

IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment delivered on: 03.03.2023**

+ **CRL.M.C. 2876/2022 & CRL.M.A. 11892/2022 (stay)**

SYED SHAHBAZ HUSSAIN & ANR. Petitioners

versus

GOVT. OF NCT OF DELHI & ANR. Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Subodh Pathak & Mr. Akash Swami, Advocates

For the Respondents : Ms. Priyanka Dalal, APP for the State with WSI Jyoti, PS Mandir Marg.
Mr. Sanjiv Kumar Singh, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) has been filed, *inter-alia*, praying for setting aside the judgment / order dated 31.05.2022 passed by the learned Additional Sessions Judge (ASJ) (hereinafter referred to as “**the impugned order**”), Patiala House Court in Criminal Revision No.254/2018.

2. Learned Metropolitan Magistrate by order dated 25.06.2018, in an application filed by the Respondent No. 2 under Section 156(3) of CrPC, had refused to direct the police to register an FIR. The learned ASJ by the impugned order while setting aside the said order directed the SHO Mandir Marg to register an FIR under Sections 420, 376, 295A, 493, 496, 506, 509, 511 and 120B of the Indian Penal Code.

3. The facts, as alleged which led to the filing of an

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application under Section 156(3) of the CrPC, by Respondent
No. 2, bearing CC No. 782-18, are enunciated below:

- 3.1. The complainant was running an NGO, where she encountered accused no. 1, Shri Shahbaz Hussain (Petitioner No. 1) at 7, Pandit Marg, New Delhi who introduced himself as the brother of Shri Shehnawaaz Hussain, a member of Parliament. The complainant was highly impressed and mesmerised by the Accused No. 1, with whom she developed intimacy. Accused No. 1 promised that he would marry the complainant.
- 3.2. The complainant was allegedly raped by the Accused No.1 at Flat No. 24/3 A, Sector-2, Gole Market, New Delhi, and when the complainant protested, she was promised marriage by the Accused No. 1. Keeping in mind her dignity and reputation and the promise made by the Accused No. 1, the complainant decided to remain quiet, but was appalled when she found out on the very next day that the Accused No. 1 was already married and was a father of 2 children. On learning this fact, the complainant expressed her anguish and anger for the false promise as well as the misrepresentation. She, however, was met with several threats.
- 3.3. It is claimed that after being disappointed and let down at the hands of the Accused no. 1, the complainant visited the house of Accused No. 2, Shri Shahnawaz Hussain, in anticipation of support and justice from him, and narrated the entire story to him. The Accused No. 2, pacified the complainant

and explained to her that marriage with the Accused No. 1 would come to fruition as the Accused No. 1 was Muslim, and was allowed to have 4 wives.

3.4. The Accused No. 2 categorically asked the complainant to not highlight the matter and raise a hue and cry over the matter as it would be detrimental to both parties, the Accused No. 2 as well as the complainant. After the assurance given by the Accused No. 2, the Accused No. 1, Shri Shahbaz Hussain allegedly started visiting the complainant again at her residence and informed the complainant that even his brother, i.e. Shri Shahnawaz Hussain has accepted her as his sister in law and that they shall soon be married to each other. The Accused No. 1 allegedly again made sexual relations with the complainant, on the false pretext of marriage.

3.5. It has further been alleged that the complainant was being pressurised to eat beef and change her religion and embrace Islam. The complainant always protested against it and also lodged a complaint with Mahilla Ayog, New Delhi, which was transferred to the DCP, New Delhi. However, no action has been taken till date even after all the false assurances given by the DCP.

3.6. On 05.01.2017, when the complainant was at India Gate, she received threats from someone standing nearby to not marry the Accused No. 1, in response to which the complainant called the Police from her Mobile Number. The person who allegedly

threatened, fled away and the Police for reasons best known to them, instead of chasing/locating the person who made such threats, chose to take the complainant away to PS Mandir Marg.

3.7. On 10.01.2017 the complainant filed another complaint against the Accused persons as well as their associates. It was alleged that the Accused No. 1 married the complainant in the presence of a Maulavi and some other persons, and the complainant was forced to sign a marriage certificate, after which the Accused No. 1 as well as his associates ran away and left the complainant alone. It was later discovered that the Maulavi was not who he posed to be and even the marriage certificate issued by him was fake.

3.8. Further, it has been alleged that on 13.01.2017, when the Complainant was going to the P.S. Mandir Marg to lodge a criminal complaint against the Accused No. 1 and his associates for the incident of forcible marriage and issuance of fake certificate, the Accused No. 1 and his associates again stopped her and tried to dissuade the complainant by promising her an actual marriage with the assistance of an authorised Maulavi.

3.9. Thereafter, it is stated that the Maulavi performed the Nikah of the complainant along with Accused No. 1 and also issued a Marriage Certificate, after which the Accused No. 1 said “talaq, talaq, talaq” and ran away from the spot leaving the complainant alone. After being humiliated and conned yet again,

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the complainant visited the house of the Accused No. 1 in Jasola, where she met his wife and mother, who informed her about the invalidity of her marriage since the complainant did not convert to accept Islam as her religion. The complainant was told that the wife of the Accused No. 1 would divorce him after she converted to Islam. Complainant was made to forcibly sign the conversion papers which were already filled with her details and her photo was already affixed.

3.10. Further, it has been alleged by the complainant that threat calls were made to her wherein filthy and abusive language was used against her, and that recording of the aforesaid conversation is also available with the complainant.

3.11. Accused No. 1 had been hiding himself from the complainant and started ignoring her calls. The accused No. 2 has conspired with the accused No.1 and has supported the accused No. 1 to commit the said offences. The complainant has also been induced and cheated for a sum of Rs. 5 Lacs which the Accused No. 1 borrowed from her and has not returned to her till the present date. That in furtherance of the events that took place, the complainant filed a complaint dated 21.09.2017, which was followed by another complaint dated 19.12.2017.

4. An application under Section 156(3) CrPC was thereafter filed on 31.01.2018. The learned MM called for a status report
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which revealed that the preliminary enquiry was conducted and it was found that the Petitioner No. 1 herein and Respondent no. 2 were in a live-in-relationship. It was stated as under:

“Most respectfully submitted that Ms. Poonam Pandey D/o late Sh. Janardan Pandey R/O 29/3A, Gole Market, Sec-2, Delhi aged about 40 years lodged numerous complaints against Mr. Syed Shahbaz Hussain S/O late Nasir Hussain R/O plot no. 100, Third Floor, Pkt-2, Jasola, ND & also B-50, 1st Jauhari Farm,. Noor Nagar Ext. Okhla, New Delhi. In these complaints she alleged rape on the pretext of promise of marriage and threat extend to her by Mr. Shahbaz Hussain and his associates.

During the course of enquiry, both the parties were called and it is revealed that both were having live-in-relationship. During enquiry, Ms. Vandana Rai divulged that Ms. Poonam Pandey told her that she was in love with Shahbaz Hussain. On 17-12-16, Ms. Poonam Pandey visited the police station and gave in writing that she and Shahbaz had agreed to marry and requested for no action on her complaint. On 22-12-16, she again visited police station along with Shahbaz and gave in writing that both had mutually planned their marriage for 23.12.16 and would get their marriage register with SDM. She further requested not to take any action on her complaint. She also furnished a photocopy of affidavit stating therein she is going to marry with Syed Shahbaz Hussain legally. She further stated that she was having some misunderstanding with Syed Shahbaz Hussain. On 05-01-17, Ms. Poonam Pandey along with her advocate Abdul Jaffar and Shahbaz Hussain visited police station and gave in writing that she is going to marry with Shahbaz. On 11.01.17, she again visited police station and lodged a complaint that she came to know that their marriage dated 10.01.17 and Nikahnama is not authorized. She further told that Syed Shahbaz Hussain has requested for 4 days and also given an affidavit that within 4 days their marriage will be registered. She asked for getting her marriage dated 10-01-2017 be verified. Marriage between Poonam Pandey and Shahbaz Hussain was verified and witnesses reported it to be true. Poonam Pandey converted herself as a Muslim woman namely Chandni through Affidavit dt. 04.01.17. The Nikahnama also supported this. On 13.01.17, Poonam Pandey @ Chandni again solemnized her marriage with Syed Shahbaz Hussain at ward no.06, Islam Colony, Mehrauli before the Kaji Kadir Khan. The second marriage was verified and Quazi-E-Nikah Mr. Quari Nemat ullah (9711403569) authenticate the marriage certificate. (Copy of two marriage certificates and two conversion are enclosed).

On 07-03-17, Poonam Pandey made a PCR call at 10:50 PM, informing that "her husband has left her home without informing her and has not come since 1 :30 PM. She further stated that she does not want police to visit her home. (DD no. 25A dt. 07-03-17 and 50B dt. 08-03-17 are enclosed)

On the other hand, Mr. Shahbaz Hussain, also lodged complaints alleging therein that Ms. Poonam Pandey lodged complaint against him at PS Mandir Marg and consequently he performed Nikahnama with her on 10-01-17. Poonam Pandey posted his photograph on Facebook to malign his reputation and making false complaints maliciously. One more complaint of Sh. Syed Shahnawaj Hussain against Ms. Poonam Pandey alleging that he is residing at 7, Pandit Pant Marg, New Delhi and one Poonam Pandey who resides at 2/82, Palam, Raj Nagar-II, ND, Akash Ganga Appt, 115, Plot No.17, Sec-6, Dwarka, New Delhi and also at 24/3-A, DIZ area, Sector-2, Gole Market, ND having some dispute with his brother Shahbaz Hussain who is residing at Okhla, New Delhi. Mr. Shahnawaz further stated that he is not privy to any of the affairs of his said brother. This lady is dragging him and his family members into social media and defaming him and his family members. During this enquiry, it is divulged in the complaint that the matter is seized before the Hon'ble Delhi High Court in Writ Petition (Crl) No. 3463 of 2017 in re Syed Shahbaz Hussain Vs The State Govt. of NCO of Delhi and also Writ Petition (Crl) No. 3457 of 2017 in re Lama Hussain Vs The State Govt. of NCO of Delhi and Ms. Poonam Pandey is respondent in both the cases. The Hon'ble Delhi High, Court disposed of the petition with the directions that local police station Jamia Nagar as also the "Cyber Crime Cell of the Delhi Police be sensitized of this situation and they will ensure that the complainant are not harassed on this count. Furthermore, two criminal cases against Ms. Poonam Pandey vide FIR No. 190/2017 dt. 14.06.17 u/s 341/323/506/452/34 IPC registered at PS Sarita Vihar and also FIR no. 458/2017 dt. 07-07-17 u/s 451/323/34 IPC PS Jamia Nagar are lodged by Smt. Lama Hussain (wife of respondent) & Shahbaz Hussain and under investigation by South East District Delhi Police. Hence, these complaints made by Shahbaz Hussain were sent to South East District police to do needful.

During enquiry, Respondent-1 produced a photocopy document from the office of Ministry of Urban Development Directorate of Estates, Subletting Section Nirman Bhawan, New Delhi shows that" subletting case was initiated against allottee shri Naresh Kumar Malik of Qtr. No. 24 / 3A, Sector-II, DIZ area, New Delhi after the quarter was inspected on 02-09-2016 on the receipt of a complaint. One lady occupant was found in the quarter. She informed her name as Poonam Pandey (daughter in law of allottee). After hearing of the case, the allottee failed to

prove relationship with the lady occupant. (The copy of the same is annexed.)

It is not out of place to mention here that Poonam Pandey also lodged a complaint at PS Jamia Nagar regarding beating/harassment and demand of dowry by Shahbaz Hussain. The same complaint was sent to CAW Cell South East District and enquired into the facts and closed as she stated that marriage was only a drama and she is interested to get the case registered under the provisions of rape. (A copy of the same is also enclosed). There is no specific allegation against the alleged no.2 except extending threat and no role is assigned against alleged no.3 in the commission of the offence.

It is also worth mention here that in her complaint, she admitted the factum of her marriage with Shahbaz Husain on 10-01-17 and complaint against him regarding harassment and demand of dowry. A copy of the same is also annexed. On the basis of documents of marriage video footage and chatting between the parties, it is proven that both had performed marriage as per Muslim rites.

In view of the above facts and circumstances, the allegation of rape on pretext of marriage could not substantiated and complaint of Ms. Poonam Pandey was filed and no FIR was registered.”

5. The learned MM, after considering the status report, came to the conclusion that there is no requirement of police investigation and relying upon the judgment passed by the Hon’ble Allahabad High Court in the case of ***Sukhwasi vs. State of U.P. (2007) 58 SCC 754***; held that the Magistrate is not bound to direct registration of FIR if the facts of the case do not disclose the commission of a cognizable offence. It further held that the police investigation is necessary only in the cases where evidence is neither in possession of the complainant nor can be produced by the witnesses on being summoned at the instance of the complainant or where the nature of the evidence is technical. The learned Magistrate, however, took cognizance under Section 200 of the CrPC and directed the complainant / respondent No. 2 to lead her pre-summoning evidence.

6. The order passed by the learned Magistrate was challenged

by respondent No. 2 by filing a revision petition under Section 397 of the CrPC. The learned ASJ while placing reliance on the judgement passed by the Hon'ble Apex Court in the case of ***Lalita Kumari Vs. Government of Uttar Pradesh : (2014) 2 SCC 1***, set aside the order passed by the learned MM and held that the police authorities are not required to conduct preliminary inquiry if the complaint discloses the commission of cognizable offence. Learned ASJ further directed registration of FIR under Sections 420, 376, 295A, 493, 496, 506, 509, 511 and 120B of the Indian Penal Code, which led to filing of the present petition.

7. Learned counsel appearing for the petitioner submits that the learned ASJ has committed an error in directing the SHO to register the FIR. He further submits that the learned ASJ has misinterpreted and misconstrued the judgment passed in ***Lalita Kumari (supra)***. He submits that the judgment passed by the Hon'ble Apex Court in the case of ***Lalita Kumari (supra)*** is not applicable to the facts of the case. The Hon'ble Apex Court had passed the judgment and laid down certain principles in relation to the duties of the police on receipt of the information disclosing commission of the cognizable offence. The same, however, does not apply to the Magistrate exercising the power under Section 156(3) of the CrPC. He further submits that the allegations does not disclose commission of any cognizable offence.

8. He submits that no notice was issued by the learned ASJ to the Revision Petition filed by the respondent. It is vehemently argued that had an opportunity of hearing been granted to the petitioner, they would have placed the law and the facts in the correct perspective before the learned ASJ.

9. He relied upon the judgment passed by the Hon'ble Apex Court in ***Manharibhai Muljibhai Kakadia And Another vs. CRL.M.C. 2876/2022***

Shaileshbhai Mohanbhai Patel And Others : (2012) 10 SCC 517, to contend that no order can be passed by the Court, exercising power under Section 397 of CrPC, without hearing the party against whom the revision is exercised. He submits that it is a settled law that if an order of the Magistrate rejecting the application under Section 156(3) of the CrPC is assailed by way of a revision petition, the learned Revision Court should not upset the order without giving an opportunity to the party in whose favour the order under revision was passed.

10. The learned counsel has confined his arguments to the aspect that the matter be remanded back to the learned ASJ for fresh consideration, on the ground that the petitioners were not heard.

11. Learned counsel for the complainant submits that the right of the accused to be heard does not accrue in favor of the accused at before registration of the FIR, and that too in the jurisdiction of a criminal revision, and an order under Section 397 and 401 can be passed without hearing the accused person.

CONCLUSION

12. In the case of ***Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited And Another : (2009) 2 SCC 363***, the Hon'ble Apex Court was considering the issue whether the High Court in exercise of its jurisdiction under Section 397 and 401 of the CrPC can pass an order in the absence of the accused persons. Respondent No. 1 before the Hon'ble Apex Court had filed a complaint under Section 156(3) read with Section 200 of the CrPC before the learned Metropolitan Magistrate alleging commission of offence punishable under Section 323, 382, 420 etc. of the Indian Penal Code, 1860. The

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learned Metropolitan Magistrate dismissed the application under Section 156(3) of the CrPC and proceeded with the complaint under Section 200 of the CrPC and directed the complainant to lead pre-summoning evidence. The High Court in a revision petition challenging the order passed by the learned Metropolitan Magistrate set aside the said order. In a challenge before the Hon'ble Apex Court, it was contended that the revision petition could not have been disposed of without notice to the accused. The Hon'ble Apex Court held as under:

“22. Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under Section 156(3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.

23. We, therefore, are of the opinion that the impugned judgment cannot be sustained and is set aside accordingly. The High Court shall implead the appellant as a party in the criminal revision application, hear the matter afresh and pass an appropriate order.”

13. The judgment passed in ***Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited And Another*** (*supra*) was thereafter considered by the Hon'ble Apex Court in the case of ***Manharibhai Muljibhai Kakadia And Another vs. Shaileshbhai Mohanbhai Patel And Others*** (*supra*). The Hon'ble Apex Court in this case was again considering the issue whether a suspect is entitled to hearing by a Revisional Court in a revision preferred by the complainant challenging an order of the Magistrate dismissing the complaint under Section 203 of the CrPC.

14. It was contended before the Hon'ble Apex Court that the accused / suspect is not entitled to be heard on the question

whether the process should be issued against him or not. Therefore, it was contended that since the accused / suspect was not entitled for any hearing at the initial stages, he had no right to be heard in a revision petition challenging the order of the Magistrate dismissing the complaint.

15. The Hon'ble Apex Court considering the earlier judgments and after considering the provisions of not only Section 200, 201, 202, 203, 210 of the CrPC but also of Section 156(3) of the CrPC came to the conclusion in **Manharibhai Muljibhai Kakadia (surpa)** as under :

“53. We are in complete agreement with the view expressed by this Court in P. Sundarrajan [(2004) 13 SCC 472 : (2006) 1 SCC (Cri) 345] , Raghu Raj Singh Rousha [(2009) 2 SCC 363 : (2009) 1 SCC (Cri) 801] and A.N. Santhanam [(2012) 12 SCC 321 : (2011) 2 JCC 720] . We hold, as it must be, that in a revision petition preferred by the complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the Revisional Court. In other words, where the complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled.”

16. A coordinate Bench of this Court in the case of **Nishu Wadhwa Vs. Siddharth Wadhwa : (2017) 236 DLT 612**, relying

upon the judgment passed by the Apex Court in **Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters Private Limited and Another : (2009) 2 Supreme Court Cases 363**, held as under :

“10. In Raghu Raj Singh Rosh v. Shivam Sundram Promoters Pvt. Ltd. (2009) 2 SCC 363 while dealing with the right of an accused to be heard in a criminal revision petition, it was observed that indisputably if the learned Magistrate had taken cognizance of the offence and merely issuance of summons upon the accused had been postponed, the accused was entitled to be heard before the High Court in a criminal revision petition filed on behalf of the complainant. It was further held that since the Magistrate refused to exercise his jurisdiction under Section 156(3) Cr.P.C. and came to the conclusion that the dispute was a private dispute in relation to an immovable property, Police investigation was not necessary and directed examination of the complainant, having taken cognizance of the offence even though the accused had not been summoned, he had a right to be heard in the revision petition. Thus the Supreme Court recognized the right of an accused to be heard in a revision petition once cognizance of the offence was taken even though the accused had not been summoned.”

17. In my opinion, the right of the suspect / accused to be heard in a revision petition filed by the complainant against dismissal of application under Section 156(3) CrPC is no longer *res interga* and would be squarely covered by the judgment passed by the Hon’ble Apex Court **Manharibhai Muljibhai Kakadia And Another (supra)**.

18. It is not in doubt that at the stage of considering of application under Section 156(3) CrPC, the suspect is not a person who is aggrieved so as to be entitled for any hearing. The suspect has no *locus standi* to appear and participate at the stage when the Court is considering if the registration of the FIR is to be ordered or not. Furthermore, the Police is not obliged to hear the suspect at the stage of registering FIR.

19. It is also well settled that an order passed under Section

156(3) CrPC whether dismissing or allowing the application is not an inter-locutory order (Re: **Nishu Wadhwa Vs. Siddharth Wadhwa**). Such order disposes off an application under Section 156(3) CrPC. Once an order is passed, some rights accrue either in favour of, or against the parties. Such rights cannot be taken away in a challenge made against the order without there being issuance of any notice or an opportunity of hearing, to the party whose right is now sought to be taken away.

20. The powers of Sessions Judge exercising the revisional jurisdiction are specified in Section 399 of the CrPC. Section 399(2) of Cr.PC specifically states that in case of any proceedings, the Sessions Judge may exercise all or any of the powers, which may be exercised by the High Court under Sub-Section 1 of Section 401 and the provisions of Sub-Section 2, 3, 4 and 5 of Section 401 shall, so far as may be, apply to such proceedings which commence before the Sessions Judge under Sub-Section 1 of Section 399.

21. Section 401(2) states as under:

“Section 401. High Court’s powers of revision.

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(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

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22. From the bare perusal of the provisions stated above, it is clear that while exercising powers of a revisional court, no order to the prejudice of an accused or any other person can be made by a court unless the said accused or the said person has been given an opportunity of being heard. It cannot be said that an order directing registration of FIR, while exercising revisional

powers, is not to the prejudice of the accused.

23. These aspects were in fact considered by the Hon'ble Apex Court in the case of **Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited And Another** (*supra*) and **Manharibhai Muljibhai Kakadia And Another vs. Shaileshbhai Mohanbhai Patel And Others** (*supra*) and specifically followed by this Court in **Nishu Wadhwa Vs. Siddharth Wadhwa** (*supra*).

24. The Hon'ble Apex Court had repelled the contention that at the time when the revision was filed, the suspect was not prejudiced since he was not an accused. It was held that an order refusing to exercise jurisdiction under Section 156(3) of the CrPC can be termed as an order passed partially in favour of the suspect and had an opportunity of hearing was given, he could have shown that no revision application was maintainable and / or even otherwise, no case has been made for interference with the impugned order dismissing the application under Section 156(3) of the CrPC.

25. In view of the law as discussed above, the impugned judgment dated 31.05.2022 is set aside. The Criminal Revision No. 254/2018 is restored and is remanded back to the concerned Court for a decision afresh after giving an opportunity of hearing to the petitioners.

26. Copy of the order be given *dasti* to the learned counsel for the parties and be also sent to the learned Principal District & Sessions Judge, Patiala House Courts, New Delhi for necessary compliance. The parties are also at liberty to approach the concerned Court for fixing a date of hearing.

AMIT MAHAJAN, J

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