

(2017) 03 BOM CK 0089

In the Bombay High Court

Case No : Criminal Revision Application No. 128 of 2017 With Criminal Application No. 126 of 2017 And Criminal Application No. 150 of 2017 In Criminal Revision Application No. 128 Of 2017

Rajesh Swarupchand Kankaria

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401
Penal Code, 1860 (IPC) — Section 323, Section 323, Section 34, Section 34, Section 352, Section 354, Section 65
Probation of Offenders Act, 1958 — Section 3, Section 4

Citation : (2017) 2 AIRBomRCri 71 : (2017) ALLMRCri 1781 : (2017) 2 MhLJCrI 549

Hon'ble Judges : Mr. A. M. Badar, J.

Bench : Single Bench

Advocate : Mr. Vikas Balasaheb Shivarkar, Advocate, for the Petitioner; Mr. Vinod Chate, APP, for the Respondent/ State

Final Decision : Disposed Off

Judgement

Mr. A. M. Badar, J.(Oral)—By this revision petition, revision petitioners / original accused nos.1 to 3 are challenging the judgment and order dated 17th February 2017 passed by the learned Additional Sessions Judge, Pune, in Criminal Appeal bearing no.71 of 2011 filed by them, so also the judgment and order passed by the learned JMFC, Vadgaon Maval, Pune, on 29th January 2011 in Summary Criminal Case No.575 of 2006.

2. For the sake of convenience, it is apposite to reproduce operative portion of the judgment and order dated 29th January 2011 passed by the learned JMFC, Vadgaon Maval, District Pune. It reads thus :

ORDER

"1) Accused Nos.1 to 3 viz. Rajesh Swarupchand Kankaria and Swarupchand

Rupchand Kankaria, are hereby convicted U/sec.248(2) of Cr.P.C. of the offences punishable U/sec.354 r.w.34 of Indian Penal Code.

2) Both are sentenced to suffer 2 months rigorous imprisonment and fine of Rs.10,000/each. In default of payment of fine, accused shall undergo the rigorous imprisonment of 8 months.

3) Accused No.2 Dinesh Kankaria is hereby convicted U/sec.248(2) of Cr.P.C. of the offence punishable U/sec.323 r.w.34 of Indian Penal Code.

4) He is sentenced to suffer 2 months simple imprisonment and fine of Rs.5,000/. In default of payment of fine he shall undergo the simple imprisonment of 8 months.

5) Accused nos.1 to 3 are hereby acquitted U/sec.248(1) of Cr.P.C. of the offences punishable U/sec.504 and 506 r.w.34 of Indian Penal Code.

6) The amount of Rs.15,000/be given to the complainant Sunita Bedmutha as a compensation out of the total fine amount U/sec.357(2) of Cr.P.C. after appeal period is over. Rest of the fine amount be credited to government, as per rules.

7) Bail bonds of all accused, stands forfeited.

8) Dictated and pronounced in open court.

9) Copy of judgment be given to accused persons free of costs."

Similarly, it is also apposite to quote the operative part of the judgment and order passed by the learned Additional Sessions Judge, Pune, on 17th Feb 2017 allowing the appeal filed by revision petitioners / original accused partly. The same reads thus:

ORDER

"1) The appeal is partly allowed.

2) The judgment and order dated 29.01.2001 passed in Summary Criminal Case No.575/2006 by the Judicial Magistrate First Class, Vadgaon Maval, Pune, stands modified as under :

i) The accused no.1 Rajesh and accused no.3 Swarupchand are convicted for the offence punishable under section 354 read with section 34 of the IPC and sentenced to suffer two months rigorous imprisonment and pay fine of Rs.10,000/ each, in default they shall further undergo to the rigorous imprisonment for eight months.

ii) The accused no.2 Dinesh is convicted for the offence punishable under section 323 of the IPC and sentenced to suffer simple imprisonment for two months and pay fine of Rs.1000/, in default to suffer simple imprisonment for eight months.

iii) The sum of Rs.15000/out of the aforesaid fine amount, on realization, be paid to the informant Sunita towards the compensation as per section sub section (1)

(b) of section 357 of the Code of Criminal Procedure and the remaining fine amount be credited to the State.

iv) Excess fine amount Rs.4000/, if paid be refunded to accused no.2 Dinesh Kankaria.

3) Since the appellants/accused are present for hearing the judgment, they are directed to surrender themselves to receive the sentence. Accordingly, conviction warrant be prepared and issued.

4) Copy of judgment be given to the appellant forthwith."

It is, thus, clear that so far as the offence punishable under Section 354 read with Section 34 of the IPC is concerned, conviction and sentence imposed on revision petitioner nos.1 and 3 / original accused nos.1 and 3 came to be confirmed by the appellate court. Fine imposed on revision petitioner no.2 / original accused no.2 for the offence punishable under Section 323 of the IPC came to be reduced from Rs.5,000/to Rs.1,000/, maintaining the substantive sentence of imprisonment and by holding him guilty of the offence punishable under Section 323 of the IPC. It is, thus, clear that revision petitioner nos.1 to 3 / original accused nos.1 to 3 are taking exception to their conviction for offence punishable under Section 354 read with Section 34 of the IPC and under Section 323 of the IPC and resultant sentence imposed on them. For the sake of convenience, revision petitioners shall be referred to in their original capacity while deciding the instant revision petition.

3. Briefly stated, it is the case of the prosecution that first informant / PW1 Sunita Nandkishore Bedmutha is residing with her husband PW5 Nandkishore Bedmutha at Bhangarwadi area of Lonavla in Pune District. Her husband Nandkishore Bedmutha runs a grocery shop at Indrayani Nagar of Lonavla. Kundanmal Bedmutha - fatherinlaw of PW1 Sunita Bedmutha resides at the first floor of two storeyed building situated near Jain Mandir, at Gaothan of Lonavla. It is the case of the prosecution that as Kundanmal - fatherinlaw of PW1 Sunita was residing separately from her, either PW1 Sunita or her husband PW5 Nandkishore used to reach the tiffin to him by visiting his house at Gaothan area of Lonavla. The alleged incident happened at the ground floor of the property, which is standing in the name of Kundanmal Bedmutha.

4. It is the case of prosecution that on 22nd March 2006, at about 12 noon, PW1 Sunita had been to this building where her father-in-law Kundanmal Bedmutha used to reside. Accused persons are stated to be in possession of the ground floor of that building owned by Kundanmal Budmutha and they were having godown / shop at the ground floor of the said building. PW1 Sunita noticed that Varsha-daughter of accused no.3 Swarupchand Kankaria, at the upper floor of the building. Hence, PW1 Sunita came at the ground floor of that building, met accused no.3 Swarupchand Kankaria in his shop at the ground floor and questioned him as to why his family members are going upstairs despite warning to them not to go at upper floors of the said building. Upon that, accused no.3

Swarupchand Kankaria is stated to have asked informant PW1 Sunita to refund the amount given to her fatherinlaw Kundanmal Bedmutha. At that time, sons of accused no.3 Swarupchand Kankaria namely, accused no.1 Rajesh Kankaria and accused no.2 Dinesh Kankaria rushed out of the shop. Hence, informant PW1 Sunita went to the grocery shop of her husband PW5 Nandkishore located at Indrayani Nagar, Lonavla, and informed this incident to him. She, then, came back with her husband PW5 Nandkishore to the said building at the ground floor of which, shop / godown of accused persons was situated. At that time, according to the prosecution case, accused no.1 Rajesh Kankaria pulled informant PW1 Sunita by holding her left hand. Accused no.3 Swarupchand Kankaria caught hold of corner of her saree and pulled it causing her fall. He gave abuses to her. Accused no.2 Dinesh Kankaria assaulted her husband PW5 Nandkishore, when he attempted to pacify the quarrel.

5. Aggrieved PW1 Sunita then went to Police Station Lonavla City and lodged report Exhibit 36 which has resulted in registration of Crime No.35 of 2006 for offences punishable under Sections 354, 324, 504 and 506 of the IPC against accused persons.

6. Informant PW1 Sunita and her husband PW5 Nandkishore were then referred to hospital for their treatment. Routine investigation followed and ultimately they came to be chargesheeted for offences punishable under Sections 354, 324, 504 and 506 of the IPC.

7. After framing charges, the learned trial Magistrate convicted and sentenced them as indicated in the opening paragraph of this judgment and in appeal with minor modification, the conviction as well as sentence came to be confirmed, as reflected from the opening paragraph of the judgment.

8 I have heard Shri Vikas Shivarkar, the learned advocate appearing for revision petitioners / original accused. By taking me through the evidence of PW1 Sunita and PW5 Nandkishore, the learned advocate argued that case of the prosecution is totally improbable as no father would outrage modesty of a woman in presence of his one son with the assistance of another son. The learned advocate pointed out inconsistencies in evidence of PW1 Sunita and PW5 Nandkishore regarding the manner in which the alleged incident started. He further argued that alleged incident is divided in two parts and in the first part of the incident, PW1 Sunita was all alone in the building of her fatherinlaw Kundanmal Bedmutha. If really accused persons intended to outrage her modesty, they were having ample time to do so at the first opportunity itself. The learned advocate further argued that because of previous enmity between the prosecuting party and the accused persons which is established from the evidence on record, evidence of both these witnesses is totally unreliable. He further argued that evidence of alleged eye witness PW3 Ganpat Shelawane is rightly disbelieved by the courts below as he has stated time of the incident as 2.00 p.m. It is further argued by the learned advocate for the revision petitioners that evidence of PW6 Rajendra Pawar, A.S.I., shows that this Investigating Officer has not recorded statement of PW5

Nandkishore under Section 161 of the Code of Criminal Procedure (Cr.P.C.) and therefore, it cannot be said that PW5 Nandkishore was an eye witness to the incident in question. It is further argued by the learned advocate that cross-examination of PW6 Rajendra Pawar, Investigating Officer, shows that in respect of the same incident, there was a counter report by Varsha - sister of accused no.1 Rajesh Kankaria as well as accused no.2 Dinesh Kankaria and daughter of accused no.3 Swarupchand Kankaria. She had even lodged private criminal complaint and as such, it cannot be said that offence of outraging the modesty of a woman is made out by the prosecution. The learned advocate placed reliance on judgment of the Hon"ble Apex Court in the matter of Pandurang Sitaram Bhagwat v. State of Maharashtra (2005) 9 Supreme Court Cases 44 and argued that animosity between both parties is sufficient to conclude that there is false implication of accused persons by the prosecuting party.

9. I have also heard the learned APP who argued that both courts below rightly came to the conclusion that alleged offences are proved against accused persons.

10. With the assistance of the learned advocate for the revision petitioners / original accused, I have gone through the record and proceedings including evidence of witnesses examined by the prosecution. I have carefully considered the rival submissions.

11. At the outset, it needs to be mentioned here that revision petitioners / accused persons are invoking revisional jurisdiction of this court for challenging the judgment and order passed by the appellate court which concurred with the finding recorded by the learned trial court that accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria in furtherance of their common intention, outraged the modesty of PW1 Sunita and that accused no.2 Dinesh Kankaria had voluntarily caused hurt to PW5 Nandkishore. It is well settled that revisional jurisdiction is to be exercised sparingly and in exceptional cases when it is shown that there is manifest error on the point of law which has resulted in miscarriage of justice or there is glaring defect of procedure. The revisional court cannot re appreciate evidence and cannot function as an appellate court. If finding of fact is supported by some evidence on record, then the same cannot be interfered with, but when the court below comes to a conclusion which no reasonable man of ordinary prudence could have arrived at on the basis of the evidence on record, or in other words, when the finding is perverse, then the revisional court is justified in interfering with the impugned judgment and order. Keeping in mind these limitations for exercising revisional jurisdiction by this court, let us examine the case in hand.

12. Undisputedly, revision petitioners / accused persons are having their shop / godown at the ground floor of the building in which Kundanmal Bedmutha - father-in-law of informant PW1 Sunita resides. Even her FIR Exhibit 36 shows that she had been to this shop of accused persons to question presence of Varsha at the upper floor of the building of her fatherinlaw. Undisputedly, informant PW1 Sunita and her husband PW5 Nandkishore were living separately

from Kundanmal Bedmutha. The prosecution case as reflected from the FIR at Exhibit 36 lodged by PW1 Sunita indicates that the prosecuting party was not having harmonious or cordial relations with accused persons. On this backdrop, it is in evidence of PW1 Sunita that when she had been to the building of her father-in-law at about 12 noon of 22nd March 2006, she saw Varsha coming down from the staircase and therefore she questioned accused no.3 Swarupchand Kankaria as to why they are using staircase and first floor of the building. Thereafter, PW1 Sunita went to call her husband PW5 Nandkishore and returned on the spot in a short while. PW5 Nandkishore has also vouched this fact. Thereafter, according to version of PW1 Sunita all accused persons rushed towards them. Then, accused no.1 Rajesh Kankaria twisted her hand and caused her fall on the ground. She deposed that accused no.3 Swarupchand Kankaria caught hold of her saree and outraged her modesty, whereas accused no.2 Dinesh Kankaria assaulted her husband PW5 Nandkishore. As against this, PW5 Nandkishore has stated that when he along with his wife PW1 Sunita reached the spot of the incident, his wife went to accused persons for having talks with them and at that time, the incident as stated by his wife PW1 Sunita had happened. The FIR lodged with promptitude contains the version of PW1 Sunita that when her husband PW5 Nandkishore was pacifying the quarrel, accused no.2 Dinesh Kankaria assaulted him. Neither PW1 Sunita nor PW5 Nandkishore have stated that either accused no.1 Rajesh Kankaria or accused no.3 Swarupchand Kankaria had beaten PW1 Sunita. Rather, PW5 Nandkishore has stated that accused no.1 Rajesh Kankaria caught hold of hand of PW1 Sunita and accused no.3 Swarupchand Kankaria caught hold of corner of her saree. He has not stated that accused no.1 Rajesh Kankaria twisted hand of PW1 Sunita. This evidence unerringly points out that quarrel ensued between the parties during which incident as alleged took place. The quarrel came to be initiated at the behest of PW1 Sunita who questioned accused no.3 Swarupchand initially and later on returned on the spot with her husband PW5 Nandkishore.

13. On this backdrop, cross-examination of PW1 Sunita shows that there were various disputes between members of her family and accused persons over enjoyment of the staircase of the property where the incident in question occurred. She went on to deny the fact that accused persons are running grocery shop at the ground floor of the building where the incident took place though her FIR itself reveals that accused persons are having shop at the ground floor of that building. She denied that the said building is leased out to accused persons by her father-in-law Kundanmal Bedmutha for lease amount of Rs.5 Lakh but accepted the fact that accused no.3 Swarupchand Kankaria proposed that the leased amount paid by him to Kundanmal be returned to him. In similar way, it is seen from the cross-examination of her husband PW5 Nandkishore that he had filed civil suit against his father Kundanmal Bedmutha as well as his brothers and sister in respect of the building where the incident in question had happened. He admitted that in the plaint he has pleaded that his brother had let out the ground floor of the building and godown of accused persons is situated on the ground

floor of the building which is in the name of his father Kundanmal Bedmutha. PW5 Nandkishore candidly accepted the fact that there is dispute between them and accused persons in respect of use of first and second floor of that building.

In the wake of first statement of PW1 Sunita where she has denied that the accused no.1 was running grocery shop at the ground floor of the building where the incident took place, despite recitals in her FIR that accused persons were having shop at ground floor of the building, the learned advocate for revision petitioners pressed in service paragraph 20 of judgment in the matter of Pandurang Sitaram Bhagwat (*supra*) which reads thus :

"20. We are not oblivious that the doctrine "falsus in uno, falsus in omnibus" is not applicable in India but the evidence led by the parties must be appreciated keeping in view the entirety of the situation. The Trial Judge, as noticed hereinbefore, came to the conclusion that most of the statements made by PW2 and PW3 were incorrect and no reliance could be placed thereon. The statements of the said witnesses with regard to commission of an offence by the appellant under Section 354 IPC should have been considered keeping in view the extent of falsity in their statements. PW2 and PW3 not only failed to substantiate the allegations as regards commission of offences under Sections 323, 504, 506 read with Section 34 IPC but also implicated the three persons falsely. The statements of the said witnesses should have been accepted with a pinch of salt and keeping in view the admitted animosity between the parties. The background of the case visavis continuous animosity between the complainant and her husband, on the one hand, as also the appellant and his other tenants could not have been lost sight of by the learned Trial Judge."

In view of extent of falsity of statement of PW1 Sunita and enmity between the prosecuting party as well as accused persons, applicability of Section 354 of the IPC will have to be considered.

14 It is, thus, clear that there was strong animosity between the prosecuting party as well as accused persons, mainly because of possession of accused persons over the ground floor of the building owned by father of PW5 Nandkishore. The prosecuting party seems to be having non-cordial relations with even owner of the building as PW5 Nandkishore has accepted the fact that he has filed a civil suit against his father Kundanmal - owner of that building. Use of the staircase and upper floors of the building by accused persons is also a cause of dispute between them. In this factual scenario, one will have to consider how the incident in question took place. Initially, there was a protest by PW1 Sunita over the use of the staircase and upper floors of the building by Varsha - relative of accused persons, for which she questioned accused no.3 Swarupchand Kankaria and then went to seek help of her husband PW5 Nandkishore. PW1 Sunita then immediately returned back to the place of incident with her husband PW5 Nandkishore and then she went to talk with accused persons when the incident in question happened. Her FIR itself shows that the quarrel ensued, which her husband PW5 Nandkishore attempted to pacify. Apart from this eye

witness account of the incident given by PW1 Sunita and PW5 Nandkishore, the prosecution has also relied on evidence of PW3 Ganpat Shelawane - an alleged eye witness who had not even identified accused persons and he is purely a chance witness.

15. On the basis of this evidence, coupled with the medical evidence on record, accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria were held guilty of offence punishable under Section 354 read with Section 34 of the IPC by the courts below. Now let us examine whether the learned courts below have correctly convicted accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria of the offence punishable under Section 354 of the IPC, or whether their conviction for these offences suffers from error of law.

16 The offence punishable under Section 354 of the IPC is committed when it is proved that a person assaults or uses criminal force to a woman in two circumstances, viz. :

- a) intending to outrage her modesty; or
- b) knowing it to be likely that he will thereby outrage her modesty.

For recording a conviction of the offence punishable under Section 354 of the IPC, it is not enough merely to show that accused persons assaulted a woman. In addition thereto, it is also required to establish either, that, accused persons were harbouring intention to outrage the modesty of the victim who has been assaulted by them. Thus, it is clear that to constitute an offence under Section 354 of the IPC, an intention to outrage her modesty must be present. The culpable intention of the accused is the crux of the matter. Intention is certainly a mental state of a person and as such it is difficult to procure direct evidence to prove the intention of the accused. Therefore, in such cases, intention of the accused is required to be inferred by appreciating direct act of accused persons while committing the crime, so also on the basis of assessment of total evidence in the case keeping in mind the conduct of accused persons and all other relevant surrounding circumstances. However, the intention is not the sole criteria of this offence. It can also be said to have been committed by the person assaulting or using criminal force to any woman if he knows that by such act, the modesty of the woman is likely to be affected.

17. In the case in hand, no inference of a criminal intention can be drawn from acts of accused persons in the wake of the fact that the actual incident was that of a quarrel initiated by the alleged victim PW1 Sunita. During the course of the quarrel between both parties incident of pulling her by holding her hand and pulling her by catching hold of a corner of her saree took place. PW1 Sunita was not alone at that time. Her husband PW5 Nandkishore was with her. As culpable intention is an essential ingredient of the offence punishable under Section 354 of the IPC; unless the same is proved, merely twisting the hand causing fall of a woman or catching hold of a corner of her saree during the cause of a quarrel cannot be called a deliberate act of outraging the modesty of a female within the

meaning of Section 354 of the IPC. If evidence of PW1 Sunita and PW5 Nandkishore is seen in proper perspective, it cannot be said that accused persons viz., accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria might have fairly presumed or knew that by their act, they are likely to outrage modesty of PW1 Sunita. The test will be whether a reasonable man will think that the act of accused was intended to or was known to be likely to outrage the modesty of the woman.

18. In the instant case, though PW1 Sunita states that on reaching the spot of the incident with her husband PW5 Nandkishore, all accused persons rushed towards them, the evidence of PW5 Nandkishore shows that at that time, in fact PW1 Sunita again went to accused persons for talking with them and then the alleged incident occurred. On this backdrop, it is in cross-examination of PW6 Rajendra Pawar, Investigating Officer, that in respect of the same incident, Varsha Kankaria - sister of accused no.1 Rajesh Kankaria and accused no.2 Dinesh Kankaria and daughter of accused no.3 Swarupchand Kankaria had lodged the report. This witness further admits that thereafter said Varsha lodged complaint to the Senior Police Officer in respect of the incident. It is also admitted by PW6 Rajendra Pawar, Investigating Officer, that the said complaint was entrusted to him for inquiry and then said Varsha also lodged a private criminal complaint with the learned JMFC which has resulted in passing an order under Section 156(3) of the Cr.P.C. and then investigation of the said offence was also entrusted to him. This evidence on record as such indicates that the alleged incident also resulted in lodging the private criminal complaint by Varsha Kankaria - close relative of accused persons, who herself was the cause behind the incident as she was found to be using the first floor and staircase of the building by PW1 Sunita leading to lodging protest by PW1 Sunita with accused persons. It is, thus, clear that in fact there must have been quarrel between the prosecuting party and accused persons over the issue of using the upper floors of the building and its staircase. There was no previous deliberation or determination to quarrel which is a bilateral phenomenon. If quarrel suddenly takes place, for which both parties are more or less to be blamed, then by no stretch of imagination it can be held that in the resultant scuffle between the quarreling parties, accused persons i.e. accused nos.1 and 3 either intended or were knowing it to be likely that they will thereby outrage the modesty of PW1 Sunita. In view of the fact that there was quarrel which preceded the alleged incident, so far as offence punishable under Section 354 of the IPC is concerned, accused persons - a father and son due are certainly entitled for the benefit of doubt. Their conviction and resultant sentence for the offence punishable under Section 354 read with Section 34 of the IPC as such is totally contrary to law and therefore, needs to be quashed and set aside. At the same time, evidence of PW1 Sunita and PW5 Nandkishore which is accepted and acted upon by the learned courts below, shows that accused no.1 Rajesh Kankaria had assaulted PW1 Sunita, whereas accused no.3 Swarupchand Kankaria had applied criminal force to her by catching hold of her saree. These acts of both accused are

certainly in furtherance of common intention harboured by them. As such, though accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria are acquitted of the charge under Section 354 of the IPC, they, however, need to be convicted and sentenced for the offence punishable under Section 352 read with 34 of the IPC for assaulting and using criminal force otherwise on grave provocation to PW1 Sunita. Evidence on record does not show any grave provocation by accused persons to PW1 Sunita. This conviction is for the lesser offence and assault so also use of criminal force are ingredients of the offence punishable under Section 354 of the IPC.

19. Accused no.2 Dinesh Kankaria is convicted of the offence punishable under Section 323 of the IPC by both courts below. Congruous evidence of PW1 Sunita and PW5 Nandkishore shows that PW5 Nandkishore was assaulted by accused no.2 Dinesh Kankaria by fist blows during the course of the incident. This evidence of prosecuting witnesses is gaining corroboration from the evidence of PW7 Dr.Rajendra Parmar. He noticed the following injuries on PW5 Nandkishore which were fresh and caused due to hard and blunt object :

- 1) Bleeding on left nostrils
- 2) Nasal septum was deviated
- 3) Loose upper third tooth on left side.
- 4) Tenderness over upper teeth on left side,
- 5) Contusion over left cheek, 4cms x 3 cms.
- 6) Black eye on left side.
- 7) CLW over eye 1 x ? x

20. Concurrent finding of fact recorded by both courts below in respect of the offence punishable under Section 323 of the IPC against accused no.2 Dinesh Kankaria is as such duly supported by the evidence on record and courts below have rightly convicted accused no.2 Dinesh Kankaria of the offence punishable under Section 323 of the IPC, as the injuries noticed on the person of PW5 Nandkishore have certainly caused bodily pain to him and those were attributable to independent act of accused no.2 Dinesh Kankaria.

21. Now let us consider whether courts below correctly imposed punishment for proved offences or whether they had committed any error of law in awarding sentence to accused persons. The appellate court by holding that offence punishable under Section 323 of the IPC is proved against accused no.2 has sentenced him to suffer simple imprisonment for 2 months apart from payment of fine of Rs.1,000/, in default to suffer simple imprisonment for eight months. At this juncture, Section 323 of IPC which provides for punishment for causing voluntarily hurt to another person needs reproduction and it reads thus :

"323. Punishment for voluntarily causing hurt - Whoever, except in the case

provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Bare perusal of this provision makes it clear that the court is empowered to award maximum punishment of one year with fine which can extend to one thousand rupees or both, for this offence. At this juncture, it is also apposite to quote provision of Section 65 of the IPC, which reads thus :

"65. Limit to imprisonment for nonpayment of fine, when imprisonment and fine awardable - The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine."

Perusal of this provision in the IPC makes it clear that sentence in default of payment of a fine cannot exceed ¼th of the maximum term of imprisonment fixed for the offence. Therefore, award of sentence of imprisonment for eight months in default of payment of fine for the offence punishable under Section 323 of the IPC certainly contravenes provision of Section 65 of the IPC and is bad in law. Section 30 of the Code of Criminal Procedure acts as a corollary to this section and provides that the Court of Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law but such terms shall not, where imprisonment has been awarded as a part of the substantive sentence, exceed ¼th of the term of imprisonment which the Magistrate is competent to inflict as a punishment for the offence otherwise than as imprisonment in default of payment of the fine. Thus, under Section 65 of the IPC, the imprisonment in default of fine cannot exceed ¼th of the maximum term of imprisonment that can be awarded for the offence. In this case, for the offence punishable under Section 323 of the IPC the learned Magistrate is empowered to award maximum punishment of one (1) year imprisonment and as such, impugned judgment and order sentencing accused no.2 Dinesh Kankaria to suffer simple imprisonment for eight months in default of payment of fine of Rs.1,000/is totally erroneous and contravenes the provision of Section 65 of the IPC and as such, the same needs to be modified accordingly.

22. Now question comes for sentencing accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria for the offence punishable under Section 352 read with 34 of the IPC which is proved to have been committed by them. It is reported by the learned advocate for the revision petitioners and as seen from the judgment and order of the learned appellate court that from 17th February 2017, both these revision petitioners / accused nos.1 and 3 are undergoing the sentence. As such, they have undergone more than one month of imprisonment by now. Section 352 of the IPC dealing with punishment for assault or criminal force otherwise than on grave provocation prescribes for punishment which may extend to three months, or with fine which may extend to five hundred rupees, or with both. Considering the circumstances in which the crime in question is

committed as well as the nature of the offence, I am of the considered opinion that sentence undergone by revision petitioner no.1 Rajesh Kankaria and revision petitioner no.3 Swarupchand Kankaria i.e. original accused nos.1 and 3 upto now would meet the ends of justice in respect of the offence punishable under Section 352 read with 34 of the IPC proved against them, apart from imposition of fine of Rs.500/, and in default directing them to undergo further simple imprisonment for a period of one week.

23. The learned advocate for revision petitioners in the alternative argued that if offences are held to be proved against accused persons, they may be granted benefit of Probation of Offenders Act, 1958. Nobody can claim the benefit under Probation of Offenders Act, 1958, as a matter of right. Nature of the offence, the character of the offender and circumstances of the case are relevant considerations for determining whether accused persons can be given the benefits under Section 3 or 4 of the Probation of Offenders Act, 1958. The circumstances of the case including the age, physical as well as mental condition of accused persons and nature of proved offences as such are the decisive factors which are required to be kept in mind for extending such benefit. In the case in hand, charges of assault and use of criminal force on a woman as well as causing hurt to her husband who tried to intervene are proved against accused persons. Considering the nature of proved offences and the circumstance in which offences are committed, I am of the considered opinion that accused persons and particularly accused no.2 Dinesh Kankaria is not entitled for the benefit of the Probation of Offenders Act, 1958. Other accused are being released on the sentence which they have undergone already.

24. In the result, the revision petition is partly allowed with the following order :

i) The conviction and resultant sentence imposed on revision petitioners / accused no.1 Rajesh Kankaria and accused no.3 Swarupchand Kankaria for the offence punishable under Section 354 read with Section 34 of the IPC is quashed and set aside. Instead, they are convicted of the offence punishable under Section 352 read with 34 of the IPC and are sentenced to suffer rigorous imprisonment which they have already undergone apart from payment of fine of Rs.500/by each of them and in default of payment of fine, they should undergo further simple imprisonment for one month. Rest of the fine amount, if paid by them for the offence punishable under Section 354 read with 34 of the IPC be refunded to them.

ii) The conviction and sentence imposed upon the revision petitioner / accused no.2 by courts below is maintained.

iii) Award of compensation of Rs.15,000/out of the realized fine amount to informant PW1 Sunita is set aside and instead she be paid an amount of Rs.1,000/towards compensation out of the realized fine amount, if any, in terms of Section 357(1)(b) of the Cr.P.C.

iv) Rest of the order passed by the learned Appellate Court is maintained.

- v) Record and proceedings be sent back to courts below.
- vi) Parties to act upon the authenticated copy of this judgment and order.
- vii) In view of disposal of revision petition, pending Criminal Application Nos.126 of 2017 and 150 of 2017 stand disposed of.