06/01/2017

Shri R.K. Sharma, counsel for the applicants.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondents No.1 & 2/State.

This petition has been filed under Section 482 of CrPC against the order dated 18.11.2008 passed by First Additional Sessions Judge to the Court of Special Judge (Atrocities)/First Additional Sessions Judge, Morena in Criminal Revision No.182/2007 arising out of order dated 06.11.2007 passed by JMFC, Morena by which in exercise of powers under Section 190 of CrPC, the Magistrate has taken cognizance against the applicants and two more persons for offences punishable under Sections 323, 294, 147, 149 of IPC and under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

The necessary facts for the disposal of this petition are that on 13.08.2007 a FIR was lodged by the complainant Gautam alleging that at about 4:15 PM when he was sitting in the shop of one Vimal Khandelwal, at that time the co-accused Monu Jain was coming from the direction of Maya Temple. When complainant demanded his money which was given to him by way of loan, Monu Jain started abusing him and said that nothing is outstanding and went back to his house. At about 4:30 PM while the complainant and Vimal Khandelwal were going back towards their house, at that time Rinku Jain,

Pinki Jain, Forty Verma (applicant No.2), Uttam Verma (applicant No.1) and Manoj Jain, in furtherance of common object were standing with intention to assault the complainant. Immediately after noticing the complainant, Manoj Jain started abusing him and said "मादरचोद बेड़िया वाले तेरो को पैसा देता हूँ।" Thereafter, Monu went to the roof of his house and threw a stone on the complainant, as a result of which, the complainant received injury on his head due to which blood started oozing out. Rinku Jain, Pinki Jain and Uttam Verma threw the complainant on the road, dragged him and started assaulting him by means of fists and blows. Forty Verma (applicant No.2) assaulted the complainant by means of lathi causing injury on his right forearm. It was further alleged that the accused persons knew the complainant prior to the incident and they knew this fact that the complainant belongs to Schedule Caste and with an intention to humiliate him, he was humiliated and insulted by his caste on a place which is within the public view.

On the complaint of the complainant, the FIR was recorded. The complainant was sent for medical examination. In MLC, the doctor found the following injuries:-

(1) Lacerated wound 2cm x ½ cm x bone deep in center of scalp

(2) Contusion 4 cm x 6 cm on right side of back of lumber region near spine.

(3) Swelling on right forearm.

X-ray was advised, however, no bony injury was seen. The statement of complainant was recorded on 13.08.2007 itself in which he reiterated the same allegations which he had made in the FIR. However, after ten days of the incident i.e., on 23.08.2007, the police recorded the statements of Ajay Jain, Naresh Kumar, and Rampal. The statement of Ram Kumar was recorded on 31.08.2007. The statement of Narottam was recorded on 24.08.2007 and statement of Deepak Kumar was recorded on 24.08.2007 and on subsequent dates the statements of Ashok Jain, Rajendra, Girraj, Vinod, Satish, Pramod Jain, Ramavtar, Rakesh Shivhare, Anand Singh and Bunty Bansal were recorded. All these witnesses have stated that the complainant was demanding money from Monu Jain. Monu had never taken any loan from the complainant. When Monu refused to give the money to the complainant, then the complainant caught hold the collar of Monu, as a result of which, there was a scuffle between both of them and as head of the complainant was dashed against one pillar, therefore, he received injury on his head. All the witnesses have specifically stated that Rinku Jain, Pinki Jain, Forty Verma and Uttam Verma were not present on the place of incident and they had not participated in any crime. The police after considering the statements of the witnesses

filed a charge-sheet against Monu Jain only and did not file charge-sheet against Rinku Jain, Pinki Jain, Uttam Chandra and Forty Verma by relying on the statements of the witnesses. Further, the police did not file the charge-sheet against Monu Jain for an offence punishable under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The Magistrate in exercise of powers under Section 190 of CrPC came to the conclusion that in the light of the statement of the complainant, cognizance was required to be taken against Pinki Jain, Rinki Jain, Forty Verma and Uttam Verma for offence punishable under Section 3 (1) (x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The said order was challenged by the applicants by filing a criminal revision. The criminal revision filed by the applicants suffered dismissal by order dated 18.11.2008 which is under challenge.

It is submitted by the counsel for the applicants that if the statements of the witnesses are considered then it would be clear that all those witnesses have specifically stated that the applicants, Pinki Jain and Rinki Jain were not present on the spot and, therefore, the question of their participation in the crime does not arise. Further, it is submitted by the counsel for the

applicants that before exercising powers under Section 190 of CrPC, the Trial Magistrate should have given an opportunity of hearing to the applicants and as the said opportunity was not extended by the Magistrate, therefore, the order is liable to be quashed on the said ground.

The counsel for the applicants in support of his contention has relied upon the judgment of the Supreme Court passed in the case of **Sunil Bharti Mittal v. Central Bureau of Investigation** reported in **AIR 2015 SC 923** and the judgments passed by the Coordinate Bench of this Court in the cases of **Omprakash vs. State of M.P. & Ano.** reported in **2015 (1) MPLJ (Cri.) 347** and **Virendra Singh v. State of M.P. & Ano.,** reported in **2014 (2) MPLJ (Cri.) 68**.

Per contra, it is submitted by the counsel for the State that in the FIR as well as in the case diary statement, the complainant has specifically narrated about the overt-act on the part of the applicants and other two accused person. The allegations made in the FIR as well as in the case diary statements find full corroboration with the medical evidence. At the stage of taking cognizance under Section 190 of CrPC, meticulous appreciation of evidence is not permissible and if the Magistrate has taken cognizance against the applicants and two accused persons on the basis of the FIR as well as the case diary statements of the complainant, then

it cannot be said that the Court of Magistrate had committed any illegality.

Further, it is submitted by the counsel for the respondents that once it is found in the FIR that the accused persons had humiliated the complainant at a place which is within a public view by calling him by his caste then *prima-facie* such an allegation is sufficient to take cognizance for offence punishable under Section 3 (1)(x) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Heard the learned counsel for the parties and perused the petition.

So far as the contention of the counsel for the applicants that prior to exercising powers under Section 190 of CrPC, the Magistrate was under obligation to extend an opportunity of hearing to the persons against whom the cognizance was to be taken is concerned, suffice it to say that there is no provision in Code of Criminal Procedure which provides for grant of such an opportunity to the persons against whom the Magistrate is inclined to take cognizance.

It is well settled principle of law that the rule of *audi alteram partem* is subject to exceptions. Such exceptions can be provided either by law or by such necessary implications where no other interpretation is possible.

The Supreme Court in the case of **Anju**

Chaudhary v. State of Madhya Pradesh reported in **(2013) 6 SCC 384** has held as under:-

> "30. Section 154 of the Code places an unequivocal duty upon the police officer in charge of a police station to register FIR upon receipt of the information that a cognizable offence has been committed. It hardly gives any discretion to the said police officer. The genesis of this provision in our country in this regard is that he must register the FIR and proceed with the investigation forthwith. While the position of law cannot be dispelled in view of the three Judge Bench Judgment of this Court in State of Uttar Pradesh v. Bhagwant Kishore Joshi [AIR 1964 SC 221], a limited discretion is vested in the investigating officer to conduct a preliminary inquiry pre-registration of an FIR as there is absence of any specific prohibition in the Code, express or implied. The subsequent judgments of this Court have clearly stated the proposition that such discretion hardly exists. In fact the view taken is that he is duty bound to register an FIR. Then the question that arises is whether a suspect is entitled to any pre-registration hearing or any such right is vested in the suspect.
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> 31. The rule of audi alteram partem is subject to exceptions. Such exceptions may be provided by law or by such necessary implications where no other interpretation is possible. Thus rule of natural justice has an application, both under the civil and criminal jurisprudence. The laws like detention and others, specifically provide for post-detention hearing and it is a settled principle of law that application of this

doctrine can be excluded by exercise of legislative powers which shall withstand judicial scrutiny. The purpose of the Criminal Procedure Code and the Indian Penal Code is to effectively execute administration of the criminal justice system and protect society from perpetrators of crime. It has a twin purpose; firstly to adequately punish the offender in accordance with law and secondly, to ensure prevention of crime. On examination, the scheme of the Criminal Procedure Code does not provide for any right of hearing at the time of registration of the First Information Report. As already noticed, the registration forthwith of a cognizable offence is the statutory duty of a police officer in charge of the police station. The very purpose of fair and just investigation shall stand frustrated if pre-registration hearing is required to be granted to a suspect. It is not that the liberty of an individual is being taken away or is being adversely affected, except by the due process of law. Where the Officer In-charge of a police station is informed of a heinous or cognizable offence, it will completely destroy the purpose of proper and fair investigation if the suspect is required to be granted a hearing at that stage and is not subjected to custody in accordance with law. There would be the pre-dominant possibility of a suspect escaping the process of law. The entire scheme of the Code unambiguously supports the theory of exclusion of audi alteram partem pre-registration of an FIR. Upon registration of an FIR, a person is entitled to take recourse to the various provisions of bail and anticipatory bail to claim his liberty in accordance with law. It cannot be said to be a violation of the

principles of natural justice for two different reasons: firstly, the Code does not provide for any such right at that stage, secondly, the absence of such a provision clearly demonstrates the legislative intent to the contrary and thus necessarily implies exclusion of hearing at that stage. This Court in the case of Union of India v. W.N. Chadha (1993) Suppl. (4) SCC 260 clearly spelled out this principle in paragraph 98 of the judgment that reads as under:

> "98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."

32. In the case of Samaj Parivartan Samuday v. State of Karnataka (2012) 7 SCC 407, a three-Judge Bench of this Court while dealing with the right of hearing to a person termed as "suspect" or "likely offender" in the report of the CEC observed that there was no right of hearing. Though the suspects were already interveners in the writ petition, they were heard. Stating the law in regard to the right of hearing, the Court

held as under :

> "50. There is no provision in CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect. CBI, as already noticed, may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialised agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court. This question is of no relevance to the present case as we have already heard the interveners."

33. While examining the above-stated principles in conjunction with the scheme of the Code, particularly Section 154 and 156(3) of the Code, it is clear that the law does not contemplate grant of any personal hearing to a suspect who attains the status of an accused only when a case is registered for committing a particular offence or the report under Section 173 of the Code is filed terming the suspect an accused that his rights are affected in terms of the Code. Absence of

> specific provision requiring grant of hearing to a suspect and the fact that the very purpose and object of fair investigation is bound to be adversely affected if hearing is insisted upon at that stage, clearly supports the view that hearing is not any right of any suspect at that stage.
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> 34. Even in the cases where report under Section 173(2) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law."

Thus, it is clear that no opportunity of hearing is required to be extended to the persons against whom the Court proposes to take cognizance under Section 190 of CrPC. Now the question for consideration is that whether at the time of taking the cognizance under Section 190 of CrPC meticulous appreciation of evidence is permissible or the Magistrate is only required to see that there is some material available on record to take cognizance.

The counsel for the applicants has placed reliance on the judgments passed by the Coordinate Bench of this Court in the cases of **Omprakash (supra)** and **Virendra Singh (supra)**. These judgments are not applicable to the facts of the case because in the present case, the Trial Court

has taken cognizance while exercising powers under Section 190 of CrPC whereas the above mentioned two cases deals with exercising of powers under Section 319 of CrPC. The scope of power under Section 319 of CrPC is different from that of under Section 190 of CrPC.

It is well settled principle of law that while exercising powers under Section 319 of CrPC, the Court has to prima facie form an opinion that on the basis of the evidence which has already come on record, the additional accused can be convicted, whereas, that is not the scope while exercising powers under Section 190 of CrPC.

In the case of **Sunil Mittal (supra)**, the Supreme Court has held as under:-

> "Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (See SWIL Ltd. v. State of Delhi, (2001) 6 SCC 670). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (See Union of India v. Prakash P. Hinduja and another, (2003) 6 SCC 195). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the

> police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."

The counsel for the applicants relied upon a judgment of the Supreme Court passed in the case of **Harchand Singh & Ano. v. State of Haryana** reported in **AIR 1974 SC 344** and submitted that in a case, where the prosecution leads two sets of evidence and each one of which contradict the other then it is difficult to find the conviction of the accused. Accordingly, it was submitted that there are two sets of evidence in the present case i.e.,:-

(i) The FIR and the case diary statement of the complainant; and

(ii) The statement of the independent witnesses.

It was further submitted by the counsel for the applicants that in view of the statement of the independent witnesses, the Trial Court should have rejected the allegations made by the complainant in the FIR as well as in his case diary statement.

Suffice it to say that for taking cognizance under Section 190 of CrPC, meticulous appreciation of evidence is not permissible. Whether the FIR and the police case diary statement of the complainant

should be accepted or not or whether the statements made by the independent witnesses should be discarded in the light of the FIR and the case diary statements of the complainant, is a question which is to be decided by the Trial Court after recording of evidence. Even, the case of Harchand (supra) was decided after full-fledged trial and, therefore, the preposition as laid down in the said case cannot be made applicable at the stage of taking cognizance in exercise of powers under Section 190 of CrPC.

The Supreme Court in the case of **Nupur Talwar v. Central Bureau of Investigation, Delhi and another** reported in **(2012) 2 SCC 188** has held as under:-

> "15. Now the question is: what should be the extent of judicial interference by this Court in connection with an order of taking cognizance by a Magistrate while exercising his jurisdiction under Section 190 of the Code?
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> 16. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

17. The taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.

18. The principles relating to taking of cognizance in a criminal matter has been very lucidly explained by this Court in S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Ors. - (2008) 2 SCC 492, the relevant observations wherefrom are set out:

> "19. The expression 'cognizance' has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means 'become aware of' and when used with reference to a court or a Judge, it connotes' to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.
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> 20. 'Taking Cognizance' does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition

> precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."

19. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, anyone reading the order of the Magistrate taking cognizance, will come to the conclusion that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a Criminal Revision under Sections 397 and 401 of the code (not under Section 482) at the instance of Dr. Mrs. Nupur Talwar would also show that there has been a proper application of mind and a detailed speaking order has been passed.

20. In the above state of affairs, now the question is: what is the jurisdiction and specially the duty of this Court in such a situation under Article 136?

22. Reference in this connection may be made to a three Judge Bench decision of this Court in the case of M/s. India Carat Private Ltd. Vs. State of Karnataka & Anr. (1989) 2 SCC 132. Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we would rather quote the observation as under:-

> "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused..."

> These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.

Now the question for consideration before this Court is that whether the order passed by the Trial Court taking cognizance against the applicants and two more persons is perverse or the same has been

passed on the basis of some evidence which is said to be available on record.

The FIR was lodged by the complainant on 13.08.2007 within half an hour of the incident. The incident is alleged to have taken place at 16:30 and the FIR was lodged at 17:00 on the same day. In the FIR, the complainant has specifically mentioned the overt-act of the accused persons. The said overt-act as alleged in the FIR finds full corroboration with the medical report of the complainant. The statement of the complainant was also recorded on the same day in which he reiterated the same allegation which he had made in the FIR. However, the statement of the remaining witnesses was recorded on 23.08.2007 or on subsequent dates. Some of the witnesses have stated that the applicants and the other two accused persons namely Pinki Jain and Rinku Jain were not present on the spot. What was the occasion for the witnesses to say specifically about the absence of the accused persons on the spot, is not known. It is expected of a witness that he would narrate the incident which he had witnessed and not to say that whether any other person had participated in the assault or not? Further, these witnesses were examined after more than 10 days of the incident. Even, these witnesses have not stated that the co-accused Monu had pelted stone on the head of the complainant from the roof of his

house. Their allegation is that the co-accused Monu Jain and the complainant were quarrelling with each other and in that incident the complainant suffered a head injury as his head dashed against the pillar. When the police has come to the conclusion that prima-facie offence has been made against Monu Jain and the police has filed the charge-sheet against him that means the police did not rely on the earlier part of the statements of these witnesses. Then under these circumstances, there was no occasion for the police to believe the later part of the statement of the witnesses which was to the effect that the applicants and the co-accused persons were not on the spot. Further, it was for the Magistrate to consider that whether there is some evidence available on record to take cognizance under Section 190 of CrPC against the applicants and two co-accused persons. Viewed from any angle, it cannot be said that the order passed by the trial magistrate taking cognizance against the applicants and two other co-accused persons was passed based on no evidence.

So far as the question of taking cognizance of offence punishable under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, it is clear from the FIR as well as the case diary statement of the complainant that he was called by his caste and undisputedly the complainant belongs to scheduled

caste whereas the applicants and other co-accused persons belongs to higher caste, calling a member of the Scheduled Caste by `Bedia' with an intent to insult or humiliate him in a place within public view is certainly an offence under section 3(1)(x) of the Act.

The Supreme Court in the case of **Swaran Singh & Ors. v. State through Standing Counsel & Anr.**, reported in **(2008) 8 SCC 435** has held as under:-

> "20. The Chamars also suffered terribly during this period. The British industries e.g. Bata almost completely destroyed the vocation of the Chamars, with the result that while they were a relatively respectable section of society before the coming of British rule (because they could earn their livelihood through manufacture of leather goods) subsequently they sank in the social ladder and went down to the lowest strata in society, because they lost their livelihood and became unemployed.
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> 21. Today the word "Chamar" is often used by people belonging to the so-called upper castes or even by OBCs as a word of insult, abuse and derision. Calling a person "Chamar" today is nowadays an abusive language and is highly offensive. In fact, the word "Chamar" when used today is not normally used to denote a caste but to intentionally insult and humiliate someone.
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> 22. It may be mentioned that when we interpret section 3(1)(x) of the Act we have to see the purpose for which the Act was enacted. It was obviously made to prevent indignities, humiliation and harassment to the members of SC/ST community, as is

evident from the Statement of Objects & Reasons of the Act. Hence, while interpreting section 3(1)(x) of the Act, we have to take into account the popular meaning of the word "Chamar" which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.

23. This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word "Chamar" when addressing a member of the Scheduled Caste, even if that person in fact belongs to the "Chamar" caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity - so many religions, castes, ethnic and lingual groups, etc. - all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united.

24. In our opinion, calling a member of the Scheduled Caste "Chamar" with intent to insult or humiliate him in a place within public view is certainly an offence under section 3(1)(x) of the Act. Whether there was intent to insult or humiliate by using the word "Chamar" will of course depend on the context in which it was used."

Accordingly for taking cognizance for offence punishable under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989, there is a sufficient material available on record and thus, the trial magistrate did not commit any mistake while taking cognizance against all the accused persons for offence punishable under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Accordingly, it is held that neither the Court of Magistrate nor the Revisional Court has committed any illegality by passing the orders under challenge. Consequently, this petition fails and is hereby dismissed.

The interim order passed on 04.12.2008 is hereby vacated.

A copy of this order be sent to the Trial Court for necessary information.

(G.S.Ahluwalia)
(ra) **Judge**