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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 21.09.2017
Judgment Pronounced on: 08.01.2018

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CRL.LP. 238/2017

CUSTOMS

..... APPELLANT

Through: Mr. P.C. Aggarwal, Advocate

Versus

JUARAH & ANR.

..... RESPONDENTS

Through: Mr. Yogesh Kr. Saxena,
Advocate with Mr. Sikander,
Advocate

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. The present leave to Appeal has been filed against the impugned judgment dated 28.02.2017 passed in Sessions Case No.440805/2016 (Old No. 02/2013) by Sh. Sanjay Garg, Learned Special Judge (NDPS), Dwarka Courts (in short 'the Trial Court') whereby the Respondents Juaraah and M. Walai were acquitted of the charges for the commission of offences punishable under Section 21/23/29 of the The Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the NDPS

Act”) on the grounds that the alleged recovery of narcotic drug from the Respondents cannot be used against the Respondents as the investigating agency failed to comply with the provision of Section 50 of the NDPS Act and with the provision of Section 103 of the Customs Act, 1962 and the statements of the Respondents under Section 67 of the NDPS Act recorded by the investigating agency do not meet the legal requirements and as such the investigating agency defaulted on all the above aspects.

2. The case of the prosecution is that on 01.04.2010 at 12:45 pm, an information was received by Sh. D.C. Misra (PW8), Joint Commissioner, Air Customs, IGI Airport, New Delhi, that a person namely Jura (an Afghan national) and his accomplice (name not known) would arrive on the same day from Kabul by Ariana Afghan Airlines, Flight no. FG311, who were suspected to carry Heroin concealed in their baggage and in their bodies. Sh. D.C. Misra reduced the information into writing and forwarded the same to Sh. J.S. Kandhari (PW17), Assistant Commissioner, Air Customs, IGI Airport, who constituted a team consisting of Sh. S.C. Rawat (PW5) (Air Customs Superintendent), Sh. Prashant Prakhar (PW1) (Air Customs Officer), Sh. Amrik Lal (PW23) (Air Customs officer) and Sh. S.S. Hundal (PW22) (Air Customs Officer). On the basis of the above information, the said Jura (respondent No.1) was identified by the Customs officers after immigration clearance with the help of his passport, wherein his name was reflected as

Juarah. After about ten minutes, respondents M.Walai joined respondents Juarah after immigration clearance and both of them started going towards the exit gate of the arrival hall. They were carrying only one hand baggage. Both the respondents were intercepted near the exit gate by the Customs officers. Since both the respondents were not conversant with English and Hindi, the Customs officers took help of two personnel from Ariana Afghan Airlines namely Khalid A. Noori (PW13) and Noor Ali Khosti, who were acquainted with the vernacular language of the respondents i.e. *Farsi*. On being asked as to whether they were carrying any narcotic drug, the respondents hesitatingly replied in the negative. Both the Respondents were served with separate notices under Section 50 of the NDPS Act which were read over to them by the said interpreters. By the said notices, it was explained to the Respondents that if they desired, the examination of their baggage and their personal search could be conducted before a Magistrate or a Gazetted Officer. However, both the Respondents declined to avail the same and stated that any Customs officer could take their search or they could be taken anywhere for medical check-up. Thereafter, the examination of the baggage of the Respondents and their personal search was conducted but nothing incriminatory was recovered. Since the Respondents were feeling uneasy and had also refused to take any hot/cold drinks being offered to them, their body search was conducted and it

was noticed that their bellies were unusually stiff. Considering the same, the Respondents were produced before the learned Duty Magistrate, Patiala House Courts, New Delhi and an application seeking permission for their medical examination was filed which was allowed vide order dated 01.04.2010.

3. Accordingly, the Respondents were produced before the Senior Medical Officer, Safdarjang Hospital, New Delhi, who admitted both of them in hospital for their proper examination. On 02.04.2010, Dr. M.K. Mittal (PW2) conducted non-contrast CT scan of the abdomen of the Respondents and found multiple capsules shaped radio opacities surrounded by air lucency in the entire large bowel from caecum till rectum suggestive of foreign bodies. The Respondents Juarah and M. Walai remained admitted in Safdarjang Hospital from 02.04.2010 to 09.04.2010 and during the said period, they had ejected a total number of 55 capsules weighing 382.58 gm and 58 capsules weighing 586.67 gms respectively from their rectum. This recovery was made in the presence of doctors on duty, interpreter and two *punch* witnesses. The capsules recovered were sealed and deposited with the SDO (Arrival) of IGI Airport, New Delhi.
4. After the discharge of the Respondents from the hospital on 09.04.2010, they were taken to Customs office at IGI Airport, New Delhi for further enquiries. The recovered capsules were summoned from the SDO (Arrival) and the same were found in sealed condition. Thereafter, the examination of the aforesaid

capsules was conducted and the same were found containing off-white coloured powdery substance. The net weight of the substance recovered from the capsules ejected by the Respondents Juara and M. Walai was found to be 382.58 gm and 586.67 gms respectively. On being tested, the substance was found positive for Heroin. Three samples each were drawn from the substance recovered from the capsules ejected by the respondents and the remaining substance of both respondents were kept separately. The entire proceedings were recorded in a *panchnama*. After completion of the *panchnama* proceedings, the respondents were summoned by Sh. Prashant Prakhar (PW1) for further enquiries and they tendered their voluntary statements under Section 67 of the NDPS Act with the help of interpreter Sh. Shams Sherwani. In the said statements, the respondents admitted about their apprehension and seizure effected from them. Both the respondents were arrested by Sh. Prashant Prakhar, who submitted the report under Section 57 of the NDPS Act regarding the seizure of contraband from the respondents and their arrest before Sh. S.C. Rawat, Superintendent Customs. One sample each of the substance recovered from the respondents were sent to Central Revenues Control Laboratory (CRCL) for chemical examination, which were found positive for Heroin.

5. After the completion of investigation, the prosecution filed the complaint under Sections 21, 23, 28 and 29 of the NDPS Act.

On 16.11.2010, the charges for the commission of offences under sections 21/23/29 of the NDPS Act were framed against both the Respondents to which they pleaded not guilty and claimed trial.

6. On behalf of the prosecution 30 witnesses were examined. On 21.08.2016 the statements of the respondents under section 313 Cr.P.C were recorded separately. The respondents in their respective statements denied that they were carrying the drugs concealed in their bodies. They pleaded that they were falsely implicated. After considering the entire evidence on record, the learned Special Judge by his impugned judgment acquitted the Respondents. It is this order of acquittal against which leave is sought to challenge in the appeal.
7. Mr. P.C. Aggarwal, Ld. Counsel for the leave petitioner contended that the Trial Court had erred in holding that requirements of section 50 of the NDPS Act has not been complied with. He argued that notices under section 50 of the NDPS Act, were duly served upon the respondents separately through the interpreters PW13 Sh. Khalid A. Noori and PW20 Sh. Sham Sherwani and in their testimony they have proved the same.
8. He urged that the compliance of Section 50 of the NDPS Act was automatically completed when the Respondents were produced before the learned Duty Magistrate, Patiala House Courts, New Delhi and an application seeking permission for

their medical examination was filed by the investigating agency under Section 103 of the Customs Act which was allowed vide order dated 01.04.2010. He argued by that the application under section 103 of the Customs Act was moved because the mode of concealment was not an ordinary one but it was a special mode of concealment i.e. concealment inside the body and a medical examination of the Respondents was required to recover the concealed articles.

9. He emphasized that the Trial Court failed to appreciate that due permission was obtained by the investigating agency from the Ld. Metropolitan Magistrate for the detection of the substance as concealed by the Respondents in their stomach. It was submitted that the Trial Court ought to have appreciated the special circumstances under which the recovery of the substance i.e. Heroine was made before the doctors of the Safdarjung Hospital as the process is life threatening in case of any burst of any capsule inside the stomach.
10. He urged that the medical examination of the Respondents and the recovery of the substance were made before the concerned doctors of Safdarjung Hospital and PW13 Khalid A. Noori. He emphasised that the concerned doctors have been duly examined by the prosecution as PW2 Dr. M.K. Mittal, Radiologist, PW3 Dr. Shishir Chandan, PW6 Dr. Yashwant Kumar, PW10 Dr. Deepak Rajput and PW29 Dr. Mukul Sinha. He argued that from the testimony of the doctors and PW13

Khalid A. Noori, it has been proved that the Respondents were admitted in the hospital and they had concealed the recovered substances in their stomach in the shape of capsules and since all the doctors and PW13 are independent witnesses, and thus the Trial Court should have believed the recovery from the bodies of both the Respondents.

11. The Ld. Counsel for the leave petitioner lastly contended that the statement of the Respondents under Section 67 of the NDPS Act was made voluntarily because the information and facts narrated by the Respondents in their respective statements are in their personal knowledge and same have been corroborated.
12. Per contra, it is submitted by the Ld. Counsel for the respondents that the Trial Court has rightly acquitted the respondents after finding non-compliance of mandatory requirements under section 50 & 67 of the NDPS Act and Section 103 of the Customs Act. He prayed that the leave petition to appeal may be declined.
13. I have heard the learned counsel for the leave petitioner and the learned counsel for the respondents.
14. The important points for consideration to adjudicate in the present leave petition are:
 - A. whether the alleged recovery of the narcotic drug from the Respondents was in compliance of the provisions of Section 50 of NDPS Act

B. whether the alleged recovery of the narcotic drug from the Respondents was in compliance of the provisions of Section 103 of the Customs Act and;

C. Whether the statement of the Respondents under Section 67 of NDPS Act was as per the legal requirement or not.

15. In order to appreciate the rival contentions raised by the parties, it would be profitable to refer to Section 50 of the NDPS Act which reads as follows:

“50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

16. Section 50 of the NDPC Act prescribes the safeguards to be followed before conducting personal search of a suspect. It confers an extremely valuable right upon a suspect to get his person searched in the presence of a gazetted officer or a Magistrate. The compliance with the procedural safeguard contained in the above provision is intended to protect a person against false accusation and also to lend credibility to the search and seizure conducted by the empowered officer.

17. It is the case of the prosecution that the Respondents Juarah and M. Walai, who were intercepted at IGI Airport on 01.04.2010 at about 2/2.30 p.m after their arrival from Kabul by Ariana Afghan Airlines on the basis of prior information against them of carrying drug in their baggage's and bodies, were served with separate notices under Section 50 of the NDPS Act. PW1 Sh. Prashant Prakhar, Air Customs Officer, has proved the said notices as Ex.PW1/A and Ex.PW1/D respectively. He has deposed that since both the Respondents were not conversant with English or Hindi, the Customs officers took the help of two personnel from Ariana Afghan Airlines namely PW13 Sh. Khalid A. Noori and Sh. Noor Ali Khosti, who explained the contents of the notices under Section 50 of the NDPS Act to the Respondents in their vernacular language. By way of the said notices, the following information was conveyed to the Respondents:

“The examination of your baggage and your personal search is to be conducted. **If you so desire**, the same could be conducted before a Magistrate or a Gazetted Officer of Customs.”

18. PW13 Sh. Khalid A. Noori in his cross-examination, clearly and categorically deposed that he had translated the notice under section 50 of the NDPS Act verbatim to the Respondents without any addition or deletion of any word. **He also explicitly**

admitted that since the expression 'legal right' did not find mention in the aforesaid notice, the Respondents were not apprised about the same by PW1. From the contents of the notices served upon the Respondents and the above deposition of PW13 Sh. Khalid A. Noori, it is apparent that the Respondents were merely given an option and only an enquiry was made by the empowered officer to get their search conducted in the presence of a Gazetted Officer or a Magistrate and **were not apprised of their legal right to be taken to a Gazetted Officer or nearest Magistrate for the purpose of their search, if they so required.**

19. The Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609 while dealing with the effect of non-compliance and the requirement of strict compliance of the provisions of Section 50 of the NDPS Act, 1985 by the empowered officer held as under:

'29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, **it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate.** We have no hesitation in holding that

in so far as the **obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the respondents during such search.** Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

30. As observed in Presidential Poll, In re (SCC p. 49, para 13)

“13. ...It is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. ‘The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.’”

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.’

20. In view of dictum laid down by the Hon'ble Supreme Court in the above judgment, it is apparent that the notices served upon the Respondents were not in conformity with the provisions of Section 50 of the NDPS Act and were merely an enquiry by the empowered officer to the Respondents. By these notices the respondents were not informed of their legal rights to be searched before the Magistrate or Gazetted officer. Further it is note worthy that PW13 Sh. Khalid A. Noori in his cross examination admitted that he did not know the meaning of words "Gazetted officer" and "Magistrate" in Persian. Since both the respondents were not conversant with English, the meaning of these two words was not conveyed to them in vernacular language by PW13. Looked from any angle the very purpose of notice under section 50 was defeated what to speak of compliance.
21. It is also relevant to advert to Section 103 of the Customs Act which reads as under:

"103. Power to screen or X-ray bodies of suspected persons for detecting secreted goods.—

(1) Where the proper officer has reason to believe that any person referred to in sub-section (2) of section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and produce him without unnecessary delay before the nearest magistrate.

(2) A magistrate before whom any person is brought under sub-section (1) shall, if he sees no reasonable ground for believing that such person has any such goods secreted inside his body, forthwith discharge such person.

(3) Where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect.

(4) Where a magistrate has made any order under sub-section (3), in relation to any person, the proper officer shall, as soon as practicable, take such person before a radiologist possessing qualifications recognized by the Central Government for the purpose of this section, and such person shall allow the radiologist to screen or X-ray his body.

(5) A radiologist before whom any person is brought under sub-section (4) shall, after screening or X-raying the body of such person, forward his report, together with any X-ray pictures taken by him, to the magistrate without unnecessary delay.

(6) Where on receipt of a report from a radiologist under sub-section (5) or otherwise, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction: Provided that in the case of a

female no such action shall be taken except on the advice and under the supervision of a female registered medical practitioner.

(7) Where any person is brought before a magistrate under this section, such magistrate may for the purpose of enforcing the provisions of this section order such person to be kept in such custody and for such period as he may direct.

(8) Nothing in this section shall apply to any person referred to in sub-section (1), who admits that goods liable to confiscation are secreted inside his body, and who voluntarily submits himself for suitable action being taken for bringing out such goods. Explanation.—For the purpose of this section, the expression “registered medical practitioner” means any person who holds a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916 (7 of 1916), or notified under section 3 of that Act, or by an authority specified in any of the Schedules to the Indian Medical Council Act, 1956 (102 of 1956).”

22. Section 103 of the Customs Act provides for the power to screen through x-ray, bodies of suspected persons for detecting hidden goods. Section 103 of the Customs Act will apply when the body of the suspected person is required to be x-rayed. In the present case, the customs officers have opted to go for x-ray examination of the body of the Respondents, and, therefore, they had to follow the procedure laid down in Section 103 of the said Act.

23. Sub-section (1) of Section 103 of the Customs Act provides that when the proper officer has reason to believe that a suspect has any goods liable to confiscation secreted inside his body, he shall produce him before the nearest Magistrate. Sub-section (3) lays down that if the Magistrate has reasonable ground for believing that the suspect produced before him by the proper officer has any such goods secreted inside his body, he may make an order for getting the body of the suspect screened or xrayed for the purpose of discovering such goods. Sub-section (5) casts a obligation upon the radiologist before whom such suspect is produced, to forward his examination report alongwith the Xray pictures to the Magistrate without unnecessary delay. Sub-section (6) provides that upon receipt of the report of the radiologist, if the Magistrate is satisfied that such person has any goods liable to confiscation secreted inside his body, he may pass suitable direction for bringing out such goods. Sub-section (7) lays down that the Magistrate may order such person to be kept in such custody and for such period as he may direct.
24. It is not in dispute that the Customs officers had produced the respondents before the learned Magistrate on 01.04.2010 and sought permission for their medical examination. Vide order dated 01.04.2010 (Ex.PX), the Court had allowed the Customs officers to get the respondents medically examined and directed them to file the medical reports on the next day. The said

direction was in terms of the provisions of sub-section (3) of Section 103 of the Customs Act. PW1 Sh. Prashant Prakhar has deposed in his examination-in-chief that in pursuance to the above order, the CT scan of the respondents was got conducted on the intervening night of 01/02.04.2010 at Safdarjang Hospital and vide his reports (Ex.PW2/A and Ex.PW2/B), Dr. M.K. Mittal, Radiologist, opined that there were multiple capsule shaped foreign bodies in the abdomen of both the respondents. He has further deposed that thereafter, the respondents were got admitted in the Surgical Emergency Ward of the Safdarjang Hospital and respondents Juarah and M. Walai ejected 32 capsules and 9 capsules respectively through their rectum on 02.04.2010. He has also deposed that since more capsules were secreted by the respondents in their bodies, an application was filed before the learned Magistrate on 02.04.2010 and the Court directed both the respondents to remain admitted in the hospital till the final recovery of capsules. He has exhibited the said application as Ex.PW1/H. The Trial Court has rightly not placed reliance upon the said application as it is not a certified copy and the prosecution has failed to summon the relevant record from the concerned court to prove the same. **The alleged order dated 02.04.2010 passed on the said application has also not seen the light of the day. Infact, in his cross examination PW1 Sh. Prashant Prakhar admitted that the only permission granted to them by the**

learned Magistrate was to take the respondents to a hospital for their medical examination. The above deposition of the witness clearly falsifies the case of the prosecution that the admission of the respondents in the hospital from 02.04.2010 to 09.04.2010 and recovery of the suspected contraband from their bodies during the said period was with the permission of the Court under sub-sections (6) and (7) of Section 103 of the Customs Act. Since the investigating agency had failed to obtain the necessary permission of the Court in terms of sub-sections (6) and (7) of Section 103 of the Customs Act, it cannot be said that the alleged recovery of capsules from the respondents during their admission in the hospital was in accordance with the procedure prescribed.

25. Consequently, it is evident from the record that the alleged recovery of narcotic drug from the respondents was in violation of the safeguards provided in Section 50 of the NDPS Act as well as Section 103 of the Customs Act and thus, the same cannot be used as evidence of proof of unlawful possession of the contraband against the respondents.
26. The Appellant has lastly contended that the statements of the Respondents under Section 67 of the NDPS Act admitting their guilt are voluntary and they narrated the facts from their personal knowledge. The Respondents were detained on 01.04.2010 and their alleged statements under Section 67 of the NDPS Act were recorded on 09.04.2010 while they were in

custody of the Customs officers. The custody of the Respondents herein till 09.04.2010 was without any order from the Trial Court and was against the provisions of law. It is a settled law that while weighing the evidentiary value of a statement under Section 67 of the NDPS Act, the Court should not lose sight of the ground realities and should take into consideration whether the confession was made under duress or was voluntary in nature. The alleged recovery from the Respondents was made from 02.04.2010 to 09.04.2010 and the purported confession was made by the respondents on 09.04.2010 after the recovery of the substance in custody. PW1 in his cross-examination admitted that he had interrogated the Respondents through the interpreter PW20 and the answers given by them were recorded in the form of their statements under Section 67 of the NDPS Act. PW1 Sh. Prashant Prakhari also admitted that he had told the respondents that they were required to tender their statements under Section 67 of the NDPS Act and did not inform them about their right to remain silent which again is a violation of the law. The **Hon'ble Supreme Court** in **D.K. Basu v. State of West Bengal 1997 (1) SCC 416** laid down the law that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. This judgment has been followed by the **Hon'ble Supreme Court** in various cases. In **U.O.I vs Bal Mukund & Ors. JT 2009 (5) SC 45**

while relying upon D.K. Basu case, the **Hon'ble Supreme Court** stressed that conviction should not be based merely on the basis of statement under Section 67 of the NDPS Act, without independent corroboration. In **Bal Mukund's** case (supra), the Apex Court observed that if the maker of such a statement was interrogated while in the custody, it cannot be said that the statement was voluntary. It was further stressed that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. It was also held that a conviction should not be based merely on the basis of a statement under Section 67 of the NDPS Act without any independent corroboration. In the case on hand, the respondents were apprehended on 01.04.2010 and their alleged statements under Section 67 of the NDPS Act were recorded on 09.04.2010 while they were in custody of the Customs officers. In his cross-examination PW1 Sh. Prashant Prakhari admitted that he had interrogated the respondents through the interpreter and the answers given by them were recorded in the form of their statements under Section 67 of the NDPS Act. PW1 Sh. Prashant Prakhari also admitted that he had told the respondents that they were required to tender their statements under Section 67 of the NDPS Act and did not inform them about their right to remain silent. Considering the same, the statements of the respondents under Section 67 of the NDPS Act cannot be said to be voluntary in view of the law laid

down in **D.K. Basu's** case (supra) and **Bal Mukund's** case (supra) and thus no reliance can be placed on the same.

27. In view of above discussion I do not find any merit in the leave petition and same is dismissed.

(VINOD GOEL)
JUDGE

JANUARY 08, 2018

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HIGH COURT OF DELHI



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