that may be made in this behalf, follow such summary procedure as it thinks fit."* reflects the clear intention of the legislature that if rules have been made the rules ought to be followed. The expression *"subject to"* conveys the idea of the said Rules yielding place to the *"summary procedure"* as the Claims Tribunal *"thinks fit."* This was the procedural law which was required to be followed by the Claims Tribunal while determining whether or not the Claimant was entitled to an *"award"* under Section 140 of the said Act. When the said Rules provide for the procedure to be followed to determine the claim under Section 140 it was incumbent upon the Claims Tribunal to have followed the said procedure.

23. Section 140 of the said Act provides as under:

> ***"140. Liability to pay compensation in certain cases on the principle of no fault.***— *(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.*
>
> *(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of 1[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of 2[twenty-five thousand rupees].*
>
> *(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.*
>
> *(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.*

> *(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force: Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."*

24. A bare reading of Section 140 of the said Act reflects that without a determination about the factum of *"death"* or *"permanent disablement"* resulting from an accident arising out of the use of a motor vehicle the *"owner"* of the vehicle cannot be held liable to pay compensation in respect of such *"death"* or *"permanent disablement"* in accordance with the provisions of the said section. The determination as to who is the *"owner"* of the said motor vehicle is also imperative. The word *"owner"* has been defined under Section 2(20) of the said Act. Section 140(3) of the said Act makes it clear that in any claim for compensation under Section 140(1) of the said Act the Claimant shall not be required to plead or establish that the *"death"* or *"permanent disablement"* in respect of which the claim has been made was due to any wrongful act, neglect or default of the *"owner"* or owners of the vehicle or vehicles concerned or of any other person. Section 140(4) of the said Act further provides that the claim for compensation under section 140(1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose *"death"* or *"permanent disablement"* the claim has been made nor shall the quantum of compensation recoverable in respect of such *"death"* or *"permanent disablement"* be reduced on the basis of the share of such person in the responsibility for such *"death"* or *"permanent disablement"*. The proviso to Section 140 of the said Act provides that the amount of compensation to be given under any other law shall be reduced from the amount of compensation payable under Section 140 or under Section 163A of the said Act.

25. To attract the liability of the *"owner"* under Section 140 of the said Act all that is required is an accident arising out of the use of a motor vehicle leading to *"death"* or *"permanent disability"* of any person. The

liability of the *"owner"* is without fault but the fact of ownership of the motor vehicle is also required to be determined. The inquiry to award the compensation under Section 140 of the said Act is limited but the inquiry is a must. As held by the Supreme Court in re: ***Eshwarappa alias Maheshwarappa & Anr. v. C. S. Gurushanthappa & Anr.***[2] the Supreme Court would hold:

> *"**20.** The provisions of Section 140 are indeed intended to provide immediate succour to the injured or the heirs and legal representatives of the deceased. Hence, normally a claim under Section 140 is made at the threshold of the proceeding and the payment of compensation under Section 140 is directed to be made by an interim award of the Tribunal which may be adjusted if in the final award the claimants are held entitled to any larger amounts. ...."*

26. Without determining whether the *"death"* or *"permanent disablement"* has been caused as a result of an accident arising out of the use of the motor vehicle or motor vehicles and is owned by the *"owner"* no order under Section 140 of the said Act may be passed. Section 142 of the said Act provides that for the purpose of Chapter X, *"permanent disablement"* of a person shall be deemed to have resulted from an accident of the nature referred to in sub-section (1) of Section 140 if such person has suffered by reason of the accident, any injury or injuries involving- (a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or (b) destruction or permanent impairing of the powers of any member or joint; or (c) permanent disfigurement of the head or face. The order to be passed under Section 140 of the said Act must be passed urgently but cautiously to meet the requirement of the law i.e. to award compensation to the person who has suffered due to the accident without determination of any fault or negligence. Section 141 (2) of the said Act provides that a claim for compensation under Section 140 of the said Act in respect of *"death"* or *"permanent disablement"* of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of

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[2] (2010) 8 SCC 620

such *"death"* or *"permanent disablement"* under Section 140 and also in pursuance of any right on the principal of fault, the claim for compensation under Section 140 of the said Act shall be disposed of as aforesaid in the first place. This, however, does not mean no inquiry is required to be conducted. An order passed under Section 140 of the said Act without determination following the procedure prescribed would have no sanctity in the eyes of law. The impugned order dated 23.2.2018 does not reflect that the Claims Tribunal had even *prima facie* determined the ingredients of Section 140 of the said Act vis-à-vis the facts of the present case. The Claims Tribunal records that a perusal of the FIR dated 23.4.2016 reveal that the Claimant sustained *"severe injuries"*. Whether the severe injuries resulted in *"death"* or *"permanent disablement"*, which is the *sine-qua-non* of Section 140 of the said Act is not reflected in the impugned order.

27. The Claims Tribunal must always remember that procedural and substantive laws need to work together to ensure that justice is not only done but also seen to be done. Following the prescribed procedure ensures fairness and avoids arbitrariness in the process of determination. Procedural law engrafted in Rule 268 to Rule 275 of the said Rules would ensure due process which is fundamental to justice dispensation. Procedural due process is a right of the parties who may be affected by the award passed under Section 140 of the said Act. Procedural due process embodies the notion of legal fairness. It is equally important to keep in mind that the fundamental facts, as laid down above, being the ingredients of Section 140 of the said Act must be determined before passing an award under the said provision even if it is interim in nature.

28. In view of the aforesaid, the impugned order dated 23.02.2018 is set aside, the application filed by the Claimant under Section 140 of the said Act shall be reconsidered by the Claims Tribunal along with the objection filed by the Appellant after considering all the relevant material on record and following the procedure prescribed. The application made by the Respondent No.1 under Section 140 of the said Act along with the objection filed by the Appellant is restored to the files of the Claims Tribunal for reconsideration as per law. As the pleadings are complete with regard to the claim under Section 140 of the said Act the Claims Tribunal shall dispose of the said claim expeditiously. The appeal is allowed.

SLR (2018) SIKKIM 1245
(Before Hon'ble the Acting Chief Justice)

W.P. (C) No. 60 of 2017

Himalaya Distilleries Limited ..... **PETITIONER**

Versus

State of Sikkim and Others ..... **RESPONDENTS**

For the Petitioner: Mr. Debashis Baruah, Ms Nirmala Upadhyaya and Mr. Passang Tshering Bhutia, Advocates.

For Respondent 1 to 4: Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee, Government Advocate, Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates.

For Respondent No. 5: Mr. T.B. Thapa, Senior Advocate with Mr. T.R. Barfungpa, Advocate.

For Respondents 6 and 7: Ms Yangchen D. Gyatso and Ms Tshering Palmoo Bhutia, Advocates.

For Respondents 8 and 10: Mr. Sajal Sharma, Advocate.

For Respondents 9: Mr. N. Rai, Senior Advocate with Ms Malati Sharma, Advocate

Date of decision: 26th September 2018

A. Sikkim State Rules Registration of Document Rules, 1930 – Rule 7 – Procedure for Presenting Elucidated – (1) On execution of deeds, the person(s) executing the deed or his or their authorised

representative with one or more witnesses to the execution of the deed is to attend the Registrar's Office – (2) These persons are required to prove by solemn affirmation before the Registrar the due execution of the deed – (3) Upon such affirmation the Registrar shall cause an exact copy of the deed to be entered in the proper register – (4) After the copy is carefully compared with the original, the Registrar shall attest the copy with his signature – (5) He shall also cause the parties or their representatives in attendance to subscribe their signatures to the copy – (6) The Registrar shall then return the original with a certificate under his signature endorsed therein specifying the date on which such deed was so registered – (7) For this purpose reference has to be made to the book containing the registration thereof, and the page and number under which the same shall have been entered therein.

(Para 18)

B. Sikkim State Rules Registration of Document Rules, 1930 – Rule 7 – Procedure for Presenting – Rule 7 nowhere prescribes that the copies of the deed shall contain the details, *viz.*, serial number, book number or date of registration – Those details are to be entered in the original Deed – Rule 7 mandates that a copy is to be attested by the Registrar with his signature. He is required to cause the parties or representatives to subscribe their signatures on the copy – Annexure P-1 is a "certified to be true copy" of the original Sale Deed. The original is allegedly untraceable. The reverse of the document records "CERTIFIED TO BE TRUE COPY", below which an illegible signature appears and bears the stamp of the "Registration Clerk" and the date 05.12.1984 – The specific requirement of Rule 7 pertaining to copies of deeds is that the Registrar shall attest the copy with his signature and not that of the "Registration Clerk" as appears to have been done in the instant matter. In absence of the Registrar's signature, a niggling doubt ensues as to the authenticity of the document. The document also ought to bear the signature of the parties or their authorised representative(s) which are non-existent on Annexure P-1 – Does not fulfill any of the requirements as envisaged by Rule 7.

(Para 20)

C. Sikkim State Rules Registration of Document Rules, 1930 – Makes express provisions for registration of documents in the State of Sikkim – The Registering Authority is debarred from making an enquiry into title, this falls in the domain of the Civil Courts.

(Para 22)

D. Sikkim State Rules Registration of Document Rules, 1930 – Rule 20 – Rule 20 specifically lays down that the period of limitation within which the document is to be produced for registration is four months from the date of execution thereof and six months at the maximum, this too subject to deposit of penalty as prescribed in the Rules – The original document is alleged to have been presented in 1983 – The Petitioner has approached the Sub-Divisional Magistrate/Sub-Registrar in the year 2009, no reasons have been given for the delay in approaching the Registering Authority. No explanation issues on what transpired between 1983 to 2009 and why necessary steps as envisaged by Rule 20 were not taken up by the Petitioner. The argument that the Petitioner learnt of the transfer of land to other persons in 2009 when they went to pay land taxes is rather frail apart from the argument of payment of taxes being non-existent in the pleadings.

(Para 29)

Petition dismissed.

Chronological list of cases cited:

1. Chairman/Secretary, Deep Apartment CHS Ltd. v. The State of Maharashtra and Others, 2013 (1) Bom CR 663.
2. Satya Pal Anand v. State of Madhya Pradesh and Others, (2016) 10 SCC 767.
3. Commissioner of Police, Bombay vs. Gordhandas Bhanji, AIR 1952 SC 16.
4. K. Nanjappa (dead) by Legal Representatives v. R.A. Hameed *alias* Ameersab (dead) by Legal Representatives and Another, (2016) 1 SCC 762.
5. Shankara Cooperative Housing Society Limited v. M. Prabhakar and Others, (2011) 5 SCC 607.
6. State of Maharashtra v. Digambar, (1995) 4 SCC 683.
7. Beant Singh v. Union of India and Others, AIR 1977 SC 388.
8. Thota Ganga Laxmi v. State of A.P., (2010) 15 SCC 207.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. The Petitioner is a limited company registered under the provisions of the Registration of Companies Act, 1961 and is in the business of manufacturing and bottling of liquor at Majitar, Rangpo. The Petitioners case is that one late Kashi Raj Pradhan and his son, late Bhim Raj Pradhan, agreed to sell a plot of land situated at Baghey Khola, measuring 5.3160 hectares, recorded in their names as well as that of Swarup Raj Pradhan (Respondent No.8) and Kishore Raj Pradhan (Respondent No.9), late Kashi Raj Pradhan being their guardian. Towards this a Sale Deed was executed on 17.01.1983 between the Petitioner and late Kashi Raj Pradhan and the land transferred to the Petitioner while the Sale Deed was submitted to the Office of the Sub-Registrar for registration the same year. Evidently, registration was completed as a certified copy of the Sale Deed (Annexure P-1) was furnished to the Petitioner on 5.12.84, in terms of Rule 8 of the Registration of Document Rules, 1930 (hereinafter 'Registration Rules'). That, the Petitioner has since been in possession of the land being of the impression that the right, title and interest thereof stood transferred to it absolutely unfettered. In the year 2009, however, the Petitioner came to learn that the land in question stood recorded in the names of one Sinora Pradhan and the Respondent No.10, Urmila Pradhan. Vide a letter dated 28.09.2009, the Petitioner questioned the Respondent No.3 of the above circumstance in response to which confirmation was received of the fact vide a communication (Memo No. 1013/DCE) dated 01.02.2013. That, the Sale Deed (Annexure P-1) according to Respondent No. 3 had been submitted for registration but could not be registered by the Authority then, for reasons best known to them and the Petitioner was requested by the Respondent No.3 to execute a fresh Sale Deed with the persons in whose name the land stood mutated as the previous Deed could not be considered in view of Rule 28 of the Registration Rules. The Petitioner avers that the ambit of Rule 28 of the Registration Rules pertains to documents which though registered remain unclaimed for a period exceeding three years and not with documents pending registration as in the instant case. In the meanwhile, the search and enquiries pertaining to mutation of the properties and land records in regard to Sinora Pradhan and Respondent No.10 proved futile despite invocation of the provisions of the Right to Information Act, 2005. Thus aggrieved, the Petitioner approached this Court in W.P(C)

No. 39 of 2013 (*M/s Himalaya Distilleries Ltd. vs. State of Sikkim and Others*) which was disposed of vide Judgment and Order dated 14.11.2013, with a direction that as agreed by the parties, the petitioner could prefer an appeal before the Registrar against the Memo dated 01.02.2013. The Registrar was directed to hear the appeal on merit and the Petitioner was free to approach this Court in the event of adverse orders by the Registrar.

2. Although, the Petitioner complied with the directions and assailed the said Memo dated 01.02.2013 of the Sub-Divisional Magistrate/Sub-Registrar, East District, before the Respondent No.2, the matter was kept pending for almost three years resulting in the Petitioner filing yet another petition before this Court being WP(C) No. 26 of 2016 (*M/s Himalaya Distilleries Limited vs. State of Sikkim and Others*) complaining of the inaction *supra*. This Writ Petition was considered on 12.06.2017 and an Order of the same date directed the Appellate Authority to dispose of the Appeal not later than 45 (forty-five) days from the above date. Consequently, on 05.07.2017, the Petitioner was summoned to appear before the Respondent No.2 (Appellate Authority) on 10.07.2017, who upon recording that the original Sale Deed was not before him directed the Respondent No.3 to locate it and also to produce the original certified copy of the deed obtained by the Petitioner. On 21.07.2017, when the matter was heard although the Petitioner furnished the original certified copy but the Respondent No.3 failed to furnish the original deed. A written report dated 21.07.2017 (for clarity, Memo No. 484/DCE) submitted by the Respondent No.3 to the Respondent No.2 (Appellate Authority) was duly considered sans copy or information being furnished to the Petitioner. The report informed that the original Sale Deed document dated 17.01.1983, as well as the entire related registration proceedings could not be traced in the office of the Respondent No.3 despite thorough search of the Record Section contrary to what was stated in the Communication dated 01.02.2013. That, it would stand to reason therefore, that the Sale Deed and the registration records were deliberately misplaced/lost to deprive the Petitioner of its rights in respect of the land. The Order dated 25.07.2017 of the Respondent No.2, dismissed the Petitioners Appeal, *inter alia*, on grounds that the original Sale Deed document could not be produced by the Respondent No.3, the relevant File pertaining to the Registration proceedings were not traceable, the executant of the Sale Deed had passed away and 26(twenty-six) years had elapsed since execution of the Sale Deed and its submission

for registration. It was also held that insufficient material furnished before the Respondent No.2 disabled it from further investigation into the matter. That, the Sale Deed dated 17.01.1983 sought to be registered is no longer in existence, hence no question of registration arises. According to the Petitioner, even if the original sale deed dated 17.01.1983 and the related files are missing, the contents thereof can easily be traced from the original certified copies issued by the Respondent No.3. That, as the execution, presentation and submission of the original sale deed are undisputed, there ought to be a reconstruction of the original sale deed by using the original certified copy thereof and the deed registered if not already completed. In fact, on due application of Rule 8 of the Registration Rules, the certified copy should have been treated as sufficient evidence of the instrument on loss, misplacement or destruction of the original instrument. That, merely because a delay of 26 (twenty-six) years occurred, the Petitioner cannot be deprived of its right as the Registering Authority cannot refuse registration of a deed validly presented before it and accepted. That, the procedure prescribed in Rule 7 to Rule 54 of the Registration Rules ought to be observed. The reliefs sought for, *inter alia*, are as follows;

(1) Writ or in the nature of mandamus cancelling or recalling the impugned Order dated 25.07.2017 of the Respondent No.2 and Memo dated 01.02.2013 issued by the Respondent No.3.

(2) Writ or in the nature of certiorari commanding the Respondents No. 2 and 3 to forward all relevant records in relation to the instant case.

(3) Writ in the nature of mandamus or like nature commanding the Respondent Authorities to forthwith complete the process of registration of the instrument dated 17.01.1983, by treating the certified copy thereof as the original instrument.

(4) Rule NISI in terms of the prayers.

(5) In the absence of sufficient cause to make the Rule NISI absolute.

3. The Respondents No. 1, 2, 3 and 4 filed a joint counter-affidavit denying and disputing the allegations and would specifically aver that the

Petition is liable to be dismissed having been brought after more than 26 (twentysix) years when the executants thereof are no more and there is a change in ownership, hence the Petitioners remedy lies before the Civil Court. The Respondents No. 1 to 4 deny that the Registration Rules indicate that when the original deeds are not forthcoming, the copies of the deeds shall be received as evidence of such deeds and the provisions of the Registration Rules, being Rule 8 and Rule 28 are being wrongly interpreted by the Petitioner. Annexure P-1 is an unregistered certified copy as it does not contain the registration seal with the book number, serial number and date of registration. While supporting the Order of the Respondent No.2 dated 25.07.2018, it was averred that it was a detailed order taking into consideration all aspects placed before it and that allegations of misplacement of original by the Registering Authority are bereft of material particulars. On the failure of the Petitioner to place the Sale Deed for registration in 1983, they cannot now allege that the authorities have in connivance with the private Respondents purposely misplaced the records pertaining to the registration. Responsibility rests on the Petitioner to see that the documents so presented receive proper registration, hence the grounds set out by the Petitioner are not tenable in the eyes of law.

4. The Respondents No. 8 and 10 in their joint counter-affidavit stated that the Petitioner has filed a Civil Suit being Title Suit No. 11 of 2017 (*Himalaya Distilleries Ltd. Vs. Urmila Pradhan and Ors.*) pending disposal before the Court of the learned District Judge, East Sikkim at Gangtok, praying for a decree, declaring right, title and interest in his favour in respect of the "Schedule A" land while in the present Writ Petition they have prayed for registration of certified copy of Annexure P-1, hence the prayers are similar. That, execution, presentation and submission of the original Sale Deed are disputed which only a trial can determine. That, the Government Respondents have rightly rejected the request of the Petitioner for registration, as it is invalid in the eyes of law sans the Sale Deed signed by late Kashi Raj Pradhan. That, the purported Sale Deed, Annexure P-1, clearly suggests that the property was not transferred to the Petitioner and neither was consideration value or advance, paid. Hence, the Orders dated 01.02.2013 of the Registering Authority and 25.07.2017 of the Appellate Authority were passed considering all relevant facts and records. In fact, late Kashi Raj Pradhan had no right, title and authority over the portion of the suit property recorded in the name of the said Respondents and any statement contrary to this fact is denied by the answering Respondents.

That, late Bhim Raj Pradhan in his written statement in Title Suit No. 6 of 2014 (*Himalaya Distilleries Limited vs. Smt. Urmila Pradhan & Others*) before the Court of the learned Principal District Judge, East Sikkim at Gangtok, had categorically denied the averments of the Plaintiff pertaining to sale of the property in question, execution of sale deed and transferring the possession of the property to the Petitioner. The Respondents also referred to Rule 8 and Rule 28 of the Registration Rules and averred that both were inapplicable to the instant matter. As per Registration Rules, two sets of signed sale deeds are presented for registration and one original sale deed is returned to the purchaser with certification of the registering authority but the Petitioner in all Fora is relying upon Annexure P-1, a copy, while interpreting the rules as per their convenience. That, the question of the Petitioner having a prima facie good case or suffering loss and injury does not arise. The instant Writ Petition besides being inordinately delayed, lacks in merit and considering that a Title Suit is pending, this Petition thereby deserves a dismissal.

5. Respondent No.10, Urmila Pradhan, the constituted attorney of the Respondent No.9, in her counter affidavit on her sons behalf while denying and disputing the allegations in the Petition averred that simply obtaining a certified copy from the Registrar of documents will not confer rights on the Petitioner over the property/land of the parties. It is the duty of the Registrar to issue the certified copy from the records maintained by him if a party applies for such copies and unless the document is registered as per the Registration Rules and in consonance with the Transfer of Property Act, 1881, the Petitioner has no case, moreover the disputed property is still in the possession of the original owner. Besides, Annexure P-1 is not an original document and the Registering Authority is not bound to put forth an explanation for an unregistered document. That, the possession of two plots of land was with the Respondent No.9 till 2005 and thereafter has been transferred in the name of Respondent No.10 which is now in her possession. That, the names of Sinora Pradhan and the Respondent No.10 were recorded after observing due formalities and the very fact that the Petitioner came to learn of this in the year 2009 indicates that their claims are illegal. The Respondent also raised questions about the interpretation of Rule 8, Rule 20 and Rule 28 of the Registration Rules and submitted that the instant Petition is not an efficacious method for obtaining the reliefs by the Petitioner. The response of this Respondent largely reiterated what the other respondents had stated and submitted that as the Petitioner has filed

the instant misconceived Writ Petition devoid of merits, it deserves to be dismissed.

6. In the Rejoinder to the counter-affidavit of the Respondents No. 1 to 4, the Petitioner would, *inter alia*, state that it is the duty of the Registering Office being the custodian of the said document to preserve and maintain safe custody of the document. Under no circumstances, the document could have been destroyed in violation of Rule 34 of the Registration Rules. The invocation of Rule 28 of the Registration Rules in the impugned Order/Memo dated 01.02.2013 is testament to the fact that the said document was destroyed by the Registration Office. The Appellate Authority could not find any records justifying or showing that the document was destroyed. In such circumstances, the rights of the Petitioner cannot be annulled as it was dereliction and abdication of the duties by the statutory authorities. The statement that there has been change of ownership of the land during the interregnum and as such the said document cannot be taken up for registration is totally misconceived. The Registering Authority is to look into the title as on the date of presentation and the presence of the executants or the person claiming under the document is not required for registration as evident from the Registration Rules. That, the burden lies upon the Registering Office to show as to what the Registration Office did to the duly executed Sale Deed dated 17.01.1983.

7. In the Rejoinder affidavit to the counter-affidavit of the Respondents No.8 and 10, the Petitioner would, *inter alia,* contend that the cause of action for filing of Civil Suit is completely different to the cause of action for filing the instant Writ Petition as the challenge in the Writ Petition is to the Memo dated 01.02.2013 and Order dated 25.07.2017, on the grounds of abuse of power by the statutory authority and that the impugned Orders suffer from malice in law and fact. The suit filed by the Petitioner as Plaintiff is concerned with the Petitioners rights over the Schedule lands mentioned in the Plaint, clouded by the action of the private Respondents herein and seeks confirmation of possession and restoration of the concerned property from the Respondents No. 8 to 10. That, the statement to the effect that late Kashi Raj Pradhan had no right, title and authority over the land recorded in the names of the Respondents No. 8, 9 and 10 is misconceived since acting as *karta* he had duly executed the deed of sale dated 17.01.1983. The written statement of late Bhim Raj Pradhan in Title Suit No. 6/2014 is only pleadings, not proof. Respondents No. 5, 6 and 7, who

are the successors in interest of late Bhim Raj Pradhan, have admitted the fact of sale in their statements filed in Title Suit No. 11/2017, and thus waived their right to contest the suit filed by the Petitioner by filing written statement. That, the attempts by the Respondents to dispute the existence, contents and execution of Annexure P-1 amounts to a clear ruse of the Respondents to mislead this Court from the dispute involved in the present proceedings and the counter-affidavit ought to be rejected.

8. The Rejoinder of the Petitioner to the counter affidavit filed by the Respondent No.9, *inter alia*, averred that the Respondent No. 9 having been divested of his rights in respect of the land in question vide a Deed of Sale dated 17.01.1983 could not have transferred the said land by any means to the Respondent No.10. That, when the Deed of Sale was executed on 17.01.1983, the Respondent No. 9 appears to have been 9 years old and attained majority in the year 1992, however, despite knowledge of the Document he neither challenged it nor did he have possession of any portion of the land mentioned in the said Deed until 24.04.2014, when the Respondents No. 8, 9 and 10 along with one Sinora Pradhan forcefully took possession of an area measuring 2.52 hectares of land. However, recording of the name of Sinora Pradhan could not have been done in accordance with law as the Respondents No. 8 and 9 had no authority whatsoever to transfer the land after the Sale Deed, Annexure P-1. It is for this reason that the Petitioner has filed a suit for recovery of possession of that land. This however is not relevant for determination of the issues involved in the instant proceedings. That, Rule 20 of the Registration Rules is not applicable to the present facts as admittedly Annexure P-1 was duly submitted after being executed in the year 1983 and the Registering Office never intimated the Petitioner or the executant who presented the Deed of Sale for registration that it was barred by the said provision, hence the counter-affidavit ought not to be acted upon.

9. Learned Counsel for the Petitioner while advancing his arguments reiterated the facts put forth in his pleadings and contended that till the year 2009 the Petitioner was of the belief that the land in question was registered in the name of the Company in view of Annexure P-1. However, when the Petitioner sought to deposit tax for the land in question in 2009, they came to learn that it was registered in the name of one Sinora Pradhan and another. That, mere records of rights in the names of the aforestated persons do not create title over immovable property. Besides, the

Respondent No.3 is not required to look into the title or beyond the Sale Deed document for its registration. On this count, reliance was placed on the ratio of the High Court of Bombay in ***Chairman/Secretary, Deep Apartment CHS Ltd. vs. The State of Maharashtra & Ors***[1] and ***Satya Pal Anand vs. State of Madhya Pradesh and Others***[2]. That, to the contrary, Annexure P-1 is proof of sale of the property in question between Kashi Raj Pradhan and the Petitioner. Drawing attention to the impugned Memo of Respondent No.3, it was argued that Rule 21 of the Registration Rules stipulates that a document required to be registered shall be presented either by the person executing it or by the person claiming under it after which the Registering Authority ought to take needful steps in terms thereof. Neither the presence of the executants nor the person claiming under the said document are required thereafter. That, the Registration Rules do not indicate that the copies of such deeds should bear the serial number, book number or date of registration as averred by the Respondents. The issuance of a copy coupled with the clear admission on the part of the Registering Authority in the impugned Memo that the deed of sale after execution was presented for registration, indicates that the Sale Deed was duly registered. That, Rule 28 of the Registration Rules provide that documents other than Wills remaining unclaimed in any Register for a period extending three years may be destroyed but in the instant case, the original deed in question was pending registration therefore the document being unclaimed does not arise. That, application of the provisions of Rule 28 requires compliance of procedure envisaged in Rule 32 to Rule 34 of the Registration Rules. It was further contended that the Respondent No.2 failed to exercise its lawful authority under law by not setting aside the impugned Memo and directing the Respondent No.3 to comply with the process of registration if it had not already been done. The question of executing a new Sale Deed between Respondent No.10, Sinora Pradhan and the Petitioner does not arise as the original of Annexure P-1 is with the Respondent No.3. Thus, the Registering Authority ought to have viewed the claim of the Petitioner based on Annexure P-1 filed on the date of execution of the document and not on a document created subsequently. That, inconsistencies in the impugned Memo and Order of the Respondent Authorities provide reasons to believe that the loss/misplacement of Sale Deed was deliberate to deny and frustrate the Petitioners claim over the land in question. Relying on Rule 8 of the Registration Rules, it was contended that the registration proceedings ought

[1] 2013 (1) Bom CR 663
[2] (2016) 10 SCC 767

to have been reconstructed and registration process completed, failure thereof calls for interference by this Court and the actions of the Respondent Authorities violates the mandate of Article 300A of the Constitution of India. Calling attention to Rule 7 of the Registration Rules, it was put forth that in compliance thereof it is the duty of the Registering Authority after completing registration to hand back the original document to the Appellant, which admittedly has not been done thereby constituting dereliction of duties. Strength was also drawn from Rule 26 of the Registration Rules and contended that when the Registrar finds that the document has been duly executed, the applicants are entitled to registration and the document shall be ordered to be registered compulsorily. While Rule 20 of the said Rules is not applicable to the instant facts. Claiming that there was no wilful delay or laches in presenting the instant Petition and hence, the reliefs as prayed be granted. Succour was also garnered from the decision in ***Commissioner of Police, Bombay vs. Gordhandas Bhanji***[3]**.**

10. Learned Senior Government Advocate for the State-Respondents No. 1 to 4, while also relying on the averments made in the pleadings would contend the purported Sale Deed suggests that the property has not been transferred to the Petitioner neither has consideration amount been paid thereby proving that the Petitioners prayer is not valid. That, due procedure prescribed for registration not having been followed at the relevant time, it cannot be done now and the only possibility for registration is on a new deed being executed between the registered owners and the Petitioner. It was also contended that the Petitioner has raised disputed questions of fact which cannot be adjudicated in a petition under Article 226 of the Constitution.

11. Learned Counsel for the Respondents No. 5, 6 and 7, would submit that a response has been filed by the Respondents in Title Suit No. 11 of 2017, wherein they have stated that they were given to understand that the suit property had subsequently been sold but they have no further knowledge as to the manner, extent and circumstance in which such sale was carried out. Consequently, he has no further submissions to make in this matter.

12. Learned Counsel for the Respondent No. 9 submitted that if the Petitioner was of the belief that the certified copy was proof of registration

[3] AIR 1952 SC 16

then its rights are secured and it is incomprehensible as to why the Petitioner is before this Court. To the contrary, a perusal of Annexure P-1 would reveal that although consideration value has been reflected therein, no date of payment of the consideration value issues therein and neither is there indication of payment of money. The date of execution of the deed is blank, as also the names of the witnesses and hence, cannot be said to be a registered deed. The Petitioner is therefore required to prove the document. Reliance was placed on ***K. Nanjappa (dead) by Legal Representatives vs. R.A. Hameed alias Ameersab (dead) by Legal Representatives and Another***[4]**.** It is his contention that Rule 38 and Rule 43 of the Registration Rules have not been complied with. Besides, the Petition suffers from delay and laches as the purported sale was of 1983 and the registration is being sought in 2009. That, the Writ Petition deserves a dismissal.

13. Learned Counsel for the Respondents No.8 and 10 would point to Rule 7, Rule 22, Rule 38 and Rule 43 of the Registration Rules and argue that none of the Rules have been complied with by the Petitioner. Over and above this was the fact that the Petitioner is before the Court after a period of 26(twenty-six) years and hence being guilty of delay and laches, the Petition ought to be dismissed. To fortify his submissions, reliance was placed on ***Shankara Cooperative Housing Society Limited vs. M. Prabhakar and Others***[5], ***State of Maharashtra vs. Digambar***[6]**.** That, the Respondents No.2 and 3 have issued correct orders and this Court exercising powers under Article 226 of the Constitution ought not to sit as a Court of Appeal to substitute its own judgment for that of the Statutory Authorities. In this context, reliance was placed on ***Beant Singh vs. Union of India and Others***[7].

14. The rival contentions of learned Counsel for all parties were heard *in extenso* and the pleadings and documents carefully perused as also citations made at the Bar. The relevant Registration Rules relied on by the parties have also been carefully examined by me.

15. It is now to be determined whether the Petitioner is entitled to the reliefs claimed.

[4] (2016) 1 SCC 762
[5] 2011) 5 SCC 607
[6] (1995) 4 SCC 683
[7] AIR 1977 SC 388

16. While addressing the grievances and arguments of the Petitioner, it would be apposite to first refer to the "Sikkim State Rules Registration of Document Rules, 1930" to have an understanding thereof. The said Rules, *inter alia*, provides for the head registry Office in Sikkim at Gangtok where the registering Officer shall be known as Registrar. Sub-offices of the registry of deeds were established in 12(twelve) places in the erstwhile Kingdom of Sikkim and the registering Officers at the said places were to be known as Sub-Registrars. Rule 2 makes provisions for maintaining registers for absolute transfer of property, other transfer of immovable property i.e. mortgage, etc., register of decrees and orders of court and award of arbitrators and a general register. Rules 3 and 4 enumerate details of other registers to be maintained. Rule 5 requires the Sub-Registrar to perform his duties under the superintendence and control of the Gangtok Registrar. Rule 6 empowers the Registrar to revise or alter any order of any Sub-Registrar refusing to admit a document if an appeal against such orders was presented to the Registrar within a month from the date of order. The procedure to be observed in the "Registry of Deeds" is enumerated in Rule 7 to Rule 54 of the said Rules.

17. In this milieu, while addressing the contention of the Petitioner that the Rules do not provide that the Sale Deed document should bear serial number, book number or date of registration, we may usefully refer to Rule 7 which is reproduced herein below;

> "**7.** The person or persons executing the deed or his or their authorised representative with one or more witnesses to the execution of it, shall attend at the Registrars office and prove by solemn affirmation before the Registrar the due execution of deeds upon which the Registrar shall cause an exact copy of the deed to be entered in the proper register and after having caused it to be <u>carefully compared with the</u> <u>**original shall attest the copy with his signature and shall also cause the parties or their authorised representative in attendance to subscribe their signatures to the copy and shall**</u> <u>then return the original with a certificate under his signature endorsed thereto specifying the date on</u>

> which such deed was so registered with REFERENCE to the book containing the registry thereof and the page and number under which the same shall have been entered therein."

18. The Rule may be elucidated thus;

(1) On execution of deeds, the person or persons executing the deed or his or their authorised representative with one or more witnesses to the execution of the deed is to attend the Registrars Office.

(2) These persons are required to prove by solemn affirmation before the Registrar the due execution of the deed.

(3) Upon such affirmation the Registrar shall cause an exact copy of the deed to be entered in the proper register, viz., registers as detailed at Rule 2 *supra.*

(4) After the copy is carefully compared with the original, the Registrar shall attest the copy with his signature.

(5) He shall also cause the parties or their representatives in attendance to subscribe their signatures to the copy.

(6) The Registrar shall then return the original with a certificate under his signature endorsed therein specifying the date on which such deed was so registered.

(7) For this purpose reference has to be made to the book containing the registration thereof, and the page and number under which the same shall have been entered therein.

19. Rule 7 of the Registration Rules is fortified by Rule 21, which provides that;

> "**21.** A document required to be registered shall be presented either by the person executing it or by the person claiming under it."

20. It has to be agreed, as pointed out by the Petitioner that Rule 7 nowhere prescribes that the copies of the deed shall contain the aforestated details, viz., serial number, book number or date of registration, those details are to be entered in the original Deed. At the same time, it is relevant to consider the other aspect of Rule 7, which mandates that the copy is to be attested by the Registrar with his signature. He is required to cause the parties or representatives to subscribe their signatures on the copy. On the touchstone of these requirements, we may usefully refer to Annexure P-1 which is admittedly a 'certified to be true copy' of the original Sale Deed. The original is allegedly untraceable. The reverse of the document records "CERTIFIED TO BE TRUE COPY", below which an illegible signature appears and bears the stamp of the "Registration Clerk" and the date 5.12.84. The specific requirement of Rule 7 pertaining to copies of deeds is that the Registrar shall attest the copy with his signature and not that of the "Registration Clerk" as appears to have been done in the instant matter. In absence of the Registrars signature, a niggling doubt ensues as to the authenticity of the document. The document also ought to bear the signature of the parties or their authorised representative(s) which are non-existent on Annexure P-1. It is evident that Annexure P-1 does not fulfil any of the requirements as envisaged by Rule 7 of the Registration Rules.

21. We may now relevantly look to the decision of the Honble Supreme Court in ***Satya Pal Anand*** (*supra*), wherein it was, *inter alia*, held that;

> "**41.** Section 35 of the Act does not confer a quasi-judicial power on the Registering Authority. The Registering Officer is expected to reassure that the document to be registered is accompanied by supporting documents. He is not expected to evaluate the title or irregularity in the document as such. The examination to be done by him is incidental, to ascertain that there is no violation of provisions of the Act of 1908. In the case of Park View Enterprises (supra) it has been observed that the function of the Registering Officer is purely administrative and not quasi-judicial. He cannot decide as to whether a document presented for registration is executed by person having title, as mentioned in the instrument. We agree with that exposition."

22. The ratio explains the role assigned to the Registering Authority as provided under the Registration Act 1908. It exposits that Authority cannot decide whether a document presented for registration is executed by person having title as mentioned in the instrument. For the purposes of the matter at hand, the Registration of Document Rules, 1930 are relevant which make express provisions for registration of documents in the State of Sikkim. Here too, the Registering Authority is debarred from making an enquiry into title, this falls in the domain of the Civil Courts. Respondent No.3 has not refused registration on the basis of Title but as evident from the impugned Memo has invoked Rule 28 of the Registration Rules, which provides that Documents (other than wills) remaining unclaimed in any registration office for a period exceeding three years may be destroyed. In other words, it can be culled out that the assumption of Respondent No.3 was that considering the lapse of 26 years since the alleged initial process, the document in all probability was destroyed/untraceable. It is but trite to mention that the Registering Authority does require to satisfy himself that the persons before him are the persons to have executed the deed. Rule 7 of the Registration Rules demands much the same along with Rule 21 already extracted hereinabove for reference. It is thereafter that the process of registration commences. In the instant matter, the Petitioner who sought registration of Annexure P-1 in 2009 has „sent the document to the Respondent No.3 and not appeared before the Respondent No.3 as would be evident from the impugned Memo dated 01.02.2013. Secondly, even assuming that a personal appearance was made before the Respondent No.3 with Annexure P-1, it is no ones case that the presenter was the party to the execution of Annexure P-1 or the person claiming under it. The identity of the person who presented Annexure P-1 in 2009 has not been disclosed by the Petitioner while on the other hand the executant of the purported Sale Deed has since passed away and the execution of the document, if at all was done 26(twenty-six) years ago.

23. The Honble Supreme Court in the matter of ***Satya Pal Anand*** (*supra*) referring to the decision in ***Thota Ganga Laxmi vs. State of A.P***[8], held as follows;

> "**46.** In our considered view, the decision in the case of Thota Ganga Laxmi (supra) was dealing with an express provision, as applicable to the State of

[8] (2010) 15 SCC 207

> Andhra Pradesh and in particular with regard to the registration of an Extinguishment Deed. In absence of such an express provision, in other State legislations, the Registering Officer would be governed by the provisions in the Act of 1908. Going by the said provisions, there is nothing to indicate that the Registering Officer is required to undertake a quasi judicial enquiry regarding the veracity of the factual position stated in the document presented for registration or its legality, if the tenor of the document suggests that it requires to be registered. The validity of such registered document can, indeed, be put in issue before a Court of competent jurisdiction."

The above ratio would indicate that where express provision is made for registration of a particular deed, the provisions have necessarily to be adhered to. The Registration Rules in the instant matter are to be duly complied with. As already discussed, the document Annexure P-1 is lacking in material details under the specific provision of the Rules referred to.

24. Rule 8 of the Registration Rules provides that the Registrar shall on application being made to him, allow all persons to inspect the Register books as well as grant copies of all deeds registered by him to persons whom they may concern and such copies in the event of original being lost, destroyed or not forthcoming, shall be received as sufficient evidence of such deeds. Pausing here for a moment, no prayer appears to have been made by the Petitioner for inspection of the Registers in the Office of the Respondent No.3 as provided by the Rule. While considering the argument of learned Counsel for the Petitioner that Annexure P-1 ought to have been received as sufficient evidence of execution of the Sale Deed as the original as well as its records have evidently been lost or are untraceable in the concerned Office, it may be essential once more to revisit Rule 7 of the Registration Rules and reiterate that Annexure P-1 is lacking in material particulars in terms of the requirements thereof. In such a circumstance, it stands to reason that the contents therein cannot be relied upon.

25. Although, Rule 22 of the Registration Rules was alluded to by the Respondents No.8 and 10, it evidently has no bearing to the matter at hand as it provides that the registration Officer after satisfying himself that the

contents of the document do not conflict with the existing land laws and rules regarding the holding of immovable property in Sikkim shall proceed with the registering of the document in accordance with procedure specified in Paragraph (7) of the Rules.

26. As per the Petitioner, the application of Rule 28 is contingent upon compliance of Rule 32, Rule 33 and Rule 34 of the Registration Rules. The said Rules read as follows;

> "**32.** The following records shall be permanently preserved in the Registrars Office whether they are already there or whether they are transferred thereto from the sub-Registering Office.
>
> (i) Register of documents and their indexes.
>
> (ii) Register of power of attorney.
>
> (iii) Reports of destruction of records and lists of papers destroyed.
>
> **33.** Every Registering Officer shall be responsible for the preservation and safe custody of all registration records, including those of previous years which have accumulated in or been transferred to his office.
>
> **34.** No documents, books or papers whatever shall be destroyed at any registration office within the previous sanction of the Darbar. Before any document is destroyed, an endeavour must always be made by the Registering Officer in whose Office the document is kept to induce the presentant thereof to take it back."

27. A reading of the Rules do not indicate what punitive action the erring official would be subjected to, this of course is a rhetorical statement. Rule 28 of the Registration Rules have already been discussed. The

Petitioner was before the Registering Authority after a substantial lapse of time not three years as anticipated in Rule 28. The Rules extracted above do not lack lucidity. There is, thus, legitimate reason to believe that if the original document existed the Registry was not in folly for its misplacement or destruction. It is not the Petitioners case that no endeavour was made by the Registering Officer requesting the presentant to take back the original. In fact, no light can be shed on this facet in the nebulous circumstances of who went to present Annexure P-1 to Respondent No.3. Besides, the Respondent No.3 has categorically stated in the impugned Memo dated 01.02.2013 that;

> "…………………………………………..
>
> You had submitted a copy of sale deed executed with a request to register the same in the year 1983. The said documents have been examined as follows;
>
> 1) That the sale deed was submitted to the office in the year 1983.
>
> 2) The deed could not be registered then for the reason best known to them.
>
> 3) The sale deed was executed by 1) Kashi Raj Pradhan, S/o Lt. Kalu Ram Pradhan, 2) Bhim Raj Pradhan, S/o Kashi Raj Pradhan, 3) Master Swarup Raj Pradhan, S/o Chet Raj Pradhan, 4) Master Kishor Raj Pradhan, S/o Lt. Khagendra Raj Pradhan.
>
> As per record, the land has already been transferred and mutated in the name of Sinora Pradhan & Urmila Pradhan. Since the land in question has been recorded in the name of Sinora Pradhan, W/o Lt. Chet Raj Pradhan and Urmila Pradhan, W/o Lt. Khagendra Raj Pradhan as per the records, you are requested to execute a fresh set of sale deed for taking necessary action as per standing Government norms.
>
> ……………………………………………………………………"

28. The Memo hereinabove does not indicate that the document was destroyed and it appears to be an assumption drawn by the Petitioner. The assumption of the official that the Sale Deed was submitted for registration is based on details entered in Annexure P-1. There is no other document for Respondent No.3 to draw such conclusions from. It may be pointed out that Rule 20 of the Registration Rules is germane to the issue contrary to the submissions of the Petitioner and reads as follows;

> "**20.** All instruments required to be registered (Excepting a will) shall be produced within four months from the date of execution thereof, but if any instrument owing to unavoidable for the Registrar in cases where the delay in presentation has not exceeded six months to direct that on payment of a penalty not exceeding ten times the amount of the proper registration fee such instrument may be accepted for registration."

29. The above extracted Rule specifically lays down that the period of limitation within which the document is to be produced for registration is four months from the date of execution thereof and six months at the maximum, this too subject to deposit of penalty as prescribed in the Rules. The original document is alleged to have been presented in 1983, sans proof. The Petitioner has approached the Sub-Divisional Magistrate/Sub-Registrar in the year 2009, no reasons have been given for the delay in approaching the Registering Authority. No explanation issues on what transpired between 1983 to 2009 and why necessary steps as envisaged by Rule 20 were not taken up by the Petitioner. The argument that the Petitioner learnt of the transfer of land to other persons in 2009 when they went to pay land taxes is rather frail apart from the argument of payment of taxes being non-existent in the pleadings. One would thereby mull over whether land tax was not paid for the other years.

30. The Appellate Authority in its impugned Order would observe as follows;

"**25/07/2017**

....

Taken up for hearing on 21.07.2017

....

6. Since the original copy of the Sale Deed dated 17/01/1983 and the relevant file(s) pertaining to the registration proceedings are missing and not traceable in the Office of the Sub-Registrar and in the interim period the executants of the Sale Deed is also deceased and in view of the fact that more than 26 years have lapsed since the Sale deed in question was submitted for registration, I find that there is insufficient material evidence before me to further investigate into the matter and to question the findings of the Sub-Registrar as per his Order No 1013/DCE dated 01/02/2013 at this very late stage.

7. Furthermore, the Sale Deed dated 17/01/1983 that is sought to be registered is no longer in existence and hence there is no question of its registration in any case.

8. Consequently, for the reasons stated hereinabove, the Appeal stands dismissed.

Sd/-
25/7/2017
(Tsegyal Tashi), IAS
Appellate Authority
Land Revenue & D.M. Department"

31. The Order succinctly spells out reasons for refusal to register Annexure P-1, which on examination would also reveal that details in the dotted lines are blank thereby rendering the document speculative and incomplete. At this juncture relevant reference may be made to Rule 44 of the Registration Rules which reads as follows;

> "**44.** When a document occupies more than one sheet of paper, the seal and signature of the Registering Officer shall be attached to every sheet."

This Rule has to be read in conjunction with Rule 7 and the requirements of which, as evident, are devoid in Annexure P-1.

32. That having been stated, it would be apposite to consider the pleadings of the Petitioner at Paragraph 5, which reads as follows;

> "**5.** That the Petitioner states that on 05.12.1984 a certified copy of the Deed of Sale dated 17.01.1983 was furnished to the Petitioner Company. It may be relevant herein to mention that a perusal of the Registration of Documents Rules, 1930 (hereinafter for short referred to as the 'Registration Rules') would go to show that copies of Deeds which are registered can only be furnished by the Registrar on an Application being made to him and in the event of the original being destroyed/lost or not forthcoming, the said copies of the Deeds shall be received as sufficient evidence of such Deeds. The furnishing of the certified copy presupposes that the Registration process was duly completed. ..."

The Petitioner seeks to exposit by this pleading that Annexure P-1 indicates that the registration process was duly completed. If that be so, it is indeed unfathomable as to why the Petitioner would be before this Court or before the Respondent No.2 and the Respondent No.3 seeking registration of Annexure P-1.

33. Hence, in view of the shortcomings in Annexure P-1 discussed above which flies in the face of the Registration Rules, the question of application of Rule 8, I am afraid does not arise, as Annexure P-1 cannot be received as evidence. On the anvil of the discussions that have ensued hereinabove, it is evident that the reliefs as prayed for cannot be granted.

34. The Writ Petition fails and is accordingly dismissed.

35. No order as to costs.

36. Records of the Respondent No.2 be transmitted forthwith.

HIGH COURT OF SIKKIM
GANGTOK
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