

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Writ Jurisdiction Case No.1843 of 2019**

Arising Out of PS. Case No.-2672 Year-2017 Thana- PATNA COMPLAINT CASE District-  
Patna

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1. M/S Arya Traders through its Proprietor, namely, Mrs. Ranjan Kumari aged about 54 years, (Female), wife of Sri Satya Kinker, resident of Village - Rakhram Singh Badd Nalagarh Highway, P.S-Nalagarh, District- Solan, Himachal Pradesh.
  2. Mrs. Ranjan Kumari, wife of Sri Satya Kinker Resident of Village - Rakhram Singh Badd Nalagarh Highway, P.S-Nalagarh, District- Solan, Himachal Pradesh.

... .. Petitioners

Versus

1. The State of Bihar
2. Sandeep Rajarshi, son of Hrishikesh Chandra Sharma, resident of Village - Aunta, Raghuram Tola, Near Durga Asthan, P.O. And P.S.- Aunta, District- Patna, Bihar.

... .. Respondents

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with

**Criminal Writ Jurisdiction Case No. 1841 of 2019**

Arising Out of PS. Case No.-2671 Year-2017 Thana- PATNA COMPLAINT CASE District-  
Patna

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1. M/S Pharma Printpact, through its Proprietor namely Mr. Satya Kinker, son of Umesh Chandra Sharma, resident of Village-Rakhram Singh Badd Nalagarh Highway, P.S.-Nalagarh, District-Solan, Himachal Pradesh.
  2. Mr. Satya Kinker Son Of Umesh Chandra Sharma, resident of Village-Rakhram Singh Badd Nalagarh Highway, P.S.-Nalagarh, District-Solan, Himachal Pradesh.

... .. Petitioners

Versus

1. The State of Bihar through Principal Secretary, Home Deptt. Bihar Patna
2. Sandeep Rajarshi, son of Hrishikesh Chandra Sharma, resident of Village- Aunta, Raghuram Tola, Near Durga Sthan, P.O And P.S-Aunta, District- Patna, Bihar, Pin-803303.

... .. Respondents

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**Appearance :**

(In Criminal Writ Jurisdiction Case No. 1843 of 2019)

For the Petitioner/s : Mr. Ravindra Kumar, Advocate  
Mr. Manoj Kumar, Advocate

For the Respondent/s : Mr. Deepak Kumar, AC to GP 4

For Respondent no. 2 : Mr. Pankaj Kumar Singh, Advocate



(In Criminal Writ Jurisdiction Case No. 1841 of 2019)

For the Petitioner/s : Mr. Rabindra Kumar, Advocate  
Mr. Manoj Kumar, Advocate  
For the Respondent/s : Mr. Saroj Kumar Sharma, AC to AAG 3  
For the respondent no. 2 : Mr. Pankaj Kumar Singh, Advocate

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**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD**  
**ORAL JUDGMENT**

**Date : 08-09-2022**

Heard learned counsel for the petitioners and learned counsel for the respondent no. 2 as also Mr. Deepak Kumar, learned AC to GP-4 for the State in Cr.W.J.C. No. 1843/2019.

2. Since these two writ applications involve identical issues between same parties, learned counsel for the parties have requested this Court to hear and dispose of both the writ applications together.

This Court would, for sake of clarity of facts, record brief facts of the case(s) separately as under:-

**Complaint Case No. 2671 (C) of 2017**

3. This complaint case was filed by respondent no. 2 against the petitioners alleging therein that these petitioners of Cr.W.J.C. No. 1841/2019 had obtained a friendly cash loan of Rs. 60 lakhs in lieu of giving partnership status to the respondent no. 2 in the proprietorship firm of the petitioners and they had agreed to share 14% of the profits in the business after deduction of taxes. At the same time, it is also claimed that the accused persons-petitioners agreed to repay on demand the



amount. According to the complainant, in order to secure his interest the accused persons issued some post-dated cheques bearing nos. 580148 dated 02.11.2015 for Rs. 2,50,000/-, 580149 dated 08.05.2017 for Rs.2,50,000/-, 580150 dated 02.05.2017 for Rs. 5,00,000/- and 763051 dated 28.03.2017 for Rs. 6,00,000/-.

The complainant alleged that the accused persons neither inducted the complainant in the partnership nor provided any part of the profit of the business. It is the case of the complainant that the accused persons sent a legal notice dated 03.05.2017 (Annexure '2' to the complaint petition) in which they threatened the complainant to implicate him in false cases. Sensing the trouble the complainant put all the cheques for encashment but those cheques stood dishonoured on presentation for want of sufficient fund.

In paragraph '7' of the complaint petition the complainant gave instance of the cheques bearing no. 763051 dated 02.05.2017 for Rs. 6 lakhs and cheque no. 580149 dated 02.05.2017 for Rs. 2,50,000/- which he had put for encashment and stood dishonoured on presentation for want of sufficient fund. The



complainant alleges that he sent a legal notice dated 19.05.2017 (Annexure '5' to the complaint petition) calling upon the accused persons to pay the amount in question under the cheques but the accused persons sent a reply dated 02.06.2017 wherein they denied their liability to pay the amount.

**Complaint no. 2672 (C) of 2017 (in Cr.W.J.C. No. 1843 of 2019)**

4. In this complaint, the complainant-respondent no. 2 claims that the accused no. 2 of Cr.W.J.C. No. 1843/2019 was in friendly relationship with him and upon request of accused no. 1 to accused no. 2 the complainant had forwarded a loan of Rs.44 lakhs only for revival of the business of the accused persons. It is his case that the said loan was given to the accused persons by the complainant by way of unsecured loan for a period of three (3) years i.e. the maximum allowed limit for a loan forwarded from NRE account. The complainant claims that the loan was provided at an interest of 12% per annum and the accused persons had agreed to repay on demand the said amount. In order to secure the interest of the complainant, it is stated that the accused persons issued some post dated cheques bearing nos. 613976, 613979, 613980, 613981, 613982, 613983,



613984 and 613985 all amounting to Rs. 45,00,000/-.

It is the further case of the complainant that when the complainant demanded his money back from the accused persons, the accused persons kept on assuring the complainant and told him to allow him some time to return the money but the money was not returned to the complainant. Again in this complaint, the complainant refers the legal notice dated 03.05.2017 (Annexure '2') said to have been received from the accused persons, his reply dated 15.05.2017 (Annexure '3' to the complaint). The complainant has further alleged that when he presented those cheques for payment, the cheques stood dishonoured on presentation for want of sufficient fund in the account of the accused persons. He served a legal notice (Annexure '5' to the complaint petition) calling upon the accused persons to pay the amount but the accused persons denied their liability by a reply notice dated 02.06.2017 (Annexure '6' to the complaint).

**Submission on behalf the petitioners**

5. Learned counsel for the petitioners submits that on a bare perusal of the complaint petition and the Annexures thereto it would appear that the complainant had not disclosed



the true and correct facts in the complaint petition. As regards the loan of Rs. 60 lakhs said to have been given in cash, learned counsel for the petitioner submits that the complainant has not produced any cogent material to prove even *prima-facie* that he had advanced a loan of Rs.60 lakhs in cash.

6. Learned counsel submits that in course of solemn affirmation of the complainant, the learned Magistrate asked him a specific question as to whether he has any document to show that he had provided the loan amount, the complainant answered that he had no document with him showing giving of loan of Rs.60 lakhs to the accused persons.

7. It is further submitted that though learned Magistrate has in his order dated 04.09.2018 refers Annexure '2' to the complaint petition, in fact the learned Magistrate has not at all looked into Annexure '2' for a moment, otherwise, it would have been very clear to him that in Annexure '2' the petitioners nowhere acknowledges receipt of cash loan. Further Annexure '2' provides the details of payment made to the complainant as against the friendly loan of Rs. 44,00,000/-. These facts were concealed in the complaint petition. The learned Magistrate did not look into Annexure '3' which is the earliest version of the complainant – O.P. No. 2. In paragraph



4(b) of the Annexure '3' it is only stated that "further Rs. 60,00,000/- were to be paid by way of cash". The complainant has nowhere stated that actually Rs. 60,00,000/- were paid to the petitioners. No date or year of such payment has been disclosed in Annexure '3' save and except making a vague statement that the transactions were made in the year 2012-13 and 2013-14. It is, his own case in Annexure '3' that this amount was given for purpose of his induction in partnership and in lieu of apportionment of profit @ 14% per annum.

8. Learned counsel submits that the petitioners admit in respect of Complaint Case No. 2672(C) of 2017 that they had received a friendly loan of Rs. 44 lakhs from the complainant-respondent no. 2 and in lieu thereof the petitioners had provided some post-dated cheques to the complainant which the complainant was obliged to return as and when the payment are made to them.

9. It is submitted that from Annexures '3' and '5' to the complaint petition itself, it would have been clear to the learned Magistrate that the complainant himself admits refund of Rs. 11,70,000/- to Mrs. Ankita Kumari and Rs. 8,30,000/- to Mrs. Kiran Sharma. He had, however, not disclosed these facts in the complaint petition. It is submitted that the complainant



had himself received Rs. 28,00,000/- in his account from the proprietorship firm of the petitioners, but while filing the complaint petition, it was not disclosed.

**10.** Learned Counsel for the petitioners submits that the complainant claims to have given Rs. 60,00,000/- in cash but without any *prima-facie* proof and these are not said to be accounted money. Learned counsel has relied upon a judgment of Hon'ble Bombay High Court in the case of **Sanjay Mishra vs. Kanishka Kapoor @ Nikki and Anr.** reported in **2009 Cri. L.J. 3777** to submit that if the amount is unaccounted money and it is a large amount and is not repayable within few months, the failure to disclose the amount in Income Tax Return or Books of Accounts of the complainant may be sufficient to rebut the presumption under Section 139 of Negotiable Instrument Act (hereinafter referred to as the 'N.I. Act'). Learned Counsel refers to paragraphs '12' and '13' of the said judgment of the Hon'ble Bombay High Court to submit that the Hon'ble High Court has relied upon the judgment of the Hon'ble Apex Court in the case of **Krishna Janardhan Bhat v. Dattatraya G. Hegde (AIR 2008 SC 1325)** to show that there is no presumption under Section 139 of the N.I. Act that the debt is legally recoverable debt.



**11.** Learned counsel further relied upon the judgment of the Hon'ble Supreme Court in the case of **Sunil Todi and others vs. State of Gujarat and Anr.** reported in **2021 SCC Online SC 1174** (paragraphs 35, 36, 37 and 38) to make two-fold submissions :-

(I) that even if it is assumed that the cheques in the present case have been issued as a security, the legal requirement which Section 138 embodies is that a cheque must be drawn by a person for the payment of money to another "for the discharge, in whole or in part, of any debt or other liability". A cheque may be issued to facilitate a commercial transaction between the parties. Where, acting upon the underlying purpose, a commercial arrangement between the parties are fructified. In this case as against the loan of Rs. 44 Lakhs petitioners had refunded Rs. 39,70,000/- to the complainant, his sister and mother, and the complainant showed his willingness to refund Rs. 4.30 Lakhs provided the complainant returns the cheques. Thus, by no means it may be said to be a *prima-facie* case under Section 406 I.P.C. and 138 N.I. Act, 1881. The impugned order has been passed in a routine and mechanical manner ignoring the materials available on the record.

(II) In the instant case, the learned Magistrate has



failed to appreciate the mandate of Section 202 Cr.P.C. which talks of postponement of issue of process. It is his submission that the accused persons in the present case are residing in the State of Himachal Pradesh and the address mentioned in the complaint petition makes it crystal clear that the accused were living outside the area in respect of which the learned Magistrate is exercising his jurisdiction. In such circumstance, the learned Magistrate was duty-bound to postpone the issuance of process and to either enquire into the case himself or to direct an investigation either by a police officer or by some other persons. Referring to paragraph '39' of the judgment in **Sunil Todi** (supra) learned counsel submits that in this case, learned Magistrate has passed the impugned order in a routine and in a mechanical manner and has not applied his judicious mind to the allegations in the complaint. In paragraph '39' of its judgment in case of **Sunil Todi** (supra) the Hon'ble Supreme Court has referred in turn the two judgments of the Hon'ble Supreme Court in the case of **Mehmood UI Rehman v. Khazir Mohammad Tunda** reported in (2015) 12 SCC 420 and **Pepsi Foods Ltd. Vs. Special Judicial Magistrate** reported in (1998) 5 SCC 749; wherein it has been observed that setting the criminal law in motion against a person is a serious matter.



Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the inquiry conducted constitute a violation of law. (emphasis supplied)

**12.** Learned counsel submits that had the learned Magistrate applied his judicious mind and had carefully read Annexures '2', '3' and Annexure '5' which are the admitted documents exchanged between the parties and enclosed with the complaint petition by the complainant-respondent no. 2 himself, he would have easily found the strong contradictions which are present in the two documents issued on behalf of the complainant - Respondent No. 2 and the changing/diversed stand of the complainant while filing the present complaint case could have been easily found. In any case, learned counsel submits that no *prima-facie* case under Section 406 I.P.C. or Section 138 N.I. Act could have been made out.

**13.** It is submitted that in the nature of the present case, where the alleged cheques were not issued against any 'debts' or 'liability' duly determined and the complainant had received a sum of Rs. 39,70,000/- as against the friendly loan of Rs. 44,00,000/-, but did not return the cheques to the petitioners, the learned Magistrate could have well-appreciated that it was



not a case in which even cognizance under Section 138 N.I. Act could have been maintained. On these grounds, learned counsel seeks setting-aside of the impugned order(s) in both the complaint cases.

**Submissions on behalf of Respondent No. 2**

14. On the other hand, Mr. Pankaj Kumar Singh, learned counsel for respondent no. 2 has opposed this application. It is his submission that admittedly the cheques in question were issued as security towards the friendly loan advanced to the petitioners. Learned counsel submits that Rs.60,00,000/- were advanced to the petitioners in cash and according to the complainant out of this, Rs.40,00,000/- were contributed by him whereas Rs.10,00,000/- each were contributed by Ankita Kumari and Kiran Sharma. The complainant-respondent no. 2 admits that the petitioners had refunded Rs.20,00,000/- in total to Ankita Kumari and Kiran Sharma. Learned counsel for the respondent No. 2 further submits that respondent No. 2 has received Rs. 28,00,000/- in his account, still a sum of Rs.64,30,000/- has remained outstanding against the petitioners which they have failed to pay.

15. This Court has been further informed that the



complainant-respondent No. 2 has filed money suit bearing M.S. No. 5 of 2019 which is pending in the court of learned Sub-Judge IV, Barh. The suit has been filed for realisation of the total outstanding amount from the petitioners.

**16.** While trying his level best to defend the impugned order dated 04.09.2018, after going through the provision of Section 202 Cr.P.C. and the judgment of the Hon'ble Supreme Court in the case of **Sunil Todi & others** (supra), learned counsel for respondent no. 2 fairly agrees to this extent that in this case the learned Magistrate was required to conduct an inquiry which has not been done. Learned counsel submits that under these circumstances this Court may not enter into the merit of the contentions at this stage and remand the matter to the learned court below for a fresh consideration after following the established procedure of law.

**17.** Learned counsel for the petitioners has brought to the notice of this Court that in the complaint petition for the first time the respondent no. 2 has come out with a statement that the loan of Rs. 44 Lakhs were provided on interest @ 12% per annum. This was not the stand of the complainant – respondent no. 2 in either Annexure '3' or Annexure '5' which are the two legal notices served upon the accused – petitioners at the



instance of the complainant–respondent no. 2 at the earliest opportunity.

### **Consideration**

**18.** Having regard to the facts and circumstances of the case and the materials available on the record, this Court is persuaded to take a view that the learned A.C.J.M. VIII, Patna has while passing the impugned order dated 04.09.2018 acted in hot haste.

**19.** Learned Magistrate could not take into consideration the provision of Section 202 Cr.P.C. which is in the nature of a safeguard to the accused persons who are residing outside the jurisdiction of the Magistrate. In this regard, what has been held by the Hon’ble Supreme Court in paragraph 38, 39 of the judgment rendered in the case of **Sunil Todi (supra)** may be profitably referred to for a ready reference:

“38. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In *Vijay Dhanuka v. Najima Mamtaj*<sup>20</sup> this Court dwelt on



the purpose of the amendment to Section 202, observing:

“11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process ‘in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction’ and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words ‘and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction’ were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:

‘False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for



finding out whether or not there was sufficient ground for proceeding against the accused.’

The use of the expression “shall” prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

**39.** This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a *prima facie* sufficient ground for proceeding. In *Mehmood UI Rehman v. Khazir Mohammad Tunda*<sup>21</sup>, this Court followed the dictum in *Pepsi Foods Ltd. v. Special Judicial Magistrate*<sup>22</sup>, and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry conducted constitute a violation of law. The Court observed:



“20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in *Pepsi Foods Ltd. v. Judicial Magistrate* [*Pepsi Foods Ltd. v. Judicial Magistrate*, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter.”

“22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the



Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

(underline is mine)

**20.** This Court further finds that in the case of **Abhijit Pawar Vs. Hemant Madhukar Nimbalkar** reported in **(2017) 3 SCC 528**, the Hon'ble Supreme Court has taken note of the amendment brought into effect in Section 202 Cr.P.C. and observed in paragraph '25' as under:-

"25.... the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when



considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment *Mehmood Ul Rehman v. Khazir Mohammad Tunda*<sup>11</sup> .....”

**21.** This Court is, therefore, convinced that in the present case immediately after recording the solemn affirmation of the complainant the Magistrate was obliged to conduct an inquiry in terms of Section 202 Cr.P.C. and only after applying his judicious mind to the allegations in the complaint and the materials available on the record and upon enquiry he could have proceeded to pass an appropriate order in accordance with law. Learned counsel for the complainant- respondent no. 2 has, therefore, rightly agreed to the extent indicated hereinabove.

**22.** Although learned counsel for the petitioners have submitted that in the facts of the present case where the complainant- respondent no. 2 has received a substantial amount of Rs. 39,70,000/- and he has no material at all to show even *prima-facie* that a sum of Rs. 60,00,000/- has been advanced to the petitioners, the learned Magistrate could not have taken cognizance under Sections 406 I.P.C. and 138 N.I. Act in the facts of the present case, but this Court is not going into that issue in view of the pending proceedings as also that this



Court finds that for the purpose of adjudication of the present writ petitions, at this stage, the impugned orders are fit to be set-aside on the solitary ground that it has not been passed by following the established procedure of law. The contentions raised on behalf of the petitioners are left open to be considered by the learned court below in the light of the law laid down by Hon'ble Supreme Court and the High Court, while taking an appropriate decision in the matter in accordance with law. The court below shall pass an independent order after following the established procedure of law.

**23.** As a result of the aforesaid discussions, the impugned order taking cognizance and issuance of summons dated 04.09.2018 in complaint case no. 2672(C) of 2017 (in Cr.W.J.C. No. 1843 of 2019) and in complaint case no. 2671(C) of 2017 (in Cr.W.J.C. No. 1841 of 2019) to the petitioners are hereby set-aside. The matter is remitted to the learned court below.

**24.** These two writ applications stand disposed of accordingly.

**(Rajeev Ranjan Prasad, J.)**

Rajeev/-

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| AFR/NAFR          | AFR        |
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| Uploading Date    | 10.09.2022 |
| Transmission Date | 10.09.2022 |

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.

