

**HIGH COURT OF TRIPURA**  
**A\_G\_A\_R\_T\_A\_L\_A**  
**Crl. A(J) No. 05 of 2024**

1. Sri Prantosh Modak, son of Sri Santosh Modak, resident of Jogendranagar, P.S. East Agartala, District: West Tripura.

.....Appellant

**-V E R S U S-**

1. The State of Tripura.

..... Respondent.

**B\_E\_F\_O\_R\_E**  
**HON'BLE MR. JUSTICE T. AMARNATH GOUD**  
**HON'BLE MR. JUSTICE BISWAJIT PALIT**

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|----------------------------------------------------|---|----------------------------|
| For Appellant(s)                                   | : | Mr. Ratan Datta, Advocate. |
| For Respondent(s)                                  | : | Mr. R. Datta, P.P.         |
| Date of hearing and delivery of judgment and order | : | <b>21.05.2025</b>          |
| Whether fit for reporting                          | : | <b>YES</b>                 |

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**JUDGMENT & ORDER [ORAL]**

**[T. Amarnath Goud, J]**

Heard Mr. Ratan Datta, learned counsel appearing for the appellant and Mr. R. Datta, learned Public Prosecutor, appearing for the respondent-State.

[2] The present appeal has been filed under Section-374(2) of Cr. P.C. against the impugned judgment and order of conviction and sentence dated 19.11.2021 in connection with case No. Special (POCSO) 62 of 2016 by the learned Special Judge (POCSO), West Tripura, Agartala, whereby and whereunder, the appellant has been convicted under Section-376(2)(i) of IPC and thereby sentenced him to suffer RI for 10 years and to pay a fine of Rs.5,000/- only in default of payment he shall suffer imprisonment for two years.

[3] The Prosecution case in brief is that on 27.04.2015 the informant with his wife had gone out for their works as usual and the victim

(name withheld) stayed alone at home. During that period the accused person namely, Prantosh Modak communicated the victim over phone and subsequently the accused came to the house of the victim and allured her by several ways. Thereafter, the accused kidnapped the said victim. On that day, when the informant along with his wife returned at about 5/5.30 pm they found that their daughter was not available at home. Subsequently, they started looking for her but could not find the victim. After that, wife of the accused Smti. Soma Modak came to their house and told them that her husband i.e. accused has eloped with the victim. Then, they thoroughly searched for the said victim but could not trace her whereabouts. The informant also stated in the ejahar that the accused is already a married person. The ejahar further recites that the accused took cash amounting to Rs. 10,000/- along with some gold ornaments and necessary documents.

[4] After investigation, I.O. of the case submitted charge-sheet against the appellant vide P.S. C.S. No. 68 of 2015, dated 15.09.2015 under Sections-366(A)/376(1) of the IPC. On perusal of the charge-sheet and other materials placed on record, the learned trial Court framed charges under Sections-366/376(2)(1) of the IPC read with Section-4 of the POCSO Act, after closing of evidence of the prosecution, accused was examined under Section-313 Cr.PC and the accused also adduced oral evidences. After hearing the parties and on the basis of evidences and documents on record the learned trial Court convicted the appellant under Section-376 (2) of IPC and sentenced him to suffer RI for 10 (ten) years and to pay a fine of Rs 5,000/- only and in default of payment of fine he shall suffer simple imprisonment for 2 months.

[5] Accordingly, investigation of the case was taken up by police on the said case. In course of investigation, the IO proceeded towards the house of the victim situated at Indranagar, near Kalibari. Thereafter, she found the sister of the victim namely, Ruma Bhowmik and also one neighbour namely, Bikash Majumder and accordingly, she examined them and recorded their statement under Section-161 of Cr.PC. Thereafter, she returned to the PS wherein she found the accused and the victim girl were also brought to the PS by one Atul Dey and the wife of accused Prantosh.

Subsequently, the IO examined Soma Modak, the wife of accused and Atul Dey who were available there and recorded their statements under Section-161 of Cr.PC. She also arrested the accused at the PS. Thereafter, she arranged for the medical examination of the victim at GBP Hospital and the victim was accompanied by her mother.

[6] On the next date, the accused was interrogated by the IO and he was also medically examined. After that the IO visited the PO being accompanied by the victim which is situated at College Tilla from where she was kidnapped and prepared hand sketch map of the PO with separate index. Again on 28.04.2015 the accused was taken to GB Hospital for his potency test and the potency test was done there by the medical officer and then she came back to the PS along with the accused. On that day the victim was produced before the Magistrate for recording her statement and the accused was forwarded to the Court. On the same very date the victim returned to the PS along with her parents at about 1340 hours whereupon the IO examined them and recorded their statements under Section-161 of Cr.PC. Thereafter, IO went to Golbazar to visit the second PO along with the victim girl and the victim girl identified the Central Guest House where the victim was kept by the accused and the IO prepared the hand sketch map of the said second PO with index.

[7] After searching Room No.110 of the Guest House she found an Aadhar Card in the name of the accused which was seized by her. Subsequently, the IO also examined the owner of the guest house namely, Biswajit Paul and staff of the said guest house and recorded their statements under Section-161 of Cr.PC. On that day, the IO also seized the vaginal swab of the victim, blood sample of the accused and one under garment of the victim by preparing a seizure list. On 29.04.2015 the IO seized the birth certificate of the victim which reflects that her date of birth is 23.12.1998. Further during investigation seized vaginal swab and blood samples were sent to the SFSL. Thereafter, she has collected the medical reports and also received the forensic reports. Finally, completion of investigation, IO submitted charge-sheet vide East Agartala Women PS CS No.68/2015, dated 15.09.2015 under Sections-366(A)/376(1) of the IPC.

[8] On perusal of the case record it reflected that the IO filed the charge sheet and since the alleged incident of this case occurred on 26.04.2016 and at the time of alleged occurrence, the age of the victim was 16 years old and the POCSO Act, 2012 has come into force w.e.f 14.11.2012. So, at this juncture, on hearing the learned Special PP, as well as, learned defence counsel it was decided that the instant case shall be tried under POCSO Act and consequently, orders dated 19.05.2016, 20.06.2016 and 22.06.2016 were passed.

[9] During trial, upon hearing submissions of parties and taking into consideration the record and documents submitted therewith, framed charge under Sections 363/376(2)(i) of the IPC read with Section-4 of the POCSO Act. Subsequently, the contents of the said charge was read over and explained to the accused person to which, he pleaded not guilty and claimed to be tried.

[10] To substantiate the charge, prosecution has adduced as many as 8 witnesses including the complainant of this case mentioned in the appendix attached herewith. The prosecution also relied upon some documentary evidence as well as material object which were also marked as exhibits in connection with the present case as reflected in the attached appendix. During his examination under Section-313 of Cr. P.C, pleaded his innocence and adduced two witnesses in support of his defence.

[11] Having heard the learned counsel appearing for the parties and appreciation of material evidences, the learned Court below has observed as under:

“In the result, accused namely, Sri Prantosh Modak is convicted on the charges framed under Sections-363/376/(2) (i) of IPC and alternatively under Section-4 of the POCSO Act. He is taken into custody and will be heard on question of sentence in due course of time of the day.

24. Surety of the bail bond, except the bail bond furnished under Section-437A Cr. P.C., stands discharged.”

[12] The appellant herein, being aggrieved by and dissatisfied with the impugned judgment and order of conviction dated 19.11.2021, has preferred this present appeal for ends of justice.

[13] Mr. Ratan Datta, learned counsel appearing for the appellant has submitted that the findings of the learned Court below is perverse, illegal, unjustified, unreasonable, unwarranted in law and facts and as such not tenable in the eye of law and liable to be set-aside. The Court below by way of improper appreciation of evidence on record and the facts and circumstances of the case arrived at absolutely wrong and unwarranted findings causing grave miscarriage of justice to the appellant. The learned Court below held the convict appellant to be guilty of alleged offences on the basis of no evidence inasmuch as, the evidence on record does not constitute the alleged offence and in no case implicated the convict appellant in the commission of alleged offence.

[14] It has been contended that the alleged presence of the convict appellant at the alleged place of occurrence, is absolutely doubtful and on the basis of such evidence the appellant could not be legally convicted for the alleged offence.

[15] The learned Court below ought to have appreciated that the prosecution examined as many as 08 witnesses, out of which PW.1 Sri Dipak Bhowmik is the father of the alleged victim girl, PW.2 Smt. Ruma Bhowmik is her elder sister, PW.3 is alleged victim girl and PW.7 is her mother. PW.2 stated that on 26.04.2015 she and her sister were in their house and at that time her parents were not available in the house. At about 02/03 PM she left the house without informing her anything. When her parents came to house then she informed the same to her parents on that night. They did not search for her and on the following date her father lodged a case against Prantosh Modak for Kidnaping his daughter. Though not admitting, but assuming that the victim left with Prantosh and that was indulged by her but not by the appellant but the learned Court below failed to appreciate the same.

[16] PW.3, the victim herein, stated that on 26.04.2015 Prantosh Modak called her over telephone and asked her to go to College Tilla to meet with him accordingly she went there and from there they went to a hotel situated at Golbazar and they stayed in that hotel in that night and they committed sexual intercourse. Further she stated that before 26.04.2015 Prantosh use to talk with her over telephone. But the learned Court below

failed to appreciate the evidence of the victim girl and her sister and other relatives. PW.5 Dr. Subhankar Nath, Deputy Director, FSL, Tripura categorically stated that on biology, serology examination blood stain and semen stain of human origin was not detected in the Exbt. marked as A and B. Exbt.A is vaginal swab of the victim and Exbt. B is the panty of the victim but the learned Court below failed to appreciate the same.

[17] PW.6 Dr. Juthika Debbarma who examined alleged victim categorically stated that on examination she found no injuries over the mons pubis, labia majora, labia minora, and clitoris, Hyman-was old healed tears were present at 3, 5, 7 and 9 o'clock positions. So it is crystal clear that the alleged victim girl habituated with sexual intercourse but the learned Court below failed to appreciate facts completely. From the entire evidence of the prosecution it is not revealed that the accused forcefully took the victim girl or forcefully raped her but the learned Court below failed to appreciate the same and erroneously convicted the appellant causing serious injustice to appellant.

[18] From the appellant side two witnesses were adduced, they are DW.1 Smt. Soma Modak and DW.02 Smt. Ruma Biswas who categorically stated that the victim girl would often visit the house of the accused and pressurized the appellant to marry her but the said fact has not been considered by the learned Court below. From the evidence of PW-5 and 6 it is evident that no rape was committed on alleged date and time of alleged occurrence.

[19] In support of his case, Mr. Datta, learned counsel appearing for the appellant has placed his reliance on some decisions of the Hon'ble Apex Court ***in Alamelu and another v. State, represented by Inspector of Police with Sekar and Another v. State, represented by Inspector of Police with Rangaswamy and another v. State, represented by Inspector of Police***, reported in ***AIR (2011) SC 715, Jarnail Singh v. State of Haryana***, reported in ***AIR (2013) SC 3467*** and ***Navin Dhaniram Baraiye v. State of Maharashtra***, reported in ***AIR ONLINE (2018) BOM 986***.

[20] In *Alamelu and another v. State, represented by Inspector of Police with Sekar and Another v. State, represented by Inspector of Police with Rangaswamy and another v. State, represented by Inspector of Police*, reported in *AIR (2011) SC 715*, the Hon'ble Apex Court has observed as under:

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*, observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....

..... Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by

the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*<sup>2</sup>, where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"."

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.

41. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC 745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of *Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.*<sup>3</sup>, In the aforesaid judgment, it is observed as follows:-

".....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

\* \* \* \* \*

[21] Per-contra, Mr. R. Datta, learned P.P. has opposed the submission of the learned counsel appearing for the appellant and submitted that the prosecution case is well proved by the evidence of PWs and observation made by the learned Court below is just and proper. Learned P.P. has vehemently opposed the arguments advanced by the learned counsel appearing for the appellant and contended that the conviction as awarded by

the learned Court below needs to be confirmed as the medical evidence and the depositions of the prosecution are against the accused person and prayed to dismiss the appeal and confirm the conviction.

[22] In view of the submissions canvassed by the learned counsel appearing for the parties as reflected above, let us make a short survey of the evidence and material placed on records to justify the conviction and sentence declared against the accused-appellant.

[23] DW-1 deposed that the accused is her husband and she knows the informant Dipak Bhowmik and his victim-daughter. She also stated that her husband once went to the house of the victim for the work of his mason and thereafter a relationship grew up between our family and the family of informant. She also deposed that they would visit their house often and the victim's family would also visit the house of accused in this regard. DW-1 further deposed that in the year 2014 one day her husband informed her that the victim had given him proposal for love thereafter the witness also talked with the victim and requested her to refrain from creating any love affair with the accused but, the victim did not hear to her request. Thereafter, one day victim came to her house and created 'Halla' in her house demanding that she would marry the accused. The victim also threatened them that if the accused did not marry her she would commit suicide. DW-1 continued to depose that later on as her husband refused to marry the victim and the witness also objected to the demand of the victim, her father lodged the case against the accused. Thereafter, one day the victim called the accused and took him to Agartala Township giving pressure to him to marry her. After knowing the same from her husband the witness informed the matter to the husband of her sister-in-law whereupon the husband of her sister-in-law namely, Atul Dey informed the matter to the police. Accordingly, after getting information from Atul Dey the accused along with the victim appeared in the East Agartala Women PS wherein the accused was arrested. It also stated by the witness that said Atul Dey is hard of hearing.

[24] During cross-examination by the prosecution, the DW-1 stated that police examined her in connection with this case. The witness denied the fact that her husband abducted the victim or that later on police recovered

both of them from College Tilla area. She also denied the fact that the victim did not offer her husband for love affair or that she did not create any pressure to marry her husband or that she never created any 'Halla' in her house demanding to marry her husband under threat that if her marriage is not solemnized with her husband she would commit suicide. She continued to deny the fact that thereafter one day the victim did not take her husband to Agartala Township for marriage purpose or that she did not inform the matter to Atul Dey or that Atul Dey did not-inform the matter to the police station and also to her husband or that her husband did not appear thereafter in the Women PS. DW1 also denied the fact that at the behest of her husband she has deposed falsely before the Court.

[25] DW-2 stated that she knows the accused as she used to reside in the adjacent house of accused as tenant. She also stated that she has shifted to her own house from that house about 6 months ago. DW-2 further deposed that during that time victim would often visit to the house of the accused and on asking wife of accused she told her that victim was pressurizing the accused to marry her in spite of the fact that they instructed the victim that such a marriage was not possible as accused was a married person. She continued to depose that even one day, the victim cut some portion of her own hand and appeared in the house of accused and gave him threat to marry her, otherwise, she would commit suicide. DW2 further deposed that at that time she was also present there and she also heard that father of victim allured accused that he would give all his properties to the accused if he agreed to marry the victim. DW-2 finally deposed that later on father of victim lodged a case against the accused, as accused did not marry the victim.

[26] During cross-examination, DW-2 stated that the victim consulted with Doctor after she had cut her hand and the witness found the victim on 2/3 occasions to visit the house of accused. DW-2 denied the fact that she was not a neighbour of the accused or that the victim never gave any pressure upon the accused to marry her or that she did not give any threat to accused that she would commit suicide if the accused did not marry her. The witness also denied the fact that the victim did not cut her hand to create

pressure on accused. DW-2 stated that she did not talk with the victim directly concerning the disputes.

[27] It is seen from the record that the re-examination of the father, mother and the sister of the victim girl was done and for the purpose of reference the same may be extracted hereunder:

**“Re-cross examination of PW-1:**

The victim was my younger daughter who is no more alive. She died about 1 ½ years back in my house. Before her death, my victim daughter gave statement before me and stated that the accused is not liable for what has been alleged against him. My daughter expressed that the accused should not be held guilty as the allegations forwarded are false. She also expressed that the accused should not suffer for her wrong statement. It is a fact that I could realize after recording of my deposition, that this case has been lodged out of spur of a moment and anger.

**Re-cross examination of PW-2:**

The victim was my younger sister who is no more alive. She died on October 2018 in our house due to illeness. Before her death, my victim sister gave statement before me and stated that the accused is not liable for what has been alleged against him. My sister expressed that the accused should not be held guilty as the allegations forwarded are false. She also expressed that the accused should not suffer for her wrong statement. It is a fact that I could realize after recording of my deposition, that this case has been lodged out of spur of a moment and anger.

**Cross-examination of the victim girl:**

It is not a fact that on 26.04.2015 Prantosh did not call me over phone to go to College tilla to meet with him. It is not a fact that on 26.04.2015 I rang Prantosh and told him to come at College tilla to bring me, otherwise I will commit suicide. It is not a fact that I compelled Prantosh to take me in a hotel of Golbazar and stay with me in the night in that hotel. It is not a fact that on 27.04.2015, Prantosh made me understanding not to go in a wrong way and he brought me to the college tilla police out post to hand over me to the police! It is not a fact that Prantosh told me that he was a married person having 2 children and wife and he did not want to mix with me but I insisted him to mix with me. It is not a fact that in the hotel at Golbazar, Prantosh did not commit any sexual intercourse with me. It is not a fact that on 27.04.2015, brother in law of Prantosh did not detain us at college tilla and to take us in the police out post. Now I am a student of Class XI and I could not continue my study as I have dropped for one year. It is not a fact that my father executed a power of attorney in my name in respect of landed property and in the said power of attorney, my husband's name was reflected as Prantosh Modak. It is not a fact that there was a previous relationship with the family of Prantosh and our parents including me and we had free access in both the houses. It is not a fact that I gave proposal to Prantosh to marry me and he did not agree with my proposal on the ground that he is a married person and that is why, out of that grievance, I insisted my father to lodge a case against him. It is not a fact that I have deposed falsely today in the court. It is not a fact that my date of birth is not on 23.12.1998.

**Re-cross of PW-7:**

The victim was my younger daughter who is no more alive. She died about 2 years back in my house. Before her death, my victim-daughter discussed and stated before me that the accused Prantosh Modak is not liable for what was alleged against him. My daughter expressed voluntarily that the accused should not suffer nor be prosecuted as the allegations forwarded are false. She also expressed that the accused should not suffer for her wrong statement. It is a fact that I could realize after recording of my deposition that this case was lodged in a haste, as well as, anger. We have no grievance against the accused.

[28] considering the evidence of PW-2, the victim herein, that they were married and they were in relationship and she was staying separately and on the fateful day she accompanied with her so called husband to the hotel and overnight they stayed there and next day she was recovered and thereafter, legal proceedings were initiated. Considering the said aspect and examining the same in the light of Section-375 Exception-2 of IPC wherein, it has been held that *“Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”*, and in the present case the girl was more than 16 years and accordingly, the same would not amount to rape. It has also revealed after interacting with the learned counsel appearing for the parties that the victim girl has already been died and the appellant is in jail. It is pertinent to mention herein that his first wife along with two minor children is suffering for this prolonged litigation which on humanitarian ground cannot be accepted.

[29] Before awarding conviction against accused, the Courts should be mindful of fact that there should be no room to suspect evidence of key prosecution witnesses based on whose evidence conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, Court should bear in mind, that it is not quantity, but quality of evidence that is material. It is the duty of Court to consider the trustworthiness of witness and evidence adduced on record and to assess the same in a prudent manner, whether the same inspires confidence, so as to accept and act upon, before convicting accused.

[30] In view of above observations, this Court inclined to allow the present appeal by setting aside the judgment and order of the learned Court below dated 19.11.2021 in connection with case No. Special (POCSO) 62 of 2016. Consequently, the appellant shall be released forthwith, if not wanted

in any other cases. The bail bond, if any, shall stand discharged. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs.

**B. PALIT, J**

**T. AMARNATH GOUD, J**

*A.Ghosh*

ANJAN GHOSH

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