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SUBJECT INDEX

under S. 302 IPC certainty of facts is vital. The appreciation of those facts in view of settled law and surrounding circumstances is a subsequent requirement. The feeling of factual uncertainty is trouble to the judicial mind. We are of the considered view that it is crucial to ascertain the fact whether oath was actually administered or not on the Respondent when the statement under S. 164 Cr.P.C. was recorded before we examine the relevance and the implications of the confession to the facts of the present case. On the face of the original document of confession recorded under S. 164 Cr.P.C. it is evident that the said confession was recorded in a pre-typed form for recording of deposition. In such circumstances the evidence whether oath was actually administered or not upon the Respondent may have a vital bearing in the present appeal. The additional evidence would be necessary to effectively decide the present appeal.

State of Sikkim* v. *Suren Rai ***389-A***

Code of Criminal Procedure, 1973 – S. 261 – The argument that the Learned Trial Court failed to alter the Charge that had been framed under the POCSO Act, 2012 despite the victim being above 18 years, merits no consideration herein, as no such objection was raised before the Learned Trial Court. It is settled law that an objection cannot be raised for the first time before the appellate forum when it was not made before the Court of first instance.

Chenga Tshering Bhutia* v. *State of Sikkim ***440-B***

Code of Criminal Procedure, 1973 – S. 482 – Compounding of non-compoundable offence in exercise of power under S. 482 Cr.P.C – It is well-settled principles of law that the High Court is competent to exercise its extraordinary jurisdiction under S. 482 Cr.P.C. to quash the criminal proceedings, even in non-compoundable cases, in the facts and circumstances of the case, which do not fall in the category of heinous and serious offences and also does not involve offences like rape, murder, etc. However, the High Court is required to exercise its jurisdiction sparingly, conscientiously to secure ends of justice to bring peace and cordiality in the family life.

Shri. Narayan Sharma (Dawari) and Another* v. *State of Sikkim ***454-A***

Code of Criminal Procedure, 1973 – S. 482 – It is well-settled that the High Court is competent to exercise its extraordinary jurisdiction under S. 482 to quash the criminal proceedings, even in non-compoundable cases, which do not fall in the category of heinous and serious offences and also

does not involve offences like rape, murder, etc. Exercise of power by the High Court in such proceedings has to be done sparingly, conscientiously to secure ends of justice in the society and to prevent abuse of the process of any Court. The High Court is also required to examine the stage of the trial, whether quashing is sought at the initial stage or after examination of evidence or on completion of the trial, before pronouncement of the order – Without going into merit of the case, when the third petitioner herself is a party to the compromise deed and also both the victims want to settle the dispute amicably, to secure peace and to further friendship, it cannot be held that the charge under S. 354 IPC, in such facts of the case, cannot be quashed under S. 482 of the Cr.P.C. This petition is filed before commencement of examination of evidence – All the three petitioners belong to a common political outfit. The quarrel appears to have taken place on a heat of the moment and it is amicably settled now, as they have entered into a compromise – The petition deserves to be allowed.

Shri. Prem Singh Tamang and Others* v. *State of Sikkim *393-A*

Constitution of India – Article 19 – Freedom of speech and expression as found in Article 19 (1) is one of the basic right but is not absolute being liable to curtailment by laws made by the State to the extent mentioned in clause (2) to (6) thereof. Article 19 (2) of the Constitution extracted hereinabove empowers the State to make laws setting reasonable restrictions in the interest of the general public, security of the State, public order, decency, morality, health or protection of general welfare or any other reason as set out therein. Thus, the scheme of Article 19 indicates that the group of rights, listed as clause (a) to (g), though recognized as fundamental rights conferred on citizens cannot be absolute, uncontrolled or wholly emancipated from restraints, which could result in anarchy.

Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others *464-B*

Constitution of India – Article 21 – This right encompasses the right to live with human dignity inclusive of the bare necessities such as food, clothing and shelter as also leisure and pursuit of better standards of living. The right to privacy is not listed as a fundamental right but is found to be inherent in Article 21 – When the right to information and right to privacy are placed in juxtaposition, the former gives one the right to know, while the right to privacy protects the rights of the individual. Consequently, a balance is to be struck between the fundamental rights of persons seeking information and that of the person whose information is being sought.

Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others *464-C*

Constitution of India – Article 371F – Article 371 F of the Constitution of India was inserted by the Constitution (thirty-sixth amendment) Act, 1975 with effect from 26.04.1975. Any enactment which is in force in a State of India at the date of the Notification is required to be extended by the President by way of a public Notification. The Architects Act, 1972 was an enactment which was in force in a State of India at the date of the Notification and thus, the said enactment was required to be extended by the President by way of public Notification.

Miss Dibya Gurung* v. *State of Sikkim and Others ***367-A***

Indian Evidence Act, 1872 – S. 137 – The evidence in cross-examination deserves equal weightage to the evidence in examination-in-chief – It is well settled that if a prosecution witness deposes facts in favour of the accused and the prosecution fails to declare the said witness hostile and cross-examine him, the prosecution cannot wriggle out of the statement. The said evidence is binding on the prosecution. The accused can rely upon such evidence. It must be taken that the prosecution has accepted that evidence to be true.

Shri. Suren Gurung* v. *State of Sikkim ***407-F***

Indian Penal Code, 1860 – S. 287 – Does motor vehicle fall within the meaning of machinery – S. 287 IPC uses the word "machinery" but does not define it. The word "machinery" thus needs to be understood in its ordinary sense – In view of the definition of the words "machine" or "machinery" in its ordinary grammatical sense and the definition of the word "motor vehicle" or "vehicle" in S. 2 (28) of the Motor Vehicles Act, 1988 all motor vehicles are machines but all machines may not be motor vehicles. The word "machine" would include within its definition "motor vehicles" also for the purpose of S. 287 IPC.

Shri. Suren Gurung* v. *State of Sikkim ***407-A***

Indian Penal Code, 1860 – S. 287 – The first part of S. 287 IPC deals with the rash or negligent act with the machinery endangering human life or to be likely to cause hurt or injury to any person. The second part of S. 287 IPC deals with knowingly or negligently omitting to take such order with the machinery in his possession or under his care. S. 287 IPC thus deals with negligent conduct with respect to machinery.

Shri. Suren Gurung* v. *State of Sikkim ***407-B***

Indian Penal Code, 1860 – S. 287 – The word "order" in the phrase

"omits to take such order" used in the second part of S. 287 IPC would also imply arrangement and thus the failure to make adequate arrangement with the machinery would also fall within its mischief if the failure is done "knowingly" or "negligently". In order to make the omission to take such order with any machinery liable for punishment under this part of S. 287 IPC, it must necessarily be proved that the accused had failed or omitted to take such order or make such arrangement with the machinery "knowingly or negligently" as is sufficient to guard against any probable danger to human life from such machinery.

Shri. Suren Gurung* v. *State of Sikkim ***407-C***

Indian Penal Code, 1860 – S. 304-A – To fall within the mischief of S. 304-A IPC, death must be the result of rash or negligent act although without intention to cause death, nor knowledge that the act done will in all probability result into death. However, the rashness must be so reckless or indifferent and the negligence must be so gross or culpable that it would result in the death of another person – As the IPC has not defined what is "rash and negligent" act, it is incumbent to understand and appreciate the phrase in criminal jurisprudence. It is also equally vital to understand and appreciate the difference of the said phrase "rash and negligent" in civil action and criminal cases – "Rash and negligent" act is the integral ingredient of all theafore-quoted provisions of law. To hold an accused criminally liableunder the aforesaid provisions it is essential to prove that the act of the accused is a "rash and negligent" act. The meaning of the phrase used in the afore-quoted provisions i.e. "rash and negligent" must necessary be the same in all the said provision – *"Causa"* in Latin means cause. *"Causa causans"* means an immediate or effective cause. *"Causa sine qua non"* means a necessary cause; the cause without which the thing cannot be or the event would not have occurred. (Black's Law Dictionary, Tenth Edition). Therefore, it is clear that the "rash and negligent" act must be the immediate or effective cause and it is not enough that it was the necessary cause or the cause without which the event would not have occurred.

Shri. Suren Gurung* v. *State of Sikkim ***407-E***

Indian Penal Code, 1860 – S. 337 and S. 338 – It would be noticed that the difference between S. 337 and S. 338 IPC is the extent of hurt. Whereas an act to fall within S. 337 IPC hurt must be caused and to fall within S. 338 IPC the act must result in grievous hurt. The act in both the sections must be rash or negligent as to endanger human life, or the personal safety of others. It is evident therefore, that the rash or negligent

act of the accused must be to such an extent that it should endanger human life, or the personal safety of others. If the rash or negligent act complained of is to such an extent then for the purpose of S. 337 IPC it must result in hurt and for the purpose of S. 338 IPC it must result in grievous hurt.
Shri. Suren Gurung* v. *State of Sikkim ***407-D***

Principle of waiver – On 12.07.2017 much before the names of successful candidates had been notified on 04.08.2016 and *viva-voce* held on 23.08.2016, the Petitioner was informed that the Council of Architecture Regulations under the Architects Act, 1972 had been followed in the State of Sikkim and that adherence to the said norms and registration with the Council of "Architecture" was mandatory for functioning as an "Architect". In spite of the same, the Petitioner participated in the *viva-voce* without any protest on 23.08.2016 and was declared unsuccessful in the combined selection merit list of the written examination as well as the *viva-voce* on 27.08.2016. In such circumstances, the law which is well settled by the Supreme Court that a candidate who participates in the selection process knowing well the procedure set down therein is not entitled to question the same upon being declared unsuccessful, would squarely apply to the Petitioner – To allow such an objection to succeed would result in nullifying the merit of the Respondent No. 4 in the written examination as well as *viva-voce* and permitting the Petitioner to dislodge the Respondent No. 4 in the merit list although admittedly the Petitioner was below the Respondent No. 4 in merit. This would be impermissible as the principal of waiver would also operate against the Petitioner.
Miss. Dibya Gurung* v. *State of Sikkim and Others ***367-C***

Right to Information Act, 2005 – Object of the Act – The statement of objects and reasons, *inter alia*, provides that in order to ensure great and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 enacted by Parliament needs to be made more progressive participatory and meaningful. The proposed legislation was to provide an effective framework for effectuating the right of information recognised under Article 19 of the Constitution of India. The Right to Information as provided in the RTI Act stems from the Universal Declaration of Human Rights 1986, International Covenant on Civil and Political Rights 1966 and Part III of the Constitution of India, which enumerates Fundamental Rights. Nevertheless, reasonable restrictions on right to information are envisaged in each of the above.
Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others ***464-A***

Right to Information Act, 2012 – S. 8 – Exemption from disclosure of information – On the anvil of the afore stated reasonings, when the provisions of S. 8 of the RTI Act is to be considered, almost all reasonable restrictions and exclusions discussed under Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and Article 19(2) of the Constitution of India find place as exemptions in the RTI Act with additions of few more grounds. The Section being a restriction on the fundamental right to information must be considered as a whole and construed strictly.

Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others ***464-D***

Right to Information Act, 2012 – S. 8 – Exemption from disclosure of information – What tantamounts to invasion of private life would be divulgence of the name, address, occupation, physical health including medical status of the person and financial status, such as income, assets liabilities of self and other members of the family. Generally, a person may be reticent about disclosing such information but there may be circumstances when it becomes absolutely expedient to share some of this information in larger public interest viz. when there is a doubt about the integrity of any person occupying a public office or if it is seen in the larger public interest. At the same time, I hasten to add that no specific parameters can be laid down as it depends on the facts of every individual case. The object of the RTI Act being to bring about transparency and accountability in the working of the public authority, a citizen has the right to access information from the public authority who can facilitate such information – It is apparent from a reading of the said provision that personal information can be disclosed only if the concerned authority who is dealing with the application requiring the information is satisfied that larger public interest justifies the disclosure of such information.

Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others ***464-E***

Right to Information Act, 2012 – S. 8 (1)(j) – This Court is aware and conscious of the fact that the pivotal object of the RTI Act is to advance transparency and accountability and to contain corruption. However, despite these objects, the right to privacy and personal information are on a separate footing and protected under the provisions of Section 8 (1)(j) of the RTI Act, unless the information sought is established to be in public interest – In a given case, information pertaining to assets and liabilities can be disclosed with the rider that there must be larger public interest involved justifying such disclosure. As can be culled out from the averments and

submissions, the petitioner herein suspects that the respondent No.5 is in possession of assets disproportionate to his known sources of income, however mere suspicion without any *prima facie* material to substantiate it does not justify the disclosure of such information as rests with the concerned Government authority. This situation indeed appears to be a fishing expedition embarked upon by the petitioner without any *bona fide* public interest. In these circumstances, it obtains that disclosure of such information would cause unwarranted invasion of the privacy of the individual and falls under the ambit of Section 8 (1)(j) of the RTI Act.
Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others ***464-G***

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – Rule 101 clearly mandates that every person who is likely to be affected in any manner by the result of the petition shall be joined as a Respondent to the Writ Petition. It also provides that if a "necessary party" is not impleaded, the Writ Petition is liable to be dismissed.
Sri. Avantika Contractors (I) Ltd*v. *Union of India and Others ***459-A***

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 113 – Application of Code of Civil Procedure, 1908 – Rule 113 provides that the provisions of the CPC would apply *mutatis mutandis* in all matters for which no provision has been made by the said P.P. Rules and to the extent that they are not inconsistent with the said P.P. Rules.
Sri. Avantika Contractors (I) Ltd* v. *Union of India and Others ***459-B***

Sikkim Government Servants (Conduct) Rules, 1981 – Rule 19 – A Government servant shall on his first appointment to any service or post and thereafter, at the close of every financial year submit to the Government a return of assets and liabilities in such Form as maybe prescribed by the Government giving full particulars regarding immovable property, movable property, both inherited and acquired, debentures and other such details as enumerated in the provisions thereof. The provision also envisages that a Government servant found to be in possession of pecuniary resources or property disproportionate to his known sources of income for which he cannot satisfactorily account shall unless the contrary is proved, be presumed to have been guilty of grave misconduct for which he shall be liable for criminal action besides departmental proceedings. What emerges from the above is that consequent upon the Government servant disclosing

his assets and liabilities to the Government on a yearly basis, should the Government find that there is a mismatch in the possession of property and the income of the government servant, he would be taken to task by the Government.

Shri. Sancha Bahadur Subba* v. *State of Sikkim and Others ***464-F***

Sikkim State Architect Service Recruitment Rules, 2001 – Requirement to be a registered Architect – The post of "Assistant Architect" falls under the Sikkim State Architect Service Recruitment Rules, 2001 made under the proviso to Article 309 of the Constitution of India. Under the Schedule thereto the 14 posts of "Assistant Architects" belongs to the junior grade in the scale of pay of 7000-225-11500. The method of recruitment is 100% by direct recruitment. The eligibility condition required for direct recruitment, *inter-alia*, is a degree of a recognized university in Architecture. There is no requirement in the eligibility condition to be a registered "Architect".

Miss. Dibya Gurung* v. *State of Sikkim and Others ***367-B***

SLR (2018) SIKKIM 367

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

W.P. (C) No. 70 of 2016

Ms. Dibya Gurung ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Rinzing Dorjee Tamang and Ms. Sonam Chhoden Bhutia, Advocates.

For Respondent No.1: Mr. Karma Thinlay, Senior Govt. Advocate with Mr. Thinlay Dorjee, Govt. Advocate and Mr. S. K. Chettri Assistant Govt. Advocate.

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

For Respondent No.3: Mr. Ajay Rathi and Ms. Phurba Diki Sherpa, Advocate.

For Respondent No.4: Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chhetri, Advocate.

Date of decision: 10th April 2018

A. Constitution of India – Article 371F – Article 371 F of the Constitution of India was inserted by the Constitution (Thirty-Sixth Amendment) Act, 1975 with effect from 26.04.1975. Any enactment which is in force in a State of India at the date of the Notification is required to be extended by the President by way of a public Notification. The Architects Act, 1972 was an enactment which was in force in a State of India at the date of the Notification and thus, the said enactment was required to be extended by the President by way of public Notification.

(Paras 4 and 5)

B. Sikkim State Architect Service Recruitment Rules, 2001 – Requirement to be a registered Architect – The post of "Assistant Architect" falls under the Sikkim State Architect Service Recruitment Rules, 2001 made under the proviso to Article 309 of the Constitution of India. Under the Schedule thereto the 14 posts of "Assistant Architects" belongs to the junior grade in the scale of pay of 7000-225-11500. The method of recruitment is 100% by direct recruitment. The eligibility condition required for direct recruitment, *inter-alia*, is a degree of a recognized university in Architecture. There is no requirement in the eligibility condition to be a registered "Architect".

(Para 14)

C. Principle of waiver – On 12.07.2017 much before the names of successful candidates had been notified on 04.08.2016 and *viva-voce* held on 23.08.2016, the Petitioner was informed that the Council of Architecture Regulations under the Architects Act, 1972 had been followed in the State of Sikkim and that adherence to the said norms and registration with the Council of "Architecture" was mandatory for functioning as an "Architect". In spite of the same, the Petitioner participated in the *viva-voce* without any protest on 23.08.2016 and was declared unsuccessful in the combined selection merit list of the written examination as well as the *viva-voce* on 27.08.2016. In such circumstances, the law which is well settled by the Supreme Court that a candidate who participates in the selection process knowing well the procedure set down therein is not entitled to question the same upon being declared unsuccessful, would squarely apply to the Petitioner – To allow such an objection to succeed would result in nullifying the merit of the Respondent No. 4 in the written examination as well as *viva-voce* and permitting the Petitioner to dislodge the Respondent No. 4 in the merit list although admittedly the Petitioner was below the Respondent No. 4 in merit. This would be impermissible as the principal of waiver would also operate against the Petitioner.

(Paras 25 and 26)

D. Architects Act, 1972 – S. 2(a) – The matter could have rested at that but the Petitioner also contends that although the Architects Act, 1972 has not been enforced in Sikkim, the State-Respondents

have all along applied the said Act in Sikkim and thus the use of the word "Assistant Architect" to define the post in the advertisement could only mean a registered "Architect" as defined in S. 2(a) of the Architects Act, 1972. This plea, weighty as it seems, in the fact of the present case, need only be mentioned to be rejected in limine. If that be so, the Petitioner ought not to have applied for the post of "Assistant Architect" when admittedly on the date of the application the Petitioner was not a registered "Architect" – It is seen that the Respondent No.4 is now a registered "Architect" falling within the definition of the said term in S. 2(a) of the Architects Act, 1972 and as such there would be no impediment for her to hold the post of "Assistant Architect".

(Para 27)

Petition dismissed.

Chronological list of cases cited:

1. Dal Bahadur Lama v. Smt. Ratna Kumari Basnet, AIR 1986 Sikk 10.
2. Ramesh Chandra Shah & Ors. v. Anil Joshi and Others, (2013) 11 SCC 309.
3. Ashok Kumar v. State of Bihar, (2017) 4 SCC 357.

JUDGMENT

Bhaskar Raj Pradhan, J.

1. The Petitioner, an *"Architect"* by profession has preferred the present Writ Petition challenging the selection of Respondent No. 4 for the post of *"Assistant Architect"* by the Respondent No. 2 (Sikkim Public Service Commission) on the ground that at the time of selection of the Respondent No. 4 to the post of *"Assistant Architect"* she was not a registered *"Architect"* under the Architect's Act, 1972 and therefore, ought not to have been selected by the Respondent No.2.

2. The factual matrix of the present dispute lies in a narrow compass. The Petitioner graduated in the Bachelor of Architecture in the year 2014. The Respondent No. 4 graduated in the Bachelor of Architecture with a First Class in the year 2015. The Petitioner registered herself as an *"Architect"* with the Respondent No. 3 (Council of Architecture) and possesses a valid

certificate of registration effective from 20.06.2016. The Respondent No.4 applied for registration with the Respondent No.3 on 15.12.2016 and was duly registered vide registration No. AC/2016/60614 on 31.12.2016 six months after the Petitioner.

3. It is an admitted position that the Architects Act, 1972 has not been enforced in Sikkim. It is the categorical submission of the State of Sikkim (Respondent No.1) that it is so. Article 371 F of the Constitution of India is a special provision with respect to the State of Sikkim. Article 371 F (n) provides:

> **"***Notwithstanding anything in this Constitution,- the President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a State in India at the date of the notification;***"**.

4. Article 371 F of the Constitution of India was inserted by the Constitution (Thirty-sixth Amendment) Act, 1975 with effect from 26.04.1975. Thus, any enactment which is in force in a State of India at the date of the notification is required to be extended by the President by way of a public notification.

5. The Architects Act, 1972 was an enactment which was in force in a State of India at the date of the notification and thus, the said enactment was required to be extended by the President by way of public notification.

6. On 28.06.2001 the Department of Personnel, Administrative Reforms & Training, Government of Sikkim issued Notification No.42/GEN/DOP bringing into force the Sikkim State Architect Service Recruitment Rules, 2001 which was published in the Sikkim Government Gazette on 05.07.2001. Under Rule 3 thereof the Method of Recruitment, age limit, qualification and other matters relating to said post shall be as specified in Columns 5 to 9 of the Schedule. The Schedule prescribed a degree of a recognized University in Architecture as the educational qualification required for direct recruitment to the post of *"Assistant Architect"*. There were 9 posts of *"Assistant Architects"* in the Sikkim State Architects Service in the year 2001 which was subsequently raised to 14 vide Notification No.J(80)/147/GEN/DOP dated 21.07.2008 published in the Sikkim Government Gazette on 19.08.2008.

7. On 10.03.2016, much before the Petitioner as well as the Respondent No.2 became registered *"Architects"*, the Respondent No.2 issued an advertisement inviting applications from eligible local candidates for filling up four posts of *"Assistant Architects"* on temporary regular basis in four categories i.e., unreserved, Bhutia-Lepcha, Other Backward Classes (Central List) and Other Backward Classes (State List). A degree in Architecture from a recognized University was one of the conditions of eligibility under the requirement of minimum educational qualification. It was also provided that in accordance with Notification No.44/GEN/DOP dated 27.10.2015 candidates who are in the final/semester of the prescribed course shall be accepted provided such candidates have cleared all the previous semesters at the time of submission of application and subject to submission of the final year results on or before the dates specified by Respondent No.2 before the interview. It was provided that failure to submit the proof of essential educational qualification by prescribed date shall make the application of such candidates liable to be rejected without assigning any reason thereof. The duty of the said post of *"Assistant Architect"* was also notified as *"designing of buildings"*. In paragraph 6 of the said advertisement it was provided that the candidates need not submit any documents; however, the candidate should ensure that they are qualified on the date of interview in all respect. This paragraph was repeatedly emphasized by the Learned Counsel appearing for the Petitioner. He submits under the said clause the requirement that the candidate should ensure they are qualified on the date of interview *"in all respect"* would only mean that the candidate must also be a registered *"Architect"* on or before the date of interview. This argument of the Learned Counsel appearing for the Petitioner would stem from his pivotal argument that although the Architects Act, 1972 has not been enforced in Sikkim it has been applied and followed and therefore a law which is binding and thus as per the definition of the term *"Architect"* as defined in Section 2(a) of the Architects Act, 1972 the use of the words *"Assistant Architect"* in the advertisement could only mean a person whose name is for the time being entered in the register maintained by the Respondent No. 3 prepared and maintained under Section 23 thereof. In such circumstances, a Division Bench of this Court in re: ***Dal Bahadur Lama v. Smt. Ratna Kumari Basnet***[1] had held the stringent provisions of the Act would not govern the case.

[1] AIR 1986 Sikk 10

8. The application form was required to be filled up by the candidate and submitted in the office of the Respondent No. 2 on any working day between 10.30 a.m. to 3.30 p.m. along with the original bank receipt of State Bank of Sikkim, for Rs.150/- credited to '0051-SPSC'. The complete filled in application form was required to reach the Secretary of the Respondent No. 2 by hand or by post on or before 3.00 p.m. on 09.04.2016. No application submitted after 3.00 p.m. on 09.04.2016 would be accepted.

9. Those candidates who would qualify in the written examination were to be called for interview.

10. There was no requirement of the applicant to be a registered *"Architect"* in the advertisement. The very fact that in the conditions of eligibility one of the provisions permitted candidates who are in the final/ semester of the prescribed course to participate in the examination provided that such candidates had cleared all the previous semesters at the time of submission of applications and subject to submission of the final year result on or before the date specified by the Respondent No.2 before the interview in accordance with Notification No.44/GEN/DOP dated 27.10.2015 would clearly reflect the intention of the Respondent No.2 that the eligibility condition for the post of *"Assistant Architect"* was as provided in the Schedule to the Sikkim Architect Service Recruitment Rules, 2001 and no more.

11. The Petitioner belonging to the *"Gurung"* Community and falling in the Other Backward Classes (Central List) reserved category submitted her application for the said post. So did the Respondent No. 4 who also belongs to the same reserved category. On the date of submission of the application i.e. 09.04.2016 both the Petitioner as well as the Respondent No.4 had not registered themselves with the Respondent No.3 as an *"Architect"* since admittedly the Petitioner was registered only on 20.06.2016 and Respondent No.4 was registered on 31.12.2016. Even then the Petitioner without any hesitation or protest submitted her application. The Respondent No.4, oblivious of the future action that the Petitioner would take on the legal premise sought to be canvassed before this Court, also applied for the said post.

12. The Respondent No.2 vide Notice No. 143/SPSC/2016 dated 10.06.2016 fixed the date for written examination for the post of *"Assistant Architect"* under the Sikkim State Architect Service on 02.07.2016.

13. The Petitioner as well as the Respondent No. 4 appeared in the said examination held on 02.07.2016 and qualified for the *viva-voce* as notified vide Notice No. 149/SPSC/Exam/2016 dated 04.08.2016. In the notice the roll numbers of all the candidates who had been short-listed in the written examination was notified. By the said Notice the short-listed candidates were required to report to the examination section of the Respondent No. 2 on 18.08.2016 along with the attested copies of all the required documents mentioned therein for the purpose of scrutiny and verification. Amongst others, the degree certificate and mark-sheet were also required to be scrutinized. Again there was no requirement of the applicant submitting her/his registration certificate issued by the Respondent No.3 registering her/him as an *"Architect"*. On the date of scrutiny and verification of documents i.e. 18.08.2016 the Petitioner was a registered *"Architect"*. However, the Respondent No.4 was not. The learned Counsel for the Petitioner submits that the Respondent No.4 ought to have known that under the Architects Act, 1972 she must mandatorily register herself as an *"Architect"* and consequently ensure her registration prior to the date of verification of documents as was done by the Petitioner. There is a fundamental flaw in this argument which ignores the fact that the advertisement did not seek for the registration document at any stage and there was no requirement for the applicant to have been a registered *"Architect"* neither at the time of the application nor at the time of verification or scrutiny of documents. Even otherwise, the Petitioner did not protest against the short-listing of the Respondent No.4. It is difficult to appreciate that a graduate in Architecture would have the necessary legal acumen to appreciate that in spite of the Architects Act, 1972 not having been enforced and the advertisement not having asked for it, would know that the mandate of the said Architects Act, 1972 was applicable and consequently, ensured her registration as an *"Architect"* with the Respondent No. 3 prior to the date of scrutiny.

14. The post of *"Assistant Architect"* falls under the Sikkim State Architect Service Recruitment Rules, 2001 made under the proviso to Article 309 of the Constitution of India. Under the Schedule thereto the 14 posts of *"Assistant Architects"* belongs to the junior grade in the scale of pay of Rs.7000-225-11500. The method of recruitment is 100% by direct recruitment. The eligibility condition required for direct recruitment, *inter-alia*, is a degree of a recognized university in Architecture. There is no requirement in the eligibility condition to be a registered *"Architect"*. The

said Sikkim State Architect Service Recruitment Rules, 2001 is not under challenge.

15. In the meanwhile the Petitioner filed Right to Information (RTI) application with the Buildings & Housing Department, Government of Sikkim seeking certain information which would be replied on the same date by the said Department on 12.07.2017.

16. Both the Petitioner as well as the Respondent No. 4 appeared for the *viva-voce* held on 23.08.2016 whose result was notified vide Notice Reference No.154/SPSC/2016 dated 27.08.2016. The Respondent No. 4 along with three others was declared qualified and their names recommended for appointment as *"Assistant Architect"*. Admittedly, the Petitioner fell in the fifth place in the merit list as would be seen from the statement of marks obtained in written examination and *viva-voce* for the post of *"Assistant Architect"* filed by the Respondent No.4 and stood unqualified and was not recommended for appointment. The Petitioner has not challenged the merits of the selection process and admits her position in the merit list.

17. The Respondent No. 2 vide communication bearing reference No. 604/SPSC/2016 dated 31.08.2016 to the Commissioner-cum-Secretary, Department of Personnel Administrative Reforms & Trainings informed that 17 applications had been received and all the applicants had appeared in both sessions of written examination held on 02.07.2016. Out of them a total of 7 candidates had qualified at the ratio of 1:2 and call for interview. On the basis of the marks obtained in written examination and interview the following candidates had been declared qualified in the order of merit and the names of the selected candidates were recommended for appointment:

Roll No.	**CANDIDATE NAME**	**ROSTER POINT ALLOTED**
16754009	NISHA LAMICHANEY	UR / 01
16754011	PENZANG DORJEE LEPCHA	BL / 02
16754013	SAMJANA PRADHAN	OBC (SL)/04
16754010	OSHIN RAHUL GURUNG	OBC (CL)/03

18. On 07.12.2016 the Petitioner issued a legal notice demanding justice to the Chief Secretary, Home Department, Government of Sikkim as well as the Respondent No.2. For the first time the Petitioner protested about the selection of the Respondent No.4 to the post of *"Assistant Architect"* as the Respondent No.4 was not a registered *"Architect"*. This solitary fact was also the sole ground for the demand for justice.

19. The Petitioner, aggrieved by the fact that although the legal notice demanding justice had been duly received no action was taken by the State-Respondents approached this Court by filing the present Writ Petition on 28.10.2017 seeking to quash the selection of Respondent No.4 for the post of *"Assistant Architect"* and further for the Petitioners' selection to the said post. Again, the failure to register herself as a registered *"Architect"* is the sole ground of attack on the Respondent No.4 by the Petitioner in the present Writ Petition.

20. The Sikkim State Architect Service Recruitment Rules, 2001 is not under challenge in the present proceedings, nor is the advertisement or the Office Order No. 2422/G/DOP dated 28.12.2016 appointing the Respondent No. 4 as *"Assistant Architect"* in the junior grade of the Sikkim State Architect Service Recruitment Rules, 2001. All that the Petitioner seeks is the quashing of the selection of the Respondent No.4 and the selection of the Petitioner to the post of the *"Assistant Architect"* not on the ground of merit but on the sole ground that the Respondent No. 4 was not a registered *"Architect"* on the date of scrutiny.

21. Mr. Karma Thinlay, Learned Senior Government Advocate would raise a preliminary objection on the *locus standi* of the Petitioner to approach this Court challenging the selection of Respondent No.4 after having consciously participated in the selection process without any protest and having failed in the said selection. Mr. Karma Thinlay would submit, and quite correctly, that it is settled law that when a candidate appears at an examination without objection and is subsequently found to be not successful a challenge to the process is precluded. Mr. Karma Thinlay would rely on the judgment of the Supreme Court in re: ***Ramesh Chandra Shah & Ors. v. Anil Joshi & Ors.***[2] in which it was held:

[2] (2013) 11 SCC 309

"18. *It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.*

19. *One of the earliest judgments on the subject is Manak Lal v. Prem Chand Singhvi [AIR 1957 SC 425]. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct levelled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below: (AIR pp. 431-32, paras 8-9)*

> *"8. … If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time. …*

9. From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time. … Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

20. *In G. Sarana v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] , this Court held that the appellant who knew about the composition of the Selection Committee and*

took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. *In Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644] , a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] in the following words: (SCC p. 493, para 9)*

> *"9. … The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644] it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

22. *In Manish Kumar Shahi v. State of Bihar [(2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)*

> *"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."*

23. *The doctrine of waiver was also invoked in Vijendra Kumar Verma v. Public Service Commission [(2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21] and it was held: (SCC p. 156, para 24)*

> *"24. When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge*

of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction."

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

22. In re: ***Ashok Kumar v. State of Bihar***[3] the Supreme Court would examine the various judgments rendered by it earlier and ultimately hold thus:-

[3] (2017) 4 SCC 357

> ***"12.*** *The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.*
>
> ***13.*** *The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla [Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar [Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , this Court held that: (SCC p. 107, para 18)*
>
> > *"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See Munindra Kumar v. Rajiv Govil [Munindra Kumar v. Rajiv Govil, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and Rashmi Mishra v. M.P. Public Service*

Commission [Rashmi Mishra v. M.P. Public Service Commission, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345] .)"

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

15. *In Manish Kumar Shahi v. State of Bihar [Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , the same principle was reiterated in the following observations: (SCC p. 584, para 16)*

"16. We also agree with the High Court [Manish Kumar Shahi v. State of Bihar, 2008 SCC OnLine Pat 321 : (2009) 4 SLR 272] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the

High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in Madan Lal v. State of J&K [Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] , Marripati Nagaraja v. State of A.P. [Marripati Nagaraja v. State of A.P., (2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68] , Dhananjay Malik v. State of Uttaranchal [Dhananjay Malik v. State of Uttaranchal, (2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005 : (2008) 3 PLJR 271] , Amlan Jyoti Borooah v. State of Assam [Amlan Jyoti Borooah v. State of Assam, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and K.A. Nagamani v. Indian Airlines [K.A. Nagamani v. Indian Airlines,."

16. *In Vijendra Kumar Verma v. Public Service Commission [Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21] , candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.*

17. *In Ramesh Chandra Shah v. Anil Joshi [Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309 : (2011) 3 SCC (L&S) 129] , candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents*

would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

> *"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."*

18. *In Chandigarh Admn. v. Jasmine Kaur [Chandigarh Admn. v. Jasmine Kaur, (2014) 10 SCC 521 : 6 SCEC 745] , it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey [Pradeep Kumar Rai v. Dinesh Kumar Pandey, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274] , this Court held that: (SCC p. 500, para 17)*

> *"17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the*

> *interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."*
>
> *This principle has been reiterated in a recent judgment in Madras Institute of Development Studies v. K. Sivasubramaniyan [Madras Institute of Development Studies v. K. Sivasubramaniyan, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462].*
>
> ***"19.** In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the impugned judgment that the interpretation of Rule 6 was not free from vagueness. There was, in other words, no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90 : 10 allocation.***"***

23. In the present case on the date of the advertisement dated 10.03.2016 the Petitioner was admittedly not a registered "*Architect*". The advertisement dated 10.03.2016 also did not prescribed any requirement for

the applicant to be a registered *"Architect"*. Nevertheless, the Petitioner admittedly submitted her application for the post of *"Assistant Architect"* on or before 09.04.2016 (i.e. the last date of submission of application as per the advertisement dated 10.03.2016) knowing well that she was even by then not a registered *"Architect"*. Between the date of advertisement and the date of submission of application there was a gap of one whole month for the Petitioner to take recourse to the law and challenge the advertisement which was not done. The Petitioner appeared in the written examination held on 02.07.2016 on which date she was a registered *"Architect"* knowing well that the advertisement had not prescribed any requirement for the applicants to be a registered *"Architect"* for the post of *"Assistant Architect"* as well as the fact that therefore there would have been other applicants who may not have been a registered *"Architect"* on the date of the advertisement or on the date of submission of the applications. On 04.08.2016 after a month of the written examination when the names of the successful candidates in the written examination were notified by the Respondent No.2 it was clear that both the Petitioner as well as the Respondent No. 4 had cleared the written examination. Even then the Petitioner participated in the subsequent *viva-voce* held on 23.08.2016 nearly a month thereafter along with other applicants including the Respondent No. 4 who had succeeded in the written examination. The Petitioner did not object to the participation of the Respondent No.4 in the written examination as well as the *viva-voce*.

24. Admittedly, the Petitioner had filed a Right to Information application on 12.07.2017 with the Buildings & Housing Department, raising three questions which were all answered by the said Department on the same date. The said questions and answers were as follows:-

> **"***a) Is the Council of Architecture regulations under the Architects Act, 1972 followed in the State of Sikkim?*
>
> *Ans: Yes, it is being followed.*
>
> *b) Is adherence to the said norms and registration with the Council of Architecture mandatory for functioning as an Architects in the State of Sikkim?*
>
> *Ans: Yes, it is mandatory.*

c) Is Registration with the Council of Architecture mandatory to be recruitment as an Architect under the Government of Sikkim?

*Ans: Since the regulations under the Council of Architecture are being followed, registration is mandatory.***"**

25. Significantly, therefore, on 12.07.2017 much before the names of successful candidates had been notified on 04.08.2016 and *viva-voce* held on 23.08.2016 the Petitioner was informed that the Council of Architecture Regulations under the Architects Act, 1972 had been followed in the State of Sikkim and that adherence to the said norms and registration with the Council of *"Architecture"* was mandatory for functioning as an *"Architect"*. In spite of the same, the Petitioner participated in the *viva-voce* without any protest with the Respondent No. 4 on 23.08.2016 and was declared unsuccessful in the combined selection merit list of the written examination as well as the *viva-voce* on 27.08.2016. In such circumstances, the law which is well settled by the Supreme Court that a candidate who participates in the selection process knowing well the procedure set down therein is not entitled to question the same upon being declared unsuccessful, would squarely apply to the Petitioner.

26. From the chronology of the events as set out hereinabove it is quite evident that the Petitioner started the exercise of seeking and gathering information about the requirement of registration of *"Architects"* in Sikkim after having appeared in the written examination on 02.07.2016. The Petitioner has nowhere averred in the Writ Petition that she had submitted her registration certificate at the time of submission of documents on 18.08.2016 along with the attested copies of all the required documents mentioned in Notice No. 149/SPSC/Exam/2016 dated 04.08.2016 for the purpose of scrutiny and verification. Evidently, the objection of the Petitioner against the Respondent No. 4 that she was not a registered *"Architect"* was an afterthought solely for the purpose of taking advantage of her being registered as an *"Architect"* six months prior to the Respondent No.4's registration to the Petitioner's benefit and to the detriment of the Respondent No. 4. To allow such an objection to succeed would result in nullifying the merit of the Respondent No. 4 in the written examination as well as *viva-voce* and permitting the Petitioner to dislodge the Respondent No. 4 in the

merit list although admittedly the Petitioner was below the Respondent No. 4 in merit. This would be impermissible as the principal of *waiver* would also operate against the Petitioner. Further, it is quite evident that there is no fault of the Respondent No.4 in this entire situation.

27. The matter could have rested at that but the Petitioner also contends that although the Architects Act, 1972 has not been enforced in Sikkim, the State-Respondents have all along applied the said Act in Sikkim and thus the use of the word *"Assistant Architect"* to define the post in the advertisement could only mean a registered *"Architect"* as defined in Section 2(a) of the Architects Act, 1972. This plea, weighty as it seems, in the fact of the present case, need only be mentioned to be rejected in *limine*. If that be so, the Petitioner ought not to have applied for the post of *"Assistant Architect"* when admittedly on the date of the application the Petitioner was not a registered *"Architect"*. Thus, although the Learned Counsel appearing for the Petitioner has made extensive and impressive arguments basing his plea under the Architects Act, 1972 this Court shall refrain from venturing any finding on the same and leave the question open to be decided appropriately in another case. It is seen that the Respondent No.4 is now a registered *"Architect"* falling within the definition of the said term in Section 2(a) of the Architects Act, 1972 and as such there would be no impediment for her to hold the post of *"Assistant Architect"*.

28. The Writ Petition is dismissed. Parties to bear their respective costs.

SLR (2018) SIKKIM 389

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

Crl. A. No. 17 of 2016

State of Sikkim ….. **APPELLANT**

Versus

Suren Rai ….. **RESPONDENT**

For the Appellant: Mr. Karma Thinlay, Addl. Public Prosecutor with Ms. Pollin Rai, Asstt. Public Prosecutor.

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

For Respondent No. 2: Mr. A. Moulik, Senior Advocate, with Ms. K.D. Bhutia, Mr. Ranjit Prasad, Advocates as Amicus Curiae.

Date of decision: 11th April 2018

A. Code of Criminal Procedure, 1973 – S. 164 – In a Criminal case and that too when the allegation is of commission of a heinous crime punishable under S. 302 IPC certainty of facts is vital. The appreciation of those facts in view of settled law and surrounding circumstances is a subsequent requirement. The feeling of factual uncertainty is trouble to the judicial mind. We are of the considered view that it is crucial to ascertain the fact whether oath was actually administered or not on the Respondent when the statement under S. 164 Cr.P.C. was recorded before we examine the relevance and the implications of the confession to the facts of the present case. On the face of the original document of confession recorded under S. 164 Cr.P.C. it is evident that the said confession was recorded in a pre-typed form for recording of deposition. In such circumstances the evidence whether oath was actually administered or not upon the

Respondent may have a vital bearing in the present appeal. The additional evidence would be necessary to effectively decide the present appeal.

(Para 4)

Chronological list of cases cited:

1. State of Sikkim v. Suren Rai, 2018 SCC OnLine Sikk 12.

ORDER

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

1. Mr. Karma Thinlay, Additional Public Prosecutor submits that a bare perusal of the confession recorded under Section 164 Code of Criminal Procedure, 1973 (Cr.P.C.) at page 34 of the paper-book makes it clear that oath was not actually administered upon the Respondent and the words *"taken on oath solemn affirmation"* was part of a pre-typed *"form for recording deposition"* and as such in view of paragraph 126 of the judgment rendered by the Full Bench of this Court in re: ***State of Sikkim v. Suren Rai***[1] it would be important to remit the matter back to the Court of the Learned Sessions Judge for the limited purpose of taking evidence of non-compliance of Section 164 and 281 Cr.P.C.

2. Mr. B. Sharma, Learned Senior Advocate for the Respondent submits that the confession under Section 164 Cr.P.C. was evidently recorded under oath and duly signed by the Judicial Officer and further the Respondent in his statement under Section 313 Cr.P.C. had stated that he had made the statement on being pressurised by the Investigating Officer. He therefore, submits that remitting the matter would serve no useful purpose.

3. In re: ***Suren Rai (supra)*** this Court held that:-

> ***"126.*** *It is also evident that on examination of Section 164(5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the*

[1] 2018 SCC OnLine Sikk 12

mandate of Section 164 and 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, Section 463 Cr.P.C would be applicable and the Court shall take evidence of non-compliance of Section 164 and 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence. We answer the second question accordingly."

4. In a Criminal case and that too when the allegation is of commission of a heinous crime punishable under section 302 Indian Penal Code, 1860 (IPC) certainty of facts is vital. The appreciation of those facts in view of settled law and surrounding circumstances is a subsequent requirement. The feeling of factual uncertainty is trouble to the judicial mind. We are of the considered view that it is crucial to ascertain the fact whether oath was actually administered or not on the Respondent when the statement under section 164 Cr.P.C. was recorded before we examine the relevance and the implications of the confession to the facts of the present case. On the face of the original document of confession recorded under Section 164 Cr.P.C. it is evident that the said confession was recorded in a pre-typed form for recording of deposition. In such circumstances the evidence whether oath was actually administered or not upon the Respondent may have a vital bearing in the present appeal. The additional evidence would be necessary to effectively decide the present appeal.

5. Section 391 Cr.P.C. provides:

"391. Appellate Court may take further evidence or direct it to be taken.-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

6. We, therefore, direct that the case papers be remitted back to the Court of the Learned Sessions Judge, West Sikkim at Gyalzing for examining whether oath was actually administered upon the Respondent by the Learned Magistrate while recording his confession under section 164 Cr.P.C. in terms of Section 463 Cr.P.C. The Learned Sessions Judge is directed to complete the said proceeding within a period of 15 days.

7. We are also of the view that a warrant in terms of Section 390 Cr.P.C., in the facts and circumstances of the present case, must be issued. Accordingly, let a warrant be issued forthwith and the Respondent be arrested and brought before the Court of Learned Sessions Judge, West Sikkim at Gyalzing for compliance of the provision of Section 390 Cr.P.C.

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SLR (2018) SIKKIM 393

(Before Hon'ble the Chief Justice)

Crl. M.C No. 04 of 2018

Shri Prem Singh Tamang and Others ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Mr. Sudesh Joshi, Mr. Rinzing Dorjee Tamang and Mr. Girmey Bhutia, Advocates.

For the Respondent: Mr. J.B. Pradhan, Public Prosecutor with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 11th April 2018

A. Code of Criminal Procedure, 1973 – S. 482 – It is well-settled that the High Court is competent to exercise its extraordinary jurisdiction under S. 482 to quash the criminal proceedings, even in non-compoundable cases, which do not fall in the category of heinous and serious offences and also does not involve offences like rape, murder, etc. Exercise of power by the High Court in such proceedings has to be done sparingly, conscientiously to secure ends of justice in the society and to prevent abuse of the process of any Court. The High Court is also required to examine the stage of the trial, whether quashing is sought at the initial stage or after examination of evidence or on completion of the trial, before pronouncement of the order – Without going into merit of the case, when the third petitioner herself is a party to the compromise deed and also both the victims want to settle the dispute amicably, to secure peace and to further friendship, it cannot be held that the charge under S. 354 IPC, in such facts of the case, cannot be quashed under S. 482 of the Cr.P.C. This petition is filed before commencement of examination of evidence – All the three petitioners

belong to a common political outfit. The quarrel appears to have taken place on a heat of the moment and it is amicably settled now, as they have entered into a compromise – The petition deserves to be allowed.

(Para 15)

Appeal allowed.

Chronological list of cases cited:

1. Manoj Sharma v. State and Others, (2008) 16 SCC 1.
2. Sushil Suri v. Central Bureau of Investigation and Another, (2011) 5 SCC 708.
3. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 30.
4. Ashok Sadarangani and Another v. Union of India and Others, (2012) 11 SCC 321.
5. Narinder Singh and Others v. State of Punjab and Another, (2014) 6 SCC 466.
6. Yogendra Yadav and Others v State of Jharkhand and Another, (2014) 9 SCC 653.

ORDER

Satish K. Agnihotri, CJ

This is a petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "Cr. P.C."), seeking to quash the First Information Report (FIR) No. 333 of 2016 dated 22nd September 2016, lodged by the second petitioner against the first petitioner, wherein the second petitioner alleged that the first petitioner assaulted the second petitioner as well as the third petitioner, who happened to be the cousin sister of the second petitioner and consequential G.R. Case No. 228 of 2017 pending on the file of the Judicial Magistrate, Soreng Sub-Division, stationed at Gangtok, East Sikkim.

2. The facts in brief as culled out from the pleadings and documents appended thereto are that the second petitioner lodged an FIR under

Section 154 read with Section 157 of the Cr. P.C. on 22nd September 2016, which was registered as FIR No. 333/2016 against the first petitioner stating that the first petitioner called the second petitioner to his Lumsey Residence at 5th Mile, Gangtok. When he reached Lumsey Residence, the first petitioner along with his supporters came in his vehicle and started assaulting with blows on the chest and face of the second petitioner. Even his shirt was torn. On this, the third petitioner intervened and she was also beaten by the first petitioner mis-appropriately. Thereafter, some more people came forward and he was separated. The first petitioner also threatened to ruin the second petitioner's future.

3. On the basis of said FIR, challan was filed and a case was registered as General Register Case No. 228 of 2017 under the provision of Sections 323/354 of the Indian Penal Code, 1860 (for short, "IPC"). The Chief Judicial Magistrate, East Sikkim at Gangtok took cognizance on 20th July 2017. On taking cognizance, the case was referred to the Judicial Magistrate (First Class), East Sikkim at Gangtok on 20th July 2017. Subsequently, on 15th September 2017 the case was transferred to the Court of Judicial Magistrate, Soreng Sub-Division, stationed at Gangtok for trial and disposal as per law.

4. During pendency of the trial, the petitioners entered into a compromise on 19th February, 2018 in following terms:-

> "1. That the First Party freely in his own free will and without any force or coercion has compromised the matter/case same **being G.R. Case No.100 of 2017, State of Sikkim-versus-Milan Gurung** with the Second Party and does not want to pursue and press any charges against the Second Party any further and does not have any objection if the G.R. Case No. 100 of 2017 is compounded by the Hon'ble Court of Ld. Judicial Magistrate (First Class), Soreng Sub-Division, stationed at Gangtok, East Sikkim.
>
> 2. That the Second Party and the Third Party too freely without any force or coercion has compromised the matter/case same being **G.R. Case**

No. 228 of 2017, State of Sikkim versus Prem Singh Tamang with the First Party and does not want to pursue and press any charges against the First Party any further and does not have any objection if the FIR No. 333/2016, U/S 323/354 of IPC, 1860, Dated 22/09/2016, Time: 2100 hours and a Criminal Trial same being G.R. Case no. 228 of 2017 is quashed by the Hon'ble Court of Sikkim.

3. That the Second Party and the third Party freely agrees and undertakes to be present before the Hon'ble High Court of Sikkim and co-operate and facilitate the First Party during the proceedings under Section 482 of Cr. PC, for quashing of the pending criminal trial against him same being G.R. Case No. 228 of 2017, State of Sikkim versus Prem Singh Tamang arising out of FIR No.333/2016, U/S 323/354 of IPC, 1860, Dated 22/09/2016, Time:2100 hours.

4. That any differences and disputes that had arisen between all the three parties to this compromise deed have been settled as compromised and all the parties do not want to continue with the criminal case against each other.

5. That all the contents of this agreement have been read over and explained to both the parties in Nepali language and after fully understanding the contents of this agreement have scribed their respective signatures."

5. Consequently thereupon, the instant petition is filed by the complainant/ victims and accused jointly, on 17th March, 2018.

6. Learned counsel appearing for the petitioners would submit that the parties have settled their disputes amicably, thus, no grievance survives. It was a case of assault which had taken place unintentionally, on a spur of moment, without there being any motive to harm the second and third petitioners on the part of the first petitioner. The second and third petitioners

have realized that they are friends and as such to have peace in the relationship, the dispute was compromised and the FIR so lodged, and resultant criminal proceedings be quashed.

7. On the other hand, Mr. J.B. Pradhan, learned Public Prosecutor, would submit that the Compromise Deed executed between the parties is vague. It is further contended that one lady was assaulted and as such it is not a case which ought to be allowed, as the complainant and the accused are not close relations.

8. Heard learned counsel appearing for the parties, examined the pleadings and also the relevant documents appended thereto. There is no dispute that on 22nd September 2016 one more FIR was lodged by the Personal Security Officer of the first petitioner against the second petitioner making a complaint of assault by the second petitioner on the first petitioner. It appears that the quarrel between the first petitioner and the second petitioner was not premeditated and admittedly they are friends. The petitioners want to maintain peace and cordial relations among themselves. Thus, this petition is filed jointly to quash the FIR to strengthen the friendly relationship among them.

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

> **"8.** In our view, the High Court's refusal to exercise its jurisdiction under Article 226 of the Constitution for quashing the criminal proceedings cannot be supported. The first information report, which had been lodged by the complainant indicates a dispute between the complainant and the accused which is of a private nature. It is no doubt true that the first information report was the basis of the investigation by the police authorities, but the dispute

[1] (2008) 16 SCC 1

> between the parties remained one of a personal nature. Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. We do not suggest that while exercising its powers under Article 226 of the Constitution the High Court could not have refused to quash the first information report, but what we do say is that the matter could have been considered by the High Court with greater pragmatism in the facts of the case.**"**

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

> **"27**. There can be no doubt that a case under Section 302 IPC or other serious offences like those under Sections 395, 307 or 304-B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power under Section 482 CrPC or in writ jurisdiction on the basis of compromise. However, in some other cases (like those akin to a civil nature), the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. ……**"**

10. In yet another case, ***Sushil Suri vs. Central Bureau of Investigation & Anr.***[2], the scope, ambit and extent of Section 482 of the Code was examined by the Supreme Court, wherein it was held as under:-

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

[2] (2011) 5 SCC 708

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

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

> **"57**. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the

[3] (2012) 10 SCC 30

material on record as to whether the end of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment**.**

58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. ……**"**

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

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

[4] (2012) 11 SCC 321

13. In ***Narinder Singh and others vs. State of Punjab and another***[5], the Supreme Court held as under:

> "**29.** In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
> **29.1.** Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
> **29.2.** When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (*i*) ends of justice, or
>
> (*ii*) to prevent abuse of the process of any court.
>
> While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.
> **29.3.** Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be

[5] (2014) 6 SCC 466

quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for

the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime

and, therefore, there is no question of sparing a convict found guilty of such a crime."

14. In ***Yogendra Yadav and others vs., State of Jharkhand and another***[6], wherein the accused was charge-sheeted for an offence committed, *inter alia*, under Section 307 IPC, which is non-compoundable, the Supreme Court held as under:

> "4. Now, the question before this Court is whether this Court can compound the offences under Sections 326 and 307 IPC which are non-compoundable? Needless to say that offences which are non-compoundable cannot be compoundable by the court. Courts draw the power of compounding offences from Section 320 of the Code. The said provision has to be strictly followed (*Gian Singh v. State of Punjab : (2012) 10 SCC 303)*. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve more turpitude, grave offences like rape, murder, etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such

[6] (2014) 9 SCC 653

> cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace."

15. On studied examination, the common thread running through the aforestated judicial pronouncements, it is well-settled that the High Court is competent to exercise its extraordinary jurisdiction under Section 482 of the Cr. P.C. to quash the criminal proceedings, even in non-compoundable cases, which do not fall in the category of heinous and serious offences and also does not involve offences like rape, murder, etc. Exercise of power by the High Court in such proceedings be done sparingly, conscientiously to secure ends of justice in the society and to prevent abuse of the process of any Court. The High Court is also required to examine the stage of the trial, whether quashing is sought at the initial stage or after examination of evidence or on completion of the trial, before pronouncement of the order. In the instant case, the first petitioner was charge-sheeted under the provisions of Sections 323 and 354 IPC. Offence under Section 323 IPC is compoundable and punishable with imprisonment of either description for a term of which may extend to one year, or with fine which may extend to one thousand rupees, or with both. Under Section 354 IPC, the minimum punishment is one year extendable to five years, and shall also be liable to fine, which is not compoundable. The third petitioner has not lodged any complaint. The second petitioner stated to be the cousin brother of the third petitioner has lodged the complaint alleging that the first petitioner has assaulted into the private parts of the third petitioner. Without going into merit of the case, when the third petitioner herself is a party to the Compromise Deed and also both the victims want to settle the dispute amicably, to secure peace and to further friendship, it cannot be held that the charge under Section 354 IPC, in such facts of the case, cannot be quashed under Section 482 of the Cr. P.C. This petition is filed before commencement of examination of evidence. It is well-settled that all the three petitioners belong to a common political outfit. The quarrel appears to have taken place on a heat of the moment and it is amicably settled now, as they have entered into a compromise. Thus, I am of the considered view that the petition deserves to be allowed.

16. Resultantly, FIR bearing No. 333 of 2016 dated 22nd September 2016 and the consequential proceedings in GR Case No. 228 of 2017

(State of Sikkim Versus Prem Singh Tamang) pending on the file of the Court of Judicial Magistrate (First Class), Soreng Sub-Division, West Sikkim stationed at Gangtok, are quashed.

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

SLR (2017) SIKKIM 407

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

Crl. Rev. P. No. 03 of 2017

Shri Suren Gurung ….. REVISIONIST

Versus

State of Sikkim ….. RESPONDENT

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

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

Date of decision: 11th April 2018

A. Indian Penal Code, 1860 – S. 287 – Does motor vehicle fall within the meaning of machinery – S. 287 IPC uses the word "machinery" but does not define it. The word "machinery" thus needs to be understood in its ordinary sense – In view of the definition of the words "machine" or "machinery" in its ordinary grammatical sense and the definition of the word "motor vehicle" or "vehicle" in S. 2 (28) of the Motor Vehicles Act, 1988 all motor vehicles are machines but all machines may not be motor vehicles. The word "machine" would include within its definition "motor vehicles" also for the purpose of S. 287 IPC.

(Paras 14 and 16)

B. Indian Penal Code, 1860 – S. 287 – The first part of S. 287 IPC deals with the rash or negligent act with the machinery endangering human life or to be likely to cause hurt or injury to any person. The second part of S. 287 IPC deals with knowingly or negligently omitting to take such order with the machinery in his possession or under his care. S. 287 IPC thus deals with negligent conduct with respect to machinery.

(Para 17)

C. Indian Penal Code, 1860 – S. 287 – The word "order" in the phrase "omits to take such order" used in the second part of S. 287 IPC would also imply arrangement and thus the failure to make adequate arrangement with the machinery would also fall within its mischief if the failure is done "knowingly" or "negligently". In order to make the omission to take such order with any machinery liable for punishment under this part of S. 287 IPC, it must necessarily be proved that the accused had failed or omitted to take such order or make such arrangement with the machinery "knowingly or negligently" as is sufficient to guard against any probable danger to human life from such machinery.

(Para 19)

D. Indian Penal Code, 1860 – S. 337 and S. 338 – It would be noticed that the difference between S. 337 and S. 338 IPC is the extent of hurt. Whereas an act to fall within S. 337 IPC hurt must be caused and to fall within S. 338 IPC the act must result in grievous hurt. The act in both the sections must be rash or negligent as to endanger human life, or the personal safety of others. It is evident therefore, that the rash or negligent act of the accused must be to such an extent that it should endanger human life, or the personal safety of others. If the rash or negligent act complained of is to such an extent then for the purpose of S. 337 IPC it must result in hurt and for the purpose of S. 338 IPC it must result in grievous hurt.

(Para 22)

E. Indian Penal Code, 1860 – S. 304-A – To fall within the mischief of S. 304-A IPC, death must be the result of rash or negligent act although without intention to cause death, nor knowledge that the act done will in all probability result into death. However, the rashness must be so reckless or indifferent and the negligence must be so gross or culpable that it would result in the death of another person – As the IPC has not defined what is "rash and negligent" act, it is incumbent to understand and appreciate the phrase in criminal jurisprudence. It is also equally vital to understand and appreciate the difference of the said phrase "rash and negligent" in civil action and criminal cases – "Rash and negligent" act is the integral ingredient of all the afore-quoted provisions of law. To hold an accused criminally liable under the aforesaid provisions it is

essential to prove that the act of the accused is a "rash and negligent" act. The meaning of the phrase used in the afore-quoted provisions i.e. "rash and negligent" must necessary be the same in all the said provision – "Causa" in Latin means cause. "Causa causans" means an immediate or effective cause. "Causa sine qua non" means a necessary cause; the cause without which the thing cannot be or the event would not have occurred. (Black's Law Dictionary, Tenth Edition). Therefore, it is clear that the "rash and negligent" act must be the immediate or effective cause and it is not enough that it was the necessary cause or the cause without which the event would not have occurred.

(Paras 25, 26, 29 and 31)

F. Indian Evidence Act, 1872 – S. 137 – The evidence in cross-examination deserves equal weightage to the evidence in examination-in-chief – It is well settled that if a prosecution witness deposes facts in favour of the accused and the prosecution fails to declare the said witness hostile and cross-examine him, the prosecution cannot wriggle out of the statement. The said evidence is binding on the prosecution. The accused can rely upon such evidence. It must be taken that the prosecution has accepted that evidence to be true.

(Paras 40 and 42)

Revision allowed.

Chronological list of cases cited:

1. Mohri Ram v. Emperor, AIR 1930 Lahore 453.
2. Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648.
3. Mahadev Prasad Kaushik v. State of U.P., (2008) 14 SCC 479.
4. Sushil Ansal v. State through Central Bureau of Investigation, (2014) 6 SCC 173.
5. Emperor v. Omkar Ram Pratap, (1902) 4 Bom LR. 679.
6. Kurban Hussein Mohammedali Rangwala v. State of Maharashtra, (1965) 2 SCR 622.
7. Suleman Rehiman Mulani and Another v. State of Maharashtra,(1968) 2 SCR 515.

8. Ambalal D. Bhatt v. The State of Gujarat, (1972) 3 SCC 525.

9. Sushil Ansal v. State through Central Bureau of Investigation, (2014) 6 SCC 173.

10. Duli Chand v. Delhi Administration, (1975) 4 SCC 649.

11. State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand and Others with Satish Kaur Sahni v. Jagmohan Singh Kuldip Singh Anand and Others, (2004) 7 SCC 659.

12. Jagan M. Seshadri v. State of T.N, (2002) 9 SCC 639.

13. Raja Ram v. State of Rajasthan, (2005) 5 SCC 272.

14. Mukhtiar Ahmed Ansari v. State (NCT of Delhi), (2005) 5 SCC 258.

15. Javed Masood and Another v. State of Rajasthan, (2010) 3 SCC 538.

16. Assoo v. State of Madhya Pradesh, (2011) 14 SCC 448.

17. Sanjay Subba v. State of Sikkim, 2017 SCC OnLine Sikk 184.

18. Ashok Kumar v. State of Haryana, (2010) 12 SCC 350.

19. Jodhan v. State of Madhya Pradesh, (2015) 11 SCC 52.

20. Kaziman Gurung v. State of Sikkim, SLR 2017 Sikk 134.

JUDGMENT

Bhaskar Raj Pradhan, J

1. On 15.04.2013 around 10:40 hours one taxi vehicle (Scorpio) bearing registration No. Sk.01J/1501 driven by Suren Gurung, the Revisionist herein, was on the way from Rongli to Gangtok. The Revisionist parked the car to attend to natures call. Few passengers also alighted. Thereafter, the said vehicle rolled back and tumbled about 100 meters below the road at 5th Mile on Rorathang-Rangpo Road. One Bikram Rai succumbed to his injuries sustained in the accident while other occupants sustained bodily injuries, both grievous as well as simple.

2. On 15.04.2013 on receipt of the information a First Information Report (FIR) was registered and the investigation taken up.

3. Charge-sheet No.8 dated 26.07.2013 was filed against the Revisionist on finding *prima facie* offences made out under Section 279, 304-A, 338, 337 Indian Penal Code, 1860 (IPC) read with Section 3, 9 III (b) of Motor Vehicles Act, 1988 although in the Final Form/Report under Section 173 Cr.P.C. under the head *"(xvi) Under Act/s & Sections: 304-A/279/336/337/IPC r/ w 183/184 CMM Act, 1988."* has been endorsed.

4. On 6.05.2014 the Learned Chief Judicial Magistrate, East & North Sikkim at Gangtok framed five substance of accusations under Section 287, 304-A, 337, 338 IPC and Section 181 Motor Vehicles Act, 1988 to which the Revisionist pleaded not guilty and claimed trial.

5. In the trial that commenced the Prosecution examined ten witnesses including the Investigating Officer. The examination of the Revisionist under Section 313 of the Code of Criminal Procedure (Cr.P.C.) was conducted on 19.08.2016.

6. On 04.11.2016 the Learned Chief Judicial Magistrate rendered his judgment and convicted the Revisionist for offences punishable under Section 287, 304-A, 337 and 338 of IPC. However, the Revisionist was acquitted for offence under Section 181 of the Motor Vehicles Act, 1988.

7. On 11.11.2016 the Learned Chief Judicial Magistrate sentenced the Revisionist to simple imprisonment of three months for offence under Section 287 IPC; a fine of Rs.500/- for offence under Section 337 and to undergo simple imprisonment of twenty days for failure to pay the fine; a fine of Rs.1000/ - for offence under Section 338 of IPC and to undergo simple imprisonment of twenty days for failure to pay the fine; and rigorous imprisonment of six months for offence under Section 304-A IPC and a fine of Rs.2000/- and to undergo rigorous imprisonment of one month for failure to pay the fine. All sentences were to run concurrently.

8. Aggrieved by the judgment dated 04.11.2016 and sentence dated 11.11.2016 rendered by the Learned Chief Judicial Magistrate the Revisionist preferred an appeal under Section 374 (3) (a) Cr.P.C. before the Court of the Learned Sessions Judge, East & North Sikkim at Gangtok being Criminal Appeal No. 08 of 2016.

9. The Learned Sessions Judge vide judgment dated 06.06.2017 declined to interfere with the conviction and upheld the judgment and sentences impugned in the appeal.

10. Dissatisfied by the said judgment dated 06.06.2017 passed by the Learned Sessions Judge in Criminal Appeal No. 08 of 2016 the Revisionist has preferred the present revision application under Section 397 and 401 read with Section 482 Cr.P.C.

11. Heard Mr. Ajay Rathi, Learned Counsel appearing for the Revisionist as well as Mr. S. K. Chettri, Assistant Public Prosecutor appearing for the State-Respondent. Both the Learned Counsels representing the respective parties led this Court extensively to the evidence on record and advanced their respective submissions. Mr. Ajay Rathi propounded that in a criminal case the burden lies on the prosecution to prove every ingredient of the offences charged and the accused is to be considered innocent until proven guilty. This is a salutary principal in criminal jurisprudence and the prosecution may not need to quarrel with the defence on this point. He further submitted that the present case is a case in which the Revisionist ought to be given the benefit of doubt. *Per contra,* Mr. S. K. Chettri asserts that the prosecution has been able to establish its case beyond reasonable doubt before the Trial Court as well as the appellate Court and therefore, the impugned judgment may not be interfered with.

12. As the Revisionist has been found guilty and convicted under Sections 287, 337, 338 and 304-A IPC it is necessary to examine the ingredients of the said provisions.

13. Section 287 IPC reads thus:

> ***"287. Negligent conduct with respect to machinery****.—Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,*
> *or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,*

*shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.***"**

[Emphasis supplied]

14. Section 287 IPC uses the word *"machinery"* but however, does not define it. The word *"machinery"* thus needs to be understood in its ordinary sense. The following are the dictionary meanings assigned to the word *"machinery"* or *"machine":-*

(i) The Black's Law Dictionary, Tenth Edition defines the word *"machine"* thus:-

"machine**. (16c) Patents. A device or apparatus consisting of fixed and moving parts that work together to perform some function. Machines are one of the statutory categories of inventions that can be patented.-Also termed apparatus; device. Cf. MANUFACTURE; PROCESS (3)."**

(ii) The Webster's Dictionary of the English Language, Unabridged, Encyclopaedic Edition defines the word *"Machine"* as:

***"Machine",** n. [Fr. Machine: L. machine; Gr. mçchanç, a machine, engine, device.]*

1. *……..*

2. *(a) a vehicle, as, formerly, a carriage, cart, etc.; b) a vehicle operated mechanically; specifically, an automobile.*

3. *a structure consisting of a frame work and various fixed and moving parts, for doing some kind of work; mechanism; as, a sewing machine.*

4. *.....*

5. *……..*

6. *……..*

7. *……..*

8. *in mechanics, a device that transmits, or changes the application of, energy; the lever, wheel, and screw are called simple machines.***"**

(iii) The Chambers Thesaurus, 2007 Edition defines *"Machine"* and *"Machinery"* as:

***"machine** n.*

1. INSTRUMENT, device, Contrivance, tool, Contraption, mechanism, engine, motor, apparatus, appliance, gadget, hardware

2. AGENCY, organization, structure, instruments, tool, organ, vehicle, influence, catalyst, system, workings

*3. AUTOMATION, robot, mechanical person, tool, mechanism, zombie, android***"**

***"machinery** n.*

1. INSTRUMENT, Mechanism, tools, apparatus, equipment, tackle, gear, gadgetry

*2. ORGANIZATION, channel (s), structure, system, procedure, workings, agency***"**

(iv) The Concise Oxford English Dictionary, Indian Edition defines *"machine"* as:

***"machine** ■ n.*

1. an apparatus using mechanical power and having several parts, each with a definite function and together performing a particular task. ➢ Technical any device that transmits a force or directs its application

*2. .....***"**

15. The Motor Vehicles Act, 1988 Section 2(28) reads thus:

> ***"2(28)** "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other*

> *enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 1[twenty-five cubic centimetres];***"**

16. In view of the definition of the words *"machine"* or *"machinery"* in its ordinary grammatical sense and the definition of the word *"motor vehicle"* or *"vehicle"* in section 2(28) of the Motor Vehicles Act, 1988 all motor vehicles are machines but all machines may not be motor vehicles. The word *"machine"* would include within its definition *"motor vehicles"* also for the purpose of Section 287 IPC.

17. To fall within the mischief of Section 287 IPC an accused must have done, with any machinery, any act so *"rashly and negligently"* as to endanger human life, or to be likely to cause hurt or injury to any person. Section 287 IPC also makes the *"knowingly or negligently"* omitting to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery an offence. The first part of Section 287 IPC thus deals with the *"rash and negligent"* act with the machinery endangering human life or to be likely to cause hurt or injury to any person. The second part of 287 IPC deals with *"knowingly and negligently"* omitting to take such order with the machinery in his possession or under his care. Section 287 IPC thus deals with negligent conduct with respect to machinery.

18. In re: ***Mohri Ram v. Emperor***[1] cited by Mr. S. K. Chettri, the Lahore High Court dealt with the provision of Section 287 IPC in this manner:

> ***"****……. I am of opinion that both these petitioners are liable to be punished under S. 287 I. P. C. because they were in possession of and had the care of the flour mill and consequently of the belting which was the cause of this accident, and it is obvious that they omitted to take care of such machinery negligently as was sufficient to guard against probable danger to human life. They should have known that by leaving the belting protruding outside the building and without fencing there was danger to persons who might be passing near the belting.I alter their conviction to S. 287, I. P. C. and reduce their sentences of fine to*

[1] AIR 1930 Lahore 453

*Rs. 250/- in the case of Mohri Ram and Rs.150/- in the case of Munshi Ram; in default of payment of fine they will both suffer rigorous imprisonment for three months each.***"**

[Emphasis supplied]

19. A reading of Section 287 IPC and the judgment of the Lahore High Court in re: ***Mohri Ram (supra)*** makes it clear that the word *"order"* in the phrase *"omits to take such order"* used in the second part of Section 287 IPC would also imply arrangement and thus the failure to make adequate arrangement with the machinery would also fall within its mischief if the failure is done *"knowingly"* or *"negligently"*. Thus, in order to make the omission to take such order with any machinery liable for punishment under this part of Section 287 IPC it must necessarily be proved that the accused had failed or omitted to take such order or make such arrangement with the machinery *"knowingly or negligently"* as is sufficient to guard against any probable danger to human life from such machinery.

20. Section 337 IPC reads thus:

"337. Causing hurt by act endangering life or personal safety of others.*—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.***"**

[Emphasis supplied]

21. Section 338 IPC reads thus:

"338. Causing grievous hurt by act endangering life or personal safety of others.*—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which*

*may extend to two years, or with fine which may extend to one thousand rupees, or with both.***"**
[Emphasis supplied]

22. It would be noticed that the difference between Section 337 and Section 338 IPC is the extent of hurt. Whereas an act to fall within Section 337 IPC hurt must be caused, to fall within Section 338 IPC the act must result in grievous hurt. The act in both the sections must be "*rash and negligent"* as to "*endanger human life, or the personal safety of others"*. It is evident therefore, that the *"rash and negligent"* act of the accused must be to such an extent that it should endanger human life, or the personal safety of others. If the "*rash and negligent"* act complained of is to such an extent then for the purpose of Section 337 IPC it must result in hurt and for the purpose of Section 338 IPC it must result in grievous hurt.

23. In re: ***Alister Anthony Pareira v. State of Maharashtra***[2] the Supreme Court examined the provisions of Section 304-A, 337 and 338 and explained it thus:

*"**37.** In Empress of India v. Idu Beg [ILR (1881) 3 All 776] Straight, J. explained the meaning of criminal rashness and criminal negligence in the following words: (ILR pp. 779-80)*

"… criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has

[2] (2012) 2 SCC 648

arisen, it was the imperative duty of the accused person to have adopted."

The above meaning of criminal rashness and criminal negligence given by Straight, J. has been adopted consistently by this Court.

38. *Insofar as Section 304-A IPC is concerned, it deals with death caused by doing any rash or negligent act where such death is caused neither intentionally nor with the knowledge that the act of the offender is likely to cause death. The applicability of Section 304-A IPC is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder. An essential element to attract Section 304-A IPC is death caused due to rash or negligent act. The three things which are required to be proved for an offence under Section 304-A are:*

(1) death of human being;

(2) the accused caused the death; and

(3) the death was caused by the doing of a rash or negligent act, though it did not amount to culpable homicide of either description.

39. *Like Section 304-A, Sections 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act. The scheme of Sections 279, 304-A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life.***"**

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> ***78.*** *We have also carefully considered the evidence let in by the prosecution—the substance of which has been referred to above—and we find no justifiable ground to take a view different from that of the High Court. We agree with the conclusions of the High Court and have no hesitation in holding that the evidence and materials on record prove beyond reasonable doubt that the appellant can be attributed with knowledge that his act of driving the vehicle at a high speed in a rash or negligent manner was dangerous enough and he knew that one result would very likely be that people who were asleep on the pavement may be hit, should the vehicle go out of control.***"**

24. Section 304-A IPC reads thus:

> ***"304-A. Causing death by negligence****.— Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*
>
> *[Emphasis supplied]*

25. To fall within the mischief of Section 304-A IPC death must be the result of the *"rash and negligent"* act although without intention to cause death, nor knowledge that the act done will in all probability result into death. However, the rashness must be so reckless or indifferent and the negligence must be so gross or culpable that it would result in the death of another person.

26. As the IPC has not defined what is *"rash and negligent"* it is incumbent to understand and appreciate the phrase in criminal jurisprudence. It is also equally vital to understand and appreciate the difference of the said phrase *"rash and negligent"* in civil action and criminal cases.

27. The Supreme Court in re: ***Mahadev Prasad Kaushik v. State of U.P.***[3] has explained Section 304-A IPC thus:

[3] (2008) 14 SCC 479

*"**23.** Section 304-A was inserted by the Penal Code (Amendment) Act, 1870 (Act 27 of 1870) and reads thus:*

"304-A. Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

> *The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Sections 299 and 300 IPC and covers those cases where death has been caused without intention or knowledge. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are rash or negligent and are directly the cause of death of another person.*

***24.** There is thus distinction between Section 304 and Section 304-A. Section 304-A carves out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300 IPC. In other words, Section 304-A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the "motivating force" of the act complained of, Section 304-A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts*

*disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death.***"**

28. In re: ***Sushil Ansal v. State through Central Bureau of Investigation*** [4] the Supreme Court would examine Section 304-A IPC and held as under:

*"**(ii) "Rash" or "negligent" — Meaning of***

***56.** Section 304-A IPC makes any act causing death by a rash or negligent act not amounting to culpable homicide, punishable with imprisonment of either description for a term which may extend to two years or with fine or with both. It reads:*

*"**304-A. Causing death by negligence**.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

***57.** The terms "rash" or "negligent" appearing in Section 304-A extracted above have not been defined in the Code. Judicial pronouncements have all the same given a meaning which has been long accepted as the true purport of the two expressions appearing in the provisions. One of the earliest of these pronouncements was in Empress of India v. Idu Beg [Empress of India v. Idu Beg, ILR (1881) 3 All 776] , where Straight, J. explained that in the case of a rash act, the criminality lies in running the risk of doing an act with recklessness or indifference as to consequences. A similar meaning was given to the term "rash" by the High Court of Madras in Nidamarti Nagabhushanam, In re [Nidamarti Nagabhushanam, In re, (1871-74) 7 Mad HCR 119] , where the Court held that culpable rashness meant acting with the*

consciousness that a mischievous and illegal consequence may follow, but hoping that it will not. Culpability in the case of rashness arises out of the person concerned acting despite the consciousness. These meanings given to the expression "rash", have broadly met the approval of this Court also as is evident from a conspectus of decisions delivered from time to time, to which we shall presently advert. But before we do so, we may refer to the following passage from A Textbook of Jurisprudence by George Whitecross Paton reliance whereupon was placed by Mr Jethmalani in support of his submission. Rashness according to Paton means:

"where the actor foresees possible consequences, but foolishly thinks they will not occur as a result of his act".

(emphasis supplied)

58. *In the case of "negligence" the courts have favoured a meaning which implies a gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual which having regard to all the circumstances out of which the charge arises, it may be the imperative duty of the accused to have adopted. Negligence has been understood to be an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do. Unlike rashness, where the imputability arises from acting despite the consciousness, negligence implies acting without such consciousness, but in circumstances which show that the actor has not exercised the caution incumbent upon him. The imputability in the case of negligence arises from the neglect of the civil duty of circumspection.***"**

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72. *To sum up, negligence signifies the breach of a duty to do something which a reasonably prudent man would under the circumstances have done or doing something which when judged from reasonably prudent standards should not have been done. The essence of negligence whether arising from an act of commission or omission lies in neglect of care towards a person to whom the defendant or the accused as the case may be owes a duty of care to prevent damage or injury to the property or the person of the victim. The existence of a duty to care is thus the first and most fundamental of ingredients in any civil or criminal action brought on the basis of negligence, breach of such duty and consequences flowing from the same being the other two. It follows that in any forensic exercise aimed at finding out whether there was any negligence on the part of the defendant/ accused, the courts will have to address the above three aspects to find a correct answer to the charge.*

(iv) Difference between negligence in civil actions and in criminal cases

73. *Conceptually the basis for negligence in civil law is different from that in criminal law, only in the degree of negligence required to be proved in a criminal action than what is required to be proved by the plaintiff in a civil action for recovery of damages. For an act of negligence to be culpable in criminal law, the degree of such negligence must be higher than what is sufficient to prove a case of negligence in a civil action. Judicial pronouncements have repeatedly declared that in order to constitute an offence, negligence must be gross in nature. That proposition was argued by Mr Ram Jethmalani at great length relying upon the English decisions apart from those from this Court and the High Courts in the country. In fairness to Mr Salve, counsel appearing for CBI and Mr Tulsi appearing for the Association of Victims,*

we must mention that the legal proposition propounded by Mr Jethmalani was not disputed and in our opinion rightly so. That negligence can constitute an offence punishable under Section 304-A IPC only if the same is proved to be gross, no matter the word "gross" has not been used by Parliament in that provision is the settled legal position. It is, therefore, unnecessary for us to trace the development of law on the subject, except making a brief reference to a few notable decisions which were referred to at the Bar.

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78. *There is no gainsaying that negligence in order to provide a cause of action to the affected party to sue for damages is different from negligence which the prosecution would be required to prove in order to establish a charge of "involuntary manslaughter" in England, analogous to what is punishable under Section 304-A IPC in India. In the latter case it is imperative for the prosecution to establish that the negligence with which the accused is charged is "gross" in nature no matter that Section 304-A IPC does not use that expression. What is "gross" would depend upon the fact situation in each case and cannot, therefore, be defined with certitude. Decided cases alone can illustrate what has been considered to be gross negligence in a given situation.***"***

29. *"Rash and negligent"* act is the integral ingredient of all the afore-quoted provisions of law. To hold an accused criminally liable under the aforesaid provisions it is essential to prove that the act of the accused is a *"rash and negligent"* act. The meaning of the phrase used in the afore-quoted provisions i.e. "*rash and negligent"* must necessary be the same in all the said provision.

30. In re: ***Emperor v. Omkar Ram Pratap***[5] it was observed by Sir Lawrence Jenkins that: *"To impose criminal liability under Section 304-A, Indian Penal*

[5] (1902) 4 Bom LR. 679

Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non." This view has been followed by the Supreme Court in several decisions including in re: ***Kurban Hussein Mohammedali Rangwala v. State of Maharashtra***[6] ***Suleman Rehiman Mulani & Anr. v. State of Maharashtra*** [7].

31. *"Causa"* in latin means cause. *"Causa causans"* means an immediate or effective cause. *"Causa sine qua non"* means a necessary cause; the cause without which the thing cannot be or the event would not have occurred. (Black's Law Dictionary, Tenth Edition). Therefore, it is clear that the *"rash and negligent"* act must be the immediate or effective cause and it is not enough that it was the necessary cause or the cause without which the event would not have occurred.

32. In re: ***Ambalal D. Bhatt v. The State of Gujarat***[8] it was held that in a prosecution for an offence under Section 304-A of IPC, the Court has to examine whether the alleged act of the accused is the direct result of a rash and negligent act and that act was the proximate and efficient cause of the death without intervention of others negligence.

33. In re: ***Sushil Ansal v. State through Central Bureau of Investigation***[9] the Supreme Court has lucidly explained the doctrine of *causa causans* thus:-

> ***(v) Doctrine of causa causans***
>
> ***80.*** *We may now advert to the second and an equally, if not, more important dimension of the offence punishable under Section 304-A IPC viz. that the act of the accused must be the proximate, immediate or efficient cause of the death of the victim without the intervention of any other person's negligence. This aspect of the legal requirement is also settled by a long line of decisions of the courts in this country. We may at the outset refer to a Division Bench decision of the High Court of Bombay in Emperor v. Omkar Rampratap [(1902) 4 Bom LR 679] where Sir*

[6] (1965) 2 SCR 622
[7] (1968) 2 SCR 515
[8] (1972) 3 SCC 525
[9] (2014) 6 SCC 173

Lawrence Jenkins speaking for the Court summed up the legal position in the following words:

> *"… to impose criminal liability under Section 304-A of the Indian Penal Code, it is necessary that the act should have been the direct result of a rash and negligent act of the accused and that act must be proximate and efficient cause without the intervention of another negligence. It must have been the causa causans; it is not enough that it may have been the causa sine qua non."*

The above statement of law was accepted by this Court in Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra [Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra, AIR 1965 SC 1616 : (1965) 2 Cri LJ 550 : (1965) 2 SCR 622] . We shall refer to the facts of this case a little later especially because Mr Jethmalani, learned counsel for the appellant Sushil Ansal, placed heavy reliance upon the view this Court has taken in the fact situation of that case.

81. *Suffice it to say that this Court has in Kurban Hussein case [Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra, AIR 1965 SC 1616 : (1965) 2 Cri LJ 550 : (1965) 2 SCR 622] accepted in unequivocal terms the correctness of the proposition that criminal liability under Section 304-A IPC shall arise only if the prosecution proves that the death of the victim was the result of a rash or negligent act of the accused and that such act was the proximate and efficient cause without the intervention of another person's negligence. A subsequent decision of this Court in Suleman Rahiman Mulani v. State of Maharashtra [Suleman Rahiman Mulani v. State of Maharashtra, AIR 1968 SC 829 : 1968 Cri LJ 1013] has once again approved the view*

taken in Omkar Rampratap case [(1902) 4 Bom LR 679] that the act of the accused must be proved to be the causa causans and not simply a causa sine qua non for the death of the victim in a case under Section 304-A IPC. To the same effect are the decisions of this Court in Rustom Sherior Irani v. State of Maharashtra [Rustom Sherior Irani v. State of Maharashtra, 1969 ACJ 70 (SC)] , Bhalchandra v. State of Maharashtra [Bhalchandra v. State of Maharashtra, AIR 1968 SC 1319 : (1968) 3 SCR 766 : 1968 Cri LJ 1501] , Kishan Chand v. State of Haryana [(1970) 3 SCC 904] , S.N. Hussain v. State of A.P. [S.N. Hussain v. State of A.P., (1972) 3 SCC 18 : 1972 SCC (Cri) 254] , Ambalal D. Bhatt v. State of Gujarat [(1972) 3 SCC 525 : 1972 SCC (Cri) 618] and Jacob Mathew case [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] .

82. *To sum up: for an offence under Section 304-A to be proved it is not only necessary to establish that the accused was either rash or grossly negligent but also that such rashness or gross negligence was the causa causans that resulted in the death of the victim.*

83. *As to what is meant by causa causans we may gainfully refer to Black's Law Dictionary (5th Edn.) which defines that expression as under:*

> *"Causa causans.—The immediate cause; the last link in the chain of causation."*

The Advance Law Lexicon edited by Justice Chandrachud, former Chief Justice of India defines causa causans as follows:

> *"Causa causans.—The immediate cause as opposed to a remote cause; the 'last link in the chain of causation'; the real effective cause of damage."*

84. *The expression "proximate cause" is defined in the 5th Edn. of Black's Law Dictionary as under:*

> *"Proximate cause.—That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which the result would not have occurred. Wisniewski v. Great Atlantic & Pacific Tea Co. [226 Pa Super 574 : 323 A2d 744 (1974)] , A2d at p. 748. That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.*

34. Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent citing a judgment of the Supreme Court in re: ***Duli Chand v. Delhi Administration***[10] submitted that since there are concurrent findings of fact the jurisdiction of the High Court in a criminal revision application is severely restricted and it cannot embark upon a re-appreciation of evidence.

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[10] (1975) 4 SCC 649

35. In re: ***State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand & Ors.*** with ***Satish Kaur Sahni v. Jagmohan Singh Kuldip Singh Anand & Ors***.[11] the Supreme Court has held:-

> *"**22.** The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,*
>
> > *"for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court".*
>
> *It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.*
>
> ***23.** On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn. [(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5)*
>
> *"The High Court in revision was exercising supervisory jurisdiction of a*

[11] (2004) 7 SCC 659

restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."

24. *It is necessary to note that in the case of Duli Chand [(1975) 4 SCC 649: 1975 SCC (Cri) 663 : AIR 1975 SC 1960] the High Court had reappreciated the whole evidence and confirmed the findings of the two courts below. This Court, therefore, did not interfere with them.***"**

36. Mr. Ajay Rathi, drew the attention of this Court to the evidence of a vital prosecution witness Bijay Gurung (P.W.2) who was one of the occupants of the vehicle driven by the Revisionist from Rongli for going to Gangtok. Bijay Gurung (P.W.2) identified the Revisionist in Court. He stated that:-

"*I know the accused present before the Court. On 15.04.2013. I along with my family members boarded the vehicle driven by the accused from Rongli for going to Gangtok. On reaching Kumrek the accused driver stopped the vehicle on the way and went for short toilet. At that time, the vehicle which we had boarded suddenly started moving and fell below the road. I along with other passengers travelling in the said vehicle also fell along with the vehicle. From the PO I along with the others were evacuated to Rangpo hospital from where I was referred to CRH, Tadong. In the said accident I sustained fracture, injury on my left leg and I had to undergo 17 stitches on my right. I was admitted in the hospital for 2 months for the treatment of my injuries sustained in the said accident.*

xxx on behalf of the accused

*It is not a fact that on 15.04.2013 I did not board the vehicle driven by the accused from Rongli towards Gangtok. It is true that I was seated at the back seat of the vehicle i.e., Scorpio. It is true that on the relevant day of 15.04.2013 the vehicle/driver/accused person and some of the passengers had stopped at the PO to attend the call of the nature. It is true that there were other vehicles already parked in front of our vehicle at the PO. I do not know if the accused person had pulled the handbrake of the vehicle. I also do not know if the accused had put a stone at the back side of the tyre to stop the flow. It is true that I was listening to the music being played inside the vehicle. It is true that three persons including the driver had gone out of the vehicle and the rest (7) of the passengers were in the vehicle. It is true that the accused drove the vehicle smoothly from Rongli to PO. It is true that movement among the sudden passengers inside the vehicle cause the same to flow backwards towards the cliff, the PO was an uphill road. I cannot say if the vehicle had back flowed due to the negligence of the accused person. It is not a fact that I am deposing falsely.***"***

[Emphasis supplied]

37. The Learned Chief Judicial Magistrate in his judgment dated 04.11.2016 has dealt with this crucial evidence in this manner:

> ***"****the argument that the passengers contributed the roll because of their movement inside is fallible, as no passenger can be expected to sit like an inanimate object inside a vehicle, in fact long sittings at a same place inclines any person to adjust his sittings more so when the vehicle is halted, this cannot at all be termed as contributory negligence. A vehicle is not manufactured even ordinarily not to withstand the movement of the passengers occupying it if sufficient care and precaution is taken to secure any slipping of the vehicle by the movement of the passengers occupying it. The evidence clearly prove beyond reasonable doubt that the act of the accused was negligent culpable in nature.***"**

38. The Learned Chief Judicial Magistrate has dealt with the evidence in cross-examination of a prosecution witness who was not declared hostile or cross-examined in that aspect as if the Court was dealing with an improbable and obnoxious statement of a defence witness failing to appreciate that it was a statement of a fact from the mouth of the injured prosecution witness who had suffered severe injuries in the accident. Bijay Gurung (P.W.2) has categorically stated two facts. He stated that it was the sudden movement amongst the passengers which caused the vehicle to roll back. He also stated that he could not say if the vehicle had back flowed due to the negligence of the Revisionist. Bijay Gurung (P.W.2) was a passenger who was inside the vehicle when the vehicle rolled back and because of which he suffered injuries. His statement must be accepted with the seriousness it deserves.

39. The Learned Sessions Judge has quoted the relevant cross-examination of Bijay Gurung (P.W.2) but highlighted and emphasised only the portion which reads *"the PO was an uphill road…."* ignoring the rest. The Learned Sessions Judge has thereafter, held that the evidence of Bijay Gurung (P.W.2) has not been demolished during his cross-examination without reference or adverting to the statement of Bijay Gurung (P.W.2) that it was the movement amongst the passengers inside the vehicle which caused the vehicle to flow backwards towards the cliff.

40. On this vital aspect there is no concurrence of findings of the Learned Chief Judicial Magistrate and the Learned Sessions Judge. In fact there is no finding on this aspect by the Learned Sessions Judge and as stated above the Learned Chief Judicial Magistrate has simply brushed aside this evidence on a reasoning of probability only. The evidence in cross-examination deserves equal weightage to the evidence in examination-in-chief.

41. Both the Courts below have held that the prosecution has been able to prove that the Revisionist had failed or omitted to secure the vehicle safely while parking. Section 101 of the Evidence Act, 1872 provides whoever desires any Court to give judgment as to any legal right or liability depending on the existence of facts which he asserts, must prove those facts exist. However, on perusal of the prosecution evidence there is no cogent evidence to show that the Revisionist failed to secure the vehicle. Thus, this Court is of the view that for the purpose of satisfying itself as to the correctness, legality or propriety of the findings and sentences passed by the Courts below this Court must necessarily examine the same.

42. It is well settled that if a prosecution witness deposes facts in favour of the accused and the prosecution fails to declare the said witness hostile and cross-examine him the prosecution cannot wriggle out of the statement. The said evidence is binding on the prosecution. The accused can rely upon such evidence. It must be taken that the prosecution has accepted that evidence to be true. (vide ***Jagan M. Seshadri v. State of T.N; Raja Ram v. State of Rajasthan[12]; Mukhtiar Ahmed Ansari v. State (NCT of Delhi[13]); Javed Masood & Anr. v. State of Rajasthan[14]; Assoo v. State of Madhya Pradesh[15] and Sanjay Subba v. State of Sikkim[16]***)

43. Bijay Gurung (P.W.2) was an injured witness. Bijay Gurung (P.W.2) has stated that the accident had occurred on 15.04.2013 after the Revisionist had stopped the vehicle on the way to answer to natures call. Bijay Gurung (P.W.2) has also stated that the vehicle which he along with his family members had boarded suddenly started moving and fell below the road as a result of which he sustained fracture on his left leg and had to undergo 17 stitches on his right leg and was hospitalised for two months for treatment. Bijay Gurung (P.W.2) has also candidly admitted that he was seated at the back seat of the said vehicle while the Revisionist and some passengers had stopped at the place of occurrence to attend to the call of nature. The evidence of Bijay Gurung (P.W.2) to the aforesaid effect is also supported by the evidence of other injured witnesses Santosh Kumar Pradhan (P.W.3) who sustained injuries on his hands and Nilu Pradhan (P.W.4) who sustained injuries on her leg.

44. Santosh Kumar Pradhan (P.W. 3) who was also one of the passengers of the vehicle stated that:

> **"***As soon as the accused got down of the vehicle, the vehicle started moving backwards and fell the road. When the accused got down from the vehicle the engine of the vehicle was still running. As soon as the accused got down of the vehicle, the vehicle started moving backward and fell the road. When the vehicle was falling down I jumped out of the vehicle, in the said accident we all sustained injuries. I sustained injuries on my hands. My father-in-law Bikram Rai was also travelling in the said vehicle. He succumbed to his injuries at the PO due to the accident. After getting down from the vehicle the*

[12] (2005) 5 SCC 272
[13] (2005) 5 SCC 258
[14] (2010) 3 SCC 538
[15] (2011) 14 SCC 448
[16] 2017 SCC OnLine Sikk 184

*accused did not put any stone in the tyres of the said vehicle to secure the from moving backward.***"**

[Emphasis supplied]

45. In cross-examination, Santosh Kumar Pradhan (P.W.3) stated:

> **"***It is true that the PO is an uphill road. I do not know the mechanism of the vehicle. It is not true that the accused person pulled the handbreak of the vehicle. I do not know how the handbreak functions. I do no remember if the accused person had turned of the ignition of the said vehicle. It is true that I have not mentioned any of my today's deposition while giving my statement to the police u/s. 161 of the Cr.P.C., 1973. It is true that I was sitting at the last seat of the said vehicle, it is true that I could not see the rear tyre from my seat. .....***".***
>
> *[Emphasis supplied]*

46. However, Santosh Kumar Pradhan (P.W.3) also stated in cross-examination that:

> *"It is true that the accused person had driven the said vehicle in a safe manner from Rongli till PO. I cannot say if the accident occurred due to the negligence of accused person or due to the movement of nine passengers inside the said vehicle causing the same to flow backwards."*
>
> *[Emphasis supplied]*

47. Nilu Pradhan (P.W.4) stated that:

> **"***At around 9:30 am we reached Roarathang and the accused got down to attend nature's call. We were all together nine persons inside the said vehicle. When the accused got down from the vehicle, the vehicle started moving backward and fell off the road. When the vehicle was falling down I jumped out of*

the vehicle. In the said accident we all sustained injuries. I sustained injuries on my leg. I was taken to CRH Tadong for my treatment after my accident.

My sister-in-law's father, Bikram Rai who was also travelling in the said vehicle succumbed to his injuries at the PO due to the said accident.

*After getting down from the vehicle the accused did not put any stone in the tyres of the said vehicle to secure the from moving backward.***"**

[Emphasis supplied]

48. Nilu Pradhan (P.W.4) in cross-examination stated:

"*It is true that the PO is usually used as toilet by the drivers and passengers. It is true that on the relevant day the accused person had parked the vehicle to attend the nature's call. It is true that the PO is an uphill road. I do not know the mechanism of the vehicle. It is true that I do not remember whether the accused person had pulled the handbrake of the vehicle. I do not know how the handbrake functions. I do not remember if the accused person had turned off the ignition of the said vehicle. It is true that I have not mentioned any of my todays deposition while giving my statement to the police u/s. 161 of the Cr.P.C., 1973. It is true that I was sitting at the second seat of the said vehicle. It is true that I did not exit the said vehicle while the accused person left the vehicle. It is true that I could not see the rear tyre from my seat. It is not true that as soon as the accused got off from the vehicle, the vehicle did not flow backwards and did not fall off the road. It is not true that my sister in law's father did not succumb to his injuries at the PO due to the said accident. It is true that the accused person had driven the said vehicle in a safe manner from Rhenock till PO. I cannot say if the accident occurred due to the negligence of accused*

person or due to the movement of nine passengers inside the said vehicle causing the same to flow backwards. It is not true that I did not sustain injuries due to the said accident. It is not a fact that I am deposing falsely."

[Emphasis supplied]

49. From the depositions and the evidence on record it is established that on 15.04.2013 the vehicle driven by the Revisionist with nine passengers was travelling from Rongli to Gangtok. The Revisionist had driven the said vehicle in a safe manner from Rhenock to the place of occurrence. At around 9:30 am when the vehicle reached Rorathang, the Revisionist parked the vehicle and got down along with some of the passengers to attend to natures call. At that time the vehicle suddenly started moving and fell below the road. When the vehicle was falling down Santosh Kumar Pradhan (P.W.3) jumped out of the vehicle and as a result sustained injuries on his hands. Nilu Pradhan (P.W.4) also jumped out of the vehicle and sustained injuries on her leg. Bijay Gurung (P.W.2) however, fell with the vehicle and sustained fracture on his left leg and had to undergo 17 stitches on his right leg. Santosh Kumar Pradhan's (P.W.3) father-in-law one Bikram Rai who was in the vehicle succumbed to his injuries at the PO due to the accident.

50. The evidence of Dr. Tej Chettri (P.W.7) the Medico Legal Consultant at District Hospital, Singtam confirms the death of Bikram Rai due to the accident. The evidence of Dr. Yankee D. Bhutia (P.W.8) establishes grievous injury on Durga Rai. Her evidence also establishes simple injury on one Kinara Gurung. Dr. D. P. Sharma (P.W.9) establishes the examination of Buddha Rai, Santosh Kumar Pradhan (P.W.3) and Niku Pradhan and that they had sustained simple injuries. His evidence also establishes that one Sinara Pradhan had sustained grievous injuries. None of the injured prosecution witnesses have named Durga Rai, Kinara Gurung, Niku Pradhan and Sinara Pradhan as those people who were injured in the accident although they state that there were other passengers in the vehicle.

51. Although, Nilu Pradhan (P.W.4) stated in her examination-in-chief that the accused did not put any stone in the tyres of the said vehicle to secure it from moving backwards she admitted that she was sitting at the second seat of the said vehicle and could not see the rear tyre from her seat. The fact that Nilu Pradhan (P.W.4) admits in cross-examination that she was sitting on the second seat of the said vehicle and could not see the rear tyre coupled with the admission that she had not stated what she stated in her examination-in-chief in her statement to the

police under section 161 Cr.P.C. creates doubt in the mind of this Court regarding her statement in examination-in-chief that after getting down from the vehicle the Revisionist did not put any stone in the tyre of the vehicle to secure it. There is no positive assertion as to the fact that the Revisionist had not pulled the handbrake of the vehicle by any prosecution witnesses although in cross-examination Santosh Kumar Pradhan (P.W.3) denied that the Revisionist had pulled the handbrake of the vehicle. Bijay Gurung (P.W.2) is however, uncertain if the Revisionist had pulled the handbrake of the vehicle or not or if he had put a stone to secure the back tyre of the vehicle. In view of the aforesaid there is no clear and cogent evidence brought forth by the prosecution to establish that the Revisionist had not secured the tyres of the vehicle by putting stones or otherwise or that he had not applied the handbrakes of the vehicle before he got out of the vehicle to answers to natures call. The Investigating Officer visited the place of occurrence and exhibited the rough sketch map (exhibit 14) prepared. The rough sketch map does not, however, give any idea about the incline or the gradient of the road. The Investigating Officer's deposition is also silent about it. He did not also enlighten about the incline or the gradient of the road. However, Bijay Gurung (P.W.2), Santosh Kumar Pradhan (P.W.3) as well as Nilu Pradhan (P.W.4) in cross-examination admit that the place of occurrence was an uphill road. The defence is bound by their statement in cross-examination as held by the Supreme Court in re: ***Ashok Kumar v. State of Haryana***[17]. The Revisionist in his statement recorded under Section 313 Cr.P.C. states that he had put a stone in the tyre of the vehicle to secure it from moving in any direction. Therefore, although it is admitted that the place of occurrence was an uphill road it is uncertain whether the Revisionist had secured the vehicle or not. The fact that the vehicle started moving backwards coupled with the admission that the place of occurrence was an uphill road permits this Court to presume that the vehicle had not been secured by a stone or by applying the handbrakes which was in working condition. However, with the positive assertion of the injured witnesses named above that the Revisionist had driven the said vehicle from Rongli till the place of occurrence in a safe manner coupled with the assertion of the Revisionist in his Statement under Section 313 Cr.P.C. that he had in fact secured the vehicle, must permit the Court to give him the benefit of doubt on this factual score.

52. However, Bijay Gurung's (P.W.2) admission that the sudden movement of the passengers inside the vehicle caused the same to flow backwards towards the cliff is a statement which stands un-assailed. Bijay Gurung (P.W.2) was a

[17] (2010) 12 SCC 350 28

prosecution witness and therefore, the prosecution is bound by his admission to the aforesaid effect made in his cross-examination before the Trial Court. Bijay Gurung (P.W.2) was not declared hostile and cross examined on the said statement and injured witness in the natural course of events would not let go the real culprit. Furthermore, Bijay Gurung (P.W.2) also had his family members in the said vehicle. Bijay Gurung (P.W.2) was a witness who was in the vehicle when the accident occurred. His admission that it was because of the sudden movement of the passengers in the vehicle which caused the vehicle to flow backwards towards the cliff may be fatal to the prosecution case in the facts of the present case. It is well settled that the testimony of an injured witness stands on a higher pedestal than other witnesses and is considered reliable as it comes with a built-in guarantee of his presence at the scene of occurrence. (vide ***Jodhan v. State of Madhya Pradesh***[18] and ***Kaziman Gurung v. State of Sikkim***[19]. The said evidence stands un-impeached and makes it clear that the sudden movement of the passengers in the vehicle was the *causa causans* of the accident. The evidence produced clearly suggests that after the Revisionist had parked the vehicle few passengers as well as the Revisionist alighted from the vehicle. Therefore it cannot be said that the vehicle started rolling back as soon as it was parked. There was therefore a time gap between the parking, alighting of the Revisionist and some of the passengers and the vehicle rolling back.

53. Consequently, the alleged act of the Revisionist cannot be held to be the proximate cause of death of one of the passengers or the injuries sustained by the other passengers.

54. It cannot be said that the Revisionist has done any *"rash and negligent"* act with the machinery so as to endanger human life, or to be likely to cause hurt or injury to any person or that he *"knowingly and negligently"* omitted to take such order with the machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery that would make him culpable under Section 287 IPC. Parking a vehicle on an uphill road, the extent of its gradient or incline not being known would not drag the Revisionist within the mischief of Section 287 IPC unless it is also proved that the Revisionist failed to *"rashly and negligently"* secure the vehicle by taking proper care or made arrangement or omitted to secure the said vehicle *"knowingly and negligently"*. Mr. S. K. Chettri submits that there is no evidence that the Revisionist secured the vehicle. That is true. However, there is also no cogent evidence that

[18] (2015) 11 SCC 52
[19] SLR 2017 Sikk 134 29

he did not too. When the entire prosecution against the Revisionist is dependent on this crucial fact it may be unfair to harness culpability upon him on the basis of presumption more so when it is the duty of the prosecution to prove every ingredient of the offence alleged. There is no evidence that the Revisionist did any act which would enable the Court to come to a conclusion that the proved acts tantamount to running the risk of doing such an act with recklessness or indifference as to the consequences. It must always be remembered that for an act of *"rashness"* and *"negligence"* to be culpable in criminal law the degree of such rashness and negligence must be more than what is required to be proved in civil cases.

55. It cannot also be said that the Revisionist caused hurt or grievous hurt to any person by doing any act so *"rashly and negligently"* as to endanger human life or the personal safety of others that would attract the mischief of Section 337 or 338 IPC keeping in mind the degree of rashness and negligence required to be proved in criminal prosecutions.

56. In the facts of the present case, limiting the examination to the evidence produced, it cannot also be said that the Revisionist had hazarded a dangerous and wanton act with *"knowledge"* that it is so and that it may cause death to satisfy all the ingredients of the offence punishable under Section 304-A IPC.

57. The Criminal Revision Petition No. 03 of 2017 is allowed. The judgment of the Learned Sessions Judge dated 06.06.2017 in Criminal Appeal No. 08 of 2016 as well as the conviction of the Revisionist under Section 287, 337, 338 and 304-A, IPC is set aside. The Revisionist is on bail. The bail bonds of the Revisionist stands cancelled. He is set at liberty forthwith.

SLR (2018) SIKKIM 440

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

Crl. A. No. 06 of 2017

Chenga Tshering Bhutia ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Karma Thinlay Namgyal with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 16th April 2018

A. Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging FIR – From the entire evidence on record, it emerges that the delay in lodging of the FIR was a result of the trauma suffered by the victim. Merely because she was not a child as defined under S. 2 of the POCSO Act, 2012 does not deprive her of the right of being traumatized and shocked by the abhorrent act of the Appellant. It would be appropriate to state here that rape has been described as "not an act of sex, but an act of violence, with sex as the primary weapon". It may lead to a wide variety or physical and psychological reactions. Victims of rape may suffer from shock and post-traumatic stress disorder for which they require professional and psychological help which should be supportive. The victim has admitted that she slept that night and thereafter confided in P.W.2 only the next day at 3.30 p.m. This would be as a result of the shock, compounded by a natural instinct for self-preservation and fear of stigmatisation. The following day, P.W.2 informed the victim's father P.W.10. P.W.10 clearly is not educated and would be handicapped by his lack of knowledge of the law. He has only the best interest of the victim in

mind and hastened to the witnesses as already detailed hereinabove to report the matter.

(Para 14)

B. Code of Criminal Procedure, 1973 – S. 261 – The argument that the Learned Trial Court failed to alter the Charge that had been framed under the POCSO Act, 2012 despite the victim being above 18 years, merits no consideration herein, as no such objection was raised before the Learned Trial Court. It is settled law that an objection cannot be raised for the first time before the appellate forum when it was not made before the Court of first instance.

(Para 15)

Petition dismissed.

Chronological list of cases cited:

1. Raju and Others v. State of Madhya Pradesh, (2008) 15 SCC 133.
2. Mohd. Ali *alias* Guddu v. State of Uttar Pradesh, (2015) 7 SCC 272.
3. Manoharlal v. State of Madhya Pradesh, (2014) 15 SCC 587.
4. State of Rajasthan v. Babu Meena, (2013) 4 SCC 206.
5. Alamelu and Another v. State represented by Inspector of Police, (2011) 2 SCC 385.
6. Tula Ram Rai alias Gorey Rai v. State of Sikkim, 2017 CRI.L.J. 4693.
7. State of Rajasthan v. Roshan Khan and Others, (2014) 2 SCC 476.
8. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.
9. State of Himachal Pradesh v. Sanjay Kumar *alias* Sunny, (2017) 2 SCC 51.
10. Vijay *alias* Chinee v. State of Madhya Pradesh, (2010) 8 SCC 191.
11. Mahadeo s/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
12. Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551.

JUDGMENT

Meenakshi Madan Rai, J

1. This Appeal calls into question both the Judgment dated 28-12-2016 and the Order on Sentence dated 29-12-2016, of the Learned Special Judge (POCSO), West Sikkim, at Gyalshing, in Sessions Trial (POCSO) Case No.01 of 2016, convicting the Appellant under Section 376(1) of the Indian Penal Code, 1860 (for short "IPC") and sentencing him to undergo rigorous imprisonment for 9 (nine) years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only, with a default stipulation. The period of detention already undergone by the Appellant during investigation and trial were duly set off against the sentence of imprisonment imposed.

2. Aggrieved by the finding, Learned Counsel for the Appellant would argue that it has been established by evidence that the victim was infact 21 years at the time of the incident, consequently the act between her and the Appellant was consensual, this being evident from the circumstance that although the incident took place on 26-12-2015 at around 6 p.m., it remained unreported till 29-12-2015. The victim slept through the night after the incident and it was her father who brought it to the notice of the Panchayat lending further succour to the presumption of the act being consensual, the lack of injuries on the person of the victim being another such indicator. Assuming that the act was not consensual the medical examination of the victim conducted on 29-12-2015 led to a finding that there was human semen in her vaginal swab, the Scientific Report however failed to conclusively reveal that the semen was that of the Appellant. It was urged that considering that there was a gap of three days from the alleged date of sexual assault and the medical examination of the victim, the detection of semen in the vaginal swab was farfetched as she would have attended natures call, besides she was menstruating at the time. In the alternative, it could also give rise to a suspicion that in the interim period of three days she had another sexual encounter with a third person. That, although the victim was found to be above 18 years of age, the Learned Trial Court failed to alter the Charge that had been framed under the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), hence causing prejudice to the Appellant as the cross-examination could not be incisive in view of the embargo under the POCSO Act. In the next leg of his argument, it was canvassed that the occupants of the vehicle in which the victim travelled have not deposed that the victim was forced

into the vehicle by the Appellant as wrongly alleged by the victim. While contending that the statement of the victim should not be treated as gospel truth, reliance was placed on ***Raju and Others*** vs. ***State of Madhya Pradesh***[1]. Strength was drawn from the decisions in ***Mohd. Ali alias Guddu*** vs. ***State of Uttar Pradesh***[2], ***Manoharlal*** vs. ***State of Madhya Pradesh***[3], ***State of Rajasthan*** vs. ***Babu Meena***[4] and ***Alamelu and Another*** vs. ***State represented by Inspector of Police***[5] to buttress the other submissions of Learned Counsel. That, the alleged incident took place on a road where the victim had sufficient opportunity to escape, but she opted not to, on this count reliance was placed on ***Tula Ram Rai alias Gorey Rai*** vs. ***State of Sikkim***[6].

3. The *contra* arguments raised by the Prosecution to repel those of the Appellant were that there was no motive for the victim to incriminate the Appellant, a married man aged about 29 years with a family. The incident occurred at 5 p.m. on 26-12- 2015 and as is wont with people in the villages who are timid and lack exposure, she disclosed it to P.W.2 only on 27-12-2015, who for her part revealed it to the victims father, P.W.10, on 28-12-2015. That, a bare perusal of the evidence of the victim would clearly indicate that the offence was committed on her by the Appellant, besides, the Doctors evidence reveals a blunt injury on the vagina of the victim. Had the act been consensual, the question of injury would not have arisen. Reliance was also placed on Section 114A of the Indian Evidence Act, 1872 (for short "the Evidence Act") and on the decision of ***State of Rajasthan*** vs. ***Roshan Khan and Others***[7]. It was further contended that no self-respecting woman would ever make a false allegation of having been raped and in this context, reliance was placed on the decision in ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[8]. Placing reliance on ***State of Himachal Pradesh*** vs. ***Sanjay Kumar alias Sunny***[9] and ***Vijay alias Chinee*** vs. ***State of Madhya Pradesh***[10] it was put forth that the statement of the Prosecutrix has to be believed as it has been consistent.

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[1] (2008) 15 SCC 133
[2] (2015) 7 SCC 272
[3] (2014) 15 SCC 587
[4] (2013) 4 SCC 206
[5] (2011) 2 SCC 385
[6] 2017 CRI.L.J. 4693
[7] (2014) 2 SCC 476
[8] (2011) 10 SCC 192
[9] (2017) 2 SCC 51
[10] (2010) 8 SCC 191

That, the delay in the lodging of the FIR has been explained inasmuch the victim informed P.W.2 only on the next day of the incident, who informed the victims father on the following day. The father being a rustic villager reported the matter to the Panchayat of the area who summoned a meeting with P.Ws 5, 6, 7, 8, 9 and 10, whereupon on due consideration, P.W.10 was advised to report the matter to the Police. In the light of the submissions, the role of the Appellant in the commission of the offence having been established, the Appeal be dismissed.

4. Having heard Counsel for the parties at length and given anxious consideration to their submissions and also having perused the entire evidence and documents on record, the question that falls for consideration before this Court is, whether the Learned Trial Court was in error in convicting the Appellant. The facts may be briefly traversed for clarity before analysing the evidence on record.

5. The Prosecution case before the Learned Trial Court was that the victim lodged Exhibit 1, the First Information Report (FIR) on 29-12-2015, informing therein that on the evening of 26-12-2015, the Appellant volunteered to reach her home. *En route* while walking up to her house, he forcibly raped her, hence, strict legal action be taken against the Appellant. On receiving the Complaint, the Gyalshing Police Station (P.S.) registered it as FIR No.59/2015, dated 29-12-2015, under Section 376 of the IPC and Section 4 of the POCSO Act, pursuant to which it was endorsed to the Investigating Officer, P.W.14. On investigation, it transpired that the victim, a Class X student, staying in a hostel at Darap to attend coaching classes, decided to return home to Nambu on 26-12-2015, the next day being a holiday, accompanying her aunt and uncle, who however left without her, prompting her to wait for the taxi of her cousin which plied on that route. Shortly thereafter, the Appellant, the victims co-villager instead came in his taxi with two lady passengers and their goods loaded therein and the Appellant volunteered to reach her home despite her refusal. On reaching Nambu, both the ladies de-boarded the vehicle while the Appellant convinced the victim that he would reach her safely home and on getting off the vehicle, he volunteered to walk the victim home. Becoming apprehensive of his motives, she grabbed her belongings and ran uphill towards her house through rough road and a cardamom field. The Appellant pursued her, grabbed her from behind, pushed her to the ground and sexually assaulted her despite her resistance. She managed to free herself and escape and

reach home, but being traumatised, did not reveal the incident to anyone. The following day, she confided in her cousin, P.W.2, who in turn disclosed the incident on 28-12-2015 to the victims father P.W.10. On 29-12-2015 the FIR, Exhibit 1, was lodged by P.W.1.

6. During the course of investigation, apart from the other formalities, the Appellant was arrested and subjected to medical examination as also the victim, whose statement was recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") before the Learned Magistrate of the West District. The blood samples of the Appellant and the victim were obtained. On completion of investigation, Charge-sheet came to be submitted against the Appellant under Sections 376/341 of the IPC read with Section 4 of the POCSO Act.

7. The Learned Trial Court after hearing the opposing parties framed Charge against the Appellant on 06-04-2016 under Section 3(a) of the POCSO Act, punishable under Section 4 of the same Act. Subsequently, on 28-04-2016, an additional Charge under Section 376(1) of the IPC was also framed against the Appellant. The Appellant pleaded "not guilty" to the offences, pursuant to which trial commenced with the examination of 14 (fourteen) Prosecution Witnesses. On closure of the Prosecution evidence, the Appellant was extended an opportunity under Section 313 of the Cr.P.C. to explain the circumstances appearing in the evidence against him. He claimed to have been falsely implicated in the case. He also sought to examine one witness who was produced as D.W.1, to establish that the victim was not a minor at the time of the offence. On closure of the evidence furnished by the Appellant, the final arguments of the parties was heard whereupon the Learned Trial Court on consideration of the evidence on record, pronounced the impugned Order on Conviction and Sentence.

8. The Learned Trial Court has reached the finding that the victim was not a minor, in this context, it may be reiterated that P.W.10 indubitably admitted that in order to avail of the Students Scholarship provided by the Government for a particular age group, he had procured the Birth Certificate for P.W.1, in order to meet the criteria. On his request the Chief Registrar of Births and Deaths, Department of Health Care, Human Services and Family Welfare Department, Government of Sikkim, issued a Certificate in the name of P.W.1 being, Exhibit 8. Admittedly Exhibit 8 reflected a false date of birth, decreasing the victims real age by indicating her date of birth

as "15-02-1999" instead of "15-02-1995". This is supported by the evidence of D.W.1 who in his evidence has stated that the victim was a student of his School and the School Admission Register, Exhibit D(1), would indicate that the victim was admitted on 29-03-2000 in the Pre-Primary Class at Sl. No.13 with her date of birth shown as "15-02-1995". The entry was duly signed by P.W.10 as the father of the student at Column No.19 of the said entry. Substantiating this evidence is the evidence of C.W.1, the Court Witness who was the „In-Charge District Medical Officer. He produced the relevant page of the Birth Register maintained at the District Hospital. This document confirmed the date of birth of the victim as "15-02-1995". In addition to this, we may also refer to the decision in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[11] wherein the parameters of gauging the age of a juvenile was set forth in Paragraph 12, the relevant portion of which reads as follows;

> **"12.** ……...
>
> **12. (3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—
>
> (*a*)(*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (*iii*) the birth certificate given by a corporation or a municipal authority or a Panchayat;

Under Rule 12(3)(*b*), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(*a*)(*i*) to (*iii*), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be

[11] (2013) 14 SCC 637

rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"**

[emphasis supplied]

As the victim was set to appear for her Class X Board Examination, the question of production of a Matriculation Certificate does not arise, the date of birth from the School first attended has been furnished and proved as also the Birth Register, establishing that the victim was not a minor as defined under Section 2 of the POCSO Act. Ofcourse it is elementary that facts admitted need not be proved.

9. That, having been said, the evidence of the victim would inevitably point to the fact that the sexual assault was perpetrated on her by the Appellant on 26-12-2015. The sequence of events leading to the offence have been cogently deposed by the victim, viz; that on 26-12-2005, she decided to return home from her hostel for which she obtained permission. She went to 5th Mile to wait for the taxi of her cousin which plied on that route, as her relatives who were to accompany her had left her and proceeded home. The Appellant instead arrived at the spot at around 5 p.m. and enquired as to whether she was returning home and offered to drop her home. She refused finding that there were already two occupants in the vehicle and it was filled with their luggage. However, he forcibly snatched her bag, put it into the vehicle and convinced her to board the vehicle. *En route* one of the passengers got off the vehicle, followed by the second passenger a while later. Thereafter, it was her turn to get off the vehicle fromwhich she quickly disembarked after grabbing her bag, but the Appellant followed her although she was walking hurriedly. Midway on the path to her home, the Appellant caught her waist from behind and according to her, **"***Thereafter I pushed him back and when I reached little further the accused grabbed me and kissed me on my mouth, he opened my clothes as well as his clothes and thereafter he put his penis into my vagina. During that time, I somehow managed to get my right hand out from his hold and slapped him twice. After that he let me go and I quickly collected my clothes and bag and ran towards my house. After reaching certain place, I looked down and I saw he accused started his vehicle and speed away.***"** She would further depose that on reaching home, she did not reveal the incident to anyone till the following day when at around 3 p.m., she confided in her cousin, P.W.2 narrating the incident to her. On 28-12-2015, P.W.2 told the victim s father, P.W.10 of what P.W.1

had told her. On 29-12-2015, at around 10 a.m., the victim lodged Exhibit 1. Her statements in cross-examination did not waver from the facts deposed in her evidence-in-chief. The evidence of P.W.2 and P.W.10 would confirm that P.W.1 had narrated the incident to P.W.2 on 27-12-2015 at around 3.30 p.m., while P.W.10 was told of it by P.W.2, the next date, i.e., 28-12-2015, at 9 a.m. followed by the lodging of Exhibit 1 at the Police Station.

10. The records indicate that P.W.10 is a farmer. After he came to learn of the incident, he reported the matter to P.Ws 5, 6, 7 and 8. A meeting was called where the victim confirmed before the said P.Ws of the incident that occurred on 26-12-2015. To this extent, the evidence of P.W.10 is substantiated by the evidence of P.W.5 to P.W.9. P.W.5, the President of the *Nambu Sangrangchan Samaj* would testify that on 28-12-2016, at around 10.30 a.m. P.W.10 telephonically requested him to attend a meeting at the house of the Panchayat Member, P.W.6, at Nambu, he obliged. At the meeting, P.W.10 disclosed that the Appellant had sexually assaulted his daughter on 26-12-2015. The testimony of P.W.6, the Ward Panchayat and P.W.7 would support the testimony of P.W.5 with regard to the meeting being held at the house of P.W.6 where P.W.10 narrated the incident of the Appellant having committed sexual assault on his daughter on 26-12-2015. P.W.7, P.W.8 and P.W.9 would also state that the victim confirmed at the meeting of the sexual assault perpetrated on her by the Appellant. All the witnesses *supra* have vouched for the fact that on weighing the gravity of the offence, they advised P.W.10 to report the matter to the Police.

11. P.W.11, the Gynaecologist, who examined the victim on 29-12-2015 would record the following in Exhibit 9, the Medical Report, prepared by her;

> **"**.....
> *Victim gives H/o being sexually assaulted by one Chenga Tshering Bhutia driver, a resident of Nambu on 26th Dec. 15 at around 6 PM while returning from coaching classes from Darap.*
>
> *LMP – 27/12/15*
> *Gait – (N), Clothings – Changed*

O/E – Vitals – Stable
Breast - ® old scar mark
Chest & CVS – NAD.

Multiple linear abrasion with scab over the upper & lower back

P.A. Safe, NAD

Local examination –
Hymen – Tear (+) over 6'o clock position
Fourchette – Tear (+)
Tenderness (+) Pt. Mensturating (sic)

.....

FINAL OPINION –

The above clinical finding is suggestive of blunt injury, due to blunt force. Lab report shows presence of human semen which is suggestive of sexual contact.

....."

12. As argued by Learned Counsel for the Appellant although M.O.I the vaginal swab of the victim would indicate presence of semen the scientific test could not establish that it was of the Appellant. In such a circumstance, the question that needs to be mulled over is why would the victim concoct an incident of rape and falsely incriminate the Appellant. In this context, when we revert to the evidence of victim, it is clear that she has been cogent, cohesive and consistent. The evidence of sexual assault given by P.W.1 is substantiated by the Doctor, P.W.11. The medical examination has not only revealed a hymenal tear and a tear in the fourchette with tenderness, but shown multiple linear abrasions with scab present over the upper and lower back, lending credence to the allegation of the victim that the Appellant had thrown her on the ground and proceeded to commit the offence. *The fourchette and posterior commissure are not usually injured in cases of rape, but they may be torn if the violence used is very*

[12] Modi A Textbook of Medical Jurisprudence and Toxicology, 24th Edition, Second Reprint 2013, Chapter 31 - Sexual Offences, Page 668

great. The injuries on her genital points to the use of force. Had it been consensual the necessity of force would not have arisen.

13. That apart, P.W.10 in his evidence has admitted that he did not know whether the Appellant and the victim were in a relationship. The point of laying emphasis on this statement is that had the victim been in a relationship with the Appellant and had the act been consensual as alleged by the Counsel for the Appellant, there was no reason whatsoever for the victim to have divulged the incident not only to P.W.2, but also to P.W.10. It is no ones case that the sexual assault was witnessed by anyone else from which it could be concluded that P.W.1 reported the incident out of trepidation or fear of the incident being discovered. The evidence on record does not prompt this Court to elicit the view that Exhibit 1 was lodged by P.W.1 on the pressure of her family after they got a whiff of the incident. The victim denied any relationship with the Appellant, who despite opportunity afforded under Section 313 Cr.P.C. has made no claim of any relationship with the victim. Although Learned Counsel for the Appellant would seek to convince this Court that the evidence of P.W.3 and P.W.4 would indicate that the Appellant was of a good character, it must be borne in mind that the Court is concerned with evidence and the opinion of P.W.3 and P.W.4 regarding a co-villager, legally holds no weight neither can it be considered. It goes without saying that neither P.W.3 nor P.W.4 witnessed the incident or the behavior of the Appellant after they alighted from the vehicle at Nambu prior to the victim de boarding. No cross-examination has been conducted as to whether the victim took a bath after the offence and whether she ventured out of the house alone after the incident till the lodging of the Complaint to enable assessment as to whether she had other sexual encounters after the offence. This leads to the inevitable conclusion that there was no reason for the victim to concoct a story of rape on her by the Appellant.

14. Hence, from the entire evidence on record, it emerges that the delay in lodging of the FIR was a result of the trauma suffered by the victim. Merely because she was not a child as defined under Section 2 of the POCSO Act does not deprive her of the right of being traumatized and shocked by the abhorrent act of the Appellant. It would be appropriate to state here that *Rape has been described as "not an act of sex, but an*

[13] Modi A Textbook of Medical Jurisprudence and Toxicology, 24th Edition, Second Reprint 2013, Chapter 31 - Sexual Offences, Page 671

*act of violence, with sex as the primary weapon". It may lead to a wide variety or physical and psychological reactions. Victims of rape may suffer from shock and post-traumatic stress disorder (PTSD) for which they require professional and psychological help which should be supportive.**13*** The victim has admitted that she slept that night and thereafter confided in P.W.2 only the next day at 3.30 p.m. This would be as a result of the shock, compounded by a natural instinct for self-preservation and fear of stigmatisation. The following day, P.W.2 informed the victims father P.W.10. P.W.10 clearly is not educated and would be handicapped by his lack of knowledge of the law. He has only the best interest of the victim in mind and hastened to the witnesses as already detailed hereinabove to report the matter. In ***Sanjay Kumar*** (*supra*) Honble Supreme Court referring to the decision of ***Bhupinder Sharma*** vs. ***State of H.P.***[14] would observe as follows;

> ***"31.*** *After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases,*

[14] (2003) 8 SCC 551

> *is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P.). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."*
>
> [emphasis supplied]

This would be appropriate and applicable in the matter at hand.

15. The argument that the Learned Trial Court failed to alter the Charge that had been framed under the POCSO Act despite the victim being above 18 years, merits no consideration herein, as no such objection was raised before the Learned Trial Court. It is settled law that an objection cannot be raised for the first time before the Appellate Forum when it was not made before the Court of first instance. The argument that the victim did not escape despite having an opportunity is erroneous as also the reliance on the decision of this Court on ***Tula Ram*** (*supra*), for the fact that the victim in the case referred spent the remainder of the night under the same roof as the Appellant after he allegedly sexually assaulted her and failed to raise a hue and cry, while in the instant case the victim has freed herself and run to the shelter of her home. However, there is no merit in the argument of Learned Public Prosecutor invoking Section 114A of the Evidence Act as it is evident that the provision applies to a charge of rape under the various sub-clauses of Section 376(2) of the IPC.

16. In the end result, after considering the entire facts and examining and analyzing the evidence on record, no other conclusion arrives, but to concur with the finding of the Learned Trial Court.

17. Consequently, the Conviction and Sentence handed out to the Appellant warrants no interference. The Appeal thus stands dismissed.

18. In terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, a sum of Rs.3,00,000/- (Rupees three lakhs) only, be made over to the victim by the Sikkim State Legal Services Authority (for short "SSLSA").

19. No order as to costs.

20. Copy of this Judgment be remitted to the Learned Trial Court along with Records of the Court.

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

SLR (2018) SIKKIM 454
(Before Hon'ble the Chief Justice)

Crl. M.C. No. 03 of 2018

Shri Narayan Sharma (Dawari) and Another ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Mr. Tempo Gyatso Bhutia, Advocate.

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

Date of decision: 18th April 2018

A. Code of Criminal Procedure, 1973 – S. 482 – Compounding of non-compoundable offence in exercise of power under S. 482 Cr.P.C – It is well-settled principles of law that the High Court is competent to exercise its extraordinary jurisdiction under S. 482 Cr.P.C. to quash the criminal proceedings, even in non-compoundable cases, in the facts and circumstances of the case, which do not fall in the category of heinous and serious offences and also does not involve offences like rape, murder, etc. However, the High Court is required to exercise its jurisdiction sparingly, conscientiously to secure ends of justice to bring peace and cordiality in the family life.

(Para 8)

Petition allowed.

Chronological list of cases cited:

1. Yogendra Yadav and Others v. State of Jharkhand and Another, (2014) 9 SCC 653.
2. Manoj Sharma v. State and Others, (2008) 16 SCC 1.
3. Sushil Suri v. Central Bureau of Investigation and Another, (2011) 5 SCC 708.

4. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 30.

5. Ashok Sadarangani and Another v. Union of India and Others, (2012) 11 SCC 321.

6. Narinder Singh and Others v. State of Punjab and Another, (2014) 6 SCC 466.

ORDER

Saitsh K. Agnihotri, J

Invoking extraordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, "Cr. P.C."), the petitioners, who are husband and wife, have come up with this petition seeking to quash the First Information Report (FIR) No. 254 of 2014 dated 01st August, 2014 and the consequential proceedings in General Register Case No. 193 of 2015 [State of Sikkim vs. Narayan Sharma (Dawari)], pending on the file of the Chief Judicial Magistrate, East Sikkim at Gangtok, East Sikkim.

2. The facts, as stated, are that the first petitioner is the husband of legally wedded wife, the second petitioner. The second petitioner lodged an FIR on 01st August, 2014, for taking cognizance under Section 498A of the Indian Penal Code, 1860 (for short, "IPC") stating that the first petitioner had tortured and also assaulted her. It was also stated that the first petitioner also threw household goods namely, TV, Refrigerator on her with the purpose to kill her. It was further stated that she had made a complaint to the Women Commission also on 12th December, 2013.

3. The cognizance of the report was taken after investigation and the case was registered as G.R. Case No. 193 of 2015 under the provisions of Section 498A of the IPC, on 30th June, 2015. During currency of the trial, the matter was referred to mediation on 19th October, 2016. The mediator reported settlement. However, the case could not be closed as the offence under Section 498A of the IPC is not compoundable. Thus, the instant petition filed by both the parties jointly. It is stated that both the parties have also entered into a written compromise on 17th December, 2016, as under: -

"1. That the second party shall not harass the First Party or the First Party shall not harass the Second party in what so ever manner in future.

2. That the First party and the Second Party shall live peacefully in the future and will have no grievance against each other in what so ever manner.

3. That both the parties hereby agree to abide by the terms, conditions and stipulations of the agreement herein contained.

4. That both the Parties undertakes that if the party shall violate/infringe the terms and conditions of this compromise deed, both the parties shall takes necessary legal action against the Party in the court of law.

5. That this compromise deed is made bonafide."

4. Mr. Tempo Gyatso Bhutia, learned counsel appearing for the petitioners would contend that the petitioners, being husband and wife, have amicably settled the disputes between them and have decided to move ahead happily. It is further decided that there will not be any assault or torture on the part of the husband, the first petitioner. They are blessed with a daughter, who is now 12 years age. Thus, in the interest of their daughter, it has been decided by both of them to seek quashing of FIR No. 254 of 2014 and live in a peaceful homely atmosphere.

5. In response, Mr. Karma Thinlay, learned Addl. Public Prosecutor, appearing for the State would submit that the allegations made by the second petitioner against her husband i.e. first petitioner is very serious in nature and also the offence is not compoundable. It is also reiterated that the compromise is vague, which may not be acted upon.

6. Having heard the learned counsel appearing for the parties and also examined the pleadings, documents appended thereto, it is evident that the first and second petitioners are husband and wife. It is also not in dispute that they have 12 years old daughter. They seem to be keen and interested

[1] (2014) 9 SCC 653

in welfare of the daughter. Thus, in the interest of peace and cordial relationship in the family and for the betterment of family and daughter, the petition is required to be examined.

7. The question as to whether an offence which is not compoundable may be compounded by the Court in exercise of its power under Section 482 Cr. P.C. came up for consideration in *Yogendra Yadav and others vs. State of Jharkhand and another*1, wherein the offence committed, *inter alia*, was triable under Section 307 IPC, not compoundable, the Supreme Court held as under: -

> "4. Now, the question before this Court is whether this Court can compound the offences under Sections 326 and 307 IPC which are non-compoundable? Needless to say that offences which are non-compoundable cannot be compoundable by the court. Courts draw the power of compounding offences from Section 320 of the Code. The said provision has to be strictly followed (*Gian Singh v. State of Punjab : (2012) 10 SCC 303)*. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve more turpitude, grave offences like rape, murder, etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise

would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace."

8. It is well-settled principles of law that the High Court is competent to exercise its extraordinary jurisdiction under Section 482 Cr. P.C. to quash the criminal proceedings, even in non-compoundable cases, in the facts and circumstances of the case, which do not fall in the category of heinous and serious offences and also does not involve offences like rape, murder, etc. However, the High Court is required to exercise its jurisdiction sparingly, conscientiously to secure ends of justice to bring peace and cordiality in the family life. [See *Manoj Sharma vs. State & Ors.: (2008) 16 SCC 1*, *Sushil Suri vs. Central Bureau of Investigation & Anr. : (2011) 5 SCC 708*, *Gian Singh vs. State of Punjab & Anr. : (2012) 10 SCC 30*, *Ashok Sadarangani & Anr. Vs. Union of India & Ors. : (2012) 11 SCC 321* and *Narinder Singh and others vs. State of Punjab and another : (2014) 6 SCC 466]*.

9. Applying the well-settled principles to the facts of the case, it is established that the FIR was filed by the wife; during currency of the trial an attempt to settle the dispute under mediation was made, which ended in success. However, the same could not be acted upon in view of the fact that the offence alleged was non-compoundable. Examination of witnesses has not yet commenced. The parties are present in the Court. They have stated in categorical term that they have decided to live peaceful life for their betterment and also in the interest and welfare of their daughter; it is desirable that the criminal proceedings should come to an end. Thus, I am of the considered view that the petition deserves to be allowed.

10. Resultantly, FIR bearing No. 254 of 2014 dated 01st August, 2014 and the consequential proceedings in GR Case No. 193 of 2015 [State of Sikkim versus Narayan Sharma (Dawari)] pending on the file of the Chief Judicial Magistrate, East Sikkim at Gangtok, East Sikkim, are quashed.

11. Thus, the petition is allowed. No order as to costs.

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

I.A. No. 08 of 2018
IN
W.P. (C) No. 55 of 2017

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

Versus

Union of India and Others ….. RESPONDENTS

Mr. U. Narayan Sharma ….. APPLICANT

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

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

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

Date of decision: 23rd April 2018

A. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 101 – Joinder of Respondents – Rule 101 clearly mandates that every person who is likely to be affected in any manner by the result of the petition shall be joined as a Respondent to the Writ Petition. It also provides that if a "necessary party" is not impleaded, the Writ Petition is liable to be dismissed.

(Paras 7 and 8)

B. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 113 – Application of Code of Civil Procedure, 1908 – Rule 113 provides that the provisions of the CPC would apply *mutatis*

***mutandis* in all matters for which no provision has been made by the said P.P. Rules and to the extent that they are not inconsistent with the said P.P. Rules.**

(Paras 9 and 10)

Application dismissed.

ORDER

Bhaskar Raj Pradhan, J

1. Mr. U. Narayan Sharma, the Applicant in this application seeks to implead himself in the present Writ Petition as a Respondent.

2. Heard Mr. Jorgay Namka, Learned Counsel for the Applicant as well as Mr. B. S. Banthia, Learned Counsel for the Petitioner in the Writ Petition.

3. From the pleadings in the application it seems that one SSK SSKC-SSKI (JV) had issued work orders dated 23.02.2017 for supply of loaders, rock breakers, excavators and tippers on monthly hire basis for Thangu-Muguthang road project site at North Sikkim on certain terms and conditions to the Applicant herein. The Applicant contends that in the said work orders SSKC-SSKI (JV) had projected that the Thangu-Muguthang road project site at North Sikkim was theirs. The Applicant submits that the authorised signatory of the Petitioner in the Writ Petition as well as SSKC-SSKI (JV) is one and the same person, which is evidently so. The Applicant has also filed photocopies of various bills as Annexure-A6 (collectively) to the application. All the said bills *prima-facie* reflects a privity contract between SSKC-SSKI (JV) and the Applicant who seeks to implead himself in the present Writ Petition. The e-mail exchanges which have been filed as Annexure-A8 (collectively) also suggest the same fact. The Applicant has filed, what it claims to be a copy of a web page of Shri Sai Krishna Constructions, in which it has been claimed that the ITBP road from Thangu to Muguthangu (31 kms) in the State of Sikkim is being executed by SSKC-SSKI (JV). The Applicant thus submits that SSKC-SSKI (JV) and Sri Awantika Contractors (I) Ltd. is one and the same. Consequently, the Applicant pleads that the Petitioner having issued the said work orders to the Applicant and having utilized their services failed to make payment of the Applicant's bill till September, 2017 for an amount of Rs.1,63,18,623/- (Rupees one crore sixty three lakhs eighteen thousand six

hundred twenty three) which have been duly verified by the Petitioner and a further amount for Rs.17,64,499/- (Rupees seventeen lakhs sixty four thousand four hundred ninety nine) which is yet to be authenticated. The Applicant submits that since the Petitioner has, in the present Writ Petition, sought direction upon the Respondents to clear all pending outstanding dues along with interest to the Petitioner grave and serious prejudice would be caused to the Applicant if he is not made a Respondent in the present Writ Petition.

4. Mr. B. S. Banthia, *per-contra,* submits that the principles of order 1 Rule 10 of the Code of Civil Procedure, 1908 (CPC) must be applied to test whether the Applicant should be made a party Respondent in the present Writ Petition in which the Petitioner is aggrieved by the act of the Respondents for issuing a tender for construction of ITBP road in spite of the fact that the very same work had been awarded to the Petitioner. In so doing, Mr. B. S. Banthia submits, the present application is liable to be dismissed.

5. The Petitioner has also filed a reply dated 09.04.2018 to the Application under consideration. It is submitted that the Applicant has no *locus standi* or any interest in the present Writ Petition. The Petitioner contends that if at all the Applicant is aggrieved he is entitled to other legal remedies which are available to settle his accounts with the Petitioner and this is not the correct forum. The Petitioner has not denied the specific averments made by the Applicant with regard to the work orders dated 23.02.2017 for the supply of two JCB (black hole loader) 3 DX, supply of three JCB rock breaker JS-205, three JCB Excavator JS-205 and supply of ten MAN Tippers on monthly hire basis for its Thangu-Muguthang Road Project site at North Sikkim and submits that the same are matters of record. The Petitioner also states that due to paucity of time it has not been able to verify the facts submitted in the correspondence paragraphs. The Petitioner has vehemently denied the contents of the averments made by the Applicant with regard to the relationship between the Petitioner and SSKC-SSKI (JV) attributed by the Applicant in paragraph 13 to 16 of the application.

6. The Writ Petition filed by the Petitioner seeks a mandamus directing the Respondents to stay the tender bid for construction of ITBP Road from Lugnak-La to Muguthang in relation to earth work, drainage and protection

work, culverts, bituminous surfacing works and other appurtenant structures from Lugnak-La (altitude 16,500 ft) to road 31.40 km (Muguthang) (altitude 14,00 ft.) (length 11.40 kms. approx.). The Petitioner has also prayed for a direction to the Respondents to clear all outstanding dues along with interest to the Petitioner. The Writ Petition does not seek any prayers against the Applicant nor is there any averments relating to the Applicant. The Writ Petition relates only to the dispute and differences between the Petitioner and the Respondents.

7. Rule 101 of the Sikkim High Court (Practice & Procedure) Rules, 2011 (the said P.P. Rules) provides:

> ***"101. Joinder of respondents-*** *Every person who is likely to be affected in any manner by the result of a petition shall be joined as a respondent thereto. Any petition in which a necessary party is not imp leaded shall be liable to be dismissed.***"**

8. Rule 101 of the said P.P. Rules, 2011 therefore, clearly mandates that every person who is likely to be affected in any manner by the result of the petition shall be joined as a Respondent to the Writ Petition. It also provides that if a *"necessary party"* is not impleaded the Writ Petition is liable to be dismissed.

9. Rule 113 of the said P. P. Rules provides:

> ***"113. Application of C.P.C.:-*** *In all matters for which no provision is made by these rules, the provisions of the Code of Civil Procedure, 1908, shall apply mutatis mutandis, in so far as they are not inconsistent with these rules.***"**

10. Rule 113 of the said P.P.Rules therefore, provides that the provisions of the CPC would apply *mutatis mutandis* in all matters for which no provision has been made by the said P.P. Rules and to the extent that they are not inconsistent with the said P.P. Rules.

11. As Rule 101 of the said P.P. Rules clearly provides for the criteria for joinder of Respondents to Writ Petition the said P.P. Rules would govern.

12. It is well settled that a 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.

13. A perusal of the pleadings in the application along with the documents filed thereto and the reply thereof by the Petitioner it is certain that the Applicant is not going to be affected in any manner by the result of the Writ Petition between the Petitioner and the Respondents. Admittedly the Applicant is only a supplier of loaders, rock breakers, excavators and tippers to SSKC-SSKI (JV) which is not a party to the present Writ Petition. Even if there is a privity of contract between the Petitioner and the Applicant, and the Applicant has a genuine grievance against the Petitioner or SSKC-SSKI (JV) for payments which are due and payable, the inter-se contractual obligations can be effectively adjudicated in a proper forum and not in the present writ proceedings which seeks adjudication of the Petitioner's allegation about the high handedness of the Respondents in issuing the impugned tender bid in spite of the fact that the Petitioner had been working on the same project on a valid tender. It is equally certain that the Applicant is not a party without whom no order can be made effectively or 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 prayer in the Writ Petition for a direction upon the Respondents to clear all pending dues along with interest can be decided without the Applicant nor is the Applicant's presence necessary for a complete and final decision on the question.

14. It is also quite evident that it would be prejudicial to the parties to the contract to examine further the dispute and differences between the Applicant and SSKC-SSKI (JV) or the relationship between the Petitioner and SSKC-SSKI (JV) in the present application in the present proceedings. Thus, leaving the option open to the Applicant to take recourse to any course of action as the Applicant may be advised, the present application is dismissed. No orders as to cost.

SLR (2018) SIKKIM 464

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

W.P. (C) No. 31 of 2017

Shri Sancha Bahadur Subba ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Raghavendra Kumar, Advocate.

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

For Respondent No.4: Mrs. Tshering Choden Bhutia, Advocate.

For Respondent No.5: Mr. S.S. Hamal, Advocate with Ms. Sabina Chettri, Ms. Priyanka Chettri and Ms. Saroja Chettri, Advocates.

Date of decision: 30th April 2018

A. Right to Information Act, 2005 – Object of the Act – The statement of objects and reasons, *inter alia*, provides that in order to ensure great and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 enacted by Parliament needs to be made more progressive participatory and meaningful. The proposed legislation was to provide an effective framework for effectuating the right of information recognised under Article 19 of the Constitution of India. The Right to Information as provided in the RTI Act stems from the Universal Declaration of Human Rights 1986, International Covenant on Civil and Political Rights 1966 and Part III of the Constitution of India, which enumerates Fundamental Rights. Nevertheless, reasonable restrictions on right to information are envisaged in each of the above.

(Para 13)

B. Constitution of India – Article 19 – Freedom of speech and expression as found in Article 19 (1) is one of the basic right but is not absolute being liable to curtailment by laws made by the State to the extent mentioned in clause (2) to (6) thereof. Article 19 (2) of the Constitution extracted hereinabove empowers the State to make laws setting reasonable restrictions in the interest of the general public, security of the State, public order, decency, morality, health or protection of general welfare or any other reason as set out therein. Thus, the scheme of Article 19 indicates that the group of rights, listed as clause (a) to (g), though recognized as fundamental rights conferred on citizens cannot be absolute, uncontrolled or wholly emancipated from restraints, which could result in anarchy.

(Para 15)

C. Constitution of India – Article 21 – This right encompasses the right to live with human dignity inclusive of the bare necessities such as food, clothing and shelter as also leisure and pursuit of better standards of living. The right to privacy is not listed as a fundamental right but is found to be inherent in Article 21 – When the right to information and right to privacy are placed in juxtaposition, the former gives one the right to know, while the right to privacy protects the rights of the individual. Consequently, a balance is to be struck between the fundamental rights of persons seeking information and that of the person whose information is being sought.

(Paras 18 and 19)

D. Right to Information Act, 2012 – S. 8 – Exemption from disclosure of information – On the anvil of the afore stated reasonings, when the provisions of S. 8 of the RTI Act is to be considered, almost all reasonable restrictions and exclusions discussed under Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and Article 19(2) of the Constitution of India find place as exemptions in the RTI Act with additions of few more grounds. The Section being a restriction on the fundamental right to information must be considered as a whole and construed strictly.

(Para 20)

E. Right to Information Act, 2012 – S. 8 – Exemption from disclosure of information – What tantamounts to invasion of private life would be divulgence of the name, address, occupation, physical health including medical status of the person and financial status, such as income, assets liabilities of self and other members of the family. Generally, a person may be reticent about disclosing such information but there may be circumstances when it becomes absolutely expedient to share some of this information in larger public interest viz. when there is a doubt about the integrity of any person occupying a public office or if it is seen in the larger public interest. At the same time, I hasten to add that no specific parameters can be laid down as it depends on the facts of every individual case. The object of the RTI Act being to bring about transparency and accountability in the working of the public authority, a citizen has the right to access information from the public authority who can facilitate such information – It is apparent from a reading of the said provision that personal information can be disclosed only if the concerned authority who is dealing with the application requiring the information is satisfied that larger public interest justifies the disclosure of such information.

(Paras 21 and 23)

F. Sikkim Government Servants (Conduct) Rules, 1981 – Rule 19 – A Government servant shall on his first appointment to any service or post and thereafter, at the close of every financial year submit to the Government a return of assets and liabilities in such Form as maybe prescribed by the Government giving full particulars regarding immovable property, movable property, both inherited and acquired, debentures and other such details as enumerated in the provisions thereof. The provision also envisages that a Government servant found to be in possession of pecuniary resources or property disproportionate to his known sources of income for which he cannot satisfactorily account shall unless the contrary is proved, be presumed to have been guilty of grave misconduct for which he shall be liable for criminal action besides departmental proceedings. What emerges from the above is that consequent upon the Government servant disclosing his assets and liabilities to the Government on a yearly basis, should the Government find that there is a mismatch in

the possession of property and the income of the government servant, he would be taken to task by the Government.

(Para 24)

G. Right to Information Act, 2012 – S. 8 (1)(j) – This Court is aware and conscious of the fact that the pivotal object of the RTI Act is to advance transparency and accountability and to contain corruption. However, despite these objects, the right to privacy and personal information are on a separate footing and protected under the provisions of Section 8 (1)(j) of the RTI Act, unless the information sought is established to be in public interest – In a given case, information pertaining to assets and liabilities can be disclosed with the rider that there must be larger public interest involved justifying such disclosure. As can be culled out from the averments and submissions, the petitioner herein suspects that the respondent No.5 is in possession of assets disproportionate to his known sources of income, however mere suspicion without any *prima facie* material to substantiate it does not justify the disclosure of such information as rests with the concerned Government authority. This situation indeed appears to be a fishing expedition embarked upon by the petitioner without any *bona fide* public interest. In these circumstances, it obtains that disclosure of such information would cause unwarranted invasion of the privacy of the individual and falls under the ambit of Section 8 (1)(j) of the RTI Act.

(Paras 29 and 30)

Petition dismissed.

Chronological list of cases cited:

1. Mr. Jayant G. Joshi v. Mr. M.B. Patel, (CIC/SG/A/2011/003103/16921).
2. State of U.P. v. Raj Narain, (1975) 4 SCC 428.
3. Girish Chandra Deshpande v. Central Information Commissioner and Others, (2013) 1 SCC 212.
4. State of Karnataka v. Selvi J. Jayalalitha and Others, (2017-SCC Online SC 134).

5. Collector of Customs, Madras v. Nathella Sampathu Chetty, AIR 1962 SC 316.

6. Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

7. State of Gujarat v. Shantilal Mangaldas, AIR 1969 SC 634.

8. Essar Oil Ltd. v. Halar Utkarsh Samit, AIR 2004 SC 1834.

9. Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd., AIR 1989 SC 190 (202-203).

10. Ramveer Upadhaya v. State of U.P., AIR 1996 All 131.

11. Kunche Durga Prasad and Another. v. Public Information Officer, Office of Chief Manager (HR), Oil and Natural Gas Corporation Ltd., Rajahmundry and Others, AIR 2010 AP 105.

12. Central Board of Secondary Education and Another v. Aditya Bandopadhyay and Others, (2011) 8 SCC 497.

13. Janata Dal v. V.H.S. Chowdhary, (1992) 4 SCC 305.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Petitioner by filing the instant Writ Petition seeks quashing of the following Orders of different authorities under the Right to Information Act, 2005, being;

(a) Order dated 09.03.2017 passed in Appeal No. 54/SIC/2016 (Annexure P-6),

(b) Order dated 10.09.2016 passed in F.A. No. 02/2016 (Annexure P-4) and

(c) Order dated 25.06.2016 in RTI Application I.D. No.116/ GoS/DoP/RTI/2016 dated 14.6.2016 (Annexure P-2).

2. The Petitioner also seeks a declaration that the information submitted by the Government Servants/Public Authorities under Rule 19 of the Sikkim Government Servants (Conduct) Rules, 1981, is public information and not an exception within Section 8(1)(j) of the Right to Information Act, 2005

(hereinafter 'RTI Act'). That, a direction be issued to the State Public Information Officer (hereinafter „SPIO), Department of Personnel, Administrative Reforms and Training, Government of Sikkim, to supply the information sought by the Petitioner in his Application within the time frame stipulated under the RTI and not later than a month of the order and other directions as deemed proper by this Court.

3. The Petitioner's case as it unravels is that, he is the Principal Director, Finance and Accounts, presently posted in the Police Department, Government of Sikkim. The Respondent No.5 is a retired Secretary of the Energy and Power Department, Government of Sikkim, having retired in April, 2015. By an Application dated 14.06.2016, submitted under the RTI Act to the SPIO, Department of Personnel, Adm., Reforms & Training, Government of Sikkim, Gangtok, the Petitioner sought the following information pertaining to the Respondent No.5;

(a) Date of Appointment and Date of Retirement of Shri Prem Bahadur Subba.

(b) All sources of income as declared by Shri Prem Bahadur Subba as per Rule 19 of the Sikkim Government Servants (Conduct) Rules, 1981 and

(c) Declaration of assets and liabilities and all inherited and acquired properties situated within and outside the State of Sikkim as declared by Shri Prem Bahadur Subba, as per Rule 19 of the Sikkim Government Servant (Conduct) Rules, 1981 (hereinafter 'SGC Conduct Rules 1981').

4. The Respondent No.2 vide his Order dated 25.6.2016 supplied the information sought at (a) *supra* but withheld information pertaining to query No. (b) and (c), citing the reason that the Respondent No. 5 being a third-party had declined consent to the supply of such information. Aggrieved thereof, the Petitioner preferred an Appeal before the First Appellate Authority, Respondent No.3, relying on the Order of the Chief Information Commissioner of India, in the matter of ***Mr. Jayant G. Joshi vs. Mr. M.B. Patel***[1] wherein it was, *inter alia*, held that disclosure of information such as assets of a Public Servant which is routinely collected by the Public

[1] (CIC/SG/A/2011/003103/16921)

Authority and routinely provided by the Public Servant cannot be construed as an invasion on the privacy of an individual. However, by letter dated 24.8.2016 issued by the Respondent No.2, the Petitioner wasinformed that his First Appeal was disposed of ex-parte on 22.08.2016. In the face of protests by the Petitioner, a re-hearing was directed whereby the Respondent No.3 upheld the Order of the Respondent No.2, reasoning that the Petitioner did not succeed in establishing larger public interest as envisaged under Section 8(1)(j) of the RTI Act. Assailing this Order, an Appeal was preferred before the Respondent No. 4 drawing strength from the decision in ***State of U.P. vs. Raj Narain***[2], besides contending that the regular submission of information of assets and liabilities, including sources of income by all government servants including the Petitioner was a requisite under Rule 19 of the Sikkim Government Servant (Conduct) Rules, 1981. The Appellate Authority was also informed that the Petitioner was already pursuing a Complaint/Representation in the matter of corruption against the Respondent No.5 through departmental proceedings. Respondent No.4 concluded that query No. (b) and (c) of the Application of the Petitioner (extracted hereinabove) was personal information which were confidential and on the failure of the Petitioner to satisfy and convince the Commission that there was *prima facie* a case of corruption against the third-party, rejected the Appeal vide Order dated 09.03.2017. Hence, this Petition wherein it is, *inter alia*, contended that the Respondents No. 2, 3 and 4, being Public Authorities within the meaning of Section 2(h) of the RTI Act, are bound to ensure maximum disclosure and minimum exemptions in providing the information necessary for transparency and accountability and to contain corruption as envisaged under the RTI Act and not to muzzle, throttle or minimise disclosure.

5. Advancing his arguments for the Petitioner, learned Counsel sought to convince this Court that the disclosure of the assets of the Respondent No.5 would reveal whether there was large scale corruption or whether the assets of the Respondent No.5 were equivalent to his income. It was next contended that the exemptions carved under Section 8(1) of the RTI Act, vests discretion on the Public Authority to hold that personal information of a third party can be supplied to the person seeking information, when the disclosure outweighs the harm to protected interests and has some relationship to any public activity or interest and when the authority is

[2] (1975) 4 SCC 428

satisfied that larger public interest justifies the disclosure of such information. The Respondents No. 2, 3 and 4 failed to appreciate this context and erred in concluding that there was no larger publicinterest involved. Inviting the attention of this Court to Section 8(2) of the RTI Act, it was contended that the provision commences with a *non obstante* clause overarching the exemptions carved out under Section 8(1) of the RTI Act. Learned Counsel for the Petitioner would further canvass that the information sought by the Petitioner was not third party information since it is public record maintained in the regular course of governance, to ensure transparency and contain corruption. In this context, attention was also drawn to Rule 19 of the Sikkim Government Servants Conduct Rules, 1981 (for short „SGS Rules), which provides for yearly declaration of assets and liabilities and sources of income of a Government servant commencing from his appointment till superannuation. That, the Respondent No.3 erroneously relied upon the ratio in ***Girish Chandra Deshpande vs. Central Information Commissioner and Others***[3], which in fact provides that when in a given case the Central Public Information Officer or the SPIO or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed. Learned Counsel would argue that the ratio did not conclude that routine declaration of assets and liabilities by a Public Servant to a Public Authority in the course of public service is third-party confidential information within the ambit of Section 8(1)(j) of the RTI Act, as a public servant is expected to be accountable in the discharge of his duties and the privacy of a public servant cannot be of a larger concern then the public interest in transparency and accountability of governance in containing corruption. It was further contended that the Respondent No.4 failed to consider the ratio in the ***State of Karnataka vs. Selvi J. Jayalalitha and others***[4] and ***State of U.P. vs. Raj Narayan***[5], that the question of corruption was of larger public interest. Thus, the impugned orders suffer from illegality and perversity.

6. Countering the contentions advanced by the Petitioner, learned Counsel for the Respondents No.1, 2 and 3, put forth the arguments that the Petitioner was unsuccessful in establishing that the information sought for was in larger public interest. That, in fact the decision in ***Girish***

[3] (2013) 1 SCC 212
[4] (2017-SCC Online SC 134)
[5] (1975) 4 SCC 428

Ramchandra Deshpande (supra) would aptly be applicable to the facts of the instant case, as the assets of an employee was being sought thereunder but in appeal the Honble Supreme Court declined to allow the application. That, the information sought herein is purely personal and no public interest can be envisaged, as a result this Petition deserves a dismissal.

7. None appeared for the Respondent No. 4 to advance verbal submissions, however in his Counter-Affidavit while adverting to Section 3, Section 11, Section 15, Section 17, Section 18, Section 8(1)(j), Section 19, Section 23 of the RTI Act, the Respondent No.4 would aver that the information sought for by the Petitioner is personal information pertaining to Respondent No.5 and no larger public interest was indicated which justified the disclosure of such information. That, the expression „public interest like public purpose is not capable of any precise definition, however, public interest has to be construed keeping in mind the balance between right to privacy and right to information and the decision based on objective satisfaction, ensuring that larger public interest outweighs unwarranted invasion of privacy. That, no evidence was shown to indicate that the complaint of the Petitioner had been accepted by any competent authority including the Court nor has any proceeding of corruption been initiated against the Respondent No.5. The Petitioner was in fact relying on the disclosure of the assets and liabilities declared by the Respondent No.5 under Section 19 of the SGS Rules, in order to constitute a case of corruption against the Respondent No.5.

8. Learned Counsel for the Respondent No.5 while refuting the allegations of public interest would contend that no legal or fundamental right of the Petitioner has been infringed thereby the Petition be dismissed at the threshold. That in fact, the Respondent No.5 retired after 36 (thirty-six) years of unblemished service but the Petitioner being under the misconception that the Respondent No.5 is in cohorts with one Ramesh Sharma who is embroiled in some financial dispute with the Petitioner is pursuing a witch-hunt against the Respondent No.5. That, detailed investigation following the First Information Report dated 05.01.2015, lodged by the Petitioner, before the Sadar Police Station, alleging that the Respondent No.5 in connivance with Ramesh Sharma had cheated him of Rs.42,70,000/- (Rupees forty-two lakhs and seventy thousand) only, uncovered no such circumstance. That apart, the Petitioner had also

submitted a representation to the Chief Secretary, Government of Sikkim, demanding recovery of financial losses suffered by him from Ramesh Sharma and from the pensionand terminal benefits of the Respondent No.5 but Preliminary Enquiry conducted was devoid of any such revelation. A Complaint filed by the Petitioner on 16.08.2016 before the Station House Officer, Vigilance Department, Government of Sikkim, against the Respondent No.5 and his wife for amassing assets disproportionate to their known sources of income has since been closed. The Petitioner taking undue advantage of his post and position in the Pension Group Insurance & Provident Fund Division of Finance Revenue & Expenditure Department, Government of Sikkim, stalled the reliefs of the pension of Respondent No.5 for more than a year thereby causing him severe financial hardship. The information sought from the Respondent No.5 are his personal information falling under the ambit of Section 8(1)(j) and Section 11 of the RTI Act and could likely be misused against the Respondent No.5 if made available, hence the Petition be dismissed with exemplary costs.

9. The Petitioner filed his Rejoinder Affidavit to the joint Counter-Affidavit of the Respondents No.1, 2 and 3, as well as that of the Respondent No.4 and Respondent No.5, largely reiterating the averments made in his Petition.

10. Learned Counsel for the parties were heard at length and the pleadings and documents appended were perused as also the citations made at the Bar and given careful consideration.

11. What thus requires determination is whether information submitted by the Petitioner under Section 19 of the Sikkim Government Servants Conduct Rules, 1981, ought to be made available to the Petitioner or would it be exempted from disclosure in terms of Section 8, more specifically Section 8(1)(j) of the RTI Act?

12. Before embarking on a discussion or the merits of the matter, we may briefly look into the object of the RTI Act. The preamble of the RTI Act is as follows;

> "*An Act to provide for setting out the practical regime of right to information for citizens to*

secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commission and for matters connected therewith or incidental thereto.

Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

……."

13. The Statement of Objects and Reasons, *inter alia*, provides that in order to ensure great and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 enacted by Parliament needs to be made more progressive participatory and meaningful. The proposed legislation was to provide an effective framework for effectuating the right of information recognised under Article 19 of the Constitution of India. The Right to Information as provided in the RTI Act stems from the Universal Declaration of Human Rights 1986, International

Covenant on Civil and Political Rights 1966 and Part III of the Constitution of India, which enumerates Fundamental Rights. Nevertheless, reasonable restrictions on Right to Information are envisaged in each of the above. Article 19 of the Universal Declaration of Human Rights states as herein below;

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."

Article 12 of the Universal Declaration of Human Rights stipulates that:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 14 of International covenant on Civil and Political Rights while permitting restrictions lays down as follows;

> "The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security or when the interest of the private lives of the parties so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concerns matrimonial disputes or the guardianship of children."

14. Article 19 (1) (a) of the Constitution of India guarantees that all citizens shall have the right to freedom of speech and expression while making out an exception under Article 19 (2), which states that;

> "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposesreasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of (the sovereignty and integrity of India) the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

15. It goes without saying that the freedom of speech and expression as found in Article 19 (1) is one of the basic right but is not absolute being liable to curtailment by laws made by the State to the extent mentioned in clause (2) to (6) thereof. Article 19 (2) of the Constitution extracted hereinabove empowers the State to make laws setting reasonable restrictions in the interest of the general public, security of the State, public order, decency, morality, health or protection of general welfare or any other reason as set out therein. Thus, the scheme of Article 19 indicates that the group of rights, listed as clause (a) to (g), though recognized as Fundamental Rights conferred on citizens cannot be absolute, uncontrolled or wholly emancipated from restraints, which could result in anarchy.

16. In ***Collector of Customs, Madras v. Nathella Sampathu Chetty***[6], the Honble Supreme Court would hold that ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. In ***Mohd. Hanif Quareshi v. State of Bihar***[7], the Honble Supreme Court held as follows;

> "It follows that the reasonableness of a restriction has to be determined in an objective manner and from

[6] AIR 1962 SC 316
[7] AIR 1958 SC 731

the standpoint of the interest of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations."

17. Later in time, in ***State of Gujarat v. Shantilal Mangaldas***[8], the Honble Supreme Court would hold that a law cannot be said to be unreasonable merely because in a given case, it operates harshly. In other words, it cannot be claimed by a citizen that his right to exercise one of the freedoms guaranteed under Article 19 should be unfettered by any restriction which the State would otherwise be entitled to impose in respect of another freedom. At the same time, it is important to realize that since all citizens possess rights under Article 19 (1), the right of one citizen cannot be curtailed for facilitating the exercise of the fundamental right of another.

18. That having been said, we may turn our attention momentarily to Article 21 of the Constitution of India which provides for protection of life and personal liberty. This right encompasses the right to live with human dignity inclusive of the bare necessities such as food, clothing and shelter as also leisure and pursuit of better standards of living. The right to privacy is not listed as a fundamental right but is found to be inherent in Article 21. "*There is a strong link between Article 21 and the right to know.*" (***Essar Oil Ltd. v. Halar Utkarsh Samit)***[9]**.** "*The people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Article 21 of our Constitution. The right has reached new dimensions and urgency*." (***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd***.)[10]

" **.....** *In the freedom of free movement and right to life and liberty guaranteed to a citizen under Articles 19 (1) (d) and 21 of the Constitution of India, it is implicit that they should be free from fear and threat to life inasmuch as the life under*

[8] AIR 1969 SC 634,
[9] AIR 2004 SC 1834
[10] AIR 1989 SC 190 (202-203)

fear and threat of death will be no life at all and in cases of imminent threat to the freedom of free movement or right to life and personal liberty, the Supreme Court is not powerless, it can issue directions to the authorities concerned to immediately make arrangement of security of the lives of the citizens. The right to life means something more than survival or animal existence and it would include the right to live in peace with human dignity." (***Ramveer Upadhaya v. State of U.P.***)[11]

[With inputs from Right to Information Law and Practice, 2016, Justice Rajesh Tandon, Pages I.262 to I.277]

19. In the light of the above pronouncements, when the right to information and right to privacy are placed in juxtaposition, the former gives one the right to know, while the right to privacy protects the rights of the individual. Consequently, a balance is to be struck between the Fundamental Rights of persons seeking information and that of the person whose information is being sought.

20. On the anvil of the afore stated reasonings, when the provisions of Section 8 of the RTI Act are to be considered, almost all reasonable restrictions and exclusions discussed under Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and Article 19(2) of the Constitution of India find place as exemptions in the RTI Act with additions of few more grounds. The Section being a restriction on the fundamental right to information must be considered as a whole and construed strictly. This is clearly elucidated in the order of the Honble Andhra Pradesh High Court in ***Kunche Durga Prasad & Anr. v. Public Information Officer, Office of Chief Manager (HR), Oil and Natural Gas Corporation Ltd., Rajahmundry & Ors.***[12], as follows;

> "**9.** ……...On the other hand, disclosure of the information in relation to an individual, even where it is available with the Government, may amount to invasion of his privacy or right to life which in turn is also referable to Article 21 of the Constitution of India. It is also

[11] AIR 1996 All 131
[12] AIR 2010 AP 105

possible to treat the privilege of an individual not to be compelled to part with any information available with him, as an essential part of the Article 19 (1) (a) of the Constitution of India. Even while exercising his right of freedom of speech and expression, an individual can insist that any information relating to him cannot befurnished to others unless it is in the realm of publicactivity or is required to be furnished under any law, for the time being in force."

"**10.** ……....The freedom of an individual to have access to the information cannot be projected to such an extent as to invade the rights of others. Further, Section 6 (2) of the Act cannot be read in isolation, nor can be interpreted to mean that an applicant can seek, every information relating to anyone. Just as he cannot be compelled to divulge the purpose for which he needs the information, he must respect the right of the other man to keep the facts relating to him, close to his chest, unless compelled by law to disclose the same. It is relevant to mention that even where an individual is placed under obligation to speak, the law can only draw adverse inference from his failure or refused to speak but cannot go further to invade his privacy or private life."

21. What tantamounts to invasion of private life would be divulgence of the name, address, occupation, physical health including medical status of the person and financial status, such as income, assets liabilities of self and other members of the family. Generally, a person may be reticent about disclosing such information but there may be circumstances when it becomes absolutely expedient to share some of this information in larger public interest viz. when there is a doubt about the integrity of any person occupying a public office or if it is seen in the larger public interest. At the same time, I hasten to add that no specific parameters can be laid down as it depends on the facts of

every individual case. The object of the RTI Act being to bring about transparency and accountability in the working of the public authority, a citizen has the right to access information from the public authority who can facilitate such information. However, it must be borne in mind that in ***Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay & Ors***[13], the Honble Supreme Court while dealing with the provisions of the RTI Act, *inter alia,* held that;

> "**61.** Some High Courts have held that Section 8 of RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that therefore Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfillment and preservation of democratic ideals.

[13] (2011) 8 SCC 497

> **62.** When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualize and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act that is Section 8 of Freedom to Information Act, 2002. The Courts and Information Commissionsenforcing the provisions of RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonizes the two objects of the Act, while interpreting Section 8 and the other provisions of the Act."

The aforesaid extracts need no further explanation.

22. At this juncture, it would be apposite to refer to Section 8(1)(j) of the RTI Act which reads as herein below;

> **"8. Exemption from disclosure of information** -(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
>
> **(a)** …
>
> **(b)** …
>
> **(c)** …
>
> **(d)** …
>
> **(e)** …
>
> **(f)** …

(g) …

(h) …

(i) …

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interestjustifies the disclosure of such information: Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

....."

23. It is apparent from a reading of the said provision that personal information can be disclosed only if the concerned authority who is dealing with the application requiring the information is satisfied that larger public interest justifies the disclosure of such information. This position has been accepted by the Petitioner himself in Paragraph VI of „Grounds narrated in his Petition, wherein it is, *inter alia,* stated that personal information related to a third-party can be disclosed when the disclosure has some relationship to any public activity or interest and when such authority is satisfied that the larger public interest justifies the disclosure of such information.

24. That having been said, we may now refer to the provision of Section 19 of the SGC Rules. The relevant portions read as follows;

"19. Movable, immovable and valuable property.-

(i) A Government Servant shall, on his first appointment to any Service or post and thereafter at the close of every financial year, submit to the Government return of his asset and liabilities in such form as may be prescribed by the Government giving full particulars regarding –

(a) Immovable property inherited by him or owned or acquired by him or held on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any member of his family or in the name of any other person;

(b) Shares, debentures, cumulative time deposits and cash including bank deposits owned,acquired or inherited by him, or held by him, either in his own name or in the name of any member of his family or in the name of any other person;

(c) Other movable property inherited by him or similarly owned, acquired or held by him;

(d) Debts and other liabilities, if any, incurred by him directly or indirectly.

.....

(iv) The Government may, at any time, by general of special order, require a Government Servant to furnish, within a period specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or on his behalf or by any member of his family as may be specified in the order. Such statement shall, if so required by the Government include the details of the means by which, or the source from which, such property was acquired.

.....

> (vi) A Government Servant found to be in possession of pecuniary resources or property disproportionate to his known sources of income, for which he cannot satisfactorily account, shall, unless the contrary is proved, be presumed to have been guilty of grave misconduct in the discharge of his official duty for which he shall be liable for criminal action besides departmental proceedings.
>
> ....."

Suffice it to say that as per this provision, a Government servant shall on his first appointment to any service or post and thereafter, at the close of every financial year submit to the Government a return of assets and liabilities in such Form as may be prescribed by the Government giving full particulars regarding immovable property, movable property, both inherited and acquired, debentures and other such details as enumerated in the provisions thereof. The provision also envisages that a government servant found to be in possession of pecuniary resources or property disproportionate to his known sources of income for which he cannotsatisfactorily account shall unless the contrary is proved, be presumed to have been guilty of grave misconduct for which he shall be liable for criminal action besides departmental proceedings. What emerges from the above is that consequent upon the government servant disclosing his assets and liabilities to the Government on a yearly basis, should the government find that there is a mismatch in the possession of property and the income of the government servant, he would be taken to task by the government.

25. That having been said, in the instant matter despite having heard learned Counsel at length and despite having meticulously perused the pleadings, nothing emerges to establish that the request for information made by the Petitioner pertaining to Respondent No.5 is in the larger public interest. The Petitioner harbours a suspicion that the Respondent No.5 has assets disproportionate to his sources of income but would merely harbouring a suspicion make out grounds for disclosing private information of the individual, the response would have to be in the negative. While recalling the arguments of learned Counsel for the Petitioner with regard to the observations made in ***Girish Ramchandra Deshpande*** case (*supra*)

by the Honble Supreme Court, on perusal of the said Judgment, it emerges that the Honble Supreme Court was in seisen of the fact that the Petitioner therein had sought for copies of all memos, show-cause notices and orders of censure/punishment awarded to the third respondent from his employer and also details of movable and immovable properties as well as details of his investments, lending and borrowing from banks and other financial institutions. We may briefly walk through the said decision for clarity and extract the relevant answers given by the Regional Provident Fund Commissioner, Nagpur, to the queries made to him and discussed in the Judgment of ***Girish Ramchandra Deshpande*** case (*supra*), as follows;

> *"As to Point 1: Copy of appointment order of Shri A.B. Lute, is in 3 pages. You have sought the details of salary in respect of Shri A.B. Lute, which relates to personal information the disclosures of which has no relationship to any public activity or interest, it would cause unwarranted invasion of the privacy of individual hence denied as per the RTI provision under Section 8(1)(j) of the Act.*
> *....."*
>
> *As to Point 6: Copy of return of assets and liabilities in respect of Mr Lute cannot be provided as per the provision of the RTI Act under Section 8(1) (j) as per the reason explained above at Point 1.*
>
> *As to Point 7: Details of investment and other related details are rejected as per the provision of the RTI Act under Section 8(1)(j) as per the reason explained above at Point 1.*

AS to Point 8: *Copy of report of itemwise and valuewise details of gifts accepted by Mr Lute, is rejected as per the provisions of the RTI Act under Section 8(1)(j) as per the reason explained above at Point 1.*

As to Point 9: *Copy of details of movable, immovable properties of Mr Lute, the request to provide the same is rejected as per the RTI provisions under Section 8(1)(j).*

.....”

26. Aggrieved by the refusal, the Petitioner therein approached the Central Information Commissioner, who vide its order dated 18.06.2009, *inter alia*, held that the assets and liabilities, movable and immovable properties and other financial aspects qualified as personal information under Section 8(1)(j) of the RTI Act. The Petitioner therein then approached the Honble Supreme Court, who, while examining the correctness of the decisions below and considering the queries and responses as extracted above, held as follows;

> **13.** The details disclosed by a person in his income tax returns are “personal information” which stand exempted from disclosure under Clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.”
>
> **14.** The Petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.”

27. It was also clarified that “*Of course in a given case, if the Central Public Information Officer or the State Public Officer or the*

Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the Petitioner cannot claim those details as a matter of right." It would be, thus, essential to understand what public interest encompasses. *Black's Law Dictionary*[14] defines public interest as:

> "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government."

28. In ***Janata Dal v. V.H.S. Chowdhary***[15], the Honble Supreme Court observed that the purpose of the public interest is;

> "To wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not for personal gain or private profit of political motive or any oblique consideration."

29. This Court is aware and conscious of the fact that the pivotal object of the RTI Act is to advance transparency and accountability and to contain corruption. However, despite these objects, the right to privacy and personal information are on a separate footing and protected under the provisions of Section 8(1)(j) of the RTI Act, unless the information sought is established to be in public interest.

30. What concludes therefore from the gamut of discussions herein above is that in a given case information pertaining to assets and liabilities can be disclosed with the rider that there must be larger public interest involved justifying such disclosure. As can be culled out from the averments and submissions, the Petitioner herein suspects that the Respondent No.5 is

[14] 6th Edition
[15] (1992) 4 SCC 305

in possession of assets disproportionate to his known sources of income, however mere suspicion without any *prima facie* material to substantiate it does not justify the disclosure of such information of the Respondent No.5 as rests with the concerned government authority. This situation indeed appears to be a fishing expedition embarked upon by the Petitioner without any bona fide public interest. In these circumstances, it obtains that disclosure of such information would cause unwarranted invasion of the privacy of the individual and falls under the ambit of Section 8(1)(j) of the RTI Act.

31. Consequently, the prayers are rejected and the Writ Petition dismissed.

32. No costs.

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