



**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Civil Revisional Jurisdiction)

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SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE  
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**C.R.P. No.01 of 2020**

Hem Prasad Subedi,  
S/o Shri Deo Narayan Subedi,  
R/o Rawtey Rumtek,  
P.O. Sajong and P.S. Ranipool,  
East Sikkim.

..... Petitioner/Revisionist

**Versus**

1. Deo Narayan Dahal,  
S/o late Manohar Dahal,  
R/o Upper Tarku,  
P.O. Tarku and P.S. Temi,  
South Sikkim-737134.
2. State of Sikkim,  
Through the Chief Secretary,  
Manan Kendra, Gangtok,  
East Sikkim-737101.

.....Respondents

**Revision petition under Section 115 read with Section  
151 of the Code of Civil Procedure, 1908.**

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**Appearance:**

Mr. Zangpo Sherpa, Advocate and Mr. Jushan  
Lepcha, Advocate for the Petitioner.

Mr. N. B. Khatiwada, Senior Advocate with Ms  
Gita Bista and Ms. Pratikcha Gurung,  
Advocates for Respondent No.1

Ms. Pema Bhutia, Assistant Government  
Advocate for Respondent No.2.

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**J U D G M E N T (ORAL)**  
**( 18.08.2021 )**

**Bhaskar Raj Pradhan, J.**

1. A revision petition under Section 115 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) has been filed by the petitioner/defendant no.1 (the petitioner). It is against the impugned order dated 18.12.2019 passed by the learned District Judge, South Sikkim at Namchi (the learned District Judge). The impugned order rejected the application under Order VII Rule 11 of the CPC filed by the petitioner. The petitioner had sought for rejection of the suit filed by the respondent no.1/plaintiff for failure to disclose a cause of action and for being barred by law.
2. The suit was filed by the respondent no.1 against the petitioner for recovery of money for malicious prosecution and other reliefs. In the plaint it was averred that the petitioner was a teacher by profession and the defendant no.2 (the respondent no.2 herein) was the State of Sikkim who had prosecuted the respondent based on false First Information Report (FIR) lodged by the petitioner. The plaint categorically states that the respondent no.1 is not seeking any reliefs against the respondent no.2.



**3.** As per the narration in the plaint an FIR was lodged on 14.07.2016 by the petitioner before the Temi police station alleging that the respondent no.1 had committed sexual assault on the victim who was residing with the petitioner and his wife. Consequently, a warrant was issued for the arrest of the respondent no.1, and he was arrested and kept in the lockup from 14.07.2016 to 15.05.2017 for almost 10 months. It is alleged that based on the false FIR, Temi police station Case No.17/2016 dated 14.07.2016 under Section 376 of the Indian Penal Code (IPC) read with Section 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was registered against the respondent no.1. On completion of investigation charge sheet was submitted under Section 376(1)/341 IPC read with Section 4 and 8 of the POCSO Act and cognizance taken by the learned Trial Court. The plaint further narrates that the learned Trial Court heard the parties and charges were framed against respondent no.1 under Section 5(j)(ii), 5(l) of the POCSO Act and under Section 376 (2) (i), (n) and 354-B IPC.

**4.** It is stated in the plaint that the prosecution examined 12 witnesses and after a protracted trial the respondent no.1 was acquitted on 21.03.2018. It is



averred that the petitioner had lodged the false FIR against the respondent no.1 without a reasonable or probable cause which is evident from the evidence recorded during the trial. Various portions of the evidence in the criminal trial have been highlighted in paragraph 11 of the plaint. It is stated that the respondent no.1 and his family members had suffered physical and mental pain; and they have been lowered in the estimation of their friends, relatives, and society.

**5.** In paragraph 14 of the plaint, it is stated that to prove malicious prosecution the respondent no.1 was required to prove the following ingredients:

- “a. That the plaintiff was prosecuted on the complaint lodged by the defendant.*
- b. The proceeding complained was terminated in favour of the present plaintiff.*
- c. That the prosecution was instituted against the plaintiff without any just or reasonable cause.*
- d. That the prosecution was instituted with a malicious intention, that is not with the mere intention of getting the law into effect, but with an intention which was wrongful in fact.*
- e. That the plaintiff suffered damage to his reputation.”*

**6.** It is averred that the cause of action first arose on 21.03.2018 from the date of the judgment of acquittal



passed by the learned Trial Court and continued thereafter.

**7.** On such pleadings the respondent no.1 sought for expenses and financial losses incurred for engaging counsel in the criminal case, damaging reputation, mental and physical agony, and interest pendente lite and future.

**8.** On 21.02.2019 the learned District Judge issued summons to the petitioner and respondent no.2.

**9.** On 23.03.2019 the petitioner filed an application under Order VII Rule 11 read with Section 151 CPC (the application). In the application it was averred that the plaint was not maintainable and barred by the provisions of Order 11(a) and (d) of the CPC. The respondent no.1 filed his objections.

**10.** On 27.11.2019 the learned District Judge heard the learned counsel for the parties and on 18.12.2019 passed the impugned order rejecting the application. The petitioner is aggrieved by the impugned order.

**11.** Heard Mr. Zangpo Sherpa, learned counsel for the petitioner. It is contended that a reading of the plaint would show that the suit was barred by law i.e. Section 19(7) of the POCSO Act. It is his contention that under



Section 19 (1) of the POCSO Act there is an obligation cast upon any person having knowledge about sexual assault on a child victim to report the same and failure to do so is punishable under Section 21 thereof. It is pointed out that Section 19(7) provides immunity to the informant against both civil and criminal liability for giving such information in good faith. The learned counsel also draws the attention of this court to the impugned judgment which reflects that this fact was pointed out to the learned District Judge who, however, did not examine it. It is argued, while taking this court through the impugned judgment, that the acquittal was not an acquittal on a conclusion that the FIR was false, but by giving benefit of doubt to the respondent no.1. The learned counsel referred to the judgment of the Supreme Court in **SR. Tessy Jose v. State of Kerala**<sup>1</sup> which held on examination of Section 19 of the POCSO Act that a person who had an apprehension that such an offence may be committed or knowledge that it has been committed would be required to provide such information to the relevant authority.

**12.** Ms. Gita Bista, learned counsel for the respondent no.1, vehemently opposes grant of any prayer in favour of

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<sup>1</sup> (2018) 18 SCC 292



the petitioner. While taking this court through the evidence in the criminal trial filed by the respondent no.1 along with the plaint it is submitted that the respondent no.1 had clearly laid out the cause of action in the plaint and shown that it was not barred by limitation. It is contended that neither the petitioner (P.W.2) nor the victim (P.W.1) in the criminal trial had deposed that the victim informed the petitioner that it was the respondent no.1 who was responsible for her pregnancy. It is contended that as such the FIR lodged by the petitioner was evidently false and malicious against the respondent no.1. The learned counsel also drew the attention of this court to the admission made by the victim in her cross-examination where she admitted that *“it is true that I was told by Sir and Madam to depose before the court about the incident without fear. It is true that I was told to depose before the court saying that I had gone to the house of the accused on the relevant day. It is not a fact that I was told by Sir and Madam to depose saying that I never stayed overnight in any other person’s house.”* It is thus, submitted by the learned counsel that this would clearly reflect that the victim was tutored by the petitioner for lodging a false FIR. The learned counsel also argued that



the burden was on the petitioner to prove the criminal case against the respondent no.1 and having failed to do so it does not lie upon the petitioner to seek rejection of the plaint for malicious prosecution against him.

13. Ms. Pema Bhutia learned Assistant Government Advocate for the respondent no.2 submits that the dispute is between the petitioner and the respondent no.1 and as the respondent no.1 has chosen not to seek any relief against the respondent no.2, she has nothing to submit.

14. This court has considered the submission made by the learned counsel, examined the plaint and the documents sought to be relied upon therein; the application filed by the petitioner as well as the reply of the respondent no.1.

15. Order VII Rule 11(a) and (d) of the CPC reads as under:

**“11. Rejection of plaint.** – the plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

.....

(d) where the suit appears from the statement in the plaint to be barred by any law;

.....”

16. A reading of Order VII Rule 11 clearly reflects that the plaint could be rejected in any of the grounds





enumerated in sub-clause (a) to (f). Whereas under sub-clause (a) plaint could be rejected for non-disclosure of cause of action, sub-clause (d) mandates that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

**17.** In *Dahiben v. Arvinbhai Kalyanji Bhanusali (Gajra)* <sup>dead</sup><sup>2</sup> the Supreme Court held that under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by law.

**18.** In the plaint the respondent no.1 has categorically averred that the FIR was lodged by the petitioner stating that the victim who was staying with him since childhood had fallen sick and so they had taken her to Gangtok hospital for medical treatment after which the doctor told them that the victim was 28 weeks pregnant. It also avers that it was alleged that the victim was sexually assaulted by the respondent no.1. The plaint avers that after the FIR, a criminal investigation was started by the police who

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<sup>2</sup> (2020) 7 SCC 366



filed the charge sheet against the respondent no.1 under Section 376 (1)/341 of the IPC read with Section 4 and 8 of the POCSO Act. The respondent no.1 also clearly avers that the learned Trial Court framed charges against the respondent no.1 under Section 5 (j) (ii), 5(1) of the POCSO Act and under Section 376 (2) (i), (n) and 354-B of the IPC. Thereafter, the trial is referred to and the ultimate acquittal which, according to the respondent no.1, gave the cause of action to file the suit.

**19.** It is clear from reading of the plaint itself that it was not only the petitioner who had complained to the police about the commission of the offence against the respondent no.1, but also that the police had investigated the case and concluded by filing a charge sheet that the allegation made by the complainant was *prima facie* true. It is also clear from the reading of the statements in the plaint that the criminal trial pertained to allegations against the respondent No.1 under the POCSO Act.

**20.** Sections 19, 21 and 22 of the POCSO Act would be relevant at this juncture and quoted herein below.

**“19. Reporting of offences.-** (1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is*



*likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-*

- (a) the Special Juvenile Police Unit; or*
- (b) the local police.*
- (2) Every report given under sub-section (1) shall be-*
  - (a) scribed an entry number and recorded in writing;*
  - (b) be read over to the informant;*
  - (c) shall be entered in a book to be kept by the Police Unit.*
- (3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.*
- (4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.*
- (5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.*
- (6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or*



*where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.*

- (7) *No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)."*

.....

**"21. Punishment for failure to report or record a case.-** (1) *Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.*

- (2) *Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.*

- (3) *The provisions of sub-section (1) shall not apply to a child under this Act.*

**22. Punishment for false complaint or false information.-** (1) *Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.*

- (2) *Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.*



*(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimizing such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.”*

**21.** Section 19 (1) of the POCSO Act mandates that any person who has apprehension that an offence under the Act is likely to be committed or has knowledge that such an offence has been committed shall provide such information to the special juvenile police or the local police. Section 19(7) provides that no person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

**22.** The Supreme Court in **SR. Tessy (supra)** has clearly held that there is a legal obligation on a person to inform the relevant authorities if he had knowledge about commission of such an offence. It was held that the expression “knowledge” means that some information was received by such a person giving him/her knowledge about the commission of the offence. It was held that a person is supposed to know only where there is direct appeal to his senses.



**23.** Under Section 21 of the POCSO Act any person, who fails to report the commission of an offence under subsection (1) of Section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both. The POCSO Act therefore, clearly ensure that no sexual offence against a child goes unreported and for that matter further assures that the informant would also be protected if such information is in good faith. If the information provided was not in good faith and if false complaint was lodged, Section 22 provides that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under Sections 3, 5, 7 and Section 9, only with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

**24.** The protection provided under Section 19(7) of the POCSO Act against civil or criminal liability would be for giving information only in good faith and not for providing or giving false information.

**25.** A reading of the statements in the plaint makes it clear that the plaint was barred by section 19(7) of the



POCSO Act. Ms. Gita Bista, however, seeks to rely upon the documents filed with the plaint as well. The respondent no.1 along with the plaint filed a list of documents consisting of:

- (1) Certified copy of the FIR lodged by the petitioner;
- (2) Certified copy of the judgment of acquittal;
- (3) Certified copy of the deposition of prosecution witnesses and defence witnesses;
- (4) Certified copy of CFSL report pertaining to the DNA test of the respondent no.1 and
- (5) Original challan.

**26.** As contended by Ms. Gita Bista, it is correct that during the cross-examination of the victim (P.W.1) in the criminal trial, she had admitted that she was told to depose before the court saying that she had gone to the house of the respondent no.1 on the relevant day. However, the cross-examination stopped there. It was not put to the victim that what she alleged in her deposition was not true. Thus, there is no evidence of tutoring as sought to be made out by the learned counsel for the respondent no.1. The learned Trial Court examined the evidence of the victim, the petitioner, his wife (P.W.3) and Dr. Salina Tamang (P.W.5) to hold that the victim was



pregnant and gave birth to a baby boy. The learned Trial Judge, thereafter, examined as to whether the respondent no.1 was responsible for the same. Considering the DNA report the learned Trial Judge opined that the prosecution had failed to prove his case against the respondent no.1 by giving him the benefit of doubt.

**27.** The learned Trial Court has not held that the FIR was false or fabricated. What was narrated by the petitioner in the criminal trial about the fact that it was the respondent no.1 who had committed the offence of sexual assault upon the victim was not narrated by him alone but also by the victim which is clearly reflected in the judgment. The learned counsel for the respondent no.1 took this court through the deposition of the victim as well as deposition of the petitioner. These depositions also do not reflect any material that the petitioner had lodged a false FIR. A person guilty of malicious prosecution is punishable under Section 211 IPC. Instead, the respondent no.1 has sought for monetary damages under the civil law for malicious prosecution.

**28.** Section 19(7) clearly protects the informant who in good faith gives information about his knowledge of sexual assault on a child victim against both civil as well as





criminal liability. In the criminal trial the petitioner deposed that he and his wife had taken the minor victim to Ashirbad clinic at Gangtok where after examining her, the doctor told them that the minor victim was 28 weeks pregnant pursuant to which they lodged the FIR. In re-examination the petitioner deposed that after the test when she came out of the clinic, he asked the minor victim how she got pregnant, but she told him that nothing had happened to her. He further deposed that during the third week of January 2016 the victim was left to stay in respondent No.1's house. The petitioner's wife (P.W.3) however deposed that in the chamber of the doctor who conducted the ultrasound at Ashirbad clinic the victim disclosed that it was "*antaray hajurbah*" who had made her pregnant. She further deposed that back at Temi the victim disclosed how respondent No.1 had committed penetrative sexual assault upon her twice after which they lodged the FIR. Evidently the petitioner had knowledge about the commission of the offence. Although the FIR was lodged by the petitioner, neither the investigating authority nor the learned Trial Court concluded that the FIR lodged by the petitioner was false. There is no material whatsoever in the plaint, or the documents sought to be



relied upon, to establish even *prima facie* that the petitioner had lodged a false FIR.

**29.** Section 19(7) of the POCSO Act is a central legislation and the law of the land. It would squarely fall within the meaning of law as contemplated in Order 7 Rule 11 CPC. The protection under Section 19(7) is unequivocal. The plaint was clearly barred under the provision as the FIR was lodged by the petitioner in good faith. If the plaint is allowed to continue the purpose of Section 19 of the POCSO Act would be lost and people would fear to lodge genuine complaints of sexual assault upon a child.

**30.** This court is thus of the view, that the impugned order passed by the learned District Judge must be set aside and the application filed by the petitioner be allowed. It is accordingly so ordered. No order as to costs.

**31.** In view of the final disposal, the interim applications are rendered infructuous and accordingly disposed.

**(Bhaskar Raj Pradhan)**  
**Judge**

to Approved for reporting: **yes**  
Internet: **yes**