

CASE HEARD THROUGH VIDEO CONFERENCING

CRM-M No.40506 of 2019 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM No.31214 of 2020 IN/AND
CRM-M No.40506 of 2019 (O&M)
Decided on: 12.01.2021

Amarjit Singh and others

....Petitioners

Versus

State of Punjab and another

....Respondents

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. Aman Bansal, Advocate
for the petitioners.

Mr. Joginder Pal Ratra, DAG, Punjab.

None for respondent No.2.

ARVIND SINGH SANGWAN, J. (Oral)

CRM No.31214 of 2020

Prayer in this application is for early hearing of the main
petition.

Heard.

For the reasons stated in the application, the same is
allowed and the main case, which is fixed for 05.03.2021, is taken up
today for hearing.

CRM No.31209 of 2020

Heard.

Allowed as prayed for.

Documents (Annexures P-22 to P-26) are taken on record
subject to all just exceptions.

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A murdered man was found alive. Still the 15 years long agony of the petitioners (hereinafter referred to as 'the accused') is not buried by the Courts below.

This is the state of affairs that despite the National Judicial Academy as well as the Chandigarh Judicial Academy, holding seminars and imparting training to the Sessions Judges or the Magistrates, that judicial consciousness demand real and substantive justice and there is nothing illegal in the judicial system if in exceptional case, a Court, in quest of truth and justice passes an order acknowledging the constitutional right of a citizen, the Additional Sessions Judge,-I, Ludhiana and Judicial Magistrate Ist Class, Ludhiana, have failed to exercise jurisdiction vested with them.

The constitutional vision of imparting justice by the District Judiciary also encourages the Courts to be an instrument to establish a welfare state based on an equal justice to all as Article 21 of the Constitution of India provides that the right to life and personal liberty cannot be taken away except by procedure established by law which should be just, fair and reasonable. Similarly, Article 38 of the Constitution of India provides that the state should strive to promote the welfare of people by securing and protecting as effectively as it may be a social order in which justice, social, economic and political shall be ensured. Even, Article 39-A of the Constitution of India provides equal justice and free legal aid and commands the State to secure the operation of legal system, to promote justice based on an equal

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opportunity.

Brief facts of the case are that the petitioners (who are the retired police officials) were posted in Police Station Dehlon, District Ludhiana and had arrested one Hardeep Singh @ Raju, son of Nagender Singh (hereinafter referred to as 'the complainant') in FIR No.139 dated 25.08.2005 registered under Sections 15 and 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act'). When the police party was taking Hardeep Singh @ Raju in a government vehicle to produce him before the Illaqa Magistrate, he escaped from the police custody and another FIR No.140 dated 25.08.2005 was registered against him under Section 224 IPC. Thereafter, the complainant filed a criminal writ petition i.e. CRWP No.448 of 2005, praying for issuance of a writ in the nature of Habeas Corpus to produce his son Hardeep Singh, on the pretext that he has been illegally detained by the police in Police Station Dehlon, District Ludhiana. A Warrant Officer was appointed but Hardeep Singh could not be recovered.

Later on, on 17.09.2005, a dead body of an unknown person was found and its post-mortem was conducted. Thereafter, the complainant alleged that the dead body is of his son and the petitioners/accused have murdered him. This Court directed the Additional Director General of Police (Crime), to get an enquiry conducted and submit a report. ***“The Additional Inspector General of Police (Crime) gave a report that the dead body recovered from the pond was not of the son of the complainant and he was alive and was***

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in regular touch with the complainant/father.” Thereafter, this Court directed the Sessions Judge, Ludhiana, to hold an enquiry and submit a report about the whereabouts of the son of the complainant. The Sessions Judge submitted an enquiry report on 31.08.2008, holding that the son of the complainant was eliminated by the police while in custody. In view of the said report, the aforesaid CRWP No.448 of 2005, was disposed of on 21.05.2010 with a direction to register an FIR against the accused and thus, FIR No.115 dated 21.08.2010 was registered under Sections 302 and 201 IPC at Police Station Dehlon, District Ludhiana.

During the investigation of the FIR, an S.I.T. was constituted which again submitted a report that the son of the complainant was alive as no evidence has come against the accused persons and in fact, Hardeep Singh @ Raju had escaped from the police custody. On the basis of the report, a cancellation report dated 31.10.2011 was filed before the Illaqa Magistrate. The complainant, thereafter, filed a protest petition on 21.01.2012.

The Illaqa Magistrate/Judicial Magistrate Ist Class, treated the protest petition as a criminal complaint and recorded the statement of CW-1 Satpal Singh, CW-2 Gurdial Singh, CW-3 Dr. Rohit K. Singla and CW-4 Naginder Singh (himself).

Thereafter, the Judicial Magistrate Ist Class vide impugned order dated 07.12.2017 summoned the petitioners to face trial under Sections 302/201/34 IPC.

The petitioners filed CRM-M No.6082 of 2018

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challenging the aforesaid summoning order, which was however, dismissed primarily on the ground that the case is still at the preliminary stage.

Counsel for the petitioners has referred to the said order dated 09.05.2018 to submit that the primary challenge in the said petition was that the impugned summoning order is a non-speaking order.

Counsel for the petitioners further submitted that in the meantime, the Illaqa Magistrate issued Non-bailable Warrants against the petitioners and on 02.09.2019, the petitioners through their counsel moved an application before the trial Court that in fact, Hardeep Singh (claimed to be deceased son of the complainant) was in fact, alive and he was declared proclaimed offender in the aforesaid FIR No.140 dated 25.08.2005 and now, he has been arrested and he is in judicial custody. Thereafter, the case was adjourned.

In the meantime, the petitioners have filed the present petition in which while issuing notice of motion, the following order was passed:-

“Challenge in this petition is to the summoning order dated 07.12.2017 vide which the petitioners have been summoned as an accused in a protest petition/complaint filed by respondent No.2 – Naginder Singh, after the police submitted a cancellation report in FIR No.115 dated 21.08.2010 under Sections 302 and 201 IPC Police Station Dehlon, District Ludhiana.

Counsel for the petitioners has submitted that in fact, the son of the complainant was an accused in a case

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registered under the NDPS Act and in the year 2005, he escaped from the police custody and later on 17.09.2005, a dead body was recovered by the police and on that pretext, an enquiry was conducted and it was found that the dead body is not the son of the petitioner namely Hardeep Singh @ Raju. It is further submitted that the complainant then filed a petition before this Court in which on 21.05.2010, a direction was issued to conduct an enquiry and the aforesaid FIR No.115 was registered on 21.08.2010 thereafter.

*Counsel for the petitioners has further submitted that again the matter was enquired into and a cancellation report was filed in which respondent No.2 has filed a protest petition and in the said petition, the impugned summoning order has been passed. **Counsel for the petitioners has relied upon a DDR No.2 dated 30.08.2019 registered in Police Station Dehlon, Ludhiana, according to which the accused – Hardeep Singh @ Raju @ Doctor, son of Naginder Singh resident of village Rangia, Police Station Dehlon, Ludhiana, who was declared as proclaimed offender on 24.08.2010 was arrested by ASI Janak Raj, CIA Staff, Jagraon and was taken in custody in FIR No.140 of 2005, which according to counsel for the petitioners, was registered under the NDPS Act. Counsel for the petitioners has, thus, argued that the impugned summoning order which has been passed on the complaint given by Naginder Singh that his son Hardeep Singh @ Raju has been murdered by the accused person/petitioner is, in fact, alive and was arrested in the aforesaid FIR No.140 of 2005 by the police of Police Station Dehlon on 30.08.2019.***

In pursuance thereof, the Commissioner of Police, Ludhiana filed an affidavit stating that Hardeep Singh @ Raju son of

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the complainant Naginder Singh is the same person, who was allegedly murdered in FIR No.115 dated 21.08.2010. Thereafter, on 30.09.2019, the following order was passed:-

“In pursuance of order dated 23.9.2019, affidavit of Commissioner of Police, Ludhiana filed in the Court today and as per the same, Hardeep Singh @ Raju son of Naginder Singh-respondent No.2 is the same person, who was allegedly murdered in FIR No. 115 dated 21.8.2010.

During enquiry the police also recorded the statement of Parminder Singh, Ex-Sarpanch and one Sikander Singh @ Shinda. It is further stated that on verification from the SHO, Police Station Dehlon, Ludhiana, it is found that aforesaid Hardeep Singh @ Raju @ Doctor was earlier declared a proclaimed offender in FIR No. 139 dated 25.8.2005 under Sections 15 and 25 of the NDPS Act; FIR No.140 dated 25.8.2005, under Sections 212, 216, 224, 120-B IPC; and FIR No.88 dated 26.8.2006 under Sections 420, 467, 468, 471, 120-B IPC (all registered at Police Station Dehlon, Ludhiana). He is also involved in two other FIRs and now Hardeep Singh @ Raju is in judicial custody. In view of the same it is apparent that respondent No.2-Naginder Singh intentionally and deliberately mis-guided not only the police authorities while setting up a case that his son was murdered in the year 2010 and also put the State machinery on notice when number of enquiries were conducted on the basis of the false complaint given by respondent No.2-Naginder Singh.

Learned State counsel has also brought to the notice of this Court that in petition filed by Naginder Singh, the State government has also given him

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compensation of Rs.Two lacs.

Adjourned to 29.10.2019.

In view of the same, the Station House Officer, Police Station Dehlon, District Ludhiana is directed to produce respondent No.2-Naginder Singh on the next date of hearing, who will explain why the amount of Rs.Two lacs received by him be not recovered and deposited back with the State government.

However, it will be open for the trial Court to dispose of the protest petition in view of the fact that Hardeep Singh @ Raju son of Naginder Singh is alive.”

In the meantime, the complainant appeared through counsel and sought time to file reply on the point that since the complainant, on the ground that his son has been murdered, was granted an *ex-gratia* amount of Rs.2.00 lacs and the same be recovered from him.

Counsel for the petitioners has further submitted that noticing that the Magistrate has issued Non-bailable Warrants against the petitioners, all the petitioners moved application under Section 438 Cr.P.C., for grant of anticipatory bail in view of the fact that Hardeep Singh @ Raju, is alive however, the Additional Sessions Judge, failed to exercise his jurisdiction and dismissed the application on 22.07.2020, by passing the following order:-

“7. At this stage, learned Additional Public Prosecutor for the State submitted that when the protest petition is yet to be disposed of in the light of the orders of the Hon'ble High Court as submitted above, the applicant is not having any ground to seek the grant of concession of anticipatory bail.

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8. *After having gone through the record of the case and in view of the submissions made on behalf of the applicant as well as State, the application having been moved by the applicant seeking the grant of concession of anticipatory bail at this stage is disposed of with the observation that the applicant through his counsel may approach the concerned Court for disposal of the protest petition as directed by the Hon'ble High Court in CRM M-40506 of 2019 vide order dated 30.09.2019 and there-after the applicant is at liberty to avail the remedy if so advised accordingly in the light of the order to be passed by the concerned Court regarding disposal of protest petition. Learned Lower Court record be returned along with a copy of this order and file be consigned to the record room."*

The petitioners have now moved present application for modification of the order dated 30.09.2019 on the ground that even the Illaqa Magistrate/Judicial Magistrate Ist Class, vide order dated 02.12.2020, has refused to dispose of the protest petition by passing the following order:-

"In these circumstances, counsel Shri Amit Agnihotri is requesting for disposal of the case. Though counsel is requesting for disposal of the case in view of order of Hon'ble High Court and learned Sessions Court but the same cannot be done by undersigned due to following reasons:-

1) Predecessor of undersigned already took cognizance of this case when he passed the summoning order dated 07.12.2017. After passing of the summoning order, if offences are triable by the court of Sessions (as they in present case) this court only has to procure presence of accused and to commit the case. Except this, no power to do

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anything else remains with the undersigned. It is also worth mentioning here that there is no provision of review given to judicial magistrate in Cr.P.C. Meaning thereby the stage at which anything can be done by a judicial magistrate has already passed.

2) Secondly, vide said order accused were summoned under section 302, 201 read with section 34 of the IPC. Offence under section 302 of I.P.C is exclusively triable by the court of Sessions and court of Sessions is trial court in this case. This fact has to be read in the light of order dated 30.09.2019 passed by the Hon'ble High Court. Vide said order, it is ordered that it will be open for the trial court to dispose of the protest petition in view of the fact that son of complainant is alive. Now, this court is not trial court as in offence under section 302 of I.P.C, accused are triable by the court of Sessions.

6. In view of the aforesaid circumstances, no order qua disposal of protest petition can be passed by the undersigned. Thus request for dispose of the protest petition is declined accordingly.

*7. Earlier, the case was fixed for procuring presence of the accused persons through non-bailable warrants of arrest but accused have not put in appearance. **So, fresh non-bailable warrant of arrest of accused be issued for 07.01.2021.***"

Counsel for the petitioners has further argued that to add to the agony of the petitioners, when the application was moved before the Magistrate, to dispose of the protest petition, even the Magistrate refused to exercise the jurisdiction and dismissed the application.

Counsel for the petitioners has further argued that despite the fact that the person who is alleged to be murdered is alive and is in judicial custody, the trial Court failed to appreciate that the Non-bailable Warrants need to be withdrawn and it is not a case where

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anticipatory bail application could be dismissed by the Additional Sessions Judge.

Counsel for the petitioners has, thus, submitted that since both the Courts below i.e. the Judicial Magistrate Ist Class as well as the Additional Sessions Judge-I, Ludhiana, having failed to exercise the jurisdiction vested with them, the petitioners are left with no alternative remedy but to move an application for modification of the order dated 30.09.2019 and to decide the main petition on merits.

Counsel for the petitioners has further submitted that the Additional Sessions Judge while passing the order dated 22.07.2020 completely ignored that the petitioners are summoned in a protest petition in an FIR (in which cancellation was recommended) for the alleged murder of one Hardeep Singh @ Raju, who is admittedly alive and therefore, in pursuance of the Non-bailable Warrants issued by the Illaqa Magistrate, there was no reason for the Additional Sessions Judge, not to exercise his jurisdiction vested under Section 438 Cr.P.C. and thus, the order of dismissal of the anticipatory bail show that the Additional Sessions Judge, has failed to apply its judicial mind.

Counsel for the petitioners has also submitted that the anticipatory bail application was filed as the petitioners intended to appear before the Illaqa Magistrate in pursuance of the summoning order but later on, Non-bailable Warrants were again issued. It is further submitted that even the Magistrate in not disposing of the protest petition, has also failed to exercise the jurisdiction.

Counsel for the petitioners has further argued that two

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reasons given by the Magistrate, are not legally correct as it is wrongly observed that since the predecessor Judge has taken cognizance of the case while passing the summoning order dated 07.12.2017, the Magistrate cannot dismiss the protest petition though the power under Section 239 Cr.P.C., can be exercised.

With regard to Point No.(2), decided by the trial Court that the Magistrate not being the trial Court, cannot decide the protest petition, it is submitted that there is no bar under the Act to dismiss the protest petition once it has come to the notice of the Magistrate that the complainant, by playing fraud with the Court as well as the prosecuting agency and the petitioners have succeeded of getting the summoning order passed for an offence, which has never been committed by the petitioners.

Counsel for the petitioners has further submitted that judicial propriety demand that the Magistrate should have passed an order with judicial consciousness as the law does not expressly prohibit to dismiss the protest petition as fraud is committed by the complainant, which vitiates the entire proceedings. Counsel has further submitted that the Court may not to pass an order, which is a mere formality but should pass an order applying judicial mind and to do substantial justice in favour of the petitioners, who are facing the agony of unwanted litigation for the last 15 years.

Counsel for the petitioners has relied upon certain judgments to submit that ***fraud avoids all judicial acts***. Reliance is placed on the judgment "***S.P. Chengalvaraya Naidu vs Jagannath***",

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1994 (1) SCC 1, wherein the Hon'ble Supreme Court has held that fraud avoids all judicial acts.

Counsel for the petitioners has further referred to the judgment **“Meghmala and others vs G. Narasimha Reddy and others”**, 2010 SCC (10) 383, wherein the following observations have been made:-

“28. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the Court. Every Court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est.”

Counsel for the lastly, has relied upon the judgment **“Vikram Johar vs State of Uttar Pradesh and another”**, 2019 (14) SCC 207, wherein the following observations have been made:-

“16. A Three-Judge Bench of this Court in State of Orissa Vs. Debendra Nath Padhi, (2005) 1 SCC 568, had occasion to consider discharge under [Section 227](#), it was held by the court that [Section 227](#) was incorporated in the [Code](#) with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements.”

Counsel for the petitioners has also argued that the order passed by the Magistrate expressing helplessness is not exhibition of

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judicial consciousness.

Counsel for the petitioners has further submitted that while doing substantive justice in the judicial system, a Court should, in exceptional cases, can pass an order acknowledging the constitutional rights of an aggrieved party.

It is worth noticing that the Hon'ble Supreme Court, though, has held in "**Adalat Prasad vs Rooplal Jindal**", (2004) 7 SCC 338, that the Court cannot recall the summoning order but, the decision in **Adalat Prasad case (supra)**, cannot be misconstrued to mean that once a summoning order has been issued, the trial must follow especially in cases where the complainant has played fraud in getting the summoning order, which vitiates the entire proceedings.

Counsel for the petitioners has lastly, argued that on account of the endless agony of 15 years faced by the petitioners, which has caused them mental torture, financial loss and endless pain and agony, the petitioners be awarded suitable compensation. Counsel for the petitioners has also referred to the judgment of the Hon'ble Supreme Court in "**Sube Singh vs State of Haryana**", 2006(1) RCR (Criminal) 802, wherein the following observation was made:-

"17. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person

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claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure.”

Counsel for the State on the basis of the affidavit filed by the Commissioner of Police, Ludhiana, as well as the cancellation report has submitted that no fault can be found with the investigation by the State police as it was found during number of enquiries that the son of the complainant is alive, however, the summoning order was passed on the basis of the statement of CW-1 to CW-4, who have deposed in favour of the version of the complainant and the enquiry report of Sessions Judge, Ludhiana indicating the petitioners, that the son of the complainant died in police custody (a fact which is proved to be apparently false and fake).

Counsel for the State has, thus, submitted that the amount of Rs.2.00 lacs paid as compensation to the complainant be restored back to the State and if any, compensation is to be paid to the petitioners, the same be recovered from CW-1 Satpal Singh, CW-2 Gurdial Singh and CW-4 Naginder Singh (complainant).

After hearing the counsel for the parties, I find merit in the present petition.

It is the consistent stand of the police during the various enquiries that son of the complainant Hardeep Singh @ Raju was alive and was in touch with the complainant and therefore, as per the SIT report and the report under Section 173 Cr.P.C., produced before the Illaqa Magistrate, the police opined that the FIR is liable to be

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cancelled, however, on the basis of the report of the Sessions Judge, Ludhiana and the statement of CW-1 Satpal Singh, CW-2 Gurdial Singh and CW-4 Naginder singh, the Magistrate has summoned the petitioners treating protest petition as complaint under Section 190 Cr.P.C. in exercise of power under Section 204 Cr.P.C., for the purpose of committing them to the Court of Sessions under Section 209 Cr.P.C.

Though, the trial Court has rightly observed that once the cognizance has been taken, the Court cannot recall the summoning order, however, it has ignored the fact that the application was moved by the petitioners to dismiss the protest petition in view of the fact that the summoning order was procured by the complainant by playing fraud with the Court as the son of the complainant is alive and therefore, nothing precluded the trial Court to dismiss the protest petition.

Further observation made by the Magistrate that since the offences were triable by the Court of Magistrate/Court of Sessions, though are correct but the Magistrate, in exercise of power under Section 239 Cr.P.C., in order to prevent any injustice to the petitioners could have allowed the application and discharge them by dismissing the protest petition.

The Magistrate, while dismissing the application vide impugned order dated 02.12.2020 even again issued Non-bailable Warrants against the petitioners. This part of the order is also illegal as in view of provision of Section 87 of Cr.P.C., the Magistrate can withdraw Warrants as per the information supplied and also in view that the petitioners through counsel had already appeared. The proper

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course was to direct the counsel for the petitioners to furnish bail/surety bonds as they intended to appear before the Magistrate, but for dismissal of anticipatory bail by the Additional Sessions Judge, they apprehended arrest for no fault.

However, the Additional Sessions Judge having failed to exercise the jurisdiction under Section 438 Cr.P.C., in dismissing the anticipatory bail application of the petitioners despite the fact that it was brought to his notice that they are being prosecuted in pursuance to a fraud committed by the complainant, has passed a totally illegal order.

Accordingly, this petition is allowed, the protest petition dated 20.01.2012 filed in case No.45 dated 21.11.2011 under Sections 302/201 IPC read with Section 34 IPC as well as the impugned summoning order dated 07.12.2017 passed by the Judicial Magistrate Ist Class, Ludhiana and the order dated 02.12.2020 passed by the Judicial Magistrate Ist Class, Ludhiana, refusing to dismiss the protest petition are set-aside and the petitioners are discharge in FIR No.115 dated 21.08.2010 registered under Sections 302, 201, 34 IPC at Police Station Dehlon, Ludhiana, District Ludhiana.

Considering the fact that the petitioners are subjected to unwanted and unnecessary criminal prosecution for a period of last 15 years, it is directed that the State Legal Services Authority, Punjab through District Legal Services Authority, Ludhiana, will pay the costs of Rs.50,000/- each to all the 03 present petitioners namely Amarjit Singh, Jaswant Singh and Kabal Singh within a period of 04 months from today.

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It will be open for the prosecution to initiate the proceedings under Section 340 Cr.P.C. against CW-1 Satpal Singh, CW-2 Gurdial Singh and CW-4 Naginder Singh i.e. the complainant.

It will also be open for the prosecution to recover the amount of Rs.2.00 lacs from the complainant namely Naginder Singh or his legal representatives and to recover the costs of Rs.50,000/- each from CW-1 Satpal Singh, CW-2 Gurdial Singh and CW-4 Naginder Singh or their LRs, after paying the same to the petitioners.

Considering the fact that the Additional Sessions Judge, has failed to exercise its jurisdiction, it is directed that he will go through at least 10 judgments of the Hon'ble Supreme Court including the 02 Constitutional Bench Judgments i.e. "*Gurbaksh Singh Sibbia vs State of Punjab*", 1980 (SC) AIR 1632 and "*Sushila Aggarwal vs State (NCT of Delhi)*", 2020(1) RCR (Criminal) 833, wherein the Hon'ble Supreme Court has interpreted the provisions of Section 438 Cr.P.C.

The Additional Sessions Judge-I, Ludhiana, will submit the written synopsis on the exercise of jurisdiction by a Judge under Section 438 Cr.P.C., after going through the judgments, within a period of 30 days to the Director, Chandigarh Judicial Academy.

Disposed of.

(ARVIND SINGH SANGWAN)
JUDGE

12.01.2021

yakub

Whether speaking/reasoned

Yes/No

Whether reportable:

Yes/No