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EQUIVALENT CITATION

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SUBJECT INDEX

Code of Civil Procedure, 1908 – O. VIII, R. 1A – Duty of Defendant to Produce Documents – The emphasis in R. 1A (1) supra is on the words "possession or power." Hence, the provision unambiguously casts a duty on the defendant to produce documents upon which either the relief is claimed by him or on which he relies upon, when such a document or documents are in his possession or power. Should the document(s) not be in his possession or power then the defendant shall inform the Court as to in whose power or possession the document is in R. 1A(3) requires that when such document(s) which ought to have been produced by the defendant but have not been so produced, cannot be received in evidence on his behalf without the leave of the Court. It thereby concludes that should the defendant fail to file a document in terms of the provisions of O. VIII R. 1 of the C.P.C, he may do so under the provisions of O. VIII R 1A(3), subject to the leave of the Court – The Court, under this provision, is to exercise its powers judiciously at the same time considering the *bona fides* of the party, the reasons put forth by the party and the relevance of the document as well as reasons for its non-filing earlier. Should the Court be satisfied with the grounds furnished by the concerned party then and only then shall it grant leave to the party making the prayer to file the documents.
***The Karmapa Charitable Trust and Others* v.**
The State of Sikkim and Others ***595A***

Code of Civil Procedure, 1908 – O. VIII, R. 1A – The petitioners harbor apprehensions on the count that as Shamarpa Rinpoche has since passed away, the authenticity of his signature cannot be tested. This is an uncalled for apprehension as the Indian Evidence Act, 1872 makes adequate provision for such contingencies. The argument that the case of the petitioners is jeopardized by the belated and *mala fide* steps of the respondent no. 3 cannot be countenanced as the petitioners will be afforded sufficient opportunity to controvert and refute the documents during cross-examination besides the steps taken by the respondent no. 3 cannot be stated to be *mala fide* –No fixed formula can be provided for leave to be granted by the Court under O. VIII R. 1A(3) of the C.P.C.
***The Karmapa Charitable Trust and Others* v.**
The State of Sikkim and Others ***595B***

Code of Civil Procedure, 1908 – S. 11 – *Res judicata* – In determining the application of the rule of *res judicata* the Court is not concerned with

correctness or otherwise of the earlier judgment. A wrong decision by a Court having jurisdiction is as much binding as a right one and the same can be over-turned by only taking recourse to appeal or review. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier suit between the same parties cannot also be challenged in a subsequent proceeding. Once a judgment in a former suit attains finality, it binds the parties totally in all issues relating to the subject-matter of the suit or proceeding. In order to sustain a plea of *res judicata*, it is not necessary that all the parties to the litigation must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim. *Explanation IV* of S. 11 of C.P.C provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of defence or attack, shall be deemed and regarded as having been constructively in issue directly and substantially in the former suit. A party who seeks to raise that kind of plea would be precluded from taking the plea against the same party in a subsequent proceeding which is based on the same cause of action. In other words, even though a particular ground of defence or attack was not actually set up as a ground of defence or attack in an earlier suit, if it was capable of being taken in the earlier suit, it stands as a bar in regard to the said issue being taken in the subsequent suit on the touchstone of principle of constructive *res judicata*.
***Shri Chewang Dorjee Bhutia* v. *Smt. Ruth Haleem @ Ruth Karthak Lepcha and Others* 613A**

Code of Civil Procedure, 1908 – S. 11 – *Res judicata* – The appellant did not prefer any appeal against the said judgment and decree dated 09.01.1986. As such, it will not be open for the appellant to contend by filing a fresh suit that the judgment rendered in Civil Suit No. 23 of 1980 was faulty and not correct as the same was, according to him, rendered going beyond the sale deed and that, therefore, principle of *res judicata* will not be attracted – The argument that the plaintiff in Civil Suit No. 23 of 1980 had suppressed the fact that the suit land was resold to the original owner i.e. father-in-law of the appellant by the plaintiff of Civil Suit No. 23 of 1980 by an agreement dated 06.05.1969 and therefore, principle of *res judicata* is not applicable, has no merit. If the agreement dated 06.05.1969 was suppressed by the plaintiff of Civil Suit No. 23 of 1980, it should have

been pleaded accordingly by the appellant in Civil Suit No. 23 of 1980. It was also not pleaded by the appellant in the present suit that he was not aware of agreement dated 06.05.1969 earlier. It is worth remembering that in Civil Suit No. 23 of 1980, the appellant herein had, on the contrary, questioned the sale deed dated 07.02.1959 to be a forged, fabricated and manufactured document and had claimed the suit land on the basis of a gift. Even when WP (C) N0. 48 of 2006 came to be disposed of on 13.11.2006, i.e, about 5 months before the suit was filed by the appellant on 26.04.2007, the appellant had not raised the issue of the agreement dated 06.05.1969 and had submitted before the Court that he had no concern with the land purchased by the plaintiff of Civil Suit No. 23 of 1980 – In view of the above discussion, substantial question of law no. 2 is answered against the appellant.
Shri Chewang Dorjee Bhutia* v. *Smt. Ruth Haleem @ Ruth Karthak Lepcha and Others ***613B***

Code of Criminal Procedure, 1973 – S. 482 – The High Court can exercise its powers under S. 482 where the need arises and there is justification for interference. The parties herein are husband and wife they have compromised the matter amongst themselves. Proof of this has been indicated in the Compromise Deed (Annexure P3). Although the offence under Ss. 342 and 323, I.P.C are compoundable by the person on whom the offence was perpetrated, however S. 498A of the I.P.C is a non-compoundable offence. Nevertheless, considering the entire facts and circumstances and the settlement between the petitioners No.1 and 2, as evident from the Compromise Deed, and the submissions of Learned Counsel for both the parties, I am of the considered opinion that pursuing prosecution would be an abuse of the process of law besides being an exercise in futility as no evidence would be forthcoming against the petitioner No.1 from the petitioner No.2 – Therefore, a fit case where the inherent powers of this Court under S. 482 of the Cr.P.C can be exercised – F.I.R No. 78/2019 dated 16.06.2019 of the Sadar Police Station, Gangtok and G.R Case No. 282 of 2019 before the Court of Learned Chief Judicial Magistrate, East Sikkim at Gangtok quashed.
Ghausul Azam @ Guddu and Another* v. *State of Sikkim ***636A***

Constitution of India – Article 226 – Though pleading in a writ petition has to be liberally construed, it is axiomatic that some foundational facts have to be brought on record in order to substantiate a plea that the petitioner is discriminated while granting benefit to similarly situated persons.
Mr. Naresh Kumar Rai* v. *State of Sikkim and Another ***533A***

Constitution of India – Principles of Natural Justice – Even if it is found by the Court that there is violation of principles of natural justice, it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirement in those cases when non-grant of hearing has not caused any prejudice to the person against whom the action is taken. As a corollary, it follows that every violation of a facet of natural justice may not lead to the conclusion that the order passed is null and void. The validity of the order has to be decided on the touchstone of prejudice – However, it is not open for the administrative authority to dispense with the requirement of principles of natural justice by itself deciding that no prejudice is caused to the person against whom the action is contemplated. Whether opportunity of hearing will serve the purpose or not has to be considered at a later stage and this aspect cannot be presumed by the authority. It is now well established that the Courts are empowered to consider as to whether any purpose will be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom action is taken.
***Mr. Naresh Kumar Rai* v. *State of Sikkim and Another* 533B**

Constitution of India – Article 226 – When Disputed Questions of Facts are Involved, whether the High Court should Entertain a Writ Petition – The Appellate Authority in the order dated 12.04.2018 had recorded that the parties had submitted that they had not paid and received the full payment of the lease amount despite reciting to the contrary in the Lease Deed dated 07.01.2000. In the writ petition, there is no averment that such observation of the Appellate Authority is not correct and the same is perverse. In paragraph 18 of the affidavit, the respondent no. 4 categorically stated that due to not making full payment of the lease amount, the property was still in the possession of respondent no. 4. Such assertion made in paragraph 18 of the counter affidavit was not denied in the affidavit-in-reply. Assuming that there is a dispute with regard to payment of the amount and possession of the land in question, the same will not have any bearing while deciding the writ petition.
***M/s Sangh Enterprises Pvt. Ltd.* v. *State of Sikkim and Others* 543A**

Disaster Management Act, 2005 – S. 51(b) – Sikkim Public Health and Safety (COVID-19) Regulations, 2020 – Regulation 3(2) – Neither S. 51(b) of the Act nor Regulation 3(2) of the COVID-19 Regulations seem to

give any power to respondent no.2 (District Magistrate) to seal the premises – Impugned order dated 23.05.2020 stayed till further orders.
***Krishna Kumari Chettri and Another* v.**
State of Sikkim and Others ***566A***

Indian Evidence Act, 1872 – Sole Evidence of Victim in Cases of Sexual Offences – The acts of sexual assault by the appellant on the victim have been cogently deposed by the victim and withstood the lengthy cross-examination. Obviously there are no witnesses to the acts of the appellant perpetrated on the minor victim. However, the lack of witnesses by itself does not absolve the appellant of the crime. It is now no more *res integra* that the evidence of the victim suffices to convict the offender if it is cogent, consistent and trustworthy.
Bhakta Bahadur Subba* v. *State of Sikkim ***523A***

Indian Evidence Act, 1872 – S. 9 – Test Identification – Object – TIPs are meant for investigation purpose. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The object of conducting the TIP is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime and to satisfy the Investigating Authority that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The identification proceedings being in nature of test, TIP should be conducted, as soon as possible, after the arrest of the accused, so as to eliminate the possibilities of the accused being shown to the witnesses prior to the TIP. However, it must be borne in mind that identification tests do not constitute substantive evidence and identification can only be used as corroboration of the statements made in Court – There is no acceptable evidence on record to hold that the appellant was identified during the course of the investigation – He was identified in Court for the first time by PW-1 – When identification of the accused by witnesses is made for the first time in Court, it should not form the basis of conviction.
Deepak Rai* v. *State of Sikkim ***558A***

Indian Penal Code, 1860 – S. 375 – Whether Passive Submission to Sexual Act can be a Defence for Rape – S. 375. I.P.C as it stands today provides in explanation 2 that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the

specific sexual act. The proviso thereto states that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Except for the fact that the victim admitted to have not raise any alarm when the appellant shut the door to rape her, there is no evidence to show unequivocal voluntary agreement on the part of the victim to participate in the specific sexual act – Passive submission to the sexual act, cannot any longer be a defence for rape in view of explanation 2 to S. 375, I.P.C as it stands today.
Prakash Subba* v. *State of Sikkim ***572A***

Hindu Marriage Act, 1955 – S. 13 (1)(i) – The evidence of PW-2 seems to suggest that the respondent no. 2 had clandestinely entered her mother's bedroom and it was only because of the fact that she was unable to sleep because of stomach pain, per chance, her mother and respondent no. 2 being together in the bedroom, came to light. In her deposition, PW-2 did not indicate the time when she found her mother and respondent no. 2 together. In the F.I.R as well as in the divorce petition, there is no allegation that respondent no.1 and 2 were found together in a naked condition inside the room, though it is mentioned therein that they were found to be together at around 2 am in the morning. It is highly improbable that after consistent knocking of the daughter, the mother would come out naked and allow any other person in the room to remain in naked condition. Obviously, it is an embellishment and improvement of the case projected by PW-2 – Going by the un-impeached evidence of DW-1 and DW-2 and in absence of any positive evidence on the part of PW-2 that she had found both of them together at around 2 am in the bedroom of respondent no. 1, it will be difficult to accept the version sought to be projected that respondent no.1 and 2 were found in a naked condition in an unearthly hour of 2 am in the bedroom of respondent no. 1. The admission of both the respondents to the extent that respondent no. 2 was having a drink in the bedroom of respondent no. 1 as a customer at around 10.30/11 pm will not lead to a conclusion that respondent no. 1 was committing adultery with respondent no. 2 – It is in this context Exhibit-C assumes significance wherein the respondent no. 2 had admitted to have slept with respondent no. 1. It must not be forgotten that Exhibit-C was executed in the Police Station while the respondent no. 2 was in illegal detention – Without there being registration of any case, the respondent no. 2 was not only called to the Police Station but was also detained from 26.05.2018 to 27.05.208 till 6 pm. Evidence of DW-2 that he was forced to execute Exhibit-C and that he was released

only after execution of Exhibit-C are not even tested by way of cross-examination.
Suk Bir Chettri* v. *Jamuna Chettri and Another ***586A***

Notification No. 2947G dated 22.11.1946 – Validation of Unregistered Document – The agreement dated 06.05.1969, which the appellant claims to be a sale deed, is not a registered document – Notification No. 2947G, by using the expression "may", gives a discretionary power on the Court to validate and admit an unregistered document which was required to be registered. It is not an automatic formality that the Court has to invariably grant liberty to validate such an unregistered document and have it admitted in the Court without any consideration to the attending facts and circumstances – By the time Notification No. 2947G dated 22.11.1946 was issued, Sikkim State Rules Registration of Documents, 1930 had come into force and the aforesaid Rules of 1930 was also noted in the Notification No. 2947G – Rule 21 of Rules of 1930 provides that a document required to be registered shall be presented either by the person executing it or by the person claiming under it. The Notifications dated 11.04.1928 and 22.11.1946 make it clear that an unregistered sale deed shall not be considered valid unless validated – Rule 24 provides that no document relating to immovable property shall be accepted for registration unless it contains a description of the property sufficient to identify the same – A reading of Exhibit-P4 (*Rajinama*) goes to show that the document contains no description of the property. A document presented for registration must be self-contained and therefore, under Rule 24 of the Rules of 1930, the agreement dated 06.05.1969, even if had been presented before the Registering Authority, could not have been accepted for registration – No case is made out to permit validation of agreement dated 06.05.1969 after 51 years of its alleged execution.
Shri Chewang Dorjee Bhutia* v. *Smt. Ruth Haleem @ Ruth Karthak Lepcha and Others ***613C***

Sikkim State Rules (Registration of Documents), 1930 – Rule 6 – Though Mr. Thapa has sought to raise a contention that the Revenue Officer-cum-Assistant Director, Land Revenue Department, Government of Sikkim, was not the competent authority to either accept or reject the registration of the lease deed as it was either the Sub-Registrar or the Sub-Divisional Officer who was competent officer under the Rules of 1930 and Circular dated 29.10.1984, it is to be borne in mind that the said plea was not taken in the appeal preferred by the petitioner – Rule 6 of the Rules of

1930 provides that the Registrar would be empowered to revise or alter any order of any Sub-Registrar refusing to admit a document if an appeal against such order was presented to the Registrar within a month from the date of order. There is a categorical assertion of the petitioner in paragraph 19 of the writ petition that the appeal was preferred under Rule 6 of the Rules of 1930.
***M/s Sangh Enterprises Pvt. Ltd.* v. *State of Sikkim and Others* 543B**

Sikkim State Rules (Registration of Documents), 1930 – Rules and Notifications Prevailing at the Time of Sanction Would Govern the Subject of Sanction and Not the Ones Existing On the Date of Application – No vested right had accrued to the petitioner on presentation of the lease deed dated 07.01.2000. The order of rejection also does not create any right in favour of the petitioner for him to contend that at the appellate stage grounds of rejection have to be considered on the touchstone of norms existing at the time of such rejection and changes in applicable law and/or norms have to be shut out from consideration by the Appellate Authority. In that light, the notifications dated 29.02.2008 and 16.08.2014 will have to be taken note of when a consideration is made by the Appellate Authority as to whether the lease deed is to be registered or not. It is not retrospective application of the notifications to existing vested right of the petitioner as is sought to be contended by Mr. Thapa. When, admittedly, the lease deed dated 07.01.2000, which was a lease in perpetuity, do not meet the requirement of the period for which a lease deed can be executed under the notifications dated 29.02.2008 and 16.08.2014, I am of the considered opinion that the order dated 12.04.2018 was passed by the Appellate Authority taking into consideration relevant consideration and the view taken by the Appellate Authority cannot be said to be arbitrary or irrational.
***M/s Sangh Enterprises Pvt. Ltd.* v. *State of Sikkim and Others* 543C**

SLR (2020) SIKKIM 523

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

Crl. A. No. 19 of 2019

Bhakta Bahadur Subba ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. D.K Siwakoti, Legal Aid Counsel.

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

Date of decision: 14th September 2020

A. Indian Evidence Act, 1872 – Sole Evidence of Victim in Cases of Sexual Offences – The acts of sexual assault by the appellant on the victim have been cogently deposed by the victim and withstood the lengthy cross-examination. Obviously there are no witnesses to the acts of the appellant perpetrated on the minor victim. However, the lack of witnesses by itself does not absolve the appellant of the crime. It is now no more *res integra* that the evidence of the victim suffices to convict the offender if it is cogent, consistent and trustworthy.

(Para 7(ii))

Appeal dismissed.

Chronology of cases cited:

1. Rajinder alias Raju v. State of Himachal Pradesh, (2009) 16 SCC 69.
2. State of Himachal Pradesh v. Manga Singh, (2019) 16 SCC 759.

JUDGMENT

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

1. By preferring this appeal the Judgment and Order on Sentence, both dated 26-07-2019, in Sessions Trial (POCSO) Case No.10 of 2018 are assailed. The learned Trial Court subjected the appellant to trial under four counts of the Indian Penal Code, 1860 (hereinafter, "IPC") and three counts of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012"). On completion of trial, the appellant was convicted on all seven counts as follows;

(i) For the offence under Section 354 of the IPC, the convict was sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs.1,000/- (Rupees one thousand) only;

(ii) For the offence under Section 376(2)(n) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only;

(iii) For the offence under Section 376(3) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only;

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

(v) For the offence under Section 5(j)(ii) of the POCSO Act, 2012, the convict was sentenced under Section 6 of the POCSO Act, 2012, to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only;

(vi) For the offence under Section 5(l) of the POCSO Act, 2012, the convict was sentenced under Section 6 of the POCSO Act, 2012, to undergo rigorous imprisonment for a

period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only; and

(vii) For the offence under Section 7 of the POCSO Act, 2012, the convict was sentenced under Section 8 of the POCSO Act, 2012, the convict was sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs.1,000/- (Rupees one thousand) only.

All the sentences of fine carried a default clause of imprisonment. Aggrieved thereof, the appellant is before this Court.

2(i). The facts of the prosecution case, briefly narrated, are that on 14-03-2018, at around 0730 hours, written information was received at the concerned police station from P.W.2, a Para Legal Volunteer (PLV) of the area where the offence had occurred, stating that the victim P.W.1, aged about 16 years, was sexually assaulted by the appellant for the last 5/6 months. That, on 13-03-2018, the concerned Ward Panchayat, P.W.3, brought it to the notice of the informant, who in turn, enquired about it from the victim P.W.1 and after obtaining information from the victim, immediately lodged the First Information Report (FIR), Exhibit 3. The FIR was registered as a criminal case on 14-03-2018, under Section 376 of the IPC read with Section 6 of the POCSO Act, 2012, against the appellant. The matter was duly investigated into by P.W.13, the Investigating Officer (I.O.). Investigation, *inter alia*, revealed that repeated sexual assault perpetrated by the appellant, aged about 52 years, on the minor victim, aged about 15 years 8 months, led to her pregnancy.

(ii) Charge-Sheet was filed against the appellant under Section 376 of the IPC read with Section 5(j)(ii) of the POCSO Act, 2012. The learned Trial Court framed Charges against the appellant under Section 376(2)(i), Section 376(2)(n), Section 354, Section 506 of the IPC, Section 5(j)(ii)/6, Section 5(l)/6, and Section 7/8 of the POCSO Act, 2012. On a plea of "not guilty" by the appellant, the Prosecution embarked on the exercise of examining thirteen witnesses to prove its case beyond all reasonable doubt. On closure of Prosecution evidence the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C")

wherein he reiterated his innocence. However, he had no witness to examine. Pursuant thereto, the final arguments of the rival parties were heard and the learned Trial Court on due consideration of the evidence on record convicted and sentenced the appellant as detailed *supra*.

3. Learned Legal Aid Counsel for the appellant in an effort to establish the innocence of the appellant contended before this Court that, as per P.W.2, he was telephonically called by P.W.3 to her home, and on reaching there she informed him that the victim was pregnant and made enquiries about initiating legal proceedings. That P.W.2, P.W.3, P.W.4 and P.W.10 have stated that the victim was pregnant, but P.W.1, the victim, has nowhere stated that she told the said witnesses that the appellant had sexually assaulted her. The statement of the victim nowhere indicates that the appellant was responsible for the offence. The victim is unaware as to who lodged the FIR, added to which that there is no DNA report of the infant delivered by the victim to establish paternity, leading to doubts about the veracity of the Prosecution case. That, in the absence of cogent evidence to link the appellant to the offences, the benefit of doubt ought to be extended to him and he deserves to be acquitted of the offences under which he was convicted. Urging an alternative argument, learned Counsel contended that should this Court come to a finding that the appellant is guilty of the offences, the sentence imposed on him be reduced on the ground that the sexual assault took place only once and it was not perpetrated repeatedly. That, the appellant has no criminal antecedents and is now aged about 54 years. Incarcerating him for twenty long years would deprive him of the company and comfort of his family in his old age when he would require it the most, hence, sympathetic consideration be given by the Court on this aspect.

4. *Per contra*, learned Additional Public Prosecutor submitted that the impugned Judgment and Order on Sentence warrants no interference in view of the admission of the appellant of the minority of the victim which has been proved by the Prosecution and in consideration of the evidence of the victim herself where she has unequivocally stated that the appellant had sexually assaulted her from the time she was in Class VII. That, the offence of sexual assault was not a single encounter, but consistently perpetrated on the victim by the appellant resulting in her pregnancy and delivery of a child.

That, the victim's evidence in Court is duly corroborated by her Section 164 Cr.P.C. statement before the learned Magistrate which stood un-decimated by her cross-examination. That, mere non-production of the DNA report does not absolve the appellant of the crime committed by him in view of the cogent and consistent statements of the victim. That, it is now settled law that the Courts can rely on the statement of the victim alone and convict the offender if her evidence is cogent, consistent and coherent. Hence, the appeal deserves a dismissal.

5. We have heard at length the rival contentions and given our due consideration.

6. The only question that arises for consideration herein is whether the learned Trial Court erred in convicting the appellant under the offences charged?

7. In order to answer this query it is necessary to carefully examine the evidence on record.

(i) P.W.1 is the minor victim. On the date that her evidence was recorded before the learned Trial Court, i.e., 06-08-2018, she was aged about 16 years. The learned Trial Court while relying on the birth certificate, Exhibit 6, issued by the District Registrar, Births & Deaths of the concerned Hospital, Government of Sikkim, found that the victim was born on 14-06-2002. The learned Trial Court also observed that the seizure of the birth certificate had been duly proved by P.W.2 and P.W.3 from the possession of P.W.6. The veracity of the evidence of P.W.6 was duly corroborated by P.W.12, the District Medical Superintendent. That, the victim was a minor is not contested by the appellant, and in view of this admission, no further discussion need arise on the minority of the victim.

(ii) So far as the question of the appellant being the perpetrator of the offence is concerned, we may carefully examine the evidence of P.W.1 the victim. According to her, the appellant was a frequent visitor to the house where she was residing. That, she had been brought to live in the said house since 12-12-2013 and admitted to Class VI of the Government Senior Secondary School in the area. She studied there till February, 2018.

That, while she was in Class VII, one evening at her home when she was locking the hens in their coop, the appellant came to where she was and started touching her all over her body, fondled her breasts and took off her track pants. Thereafter, despite her protest he raped her. Two-three days later when she was preparing fodder for the cows at the cowshed, he came there and forcefully raped her. Although she warned him that if he repeated the act she would inform the house owner, the appellant instead threatened to kill her if she reported the matter to either the house owner or any other person. Thereafter, he would frequent the house, when no one else was around and raped her at various places in and around the house at different points of time till February, 2018. According to her, the lady Panchayat, P.W.3 requested an Accredited Social Health Activist (ASHA) volunteer, P.W.10, to conduct a urine pregnancy test on her (P.W.1), the report of which tested positive for pregnancy. When P.W.3 asked her how the pregnancy came about, she told her that the appellant was responsible for the same. Thereafter, P.W.2 came to the house where P.W.1 was residing and P.W.1, P.W.2 and P.W.4 went to the Police Station where the lady police personnel enquired from her about her pregnancy. She then narrated the incident to the police personnel in the presence of P.W.4, her mother. That, later her statement came to be recorded by a "Judge Madam", which she identified as Exhibit 1. That, on 06-06-2018, she delivered a baby girl at STNM Hospital, Gangtok. Although it was the argument of learned Counsel for the appellant that the minor victim was unaware of who lodged the FIR and thereby the authenticity of the incident could not be gauged, however, we are of the considered opinion, that such ignorance does not demolish the Prosecution case. Her evidence-in-chief was to the effect that she had gone to the Police Station with P.W.2 and P.W.4. The veracity of her statement regarding her presence at the police station with the other Prosecution witnesses was not even tested in cross-examination. The victim under cross-examination has admitted that she had made her statements pertaining to the incident, to the police, in the presence of her mother, P.W.4. The fact remains that the FIR, Exhibit 3, was lodged by P.W.2 who has stated as much, duly supported by the evidence of P.W.4 who had accompanied him to the police station. The acts of sexual assault by the appellant on the victim have been cogently deposed by the victim and withstood the lengthy cross-examination. Obviously there are no witnesses to the acts of the appellant perpetrated on the minor victim. However, the lack

of witnesses by itself does not absolve the appellant of the crime. It is now no more *res integra* that the evidence of the victim suffices to convict the offender if it is cogent, consistent and trustworthy.

(iii) In this context, we may beneficially refer to the ratiocination in ***Rajinder alias Raju vs. State of Himachal Pradesh***[1], wherein the Hon'ble Supreme Court observed as follows;

> "**19.** In the context of Indian culture, a woman—victim of sexual aggression—would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent."

In a later Judgment in ***State of Himachal Pradesh*** vs. ***Manga Singh***[2], the Hon'ble Supreme Court reiterated the same observation and held as follows;

> "**10.** The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on

[1] (2009) 16 SCC 69
[2] (2019) 16 SCC 759

> the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."

(iv) While considering the testimony of the other Prosecution witnesses, it is evident that P.W.2, P.W.3, P.W.4 and P.W.10 have indeed fortified the evidence of the victim P.W.1. According to P.W.2, after he was called on 13-03-2018 by P.W.3 to her house, he was informed that the victim was pregnant and P.W.3 enquired from him about the legal proceedings. P.W.2 then called the victim and enquired about her pregnancy. Although at first the victim was reluctant to divulge her ordeal however later she stated that the appellant was responsible for her condition. P.W.2 also summoned the appellant at that time and enquired about the incident from him. That, he initially responded with denials but when confronted in the presence of the victim, he admitted to the acts of penetrative sexual assault perpetrated by him on her. Consequent thereto, P.W.2 took the appellant also to the police station where Exhibit 3 came to be lodged. The evidence of P.W.2 finds support in the evidence of P.W.3, who being the Ward Panchayat, was informed that at the relevant time the victim was studying in Class IX of the Government Senior Secondary School, but was reluctant to go to school. She noticed that the victim's stomach was bulging and suspecting that she was pregnant she called P.W.10 to conduct a urine pregnancy test, which confirmed her suspicions. On enquiry from the victim, she informed P.W.3 that the appellant was responsible for the pregnancy. The appellant on enquiry by P.W.2 admitted as much. P.W.4, the victim's mother, was also called to the residence of P.W.3 where P.W.3 informed her that the victim was pregnant and the appellant was responsible for the pregnancy. P.W.4 lent support to the statement of P.W.3 regarding her presence in the house of P.W.3. The evidence of P.W.5, P.W.6 and P.W.12 pertain to the date of birth of the victim and in view of the admission of minority of the victim their evidence is of no relevance for the purposes of this appeal. P.W.7, the

doctor had examined the appellant and found that there was nothing to suggest that the appellant was incapable of sexual intercourse. P.W.8 recorded the Section 164 Cr.P.C. statement of the victim which was duly identified by her and corroborated by the evidence of P.W.1. P.W.9, the Gynecologist, examined the victim on 14-03-2018, at around 11.50 p.m. The victim, according to the witness, gave her a history of sexual contact by the appellant for the last two years. A urine pregnancy test was advised which tested positive for pregnancy and an ultrasonography (USG) conducted on the victim confirmed the pregnancy and the fetal well being. The Doctor opined that, as per the history and clinical findings, the fetal size was suggestive of 32-34 weeks pregnancy, duly confirmed by the USG report prepared by the Radiologist at the STNM Hospital, dated 12-04-2018. P.W.10, the ASHA worker, supported the evidence of P.W.3 regarding the urine pregnancy test conducted by her on the victim as requested by P.W.3, and the result thereof. The I.O., P.W.13, during his investigation found that the appellant had reportedly been sexually assaulting the victim since the last two years and threatened her of dire consequences if she revealed the fact to anyone. The evidence-in-chief of P.Ws 1, 2, 3, 4, 9, 10 and P.W.13 remained unscathed in cross-examination.

8. We now relevantly refer to the provision of Section 29 of the POCSO Act, which lays down as hereinbelow;

> **“29. Presumption as to certain offences**.”
> Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”

The section is self-explanatory requiring no further elucidation. Following this provision is Section 30 of the POCSO Act which casts a reverse burden on the Appellant and thereby affords him the opportunity of disproving that he had such mental state *with respect to the act charged as an offence in that Prosecution*. The appellant has failed to take advantage of this provision of law by furnishing any evidence to demolish the Prosecution case.

9. Hence, the Prosecution case of the appellant being the perpetrator of the offences as charged, on the minor victim, consequent upon which she became pregnant and delivered a child in June 2018, withstood cross-examination and was consequently proved beyond a reasonable doubt.

10. In the light of the foregoing discussions, no reason whatsoever emanates for this Court to interfere with the findings of the learned Trial Court. While considering the prayer for reduction of sentence made by learned Counsel for the appellant, in the light of the facts and circumstances of the Prosecution case, we are not inclined to interfere with the penalty imposed by the impugned Order on Sentence.

11. Consequently, the Appeal fails and is dismissed.

12. No order as to costs.

13. Copy of this Judgment be sent to the Learned Trial Court.

SLR (2020) SIKKIM 533

(Before Hon'ble the Chief Justice)

WP (C) No. 03 of 2019

Mr. Naresh Kumar Rai ..... PETITIONER

Versus

State of Sikkim and Another ..... RESPONDENTS

For the Petitioner: Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate.

For the Respondents: Mr. Vivek Kohli, Advocate General.

Date of decision: 14th September 2020

A. Constitution of India – Article 226 – Though pleading in a writ petition has to be liberally construed, it is axiomatic that some foundational facts have to be brought on record in order to substantiate a plea that the petitioner is discriminated while granting benefit to similarly situated persons.
(Para 16)

B. Constitution of India – Principles of Natural Justice – Even if it is found by the Court that there is violation of principles of natural justice, it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirement in those cases when non-grant of hearing has not caused any prejudice to the person against whom the action is taken. As a corollary, it follows that every violation of a facet of natural justice may not lead to the conclusion that the order passed is null and void. The validity of the order has to be decided on the touchstone of prejudice – However, it is not open for the administrative authority to dispense with the requirement of principles of natural justice by itself deciding that no prejudice is caused to the person against whom the action is contemplated. Whether opportunity of hearing will serve the purpose or not has to be considered at a later stage and this aspect cannot be presumed by the authority. It is now well

established that the Courts are empowered to consider as to whether any purpose will be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom action is taken.

(Paras 22 and 23)

Petition dismissed.

Chronology of cases cited:

1. O.Z Hussain (Dr) v. Union of India, 1990 Supp SCC 688.
2. State of Tripura and Others v. K.K Roy, (2004) 9 SCC 65.
3. Gopal Singh v. State Cadre Forest Officers Association and Others, (2007) 9 SCC 369.
4. Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492.
5. Karnataka SRTC v. S.G Kotturappa, (2005) 3 SCC 409.
6. Malloch v. Aberdeen Corpn., (1971) 2 All ER 1278 (HL).
7. Cinnamond v. British Airports Authority, (1980) 2 All ER 368 (CA).
8. Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati and Others, (2015) 8 SCC 519.

JUDGMENT

Arup Kumar Goswami, CJ

By filing this Writ Petition under Article 226 of the Constitution of India, the petitioner has prayed for quashing the Order dated 28.09.2018 (Annexure-P5) and for a direction to issue fresh order for promotion. The petitioner has also prayed for compensation for being subjected to mental trauma and humiliation.

2. The case of the petitioner, as presented in the writ petition, is that in pursuance of a Notification dated 17.06.2005 (Annexure P-1), the respondent no.1 had issued a common Order dated 26.09.2018, whereby the petitioner was promoted on officiating basis along with 193 Group-D employees serving in various Government Departments to the post of Lower Division Clerk (LDC). Pursuant to the aforesaid order, the petitioner had

joined the post on 27.09.2018. However, by another Order dated 28.09.2018, the officiating promotion order of the petitioner was withdrawn without assigning any reason and without issuing any show cause notice to the petitioner and he was brought back to the post of Cook.

3. It is pleaded that he was promoted on officiating basis after he had served for more than 20 years in the post of Cook in Sikkim Armed Police and he had the requisite qualification for being promoted. There were other Cooks who were also promoted on officiating basis by the said Order dated 26.09.2018 but the promotion order was withdrawn only in respect of the petitioner.

4. The respondents no.1 and 2 had filed a counter affidavit, wherein it is stated that the petitioner was appointed as a Cook in the Sikkim Armed Police vide Order dated 13.11.1998 under the post of Follower in the Group-D cadre in Sikkim Police and the service of the petitioner is governed by Sikkim Armed Police Force (Recruitment, Promotion and other Conditions of Service) Rules, 1989 (for short, the Rules of 1989). Copy of the appointment order of the petitioner was annexed with the affidavit. At the relevant time, the petitioner was working as a Cook in Sikkim Armed Police, Pangthang and the officiating promotion order of the petitioner to the post of LDC was erroneously and inadvertently issued. The said officiating promotion order was issued under Sikkim Sub-ordinate (Ministerial and Executive) Service Rules, 1984 (for short, the Rules of 1984). When a joint representation was received from the Follower (Cook) of Police Department, respondents re-verified the documents of the petitioner whereupon it was realized that the petitioner was appointed under Sikkim Police cadre and not under any civil post. In the said officiating promotion order, the petitioner was erroneously shown as Office Attendant while he was, in fact, a Cook under Sikkim Armed Police. An Assured Career Progression Scheme (ACPS) and a Modified Assured Career Progression Scheme (ACPS) were issued under revised Office Memorandum dated 18.08.2018, extending the same to the Follower of Sikkim Police. That apart, a Notification dated 21.01.2019 was issued notifying uniform promotion avenues for the Follower under Sikkim Police service.

5. A rejoinder affidavit was filed by the petitioner stating that that the officiating promotion was given to all Government servants in Group-D working in various departments and the persons who were appointed along

with the petitioner vide Order dated 13.11.1998 were not considered for promotion because they did not possess the basic educational qualification of Class-X pass. It is also stated that neither in the Order dated 13.11.1998 nor in the Rules of 1989, the post of Cook is termed as Follower and that the Rules of 1989 do not cover promotion of Office Attendant/Cook and the post of Office Attendant/ Cook does not fall under the Rules of 1989.

6. Mr. A. Moulik, learned Senior Counsel for the petitioner, has submitted that while the other Cooks, who were promoted on officiating basis, have been allowed to continue, the petitioner had been singled out and discriminatorily treated by the respondents by withdrawing his officiating promotion order. Drawing attention of the Court to Rule 28 of the Rules of 1989, which is under the heading "Residuary matters", the learned Senior Counsel points out that as there is no provision for promotion of Cook in the Rules of 1989, provision for promotion, etc., are to be regulated by the rules and orders issued by the Government from time to time, which are applicable to the corresponding rank of the Sikkim Police Force. He has submitted that by the Notification dated 17.06.2005, in exercise of powers conferred under Rule 10 of the Rules of 1984, the Government of Sikkim had relaxed the provision of Schedule-II, under item Grade-IV of the said Rules, to promote Group-D employees possessing educational qualification of Class-X pass on seniority-cum-merit basis as well as Daftaries and Barkhandas on seniority-cum-merit basis and it is on the basis of the aforesaid Notification, as the petitioner is a Group-D employee having the requisite qualification of Class-X pass, he was given the officiating promotion. It is contended by him that the respondents acted illegally and arbitrarily in withdrawing his officiating promotion without assigning any reason and without issuing any show-cause notice and, therefore, the order cannot withstand the scrutiny of law for being in violation of principles of natural justice. Relying on paragraph 10 of the counter affidavit filed by the respondent nos.1 and 2, he submits that it is admitted by the respondents that the post held by the petitioner is a civil post and, therefore, even though he is working in Sikkim Armed Police, he could be promoted on officiating basis as LDC. It is also the contention of Mr. Moulik that there must be scope for promotion in a service rule and in this connection, he placed reliance on the judgments of the Honble Supreme Court in the cases of *O. Z. Hussain (Dr) vs. Union of India*, reported in *1990 Supp SCC*

688 and *State of Tripura and Others vs. K.K. Roy*, reported in *(2004) 9 SCC 65*.

7. Mr. Vivek Kohli, learned Advocate General, Sikkim, abiding by the stand taken in the affidavit, has submitted that officiating promotion order of the petitioner was erroneously issued and, therefore, the same was rectified immediately within a period of 2 (two) days. He submits that under Section 2(c) of the Sikkim Armed Police Force Act, 1981 (for short, Act of 1981), the term „Follower is defined and it includes any person appointed to do the work of Cook, Cobbler, etc. He has submitted that no material is placed by the petitioner to demonstrate that the Cooks, whose names appeared in the Order dated 26.09.2018, were also working in the Sikkim Armed Police. He has submitted that the petitioner was appointed as a Cook in Sikkim Armed Police and therefore, there is no manner of doubt that the Rules of 1989 applies to the petitioner. Under the Rules of 1989, there is no post of LDC or Office Attendant. The Notification dated 17.06.2005 is in respect of the Rules of 1984 only and the same is not applicable to the members of the Sikkim Armed Police. It is submitted by him that reliance placed on Rule 28 of the Rules of 1989 by Mr. Moulik is misconceived as there is no pleading whatsoever that recourse was taken to Rule 28 while promoting the petitioner on officiating basis and besides, it was only because of misconception of facts that the petitioner had been given officiating promotion. Officiating promotion does not confer any right on the petitioner and that when petitioner in the Writ Petition has failed to show how he could have been promoted to a cadre post under the Rules of 1984, it cannot now be urged by the petitioner that he had been denied the opportunity to show cause and that there has been violation of principles of natural justice, he contends. He has placed reliance on the decision of the Honble Supreme Court in the case of *Gopal Singh vs. State Cadre Forest Officers Assn. & Ors.*, reported in *(2007) 9 SCC 369*.

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

9. The appointment order of the petitioner dated 13.11.1998 goes to show that the petitioner was appointed as a Cook in the Sikkim Armed Police. At the very outset, it will be appropriate to take note of Section 2(c) of the Act of 1981. It defines 'Follower', which includes a Cook.

Therefore, the contention of Mr. Moulik that the term 'Follower' is nowhere defined is not correct. Rules of 1989 was framed under the Act of 1981 and the post of Cook is mentioned in Schedule-I, reference to which is made in Rules 4 and 5 relating to "Composition of strength of the Force" and "Scale of Pay and Allowances", respectively. In Schedule-I, there is no reference to any post of Office Attendant or LDC. There is no escape from the conclusion that Rules of 1989 applies to the petitioner.

10. Rule 2(j) of the Rules of 1984 defines 'Service' to mean Sikkim Sub-ordinate (Ministerial and Executive) Service comprising of posts mentioned in Schedule-I for any of the departments and offices under the Government. A careful perusal of the above definition goes to show that posts mentioned in the Schedule-I of Rules of 1984 in any of the Departments and offices under the Government would come within the ambit of service under the Rules of 1984. Schedule-I of the Rules of 1984 lists posts under the headings 'Ministerial' and 'Executive' and it does not include any post of Cook.

11. When the Rules of 1984 were framed, post of LDC was to be filled by direct recruitment through Open Competitive Examination. Subsequently, the Rule was amended by Notification dated 29.12.2001, providing for direct recruitment to the aforesaid post through Open Competitive Examination to the extent of 85%, promotion to the extent of 5% on the basis of merit-cum-seniority from amongst Group-D employees holding grade-I post and promotion to the extent of 10% through Limited Department Competitive Examination from amongst Group-D employees having educational qualification of Class-X examination pass with minimum speed of 15 words per minute in typing. By Notification dated 17.06.2005, in exercise of powers conferred under Rule 10 of the Rules of 1984, the requirement of Departmental Competitive Examination in respect of Group-D employees was relaxed and Group-D employees along with Daftaries and Barkhandas were to be promoted on the basis of seniority-cum-merit by Departmental Promotion Committee.

12. At this juncture, it is to be placed on record that none of the parties had thrown any light on who are the Group-D employees. However, it is an admitted position that the petitioner is a Group-D employee. While the post of Cook is mentioned in Schedule-I of Rules of 1989, method of

recruitment and other eligibility conditions, which are mentioned in Schedule-II in terms of Rule 6, are, however, not indicated.

13. With regard to the submission of Mr. Moulik that Rule 28 of the Rules of 1989 was taken recourse to while promoting the petitioner on officiating basis, no factual foundation was laid and in fact, there is no reference to the Rules of 1989 in the pleadings on behalf of the petitioner at all. The contention advanced by Mr. Moulik that as the petitioner was Class-X pass, he was promoted on officiating basis in aid of the Notification dated 17.06.2005 is devoid of any merit because of the reason that the said Notification is applicable to the employees holding posts which are covered under Rules of 1984 and the petitioner could not have been promoted to a non-existent post of LDC in Sikkim Armed Police on the strength of Notification 17.06.2005.

14. Though not part of the pleadings, the learned Senior Counsel has placed a copy of Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 1981, for short, Rules of 1981 which was deemed to have come into force on and from 01.04.1974. The aforesaid Rule was framed under proviso to Article 309 of the Constitution of India. The Rules of 1989, which was framed in exercise of powers conferred under Section 27 of the Act of 1981, was to come into force from the date of publication of Official Gazette and the same was published in the Sikkim Government Gazette (Extra-Ordinary) on 24.02.1990. Annexure-R5 is a notification dated 26.04.2013 amending the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000, for short, the Rules of 2000. Notification dated 17.11.2017 is also a Notification amending the Rules of 2000. Mr. Moulik had placed the Rules of 2000. No arguments are advanced by the learned counsel of the parties on the aforesaid Rules and I have referred to the above Rules only to make the narration complete and will not dilate on these Rules any further.

15. It is not disputed by the petitioner that he was wrongly shown as an Office Attendant though he was a Cook in the Order dated 26.09.2018. There is no pleading in the Writ Petition that Cooks, who were promoted on officiating basis, are employees of Sikkim Armed Police. It was also argued by Mr. Moulik that one Nar Bahadur Pradhan at Sl. No.20 of the Order dated 26.09.2018 was posted at the Police Headquarter, Gangtok and, therefore, it is not that none has been promoted and posted in the

Police Department. There is no pleading regarding Nar Bahadur Pradhan and it is difficult to hazard a guess in absence of any pleading the status of Nar Bahadur Pradhan and it is also equally difficult to predicate whether Police Headquarter and Sikkim Armed Police stand on the same footing.

16. Though pleading in a Writ Petition has to be liberally construed, it is axiomatic that some foundational facts have to be brought on record in order to substantiate a plea that the petitioner is discriminated while granting benefit to similarly situated persons.

17. Though the petitioner has stated that he had joined on the very same date on the issuance of the Order dated 26.09.2018, it is not understood in which post he had joined as there is no post of LDC under the Rules of 1989.

18. Contention of Mr. Moulik that in paragraph 10 of the counter affidavit, it is admitted that post held by the petitioner is a civil post, is factually incorrect. What was mentioned in paragraph 10 is that the post of Office Attendant which was mistakenly considered to be the post held by the petitioner is a civil post. It is also categorically indicated therein that the petitioner was appointed as Cook in the Group-D cadre of Sikkim Armed Police. The petitioner, being a member of Sikkim Armed Police governed by the Rules of 1989, could not have been promoted on officiating basis to a civil post falling under Rules of 1984.

19. In *Gopal Singh* (supra), the question as to whether a person holding the post of Assistant Mill Manager under the cadre of A&N Islands Forest Department would be entitled to have consideration for promotion to the post of Deputy Conservator of Forests which was an encadred post of Indian Forest Service, was answered in the negative on the ground, amongst others, that the post of Assistant Mill Manager was outside the Indian Forest Service (Recruitment) Rules, 1966 and Indian Forest Service (Appointment by Promotion) Regulations, 1966.

20. In *Sohan Lal Gupta vs. Asha Devi Gupta*, reported in *(2003) 7 SCC 492*, the Honble Supreme Court observed that the principles of natural justice cannot be put in a straight-jacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he

was seriously prejudiced thereby. In *Karnataka SRTC vs. S.G Kotturappa*, reported in *(2005) 3 SCC 409*, the Honble Supreme Court observed that principles of natural justice cannot be applied in vacuum and the same are not required to be complied with when it will lead to an empty formality.

21. Lord Wilberforce in *Malloch vs. Aberdeen Corpn.,* reported in *(1971) 2 All ER 1278 (HL)* had observed that"………. A breach of procedure …..cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which have been lost by the failure. The Court does not act in vain."

Brandon L. J. opined in *Cinnamond vs. British Airports Authority*, reported in *(1980) 2 All ER 368 (CA)* as follows: " …… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

The above observations were quoted with approval by the Honble Supreme Court in *Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati and Others,* reported in *(2015) 8 SCC 519.* 10 WP(C) No.03 of 2019 (Naresh Kumar Rai vs. State of Sikkim & Anr.)

22. Thus, even if it is found by the Court that there is violation of principles of natural justice, it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirement in those cases when non-grant of hearing has not caused any prejudice to the person against whom the action is taken. As a corollary, it follows that every violation of a facet of natural justice may not lead to the conclusion that the order passed is null and void. The validity of the order has to be decided on the touchstone of prejudice.

23. However, it is not open for the administrative authority to dispense with the requirement of principles of natural justice by itself deciding that no prejudice is caused to the person against whom the action is contemplated. Whether opportunity of hearing will serve the purpose or not has to be considered at a later stage and this aspect cannot be presumed by the authority. It is now well established that the Courts are empowered to consider as to whether any purpose will be served in remanding the case

keeping in mind whether any prejudice is caused to the person against whom action is taken.

24. In the proceeding before this Court, which was instituted after five months of passing of the impugned order, the petitioner has failed to, even, *prima facie*, show how the impugned order dated 28.09.2018 suffers from a material defect qua the plea taken by the respondents that his officiating promotion order was issued on misconception of fact as also how he is prejudiced because of not being given an opportunity to show cause.

25. In the facts and circumstances of the case, I am of the considered opinion that it will be futile and an empty formality to set aside the order dated 28.09.2018 on the ground of violation of principles of natural justice. 11 WP(C) No.03 of 2019 (Naresh Kumar Rai vs. State of Sikkim & Anr.)

26. In view of what has been discussed above, I find no merit in this Writ Petition and accordingly, the same is dismissed.

27. However, before parting with the records, it will be appropriate to record that Mr. Moulik had made submissions with regard to entitlement of a Government servant for promotion during his service career. In *O. Z. Hussain (Dr)* and *K.K. Roy*(supra), Honble Supreme Court has laid down that promotion is a normal incidence of service. However, in absence of appropriate pleadings and lack of clarity on the Rules placed before the Court, in order not to cause prejudice to either of the parties, I have not dealt with or deliberated upon this aspect of the matter. Fact remains the petitioner had not earned any promotion for last 20 years. Accordingly, while dismissing this petition, I grant liberty to the petitioner to ventilate his grievances, if any, on the issue of promotional avenue, in an appropriate manner and in an appropriate proceeding.

28. No cost.

SLR (2020) SIKKIM 543
(Before Hon'ble the Chief Justice)

WP (C) No. 25 of 2018

M/s Sangh Enterprises Pvt. Ltd. ..... PETITIONER

Versus

State of Sikkim and Others ..... RESPONDENTS

For the Petitioner: Mr. T.B. Thapa, Senior Advocate with Mr. Ranjan Chettri, Advocate.

For Respondent 1-3: Dr. Doma T. Bhutia, Addl. Advocate General.

For Respondent 4: Mr. N. Rai, Senior Advocate with Mr. Yozan Rai, Advocate.

Date of decision: 14th September 2020

A. Constitution of India – Article 226 – When Disputed Questions of Facts are Involved, whether the High Court should Entertain a Writ Petition – The Appellate Authority in the order dated 12.04.2018 had recorded that the parties had submitted that they had not paid and received the full payment of the lease amount despite reciting to the contrary in the Lease Deed dated 07.01.2000. In the writ petition, there is no averment that such observation of the Appellate Authority is not correct and the same is perverse. In paragraph 18 of the affidavit, the respondent no. 4 categorically stated that due to not making full payment of the lease amount, the property was still in the possession of respondent no. 4. Such assertion made in paragraph 18 of the counter affidavit was not denied in the affidavit-in-reply. Assuming that there is a dispute with regard to payment of the amount and possession of the land in question, the same will not have any bearing while deciding the writ petition.

(Para 21)

B. Sikkim State Rules (Registration of Documents), 1930 – Rule 6 – Though Mr. Thapa has sought to raise a contention that the Revenue Officer-cum-Assistant Director, Land Revenue Department, Government of Sikkim, was not the competent authority to either accept or reject the registration of the lease deed as it was either the Sub-Registrar or the Sub-Divisional Officer who was competent officer under the Rules of 1930 and Circular dated 29.10.1984, it is to be borne in mind that the said plea was not taken in the appeal preferred by the petitioner – Rule 6 of the Rules of 1930 provides that the Registrar would be empowered to revise or alter any order of any Sub-Registrar refusing to admit a document if an appeal against such order was presented to the Registrar within a month from the date of order. There is a categorical assertion of the petitioner in paragraph 19 of the writ petition that the appeal was preferred under Rule 6 of the Rules of 1930.

(Para 22)

C. Sikkim State Rules (Registration of Documents), 1930 – Rules and Notifications Prevailing at the Time of Sanction Would Govern the Subject of Sanction and Not the Ones Existing On the Date of Application – No vested right had accrued to the petitioner on presentation of the lease deed dated 07.01.2000. The order of rejection also does not create any right in favour of the petitioner for him to contend that at the appellate stage grounds of rejection have to be considered on the touchstone of norms existing at the time of such rejection and changes in applicable law and/or norms have to be shut out from consideration by the Appellate Authority. In that light, the notifications dated 29.02.2008 and 16.08.2014 will have to be taken note of when a consideration is made by the Appellate Authority as to whether the lease deed is to be registered or not. It is not retrospective application of the notifications to existing vested right of the petitioner as is sought to be contended by Mr. Thapa. When, admittedly, the lease deed dated 07.01.2000, which was a lease in perpetuity, do not meet the requirement of the period for which a lease deed can be executed under the notifications dated 29.02.2008 and 16.08.2014, I am of the considered opinion that the order dated 12.04.2018 was passed by the Appellate Authority taking into consideration relevant consideration and the view taken by the Appellate Authority cannot be said to be arbitrary or irrational.

(Para 28)

Petition dismissed.

Chronology of cases cited:

1. C.I.T (Central)-1, New Delhi v. Vatika Township (P) Ltd., (2015) 1 SCC 1.
2. Jagdish Narain Maltiar v. State of Bihar and Others, AIR 1973 SC 1343.
3. Jharkhand Mazdoor Sangh v. Presiding Officer and Others, (2002) 10 SCC 703.
3. State of Bihar and Others v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216.
4. Orissa Agro Industries Corpn. Ltd. and Others v. Bharati Industries and Others, (2005) 12 SCC 725.
5. New Okhla Industrial Development Authority v. Kendriya Karamchari Sahkari Grih Nirman Samiti, (2006) 9 SCC 524.
6. Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and Others, (2007) 11 SCC 40.
7. State of Kerala and Others v. M.K. Jose, (2015) 9 SCC 433.
8. Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others, (2004) 1 SCC 663.

JUDGMENT

Arup Kumar Goswami, CJ

The writ petitioner is a company registered on 17.05.1997 under the Registration of Companies Act (Sikkim), 1961 and the petition was filed through one of the shareholders.

2. This Writ Petition is directed against the order dated 12.04.2018 passed by the respondent no.2 dismissing the appeal being Appeal No.03/ 2011 filed by the petitioner, a letter dated 28.05.2011 issued by the respondent no.3 as well as a letter dated 19.12.2003 issued by the Revenue Officer-cum-Assistant Director, Land Revenue Department, Government of Sikkim (who is not arrayed as party-respondent). A Writ of mandamus is also prayed for to direct the State-respondents to register the

Lease Deed dated 07.01.2000 entered in between the petitioner and respondent no.4. Prayer is also made to call for the records of the registration proceedings relating to the Lease Deed and records of Appeal No.03/2011. Further prayer is made to call for the records of Misc. Case No.70/2010, wherein the petitioner and the respondent no.4 were parties.

3. Land measuring 20,525 sq.ft. in a portion of Khasra Plot No.70/99 and 72/100 situated at Sichey in the Pioneer Reserve Block – Tadong Elakha, Gangtok was the subject matter of the Lease Deed with boundaries as indicted in the Lease Deed.

4. Before proceeding further, though not really a subject matter of this petition, for better understanding, it will be appropriate to take note of the fact that Misc. Case No.70/2010 was registered in the Court of District Collector (East) and a final order was passed in the said proceeding on 25.06.2011.

5. The petitioner had filed an objection before the District Collector (East) on 16.09.2008, stating that the land forming part of the Lease Deed was proposed to be sold by the respondent no.4 to some other parties and that registration of the plot of land in any other name would invite litigation and, accordingly, requesting the authority to intimate the petitioner in case any such document of sale is presented for registration. The said letter was taken as a standing objection filed by the petitioner. On 26.05.2010, the respondent no.4 filed a petition stating, amongst others, that he had sold the plot of land to one Ms. Tashi Ongmu Bhutia, and that a communication was sent to the petitioner on 19.12.2003 by the Land Revenue Department, Government of Sikkim through Revenue Officer-cum-Assistant Director, informing that the Lease Deed could not be registered due to the reasons mentioned therein and that in the meantime, he had mortgaged his landed property to the State Bank of Sikkim in the year 2009 for a loan for constructing a dwelling house. It was further stated that he had decided to sell out his landed property to three individuals and the Sale Deeds to that effect had been executed and accordingly, prayed for registration of Sale Deeds in favour of the purchasers. On receipt of the same, Misc. Case No.70/2010 was registered.

6. By an order dated 25.06.2011, the District Collector, East directed the Sub-Divisional Magistrate, East not to register the Sale Deeds presented

by the present respondent no.4 in respect of the land in dispute till the matter is disposed of by the appropriate authority or Court of Law. The District Collector was of the opinion that when the land was mortgaged to the State Bank of Sikkim and the mortgage has not been cleared or cancelled, sale of the same land and its registration cannot be allowed. The other reason assigned by the District Collector was that the validity of the Lease Deed between the petitioner and respondent no.4 was left to be decided by the appropriate authority or Court of Law and therefore, till the matter is disposed of by the appropriate authority or Court of Law, sale of the land in question and registration of the Sale Deeds cannot be permitted.

7. In the said proceeding registered as Misc. Case No. 70/2010, in his reply dated 10.11.2010, it was contended by the petitioner that letter dated 19.12.2003 was never received by it. As the petitioner had denied to receive the said letter, a letter dated 28.05.2011 was issued to the petitioner-company enclosing thereto the letter dated 19.12.2003. After receipt of the letter dated 28.05.2011 along with the letter dated 19.12.2003, the petitioner company preferred an appeal before the prescribed authority under the provisions of the Sikkim State Rules (Registration of Documents) 1930, (for short, Rules of 1930) praying for revising and altering the letter dated 28.05.2011 of the District Collector, East and the letter of the Revenue Officer-cum-Assistant Director, Land Revenue Department, Government of Sikkim dated 19.12.2003.

8. At this juncture, it will be appropriate to extract the entire letters dated 28.05.2011 and 19.12.2003 herein below:

"GOVERNMENT OF SIKKIM LAND REVENUE DEPARTMENT, GANGTOK

No. 3597 LR(R) *Dated 19/12/2003*

To,

Balchand Sarda (Ex MLA, Ex Mayor, GMC)
Chairman, M/S Sangh Enterprises
M.G. Marg, Gangtok,
Sikkim.

SUB : APPLICATION FOR A 99 YEARS LEASE. Sir, Reference your application regarding 99 years Lease

Deed Registration of land belonging to Shri Surendra Lama of Sichey Busty of Upper Sichey Panchayat block, East District, Sikkim. I am directed to inform you that your request could not be considered after careful examination of relevant provision of Law due to the following reasons:-

1. *This is an ancestral landed property and hence Shri Surendra Lama's son and daughter raised objection to the Lease Deed Registration proposal.*
2. *Surendra Lama is also a Schedule Tribe and therefore, Schedule Tribe land can not be alienated as per the relevant Laws.*
3. *The land proposed for Lease Deed registration is situated in Rural area and land holding is also below 5 acres, Upper Sichey block, East District, Sikkim.*

Yours faithfully,
SD/-
REVENUE OFFICER-CUM-ASSISTANT DIRECTOR
LAND REVENUE DEPARTMENT
GANGTOK.

Copy for information to:-

Miss Pemala Lama, Upper Sichey Busty, Gangtok, Sikkim.

REVENUE OFFICER-CUM-ASSISTANT DIRECTOR,
LAND REVENUE DEPARTMENT.
GANGTOK."

XXXXXXXXXXXX

"GOVERNMENT OF SIKKIM
EAST DISTRICT COLLECTORATE
GANGTOK, SIKKIM.

Memo No. 226/DC/DCE *Dated: 28/5/2011*

To,

Shri Balchand Sarda (Ex MLA),
Chairman, M/S Sangh Enterprise Pvt. Ltd.,
Sarda Building,
M.G. Marg,
Gangtok.

Sub: Registration of Lease Agreement – reg.

Sir,

This is with reference to your application for registration of lease agreement entered between you and Shri Surendra Lama for 99 years lease of the land belonging to Shri Surendra Lama of Sichey Busty, East Sikkim. From the letter bearing no. 3597/LR(R) dated: 19.12.2003 addressed to you by Revenue Officer/Asstt. Director of Land Revenue Department, Gangtok it is learnt that the registration of the lease deed had not been approved by the Land Revenue Department for the reasons given in the letter, a copy of which is enclosed herewith for your reference. During the course of enquiry being conducted by this office into your objection against registration of sale deeds filed by Shri Surendra Lama, the aforementioned letter was brought to your notice by this Office. However, you had denied having received any such letter. Meanwhile this Office is in receipt of copies of Peon Book forwarded by Land Revenue & Disaster Management Department, wherein it is revealed that you had received the aforementioned letter on 23/12/2003. Nevertheless a copy of the letter addressed to you by RO/AD is hereby once again forwarded to you for your information.

sd/-
District Collector, East.”

9. The Appellate Authority (the respondent no.1 herein) passed a final order dated 31.08.2013 upholding an order dated 25.06.2011 passed by

the District Collector, East and directed the aggrieved party to approach appropriate Court of Law for relief, if any.

10. Aggrieved by the said order dated 31.08.2013, the letter dated 28.05.2011 and the letter dated 19.12.2003, the petitioner filed a writ petition before this Court, which was registered as W.P. (C) No.02/2015. This Court, by an order dated 16.03.2017, while setting aside the order dated 31.08.2013, remitted the matter to the Appellate Authority, Secretary, Land Revenue and Disaster Management Department, Government of Sikkim to decide the appeal considering the grounds raised therein, on its own merit, in accordance with law. This Court noted that though the order dated 31.08.2013 upheld the order dated 25.06.2011, it did not state as to whether impugned communications dated 19.12.2003 and 28.05.2011, which were the subject matter of the appeal, were upheld or set aside. 11. The order of 25.06.2011, which was upheld by the order dated 31.08.2013, was not the subject matter of the said appeal and it does not appear that the said order has been assailed in any forum by either of the parties.

12. After the matter was remitted back by this Court, the Appellate Authority, after hearing the representatives of both the parties, dismissed the appeal by an order dated 12.04.2018. The Appellate Authority held that it would not be necessary to go into the issue as to whether the Government was justified in refusing to register the Lease Deed on the grounds stated in the letter dated 19.12.2003 as some of the terms and conditions of the Lease Deed dated 07.01.2000 do not conform to the present requirements stipulated by the State Government vide Notification dated 03.12.2014, whereby period of lease had been curtailed to 33 years. Liberty was, however, granted to the parties to the Lease Deed dated 07.01.2000 to re-negotiate the terms of the Lease Deed to bring it in conformity with prevailing guidelines and to re-submit the same for registration to the appropriate authority. The Appellate Authority also observed, with reference to ground no.2 of the letter dated 19.12.2003, that there is no bar on the alienation of scheduled tribe land and that there is restriction only on transfer of land belonging to the Bhutia and Lepcha communities. It was also recorded that during the course of hearing it was admitted by the parties that though it was recited in the Lease Deed that total lease amount of 32,80,500/- was paid and receipt thereof was acknowledged, such amount had not been paid in full. The Appellate Authority declined to pass any

order or make any comment on the order dated 25.06.2011 as the same was not in appeal before him. Lordshiip

13. Mr. T. B. Thapa, learned Senior Counsel for the petitioner submits that there was no restriction on the period of lease for which land could be leased out when the Lease Deed was presented for registration before the respondent no.3 on 07.01.2000 and therefore, the Appellate Authority committed manifest error of law and acted without any application of mind in placing reliance on the notification dated 29.02.2008, whereby period of lease was restricted to 99 years and the notification dated 16.08.2014, whereby period of lease was restricted to 33 years. It is submitted that such notifications are prospective in nature and cannot be applied retrospectively and therefore, when the Appellate Authority had failed to advert to the issue in its correct perspective, on that short ground alone the order dated 12.04.2018 is liable to be set aside and the matter is required to be sent back to the Appellate Authority for fresh consideration in accordance with law. He has submitted that the letter dated 19.12.2003 was passed in gross violation of principles of natural justice and the said letter was also not issued by the competent authority as it is the Sub- Registrar or Sub-Divisional Officer, who is the appropriate authority. He has submitted that the respondent no.4 had leased out his own share of ancestral property and not that of his son and daughter and this aspect of the matter was not even considered by the Appellate Authority. He has submitted that grounds cited for refusing to register the Lease Deed in the letter dated 19.12.2003 are wholly untenable in law and are perverse. He has relied on a decision of the Honble Supreme Court in the case of *C.I.T(Central)-1, New Delhi vs. Vatika Township (P) Ltd.*, reported in *(2015) 1 SCC 1.*

14. Mr. N. Rai, learned Senior Counsel for the respondent no.4 submits that it was rightly held by the Appellate Authority that at this point of time, it is of no consequence as to whether grounds of rejection for registration of the Lease Deed were justified in view of the fact that as per the law/ guidelines holding the field at the time of consideration pursuant to the direction of the Court a Lease Deed in perpetuity could not have been registered as the period of lease is limited to 33 years by notification dated 16.08.2014. He submits that though in the Lease Deed it was recited that the possession of the property was handed over to the petitioner, the same was never handed over and the respondent no.4 still continues to retain possession of the same. Similarly, though it was also recited in the Lease

Deed that one time lease amount of ₹ 32,80,500/- was paid in advance and the same was duly acknowledged, in reality, it was not so and the Appellate Authority had also taken note of the submissions of the parties that full amount was not paid. In this connection, he has also drawn the attention of the Court to paragraphs 15 and 18 of the affidavit-in-opposition. He has further submitted that the Peon Book annexed at page 125 by the petitioner demonstrates that letter dated 19.12.2003 was received by the son of Bal Chand Sarda, Chairman of the petitioner company. However, no step was taken by the petitioner till the time when the respondent no.4 wanted to sell the land to three parties. He submits that there is an inordinate delay in preferring the Writ Petition and furthermore, there are disputed question of facts because of which this Court may not go into legality or otherwise of the order dated 12.04.2018. It is also submitted by him that in the appeal preferred by the petitioner, no ground was raised by the petitioner regarding competency or jurisdiction of the Revenue Officer-cum-Assistant Director to issue the letter dated 19.12.2003. He has submitted that letter dated 28.05.2011 does not provide any cause of action as, by the said letter, only the letter dated 19.12.2003 was forwarded. He has placed reliance on the judgments of the Hon ble Supreme Court in the cases of (i) *Jagdish Narain Maltiar vs State of Bihar and Others*, reported in *AIR 1973 SC 1343*, *(ii) Jharkhand Mazdoor Sangh vs. Presiding Officer and Others*, reported in *(2002) 10 SCC 703, (iii) State of Bihar and Others vs. Jain Plastics and Chemicals Ltd.*, reported in *(2002) 1 SCC 216, (iv) Orissa Agro Industries Corpn. Ltd. and Others vs. Bharati Industries and Others*, reported in *(2005) 12 SCC 725, (v) New Okhla Industrial Development Authority vs. Kendriya Karamchari Sahkari Grih Nirman Samiti*, reported in *(2006) 9 SCC 524, (vi) Commissioner of Municipal Corporation, Shimla vs. Prem Lata Sood and Others*, reported in *(2007) 11 SCC 40 and (vii) State of Kerala and Others vs. M.K. Jose*, reported in *(2015) 9 SCC 433.*

15. Dr. Doma. T. Bhutia, learned Additional Advocate General, Sikkim, endorses the submissions of Mr. Rai and submits that the writ petition deserves to be dismissed.

16. I have considered the submissions of the learned Counsel for the parties and have perused the materials on record.

17. It will be appropriate, at the first instance, to take note of the

submissions of Mr. Rai that the writ petition deserves to be dismissed on the ground of delay alone.

18. In *Jagdish N. Maltiar* (supra), the Hon ble Supreme Court had observed that the High Court was right in dismissing the writ petition filed by the appellant after three years of his removal from service. In *Jharkhand Majdoor Sangh* (supra), the Honble Supreme Court upheld the judgment of the High Court, whereby the writ petition filed by the appellant was dismissed on the ground of inordinate and unexplained delay of five years. On the basis of the aforesaid decisions, it was sought to be contended by Mr. Rai that when the cause of action had arisen in the year 2003, there is inordinate delay in pursuing the remedies in accordance with law and therefore, the writ petition filed in the year 2018 suffers from inordinate delay. The submission is without any merit. The petitioner had taken a plea that he had not received the letter dated 19.12.2003 and after receipt of the said letter, which was enclosed with the letter dated 28.05.2011, the petitioner had preferred an appeal within a period of one month. After the appeal was disposed of by an order dated 31.08.2013, the petitioner approached this Court by filing a writ petition numbered and registered as WP(C) No.02 of 2015. While disposing of the said writ petition by an order dated 28.02.2017, this Court had directed the Appellate Authority to decide the appeal on its own merit considering the grounds raised therein in accordance with law. The appeal having been dismissed on 12.04.2018, the present writ petition was filed on 05.06.2018. In that view of the matter, it cannot be said that the present writ petition suffers from delay and laches.

19. In *Orissa Agro Industries Corpn. Ltd.* (supra), the Honble Supreme Court had laid down that where a complicated question of fact is involved and the matter requires thorough proof on factual aspect, High Court should not entertain a writ petition. Whether or not the High Court should exercise the jurisdiction under Article 226 of the Constitution of India largely depends upon the nature of the dispute and if the dispute cannot be resolved without going into the factual controversy, the High Court should not entertain the writ petition. In *New Okhla Industrial Development Authority* (supra), the Honble Supreme Court had observed that High Court has jurisdiction to try issues both of fact and law but when the petition raises complex questions of fact requiring oral evidence to be taken, the High Court should ordinarily decline to try the petition. In *M.K Jose* (supra), the Honble Supreme Court had laid down that a writ court should

ordinarily not entertain a writ petition, if there is a breach of contract involving disputed question of facts. In *Jain Plastics and Chemicals Ltd.* (supra), the Honble Supreme Court had laid down that seriously disputed questions or rival claims of the parties with regard to breach of contract are to be determined in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

20. Mr. Rai had contended that the writ petition raises disputed questions of facts regarding payment of consideration amount as well as receipt or non-receipt of the letter dated 29.12.2013 by the petitioner and therefore, this Court may not exercise its jurisdiction under Article 226 of the Constitution of India. So far as receipt or non- receipt of the letter dated 29.12.2013 is concerned, in view of the order of this Court dated 16.03.2017 passed in WP(C) No.02 of 2015 whereby direction was issued to the Appellate Authority to consider the appeal preferred by the petitioner on merit, the issue pales into insignificance and it will not be necessary for this Court to go into that arena.

21. The Appellate Authority in the order dated 12.04.2018 had recorded that the parties had submitted that they had not paid and received the full payment of the lease amount despite reciting to the contrary in the Lease Deed dated 07.01.2000. In the writ petition, there is no averment that such observation of the Appellate Authority is not correct and the same is perverse. In paragraph 18 of the affidavit, the respondent no.4 categorically stated that due to not making full payment of the lease amount, property was still in the possession of respondent no.4. Such assertion made in paragraph 18 of the counter affidavit was not denied in the affidavit-in-reply. Assuming that there is a dispute with regard to payment of the amount and possession of the land in question, the same will not have any bearing while deciding the writ petition. This court is of the considered opinion that decisions noticed above will not be applicable in the facts of the present case.

22. In the letter dated 19.12.2003, subject was written as "Application for a 99 years lease", which is not correct. In Clauses 2 and 5 of the Lease Deed, it was categorically recited that the lease was in perpetuity. Under General Conditions of Lease at (i), it was provided that lessor shall not under any circumstance foreclose the lease for a basic minimum period of 99 years. Though Mr. Thapa has sought to raise a contention that the

Revenue Officer-cum Assistant Director, Land Revenue Department, Government of Sikkim, was not the competent authority to either accept or reject the registration of the Lease Deed as it was either the Sub-Registrar or the Sub Divisional Officer who was competent officer under the Rules of 1930 and Circular dated 29.10.1984, it is to be borne in mind that the said plea was not taken in the appeal preferred by the petitioner. That apart, Rule 6 of the Rules of 1930 provides that the Registrar would be empowered to revise or alter any order of any Sub-Registrar refusing to admit a document if an appeal against such order was presented to the Registrar within a month from the date of order. There is a categorical assertion of the petitioner in paragraph 19 of the writ petition that the appeal was preferred under Rule 6 of the Rules of 1930. The appeal at page 133 bears the stamp of Appellate Authority showing the same as Land Revenue and Disaster Management Department, Government of Sikkim. In paragraph (ii) of the writ petition the petitioner states that the Secretary, Land Revenue and Disaster Management Department, Government of Sikkim, is the Appellate Authority under the Rules of 1930. This Court also, in the order passed in WP(C) No.02 of 2015, had remitted the matter to the Secretary, Land Revenue and Disaster Management Department, Government of Sikkim, as the Appellate Authority. When the point was not taken at the first instance by the petitioner and when this Court by order dated 15.06.2013 passed in WP(C) No.02 of 2015 had directed to decide the appeal considering the grounds raised therein, I am of the considered opinion that this Court need not go into that aspect of the matter. It is also relevant to note that the Chairman of the petitioner company himself had written a letter to the Chief Minister, Government of Sikkim, who had no role to play in matters of registration, on 21.07.2000, for a direction to be issued to the authorities for registration of the long term Lease Deed executed in favour of the petitioner company.

23. In the letter dated 28.05.2011 issued by the District Collector, East addressed to Shri Balchand Sarda, it is recorded that 'from the Peon Book forwarded by the Land Revenue and Disaster Management Department, Government of Sikkim, it is revealed that you had received the aforementioned letter on 23.12.2003'. As noted earlier, it is the contention of the respondent no.4 itself that the letter was received by the son of Balchand Sarda. Whether the same would amount to receipt of the letter by Shri Balchand Sarda himself may not detain us for the purpose of the proceeding. The petitioner in his reply had disputed that the son of Balchand

Sarda had not received the said letter. However, one cannot lose sight of the fact that no enquiries were made by the petitioner regarding the fate of the Lease Deed for long 8 years prior to issuance of letter dated 16.09.2008, which was already taken note of supra.

24. As noticed earlier, the Appellate Authority did not find it necessary to go into the issue whether the authority was justified in refusing registration of Lease Deed on the grounds stated in the letter dated 19.12.2003 in view of the fact that the Lease Deed dated 07.01.2000 does not conform to requirements as laid down in the notifications dated 29.02.2008 and 16.08.2014, which have laid down guidelines for registration of land on lease basis. Except ground no.2 of the letter dated 19.12.2003, other two grounds for refusing to register the lease deed were not considered.

25. The question, therefore, arises as to whether the Appellate Authority was justified to take note of the said notifications. although the Lease Deed was presented for presentation in the year 2000.

26. In *Vatika Township (P) Ltd.* (supra), on which strong reliance was placed by Mr. Thapa, the Honble Supreme Court held that legislations which modified accrued right or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. It was also observed that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose new liability otherwise than as regards matters of procedure.

27. In *Prem Lata Sood* (supra), the Honble Supreme Court had observed that while statute provides for a right and enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have invested in the person concerned. In that connection, the Honble Supreme Court had also occasion to consider the case of *Howrah Municipal Corpn. and others* v. *Ganges Rope Co. Ltd. and others*, reported in *(2004) 1 SCC 663*. The question that had fallen for consideration was whether by the order of the Court in which a period was fixed for the corporation to take a decision on the application for sanction of

construction of additional floors, any vested right had been created in favour of the company to seek sanction of the construction of additional three floors irrespective of the subsequent amendment of Building Rules and the Resolution of the corporation putting restrictions on the height of high- rise buildings on the particular road in which the building was constructed. The Honble Supreme Court held that merely by submission of application for sanction of construction, no vested right is created in favour of any party, by statutory operation of the provisions. The Honble Supreme Court also negated the argument that a vested right can be deemed to have been created by the fixation of time-limit by the Court. The Honble Supreme Court held that Building Rules and Regulations prevailing at the time of sanction would govern the subject of sanction and not the Rules and Regulation existing on a date of application for sanction.

28. No vested right had accrued to the petitioner on presentation of the Lease Deed dated 07.01.2000. The order of rejection also does not create any right in favour of the petitioner for him to contend that at the appellate stage grounds of rejection have to be considered on the touchstone of norms existing at the time of such rejection and changes in applicable law and /or norms have to be shut out from consideration by the Appellate Authority. In that light,the notifications dated 29.02.2008 and 16.08.2014 will have to be taken note of when a consideration is made by the Appellate Authority as to whether the Lease Deed is to be registered or not. It is not retrospective application of the notifications to existing vested right of the petitioner as is sought to be contended by Mr.Thapa. When, admittedly, the Lease Deed dated 07.01.2000, which was a lease in perpetuity, do not meet the requirement of the period for which a Lease Deed can be executed under the notifications dated 29.02.2008 and 16.08.2014, I am of the considered opinion that the order dated 12.04.2018 was passed by the Appellate Authority taking into consideration relevant consideration and the view taken by the Appellate Authority cannot be said to be arbitrary or irrational.

28. Accordingly, I find no merit in the writ petition and the same is dismissed.

29. No cost.

SLR (2020) SIKKIM 558

(Before Hon'ble the Chief Justice)

Crl. A. No. 14 of 2019

Deepak Rai ..... **APPELLANT**

Versus

State of Sikkim ..... **RESPONDENT**

For the Appellant: Mr. Zangpo Sherpa, Advocate.

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

Date of decision: 14th September 2020

A. Indian Evidence Act, 1872 – S. 9 – Test Identification – Object – TIPs are meant for investigation purpose. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The object of conducting the TIP is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime and to satisfy the Investigating Authority that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The identification proceedings being in nature of test, TIP should be conducted, as soon as possible, after the arrest of the accused, so as to eliminate the possibilities of the accused being shown to the witnesses prior to the TIP. However, it must be borne in mind that identification tests do not constitute substantive evidence and identification can only be used as corroboration of the statements made in Court – There is no acceptable evidence on record to hold that the appellant was identified during the course of the investigation – He was identified in Court for the first time by PW-1 – When identification of the accused by witnesses is made for the first time in Court, it should not form the basis of conviction.

(Paras 21 and 27)

Appeal allowed.

Chronology of cases cited:

1. Sujit Biswas v. State of Assam, (2013) 12 SCC 406.
2. P. Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and Another, (2015) 10 SCC 152.
3. State of Uttar Pradesh v. Wasif Haider and Others, (2019) 2 SCC 303.
4. Thathanna v. State of A.P, 1994 Crl.L.J 63.
5. Mulla and Another v. State of Uttar Pradesh, (2010) 3 SCC 508.

JUDGMENT

Arup Kumar Goswami, CJ

This appeal is preferred under Section 374(2) Cr.P.C against the judgment dated 30.05.2019, whereby, while acquitting the appellant of the offence under Section 307 IPC, he was convicted under Section 326 IPC, and the Order of Sentence dated 30.05.2019, whereby he was sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs. 1000/-, in default of the payment of fine, to undergo further simple imprisonment of one month.

2. One Dhiren Rai had filed a First Information Report (FIR) before the Station House Officer, Namchi on 19.08.2017 stating that at around 01.00 AM, his friend Raja Mukhia had come to his place and had verbally informed him that one of their friends, namely, Pranay Rai, was assaulted by unknown person at Dambudara on 18.08.2017 at around 11.00 pm and as a result of the same he had sustained cut injuries on the right side of neck and that he had been referred to Central Referral Hospital (CRH), Manipal, Tadong, Gangtok. On receipt of the FIR, Namchi Police Station Case No.41/2017 was registered under Section 325 of the IPC and the case was endorsed to Sub-Inspector Sunil Rai for investigation. The investigation had commenced and the appellant was arrested on 21.08.2017. On conclusion of investigation, finding that a prima facie case under Section 325 IPC was made out against the appellant, charge-sheet was submitted on 27.11.2017.

3. During trial, the learned Chief Judicial Magistrate, South Sikkim, on being satisfied that, prima facie, there is material for the offence of attempt

to murder under Section 307 IPC and accordingly, sent the records to the Court of learned Sessions Judge, South Sikkim, and accordingly, Sessions Trial Case No.03/2018 was registered.

4. After hearing the learned Counsel for the parties, finding, prima facie, materials against the appellant under Section 307 IPC, charge was framed accordingly. Charge being explained to the appellant, he pleaded not guilty and claimed to be tried. During trial, prosecution examined 12 witnesses while defence adduced no evidence. When examined under Section 313 Cr.P.C, the appellant claimed that he is innocent and that he had been falsely implicated.

5. PW-1 is the injured person. PW-2 is the brother of injured. PW-7 is Medical Officer of CRH, Manipal, Tadong, who had examined the injured on 19.08.2017. PW-8 and PW-9 are seizure witnesses of Exhibit-4. PW-9 was, however, declared hostile. PW-11 was the Station House Officer (SHO) of Namchi Police Station at the relevant time who had received the FIR. PW-12 is the Sub-Inspector of Namchi Police Station who is the Investigating Officer of the case.

6. PW-1, PW-2, PW-3, PW-4, PW-5 and PW-10 had attended a party organized in connection with opening ceremony of Third Eye Pub and Bar, Namchi. According to the prosecution, the incident occurred when PW-1 and PW-2 were returning home after attending the party. PW-6 is the Proprietor of Third Eye Pub and Bar.

7. The learned Sessions Judge recorded that evidence of PW-1, PW-2, PW-3 and PW-4 makes it clear that they had seen the appellant during the opening ceremony of Third Eye Pub and Bar and that evidence of PW-1 demonstrates that he was assaulted by the appellant with a broken beer bottle on his neck. It was also held that evidence of PW-1 with regard to injuries sustained by him is corroborated by the evidence of PW-2, PW-4 and PW-5. Reliance was also placed on the evidence of PW-7, who had proved one Wound Certificate (Exhibit-1), to conclude that injury sustained by injured was grievous in nature.

8. Having regard to the evidence of PW-1 and PW-2, the learned Sessions Judge, however, concluded that it cannot be said that the appellant had attempted to murder PW-1.

9. Mr. Zangpo Sherpa, learned Counsel for the appellant has submitted that prosecution has miserably failed to prove the guilt of the appellant. He has contended that there are material contradictions in the evidence of prosecution witnesses going to the root of the matter. He submits that materials on record demonstrate that no Test Identification Parade (TIP) was conducted and that the appellant was identified for the first time in Court and therefore, conviction of the appellant on the basis of such identification is not permissible in law. He submits that benefit of doubt on account of faulty investigation ought to be given to the appellant and that having regard to the evidence on record, the appellant is entitled to acquittal. He has relied on the decisions of Hon'ble Supreme Court in the cases of *Sujit Biswas* vs. *State of Assam*, reported in *(2013) 12 SCC 406*; *P. Satyanarayana Murthy* vs. *District Inspector of Police, State of Andhra Pradesh and Another,* reported in *(2015) 10 SCC 152*; and *State of Uttar Pradesh* vs. *Wasif Haider and others*, reported in *(2019) 2 SCC 303*.

10. Mr. S.K. Chettri, learned Additional Public Prosecutor, Sikkim supports the impugned judgment and sentence and contends that guilt of the appellant was proved to the hilt and no case is made out for interference with the conviction and sentence of the appellant. He has relied on a decision of the Hon'ble Supreme Court in the case of *Thathanna* vs. *State of A.P*, reported in *1994 Crl.L.J 63*.

11. I have considered the submissions of the learned Counsel for the parties and have examined the materials on record.

12. PW-1 had deposed that while he was returning from the party at around midnight along with his brother, PW-2, the accused suddenly hit him with a broken beer bottle on his neck, as a consequence of which he sustained deep cut injuries on his neck on the right side. There was profuse bleeding from the cut injuries and since flow of blood had not stopped, he went to District Hospital, Namchi along with PW-2 where his wound was treated but as flow of blood did not stop, he was immediately evacuated to CRH, Manipal, Tadong. One injury was sutured at District Hospital but a bigger wound could not be managed there. He deposed that he could recognize the assailant (who was present in the Trial Court) as he had stabbed from a close range and as there was sufficient light from the street lamps and light coming from nearby houses. In his cross-examination, he

had stated that he did not know the accused and his name and only after the incident he came to know about his name. He admitted that his statement under Section 161 Cr.P.C was recorded by the Investigating Officer after he was discharged from CRH, Manipal, Tadong. His categorical assertion was that the accused was alone during the relevant time. He had denied the suggestion that it was not the appellant who had assaulted him with a broken beer bottle.

13. PW-2, on the other hand, had stated that when he stepped out of the pub, he saw 7-8 boys near the stairs of the pub and they started picking up a quarrel with them without any rhyme or reason. 4/5 of them confronted him while remaining boys confronted his brother at a distance of about 5 to 10 meters and within 30-40 seconds of the confrontation, PW-1 came and told him that he had sustained cut injuries and saying that he proceeded towards Namchi Hospital. When PW-2 reached District Hospital after pacifying the boys, he found his brother lying in the Emergency ward. He also stated that on being asked, PW-1 had stated that the assailant was having long hair, a crap bandage over the head and he was wearing a sleeveless vest.

14. PW-3 is the informant and Raja Mukhia, based on whose information he came to lodge the FIR, had requested him to provide his vehicle to take the injured to CRH Manipal, Tadong. PW-3 stated that he was not present at the time of incident and Raja Mukhia had told him that there was a fight between the injured and the accused in the pub. Raja Mukhia is not examined in this case. PW-3 stated that he had allowed Raja Mukhia to take his vehicle to take the injured to CRH Manipal, Tadong.
15. PW-4 stated that while he was in the second floor of the building he had seen the appellant having a heated discussion in the pub with one Bhaichung and that as a result of his intervention the matter subsided. PW-1 and PW-2 were then in the ground floor. He had heard some persons quarrelling in the floors below but he did not go there. He did not witness the fight between the accused and PW-1. On receiving a call from PW-2 he came to learn that that PW-1 was grievously hurt in a fight and then he had gone to Namchi Hospital.

16. PW-5 is a Painter by profession and he stated that he had heard a clamor and saw people in the pub running helter and skelter. He stated that some boys were quarrelling and in the process of separating the boys, he

sustained injury on his nose, which started bleeding. After sometime somebody told him that PW-1 had sustained cut injuries in a fight. He further stated that he went to District Hospital, Namchi and had also accompanied PW-1 to CRH Manipal, Tadong.

17. PW-6, who is the proprietor of Third Eye Pub and Bar, stated that the function got over at 11.00 pm and at around 01.00 am on 19.08.2017 he heard that a quarrel had taken place between some boys of Wok village outside his building on the road.

18. PW-10 stated that he and PW-6 had some premonition that a quarrel might break out and therefore, they requested the persons present in the pub to vacate, so that they can close the pub. After the people left, they had closed the pub and while he was on his way, he heard that a quarrel had taken place outside the pub.

19. PW-12 stated that when he examined PW-1, PW-1 had told him that he was assaulted by one Deepak Rai and accordingly, steps were taken to trace him and Deepak Rai was arrested on 21.08.2017. He stated that the accused had drunk beer and he had an argument with PW-1 inside the pub. PW-12 admitted that he did not conduct TIP and had also not seized the medical documents of Namchi District Hospital.

20. PW-7 had described the injuries on the person of PW-1. He stated that the injuries were grievous in nature and that PW-1, who was admitted on 19.08.2017, was discharged on 25.08.2017. PW-7, however, stated that when he had examined PW-1, he did not find stitches on PW-1.

21. The Hon'ble Supreme Court in a number of cases had observed that TIPs are meant for investigation purpose. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The object of conducting the TIP is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime and to satisfy the Investigating Authority that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The identification proceedings being in nature of test, TIP should be conducted, as soon as possible, after the arrest of the accused, so as to eliminate the possibilities of the accused being shown to

the witnesses prior to the TIP. However, it must be borne in mind that identification tests do not constitute substantive evidence and identification can only be used as corroboration of the statements made in Court.

22. In *Wasim Haider* (supra) Hon'ble Supreme Court had held that benefit of doubt arising out of faulty investigation accrues in favour of the accused.

23. In *Sujit Biswas* (supra) and in *P. Satyanarayana Murthy* (supra), the Hon'ble Supreme Court reiterated that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held that the court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused.

24. In *Thathanna* (supra), the Hon'ble Supreme Court upheld the conclusion reached by the High Court that the individual acts only should be taken into account when there was a free fight and some of the witnesses were injured as well as the conviction of accused nos. 3, 4 and 7 based on the above reasoning. The decision has no application to the facts of the present case.

25. When PW-1 had come to know the name of the accused and from who has not been disclosed by him. PW-2, on being confronted in cross-examination, had admitted that he had not given the description of the assailant in his statement under Section 161 Cr.P.C. PW-12 in his cross-examination also affirmed that PW-2 did not give the description of the accused who had attacked PW-1. The evidence of PW-2 indicates that he did not see the assailant. No other witness had stated that he had seen the appellant assaulting PW-1. FIR was lodged at 07.00 am in the morning and apparently, identity of the accused was unknown till then. Wound Certificate (Exhibit-1) shows that PW-1 was admitted on 19.08.2017 and discharged on 25.08.2017. PW-1 categorically stated that his statement was recorded after his discharge from hospital. If PW-12 had come to know that the accused was Deepak Rai after the statement of PW-1 was recorded after 25.08.2017, how the appellant could have been arrested on 21.08.2017? There is a fundamental contradiction in the evidence of PW-1 and PW-2.

While the stated version of PW-1 was that the accused was alone, PW-2 had stated that out of 7-8 boys while 4-5 boys confronted him, rest confronted his brother. The evidence of PW-1 that the accused was alone is contradicted by other witnesses, namely, PW-2, PW-3, PW-4, PW-5 and PW-6. PW-4 had only stated that the appellant had heated discussion with one Bhaichung. Assuming that the appellant was present in the pub that itself is not enough to hold that it was the appellant who had inflicted the injuries. PW-1 is conspicuously silent about the fight that other witnesses have deposed to.

26. There is contradiction between PW-1 and PW-2 as to how PW-1 had gone to District Hospital. Though PW-1 stated that one wound was sutured at District Hospital, PW-7 did not find any stitch on PW-1. He also did not say that PW-1 was referred by District Hospital. However, these aberrations will not have much bearing as the evidence on record establishes that PW-1 was assaulted on 18.08.2017 near the pub and it is not in dispute that PW-1 had suffered grievous injury.

27. However, there is no acceptable evidence on record to hold that the appellant was identified during the course of the investigation and Mr. Sherpa is correct in submitting that he was identified in Court for the first time by PW-1. In *Mulla and Another* vs. *State of Uttar Pradesh*, reported in *(2010) 3 SCC 508*, the Hon'ble Supreme Court had held that when identification of the accused by witnesses is made for the first time in Court, it should not form the basis of conviction.

28. In view of the discussion above, I am constrained to hold that the prosecution, in the instant case, has failed to prove that it was the appellant who had caused grievous hurt to PW-1 and therefore, the conviction of the appellant under Section 326 IPC cannot be sustained. Accordingly, the impugned conviction and sentence of the appellant is set aside and the appellant is set at liberty. Bail Bond, if any, shall stand discharged.

29. Appeal is allowed.

30. Registry will send back the Lower Court Records.

SLR (2020) SIKKIM 566

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

I.A. No. 01 of 2020
IN
W.P (C) No. 01 of 2020

Krishna Kumari Chettri and Another ..... APPELLANTS

Versus

State of Sikkim and Others ..... RESPONDENTS

For the Appellants: Mr. Sabyasachi Chatterjee, Mr. Navin Kiran Pradhan and Ms. Bina Rai, Advocates.

For the Respondents: Mr. Sudesh Joshi, Additional Advocate General.

Date of decision: 17th September 2020

A. Disaster Management Act, 2005 – S. 51(b) – Sikkim Public Health and Safety (COVID-19) Regulations, 2020 – Regulation 3(2) – Neither S. 51(b) of the Act nor Regulation 3(2) of the COVID-19 Regulations seem to give any power to respondent no.2 (District Magistrate) to seal the premises – Impugned order dated 23.05.2020 stayed till further orders.

(Paras 8 and 11)

Petition allowed.

ORDER (ORAL)

Bhaskar Raj Pradhan, J

1. On 29.08.2020 after hearing the learned counsel for the petitioners, as well as the learned Additional Advocate General for the respondents, notice was issued in the writ petition as well as in the I.A. No.1/2020, returnable on 17.09.2020.

2. Mr. Sabyasachi Chatterjee, learned counsel for the petitioners pressed for interim orders as prayed for in I.A. No.1/2020 today.

3. Mr Chatterjee has taken this Court through the impugned order dated 23.05.2020 passed by the District Magistrate, respondent no.2 herein, which is quoted below:

"GOVERNMENT OF SIKKIM OFFICE OF THE DISTRICT COLLECTOR, EAST DISTRICT ADMINISTRATIVE CENTRE, SICHEY
GANGTOK-SIKKIM-737101

Visit us @ https://eastsikkim.nic.in. E.mail:- dceast-sk@nic.in
Phone-03592(284444) (O) Fax-03592 (284222) (F)

No.1857/DC(E)/2020 Dated: 23/05/2020

ORDER

(U/S 51 of the Disaster Management Act, 2005)

Whereas, the Ministry of Home Affairs, Government of India vide order no 40-3/2020-DM-1 (A) dated 17th May, 2020 has extended the lockdown measures till 31st May, 2020 to contain the spread COVID-19 in the country.

Whereas, the Chief Secretary, Government of Sikkim vide Order No. 09/Home/2020 dated 17/5/2020 has issued new guidelines for strict implementation in the State.

Whereas, prohibitory orders vide order no. 1854/DC (E)/2020 dated 19/05/2020 and directives vide order No. 1828/DC(E)/2020 dated 19/04/2020 were issued by the undersigned to be strictly observed in East Sikkim district during the period of lockdown.

Whereas, the following shop was found violating the aforementioned orders and had not complied with the Standard Operating Procedure

for Social Distancing for Offices, Workplaces, Factories and Establishments issued vide order no. 40-3/2020-DM-I (A) dated 17th May, 2020 by the Ministry of Home Affairs, Government of India:

1. Body Vibes Gym, Rangpo Bazaar.

Therefore, in exercise of the power conferred under section 51 (b) of the Disaster Management Act, 2005 read with section 3 (b) of the Sikkim Public Health and Safety (COVID -19) Regulations, 2020 the aforementioned shop is hereby sealed till further orders.

Since, the present circumstances do not admit serving of this order to concerned persons information regarding the same has been intimated telephonically and the matter shall be heard after the completion of the lockdown period.

Given under my hand and seal this 23rd May, 2020.

Sd/-
Raj Yadev, IAS District Magistrate cum Chairperson,
District Disaster Management Authority,
East Sikkim.

Copy to:

1. *The Superintendent of Police, East- for information and necessary action*
2. *Sub Divisional Magistrates/Rangpo- for information*
3. *The SHO, Rangpo PS- for information and necessary action."*

4. Mr. Sudesh Joshi, learned Additional Advocate General, submits that he needs further time to file response to the application because of the present covid-19 situation and the Additional Advocate General himself being in isolation.

5. From the impugned order it is clear that the respondent no.2 has sought to exercise powers under section 51(b) of the Disaster Management Act, 2005 (hereinafter "the Act") read with Regulation 3 (2) of the Sikkim Public Health and Safety (COVID-19) Regulations, 2020 (hereinafter "the COVID-19 Regulations") and by doing so directed that the Body Vibes Gym, Rangpo Bazar, be sealed till further orders. It is also seen that the impugned order was not even served upon the petitioners but only telephonically intimated.

6. Section 51 (b) of the Act is quoted below:

> ***"51. Punishment for obstruction, etc***.- *(1) Whoever, without reasonable cause-*
>
> *(a)* ....
>
> *(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act,*
>
> *shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years."*

7. Regulation 3 of the COVID-19 Regulations is quoted below:

> ***"Restrictions and Offences 3.*** *(1) It shall be compulsory to wear face cover or mask in all public places and workplaces.*

> (2) <u>*All persons in charge of public places, commercial establishment and transport (whether commercial) or otherwise) shall ensure social distancing as per the guidelines issued by the Competent Authority.*</u>
>
> (3) *Violation by any member of public of any guidelines/order/ Notification/advisory issued by the Competent Authority in respect of Social Distancing shall be an offence.*
>
> (4) *Spitting in public places shall be strictly prohibited.”*
>
> *[emphasis supplied]*

8. Neither section 51(b) of the Act nor Regulation 3 (2) of the COVID-19 Regulations seem to give any power to the respondent no. 2 to seal the premises. The learned Additional Advocate General fairly submits that it is so. He however, submits that perhaps the power exercised by the respondent no. 2 was under Section 144 of the Code of Criminal Procedure (Cr.P.C.) as at the relevant time it had in fact been imposed. He further submits that even it was so, the 2 months period contemplated in Section 144 Cr.P.C. is far over and there is nothing stopping the petitioners to reopen the gym, if it is permissible.

9. Evidently, *prima facie*, the respondent no.2 has not passed the impugned order under the provision of Section 144 Cr.P.C. Otherwise, the respondent no.2 would have said so in the impugned order dated 23.05.2020.

10. Mr. Chatterjee has also taken this Court to the guidelines issued by the Government of India, Ministry of Home Affairs, dated 03.08.2020, which provides that gymnasium in containment zone shall remain closed for public and only those outside containment zone will be allowed to open up

and the order dated 19.06.2020 issued by the respondent no. 1 which provides that Gymnasiums are allowed to operate from 10.06.2020 onwards with the condition that the occupancy at any given time is only 50% of the total capacity and the timings shall be from 7.00 am till 6.00 p.m.

11. Having considered the rival submissions of the learned counsel this Court is of the view that the impugned order dated 23.05.2020 shall remain stayed till further orders. Learned Additional Advocate General is permitted to file a response to the interim application within three weeks from today. Should the respondents desire any variance of the order passed today, they are free to file their response earlier and move for appropriate orders.

12. The operation of the gym shall, however, be subject to the rules and regulations that may be issued by the Government of India as well as the State Government from time to time to contain the spread of COVID-19 and if it is permissible. The petitioners shall strictly comply with the regulations and all norms that are required to be followed to contain the spread of COVID-19 and if they violate any of the rules or regulations issued by the Government or provisions of any applicable laws, the authorities under the law, are free to take action, as per law.

13. The observations made in this order is solely for the purpose of deciding the interim protection sought for and shall not affect the final decision in the writ petition.

SLR (2020) SIKKIM 572

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

Crl. A. No. 16 of 2019

Prakash Subba ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Gulshan Lama, Legal Aid Counsel.

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

Date of decision: 24th September 2020

A. Indian Penal Code, 1860 – S. 375 – Whether Passive Submission to Sexual Act can be a Defence for Rape – S. 375. I.P.C as it stands today provides in explanation 2 that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. The proviso thereto states that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Except for the fact that the victim admitted to have not raise any alarm when the appellant shut the door to rape her, there is no evidence to show unequivocal voluntary agreement on the part of the victim to participate in the specific sexual act – Passive submission to the sexual act, cannot any longer be a defence for rape in view of explanation 2 to S. 375, I.P.C as it stands today.

(Para 25)

Appeal dismissed.

Chronology of cases cited:

1. Sadashiv Ramrao Hadbe v. State of Maharashtra and Another, (2006) 10 SCC 92.
2. Tukaram and Another v. State of Maharashtra, (1979) 2 SCC 143.
3. Tameezuddin alias Tammu v. State (NCT of Delhi), (2009) 15 SCC 566.
4. Abbas Ahmad Choudhary v. State of Assam, (2010) 12 SCC 115.
5. Amar Singh v. Emperor, AIR 1935 Lahore 8.
6. Thulia Kali v. State of Tamil Nadu, AIR 1973 SC 501.
7. Hem Raj v. State of Haryana, (2014) 2 SCC 395.
8. State of H.P v. Gian Chand, (2001) 6 SCC 71.
9. Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502.
10. Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The learned Judge, Fast Track Court, South & West Sikkm at Gyalshing, (the learned Judge) has convicted the appellant under Section 376(1) of the Indian Penal Code, 1860 (IPC), sentenced him to rigorous imprisonment for a term of seven years and directed him to pay a fine of Rs. 20,000/-. The impugned judgement of conviction as well as order on sentence both dated 26.07.2017 are under challenge.

2. Mr. Gulshan Lama, learned counsel for the appellant submits that the medical evidence does not support the allegation of forceful rape upon the victim and there are conflicting statements made by the victim in her depositon which makes it unreliable. He submits that the victim's deposition that there are no houses nearby hers, has been contradicted by the deposition of P.W.3, P.W.4 and P.W.9 having admitted that the victim used to have petty quarrels with the appellant, it is quite probable that a false allegation had been levelled against him. Mr. Lama further submits that the delay in lodging First Information Report (FIR) (exhibit-1) has not been properly explained and if it

was actually a case of forceful rape there was no reason for the victim not to immediately report the matter to the police. Mr Lama relied upon the following judgments; ***Sadashiv Ramrao Hadbe v. State of Maharashtra & Anr.[1],; Tukaram & Anr. v. State of Maharashtra[2]; Tameezuddin alias Tammu v State (NCT of Delhi)[3]; Abbas AAhmad Choudhary v. State of Assam[4]; Amar Singh v. Emperor[5]; Thulia Kali v. State of Tamil Nadu[6].***

3. Mr. S.K. Chettri, learned Additional Public Prosecutor however, Submits that the evidence of the victim is cogent and the defence could not extract anything from the prosecution witnesses which would completely destroy their version. He submits that it is settled law that the deposition of a victim of sexual assualt does not require any further corroboration if it inspires confidence. He further submits that merely because the medical evidence could not detect any physical injury on the body of the victim that would not, *ipso-facto*, create doubt on the victim's version. Mr. S.K. chettri relied upon the following judgments; ***Hem Raj v. State of Harayana[7]; State of H.P v. Gian Chand[8]. Naval Kishore Singh v. State of Bihar[9].***

CONSIDERATION

4. The FIR was lodged on 29.09.2016 by the victim before the police station alleging that the appellant, a resident of the same village, had come her house on the pretext of asking for drinking water and thereafter, he had grabbed her neck, taken her forcibly to her bed and forcefully raped her. Based on the FIR (exhibit-1) lodged by the victim the formal FIR (exhabit-2) was registered by the Station Houses Officer-Karma Tshering Bhutia (P.W.12) on the same day. The investigation was conducted by Sub Inspector (SI) Sonam Topgay Bhutia (P.W.13) (the Investigating Officer). The Investigating Officer thereafter, filed the charge sheet dated 19.12.2016.

5. During the trial 13 witnesses including the Investigating Officer were examined by the prosecution. The victim was examined as P.W.1 and her

[1] (2006) 10 SCC 92
[2] (1979) 2 SCC 143
[3] (2009) 15 SCC 566
[4] (2010) 12 SCC 115
[5] AIR 1935 Lahore 8
[6] AIR 1973 SC 501
[7] (2014 (2) SCC 395
[8] (2001) 6 SCC 71
[9] (2004) 7 SCC 502

husband as P.W.2. P.W.3 was the zilla panchayat member of the village. P.W.4 was the elder brother of the victim's husband (P.W.2) and a co-villager of the accused. Prem Kumar Sharma (P.W.5) (Junior Scientific Officer), RFSL, Ranipool examined the forensic evidence collected during the investigating and gave his report (exhibit-5). P.W.6 turned hostile and was the cross examined by the prosecution. The appellant was the brother-in-law of the P.W.7 P.W.8. and P.W.9 were sizure witnesses to the seizure or the appellant's voter identity card (exhibit-8) vide seizure memo (exhibit-7) and the rough sketch map (exhibit-10) vide seizure memo (exhibit-9). P.W.10 was a seizure witness to the seizure of a carpert from the house of the victim vide seizure memo (exhibit-9). Dr. Birendra Subba, Medical Officer (P.W.11) examined the victim on 19.09.2016 after five days of the incident and prepared the medical report (exhibit-11). On the same day he also examined the appellant and perpared the medical report (exhibit-12)

6. The learned Judge held that the delay of five days in lodging the FIR has been clearly explained by both the victim and her husband. She held that the most vital evidence, i.e. the testimony of the victim, was incremінating and inspired confidence to sufficiently prove that she was raped by the appellant on 24.09.2016. She further held that merely because there was absence of injuries on the victim it was not sufficient to discredit her evidence. She found that the testimony of the victim inspired confidence and there was nothing to render it inconsistent or unreliable. She declined to accept the suggestion of the learned defence counsel that the appellant had a history of petty quarrels. She opined that it was highly unlikely that any women would put her modesty, chastity and reputation at stake simply on account of minor squabbles that too over petty matters. She further opined that on reasonable man would wish to put the reputation of his wife and the mother of his children, as well as the family at risk over trivial disputes with another. The learned Judge, thus, concluded that the prosecution had been successful in establishing beyond reasonable doubt that the appellant had raped the victim while she was alone at home on 24.09.2016.

7. The identification of the appellant is certain. The victim's identified him as the perpetrator of the crime. The victim's husband (P.W.2) and his brother (P.W.4) identified him as the person accused by the victim of having raped her. P.W.8, P.W.9 and P.W.10 all indentified him in court as the person from who certain seizures were made by the police. He was a resident of the same village where the victim and her family resided and known to them.

8 Section 375 IPC reads as under:-

> ***"375. Rape*** *- A man is said to commit "rape" if he-*
>
> *(a) penetrates his penis to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(b) inserts, to any extent any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
>
> *(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.under the cricumstance falling under any of the following seven descriptions:-*
>
> *First- Against her will,*
>
> *Secondly- Without her consent.*
>
> *Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*

Fourtly- *With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

Fifthly- *With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

Sixthly- *With or without her consent, when she is under eighteen years of age.*

Seventhly- *When she is unable to communicate consent.*

Explanation- 1- For the purposes of this section, "vagina" shall also include labia majora

Explanation- 2 - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicate willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regraded as consenting to the sexual activity.

Exception 1- A medical procedure or intervention shall not consitute rape.

Exceptio 2- Sexual intercource or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not rape."

DELAY IN LODGING FIR

9. This court will now deal with the concerns raised by the defence. In ***Thulia Kali (supra)*** the Supreme Court held;

> **"12.** .... *First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occerance. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.........................*"

10. In ***Gian Chand (supra)*** the Supreme Court held:

> *"**12.** Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satifaction of the court, the delay cannot be itself be a ground for disbelieving and discarding the entire prosecution case....................."*

11. The incident, according to the victim, transpired on 24.09.2016. The FIR was lodged on 29.09.2016 after five days. According to the victim she informed her husband (P.W.2) that evening when he returned home from work who then reported the matter to the zilla panchayat member (P.W.3) and others and thereafter, lodged the FIR at the police station with the help of the zilla panchayat member (P.W.3). In cross-eximanation she admitted she could not read and write. She also admitted that the nearest police station is two hours walk from her house and that her husband (P.W.2) had called the appellant to settle the matter amicably. P.W.2 was not present at the time of the alleged assault as he had gone to the jungle to collect cow fodder but when he returned home, the victim had informed him that the appellant had come to her house asking for drinking water when he suddenly grabbed her neck, took her forcibly to her bed, removed her clothes and committed rape on her after locking th door. According to him, as it was late that evening and their house far away from others, he informed his elder brother (P.W.4) the next morning, who then called the appellant to his house to settle the matter. As the appellant did not come the next day, they reported the matter to the police a few days later. During cross-examination P.W. 2 admitted that in his statement to the police he had not used the word rape but alleged that the appellant had committed

"dusht karma". He admitted that he brother (P.W.4) had called the appellant for amicable settlement. He admitted that he had not mentioned about suffering from pain in the leg, him being unable to walk to the police station as there was no motorable road and the police station being two miles away, in his statement to the police. He also admitted that in the year 2012 when he had a quarrel with one Angad Thapa he had immediately gone to the Soreng police station to lodged the FIR. He admitted that he lodged the FIR after consulting his elder brother and his wife. He further admitted that he had not given details of the incident in his statement to the police. From the evidence that had been brought by the prosecution it is quite clear that the setting of the crime is a rustic village. The victim as well as her husband (P.W.2) were poor villagers, There are discrepancies in their depositions. However, none so shocking or not understandable given the situational setting of the crime. In view of the circumstances, which can be gathered from the evidence brought forth, this court is of the view that the learned Judge's finding that delay of five days in lodging the FIR has been adequately explained by the victim and her husband cannot be faulted.

VICTIM'S DEPOSITION NOT CONSISTENT WITH MEDICAL EVIDENCE AND OTHER CONTRADICTIONS

12. The next contention vociferously argued by Mr. Lama is taken up next. He contends that the medical evidence and the contradictions in the withness statements does not support the prosecution allegation that the appellant had committed rape upon the victim.

13. In ***Tukaram (supra)*** the Supreme Court had occasion to examine Section 375 IPC as it then existed in the year 1972. The allegation was that the rape had been committed at the police station. On examination of the facts of the case the Supreme Court held that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shift. It was, therefore, incumbent on it to make out that all the ingredients of Section 375 IPC were present in the case. For the proposition that the requisite consent was lacking in the case, reliance on behalf of the State could to be placed only on clause-thirty, so that it would have to be shown that the girl had been put in fear of death or hurt that was the reason for her consent. In the absence of such findings, the alleged fear would not vitiate the consent. Further, the circumstantial evidence to be used in order to prove an ingredient of an offence, it has to be such that it leads to no reasonable inference other than that of guilt. The

Supreme Court disbelieved the prosecution evidence and the judgment of the High Court was reversed and conviction and sentence set aside.

14. In ***Sadhashiv Ramrao Hadbe (supra)*** the Supreme Court was examining a case in the allegation against the appellant therein, convicted both by the Sessions Court as well as the High Court, was that the prosecutrix had been raped by the doctor at his clinic where she, her husband and their child had visited on 17.12.1990. The Supreme Court was of the view, that the prosecution evidence had so many contradictions that the whole incident seemed highly improbable. The Supreme Court noticed that although the prosecutrix had been examined the same day they there was no injury on her body. Furthermore, the pathological report also reflected that the vaginal swab did not have presence of spermatozoa. It was noticed that the appellant therein was also medically examined the same day and found that smegma was present around the corona glandis. It was also found that the scientific evidence did not support the prosecution as the doctor who examined the appellant therein had negatived sexual intercourse. The Supreme Court noticed that the evidence suggested that there were so many person in the clinic and therefore, it was highly improbable that the appellant would have made sexual assault on the patient in the presence of large number of people in the vicinity. It is in these facts that the Supreme Court held:

> **"9.** *It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.*"

15. In ***Tameezuddian (supra)*** the Supreme Court held:

> **"9.** *It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is*

> *improbable and belies logic, would be doing violence to the very principles which govem the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable."*

16. In ***Abbas Ahmad Choudhary (supra)*** the Supreme Court held:

> **"11.** *We are conscious of the fact in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."*

17. In ***Naval Kishore Singh (supra)*** the Supreme Court did not find the contradictions pointed out by the defence sufficient to disbelieve the prosecution case.

18. The victim has clearly deposed that on 24.09.2016 while she was alone, washing dishes at home, th appellant appeared and asked for water. As she was giving him water, he suddenly shut the door, grabbed her by the neck, threw her on the bed and raped her.

19. It is correct that in her cross-eximination, certain contradictions have been brought out. The victim admitted that the house of one *"Thuli"* is situated above her house and across the river there is another house. However, she categorically denied that other houses were situated close to her house. She also admitted that she did not raise alarm when the appellant shut the door and that she was not injured during the incident. She however, denied the assertion that she had held the appellant while she was raped. She also denied that she was a consenting party and that she had in fact not been raped.

20. P.W.3 admitted in cross-examination that the houses of two persons were nearby to that of the victim. He also admitted that if one were to make noise or scream from the house of the victim it could be heard by the neighbours.

21. Dr. Birendra Subba (P.W.11) had examined the victim on 29.09.2016. During the time of her examination, according to Dr. Birendra Subba (P.W.11) the victim gave the history of being forcefully sexually assaulted by the appellant. This fact is mentioned in the medical report (exhibit-11) as well. According to Dr. Birendra Subba (P.W.11) on her examination he did not detect any external injuries on her private parts or resistance injuries on her body. According to him a vaginal swab sample of the victim was taken for laboratory investigation and handed over to the investigating officer. The Junior Scientific Officer (P.W.5) examined the vaginal swab and opined that no blood, semen of any other body fluid could be detected in it.

22. Dr. Birendra Subba (P.W.11) also examined th appellant on 29.09.2016. On his examination he did not find injuries either on his genital organs of in any other part of his body. The penal swab taken from him was also examined by the Junior Scientific Officer (P.W.5) who opined that blood, semen of any other body fluid could not be detected in it. The medical evidence thus does not provide any corroboration to the allegation made by the prosecution that the victim had been raped. It must be however, borne in mined that the examination of the victim, a 40 years old married women who was also a mother to her children as well as of the appellant was done after five days. Thus, the only direct evidence of the incident is that of the victim. It is true that the medical evidence does not support the prosection case due to the delay in thir medical examination. It however, does not rule it out either. It is by now well settled that the defence of rape would be held to have been proved even if there is an attempt of rape [penetration to any extent] on the woman and not the actual commission of rape. In such circumstances it was important to examine the other evidences produced by the prosecution in great depth. In ***Puran Chand v. State of Himachal Pradesh***[10] the Supreme Court held that in some cases where a doubt is sought to be created by the defence ralying upon the lacunae in the medical evidence which could not establish the incident in view of non-committal statement of the doctor regarding the hymen being intact, the prosecution version could not be brushed aside totally and will have to be judged by the other attending circumstances brought on record.

23. Mr. Lama questions the crediblity of the victim's deposition on the ground of inconsistencies as pointed out earlier. The victim's husband (P.W.2) corroborated the statement of the victim that she had narrated

[10] (2014) 5 SCC 689

about the rape to him when he returned after collecting cow fodder and thereafter, to the zilla panchayat member (P.W.3) and others. The zilla panchayat member (P.W.3) corroborated the victim's version that she and her husband (P.W.2) had reported about the incident to him after which they had lodged the FIR with his help. The victim's husband's elder brother (P.W.4) corroborated the fact that the zilla panchayat member (P.W.3) had called him to his house and told him that the victim and her husband (P.W.2) had come to his house and requested him to scribe the FIR. There are some inconsistencies in the prosecution witness statements with regard to whether there were other houses around the victim's house and at what distance they were located. The inconsistencies pointed out are minor and does not affect the substratum of the core of the victim's evidence. In fact, the victim had candidly admitted that at the time of the rape she was alone at home. Had it then been a case of consensual sexual act between the appellant and the victim as has been suggested during her cross-examination there was no reason for her to narrate the incident to her husband in the evening when he returned home. Thus, in fact, these inconsistencies appearing in the deposition of an untrained rustic mind lends credence to prosecution version as deposed by the victim and other prosecution witnesses.

24. Mr. Lama also points out that P.W.9 had admitted that on one occasion the appellant and the victim had come to him to settle a petty dispute and they often quarrelled over petty matters. Mr. Lama suggests that this admission from P.W.9, who was a seizure witness, is enough to dislodge the victim's assertion that she was in fact raped. The delay in lodging the FIR having been sufficiently explained it is noticed that the accusation made by the victim has been consistent throughout. The victim's deposition has been found to be reliable by the learned Judge. The fact that she narrated about the incident to her husband (P.W.2) immediately on his return home is also well established. There is no adequate reason available on the records to show that the victim and her husband would go to the extend of levelling false allegation of rape on the appellant. Even penetration to a minor extend can amount to rape now. The victim admitted, in cross-examination, that she was not injured during the act of rape which explains why no injury was seen during her medical examination. On examination of the victim's deposition and especially the cross-examination, it is seen that the appellant had sought to raise the defence of consent rather than false allegation due to petty quarrels. As such this court is of the view that the defence of petty quarrel ahd been raised by the defence as an afterthought.

25. Section 375 IPC as it stands today provides in explanation 2 that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. The proviso thereto states that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Except for the fact that the victim admitted to have not raise any alarm when the appellant shut the door to rape her, there is no evidence to show unequivocal voluntary agreement on the part of the victim to participate in the specific sexual act. Passive submission to the sexual act, cannot any longer be a defence for rape in view of explanation 2 to Section 375 IPC as it stands today. In fact, the victim categorically denied the assertion that she had held the accused while she was being raped and that she was s consenting party. In the circumstances, this court is unable to agree with the suggestion made by Mr. Lama that the victim had made a false allegations of rape upon the victim as a result of their petty quarrels or that she had consented to the alleged act of rape. The testimony of the victim does inspire confidence. Her depositon is truthful and umblemished by trained minds. There is nothing to render the surrounding circumstances highly improbable and belie the case set up by the prosecution, save certain discrepancies in her depositions are the normal wear and tear in the deposition rendered by incautions villagers in the controlled atmosphere of an overwhelming courtroom.

26. The appeal is dismissed. This court is of the view that the judgement of conviction and order on sentence both dated 26.07.2017 need not be interfered with.

27. The incident is of September 2016. The allegation of rape upon the victim stands proved. This court thus enhances the compensation of Rs. 50,000/- granted by the learned Judge to Rs.1,00,000/- under the Sikkim Compensation to Victims or his Dependents Schemes, 2011.

28. The original records of the trial court may be returned forthwith.

29. The registry may transmit a copy of this judgment to the learned Judge, Fast Track Court, South & West at Gyalshing and to the Sikkim State Legal Services Authority for compliance. A copy thereof shall also be furnished to the appellant, free of cost.

SLR (2020) SIKKIM 586

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

Mat. App. No. 02 of 2019

Suk Bir Chettri ….. APPELLANT

Versus

Jamuna Chettri and Another ….. RESPONDENTS

For the Appellant: Ms. Gita Bista, Advocate.

For Respondent No.1: Mr. Tashi Norbu Basi, Legal Aid Counsel.

For Respondent No.2 : None.

Date of decision: 25th September 2020

A. Hindu Marriage Act, 1955 – S. 13 (1)(i) – The evidence of PW-2 seems to suggest that the respondent no. 2 had clandestinely entered her mother's bedroom and it was only because of the fact that she was unable to sleep because of stomach pain, per chance, her mother and respondent no. 2 being together in the bedroom, came to light. In her deposition, PW-2 did not indicate the time when she found her mother and respondent no. 2 together. In the F.I.R as well as in the divorce petition, there is no allegation that respondent no.1 and 2 were found together in a naked condition inside the room, though it is mentioned therein that they were found to be together at around 2 am in the morning. It is highly improbable that after consistent knocking of the daughter, the mother would come out naked and allow any other person in the room to remain in naked condition. Obviously, it is an embellishment and improvement of the case projected by PW-2 – Going by the un-impeached evidence of DW-1 and DW-2 and in absence of any positive evidence on the part of PW-2 that she had found both of them together at around 2 am in the bedroom of respondent no. 1, it will be difficult to accept the version sought to be projected that respondent no.1 and 2 were found in a naked condition in an unearthly hour of 2 am in the

bedroom of respondent no. 1. The admission of both the respondents to the extent that respondent no. 2 was having a drink in the bedroom of respondent no. 1 as a customer at around 10.30/11 pm will not lead to a conclusion that respondent no. 1 was committing adultery with respondent no. 2 – It is in this context Exhibit-C assumes significance wherein the respondent no. 2 had admitted to have slept with respondent no. 1. It must not be forgotten that Exhibit-C was executed in the Police Station while the respondent no. 2 was in illegal detention – Without there being registration of any case, the respondent no. 2 was not only called to the Police Station but was also detained from 26.05.2018 to 27.05.208 till 6 pm. Evidence of DW-2 that he was forced to execute Exhibit-C and that he was released only after execution of Exhibit-C are not even tested by way of cross-examination.

(Paras 19 and 20)

Appeal dismissed.

Case cited:

1. Smt. Mala Rai v. Shri Bal Krishna Dhamala, Mat. App. No. 01 of 2015 decided on 16.06.2016.

JUDGMENT

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

Being aggrieved by the judgment and order dated 28.06.2019 passed by the learned Judge, Family Court, East Sikkim at Gangtok in F.C. (Civil) Case No.13 of 2019 rejecting the petition filed by the appellant under Section 13(1)(i) of the Hindu Marriage Act, 1955 (for short, the Act) for divorce , this appeal is preferred by the appellant.

2. In the petition under Section 13(1)(i) of the Act, it is stated that the marriage between the appellant and the respondent no.1 was solemnized in the year 1993 and they have three daughters, namely, Apsana Chettri, Asha Chettri and Anisha Chettri. At the time of the filing of the petition, they were aged about 23, 21 and 13 years, respectively and he was staying at Legship because of his work.

3. It is stated in the petition that at around 02.00 am of 25.05.2018, when Asha Chettri requested respondent no.1 to give her a glass of water

as she was suffering from diarrhoea, the respondent no.1 refused to give her water and asked her to fetch it herself and as such, she had gone to the kitchen to get water. Thereafter, Asha Chettri requested the respondent no.1 to give her a shawl. Initially, despite several requests respondent no.1 had refused to open the door of her room. However, finally the respondent no.1 had opened the door of her room whereupon she was found to be inside the bedroom along with the respondent no.2, who, thereafter, had gone away taking respondent no.1 along with him.

4. Further case of the appellant in the petition is that, fearing that something untoward may happen to her mother, Asha Chettri lodged an FIR before Soreng Police Station. When the appellant came to know about the said incident from his daughter, he had submitted a complaint before Soreng Police Station requesting that both of them be called to the Police Station. The respondent no.2 was arrested by Soreng Police on 26.05.2018 and he was released on bail on 27.05.2018. The respondent no.2 had given an undertaking on 27.05.2018 before Soreng Police in presence of witnesses stating that Asha Chettri had seen him and her mother sleeping together and therefore, it was his responsibility to look after respondent no.1. It is also alleged that in the year 2016, the respondent no.2 was involved in some cases and as the respondent no.1 had given shelter to the respondent no.2, she was assaulted by the villagers. 5. Reference is made to a maintenance case filed by his wife being FC (Crl.) No.37 of 2018. Allegation is also made that out of a loan amount of Rs.15 lakh taken by him from the Bank, Rs.2 lakh was taken away by the respondent no.1 along with 5 *tolas* of gold when she had eloped with respondent no.2.

6. In the written statement filed by the respondent no.1, it is stated that Apsana Chettri had completed Computer Engineering and she was working in Delhi. Asha had completed her Diploma in Civil Engineering and is employed at RMDD, Government of Sikkim and Anisha was studying in Class VIII at Dodok. The allegations made in the divorce petition that Asha had asked for a shawl and that she had refused to open the door despite requests made by Asha and had opened the door only after much persuasion were denied. It is stated that she and her husband had started to run a shop selling liquor to supplement the income of her husband and the respondent no.2, who is a neighbor, is a regular customer. It is pleaded that in the evening of 24.05.2018, as Asha and a male friend had come home drunk, she had scolded her daughter. Respondent no.2 had come to her

shop at around 09.00/10.00 pm and had asked for a bottle of beer. As she had scolded her daughter for drinking and smoking, she had asked respondent no.2 to drink beer inside the room while keeping the door open. Around 11.00 pm, when Asha started arguing with respondent no.1, the respondent no.2 had left the house. Thereafter, without apologizing to her, when Asha asked for a glass of water, out of anger, she had asked Asha to get it herself. Respondent no.2 was called by Asha at around 02.00 am to take the respondent no.1 with him. Respondent no.2 went back as Asha was drunk. In view of the accusations made by Asha, being hurt, she had left for her mother's home without informing Asha, contemplating to come back to her residence after a day. But when the appellant put a condition that she would be accepted only if she accuses respondent no.2 of raping her and as she was not willing to make false allegation, she started to live with her brother and his family at Gangtok. It is stated that Asha lodged the false FIR out of fear that she might be blamed if something untoward happened to her mother.

7. The respondent no.2, in his written statement, narrated the events of 24.05.2018 and 25.05.2018, more or less, in the same vein as respondent no.1. It is further stated that the Second Officer In-Charge of Soreng Police Station had asked him to come to the Police Station on 26.05.2018 and when he reached the Police Station at around 04.00 pm, he was illegally detained till 06.00 pm of 27.05.2018 because of the influence of the appellant, who is an Assistant Sub- Inspector and besides, he was also forced to execute an Undertaking before Soreng Police Station stating that he had slept with the respondent no.1. He was threatened by the appellant that he would not be released until he executed the Undertaking. It was only after executing the Undertaking, he was released from the Police Station.

8. During trial, the appellant examined himself as PW-1. Asha Chettri was examined as PW-2. The respondent nos.1 and 2 had examined themselves as DW-1 and DW-2, respectively.

9. Ms. Gita Bista, learned Counsel for the appellant has submitted that the evidence of PW-1 and PW-2 clearly demonstrates that the appellant had been able to prove the case to the hilt. It is submitted that learned Court failed to sift the evidence in its proper perspective and guided by a wrong notion that the appellant was the Sub-Inspector of Soreng Police Station,

where respondent no.2 had given the Undertaking, did not rely on Exhibit-3, the Undertaking (Ekrarnama), holding that the respondent no.2 could have been easily pressurized to execute Exhibit-3. It is submitted that though in the written statement, the respondent no.1 had made allegations that Asha had come home drunk, there was no evidence to that effect and further, when Asha was examined as PW-2, no suggestion was also given to that effect. She submits that the materials on record go to show that it is an admitted position that the respondent no.2 was with the respondent no.1 in the bedroom at 02.00 am in the night. The above fact coupled with the admission of respondent no.2 in the Undertaking establish beyond a shadow of doubt that the respondent no.1 had committed adultery with respondent no.2, she contends. She places reliance on a judgment of this Court in the case of *Smt. Mala Rai* vs. *Shri Bal Krishna Dhamala* (Mat. App.No. 01 of 2015), which was decided on 16.06.2016.

10. Mr. Tashi Norbu Basi, learned Legal Aid Counsel appearing for respondent no.1, while supporting the impugned judgment, submits that PW-2, in her deposition, did not mention the time when DW-1 and DW-2 were found to be together. He contends that there was no allegation in the FIR lodged by PW-2 or in the petition under Section 13(1)(a) of the Act that PW-2 had found respondents no.1 and 2 in a naked condition as deposed by her in her evidence and therefore, the learned Court below was justified in holding that allegations made by her is exaggerated and an after-thought. He has also submitted that the learned Court below rightly did not place any reliance on Exhibit-3 as the same was executed in the police station by respondent no.2 while being illegally detained for a day without registration of any case. He has submitted that no case is made out for interference with the impugned judgment and the appeal deserves to be dismissed.

11. Respondent no.2 had appeared once in person and thereafter had chosen not to appear. No counsel was also engaged by him. Today also, the respondent no. 2 has not appeared.

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

13. Though in the evidence as also in the judgment, the Exhibits have been referred to as 1, 2 and 3, it is seen that Exhibits were marked as Exhibit-A, B and C.

14. In the FIR (Exhibit-A) which is referred to as Exhibit-1 in the judgment of the learned Court below, it is stated that at around 02.00 am of 25.05.2018, the informant (PW-2) caught her mother and the respondent no.2 in her house when they were together in the room and that the respondent no.2 had gone away taking her mother. It is further stated that she will not be responsible if anything untoward happens to her mother. Exhibit-B is a complaint given by the appellant to Soreng Police Station, stating that his wife, who was missing from the previous day, was found to have been taken by the respondent no.2 and that they are together at a place called Timberbong. Request was made to bring them to the Police Station and to investigate the matter. Exhibit-C is the Undertaking or the *Ekrarnama* and in the paper book, it is styled as Agreement Letter. The aforesaid document was admittedly executed in Soreng Police Station. It is stated therein that in the evening of 25.05.2018, he had slept with the respondent no.1 and the same was found out by Asha Chettri. It is further stated therein that if anything happened to Jamuna Rai, he would be responsible.

15. Evidently, PW-1 was not present on 24.05.2018 and 25.05.2018 and he had deposed on the basis of information given to him by PW-2. In his evidence, he had stated that PW-2 had seen the respondent no.2 and respondent no.1 in her bedroom in a naked condition. Significantly, there is no allegation in the divorce petition that the respondent nos.1 and 2 were found in naked condition. He has admitted that he was called by the police of Soreng Police Station in connection with the FIR/complaint lodged by his daughter. In his evidence, the appellant did not depose about the allegations of theft committed by his wife.

16. PW-2, in her evidence, had stated that on the fateful day, she was unable to sleep because of acute stomach pain and therefore, she had knocked on the door of her mother but her mother told her not to disturb her and asked her to take medicine on her own. Because of the aforesaid conduct of her mother, she became suspicious and thought that since her mother had an affair with respondent no.2 earlier, he might be inside the room. When she forced her mother to open the door, to her utter surprise, she found her mother and respondent no.2 naked in the room and seeing that she thrashed respondent no.2 and ordered him out of the room. She called her father over phone and informed him about the incident and as her

father instructed her to lodge a complaint to the Police, she lodged the FIR before Soreng Police Station.

17. DW-1 in her evidence stated that PW-2 and her boyfriend were smoking the same cigarette and also having food from the same plate. She was looking very pale and weak and on PW-2 being asked what had happened to her, she told her that it was none of her business. Nonetheless, she had prepared dinner for her daughter and her boyfriend and had served them. She admitted that respondent no.2 was in the bedroom drinking beer at around 10.00 pm. PW-2 accused her of having an extra-marital affair and she asked DW-2 to leave the house and he, accordingly, had left the house. PW-2 had called DW-2 at around 02.00 am. After his arrival, when PW-2 had forced him to take her along with him, she had left for her parental house. DW-1 stated that the PW-1 had personally told her to store and serve liquor to customers from her bedroom as it was a safe place.

18. DW-2 stated that at around 11.00 pm while he was having a beer in the bedroom of respondent no.1, PW-2 had an argument with DW-1 and then he returned to his house. When he was called by PW-2 at around 02.00 am to their residence, he found PW-2 in a drunken state. She asked him to take respondent no.1 to his residence whereupon he returned home without answering her. He had deposed that he was illegally detained by Soreng Police Station from 26.05.2019 till 06.00 pm of 27.05.2019 and he was forced to execute an Undertaking (Exhibit-3) by PW-1, stating that he had slept with respondent no.1. He was told that unless and until he admitted the same and gave it in writing, he would not be released. After he had executed Exhibit-3, he was released from the Police station. He denied that he had any physical relation and extra-marital affair with respondent no.1 at any point of time.

19. The evidence of PW-2 seems to suggest that the respondent no.2 had clandestinely entered her mother’s bed room and it was only because of the fact that she was unable to sleep because of stomach pain, per chance, her mother and respondent no.2 being together in the bedroom, came to light. In her deposition, PW-2 did not indicate the time when she found her mother and respondent no.2 together. In the FIR as well as in the divorce petition, there is no allegation that the respondent nos.1 and 2 were found together in a naked condition inside the room, though it is mentioned therein that they were found to be together at around 02.00 am in the

morning. It is highly improbable that after consistent knocking of the daughter the mother would come out naked and allow any other person in the room to remain in naked condition. Obviously, it is an embellishment and improvement of the case projected by PW-2. It appears that a liquor shop was being run without license in the house of the respondent no.1. The respondent nos.1 and 2 had admitted that the respondent no.2 was there in the room of the respondent no.1 at around 10.00/11.00 pm drinking beer. Both of them had asserted that when PW-2 had a confrontation with her mother, respondent no.2 had left the house of the respondent no.1. Both of them had also stated that PW-2 had again called the respondent no.2 to their house and when the respondent no.2 had gone there, PW-2 had asked respondent no.2 to take her mother along with him. Significantly, this part of the evidence of DW-1 and DW-2 remained un-impeached. There was no cross-examination with regard to PW-2 having an argument with respondent no.1 and PW-2 again calling respondent no.2 at 02.00 am. There is also no cross-examination about PW-2 asking respondent no.2 to leave the house at around 10.00 pm at the first instance. Thus, it appears that there are two different events on the relevant day: one around 10.00/11.00 pm and the other at 02.00 am. There is no acceptable material on record to hold that respondent no.1 was taken away by respondent no.2 from the residence of respondent no.1. PW-2 is conspicuously silent about respondent no.2 taking away respondent no.1 along with him as stated in the FIR. If respondent no.1 had actually been taken away by respondent no.2 from the residence of respondent no.1, it is not understood why PW-1 had stated in Exhibit-B that his wife was missing from the previous day and that it had been found out later on that she had been taken away by respondent no.2. Going by the un-impeached evidence of DW-1 and DW-2 and in absence of any positive evidence on the part of PW-2 that she had found both of them together at around 02:00 am in the bedroom of respondent no.1, it will be difficult to accept the version sought to be projected that the respondent nos.1 and 2 were found in a naked condition in an unearthly hour of 02.00 am in the bedroom of respondent no.1. The admission of both the respondents to the extent that respondent no.2 was having a drink in the bedroom of the respondent no.1 as a customer at around 10.30/11.00 pm will not lead to a conclusion that respondent no.1 was committing adultery with respondent no.2.

20. It is in this context Exhibit-C assumes significance wherein the respondent no.2 had admitted to have slept with respondent no.1. It must

not be forgotten that Exhibit-C was executed in the Police Station while the respondent no.2 was in illegal detention. While it was true that the learned Court below was not correct in holding that the appellant was also working in the Soreng Police Station, it is established on record that he being a Head Constable of another Police Station had filed a complaint (Exhibit-B) asking that both the respondents be called to Soreng Police Station. Accordingly, without there being registration of any case, the respondent no.2 was not only called to the Police Station but was also detained from 26.05.2018 to 27.05.208 till 06.00 pm. Evidence of DW-2 that he was forced to execute Exhibit-C and that he was released only after execution of Exhibit-C are not even tested by way of cross-examination. Therefore, the learned Court below was justified in not placing any reliance on Exhibit-C.

21. In *Smt. Mala Rai* (supra), on which reliance was placed by Ms. Gita Bista, evidence was to the effect that when a neighbor had seen the appellant entering her home with a man at around 10.30 pm, he had informed her husband who, thereupon, accompanied by his elder brother, had gone to the house and both of them had witnessed through the ventilation that the appellant was having sexual intercourse with the person with whom she had come home. It was on the basis of the above evidence that this Court had upheld the grant of divorce. The facts are clearly distinguishable in the instant case.

22. Having regard to the evidence on record, we are of the considered opinion that the learned Court below was justified in dismissing the petition filed by the appellant for grant of divorce.

23. Accordingly, finding no merit, the appeal is dismissed.

24. Registry will send back the records of the Court below.

SLR (2020) SIKKIM 595

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

WP (C) No. 12 of 2020

The Karmapa Charitable Trust and Others ….. PETITIONERS

Versus

The State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. K.K. Rai and Mr. B. Sharma, Sr. Advocates with Mr. Norden Tshering Bhutia, Advocate.

For Respondent 1-2: Mr. Hissey Gyaltsen, Asstt. Government Advocate.

For Respondent No. 3: Mr. Anmole Prasad and Mr. N. Rai, Sr. Advocates with Mr. Jorgay Namka, Mr. Zangpo Sherpa, Ms. Yangchen D. Gyatso and Mr. Sagar Chettri, Advocates.

Date of decision: 28th September 2020

A. Code of Civil Procedure, 1908 – O. VIII, R. 1A – Duty of Defendant to Produce Documents – The emphasis in R. 1A (1) supra is on the words "possession or power." Hence, the provision unambiguously casts a duty on the defendant to produce documents upon which either the relief is claimed by him or on which he relies upon, when such a document or documents are in his possession or power. Should the document(s) not be in his possession or power then the defendant shall inform the Court as to in whose power or possession the document is in R. 1A(3) requires that when such document(s) which ought to have been produced by the defendant but have not been so produced, cannot be received in evidence on his behalf without the leave of the Court. It thereby concludes that should the defendant fail to file a document in terms of the provisions of

O. VIII R. 1 of the C.P.C, he may do so under the provisions of O. VIII R 1A(3), subject to the leave of the Court – The Court, under this provision, is to exercise its powers judiciously at the same time considering the *bona fides* of the party, the reasons put forth by the party and the relevance of the document as well as reasons for its non-filing earlier. Should the Court be satisfied with the grounds furnished by the concerned party then and only then shall it grant leave to the party making the prayer to file the documents.

(Para 12)

B. Code of Civil Procedure, 1908 – O. VIII, R. 1A – The petitioners harbor apprehensions on the count that as Shamarpa Rinpoche has since passed away, the authenticity of his signature cannot be tested. This is an uncalled for apprehension as the Indian Evidence Act, 1872 makes adequate provision for such contingencies. The argument that the case of the petitioners is jeopardized by the belated and *mala fide* steps of the respondent no. 3 cannot be countenanced as the petitioners will be afforded sufficient opportunity to controvert and refute the documents during cross-examination besides the steps taken by the respondent no. 3 cannot be stated to be *mala fide* –No fixed formula can be provided for leave to be granted by the Court under O. VIII R. 1A(3) of the C.P.C.

(Paras 14 and 16)

Petition dismissed.

Chronology of cases cited:

1. Ashok Sharma v. Ram Adhar Sharma, (2009) 11 SCC 47.

2. Mange Ram v. Brij Mohan and Others, (1983) 4 SCC 36.

3. Scindia Potteries & Services P. Ltd. v. J.K. Jain and Another, 2012 SCC Online Del 5296.

4. Ram Sarup Gupta v. Bishun Narain Inter College and Others, (1987) 2 SCC 555.

5. Nepal Das and Another v. Aditi Deori and Others, (2011) 5 Gauhati Law Reports 23.

6. Manguesh Rajaram Wagle v. Suresh D. Naik, 2016 SCC OnLine Bom. 7854

7. Dugaputi Sudhakar Reddy v. Avulapati Shankar Reddy and Others, 2005 (1) A.P.L.J. 245 (HC).

8. P. Sankaran v. Dr. Ambujakshan Nair, 1989 SCC OnLine Ker. 237

9. Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517.

10. The State of U.P v. Raj Narain and Others, (1975) 4 SCC 428.

11. Santveer Singh v. Addl. Civil Judge, Hanumangarh, 2004 SCC OnLine Raj 59.

12. M/s Sadhu Forging Limited v. M/s Continental Engines, 2017 SCC OnLine Del 10039.

13. Bhanumathi v. Sarvothaman,2010 SCC OnLine Ker 373.

14. Rajah R.V.G.K. Ranga Rao v. Nizams Sugars Limited, 2003 SCC OnLine AP 979.

15. Manguesh Rajaram Wagle v. Suresh D. Naik, 2016 SccOnLine Bom 7854.

JUDGMENT

Meenakshi Madan Rai, J

1. The learned trial Court, by its Order dated 10.02.2020, in Title Suit No.01 of 2017 *(Karmapa Charitable Trust & Others vs. State of Sikkim & Others),* allowed the petition filed by the Respondent No.3 under Order VIII Rule 1A(3) read with Section 151 of the Code of Civil Procedure, 1908 (for short, "CPC"), thereby permitting the Respondent No.3 to file twelve additional documents at the stage of the said Respondents evidence, after closure of the evidence of the Plaintiffs and the Respondents No.1 and 2. Aggrieved by this Order, the Petitioners assail it before this Court under Article 227 of the Constitution of India (for short, "Constitution").

2. Respondents No.1 and 2 had no counter-affidavit to file. The counter-affidavit filed by the Respondent No.3 was met by a rejoinder of the Petitioners.

3.(i) Advancing his arguments for the Petitioner, learned Senior Counsel canvassed the contention that Order VIII Rule 1A of the CPC requires the

Respondent to enter all documents that he bases his defense upon in a list, and to produce it in Court along with the written statement. If the documents that the Respondent seeks to rely on are not in his power and possession, he is to divulge as to who it is with at that time. However, the Respondent No.3 opted to disregard this provision of law. The learned Trial Court, for its part, while allowing the Respondent No.3 to file the additional documents belatedly, it is alleged, failed to appreciate that the discretion vested on it under the provisions of Order VIII Rule A1(3) of the CPC cannot be exercised in a routine manner. That, leave is to be granted only on due consideration of the *bona fides* of the party, which is non-existent on the part of the Respondent No.3. Calling the attention of this Court to the provisions of Order XVI Rule 1 of the CPC, learned Senior Counsel contended that the provision mandates that parties furnish in Court a list of witnesses whom they propose to call, either to give evidence or to produce documents. That, although the Respondent No.3 had filed his list of witnesses way back on 21.08.2002, the relevance of the witnesses now sought to be examined or the documents sought to be produced were not brought to the notice of either the learned Trial Court or the parties. It was his specific argument that by allowing the petition under Order VIII Rule 1A(3) of the CPC, the interest of the Petitioners herein are being jeopardized as it is a belated and *mala fide* step taken by the Respondent No.3, when the evidence of the Petitioners witnesses and that of the Respondents No.1 and 2 have already concluded. Consequently, it tantamounts to a *de novo* trial where the Petitioners will be deprived of the opportunity of refuting the documents in question, which introduces at this stage an element of surprise in the *lis.* That, in fact, one of the documents now being relied upon by the Respondent No.3 bears the signature of *Shamarpa Rinpoche* who has passed on 11.06.2014, thereby, making it an impossibility for the Petitioners to test the authenticity of his signature which would thereby prejudice their case. The Respondent No.3 through the additional documents is now attempting to legitimize the recognition of the *Karmapa* identified by them and also to resurrect the issue of *Tsurphu Labrang* in an effort to establish that there was a parallel administration being run by the said entity, when the matter has already been closed by an Order of the learned Trial Court and confirmed by a Judgment of this Court.

(ii) Training his arguments against the impugned Order, learned Senior Counsel contended that the learned Trial Court failed to appreciate that it

was the Respondent No.3 who was required to defend his case and his witnesses cannot introduce documents or facts which the Respondent No.3 himself is unaware of. That, despite the learned Trial Court having noticed that the Respondent No.3 sought to introduce new documents without the leave of the Court which was duly objected to by the Petitioners, instead of rejecting the documents, the Court embarked on a mission of advising the Respondent No.3 to file an appropriate application to bring on record the new documents. That, some of the documents sought to be introduced pertain to a period subsequent to the cause of action and are irrelevant while some documents, it is alleged, have been manufactured for the purposes of this *lis* and yet others subsequently procured to assist the case of the Respondent No.3, who, by surreptitiously introducing the documents without following the relevant procedure prescribed by law, seeks to cover up any lacunae which may have existed in their case.

(iii) It was next contended that the learned Trial Court in the impugned Order, has wrongly relied on the ratio of ***Ashok Sharma*** vs. ***Ram Adhar Sharma***[1]. The Respondent therein had sought permission of the Court to summon a witness to prove the date of construction of the society and on the direction of the Court the witness had brought the documents. In the instant case, the witnesses have brought the documents sans such directions. That, the Respondent No.3 apart from acting *mala fide* failed to exercise due diligence at the appropriate stage as provided by law indicating his lackadaisical conduct, hence the impugned Order for all the foregoing reasons deserves to be set aside. To augment his submissions, he relied on the following ratiocination;

(a) ***Ashok Sharma*** vs. ***Ram Adhar Sharma*** *(supra)*

(b) ***Mange Ram*** vs. ***Brij Mohan & Ors.***[2]

(c) ***Scindia Potteries & Services P. Ltd.*** vs. ***J.K. Jain & Anr.***[3]

(d) ***Ram Sarup Gupta*** vs. ***Bishun Narain Inter College & Ors.***[4]

(e) ***Nepal Das & Anr.*** vs. ***Aditi Deori & Ors.***[5]

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[1] (2009) 11 SCC 47
[2] (1983) 4 SCC 36
[3] 2012 SCC Online Del 5296
[4] (1987) 2 SCC 555
[5] (2011) 5 Gauhati Law Reports 23

(f) ***Manguesh Rajaram Wagle*** vs. ***Suresh D. Naik***[6]

(g) ***Dugaputi Sudhakar Reddy*** vs. ***Avulapati Shankar Reddy & Ors.***[7]

(h) ***P. Sankaran*** vs. ***Dr. Ambujakshan Nair8***

(i) ***Ram Bihari Yadav*** vs. ***State Of Bihar9***

(j) ***The State of U.P*** vs. ***Raj Narain & Ors.10***

4.(i) Resisting the arguments forwarded by learned Senior Counsel for the Petitioners, learned Senior Counsel for the Respondent No.3 vehemently contended that the question of resurrecting the *Tsurphu Labrang* matter does not arise as in the first instance it was never closed. The attention of this Court was drawn to the proceedings before the Hon ble Supreme Court in Special Leave to Appeal (Civil) No.22903 of 2003, dated 05.07.2004, from the Judgment and Order dated 26.08.2003 in WP 5/03 of this High Court being *Tsurphu Labrang vs. Karmapa Charitable Trust and Others*. It was pointed out that although the Honble Supreme Court observed that there was no reason to interfere with the Judgment of this High Court *(supra)* and dismissed the Special Leave Petition, it was clarified unequivocally in the same Order that *"…the trial court will not take into consideration any observations made in the impugned order or in the order of the District Judge dismissing the application.*" Learned Senior Counsel sought to elucidate that the learned Trial Court had at the relevant time, rejected the application for impleadment of the *Tsurphu Labrang* as a party in the Title Suit *inter alia* on grounds that the Suit was filed by the majority of the Trustees and they sufficiently represented the case of the *Tsurphu Labrang,* who had in any event, failed to show how its interest was involved. The Hon ble High Court while considering the impugned Order of the learned Trial Court under an application filed by the *Tsurphu Labrang* under Articles 226 and 227 of the Constitution, read with Section 115 of the CPC, *inter alia* reiterated that the *Tsurphu Labrang* had not been able to indicate how its interest was involved in the Suit. Also, that the findings of the learned Trial Court were pure findings of fact which could not be upset by the High Court in its jurisdiction under Article 227 of

[6] 2016 SCC Online Bom. 7854
[7] 2005(1) A.P.L.J. 245 (HC)
[8] 1989 SCC Online Ker. 237
[9] (1998) 4 SCC 517
[10] (1975) 4 SCC 428

the Constitution and thereby dismissed the petition. That, it is in this context that the Order of the Honble Supreme Court *(supra)* came to be pronounced and should not be misinterpreted by the Petitioners. That, the rejoinder of the Petitioners herein seeks to make out that the Honble Supreme Court in its Order was referring to the 'conduct' of the *Tsurphu Labrang*, but a reading of the said Order reflects that there is indeed no mention of the 'conduct' of the *Tsurphu Labrang* nor was such an observation made. Hence, the submission of the learned Senior Counsel for the Petitioners that the matter of *Tsurphu Labrang* has been closed is an erroneous submission before this Court.

(ii) That, the reliance of the Petitioners on the ratio of ***Ashok Sharma*** *(supra)* before this Court is misplaced as the Honble Supreme Court had upheld the order of the Honble High Court of Delhi, which while discussing the provisions of Order XVI Rule 1 and Rule 1A of the CPC had set aside the order of the learned Trial Court which had disallowed the witness to furnish additional documents after closure of Plaintiffs evidence and allowed the documents to be taken on record. That, the allegation of the Petitioners herein that the documents are manufactured subsequently is devoid of any proof whatsoever. Merely because the documents have been allowed by the learned Trial Court after closure of the evidence of the Petitioners and the Respondents No.1 and 2, does not prejudice the Petitioners case as law affords them with ample opportunity to controvert the documents at the stage of cross-examination. The Petitioners by impugning the Order of the learned Trial Court seek to block relevant and genuine documents of the Respondent No.3 in order to jeopardize his interests.

(iii) Learned Senior Counsel put forth the clarification that the documents were produced by the witnesses voluntarily during the preparation of their Evidence-on-Affidavit and the Respondent No.3 was unaware of the existence of such documents, while some of the documents came into existence post the filing of the Suit. Besides, nothing in law prohibits a party from introducing documents in a Suit even if it pertains to the period subsequent to the cause of action nor are the witnesses to be limited to depose only on the facts that the party calling them are aware of. The Petitioners, in fact, received copies of the additional documents as soon as it was filed by the Respondent No.3 and therefore had sufficient time to examine the same but raised no objections then and are raising such objections now, rather belatedly. That, the Petitioners argument that the

documents are irrelevant have, in fact, been met with the reasons and relevance of each of the documents of the Respondent No.3, in his application under Order VIII Rule 1A(3) read with Section 151 of the CPC. Learned Senior Counsel walked this Court through the contents of the said petition filed before the learned Trial Court. That, the learned Trial Court, by the impugned Order, has given adequate reasons for allowing the petition of the Respondent No.3 and has observed that though the Petitioners assail the concerned documents on grounds of its admissibility, this would not be the appropriate stage for examining this aspect. That, in view of the reasons posited regarding the relevance of the twelve documents and the reasoned finding of the learned Trial Court in the impugned Order, this petition deserves a dismissal. Learned Senior Counsel for the Respondent No.3 garnered support for his submissions from the following decisions:

(a) ***Ashok Sharma*** vs. ***Ram Adhar Sharma*** (*supra*);

(b) ***Mange Ram*** vs. ***Brij Mohan*** (*supra*);

(c) ***Santveer Sing***h vs. ***Addl. Civil Judge, Hanumangarh***[11];

(d) ***M/s Sadhu Forging Limited*** vs. ***M/s Continental Engines***[12];

(e) ***Bhanumathi*** vs. ***Sarvothaman***[13];

(f) ***Rajah R.V.G.K. Ranga Rao*** vs. ***Nizams Sugars Limited***[14]; and

(g) ***Manguesh Rajaram Wagle*** vs. ***Suresh D. Naik***[15]

5. Learned Assistant Government Advocate for the State-Respondents No.1 and 2 had no submissions to make.

6. Due consideration has been given by me to the rival contentions advanced by learned Senior Counsel for the parties. I have also carefully perused all documents placed before me including the impugned Order and the citations made at the Bar.

[11] 2004 SCC OnLine Raj 59
[12] 2017 SCC Online Del 10039
[13] 2010 SCC OnLine Ker 373
[14] 2003 SCC OnLine AP 979
[15] 2016 SccOnLine Bom 7854

7. While considering the matter, it would be worthwhile to discuss the ratiocination relied on by learned Senior Counsel for the Petitioners. In ***Ram Sarup Gupta*** *(supra)*, the Hon ble Supreme Court had held that all necessary and material facts should be pleaded by the party in support of the case set up by it. In the absence of pleadings, evidence if any, produced by the parties cannot be considered. Having considered this ratio, it is necessary to remark here that learned Senior Counsel for the Petitioners failed to specify to this Court as to which specific deficit emanated in the pleadings of the Respondent No.3 over and above which he sought to produce evidence. Hence, this Judgment is of no assistance to the Petitioners case. In the case of ***Nepal Das & Anr.*** *(supra)*, the Honble High Court of Gauhati upheld the Order of the learned Trial Court rejecting the prayer of the Defendants to produce additional documents. While discussing Order VIII Rule 1A of the CPC it was *inter alia* held that leave has to be granted bearing in mind certain conditions precedent and that the reasons for granting leave may vary from case to case. The Honble High Court also found that there was complete absence of any discernible explanation from the materials on record, as to why the Defendants had not filed a list of documents enlisting therein any of the documents, which they sought to rely upon and thereby concluded that in the circumstances aforementioned, the learned Trial Courts decision not to allow the Defendants to produce the documents was wholly justified and in accord with law. In my considered opinion, the ratio *(supra)* would not assist the case of the Petitioners herein as contrary to the findings therein, the Respondent No.3 in his petition under Order VIII Rule 1A(3) read with Section 151 of the CPC has furnished sufficient grounds to explain the delay in the filing of the documents, the reasons as to why they could not be filed earlier as also their relevance. The learned Trial Court as evident from the impugned Order was satisfied by the grounds furnished by the Respondent No.3. The Petitioners have also placed reliance on ***Dugaputi Sudhakar Reddy*** *(supra),* wherein while discussing the provisions of Order VIII Rule 1A(3) of the CPC, the Honble High Court of Andhra Pradesh held that by this provision, the Defendant is permitted to produce such documents with the leave of the Court and the same may be received in evidence subject to the satisfaction of the Court, which shall be granted based on reasons found to be justifiable, believable and capable of rendering justice by deciding all issues. The discretion thus vests on the Court to consider whether the grounds put forth are satisfactory. In ***Mange Ram*** *(supra)*, the Honble

Supreme Court while discussing the provisions of Order XVI Rule 1 and Rule 1A of the CPC *inter alia* held that;

> "**9**. …Marginal note of Rule 1-A reads as „Production of witnesses without summons and the rule proceeds to **enable a party to bring *any* witness to give evidence or to produce documents without applying for summons under Rule 1**. ……………………..……………………
> Rule 1-A of Order 16 clearly brings to surface the two situations in which the two rules operate. Where the party wants the assistance of the court to procure presence of a witness on being summoned through the court, it is obligatory on the party to file the list with the gist of evidence of witness in the court as directed by sub-rule (1) of Rule 1 and make an application as provided by sub-rule (2) of Rule 1. **But where the party would be in a position to produce its witnesses without the assistance of the court, it can do so under Rule 1-A of Order 16 irrespective of the fact whether the name of such witness is mentioned in the list or not**."
>
> **(Emphasis supplied)**

We may extract the relevant provisions of Order XVI Rule 1 and Rule 1A of the CPC hereinbelow for easy reference;

> "**Order XVI**
> **Summoning and Attendance of Witnesses**
>
> **1. List of witnesses and summons to** witnesses.—(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.
>
> (2) A party desirous of obtaining any summons for the attendance of any person shall file

in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf [within five days of presenting the list of witnesses under sub-rule (1).

1-A. Production of witnesses without summons.—Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents."

Reverting back to the decision in ***Mange Ram*** *supra*, in light of the elucidation of the scheme and purpose of Order XVI Rule 1A of the CPC by the Honble Supreme Court, it is clear that the ratio holds no succour for the Petitioners case.

8. In ***Scindia Potteries & Services P. Ltd.*** *(supra),* the Honble High Court of Delhi while considering the provisions of Order VIII Rule 1A(3) of the CPC, concluded that the Defendant No.1 had failed to show sufficient cause for belated production of the said documents and no satisfactory reason was offered as to why he should be granted liberty to place them on record now, besides demonstrating a complete lack of diligence in seeking permission to produce the documents in question. That, it could not be stated that he was earlier unaware of the existence of the said documents. This Judgment, to my mind, clearly does not aid the case of the Petitioners herein being distinguishable from the facts and circumstances put forth by the Respondent No.3 with regard to the documents sought to be exhibited

through his witnesses. The documents, it is clarified by Respondent No.3, were neither in his power or possession nor was he aware of their existence to enable him to produce the documents earlier. On pain of repetition, it may be stated here that the Respondent No.3 has laboured to explain that the documents were produced by the witnesses themselves when their Evidence-on-Affidavit was being prepared, therefore lack of diligence or lack of promptitude cannot be attributed to the Respondent No.3 unlike the conduct of the Defendant No.1 in ***Scindia Potteries & Services P. Ltd.*** *(supra)* as evident from the observations made therein.

9. In ***Manguesh Rajaram Wagle*** *(supra),* the Hon ble High Court of Bombay at Goa, while discussing the provisions of Order XIV Rule 3 and Order VII Rule 14 of the CPC held that the impugned Order passed by the learned Trial Court would show that it had considered the case of the Plaintiffs seeking to produce two Files and had concluded that the Plaintiffs had not stated the relevance of each of the documents contained in the File. The Honble High Court upheld the findings of the learned Trial Court. In this context, I have to observe that in the matter at hand, the Respondent No.3 has cited the relevance of each document in his petition before the learned Trial Court which was reiterated by learned Senior Counsel before this Court.

10. Reliance was placed on ***P. Sankaran*** *(supra)*, this ratio deals with the provisions of Section 136 of the Indian Evidence Act, 1872 (for short, "Evidence Act") which lays down that the Judge is to decide the admissibility of the evidence. It was observed therein *inter alia* that when the accused wanted to cite the Counsel representing the complainant as a witness, the learned Magistrate should have asked in what manner the evidence would be relevant for the disposal of the case. The Magistrate should have issued summons only if he thought that the evidence would be relevant for the decision. Such a duty is cast on him under Section 136 of the Evidence Act. By citing this decision, the learned Senior Counsel for the Petitioners sought to impress upon this Court that it was the duty of the learned Trial Court to have considered the relevance of the twelve additional documents before allowing the petition under Order VIII Rule 1A(3) of the CPC. The learned Trial, in the impugned Order has mentioned that the question of admissibility of the documents had not arisen as yet and that the Court had only considered the grounds pertaining to relevance of the documents. In ***Ram Bihari Yadav*** *(supra)* relied on by the Petitioners

deals with Sections 3 and 5 of the Indian Evidence Act and it was observed therein that more often than not the expressions “relevancy” and “admissibility” are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant may not be admissible, for example, a communication made by spouses during marriage or between an Advocate and his client though relevant are not admissible. The Judgment thus makes a clear distinction between the „relevance of a document and its „admissibility, setting at rest the perplexity of the Petitioners on this count. Similarly, in ***State of U.P.*** vs. ***Raj Narain and Others*** *(supra)* the Honble Supreme Court has held that „admissibility presupposes „relevancy. Pausing here for a minute, it is worth noticing that this observation does not state that „relevancy presupposes „admissibility as well. In the instant case, the question of admissibility, as earlier noted, has not arisen as yet as spelt out in the impugned Order of the learned Trial Court. Hence, the ratio *supra* too provides no support to the Petitioners case. In any event, it may relevantly be remarked herein that a distinction has to be made by the parties and the learned Courts with regard to admissibility, relevance and probative value of the documents.

11. In ***Ashok Sharma*** *(supra)* relied on by both parties, the learned Senior Counsel for the Petitioners sought to emphasize that the learned Trial Court in the impugned Order failed to appreciate that the Honble High Court of Delhi after examining the provisions of Order XVI Rule 1 and Rule 1A of the CPC, had directed the documents to be produced and taken on record thereby reversing the Order of the learned Trial Court which had refused to take the documents on record. In the instant matter, however, the act of the witnesses of the Respondent No.3 were voluntary and without any directions from any Court and therefore could not be taken on record. On this count, learned Senior Counsel for the Respondent No.3 had contrarily argued that the reliance by the Petitioners on this ratio was misplaced. Having perused the said Judgment, I am inclined to agree with the submissions of learned Senior Counsel for the Respondent No.3 as the Honble Supreme Court *inter alia* observed as follows;

> “**15**. As noted hereinearlier, Order 16 Rule 1 and Rule 1-A of the Code, if read together, would clearly indicate that it is open to a party to summon a witness to the court or even may, without applying for summons, bring a witness to give evidence or to

produce documents. Since Rule 1-A is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness, who might have been brought by a party for the purpose, the leave of the court may be necessary. This by itself would not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. Such document brought by the said witness can be taken on record and it is not necessary that the plaintiff must have filed on record the copies of the said document earlier."

The Hon ble Supreme Court further went on to discuss the provisions of law as expostulated in ***Mange Ram*** *(supra)* and ***Vidhyadhar*** *(supra)* and held that;

"**17. While considering the scope of Order 16 Rule 1 and Rule 1-A of the Code, this Court in** ***Mange Ram*** **v. Brij** ***Mohan*** *[(1983) 4 SCC 36]* held that the court cannot decline to examine the witnesses produced by the plaintiff nor could the court refuse to take the documents on record through the witnesses. ....

18. Again in ***Vidhyadhar*** **v.** ***Manikrao*** *[(1999) 3 SCC 573]* this Court following the decision of *Mange Ram* v. *Brij Mohan [(1983) 4 SCC 36]* has also held that Order 16 Rule 1 and Rule 1-A of the Code permits the court to pass the order directing the witnesses to take the documents on record. Only while dealing with the application for production of documents under Order 16 Rule 1 read with Rule 1-A of the Code, what is required was that leave of the court would be necessary. ...."

(Emphasis supplied)

Now therefore, in view of the clear exposition of law as obtains in Order XVI Rule 1 and Rule 1A of the CPC by the Honble Supreme Court, it is not necessary for this Court to enter into a prolix discussion on

this legal provision. Suffice it to note that the party who seeks to examine any other witness sans appearance of their names in the list furnished before the Court, is required to show sufficient cause for the omission and such Court, for reasons to be recorded, can exercise its discretion and permit the party to call such witness either by summons or otherwise for the purposes of giving evidence and for production of documents. Concomitant to this provision are the provisions of Order XVIII Rule 4 of the CPC which provides as follows;

> "**4. Recording of evidence**.(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence;
>
> **"...Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court. ..."**
>
> **(Emphasis supplied)**

On the same lines due consideration is also to be taken of the provisions of Order XIII Rule 2(3) of the CPC which lays down as follows;

> "**3. Rejection of irrelevant or inadmissible documents**.- The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection."

This provision empowers the Court to reject a document at any stage of the Suit if it is found either to be irrelevant or otherwise inadmissible. The Court can thus take necessary steps even if no objection is raised by any party with regard to any document, should the Court be of the opinion that the document would be of no assistance in the final and complete adjudication of the issues in *lis.*

12. That having been said, we may now refer to and consider the provisions of Order VIII Rule 1A of the CPC which was inserted by the

amendment of 2002 and came into effect from 01.07.2002. This provides as follows;

> "**1-A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him**.- (1) Where the defendant bases his defense upon a document or relies upon any document in his **possession or power**, in support of his evidence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.
>
> (2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.
>
> (3) **A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit**. ……….."

(Emphasis supplied)

The emphasis in Rule 1A(1) *supra* is on the words "possession or power." Hence, the provision unambiguously casts a duty on the Defendant to produce documents upon which either the relief is claimed by him or on which he relies upon, when such a document or documents are in his possession or power. Should the document(s) not be in his possession or power then the Defendant shall inform the Court as to in whose power or possession the document is in. Rule 1A(3) of the CPC requires that when such document(s) which ought to have been produced by the Defendant but have not been so produced, cannot be received in evidence on his behalf without the *leave of the Court*. It thereby concludes that should the Defendant fail to file a document in terms of the provisions of Order VIII

Rule 1 of the CPC, he may do so under the provisions of Order VIII Rule 1A (3) of the CPC, subject to the leave of the Court. The Court, under this provision, is to exercise its powers judiciously at the same time considering the *bona fides* of the party, the reasons put forth by the party and the relevance of the document as well as reasons for its non-filing earlier. Should the Court be satisfied with the grounds furnished by the concerned party then and only then shall it grant leave to the party making the prayer to file the documents.

13. The learned Trial Court in the impugned Order while exercising its discretion under Order VIII Rule 1A (3) of the CPC allowed the application of the Respondent No.3 on due consideration of the grounds put forth by the Respondent No.3, which for brevity are not being reiterated here. The Respondent No.3 has clarified that he had no inkling as to the existence of these documents for the reasons already given in his petition filed before the learned Trial Court. In my considered opinion, this shows the *bona fides* of the Respondent No.3.

14. The Petitioners harbor apprehensions on the count that as *Shamarpa Rinpoche* has since passed, the authenticity of his signature cannot be tested. This is an uncalled for apprehension as the Indian Evidence Act, 1872 makes adequate provision for such contingencies. The argument that the case of the Petitioners is jeopardized by the belated and *mala fide* steps of the Respondent No.3 cannot be countenanced as the Petitioners will be afforded sufficient opportunity to controvert and refute the documents during cross-examination besides the steps taken by the Respondent No.3 cannot be stated to be *mala fide*.

15. The argument advanced by learned Senior Counsel for the Petitioners pertaining to the efforts of the Respondent No.3 at resurrecting the *Tsurphu Labrang* is not being ventured into, in any event, parties would do well to carefully peruse and consider the Orders of the Honble Supreme Court in ***Tsurphu Labrang*** vs. ***Karmapa Charitable Trust and Others*** *(supra),* to which the attention of this Court was invited by learned Senior Counsel for the Respondent No.3 earlier on.

16. In conclusion, it is apposite to observe that no fixed formula can be provided for leave to be granted by the Court under Order VIII Rule

1A(3) of the CPC. The learned Trial Court herein deemed it appropriate to grant leave in the facts and circumstances as obtained in the matter on due consideration of the grounds put forth by the Respondent No.3. I have also given careful consideration to the grounds for the belated filing of the documents by the Respondent No.3 and the reasons enumerated by learned Senior Counsel for the said Respondent and I am satisfied with the grounds thus put forward.

17. While considering the entire gamut of facts and circumstances placed before this Court, the relevant provisions of law, the ratio relied on by the parties and the reasons given by the Respondent No.3 and by the learned Trial Court in its Order, no interference is warranted in the impugned Order.

18. The petition being devoid of merit deserves to be and is accordingly dismissed and disposed of. Pending applications, if any, also stand disposed of.

19. No order as to costs.

20. Copy of this Judgment be forwarded to the learned Trial Court for information.

SLR (2020) SIKKIM 613
(Before Hon'ble the Chief Justice)

R.S.A No. 03 of 2016

Shri Chewang Dorjee Bhutia ….. APPELLANT

Versus

Smt. Ruth Haleem @ Ruth Karthak Lepcha ….. RESPONDENTS and Others

For the Appellant:	Mr. N. Rai, Senior Advocate with Ms. T.P. Bhutia, Advocate.
For Respondent No.1:	Mr. A. Halim, Constituted Attorney.
For Respondent 2-3:	Ms. Yeshi W. Rinchen, Government Advocate.

Date of decision: 29th September 2020

A. Code of Civil Procedure, 1908 – S. 11 – ***Res judicata*** **–** In determining the application of the rule of *res judicata* the Court is not concerned with correctness or otherwise of the earlier judgment. A wrong decision by a Court having jurisdiction is as much binding as a right one and the same can be over-turned by only taking recourse to appeal or review. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier suit between the same parties cannot also be challenged in a subsequent proceeding. Once a judgment in a former suit attains finality, it binds the parties totally in all issues relating to the subject-matter of the suit or proceeding. In order to sustain a plea of *res judicata*, it is not necessary that all the parties to the litigation must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim. *Explanation IV* of S. 11 of C.P.C provides that where any

matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of defence or attack, shall be deemed and regarded as having been constructively in issue directly and substantially in the former suit. A party who seeks to raise that kind of plea would be precluded from taking the plea against the same party in a subsequent proceeding which is based on the same cause of action. In other words, even though a particular ground of defence or attack was not actually set up as a ground of defence or attack in an earlier suit, if it was capable of being taken in the earlier suit, it stands as a bar in regard to the said issue being taken in the subsequent suit on the touchstone of principle of constructive *res judicata*.

(Para 11)

B. Code of Civil Procedure, 1908 – S. 11 – *Res judicata* – The appellant did not prefer any appeal against the said judgment and decree dated 09.01.1986. As such, it will not be open for the appellant to contend by filing a fresh suit that the judgment rendered in Civil Suit No. 23 of 1980 was faulty and not correct as the same was, according to him, rendered going beyond the sale deed and that, therefore, principle of *res judicata* will not be attracted – The argument that the plaintiff in Civil Suit No. 23 of 1980 had suppressed the fact that the suit land was resold to the original owner i.e. father-in-law of the appellant by the plaintiff of Civil Suit No. 23 of 1980 by an agreement dated 06.05.1969 and therefore, principle of *res judicata* is not applicable, has no merit. If the agreement dated 06.05.1969 was suppressed by the plaintiff of Civil Suit No. 23 of 1980, it should have been pleaded accordingly by the appellant in Civil Suit No. 23 of 1980. It was also not pleaded by the appellant in the present suit that he was not aware of agreement dated 06.05.1969 earlier. It is worth remembering that in Civil Suit No. 23 of 1980, the appellant herein had, on the contrary, questioned the sale deed dated 07.02.1959 to be a forged, fabricated and manufactured document and had claimed the suit land on the basis of a gift. Even when WP (C) N0. 48 of 2006 came to be disposed of on 13.11.2006, i.e, about 5 months before the suit was filed by the appellant on 26.04.2007, the appellant had not raised the issue of the agreement dated 06.05.1969 and had submitted before the Court that he had no concern with the land purchased by the plaintiff of Civil Suit No. 23 of 1980 – In view of the above discussion, substantial question of law no. 2 is answered against the appellant.

(Para 34)

C. Notification No. 2947G dated 22.11.1946 – Validation of Unregistered Document – The agreement dated 06.05.1969, which the appellant claims to be a sale deed, is not a registered document – Notification No. 2947G, by using the expression "may", gives a discretionary power on the Court to validate and admit an unregistered document which was required to be registered. It is not an automatic formality that the Court has to invariably grant liberty to validate such an unregistered document and have it admitted in the Court without any consideration to the attending facts and circumstances – By the time Notification No. 2947G dated 22.11.1946 was issued, Sikkim State Rules Registration of Documents, 1930 had come into force and the aforesaid Rules of 1930 was also noted in the Notification No. 2947G – Rule 21 of Rules of 1930 provides that a document required to be registered shall be presented either by the person executing it or by the person claiming under it. The Notifications dated 11.04.1928 and 22.11.1946 make it clear that an unregistered sale deed shall not be considered valid unless validated – Rule 24 provides that no document relating to immovable property shall be accepted for registration unless it contains a description of the property sufficient to identify the same – A reading of Exhibit-P4 (*Rajinama*) goes to show that the document contains no description of the property. A document presented for registration must be self-contained and therefore, under Rule 24 of the Rules of 1930, the agreement dated 06.05.1969, even if had been presented before the Registering Authority, could not have been accepted for registration – No case is made out to permit validation of agreement dated 06.05.1969 after 51 years of its alleged execution.

(Paras 35, 37, 38, 39 and 40)

Appeal dismissed.

JUDGMENT

Arup Kumar Goswami, CJ

The appellant had filed a suit in the Court of Civil Judge, South Sikkim at Namchi, registered as Title Suit No.04/2007, against the plaintiff of Civil Suit No. 23 of 1980 as defendant no.1 and District Collector, South District, Namchi and Sub-Divisional Magistrate, Rabongla, as defendant nos. 2 and 3, respectively, with the following prayers :

"(a) To declare the plaintiff as the rightful owner of the schedule land.

(b) Impound the Purcha of Defendant No.1 bearing No.32/170 issued in the name of Ruth Karthak Lepcha pertaining to plot no.129, 53/813 and 58/814.

(c) For a decree cancelling the Parcha Khatyan No.32/170 issued in the name of Ruth Karthak Lepcha.

(d) Alternatively, to declare that the Plaintiff has acquired right, title & ownership over the schedule land by way of adverse possession against the Plaintiff.

(e) Pass such other and further order/s as this Hon'ble Court deem fit and proper in the facts and circumstances of the case, in the interests of justice and equity."

2. The schedule of the plaint reads as follows:

SCHEDULE

"All that piece and parcel of immovable property being portions of land bearing Plot/Khasra No.53 & 58 admeasuring 0.6200 & 0.1800 hecters respectively situated in Rabang Block, Ben-Namphrik Elaka, Rabongla, South Sikkim which is butted and bounded as follows:

East: C.F of Ruth Karthak

West: Reserved Forest

North: C.F. of Sherab Bhutia & Cho Lhamu

South: C.F. of Ruth Karthak"

3. The aforesaid suit was transferred to the Court of Civil Judge, Junior Division at Mangan, North Sikkim, wherein the same was registered as Title Suit No. 04 of 2014. The suit was dismissed by the learned Trial Court by judgment and decree dated 30.09.2015. The appeal preferred by the appellant being Title Appeal No.1 of 2015 having been dismissed by the learned District Judge, North Sikkim by judgment and decree dated 09.06.2016, the appellant has filed this Second Appeal.

4. By an order dated 12.04.2017, the Second Appeal was admitted to be heard on the following substantial questions of law:-

"1. Whether the present suit land (a Bhutia land) could be transferred in favour of a Sikkimese woman (the respondent No. 1/defendant No. 1) married to a non-Sikkimese, in view of the following applicable laws of Sikkim, which are protected as old laws under Article 371 (f) of the constitution of India:-

a. Notice of John C. White, Political officer, Sikkim, dated 2nd January 1897.

b. Revenue order no. 1 dated 17th May 1917.

c. Sikkim State General Department Notification no. 660/G of C.E. Dudley, General Secretary to his Highness the Maharaja of Sikkim dated 21st May 1931.

d. Sikkim State Land Revenue Department Notification no. 3082/LR dated 24th March 1954 issued by the Mahararja of Sikkim.

e. Government of Sikkim Land Revenue Department O.O no. 105/LR dated 25th February 1961.

f. Land Revenue Department Notification no. 28/L.R dated 21st April 1969 by which it is clear that the said laws prohibits the transfer of immovable property of a Bhutia in favour of a non Bhutia and whether the previous judgment rendered without examining the effect of the said laws would be binding and the subsequent suit held to be barred Res judicata?

2. Whether the first Appellate Court was correct in holding that the present suit was barred by Res judicata when the pleadings and documents on record clearly reveal that the Judgment in the previous title suit had been rendered beyond the sale deed by which the Respondent No. 1/Defendant No. 1 who was the Plaintiff in the previous suit had claimed title and further when the said

judgment had been obtained by the suppressing the fact that the said suit land had been resold to the original owner, the father in law of the Appellant/ Plaintiff vide agreement dated 06.05.1969 which agreement was found to be not forged or fabricated or manufactured for the purpose of the present suit and further when against the said finding of the learned Trial Court no appeal was preferred by the Respondent No. 1/ Defendant No. 1?

3. Whether the Appellant / Plaintiff can be made to suffer a judgment and a decree against the Appellant/Plaintiff due to the mistake or illegality committed by the Trial Court in framing a wrong issue relating to the Appellants plea of adverse possession and rendering a judgment on an issue which was not contested and failing to render a judgment on an issue which ought to have been framed and the first Appellate Court perpetuating the said wrong?

4. Whether the Judgment dated 09.01.1986 in Civil Suit No. 23 of 1980 could be enforced or executed without a decree having been passed pursuant to the said judgment and Whether the first Appellate Court was correct in holding that in spite of the non execution of the Judgment dated 09.01.1986 by the Respondent no. 1/Defendant no. 1 beyond the period of limitation it could still not be held that of Respondent no. 1/Petitioner no. 1 had waived off her rights? 5. Whether in view of Notification no. 2947/G dated 22 nd November 1946, before shutting out a document from evidence on the ground of non registration and non-validation the Appellant/ Plaintiff who sought to rely upon the said non registered document ought to have been allowed to validate the same by paying the penalty as prescribed after coming to a finding that the said document ought to have been registered by the first Appellate Court even whilst holding that the said document was not a forged and fabricated document?"

5. The case of the appellant in the suit was that he is a son -in -law of Late Mandal Nedup Bhutia, who was the original owner/ title holder of a cardamom field bearing plot no.33 with an area of 6.24 acres and that his

father-in-law was stated to have sold a portion of land falling under plot no.33 to defendant no.1, who is his niece, by a Sale Deed dated 07.02.1959. As she was married to one Mr. A. Halim, the transaction was not permissible as per law. After such sale, Mandal Nedup Bhutia remained in possession of the balance portion of the land falling outside the boundary of Sale Deed dated 07.02.1959 and cultivated the same through cultivators till 1967 when he gifted the same to his daughter in the form of "Peezo" and thereafter, he and his wife (who died in 1996) have been in continuous, unencumbered and uninterrupted possession of the land falling under the plot no.33 by cultivating the same through different cultivators. In paragraph 28, the appellant had also set up an alternative plea of acquiring right, title and interest over the land described in the schedule by way of adverse possession.

6. Further case of the appellant is that in the survey that was conducted in the year 1979-1980, plot no.33 along with other plots were divided into plot nos. 53, 58, 129,130, 393, 57/68 and the same were recorded in the name of his wife, Sonam Gymki Bhutia, vide Parcha Khatiyan dated 25.05.1982. In the year 1969, when the defendant no.1 was externed from Sikkim, she being in need of money had sold the plot of land which she had purchased from Late Mandal Nedup Bhutia back to him at a consideration of Rs. 4,000/- and the transaction was reduced in the form of an Agreement dated 06.05.1969, executed and signed by the defendant no.1. After revocation of the order of externment, the defendant no.1 filed an application for mutation in respect of the purchased land in the year 1979, to which an objection was filed by the appellant and his wife. The Deputy Commissioner, South Sikkim, by his order dated 24.11.1980, observed that parties may approach the appropriate forum in view of there being disputed questions of right and title pertaining to the land in question and accordingly, the defendant no.1 had filed a suit in the Court of learned Civil Judge, Namchi being Civil Suit No.23 of 1980. It is stated that during the pendency of the suit, a Receiver was appointed and he had taken possession of suit land (qualifying the same to be the portion which had been purchased by defendant no.1 in the year 1959 from her uncle late Mandal Nedup Bhutia and resold back to him on 06.05.1969). After the suit was decreed vide judgment dated 09.01.1986, the learned Court directed the Receiver to hand over the suit land as well as crops to the plaintiff of Civil Suit No.23 of 1980 and the Receiver, by executing a document dated 06.03.1986, handed over possession of the suit land and

the crops to the plaintiff of Civil Suit No.23 of 1980. It is pleaded that the plaintiff of Civil Suit No.23 of 1980 (the respondent no.1 herein) took possession of a portion of plot no.33 which was purchased by her without any demur from the Receiver and had raised no dispute with regard to remaining portion of plot no.33.

7. It is further pleaded by the appellant that the plaintiff of Civil Suit No.23 of 1980 (the respondent no.1 herein) had approached the High Court of Sikkim by filing a writ petition being WP(C) No.40 of 2006 and during the pendency of the said writ petition, he, as respondent no.7 the said writ petition, had made a statement that he had no concern with the land of the writ petitioner, which was purchased from Nedup Bhutia in the year 1959. On 02.12.2006, when Parcha issued to the plaintiff of Civil Suit No.23 of 1980 was shown to the Court, it was found that the entire plot no.33 (old) corresponding to Khasra no.129, 53/813, 58/814 had been found to be recorded in the name of the plaintiff of Civil Suit No.23 of 1980 and accordingly, he approached District Collector, South Sikkim on 18.12.2006 raising objection to the issuance of the above Parcha. The District Collector, vide his letter 27.07.2007, intimated that the aggrieved party may approach appropriate forum for redress and accordingly, the suit was filed.

8. In the written statement, the defendant no.1 (plaintiff of Civil Suit No.23 of 1980) had stated that the suit was filed by making false allegations with the ulterior motive of trying to grab the suit land of which she is the rightful owner in view of the judgment dated 09.01.1986 passed in Civil Suit No.23 of 1980. While referring to the case of the appellant, in sum and substance, it is stated that the issues raised were gone into and decided in Civil Suit No.23 of 1980. However, in specific terms plea of res judicata was not raised. The plea that only part of plot no.33 was sold to her was denied and it is stated that the entire plot no.33 was the subject matter in Civil Suit No.23 of 1980. It is further stated that such a plea was not raised in that suit. It is also stated that the case projected that she had sold back the land purchased by her is in the realm of complete fiction and document dated 06.05.1969 is a fraudulent document.

9. In the written statement, defendant nos.2 and 3 stated that the appellant in the suit filed by him had taken pleas which are contradictory to the stand taken by him in Civil Suit No.23 of 1980.

10. The following issues were framed in the suit:

"(1) Whether the suit land is an ancestral property of the Plaintiff's wife? (2) Whether the suit land was sold to defendant No1 vide sale deed dated 07.02.1959 and resold back by Defendant No1 to the father-in-law of the Plaintiff? (3) Whether Defendant No.1 has waived off her right to the suit premise by not executing the decree dated 09.1.1986 passed by the Ld Civil Judge South in Civil Suit No 23 of 1980? (4) Whether Defendant No1 can legally acquire any land after marrying Shri A Halim a resident of West Bengal?

(5) Whether the Defendant No1 has perfected her title over the suit land by virtue of adverse possession? (6) To what relief(s) is/are the plaintiff entitled? (7) Whether the suit of the Plaintiff is maintainable? (8) Whether the suit of the Plaintiff is barred by the principle of Constructive Res judicata and /or Res Judicata? (9) Whether the suit has been filed by the Plaintiff to frustrate the Judgment/ decision of the Court of Ld Civil Judge, South Sikkim, at Namchi dated 09.01.1986 passed in civil suit no 23 of 1980, Smt Ruth Karthak Lepchani v Shri Chewang Dorjee Bhutia and another? (10) Whether the filing of the present suit is an abuse of the process of the Court? (11) Whether the document purported to be the alleged agreement dated 06.05.1969 allegedly executed between the Defendant No1 and the father in law of the present plaintiff (filed as P-4 annexed to the plaint) is a forged and fabricated document manufactured for the purpose of this case? (12) Whether the plaintiff is in possession of the suit land as alleged by him (and if yes, how did he come to possess it)? (13) Whether the suit is barred by law of limitation? (14) Whether the suit is bad for mis-joinder of parties?"

11. Before I proceed any further, it will be apposite to take note of Civil Suit No.23 of 1980 to understand the issues as also the substantial questions of law in their correct perspective. Respondent no.1 in the present appeal had filed the aforesaid suit against the appellant and his wife in the

Court of Civil Judge, South District, Sikkim for declaration of title, restoration of possession and correction of land records in respect of a cardamom field falling under plot no.33, bearing an area of 6.24 acres, situated at Rabongla Basti, South Sikkim. The case of the plaintiff in Civil Suit No.23 of 1980 was that she had purchased the aforesaid plot of land from one Nedup Bhutia @ Sangmu Mandal (since deceased) and the Sale Deed was registered in the year 1959 and she being in continuous possession of the property was enjoying the income accruing from cardamom cultivation till the year 1968. She was arrested by the then Chogyal on charges of sedition in the year 1967 and was lodged in jail till 10.03.1969 and was thereafter externed from Sikkim in May 1969. The said externment order was revoked by notification dated 27.04.1977. During the period of her externment, a number of people grabbed her many properties in Sikkim and the suit land measuring 6.24 acres came to be illegally possessed by the defendants.

12. Civil Suit No.23 of 1980 was contested by the defendants (present appellant and his wife) stating that the suit land was in their continuous possession since the year 1967, when the same was given to the defendant no.2 by her father Nedup Bhutia as a gift. A counter-claim was lodged by the defendants challenging the Sale Deed dated 07.02.1959 on the ground that the Sale Deed was a forged and fabricated document obtained by the plaintiff in collusion with one Passang Tshering Bhutia. The defendants also claimed that they were in adverse possession of the suit land and that the suit was barred by limitation. Stand was taken that plaintiff was married to one A. Halim and as such she had lost her right to acquire landed property within the State of Sikkim.

13. In the said suit, following issues were framed:

"(i) Whether the plaintiff purchased the suit land from Nedup Bhutia @Mangam Mondal in the year 1959 under registered sale-deed, if so, whether the same is legal valid and sufficient to confer right, title and interest to the plaintiff over the suit land properties?

(ii) Whether the suit properties was given as gift to the defendants by Nedup Bhutia in the year 1967, if so, whether the same is legal, valid and sufficient to confer right, title and interest to the defendants?

(iii) *Whether the suit land is in adverse possession of the defendants?*

(iv) *Whether the suit is barred by the law of limitation?*

(v) *Whether the suit is hit by the principle of waiver, estoppels and acquiescence?*

(vi) *To what other relief or reliefs the parties are entitled to?"*

14. During the pendency of Civil Suit No.23 of 1980, a Receiver, namely, Shri Pando Tsong Kazi was appointed. While 4 witnesses were examined on behalf of the plaintiff, defendant no.1 (appellant herein) had deposed for defendants. Suffice is to say at this juncture that by judgment dated 09.01.1986, the learned Court decreed Civil Suit No.23 of 1980 by deciding all the issues in favour of the plaintiff of the suit. No appeal was preferred by the appellant herein challenging the aforesaid judgment and decree.

15. A notice was issued by the Court to the Receiver on 05.03.1986 to handover the suit land as well as the crop to the plaintiff. The Receiver in terms of the judgment and the notice handed over the cardamom field covered by plot no.33 and the crop to plaintiff of the said suit on 06.03.1986. 16. It will also be relevant, at this point, to take note of a proceeding initiated by the present respondent no.1 before the High Court of Sikkim, which was registered as WP(C) No. 40 of 2006. While it is not necessary to dilate on the issues raised in the said writ petition, what needs to be noticed is that in the order 30.11.2006, it was recorded that a statement was made by the counsel for the respondent no.7 (the appellant herein) after having consultation with him that he had no concern with the land of the writ petitioner (respondent no.1 herein and plaintiff in Civil Suit No.23 of 1980), which she had purchased from his father- in- law, Late Nedup Bhutia, in 1959. The aforesaid writ petition was disposed of by an order dated 2.12.2006 stating that grievance made by the petitioner had disappeared and that if she had any other grievance, she may move appropriate authorities. The Court also took note of a Parcha Khatian bearing no.32 of 170. While the petitioner therein had sought to contend that the Parcha in question ought to have been handed over in the year 1981, the respondent no.7 (appellant herein) had raised a grievance with

regard to the aforesaid Parcha to which this Court observed that he may articulate his grievance, if any, before appropriate authorities.

17. Mr. N. Rai, learned senior counsel for the appellant has submitted that the learned Courts below had committed a grave error of law in holding that the present suit is hit by res judicata . According to him, when decree in Civil Suit No. 23 of 1980 was not executed by the plaintiff of the aforesaid suit, the judgment rendered in Civil Suit No. 23 of 1980 has become non-est in law and therefore, principle enshrined in res judicata will not be applicable to the suit filed by the appellant. Even otherwise, issues in the present suit cannot be said to be directly or substantially in issue in Civil Suit No. 23 of 1980, he submits. The suit land in the suit filed by the appellant is also not the suit land of Civil Suit No. 23 of 1980. He has contended that judgment rendered in Civil Suit No. 23 of 1980 was obtained by the plaintiff of that suit by suppressing the material fact of her having sold back the property purchased by her to her vendor Nedup Bhutia and besides, the judgment was rendered going beyond the Sale Deed on which the plaintiff of Civil Suit No. 23 of 1980 had rested her claim. He has further submitted that no issue was framed with regard to the plea of adverse possession set up by the appellant as a result of which the appellant is prejudiced. It is his further contention that the appellant was entitled to an opportunity to have the Agreement dated 06.05.1969,which is an unregistered document, validated in terms of Notification No.2947G dated 22.11.1946, but the same was denied to the appellant resulting in miscarriage of justice. Accordingly, he has submitted that IA No.1 of 2016, which is an application praying for validation of Agreement dated 06.05.1969, deserves to be allowed.

18. Mr. A. Halim, the constituted attorney of the respondent no.1 has supported the impugned judgments. It is also submitted that Agreement dated 06.05.1969 is a fraudulent and manufactured document created for the purpose of the case. He contends that in the facts and circumstances of the case no substantial question of law arises in this appeal and the appeal deserves to be dismissed.

19. While supporting the impugned judgments, Ms. Rinchen submits that dispute is primarily between the appellant and respondent no.1.

20. I have considered the submissions advanced and have perused the material on record.

21. In determining the application of the rule of res judicata the court is not concerned with correctness or otherwise of the earlier judgment. A wrong decision by a court having jurisdiction is as much binding as a right one and the same can be over-turned by only taking recourse to appeal or review. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier suit between the same parties cannot also be challenged in a subsequent proceeding. Once a judgment in a former suit attains finality, it binds the parties totally in all issues relating to the subject-matter of the suit or proceeding. In order to sustain a plea of res judicata, it is not necessary that all the parties to the litigation must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim. Explanation IV of Section 11 of Civil Procedure Code, 1908 (for short, CPC) provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of defence or attack, shall be deemed and regarded as having been constructively in issue directly and substantially in the former suit. A party who seeks to raise that kind of plea would be precluded from taking the plea against the same party in a subsequent proceeding which is based on the same cause of action. In other words, even though a particular ground of defence or attack was not actually set up as a ground of defence or attack in an earlier suit, if it was capable of being taken in the earlier suit, it stands as a bar in regard to the said issue being taken in the subsequent suit on the touchstone of principle of constructive res judicata.

22. The learned Trial Court had taken up issue no.8 at the first instance. While doing so, it also took note of issue no.2. The learned Trial Court held that though the defendant nos.2 and 3 are new parties in the present suit as compared to the former suit, it would not make any difference since the plaintiff in Civil Suit No. 23 of 1980 is the defendant no.1 in the present suit and the issue involved between them is same and that the former judgment made it clear that they are litigating under the same title. It was

held that the suit land as described by the appellant is a portion of plot no.53 and 58, which is curved out of plot no.33 and therefore, the suit land involved in the present suit was also the subject matter of the former suit and a finding of fact was recorded that suit property was not different from what it was in the former suit. It was also observed that the learned Court in Civil Suit No. 23 of 1980, on the strength of Sale Deed dated 07.02.1959, had declared title in favour of the plaintiff of Civil Suit No. 23 of 1980 (respondent no.1 herein) over entire plot no.33 and therefore, the suit was barred by res judicata. It was further held that even assuming that division of plot no. 33 had taken place when the earlier suit was decided, then also the issue was constructively in issue. The issue as to whether defendant no.1 (plaintiff of Civil Suit No. 23 of 1980) had sold the land purchased by her vide Sale Deed dated 07.02.1959 back to Mandol Nedup Bhutia vide Agreement dated 06.05.1969, which is one limb of issue no.2, was held to be barred by constructive res judicata on the ground that the plaintiff ought to have raised that issue in Civil Suit No. 23 of 1980 in view of his claim that Agreement dated 06.05.1969 was executed in the year 1969. It was also held that cause of action for filing the suit as highlighted by the plaintiff is not different from what existed at the time of filing counter-claim and the defence in the former suit. Issue no.2 was, accordingly, decided in the light of the reasoning given in issue no.8.

23. With regard to issue no.1, the learned Trial Court held that apart from the fact that the plaintiff had miserably failed to prove that the suit property was ancestral property, the said plea is also barred by the principles of constructive res judicata as it was implicitly decided in the former suit and the plaintiff ought to have raised or defended the former suit in that respect as well. Issue No.3 was decided holding that the defendant no.1 had not waived the right over the suit land but merely had waived the right to execute the decree over the suit property. As no evidence was led by defendant no.1, it was held in issue no.5 that defendant no.1 does not have title over the suit property by way of adverse possession.

24. In issue No.4, the learned Trial Court held that Married Woman's Property Regulation, 1962 ,proclaimed by the Maharaja of Sikkim vide notification dated 12.02.1962, on which reliance was placed by the plaintiff, is not applicable to the Sale Deed executed in the year 1959 as the notification did not have retrospective effect. It was further held that though no specific issue was framed on that count in the former suit ,yet it was a

matter which was constructively in issue in that suit. The learned Court also observed that in issue no.1 of Civil Suit No. 23 of 1980, a clear finding was recorded that the defendants therein (appellant and his wife) had failed to prove that the plaintiff (present defendant no.1) was incapable of acquiring landed properties in Sikkim as she was married to Mr. A. Halim.

25. The suit was held to have been filed to frustrate the judgment dated 09.01.1986 passed in Civil Suit No.23 of 1980 in issue no.9 and in issue no. 10, it was held that the filing of the suit was an abuse of the process of the court. It was observed that though the plaintiff contended that defendant no.1 took possession only of a portion of land out of 6.24 acres of land, which was the subject matter of Civil Suit No.23 of 1980, from the Receiver appointed in Civil Suit no.23 of 1980, such contention is belied by Exhibit-P6. 26. In issue no.11, it was held that in absence of any evidence led by the defendants, it cannot be said that Exhibit-P4 is a forged, fabricated and manufactured document.

27. While deciding issue no.12, the learned Trial Court examined and evaluated the evidence of the witnesses examined on behalf of the plaintiff as well as maps exhibited by him as Exhibit - P9, P10, P11 and P12. The learned Trial Court did not place any reliance on these Exhibits as well as on the evidence of the witnesses of the plaintiff in view of the infirmities recorded during the course of discussion and it was held that the plaintiff had failed to prove that he possesses the suit property.

28. Issue No.13 and 14 were decided in favour of the plaintiff and in issue no.7, the suit was held to be not maintainable on the ground that suit of the plaintiff is barred by the principle of res judicata.

29. The learned Appellate Court, while deciding issue no.8, observed that in the written statement filed in Civil Suit No.23 of 1980, the appellant as defendant no.1 nowhere stated that Mandol Nedup Bhutia had sold out only a portion of plot no.33 and that he had also not raised any dispute with regard to the boundaries. The learned Appellate Court held that as the appellant raised that issue for the first time in the present suit despite having contested the former suit without taking any such plea in that regard in his written statement and the counter-claim, the claim of the appellant is barred by constructive res judicata. On the same analogy, the claim of the appellant that the defendant no.1 had sold the same property which was purchased

by her back to her vendor was negated. It was also observed that Exhibit-P4, pressed into service by the appellant, being an unregistered document, cannot be relied on in absence of validation under Notification No.2947G dated 22.11.1946. The learned Appellate Court held that judgment in the former suit in connection with plot no.33 comprising an area of 6.24 acres having been delivered by competent Court on being duly contested and the said judgment having not been challenged by the appellant, the decision rendered in the earlier suit attained its finality and cannot be re-opened. In view of decision in issue no. 8 as well as Exhibit-P4 being an unregistered document, the learned Appellate Court decided issue no. 2 against the appellant.

30. While upholding the decision of the learned Trial Court in issue no.1, the learned Appellate Court observed that right, title and interest of the plaintiff in Civil Suit No.23 of 1980 over the suit property had already been determined by the competent Court in the former suit and therefore, in the subsequent suit, the appellant cannot claim the property to be ancestral property.

31. The learned Appellate Court affirmed the view taken by the learned Trial Court in issue nos.3, 6, 7, 9, 10, 12, 13 and 14. Issue nos. 5 and 11 were not pressed by the learned Counsel for the appellant. While affirming issue no.4, the learned Appellate Court held that the said issue is also barred by constructive res judicata in view of the clear finding in issue no.1 of the former judgment that the defendant no.1 (appellant herein) had failed to prove that the plaintiff of Civil Suit No.23 of 1980 was incapable of acquiring property in Sikkim being married to Mr A. Halim. The learned Appellate Court also observed that the Notification dated 12/10/1962 relating to Married Woman's Property Regulation, 1962, proclaimed by the Maharaja of Sikkim would not be applicable as the said Notification was never implemented and therefore, even otherwise, there was no bar for the defendant no.1 to hold the suit property even if she was married to a non-Sikkimese or non-tribal.

32. So far as substantial question of law no.1 is concerned, it is seen that in issue no.1 of Civil Suit No.23 of 1980, the learned Court had recorded that it could unhesitatingly be held that plaintiff (respondent no.1 herein) had purchased the suit land from Nedup Bhutia in the year 1959 by a registered sale deed conferring right, title and interest on the plaintiff

(respondent no.1 herein).Though no specific issue was framed in Civil Suit No.23 of 1980, the learned Court held that the defendants (including appellant herein),though had raised the issue, failed to prove that at the time of transaction of sale of suit land, the plaintiff was incapable of acquiring landed property in Sikkim being married to Mr.A. Halim, a non-tribal. The appellant herein had the opportunity to substantiate the point sought to be canvassed in substantial question of law no.1, but he failed to do so in the former suit. It is also seen that the documents which find mention in substantial question of law no.1 were neither referred to in the pleadings nor argued as is evident from the judgments of the Courts below. In absence of any appeal preferred against the judgment and decree dated 09.01.1986 passed in Civil Suit No.23 of 1980, the findings had attained finality and therefore, it will not be open for the appellant to re-agitate the issue all over again. In view of the above discussion, in the present factual matrix, substantial question of law no.1 is answered against the appellant.

33. Coming to the substantial question of law no.2, at the outset, it is to be noted that the appellant as plaintiff in the present round of litigation, had introduced a new plea, namely, that there was an Agreement dated 06.05.1969 (referred to as Razinama in the translated version of Exhibit–P4 in the paper book) executed and signed by defendant no.1 (plaintiff of Civil Suit No.23 of 1980) by which the land purchased by the defendant no.1 (plaintiff of Civil Suit No.23 of 1980) had sold back her purchased land to Mandol Nedup Bhutia. The plaintiff in Civil Suit No.23 of 1980 rested her claim on the strength of the Sale Deed dated 07.02.1959. It is to be noticed that in Civil Suit No.23 of 1980 the appellant had taken a stand in his written statement that the suit land was in continuous possession of the defendants since the year 1967 when the same was given to the defendant no.2 (wife of the appellant) by her father Nedup Bhutia as a gift. A counter-claim was lodged by the defendants in Civil Suit No.23 of 1980 challenging the Sale Deed dated 07.02.1959 on the ground that the Sale Deed was a forged and fabricated document which was obtained by the plaintiff in collusion with one Passang Tshering Bhutia. The learned Court in Civil Suit No.23 of 1980 in issue no.2 had held that there was no gift in favour of the defendants, who were minors in the year 1967, and had categorically declared title in favour of the plaintiff of Civil Suit No.23 of 1980 in respect of suit land covered by plot no.33 measuring 6.24 acres. It is also relevant to note that the appellant himself in paragraph 2 of the plaint had stated that plot no.33 has an area of 6.24 acres. Therefore, submission of Mr. Rai that

Nadup Bhutia had sold only a portion of plot no.33 and that suit land in the suit filed by the appellant is different from the suit land in Civil Suit No.23 of 1980 has no merit.

34. As noticed earlier, the appellant did not prefer any appeal against the said judgment and decree dated 09.01.1986. As such, it will not be open for the appellant to contend by filing a fresh suit that the judgment rendered in Civil Suit No.23 of 1980 was faulty and not correct as the same was, according to him, rendered going beyond the Sale Deed and that, therefore, principle of res judicata will not be attracted. The argument that the plaintiff in Civil Suit No.23 of 1980 had suppressed the fact that the suit land was resold to the original owner i.e. father- in- law of the appellant by the plaintiff of Civil Suit No.23 of 1980 by an Agreement dated 06.05.1969 and therefore, principle of res judicata is not applicable, has no merit. If the Agreement dated 06.05.1969 was suppressed by the plaintiff of Civil Suit No.23 of 1980, it should have been pleaded accordingly by the appellant in Civil Suit No.23 of 1980. It was also not pleaded by the appellant in the present suit that he was not aware of Agreement dated 06.05.1969 earlier. It is worth remembering that in Civil Suit No.23 of 1980 the appellant herein had, on the contrary, questioned the Sale Deed dated 07.02.1959 to be a forged, fabricated and manufactured document and had claimed the suit land on the basis of a gift. Even when WP(C) NO.48 of 2006 came to be disposed of on 13.11.2006, i.e, about 5 months before the suit was filed by the appellant on 26.04.2007, the appellant had not raised the issue of the Agreement dated 06.05.1969 and had submitted before the Court that he had no concern with the land purchased by the plaintiff of Civil Suit No.23 of 1980. In view of the above discussion, substantial question of law no.2 is answered against the appellant.

35. After the decision in substantial question no.2, there should not have really been any occasion for further discussion on Agreement dated 06.05.1969. However, in view of substantial question of law no.5, it will be appropriate to discuss the question posed.The aforesaid Agreement dated 06.05.1969, which the appellant claims to be a Sale Deed, is not a registered document. The learned Appellate Court observed that Agreement dated 06.05.1969 (Exhibit P-4) being an unregistered document, the same cannot be relied on in absence of validation under Notification 2947G dated 22.11.1946. It is in view of the aforesaid observation of the learned

Appellate Court substantial question of law no.5 has arisen to consider as to whether because of Notification No.2947G dated 22.11.1946, opportunity should have been granted to the appellant to validate the Agreement dated 06.05.1969 (Exhibit -P4) by paying the penalty as prescribed. It is in that light an application being I.A No.01/2016 was filed by the appellant praying for validation of the Agreement dated 06.05.1969 on payment of penalty in terms of Notification No.2947G dated 02.11.1946. I.A No.01/2016 is required to be considered while hearing the appeal. 36**.** Notification No.2947G dated 22.11.1946 was issued amending Para 2 of Notification No.385/G dated 11.04.1928. I shall proceed on the assumption that the aforesaid Notifications still hold the field. It will be appropriate to reproduce the relevant portion of the aforesaid Notifications herein below:

> *"Notification No.385/G*
>
> *Any document such as mortgage and sale deeds and other documents, and deeds, etc. will not be considered valid unless they are duly registered.*
>
> *The contents of unregistered document (which ought in the opinion of the Court to have been registered) may be provided in Court but a penalty up to 50 times the usual registration fee shall be charged. Exception:- Hand notes duly stamped shall be exempt from registration penalty. By order of His Highness the Maharaja of Sikkim Gangtok The 11 th April,1928"*
>
> xxxxxxxxxxxxxxxxxxx
>
> *"Notification No:2947 G Amendment of para 2 of Notification No: 385/G dated 11.04.1928 An unregistered document (which ought in the opinion of the Court to have been registered) may however, be validated and admitted in Court to prove title or order matters contained in the document on payment of penalty up to fifty times the usual registration fee. Issued by order of H. H. the Maharaja of Sikkim Gangtok The 22nd Nov.,46"*

37. The Notification No.2947G, by using the expression "may", gives a discretionary power on the Court to validate and admit an unregistered document which was required to be registered. It is not an automatic formality that the Court has to invariably grant liberty to validate such an unregistered document and have it admitted in the Court without any consideration to the attending facts and circumstances.

38. By the time Notification No.2947G dated 22.11.1946 was issued, Sikkim State Rules Registration of Documents, 1930 (for short, Rules of 1930) had come into force and the aforesaid Rules of 1930 was also noted in the Notification No.2947G. Rule 21 of Rules of 1930 provides that a document required to be registered shall be presented either by the person executing it or by the person claiming under it. The Notifications dated 11.04.1928 and 22.11.1946 make it clear that an unregistered Sale Deed shall not be considered valid unless validated. Rule 24 provides that no document relating to immovable property shall be accepted for registration unless it contains a description of the property sufficient to identify the same. Translated version of Exhibit-P4 reads as follows:

> *"Razinama*
>
> *I, Ruth Karthak Lepchani, Resident of Singtam Bazar do hereby execute this Razinama Kajas on this day 6.5.69 to my maternal Uncle Mondol Nedup, Resident of Sangmoo Village, that I am handling over back to my maternal uncle the cardamom field of Rabong having received the consideration value of rupees 4,000/- (in word four thousand) which he had once given to me in the past for Rupees 3,000/- (in word three thousand) as I am required to leave Sikkim. In the event of my coming back to Sikkim I will take back the cardamom field after giving back the said amount of Rupees 4000/- (In word four thousand).*
>
> *In case if I am not able to come the Government can transfer the cardamom field in the name of my maternal uncle Mondal Nedup on the strength of this document to which I shall*

have no claim or objection whatsoever. I have signed this document of my own free will and volition.

Sd/-
Ruth Karthak Lepchani
6.5.69"

39. A reading of Exhibit-P4 goes to show that the document contains no description of the property. A document presented for registration must be self-contained and therefore, under Rule 24 of the Rules of 1930, the Agreement dated 06.05.1969, even if had been presented before the Registering Authority, could not have been accepted for registration. Exhibit-P4 also recites that transfer may be effected by the Government only in the event of the executant of the document being not able to come back to Sikkim and it is an admitted fact that the alleged executant had come back to Sikkim. The defendant no.1 in Title Suit No.04 of 2014 (plaintiff of Civil Suit No. 23 of 1980) had stated that the appellant had taken recourse to falsehood in respect of Agreement dated 06.05.1969 and that the document is a fraudulent document. It was not the case of the appellant that the land sold by Nedup Bhutia was again possessed by him at any point of time. While it was the case of the appellant in Civil Suit No.23 of 1980 that he along with his wife were in possession of the suit land (plot no.33) since 1967 on the strength of a gift made by Nedup Bhutia,in the present suit the appellant had asserted that gift was made by Nedup Bhutia to his daughter in respect of remaining portion of plot no.33 and they were in possession of the same. At the cost of repetition, it is to be noted that the learned Court, while deciding Civil Suit No.23 of 1980, had recorded a finding that the defendants had failed to prove any gift in their favour, and had decreed Civil Suit No.23 of 1980 declaring title of the plaintiff of the said suit in respect of suit land measuring 6.24 acres covered by plot no.33. 40. In view of the above discussion, I find that no case is made out to permit validation of Agreement dated 06.05.1969 after 51 years of its alleged execution. Accordingly, I.A No.01/2016 is dismissed. In the light of the above discussion, substantial question of law no.5 is also answered against the appellant.

41. For the sake of convenience, I will now take up substantial question of law no.4. A notice was issued by the Court to the Receiver on

05.03.1986 to handover the suit land as well as the crops to the plaintiff of Civil Suit No.23 of 1980. The Receiver, in terms of the judgment rendered in Civil Suit No.23 of 1980 and the notice, handed over the cardamom field covered by plot no.33 and the crops to the plaintiff of the said suit on 06.03.1986. In view of the Receiver handing over the suit land, the plaintiff of Civil Suit No.23 of 1980 obtained possession of the suit land. When the judgment was satisfied in this manner it cannot be said that the respondent no.1 had waived her right to get the fruit of the judgment. The appellant had neither challenged the notice issued by the Court on 05.03.1986 nor the action of the Receiver handing over the suit land to the plaintiff of Civil Suit No.23 of 1980. Mr. Rai had submitted that because execution of the decree had not taken place in accordance with law, judgment dated 09.01.1986 has become non-est in law and therefore, the suit filed by the appellant cannot be held to be barred by the principle of res judicata. Under Article 136 of the Limitation Act, 1963, the period of limitation for execution of a decree other than a decree granting a mandatory injunction or order of any civil court is twelve years. That does not mean that findings recorded in the judgment are obliterated or that the judgment ceases to be a judgment in the eye of law. Accordingly, substantial question of law no.4 is decided against the appellant. 42. I will now take up substantial question of law no.3. The defendant no.1 (plaintiff of Civil Suit No.23 of 1980) in the suit filed by the appellant had not set up a plea of perfecting her title over the suit land by virtue of adverse possession. However, the issue no.5 was as to whether the defendant no.1 had perfected her title over the suit land by virtue of adverse possession. The appellant had set up a plea of adverse possession but admittedly no issue was framed on that account and in that context, substantial question of law no.3 was formulated. Mr.Rai had submitted that because of non-framing of issue relating to adverse possession, the appellant is seriously prejudiced and the same had vitiated the proceedings. It is apparent that issue no.5 should have really referred to plaintiff instead of defendant no.1, but the same was not pointed out to the learned Trial Court by any of the parties. There is, however, another issue, namely, issue no.12, which is to the effect as to whether the plaintiff was in possession of the suit land as alleged by him and if yes, how did he come to possess it. So, the question of possession of the plaintiff over the suit land was very much an issue in the suit. It is apparent that the parties went to trial fully knowing the rival case. The learned Trial Court, on the basis of evidence and materials on record, had recorded a finding of fact that the

plaintiff had failed to prove his possession over the suit property, which was also affirmed by the learned Appellate Court.

43. To establish a plea of adverse possession, the person who claims adverse possession is required to establish on what day he came into possession, what was the nature of the possession, whether the factum of possession was known to other party, how long his possession has continued and his possession was open and undisturbed. When the appellant has even failed to establish his possession, question of his possessing the suit land by way of adverse possession cannot arise. In the present fact situation, it cannot be said that absence of an issue regarding plea of adverse possession set up by the appellant is fatal to the case or that the same had vitiated the proceedings. It is to be noted that in Civil Suit No. 23 of 1980 also, the court had rejected the plea of adverse possession set up by the appellant. In view of the above discussion, substantial question of law no.4 is answered against the appellant.

44. In view of what has been discussed above, I find no merit in this appeal and accordingly, same is dismissed.

45. Lower Court records be sent back.

SLR (2020) SIKKIM 636

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

Crl. M.C. No. 04 of 2020

Ghausul Azam @ Guddu and Another ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Sudesh Joshi, Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor.

Date of decision: 30th September 2020

A. Code of Criminal Procedure, 1973 – S. 482 – The High Court can exercise its powers under S. 482 where the need arises and there is justification for interference. The parties herein are husband and wife they have compromised the matter amongst themselves. Proof of this has been indicated in the Compromise Deed (Annexure P3). Although the offence under Ss. 342 and 323, I.P.C are compoundable by the person on whom the offence was perpetrated, however S. 498A of the I.P.C is a non-compoundable offence. Nevertheless, considering the entire facts and circumstances and the settlement between the petitioners No.1 and 2, as evident from the Compromise Deed, and the submissions of Learned Counsel for both the parties, I am of the considered opinion that pursuing prosecution would be an abuse of the process of law besides being an exercise in futility as no evidence would be forthcoming against the petitioner No.1 from the petitioner No.2 – Therefore, a fit case where the inherent powers of this Court under S. 482 of the Cr.P.C can be exercised – F.I.R No. 78/2019 dated 16.06.2019 of the Sadar Police Station, Gangtok and G.R Case No. 282 of 2019 before the Court of Learned Chief Judicial Magistrate, East Sikkim at Gangtok quashed.

(Paras 9 and 10)

Petition allowed.

Chronology of cases cited:

1. Manoj Sharma v. State and Others, (2008) 16 SCC 1.
2. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 303.
3. Narinder Singh and Others v. State of Punjab and Others, (2014) 6 SCC 466.

ORDER

Meenakshi Madan Rai, J

1. By filing this Petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.), the Petitioner No.1 and the Petitioner No.2, being husband and wife, seek quashing of the FIR filed by the Petitioner No.2 against the Petitioner No.1, registered at the Sadar Police Station, Gangtok, as FIR No.76/2019 (*sic*, FIR No.78/2019) under Section 498A, 342 and 232 of the Indian Penal Code, 1860 (for short IPC), and as G.R. Case No.382 of 2019 (*sic*, G. R. Case No.282 of 2019), pending in the Court of the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok.

2. Briefly narrated, the Petitioners' case is that, they were married on 12-12-2012 in Bihar according to Muslim rites and ceremonies and from the wedlock they have one daughter, now aged about 6/7 years. As the Petitioners were incompatible they started drifting apart which consequently led to an irretrievable breakdown of their marriage and since August 2018 they have been living separately. The Petitioner No.2 lodged a written Complaint before the Sadar Police Station, Gangtok, East Sikkim, on 16-06-2019, informing therein that the Petitioner No.1 after their marriage initially treated her well, however after six months he started verbally abusing her. She accompanied him to Mumbai after the marriage where she was physically assaulted on several occasions and restrained from contacting her guardians besides being confined inside her room. Following these incidents she returned home to Sikkim along with her daughter. Later, her husband repented and apologized to her, pursuant to which, on the intervention of well-wishers the Petitioner No.2 returned to Mumbai with the Petitioner No.1, who, however, repeated his verbal and physical assaults on her. Her complaint was duly registered, investigation taken up and a *prima facie* case made out against the Petitioner No.1 under Sections 498A, 342 and

323 of the IPC and Charge-sheet was submitted against him in the Court of the Learned Chief Judicial Magistrate, which came to be registered as G. R. Case No.282 of 2019 (*State of Sikkim* vs. *Ghausul Azam @ Guddu*). The matter is presently pending at the stage of hearing on consideration of the Charge and fixed on 15-10-2020. During the pendency of the matter, the Petitioner No.1 and the Petitioner No.2 again on the intervention of their relatives and the Muslim Community in Gangtok have mutually settled the matter, agreeing to dissolve the marriage with no claims against each other except the conditions agreed to between themselves in terms of a Compromise deed executed by them in the presence of witnesses.

3. Learned Counsel for the Petitioners contended that both the Petitioners have agreed that the Petitioner No.1 will pay a total sum of Rs.1,00,000/- (Rupees one lakh) only, towards full and final settlement of all past, present and future claims in lieu of maintenance and this would include all claims of permanent alimony. That, it was also agreed between them that this amount will be paid by the Petitioner No.1 to the Petitioner No.2 on the disposal of the case pending before the Court of the Learned Chief Judicial Magistrate. That, the Petitioner No.2 has no grievances against the Petitioner No.1 and should this Court not exercise its discretion under Section 482 of the Cr.P.C., the trial before the Learned Court of the Chief Judicial Magistrate will be an exercise in futility as no evidence would be forthcoming against the Petitioner No.1. It was next advanced that the Compromise Deed (Annexure P3) was duly executed between the parties in the presence of the witnesses and have been signed by both the Petitioners of their own free-will sans coercion. That it may be considered that the dispute pertains to one between a husband and a wife and as they now bear no ill will towards each other, the FIR and the G.R. Case *supra* may be quashed.

4. Learned Public Prosecutor appearing for the State-Respondent submitted that in view of the fact that the Petitioners are husband and wife and have amicably settled the matter amongst themselves, it concludes that should the matter go into trial the Prosecution would not be able to establish its case as the Petitioner No.2 would not depose against the Petitioner No.1 depriving the Prosecution of the opportunity of establishing its case. That, in view of the said circumstances the State-Respondent has no objection to the Petition under Section 482 of the Cr.P.C.

5. I have duly considered the submissions put forth by Learned Counsel for the Petitioners and Learned Public Prosecutor and perused documents placed before me.

6. Relevant reference may be made to the ratio in ***Manoj Sharma*** vs. ***State and Others***[1], where the question involved was whether an FIR under Sections 420/468/471/34/120B of the IPC deserves to be quashed either under Section 482 of the Cr.P.C. or under Article 226 of the Constitution of India, when the accused and the complainant have compromised and settled the matter between themselves. The Supreme Court observed follows;

> **"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 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."

7. In ***Gian Singh*** vs. ***State of Punjab and Another***2, the Honble Supreme Court would hold 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

[1] (2008) 16 SCC 1
[2] (2012) 10 SCC 303

interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends 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. ……..………"

8. It is worthwhile to mention here that in ***Narinder Singh and Others*** vs. ***State of Punjab and Others***[3], the Hon'ble Supreme Court while considering a matter where the FIR was registered under Sections 307/324/323/34 of the IPC, observed as follows;

"**33.** We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute, etc. is not stated in detail. However, a very pertinent statement

[3] (2014) 6 SCC 466

appears on record viz. "respectable persons have been trying for a compromise uptil now, which could not be finalised". This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No. 121 dated 14-7-2010 registered with Police Station Lopoke, District Amritsar Rural be quashed. We order accordingly."

9. Based on the principles enunciated in the above matters, it is evident that the High Court can exercise its powers under Section 482 of the Cr.P.C. where the need arises and there is justification for interference. The parties herein are husband and wife they have compromised the matter amongst themselves. Proof of this has been indicated in the Compromise Deed (Annexure P3). Although the offence under Sections 342 and 323 of the IPC are compoundable by the person on whom the offence was perpetrated, however Section 498A of the IPC is a non-compoundable offence. Nevertheless, considering the entire facts and circumstances and the settlement between the Petitioners No.1 and 2, as evident from the

Compromise Deed, and the submissions of Learned Counsel for both the parties, I am of the considered opinion that pursuing prosecution would be an abuse of the process of law besides being an exercise in futility as no evidence would be forthcoming against the Petitioner No.1 from the Petitioner No.2. This is therefore a fit case where the inherent powers of this Court under Section 482 of the Cr.P.C. can be exercised.

10. Resultant, the FIR bearing No.78/2019, dated 16-06-2019, of the Sadar Police Station, Gangtok, East Sikkim, stands quashed as also G.R. Case No.282 of 2019 before the Court of the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok.

11. Crl. M.C. No.04 of 2020 stands disposed of.

12. Copy of this Order be forwarded to the Learned Court of the Chief Judicial Magistrate, East Sikkim, at Gangtok, for information.

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