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ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Cr. Appeal No.D- 29 of 2023.

Date of hearing

Order with signature of Judge.

12.12.2023.

1. For orders on office objections as flag A.
2. For hearing of main case.

Mr. Sajid Hussain Mahessar, advocate for the appellant.

Mr. Aitbar Ali Bullo, D.P.G

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Learned counsel for the appellant submits that the appellant was taken away by the police from his home at the behest of their Mukhi, however, he could not grease palms of complainant/police officer who became annoyed and by taking summersault has implicated him in this case by foisting the alleged contraband. He next submits that appellant was shown to have been arrested on 03.2.2023 by the complainant namely Ghulam Shabir P.W-4 at Exh:6. Complainant had deposed in his examination in chief that property in question was handed over to I.O by him on 04.2.2023. I.O/P.W-5 Exh:7 had also deposed in his examination in chief regarding delivery of the contraband from the complainant on 04.2.2023. However, WPC namely Faisal Akhtar who was Incharge of the Malkhana was examined before the trial Court Exh:4 as P.W-2 had deposed that he received case property viz. Charas in sealed condition from the I.O Akhtar Ali on 03.2.2023. He further pointed out that the Entry No.19 available at page No.35 of the paper book reveals no date or time regarding property. While pinpointing the deficiencies in the evidence, the counsel has drawn our attention of the Court towards Chemical Examiner available at page No.89 of paper book which reveals contraband was dispatched on 06.2.2023 whereas was received to Laboratory on 07.2.2023, therefore, counsel is of the opinion that nothing was secured from the appellant and after making his arrest, the alleged contraband was arranged only to strengthen rope against him otherwise the evidence brought before the trial Court depicts some other truth, hence the prosecution has miserably failed to prove its charge against the appellant, therefore, appellant may be acquitted from the charges by extended benefit of doubt to him. In support of his contentions, he has placed reliance upon the case laws reported as under:

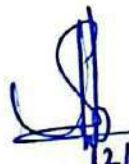
1. Muhammad Hazir v. The State (2023 SCMR 986).
 2. Mukhtiar Ali v. The State (2023 P.Cr.L.J. 1662).
 3. Umar Zaman v. The State (2022 SCMR 2093).
 4. Javed Iqbal v. The State (2023 SCMR 139).
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Learned D.P.G opposes the appeal on the ground that appellant was found in possession of the contraband and no malafide or ill will was brought on record against the police for his false implication. When confronted with the contradictions available in the evidence and major discrepancies between the statements of P.Ws, he is still arrogant to oppose the appeal.

Heard learned counsel for the parties and perused the record.

For the reasons to be recorded later on, instant appeal is allowed. Consequently the impugned judgment dated 29.4.2023 penned down by learned 1st Additional Sessions Judge/MCTC/Special Judge for C.N.S, Kandhkot in Special Case NO.16 of 2023 re: State v. Darshan Lal arisen out of Crime No.31/2023 of P.S A-Section Kandhkot registered for an offence under Sections 9(c) of C.N.S Act, 1997 is hereby set aside. Resultantly appellant is hereby acquitted of the charges by extending benefit of doubt to him. Appellant is in custody; therefore, he shall be released forthwith if his custody is no longer required by the jail authorities.


12/12/2023
JUDGE


JUDGE

shabir

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

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Crl Appeal No. D- 29 of 2023

Darshan Lal Marwai

VS

The State

SINDH HIGH COURT

Composition of Bench Before **Mr. Justice Muhammad Saleem Jessar**
Mr. Justice Kharlim Hussain Soomro (Author)

Single/D.B.

Date of Hearing: 12.12.2023

Date of Decision: 12.12.2023

(a) Judgment approved for
Reporting

YES
NO

 19/12/2023

CERTIFICATE

Certified that the judgment / Order is based upon or enunciates a principle of law / decides a question of law which is of first impression / distinguishes/ overrules/ reverses/ explains a previous decision.

Strike out whichever is not applicable.

- NOTE: - (i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used. The Reader must attach it to be the top of the first page of the judgment.
- (iii) Reader must ask the Judge writing the Judgment whether the Judgment is Approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA

Crl. Appeal No. D- 29 of 2023.

Present:

Mr. Justice Muhammad Saleem Jessar.

Mr. Justice Khadim Hussain Soomro.

Darshan Lal Marwai.

.....Appellant.

Versus

The State.

.....Respondent.

Mr. Sajid Hussain Mahessar, Advocate for appellant.

Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

Date of hearing: 12.12.2023.

Date of judgment/ short order: 12.12.2023.

Date of reasons: 19.12.2023.

Judgment

Khadim Hussain Soomro, J: Through the instant appeal, appellant Darshan Lal son of Kirpaal Mal Marwai has impugned the judgment dated 29.04.2023 passed by learned 1st Additional Sessions Judge/ Special Judge (CNS), Kandhkot, in Special CNS Case No. 16 of 2023, (Re: State v. Darshan Lal) emanated from F.I.R No.31 of 2023 registered at P.S A-Section Kandhkot, under Section 9 (c) of Control of Narcotic Substances Act, 1997, whereby he was convicted under Section 9(c) of Control of Narcotic Substances (Amendment) Act, 2022, and sentenced to suffer R.I for nine years and to pay fine of Rs.80,000/- and default in payment of fine to suffer further S.I for two years. However, the appellant has been extended the benefit of Section 382-B Cr.P.C.

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2. The facts of the prosecution case, are that the F.I.R lodged by SIP Ghulam Shabeer Mirani on 03.02.2023, stating therein that he along with other staff members namely PC Muhammad Asad, PC Muhammad Tayab, DPC Ghulam Rasool left P.S under entry No.53, at 1910 hours in police mobile for patrolling. During patrolling when they arrived at new road behind Sabzi Mandi Deh Kandhkot, in the meantime they saw on light of torches and headlights of the vehicle, that one person having black color shopping bag was going by foot towards east. Presuming his movement suspicious, the police party said him to stop but he started to run, therefore, police party stopped their vehicle, alighted, chased and apprehended him along with black color shopping bag after covering distance of about 10 paces at about 1940 hours. Police party took the shopping bag in their possession, opened and found charas in it in shape of pieces. It is alleged that on query the apprehended person disclosed his name as Darshan Lal son of Kirpal Das by caste Marwai resident of Gulsher Muhalla, Kandhkot. He further disclosed that he was going to sell out the charas. PC Muhammad Tayab brought investigation kit from the police mobile and complainant weighed the charas on digital balance which become 1100 grams. Then he engaged PC Muhammad Asad and PC Muhammad Tayab as mashirs and complainant conducted body search of the accused, whereupon nothing was recovered. Thereafter, the said charas was sealed on spot and such mashirnama of arrest and recovery was prepared there, in presence of above named mashirs and their signatures were obtained on it. Thereafter, police party returned back at P.S along with accused and case property, where SIP Ghulam Shabeer Mirani registered F.I.R on behalf of the State."

3. The learned trial Court framed the charge against the appellant at Ex.02, to which he pleaded not guilty and claimed to be tried. Then, in order to prove the charge against the appellant, the prosecution examined PW/Mashir PC Muhammad Asad at Ex.3; he produced mashirnama of arrest and recovery and mashirnama of site inspection. PW/ Incharge Malkhana of P.S, WPC Faisal Akhtar Bhutto was examined at Ex.4; he produced a photocopy of Entry No.21 of Register No.19. Dispatch Rider PC Barkat Ali Lashari was examined at Ex.5; he produced RC No.72/2023. Complainant SIP Ghulam Shabeer Mirani was examined at Ex.6; he produced F.I.R; photocopies of entries No.51 to 58 and 61 to 63. The Investigation officer of the case SIP Akbar Ali Bhangwar was examined at Ex.7; he produced Entries No.71, 14, 11, 48, 68; a letter to SSP seeking permission to send the property to FSL; acknowledgement Receipt of FSL and Chemical Report. After that, the learned Prosecutor closed the side of the prosecution vide statement Ex.08.

4. The statement of the appellant/ accused was recorded under Section 342 Cr.P.C at Ex.11, in which he denied the allegations of the prosecution levelled against him. He claimed his innocence and false implication in this case by Police. However, he neither examined himself on oath nor led any evidence in his defence.

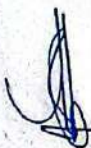
5. After hearing the counsel for the parties, the trial Court convicted and sentenced the appellant as mentioned in paragraph No.1 of this judgment.

6. Learned counsel for the appellant mainly argued that the judgment passed by the trial Court is against the law, facts and equity and liable to be set-aside; that the trial Court has failed to appreciate the factual as well as legal aspects of the case while convicting the appellant. He next argued that the evidence adduced by the prosecution at the trial consists of only police officials, which is not adequately assessed and evaluated by the trial Court, and the evidence is insufficient to warrant the conviction of the appellant. Per learned counsel, there is a delay in sending the alleged samples to the Chemical Examiner; therefore, tampering with the same cannot be ruled out. It is further contended by the learned counsel that the trial Court has erred in concluding that the alleged recovery was effected from the accused in the mode and fashion described by the prosecution and that there are some important and vital contradictions in the evidence of the prosecution witnesses, which create doubt. Lastly, he has prayed for setting-aside the impugned judgment and acquittal of the appellant.

7. Learned D.P.G., on the other hand, opposed the grant of appeal on the ground that the prosecution has fully established its case by producing trustworthy ocular as well as circumstantial and documentary evidence and that no malafide or ill will was alleged or proved against prosecution for false implication of the appellant.

8. We have considered the above contentions of the learned counsel for the appellant and learned Deputy Prosecutor General and have gone through all the evidence very carefully.

9. It is discernable that the prosecution witnesses examined at trial are police personnel, and no independent person has been cited or examined by the prosecution as mashir/witness. We circumspect that police officials are good


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witnesses, but the Courts are required to scrutinize and examine their evidence very diligently. The appellant was shown to be arrested in the day time from a road near Sabzi Mandi, where the presence of private persons could not be denied. We are of the view that either a private witness ought to be associated or some convincing reasons should be given for non-associating a private witness in the recovery proceedings. Though the evidence of police officials is as good as of others, but in a case where public persons were available at the site; and the prosecution failed to join them as witnesses, in such circumstances, evidence of police officials loses its sanctity and evidentiary value.

10. The careful re-appraisal of the material brought on the record entails that the complainant and his witnesses, no doubt, have tried to support the case. Still, their evidence, when scrutinized deeply, was found to be coupled with material contradictions, improbabilities/ infirmities, and irregularities in respect to very crucial and vital points. During cross-examination, PW Muhammad Asad and the complainant, Ghulam Shabir, provided conflicting accounts of key details. Discrepancies emerged regarding the distance between the place of arrest and the police station, with varying estimates of one kilometer and two and a half to three kilometers. Additionally, PW Muhammad Asad described a specific patrolling route through Juman Shah, Library Chowk, Noore-Mustafa Masjid, Bhitai School, and Zangi Laaro Road, while the complainant cited a different path through DSP Mor, Habib Bank, Library Chowk, and the Veterinary Hospital. Further inconsistencies arose regarding the duration of the arrest process, search, and the color of the recovered charas. Discrepant timeframes were reported for the arrest, search, weighing of charas, sealing of case property, and the preparation of the mashinama. Notably, PW Muhammad Asad and the complainant differed on the color of the charas, with descriptions ranging from brown to blackish-dark-brown. These inconsistencies highlight discrepancies in the testimonies presented during cross-examination.

11. These glaring contradictions in the evidence of prosecution witnesses substantiate the untrustworthiness and lack of confidence-inspiring nature of the evidence produced against the appellant. Such evidence is deemed unreliable and unsuitable as a foundation for imposing a sentence. An analysis of the aforementioned evidence reveals a lack of alignment between the testimonies of the witnesses on substantive matters, engendering skepticism concerning the genuineness of the prosecution's evidence.

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12. It further appears that, as per contents F.I.R, the alleged incident took place at 1940 hours. The complainant and PW/ Mashir have also affirmed this fact in their statements that the incident happened at 1940 hours. The contents of F.I.R and mashirnama show that the police party reached the spot at 1940 hours and saw a person, who on seeing the police party, tried to escape, as such police party stopped their vehicle, dismounted and then apprehended the accused, took shopper in their possession; enquired his name; then opened the shopper, which was found containing charas, which was then got weighed; after that the charas was sealed and after that that the mashirnama of arrest and recovery was prepared. Certainly, this entire process must have taken sufficient time, but the mashirnama shows the time of its preparation to be the same time, i.e. 1940 hours.

13. The record further reveals that the alleged recovery was effected on 03.02.2023, sent to the Laboratory through P.C Barkat Ali on 07.02.2023, with a delay of more than four days, and such delay has not been explained. It has also not been brought on record that it was in the safe custody of the Investigating officer of the case, and there was no chance of tampering. Though P.C Barkat Ali, who had taken the sample to the Chemical Examiner and WPC of the Malkhana had been examined, he had also not deposed any single word with regard to its keeping during the intervening period of four days. As per Rule 4(2) of the Control of Narcotic Substances (Government Analysis) Rules, 2001, this exercise was required to be completed within seventy-two hours of the recovery. For this purpose, even there is no plausible explanation brought on record by the prosecution as to why such inordinate delay was caused in the completion of this exercise by the investigating officer. Moreover, the said Barkat Ali deposed that he had received the contraband charas from the SIP Akber Ali Bhangwar on 03-02-2023, whereas the said SIP Akber Ali deposed on 04-02-2023, he had received the contraband charas from the complainant then here question arises that who deposited the charas in the malakhan which creates the doubt on the prosecution story. We have examined Malkhana register entry, which does not show the time of entry, date, month and year, which makes the entry highly doubtful. It is the prosecution's responsibility to establish each and every step, starting with the stage of recovery and continuing through the creation of sample packets, safekeeping of sample parcels, and secure transportation of sample parcels to the relevant laboratory. The


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prosecution must prove this linkage, and if any links are absent in similar acts, the accused must have received the benefit of the doubt. As a result, the prosecution failed to prove that the sample parcels were handled carefully and sent securely. This flaw on the side of the prosecution is enough to give the appellant the benefit of the doubt. We have been guided by the case of *JAVED IQBAL V/S THE STATE*, 2023 SCMR 139.

"We have heard the learned counsel for the appellant, learned Additional A.G. KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. Even the Moharrar of the Malkhana was also not produced even to say that he kept the sample parcels in the Malkhana in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in mystery as to where and in whose custody the sample parcel remained. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused."

14. A similar point of law has been discussed and observed by the Supreme Court of Pakistan in the cases of Qaisar Khan vs. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR-363), The State through Regional Director ANF Vs. Imam Bakhsh and others (2018 SCMR-2039), Ikramullah and others Vs. The State (2015 SCMR-1002) and Amjad Ali Vs. The State (2012 SCMR-577). In the referenced cases, the esteemed Supreme Court of Pakistan concluded that when a prosecution unveils the aforementioned defect, there exists a notable uncertainty regarding the establishment of the case against the accused beyond a reasonable doubt.

15. In the case of Mst. Razia Sultana v. The State and another (2019 SCMR 1300), the Supreme Court of Pakistan observed the following:-


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"At the very outset, we have noticed that the sample of the narcotic drugs was dispatched to the Government Analyst for chemical examination on 27.2.2006 through one Imtiaz Hussain, an officer of ANF but the said officer was not produced to prove safe transmission of the drug from the Police to the chemical examiner. The chain of custody stands compromised as a result it would be unsafe to rely on the report of the chemical examiner. This Court has held time and again that in case the chain of custody is broken, the Report of the chemical examiner loses reliability making it unsafe to support conviction. Reliance is placed on State v. Imam Bakhsh 2018 SCMR 2039). 3. For the above reasons the prosecution has failed to establish the charge against the appellant beyond reasonable doubt, hence the conviction and sentence of the appellant is set aside and this appeal is allowed, setting the appellant at liberty unless required in any other case. 10. In another case of Zahir Shah alias Shat V. The State through Advocate General, Khyber Pakhtunkhwa (2019 SCMR 2004), Honourable Supreme Court has held as under:- 6 2. We have reappraised the evidence with the able assistance of learned counsel for the parties and have noticed at the very outset that the Police constable, bearing No.FC-688, who delivered the sealed parcel to the Forensic Science Laboratory, Peshawar on 27.2.2013 was not produced by the prosecution. This fact has been conceded by the learned law officer appearing on behalf of the respondents. This court has repeatedly held that safe custody and safe transmission of the drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory must be satisfactorily established. This chain of custody is fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspicious, safe and secure. Any break in the chain of custody i.e., safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. Reliance is placed on State v. Imam Bakhsh (2018 SCMR 2039). 11. Recently the Honourable Supreme Court of Pakistan in the case of Qaiser and another v. The State (2022 SCMR 1641), has observed that "In absence of establishing the safe custody and safe transmission, the element of tempering cannot be excluded in this case. The chain of custody of sample parcels begins from the recovery of the narcotics by the Police including the separation of representative samples of the recovered narcotics, their dispatch to the Malkhana and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules 2001 (Rules 2001), rests upon the

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report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused. Such lapse on the part of the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner."

16. In a recent case, *Qaiser and others v. The State* (2022 SCMR 1641), the Supreme Court of Pakistan, in paragraph No. 4 of the judgment, has observed as under:-

"In absence of establishing the safe custody and safe transmission, the element of tempering cannot be excluded in this case. The chain of custody of sample parcels begins from the recovery of the narcotics by the Police including the separation of representative samples of the recovered narcotics, their dispatch to the Malkhana and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules 2001 (Rules 2001), rests upon the report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused. Such lapse on the part of the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner."

17. All these facts and circumstances make the case of prosecution as highly doubtful. As such, in the presence of these irregularities and recklessness, mere evidence of police witnesses cannot be relied upon and cannot be made the basis for awarding a sentence.

18. After reassessing the evidence presented by the prosecution which as discussed above is based on material contradictions, improbabilities/ infirmities and irregularities in respect of very crucial and vital points, we conclude that the prosecution has not proven its case against the appellant beyond a

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reasonable doubt, and that multiple circumstances creating doubt are not required to extend the benefit of the doubt. If a single circumstance raises reasonable doubt in the mind of a prudent person about the guilt of an accused, the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right. It has been held in the case of *Tariq Pervez v. The State*, reported as (1995 SCMR 1345), wherein the Honourable Supreme Court of Pakistan has held as follows:


"The concept of benefit of doubt to an accused person is deep-rooted in our country for giving him If there is a situation that raises reasonable doubt in the opinion of a wise person regarding the accused's guilt, the accused will be entitled to the benefit not as a matter of grace and concession, but as a matter of right." The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048). " The exact same reasoning was reiterated in the case of Abdul Jabbar v. State (2019 SCMR 129) when the apex court held that once a single loophole is observed in a case presented by the prosecution, such as a discrepancy between the ocular account and medical evidence or the presence of doubtful eyewitnesses, the benefit of such loophole or lacuna in the prosecution's case automatically goes in favour of an accused."

19. This is a settled principle of law and equity that it is better that 100 guilty persons should be let off, but one innocent person should not suffer. As the distinguished English jurist William Blackstone wrote, "Better that ten guilty persons escape than that one innocent suffer". Benjamin Franklin, who was one of the foremost figures of early American history, says "it is better a hundred guilty persons should escape than one innocent person should suffer". Underscores the principle of highlighting the safeguard of innocent persons within the legal system. This viewpoint reflects a commitment to justice that stresses avoiding wrongful punishment or harm to innocent people, even at the probable cost of allowing some guilty individuals to go unpunished. Franklin's assertion aligns with the vital legal principle of "presumption of innocence," which seats the burden on the prosecution to prove guilt beyond a reasonable doubt. The idea is rooted in the recognition that an unjust conviction carries severe consequences, infringing upon the rights and well-being of individuals. By expressing a inclination for the acquittal of potentially guilty individuals over the wrongful conviction of an innocent person, Franklin emphasizes the moral imperative of safeguarding the rights and freedoms of all individuals in the pursuit of justice. This principle has influenced legal systems globally and

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serves as a cornerstone in discussions about the balance between individual rights and societal interests within the realm of criminal justice.

20. It is also a well-established principle of criminal administration of justice that no conviction may be handed to an accused unless and until the prosecution presents credible, trustworthy, and unimpeachable evidence with no contradiction throwing doubt on the validity of the prosecution account. In the current instance, we believe that the prosecution's account is surrounded by dense mists of doubt and that the learned trial Court did not examine the evidence in its real context, arriving at an incorrect result by finding the appellant guilty of the charge. As a result, and for the foregoing reasons, the conviction and sentence awarded by the learned trial Court against the appellant is not sustainable. Consequently, the appeal was allowed by a short order dated 12.12.2023, whereby the appellant, Darshan Lal, was acquitted of the charge, and these are the reasons for above said short order.


19/12/2023
Judge

~~Judge~~

Ansari