

# Kalla Mallah vs The State Of Madhya Pradesh on 14 November, 2022

**Author: Rohit Arya**

**Bench: Rohit Arya, Milind Ramesh Phadke**

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IN THE HIGH COURT OF MADHYA PRADESH

AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ROHIT ARYA

&

HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE

CRIMINAL REVISION NO. 1933 OF 2021

BETWEEN: -

1. KALLA MALLAH

2. MUNNA MALLAH

3. MUNSI MALLAH

SONS OF HARI SINGH MALLAH R/O VILAGE

CHOKHPURA, TAHSIL SABALGARH, DISTRICT

MORENA

.....PETITIONERS

(BY SHRI SANKALP SHARMA- ADVOCATE)

AND

1. THE STATE OF MADHYA PRADESH THROUGH  
POLICE STATION SABALGARH, DISTRICT  
MORENA

2. UNION OF INDIA THOROUGH MINISTRY OF  
HOME AFFAIRS, NORTH BLOCK CABINET  
SECRETARIAT, RAISINA HILLS, NEW DELHI,  
DELHI 110020.

...RESPONDENTS

(SHRI RAJESH SHUKLA - DEPUTY ADVOCATE  
GENERAL FOR RESPONDENT NO.1 AND SHRI  
PRAVEEN NEWASKAR - DEPUTY SOLICITOR  
GENERAL FOR RESPONDENT NO.2/UNION OF  
INDIA.

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Reserved on : 03/11/2022

Date of order : 14/11/2022  
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This petition coming on for hearing this day, JUSTICE

ROHIT ARYA passed the following:

ORDER

Under the order dated 17/8/2022 of Hon'ble the Chief Justice, the instant reference has been placed before this Court by the Registry.

2. The following two questions have been framed in the reference order dated 26/10/2021 passed by the learned Single Bench of Hon'ble Shri Justice Sheel Nagu :-

(1) Can 7000 kgs of opium plants be treated to be less than commercial and small quantity to fall u/S. 18(c) NDPS Act r/w Note-3 of Notification dated 19.10.2021, for availing benefit of default bail u/S.167 Cr.P.C. despite bar u/S.36-A(4) NDPS Act?

(2) Whether the Coordinate Bench in the case of Raja Bhaiya Singh Vs.State of M.P. (Criminal Revision No. 1813/2020, decided on 8.1.2021) has laid down the correct law or not?

3. Before advertng to factual matrix and contentions advanced by the learned counsel for the parties, it is expedient to reiterate relevant provisions of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the "NDPS Act").

"2. Definitions - In this Act, unless the context otherwise requires -

(xv) "opium" means--

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent. of morphine;"

(xvii) "opium poppy" means--

(a) the plant of the species Papaver  
somniferum L; and

(b) the plant of any other species of Papaver from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purposes of this Act;

(xviii) "poppy straw" means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom;

(viiia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;

[(xxiiia) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;

18. Punishment for contravention in relation to opium poppy and opium.--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,--

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

(c) in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.

36A. Offences triable by Special Courts.-- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) .....

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d)	xxx	xxx	xxx
(2)	xxx	xxx	xxx
(3)	xxx	xxx	xxx
(4)	In	respect	of persons

accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":....

(5)      xxx      xxx      xxx  
(Emphasis supplied)

Schedule appended to the Act and referable to clauses (viia) and (xxiia) of section 2 of the NDPS Act inter alia against Entry No. 92 provides for small and commercial quantity of opium as 25 grams and 2.5 kg. Likewise Entry No. 110 provides for small and commercial quantity of poppy straw as 1000 grams and 50 kg.

Note No.3 appended to the schedule reads as under:-

"3. "Small quantity" and "Commercial Quantity"

with respect to cultivation of opium poppy is not specified separately as the offence in this regard is covered under clause (c) of section 18 of the Narcotics Drugs and Psychotropic Substances Act, 1985"

4. Brief facts giving rise to aforementioned two questions, in nutshell, are to the following effect :-

(i) Petitioner Kalla Mallah approached the High Court through Criminal Revision No.1933/2021 filed under Section 397 read with 401 of Cr.P.C. taking exception to the order dated 9.8.2021 passed by the Special Court (under the NDPS Act), Morena having declined benefit of default bail to the petitioners under Section 167(2)(a)(ii) of the Cr.P.C. For ready reference, the relevant provision is quoted below:-

"167. Procedure when investigation cannot be completed in twenty-four hours.--

(1) xxx xxx xxx (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that--

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding--

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(Emphasis supplied)

(ii) On police raid, it is alleged, that four persons including the three petitioners before this Court namely Kalla Mallah, Munna Mallah & Munshi Mallah and co-accused Mahendra, were found to have been cultivating opium poppy on Government land. Accordingly, a case was registered against them at Crime No.88/2021 for the offences punishable under Sections 8/16 of the NDPS Act and 70 quintals of opium poppy was seized.

(iii) As Challan could not be filed within 60 days, petitioners moved an application before the Special Court under Section 167(2)(a)(ii) of the Cr.P.C. read with Section 36(a)(4) of the NDPS Act seeking default bail.

(iv) The trial court rejected the application primarily on the ground that as per Section 36A(4) of the NDPS Act, in case seizure of contraband under the NDPS Act falls in the category of commercial quantity as per the schedule, the period for submission of charge-sheet under Section 167(2) of the Cr.P.C. shall be 180 days in place of 90 days. In the instant case as quantity of 70 quintals of opium poppy seized is a commercial quantity and 180 days' period had not expired, therefore, the petitioners were not held entitled for default bail. It may be stated that the FIR is dated 04.03.2021 and challan was not filed upto 09.08.2021.

(v) The learned Single Judge opined that 70 quintals i.e. 7000 kgs. of opium-poppy, by no stretch of imagination, could be treated as small quantity. Therefore, he proceeded on the assumption that the

quantity of seized opium plants from the petitioners is commercial quantity (para 11.1) and found that the same falls within the four corners of Section 18(b) of the NDPS Act, where the minimum period of imprisonment is 10 years and maximum period of imprisonment is 20 years. It has been further found that there is a conflict between Section 18 (b) {in correctly mentioned as 18 (c)} and Note 3 of the schedule and the said conflict is sought to be resolved on the principle that in case of variance between the executive instructions (be it statutory in nature) and statutory provisions in the NDPS Act, the statutory provisions would prevail over the instructions. Consequently, Note-3 of the schedule notified on 19.10.2001 under the NDPS Act, shall give way to the substantive statutory provisions under Section 18 (b) of the NDPS Act.

Learned Single Judge also dealt with the order passed by a coordinate single Bench of Hon'ble Shri Justice P.K.Shrivastava (as he then was) in the case of Raja Bhaiya (Supra) and recorded its disagreement with the conclusions thereof, as in the said case learned Single Judge while dealing with the claim of default bail under Section 167(2)(a)(ii) of the Cr.P.C. read with Section 36A(4) of the NDPS Act in case of the applicants therein allegedly found to be in unauthorized and illegal possession of 36 big and small cannabis plants weighing total 115 kg. by the police raid party, had come to the conclusion that cultivation of cannabis plants is punishable under Section 20 (a)

(i), which reads as under :-

20. Punishment for contravention in relation to cannabis plant and cannabis.--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,--

- (a) cultivates any cannabis plant; or
- (b) ....

shall be punishable,--

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees;

and..... ;

and held that since the contravention thereof provided for RI for a term which could extend to 10 years, the case of the applicant therein would fall under section 167(a)(ii) of the Cr.P.C. In other words, he may be entitled for default bail if challan is not filed within sixty days. Consequently, the application for grant of default bail was allowed therein.

5. In the backdrop of the aforesaid factual matrix and relevant provisions of the NDPS Act, this Court afforded audience to the counsel for the petitioners Shri Sankalp Sharma, counsel for the State Shri Rajesh Shukla and counsel for Union of India Shri Praveen Kumar Newaskar.

6. Shri Sharma submits that the reference order suffers from patent illegality as the learned Single Judge assumed 7000 kg. of opium poppy as a commercial quantity and on such premise has proceeded further. According to learned Single Judge since punishment for commercial quantity is not less than ten years and may extend to 20 years as provided for under sub clause (b) of Section 18, the petitioners are not entitled for default bail as 180 days' period was not over in terms of Section 167 (2) (a)(i) read with Section 36A (4) of the NDPS Act. Further the petitioners' case shall not fall under clause 18 (c) of the NDPS Act.

It is submitted that the terms 'small quantity' and 'commercial quantity' have legal connotations as defined in dictionary clause as sections 2(xxiii a) and 2(vii a) respectively.

It is further submitted that Section 18 provides for punishment for cultivation in relation to opium poppy and production manufacturing, possession, selling, purchase, transportation, importing inter state, exporting inter state or use of opium depending upon the quantity viz. small quantity or commercial quantity. Section 18(a) prescribes penalty where the contravention involves small quantity, which may extend to one year or fine, which may extend to 10,000/- rupees or both, whereas section 18(b) provides for penalty where the contravention involves commercial quantity with rigorous imprisonment for a term which may not be less than ten years, but which may extend to 20 years and shall also be liable to fine which may not be less than one lakh rupees which may extend to two lakh rupees.

And Section 18 (c) provides that in any other case with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees. The schedule appended to the Act, in fact, is part of the Act. As defined, "small quantity" and "commercial quantity" have direct nexus with the corresponding provisions of penalties for the contravention.

Learned counsel further submits that Section 18 (c) providing for rigorous imprisonment which may extend to 10 years and fine which may extend to one lakh rupees, is in respect of contravention relating to opium poppy not covered under Section 18 (a) and 18 (b) of the NDPS Act as there is no corresponding description of commercial quantity and small quantity in the schedule. Hence, the finding of the learned Single Judge that seizure of 7000 kg of opium poppy plants is of commercial quantity can not be sustained regard being had to the aforesaid provisions of the NDPS Act.

Consequently the case in hand shall fall under Section 18

(c) of the NDPS Act, wherein rigorous imprisonment is extendable to 10 years with fine which may extend to one lac rupees and, thus within the scope of section 167(2)(a)(ii) of the Cr.P.C making the petitioners entitled to default bail if the Challan is not filed within sixty days.

7. Per contra, Shri Rajesh Shukla, learned Deputy Advocate General supported the order of the learned Single Judge, regard being had to the seized quantity of 7 quintals of opium poppy plants and prayed to decide question nos. 1 & 2 accordingly.

8. Before advertng to the rival contentions, it is expedient to observe that the law is well settled that all penal statutes are to be construed strictly. If there is no ambiguity, there is no scope for interpretation and plain and literal meaning of the words used in the statute is to be adopted while applying the statute to a given set of facts. Penal statutes cannot be expanded by using implications (Sheila Sebastian Vs. R. Jawaharraj and another ((2018)7 SCC 581) referred to). It is the duty of the Court to give effect to the purpose - as expressed in clear and unambiguous language of the statute, and the Court is not permitted either to restrict or expand the meaning of the words used by the legislature which is in accord with the object of the statute. Besides, if reasonable and plain interpretation of a penal statute avoids penalty in a particular case, it is settled law that the Court must adopt that construction of the statute for if two reasonable constructions are possible, the Court must lean for more lenient one. Besides, if there is any ambiguity in a penal statute, the same is to be interpreted in favour of the accused (Alkem Laboratories Ltd. Vs. State of M.P.(2020)20 SCC 174) referred to). The rule has been stated by Mahajan, CJI in similar words:

"If two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature" (See Tolaram Vs. State of Bombay, AIR 1954 SC 496).

"So when in a statute dealing with a criminal offence impinging upon the liberty of citizens, a loophole is found, it is not for Judges to cure it, for it is dangerous to derogate from the principle that a citizen has a right to claim that howsoever much his conduct may seem to deserve punishment, he should not be convicted unless that conduct falls fairly within the definition of crime of which he is charged." (Spicer Vs. Holt (1976)3 ALL ER 71, pp 78, 79 (HL) referred to).

"The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear" (See R V Cuthbertson, (1980)2 ALL ER 401, p 404).

Likewise, the Privy Council speaking through Lord Justice James in the case of Dyke V. Elliot, (1872) LR 4 PC 184, p 191:-

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip; that there has been a casus omissus; that the thing is so clearly within the mischief that it must have been included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words, and within the spirit, there a penal enactment is to be construed, like any other instrument, according to fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such



doubt or ambiguity would clearly not be found or made in the same language in any other enactment"

9. The NDPS Act has been enacted to consolidate and amend existing laws relating to narcotic drugs, strengthening the existing controls over drug abuse and enhance penalty particularly for trafficking of drugs, besides for exercise of effective control over psychotropic substances and to make provisions for implementation of international conventions relating to narcotic drugs and psychotropic substances to which India became a party. This is a Special Penal Statute with stringent provisions in furtherance of its aims and objects. Therefore, the provisions made thereunder for prohibition, control and regulation of narcotic drugs and psychotropic substances; contrabands, are to be interpreted strictly on the touchstone of the principles of interpretation as reiterated by the Superior Courts quoted here-in-above.

Chapter III deals with Prohibition, Control and Regulation. S.8 provides that no person shall cultivate any coca plant, opium poppy or cannabis plant or produce, manufacture etc. as provided for under sub-sections (a), (b) and (c) except for the purposes detailed thereunder.

S.18 inter alia deals with punishment for contravention in relation to Poppy Straw (defined under section 2(xviii)) and opium (defined under section 2(xv)) of which small quantity / commercial quantity have been prescribed in the schedule as 1000 gms/50 kg and 25 gms/2.5 kg vide entry nos. 110 and 92 respectively. Although the cultivation of opium poppy is also made punishable, yet, there is no corresponding entry of small quantity or commercial quantity in the schedule.

Section 18(a) provides for punishment where contravention involves small quantity and section 18(b) provides for punishment where contravention involves commercial quantity.

Section 18(c) is a residuary clause and provides that in any other case the imprisonment shall extend to ten years and with fine which may extend to one lac rupees.

A plain reading of the said provision, in entirety, leads to the inevitable conclusion that activity of cultivation of opium poppy shall fall within the net of section 18(c) of the NDPS Act. It is further fortified by Note-3 appended to the schedule. Indeed, the schedule is a subordinate legislation issued by way of notification by the Central Government in exercise of powers conferred by clauses (viia) and (xxiiia) of Section 2 of the NDPS Act, prescribing commercial and small quantities for the narcotic drugs and psychotropic substances, to give effect to the provisions of the Act. The quantities prescribed thereunder are corresponding to the quantum of penalties prescribed under Chapter IV of the NDPS Act. The schedule, as such, is in aid of the provisions and object of the Act. Note-3 is part of the schedule categorically providing that "Small Quantity" and "Commercial Quantity" with respect to cultivation of Opium- poppy is not specified separately as the offence in this regard is covered under Clause (c) of Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is incorrect to describe the same as an executive instruction. Instead, Note-3 is required to be mandatorily read in conjunction with the provisions of the Act, particularly section 18(c) thereof.

Unlike the provision of Section 20 which deals with punishment for contravention in relation to cannabis plant and cannabis inter alia providing under sub-section (a) that cultivation of any cannabis plant shall be punishable with imprisonment which may extend to 10 years and fine which may extend to Rupees One Lac as provided for under sub-section (b)

(i), sections 18 (a) and 18(b) do not provide punishment for cultivation of opium poppy. Therefore Note-3 is inserted to ensure that for want of specification of small or commercial quantities in relation to cultivation of opium poppy, the offence of cultivation thereof in contravention of the Act does not go unaccounted for/unpunished and, therefore, is covered under Section 18(c). Hence, Note-3 is mandatorily required to be read in conjunction with Section 18(c) to give effect to the provisions of the Act having penal consequences, in conformity with the objects of the Act.

10. This Court finds substantial force in the submissions of Shri Sharma that the learned Single Judge could not have assumed that 70 quintals of seized opium poppy shall be commercial quantity. In our opinion, the aforesaid assumption of fact militates with the provisions of the NDPS Act and runs contrary to the basic tenets of interpretation of penal statutes as settled by the Privy Council and Hon'ble Supreme Court quoted hereinabove.

11. As held above, the offence of cultivation of opium poppy falls within the net of Section 18(c) which is a residuary clause providing rigorous imprisonment which may extend to 10 years and with fine which may extend to Rs.One Lac.

At this juncture, it is propitious to refer to Section 167(2)

(a)(ii) quoted above, which provides that a Magistrate may authorize the detention of an accused person otherwise than in custody of police, beyond the period of 15 days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding 60 days where the investigation relates to any other offence [i.e. does not relate to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years which entail detention upto 90 days under sub-clause (i)].

Section 36A(4) of the NDPS Act inter alia provides that for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure 1973 (2 of 1974) thereof to "ninety days" where they occur, shall be construed as reference to "one hundred and eighty days". In the case in hand, since punishment of imprisonment upto 10 years is provided for under section 18(c) of the NDPS Act, the aforesaid provision of S.36A(4) shall not be attracted in the facts and circumstances of the case. Consequently, the petitioners are entitled to default bail under section 167(2)(a)(ii) of the Cr.P.C if Challan was not filed within 60 days.

12. As a matter of fact, the right to default bail under section 167(2) of the Cr.P.C. is an indefeasible right. In this behalf, the Apex Court in the case of M.Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence ((2021)2 SCC

485) has held as under:-

"17. Before we proceed to expand upon the parameters of the right to default bail under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows:(SCC p.472, para 13)

"13...Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to subsection (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution."

17.1 Article 21 of the Constitution of India provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2), CrPC and the safeguard of 'default bail' contained in the Proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law. "

17.8 We may also refer with benefit to the recent judgement of this Court in S. Kasi v. State (2021)12 SCC 1, wherein it was observed that the indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasized that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a chargesheet.

13. In view of the foregoing discussion, the questions referred to this Bench are answered in the following terms:

(1) 7000 kgs of opium can neither be termed as "small" nor "commercial" quantity, but should be treated to fall within the net of residuary clause;

section 18(c) governing "any other case" r/w Note-3 of the Notification dated 19/10/2021 for availing the benefit of default bail u/S 167 Cr.P.C.

(2) The decision in the case of Raja Bhaiya (Supra) lays down the correct law.

The reference is answered accordingly.

List before appropriate Bench.

(and)

(Rohit Arya)  
Judge

(Milind Ramesh Phadke)  
Judge

ANAND SHRIVASTAVA  
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