

Abhinav Jindal Vs. State and Another

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Court : Delhi

Decided On : Mar-23-2012

Judge : Suresh Kait

Appeal No. : CRL.REV. P. No. 420 of 2011

Appellant : Abhinav Jindal

Respondent : State and Another

Judgement :

1. Vide the instant petition, the petitioner has sought to set aside the Order on Charge dated 30.05.2011 passed by learned ACMM, Rohini, New Delhi whereby the Id. ACMM has directed framing of Charge under Sections 420/468/471 of the Indian Penal Code, 1861 against the petitioner and Charge dated 30.05.2011 framed by Id. ACMM, Rohini, New Delhi in case FIR No. 375/05 under Section 420 of the IPC and under Section 61/1/14 of the Excise Act registered at PS Shalimar Bagh titled State v. Abhinav Jindal and proceedings emanating therefrom.

2. The facts of the instant case, in brief, are that the petitioner is the Proprietor of a liquor vend named Abhinav Jindal Wine Shop (hereinafter referred to as “the Vend”) situated at 2, 3, 4 and 5, Arcade Place, CSC, BN Block, Shalimar Bagh, Delhi and is the holder of Licence in Form L-52 for the retail sale of various brands of Indian Made Foreign Liquor /Beer as approved or registered by the statutory authority in the National Capital Territory of Delhi.

3. It is alleged that on 05.05.2005 Sub Inspector Kuldeep Singh of the Excise Intelligence Branch, Delhi (hereinafter referred to as the Sub Inspector) along with staff reached the Vend and found that Bagpiper whisky was being sold at the Vend and the caps of the bottles containing Bagpiper whisky bear the stamp "Associated Distilleries Limited Hisar - Haryana Excise". The Sub Inspector inspected the Vend completely and seized 2.03 Q, 4.16 P and 6.26 N of Bagpiper Whisky in the presence of the petitioner, accordingly seized through seizure memo.

4. On 06.05.2005, the Sub Inspector addressed a complaint to the SHO/Duty Officer, PS Shalimar Bagh, New Delhi, alleging therein, on the basis of secret information that illicit liquor (which is for sale in Haryana) is being sold at the Vend and the excise duty due to the Delhi Government was allegedly being evaded. It is further alleged "from the enquiry conducted so far it seems that the Delhi Excise Label had been pasted illegally on the stock made for Haryana. From this illegal act, the Excise Deptt. of Delhi is losing revenue".

5. It is further alleged, after discussion with senior officers, it has been decided that a case of cheating be registered and investigation be taken up by Crime Branch. The Sub Inspector requested therein that a case be registered for the offences punishable under Section 420 IPC and 61/1/14 Excise Act and investigation be handed over to SI Sunil Kumar, D-3315, PIS No.16940044 of Anti Extortion Cell, Crime Branch, as directed by senior officers of Police and Excise Department.

6. The aforementioned Complaint culminated in the registration of FIR No.375/05 under Section 420 of IPC and under Section 61/1/14, Excise Act, PS Shalimar Bagh. The petitioner was arrested. Thereafter, he was released on bail on 09.05.2005.

7. Mr. Siddharth Luthra, Ld. Sr. Counsel for the petitioner submitted that a Show Cause Notice dated 20.05.2005 was issued to the petitioner by the Excise Department, wherein it was alleged, inter alia, that the petitioner had violated various provisions of Punjab Excise Act, as well as rules, framed thereunder. One of the violations alleged against the petitioner was that he was found in possession of more than 12 cases of whisky manufactured in Haryana which was brought unlawfully with the intention of sale in Delhi, without payment of Excise Duty which

was violative of Rules 25 and 26 of the Punjab Excise Act. The petitioner was directed to show cause as to why his licence should not be suspended.

8. The petitioner replied to the aforesaid show cause notice through his Advocate vide his reply dated 23.06.2005 and after hearing the petitioner, the Collector (Excise), in exercise of his power under Section 80 (2) of Punjab Excise Act, vide Order dated 06.09.2006 directed that the Licence L-52 issued to the firm of the petitioner be suspended for a period of 30 days and that a penalty of Rs.1 lakh be imposed on the petitioner and further directed that if the petitioner deposits the said amount of penalty before coming into force/operation of suspension order, the suspension will be deemed to have been foregone.

9. Ld. Sr. Counsel for the petitioner further submits that vide letter dated 08.09.2006 addressed to the Collector (Excise), petitioner stated that he had deposited the penalty amount of Rs.1 lakh under protest vide TR No.265 dated 08.09.2006, in order to forgo the suspension order for 30 days.

10. It is alleged that on 08.04.2008 a Police report under Section 173 of the Cr.PC (hereinafter referred to as "Charge sheet") was filed by the Inspector, Anti Extortion Cell, Crime Branch, Delhi Police before the Court of Ld. ACMM, Rohini, New Delhi in FIR No.375/05 for the offences punishable under Section 420 IPC and under Section 61/1/14 Excise Act, at PS-Shalimar Bagh.

11. Ld. Counsel submits that it has been, inter alia, alleged in the charge-sheet that from the investigation carried out till date and on the basis of statement of witnesses the petitioner has, by keeping illegal liquor, caused wrongful loss of Excise duty to Excise Department and has kept and used stickers of non-existent batch numbers. Thus has committed offences punishable under Section 61/1/14 of the Excise Act and under Section 420/468/471 of the IPC.

12. Vide order dated 08.04.2008, the Ld. ACMM took cognizance of the offence alleged against the petitioner and directed therein that summon be issued to the petitioner.

13. Being aggrieved, the petitioner filed the petition being CrI.MC No.3625/2009 under Section 482 of the Cr.PC titled Abhinav Jindal v. State before this Court, for quashing of the case FIR pending in the Court of the Id. ACMM and proceedings emanating therefrom and quashing of the Order dated 08.04.2008 passed by the Id. ACMM in the case FIR and proceedings emanating therefrom.

14. Vide Order dated 22.10.2009, this Court permitted the petitioner to withdraw the aforesaid CrI. MC No. 3625/2009, with the liberty to raise all grounds available to the petitioner including the grounds taken in the said petition in accordance with law before the Court of Id. ACMM.

15. In view of the above directions and in view of the facts and circumstances of the case, the petitioner filed an application seeking discharge in case FIR pending in the Court of Id. ACMM, inter alia, stating therein that (a) the bar under Section 75 (2) of the Punjab Excise Act mandates that except with the special sanction of the State Government, no judicial Magistrate shall take cognizance of any offence under the Punjab Excise Act unless prosecution is instituted within a year from the date on which the offence is alleged to have been committed.

16. Id. Sr. Counsel further submitted that, in the present case, the FIR was registered on 06.05.2005 and charge-sheet was filed and cognizance was taken by the Court on 08.04.2008, i.e., after the expiry of almost three years from the date; (b) the Hon^{ble} Supreme Court and various High Courts have held in a number of cases that it is a well settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. Further, where there is a special Act which creates the offences, it shall prevail over the general law and the general law will not be applicable and (c) in the present case, the alleged offence, if at all is made out, is under Section 61 of the Punjab Excise At and, therefore, the recourse by the Respondent to the IPC provisions is not permissible in law. The petitioner further stated therein that the Hon^{ble} Supreme Court and various High Courts have held in a number of cases that the offences alleged to have been committed under IPC are only ancillary to the offence alleged under Special Act and therefore prosecution under IPC is bad in law.

17. Thereafter, vide the Order on Charge dated 30.05.2011, the Id. ACMM accepted the submission of the Id. Counsel for the petitioner that cognizance taken by the Id. ACMM of the offence punishable under Section 61 of the Punjab Excise Act was bad in law and, inter alia, held therein as under:-

“...the limitation in respect of offence under Section 61 of Punjab Excise Act has to be considered in the light of provision contained in Section 75 (2) of the Punjab Excise Act. Accordingly held that the charge sheet filed in respect of offence under Section 61 of the Punjab Excise Act is time barred and consequently, no cognizance could have been taken against the accused in respect of said offence under the law. Consequently, accused Abhinav Jindal stands discharged in respect of the said offence.” However, the Id. ACMM held therein as under:-

“..the contention raised on behalf of the petitioner that he should be discharged in respect of those penal offences under IPC also being ancillary in nature in view of charge sheet being barred by limitation in respect of offence under section 61 of Punjab Excise Act does not carry any force and stands rejected.

..The aforesaid conduct of the accused in not challenging the said order passed by Collector(Excise) coupled with the allegations levelled against him in the present charge sheet clearly shows that offence under IPC charged against the accused herein, are not merely ancillary in nature but are separate and independent offences”.

18. Accordingly, the Id. ACMM directed in the Order on Charge dated 30.05.2011 that charges under Sections 420, 468 and 471 of the IPC be framed against the petitioner. Accordingly vide order on charge dated 30.05.2011 the Id. ACMM framed charges under Section 420, 468 and 471 IPC against the petitioner to which the petitioner pleaded not guilty and claimed trial.

19. In support of his contentions, Id. Sr. Counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of **Radheyshyam Kejriwal v. State of West Bengal and Another**, (2011) 3 SCC 581 in which the Supreme Court has held as under:-

“38. *The ratio which can be culled out from these decisions can broadly be stated as follows:-*

(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases

20. Ld. Counsel for the petitioner has further relied upon the judgment of the Supreme Court in the case of **Malkiat Singh and Another v. The State of Punjab**, 1969 (1) SCC 157 in which the Supreme Court has held as under:-

“6. The question to be considered in this appeal is whether upon the facts found by the lower courts any offence has been committed by the appellant. It is not disputed that the truck carrying the paddy was stopped at Samalkha Barrier which is 32 miles from Delhi. It is also not disputed that the Delhi-Punjab Boundary was,

at the relevant point of time, at about the 18th mile from Delhi. It is, therefore, evident that there has been no export of paddy outside the State of Punjab in this case. The truck with loaded paddy was seized at Samalkha well inside the Punjab Boundary. It follows therefore that there was no export of paddy within the meaning of Para 2(a) of the, Punjab Paddy (Export Control) Order, 1959. It was however, argued on behalf of the respondent that there was an attempt on the part of the appellants to transport paddy to Delhi and so there was an attempt to commit the offence of export. In our opinion, there is no substance in this argument. On the facts found, there was no attempt on the part of the appellants to commit the offence of export. It was merely preparation on the part of the appellants and as a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arrange the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparation made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reas of a criminal attempts. The sufficiency of the actus reas is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiency proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but, if he bends down near the stack and light a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it. Sir James Stephen, in his Digest of Criminal Law, Article 50, defines an attempts as follows : "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of act begins cannot be defined, but depends upon the circumstances of each particular case."

21. Ld. Counsel for the petitioner has also relied upon the judgment of the Supreme Court in the case of **Koppula Venkat Rao v. State of Andhra Pradesh**,

2004 Cri.L. J. 1804 in which the Supreme Court has held as under:

"9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it: and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress, has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and,

possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.”

22. Ld. Counsel for the petitioner has lastly relied upon a judgment of the Calcutta High Court in the case of **Shyamal Biswas v. State of West Bengal, 2008 Cri.L.J.2699 (DB)** in which the Court has held as under:-

“The next reasoning given by the learned trial Judge is that P.W.10, who scribed the written complaint, would not have agreed to do so if there was no ring of truth in the complaint. This is something extraordinary. No Court is expected to proceed on the basis of this kind of presumption. Presumptions can only be raised where they are permitted under the law, and such a presumption is not permitted by any of the provisions of the Evidence Act or any other law.”

23. Ld. Sr. Counsel for the petitioner has argued that even for the sake of argument if it is accepted that the whisky bottles, as per allegations, were found in petitioner's retail shop but the case of prosecution is not that he used the same to cheat someone and that he actually cheated someone. Therefore, if there was a preparation then that preparation is not an offence described anywhere in the Criminal Procedure Code. Therefore, the petitioner has neither committed any offence under the Excise Act nor under the IPC.

24. On the other hand Ms. Rajdipa Behura, Id. APP for the State, has submitted that the main substantive offence involved in this case is evasion of excise tax of Delhi, as the modus operandi adopted by accused herein was that he used to purchase whisky which was meant for sale in Haryana without proper channel and without payment of excise tax in Delhi. The requisite procedure is that the authorised distributor in Delhi which is called L-1 was supposed to procure whisky from Haryana through proper channel and then to supply the same to its vendor/dealer (which is called L-52) and during said process, excise tax is also

charged by the Excise Department of the Government of NCT of Delhi and only then vendor L-52 is justified in possessing such whisky and selling it in the open market as per terms and conditions of the license issued to him.

25. Ld. APP has further submitted that the labels/stickers of Delhi Excise Department appearing on seized bottles of whisky, were also forged by petitioner herein with dishonest intention to cheat the Excise Department of Delhi and in this manner, petitioner has actually caused loss of revenue to the Excise Department, Government of NCT of Delhi.

26. She further argued that the petitioner has actually used those forged stickers/labels by selling the bottles of whisky in the open market and thus, prima facie case is made out in respect of offences punishable under section 420/468/471 IPC also.

27. Another contention raised by Id. APP for the State is that cognizance in respect of offences has already been taken, therefore, the issue of limitation should not be entertained at this stage. Alternatively, it has been argued that since there is no limitation for filing charge sheet in respect of offences under section 420/468/471 Indian Penal Code, 1860, punishable with imprisonment up to seven years. The period of limitation provided in Section 75(2) of Punjab Excise Act is immaterial and should not be pressed into in order to calculate the period of limitation for filing the charge sheet in the present case.

28. Ld. APP has further argued that petitioner has also been charged with offence under Section 420/468/471 IPC and there is no limitation in respect of those offences, as per Section 460 Cr.PC, there is no bar in taking cognizance in respect of offences under section 61 of Punjab Excise Act, therefore issue raised is without any force. The offences punishable under Indian Penal Code, 1860, charged against petitioner are altogether different offences in respect of which limitation is governed by provision contained in Section 468 Cr.P.C, whereas the limitation in respect of offence under section 61 of Punjab Excise Act has to be governed in view of provision contained in section 75(2) of Punjab Excise Act.

29. Accordingly, it was held that the charge sheet filed in respect of offence under section 61 of Punjab Excise Act is time barred and petitioner stand discharged in respect of the aforesaid offences.

30. Ld. APP has further submitted that since the petitioner has already got benefit under the Punjab Excise Act, as mentioned above, the same benefit cannot be given under Section 420/468/471 of IPC. Prima facie, a case is made out against the petitioner and in the revisionary jurisdiction this Court has limited power. Even otherwise, the petitioner has not made out a good case. There is no jurisdictional or procedural error apparent on the face of it, therefore, the instant petition is liable to be dismissed.

31. Ld. APP asserted that this Court cannot go into robbing inquiry against the petitioner. He has cheated the Excise Department of NCT, Delhi, by bringing liquor unlawfully within the State of Delhi with intention of selling without payment of excise duty. The Transport Permit and Invoice produced by accused during investigation relate to Bagpiper whisky, of different batches as mentioned therein, whereas the Bagpiper whisky seized from the accused are of batch number 249 which, as per the case of prosecution was never issued to the petitioner by L-1. Rather, caps of those Bagpiper whisky shows that same was manufactured in Haryana and was also meant „for sale in Haryana only?. Therefore, the petitioner has failed to disclose the source from where he procured the said whisky and thus, dishonest intention to cheat the Government by petitioner herein, can always be inferred from the facts and circumstances of the case as well as the conduct of the accused. By the said alleged illegal acts of the petitioner, loss of revenue is claimed to have been caused to the Excise Department of Government of NCT of Delhi which is quite apparent from the penalty imposed by Collector(Excise) as stated above.

32. The Id. APP has also pointed out that petitioner did not challenge the aforementioned penalty order which has attained finality, therefore, now he cannot take the view other than he has already taken. Moreso, he has accepted the penalty imposed by the Collector(Excise) as mentioned above.

33. Moreover, the excise labels stickers appeared on seized bottles of whisky are found to be forged one and since petitioner alleged to have been selling those bottles of whisky with forged lables, prima facie, there is sufficient material to show that the petitioner has actually used those forged lables. Thus, prima facie a case is made out against him in respect of offences punishable under Section 420/468/471 of IPC. Therefore, there is no discrepancy or apparent error in the order passed by the Id. Court below. Therefore, the instant petition of the petitioner is liable to be dismissed.

34. Ld. APP has also relied upon the judgment of the Supreme Court in the case of **Malkiat Singh and Another v. The State of Punjab**, 1969 (1) SCC 157 in which the Supreme Court has held as under:-

“7. The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Section 8 of the Essential Commodities Act states that "any person who attempts to contravene, or abets a contravention of, any order made under Section 3 shall be deemed to have contravened that order". But there is no provision in the Act which makes a preparation to commit an offence punishable. It follows therefore that the appellants should not have been convicted under Section 7 of the Essential Commodities Act.”

35. A show cause notice was issued to the petitioner which was replied vide his reply dated 23.06.2005. After due hearing to petitioner, the Collector (Excise), in exercise of his power under Section 80 (2) of Punjab Excise Act, vide Order dated 06.09.2006, the Licence L-52, issued to the firm of the petitioner, was suspended for a period of 30 days and that a penalty of Rs.1 lakh was imposed on the petitioner. Further, it was directed that if the petitioner deposits the said amount of penalty before coming into force/operation of suspension order, the suspension

would be deemed to have been foregone. Vide letter dated 08.09.2006, the petitioner conveyed to the Collector (Excise), that he had deposited the penalty amount of Rs.1 lakh under protest vide TR No.265 dated 08.09.2006, in order to forgo the suspension order for 30 days.

36. I note, though the aforesaid penalty amount was deposited under protest, however, the penalty imposed upon the petitioner was never challenged , therefore, the order dated 09.06.2006 passed by the Collector(Excise) has attained finality.

37. I further note that the substantive offence involved in this case is evasion of excise tax of Delhi, as the modus operandi adopted by the petitioner was that he used to purchase whisky meant for sale in Haryana without proper channel and without payment of excise tax in Delhi. The requisite procedure is that the authorised distributor in Delhi, which is called L-1, was supposed to procure whisky from Haryana through proper channel and then to supply the same to its vendor/dealer (which is called L-52). During the said process, excise tax is also charged by the Excise Department of the Government of NCT of Delhi and only then vendor L-52 is justified in possessing such whisky and selling it in the open market as per terms and conditions of the license issued to him.

38. The labels/stickers of Delhi Excise Department appearing on seized bottles of whisky, were also forged by petitioner with dishonest intention to cheat the Excise Department of Delhi. Thus, petitioner has actually caused loss of revenue to the Excise Department, Government of NCT of Delhi. He actually used those forged stickers/labels for selling bottles of whisky in open market, thus, prima facie an offence has been made out punishable under Section 420/468/471 of the Indian Penal Code, 1860.

39. On the issue raised by Id. Counsel for the petitioner regarding limitation, I hereby clarify that there is no limitation prescribed for filing charge sheet in respect of the offences punishable under Section 420/468/471 of the Indian Penal Code, 1860 with imprisonment upto 7 years. The period of limitation prescribed in Section 72(2) of the Punjab Excise Act is immaterial and ought not to have been pressed into in order to calculate the period of limitation for filing the charge sheet

in the present case. Because of the fact that in respect of Section 61 of the Punjab Excise Act, the same is found time barred and the petitioner stands discharged from the offence under Punjab Excise Act.

40. I further note, the petitioner cheated the Excise Department of Government of NCT of Delhi by bringing liquor within the territory of Delhi with intention of selling without payment of excise duty. The Transport Permit and Invoice produced by petitioner during investigation relate to Bagpiper whisky, of different batches as mentioned therein, whereas the Bagpiper whisky seized from petitioner are of batch number 249 which, as per the case of prosecution, was never issued to the petitioner by L-1. Rather, caps of those Bagpiper whisky shows that same was manufactured in Haryana and was also meant „for sale in Haryana only?. Therefore, the petitioner has failed to disclose the source from where he procured the said whisky and thus, dishonest intention to cheat the Government by petitioner can always be inferred from the facts and circumstances of the case as well as the conduct of the accused.

41. By the act of the petitioner it cannot be inferred that he just made the preparation to commit the offence and note executed the same. I am of the considered opinion that the moment he crossed the Border of Haryana and entered in Delhi territory, from very that point of time, by not paying the excise duty, he has committed the offence and by selling those bottles of whisky with forged lable, one can infer that prima facie, sufficient material is on record to show that petitioner has actually used those forged lables. This fact has to be proved in trial.

42. In view of the above discussion, I am of the considered opinion that there is no discrepancy or apparent error in the order passed by the learned Court below.

43. Therefore, I find no merit in the present petition.

44. Accordingly, the same is dismissed.

45. No order as to costs.