SUPREME COURT OF INDIA

Asha Ranjan

Vs.

State of Bihar

WP(Crl)No.132 of 2016

(Dipak Misra and Amitava Roy,JJ.,)

15.02.2017

JUDGMENT

Dipak Misra,J.,

1. Regard being had to the similitude of prayers and considering the commonality of issues exposited in these Writ Petitions, they were finally heard together. The principal issue raised is disposed of by this singular order. It is necessary to note that in Writ Petition (Criminal) No. 132 of 2016 preferred by Asha Ranjan, it has been prayed for issue of appropriate directions to the Central Bureau of Investigation (CBI) to take over the investigation in connection with FIR No. 362/16 dated 13.05.2016 under Police Station Nagar Thana, Siwan, District Siwan under Sections 302/120B read with Section 34 of the Indian Penal Code (IPC); to transfer the entire proceedings and trial in FIR No. 362/16 dated 13.05.2016 registered under the same Police Station for the same offences from Siwan, Bihar to Delhi; to call for the status report in the investigation relating to FIR No. 362/16 dated 13.05.2016; to grant appropriate compensation to the petitioner and her family members and to ensure their security. That apart, there is also a prayer to register FIR against respondent Nos. 3 and 4 for conspiracy and harboring and sheltering the proclaimed offenders in FIR No. 362/16 dated 13.05.2016. In this Writ Petition, at a subsequent stage, Criminal Miscellaneous Petition No. 17101 of 2016 has been filed for transfer of respondent No. 3, M. Shahabuddin, from Siwan Jail, Bihar to a jail in Delhi. During the pendency of this case, Writ Petition (Criminal) No. 147 of 2016 came to be filed. In the said Writ Petition, the prayer is to issue a direction to transfer respondent No. 3, M. Shahabuddin, to a jail outside the State of Bihar and to issue further directions for conducting of the trial in pending cases against him through video conferencing. Thus, the prayers in Writ Petition (Criminal) No. 147 of 2016 are two fold and in Writ Petition (Criminal) No. 132 of 2016 are manifold.

2. It is apposite to state here that both the cases, as stated earlier, were heard together and learned counsel for the parties addressed the Court with regard to sustainability of prayer for transfer of the cases pending against respondent No. 3, Shahabuddin, from Siwan Jail to a jail in Delhi and conducting of the trial through video conferencing. As far as lodging of FIR against respondent No. 4 in Writ Petition (Criminal) No. 132 of 2016 is concerned, hearing

on the said aspect was deferred which is clear from the order passed on January 17, 2017 in Writ Petition (Criminal) No. 132 of 2016. We think it appropriate to reproduce the same:-

> "In this writ petition, though the prayers have been couched in a manifold manner, there are basically three prayers, namely, the transfer of proceedings from Siwan, Bihar, to Delhi; secondly, to issue a direction to C.B.I. to investigate into certain crimes; and thirdly, to pass appropriate direction to register an F.I.R. against the respondent Nos.3 and 4. As far as the direction to C.B.I. for taking investigation is concerned, this Court had already issued the directions and, therefore, the said prayer does not any more survive. As far as the transfer of the proceedings is concerned which is associated with the transfer of the accused, we are going to deal with the same in the criminal miscellaneous petition filed in this writ petition and Writ Petition (Crl.) No. 147 of 2016. As far as the third prayer is concerned, it is seriously opposed by Mr. Surendra Singh, learned senior counsel for the respondent No.4 on the ground that there is no warrant or justification for lodging of an F.I.R. and, in any case, no case is made out and what has been stated is solely on the basis of the photographs published in the newspapers. Be that as it may, as far as this prayer is concerned, it shall be dealt with on the another date as we have reserved the order regarding transfer of the respondent No.3 from Siwan Jail, Bihar to another jail, which is similar to the prayer in the Writ Petition (Crl.) No.147 of 2016. The judgment shall be delivered dealing with the said aspects and the third prayer shall be considered on another day, which shall be fixed at a later stage."

3. Thus, we are presently required to deal with the transfer of the third respondent, M. Shahabuddin from the Siwan Jail, Bihar to a Jail in Delhi keeping in view the averments made in Writ Petition (Criminal) No. 147 of 2016 and the assertions made in the application filed in Writ Petition (Criminal) No. 132 of 2016

4. The factual matrix in Writ Petition (Criminal) No. 132 of 2016, as unfolded, is that on 13.5.2016 petitioner's husband, namely, Sh. Rajdev Ranjan, Senior Reporter (Journalist Incharge, Dainik Hindustan, Siwan Bureau, Bihar) was shot dead as he received five bullet injuries in his head and other parts of his body and FIR No. 362/16 dated 13.5.16 was registered under PS Nagar Thana, Dist. Siwan for the offences punishable under Sections 302/120(B) and 34 of IPC.

5. On 13.5.2016, the petitioner informed the police that one notorious criminal, Shahabuddin, and his henchmen were involved in the murder of her husband but the police deliberately did not include the name of Shahabuddin in the list of accused persons. Thereafter, as the matter stands today, the investigation of the said case has been transferred to the CBI. It is asseverated that in the mean time certain persons have been arrested and some have surrendered to custody.

6. The factual expose of the murder of the husband of the petitioner has a narrative that goes back to the year 2005. The husband of the petitioner, a journalist, it is averred, had written various news reports pertaining to serious and substantive criminal activities of said

Shahabuddin who had threatened to eliminate him and his family members. Undeterred he kept on writing various investigative news articles and reports in respect of murder of the three sons of one Siwan resident, namely, Chanda Babu, which eventually led to the arrest of Shahabuddin and after conclusion of the trial he stood convicted for the offence under Section 302 IPC and sentenced to undergo life imprisonment. It is apt to note that during the trial of the said case, Shahabuddin and his shooters had constantly threatened the petitioner's husband with death threats to him and the family members. As the narration has been undraped, petitioner's husband highlighted about the murder of one Shrikant Bharti by publishing news articles and at that stage on 13.5.2016 petitioner's husband got a phone call from an unknown person on his mobile about 7.15 p.m. and soon thereafter he left the office and started moving towards the Station Road. About 7.30 p.m. he was shot dead and the ephemeral threat became a reality.

7. Thereafter, during the course of investigation, two accused persons, namely, Mohammed Kaif and Mohammad Javed were declared as proclaimed offenders. On 10.9.2016, Shahabuddin was released on bail and the aforesaid proclaimed offenders were seen in his company but apathy reigned and the fear ruled so that no police official dared to arrest them. On 14.9.2016 petitioner saw the pictures of the proclaimed offenders Mohammed Kaif and Mohammad Javed with Shri Tej Pratap Yadav, Health Minister of Bihar on all media channels.

8. Feeling insecured, terrorized and helpless as regards her safety and security and of her two minor children, the petitioner has moved this Court. As set forth, the death of the husband, makes her apprehensive that Shahabuddin may eliminate her entire family. Her petrification has been agonizingly articulated in the petition and by the learned counsel, sometimes with vehemence and on occasions with desperation.

9. At this juncture, we may advert to the facts in Writ Petition (Crl.) No. 147 of 2016. It is averred that respondent No. 3 is a dreaded criminal-cum-politician who has already been declared history-sheeter Type A (who is beyond reform) and till date he has been booked in 75 cases out of which in 10 cases he has been convicted, and facing life imprisonment in two cases and 10 years rigorous imprisonment in one and 45 cases are pending for trial. He has been acquitted in twenty cases. The first criminal case against respondent No. 3 was initiated in 1986. The criminal activities continued in some form or other and on 3.5.1996 he along with his associates fired upon the then Superintendent of Police, Shri S.K. Singhal, IPS with sophisticated arms for which they were sentenced to undergo imprisonment for 10 years. Thereafter, his name figured in the murder of former JNU President, Mr. Chandrashekhar, who was shot dead in Siwan on 31.3.1997. It is alleged that he and his private army fired upon the raiding party on 16.3.2002 when his house was raided and in that incident, the vehicles of Deputy Inspector General of Police, Saran range, District Magistrate, Siwan and Superintendent of Police, Siwan were burnt. From his house, huge quantities of ammunition were recovered and FIR no. 32 of 2001 was registered. In another raid conducted in 2005, large number of arms and ammunition were recovered from the house of the third respondent and FIR Nos. 41 to 44 of 2005 were registered. In November, 2005 he was arrested by the joint team of Bihar and Delhi police in connection with various cases. It is put forth that he

ran a parallel administration in Siwan from 1990 till 2005 and in March, 2007 he was sentenced to two years imprisonment for assault on CPI-ML offices in Siwan on 19th September, 1998. Further he was sentenced to life imprisonment on 08.05.2007 under Section 364/34 IPC for abduction with an intention to commit murder of CPI (ML) worker in February, 1999, whose dead body was never traced.

10. It is set forth that in August 2004, three sons of the petitioner were picked up by the henchmen of respondent No. 3 and taken to his native village Pratappur where two of his sons, namely, Girish and Satish were drenched in acid and his third son, who witnessed the murder managed to escape and a criminal case was registered against him under Sections 341, 323, 380, 364, 435/34 IPC for abduction, etc. of the petitioner's two sons in which charges were framed on 04.06.2010 against respondent No. 3 and others. The prosecution moved an application for addition of charges under Sections 302 and 201 read with Section 120B IPC, which prayer was initially rejected on the ground of delay but after the direction of the High Court of Patna, the charges under the aforesaid Sections were added vide order dated 18.04.2014. During the litigation, the petitioner's third son, Rajeev Roshan, a material eye witness in the said case was murdered and an FIR No. 220/14 was lodged against respondent No. 3, his son Osama and other unknown persons. Thus, the three sons of the petitioner were murdered.

11. On 18.05.2016, a raid was conducted by the district administration at Siwan jail and District Magistrate, Siwan in his report stated about the conduct of respondent No. 3 inside the jail and the facilities he was enjoying in jail in violation of the jail rules/manual and recommended his transfer from Siwan to Bhagalpur jail whereafter he was transferred to Bhagalpur jail for six months.

12. As the narration would further unfurl, in the said case, the High Court granted bail to the respondent No. 3 on 02.03.2016 in FIR No. 131/04 and further granted bail in the murder's case of third son of petitioner on 07.09.2016 in the FIR No. 220/14. The petitioner as well as the State of Bihar challenged the orders granting bail. The bail orders have been set aside by this Court in *Chandrakesh.war Prasad v. State of Bihar and Anr.*[1]. While setting aside the order granting him bail, this Court has held:-

> "12. In the instant case, having regard to the recorded allegations against the respondent-accused and the overall factual scenario, we are of the view, having regard in particular to the present stage of the case in which the impugned order has been passed, that the High Court was not justified in granting bail on the considerations recorded. Qua the assertion that the respondent-accused was in judicial custody on the date on which the incident of murder in the earlier case had occurred, the judgment and order of the trial court convicting him has recorded the version of the brother of the deceased therein, that he had seen the respondent-accused participating in the offence. We refrain from elaborating further on this aspect as the said judgment and order of the trial court is presently sub judice in an appeal before the High Court.

> 13. On a careful perusal of the records of the case and considering all the aspects of the matter in question and having regard to the proved charges in the cases concerned, and the charges pending adjudication against the respondent-accused and further balancing the considerations of individual liberty and societal interest as well as the prescriptions and the perception of law regarding bail, it appears to us that the High Court has erred in granting bail to the respondent-accused without taking into consideration the overall facts otherwise having a bearing on the exercise of its discretion on the issue."

On the aforementioned factual plinth, the petitioner has sought transfer of the third respondent from the Siwan jail to a jail outside the State of Bihar and conducting of the trials in pending cases by video conferencing.

13. We have heard Mr. Shanti Bhushan and Mr. Dushyant Dave, learned senior counsel and Mr. Kislay Pandey, learned counsel for the petitioners, Mr. P.S. Narasimha, learned Additional Solicitor General and Mr. P.K. Dey, learned counsel appearing for CBI, Mr. Shekhar Naphade, learned senior counsel along with Mr. M. Shoeb Alam, learned counsel for respondent No. 3, Mr. Surendra Singh, learned senior counsel along with Mr. Dhirendra Singh Parmar, learned counsel for respondent No. 4 in Writ Petition (Criminal) No. 132 of 2016 and Mr. Gopal Singh, learned counsel for the State of Bihar.

14. As per our order dated 17.01.2017, the grievance against the 4th respondent in Writ Petition (Criminal) No. 132 of 2016 shall be heard and dealt with after pronouncement of this judgment and hence, we shall not delve into the contentions put forth in the said writ petition and the stand taken in the counter affidavit in that regard for the present.

15. The seminal issue that we are required to address is whether this Court, in exercise of power under Article 32 and Article 142 of the Constitution can direct transfer of an accused from one State to another and direct conducting of pending trials by way of video conferencing. Needless to emphasise the said advertence in law will also depend upon the factual scenario and satisfaction of the judicial conscience of this Court to take recourse to such a mode. The petitioners have asserted with regard to the criminal activities of the third respondent, the cases in which he has been roped in, the convictions he has faced, the sentences imposed upon him, the snails speed at which the trials are in progress because of the terror that reigns in Siwan, the declaration of the third respondent as a history-sheeter Type-A (who is beyond reform), the non-chalant attitude unabashedly and brazenly demonstrated by him that has unnerved and shaken the victims and the society at large, the impunity with which the collusion with the jail administration has taken place, the blatant intimidation of witnesses that weakens their sense of truth and justice; and mortal terror unleashed when they come to court, the audacious violation of the rules and regulations that are supposed to govern the convicts or under-trial prisoners inside the jail as if they have been made elegantly unperceivable and the confinement inside jail remains a word on paper, for the third respondent, still is able to issue his command and writs from the jail, run a parallel administration and get involved with the crimes, at his own whim and fancy. The stand and stance put forth in the petitions and the arguments advanced by Mr. Shanti

Bhushan and Mr. Dushyant Dave, sometimes one may be inclined to think, are in the realm of rhetorics but the learned senior counsel for the petitioners and Mr. Kislay Pandey, submitted with enormous agony, and filed a chart to bolster their stand and submission. The Court had also asked Mr. P.S. Narasimha, and Mr. P.K. Dey, learned counsel appearing for the CBI to submit a chart. The chart showing the cases where either the respondent No. 3 has been convicted or acquitted or cases pending against him, has been filed. Without commenting on the merits, we think it apt to reproduce the Chart:-

"CONVICTION CASES

Sl.No.	**FIR P.S.case No.**	**Under Section**	**Status of Trial convection (With sentence)/ Pending Acquittal (in series)**	**Status of appeal**	**Date of Grant of bail by District/High Court**	**Period of Imprisonment before grant of bail**
1	Muffasil PS Case No. 181/98 dt 18.09.98	147/341/342/44 8/504 IPC	2 Year imprisonment & 5000/- fine		Bail 28.10.09 by HC Patna	0 days
2	C-2 34/05 Dt. 07.04.05	506 IPC	1 year imprisonment and Rs.1000 fine		Bail 28.10.09 by Spl. Court	3 yrs, 8 months, 8 days
3	Muffasil PS case 61/90 Dt. 12.04.90	363/365 IPC	3 year imprisonment		Bail 11.03.11 By Spl. Court Siwan	0 Days
4	Hussainganj ps case No.14/99 dt. 07.2.99	364/34 IPC	Life & Rs.10,000/-		Bail 21.10.99 by HC Patna	3 yrs 3 mon
5	Darauli ps C.No. 34/96 dt: 04.05.96	307/353/34 IPC	10 years & Rs. 2000/-		Bail 21.10.09 by HC Patna	2 yrs 1 mon 21 days
6	Hussainganj ps Case	25I-B) A/26/35 Arms Act	3 Yrs imprisonment & 5000/- fine		Bail 20.10.09 by HC	2 yrs 9 mon 10

	no.44/05 Dt. 24.04.05				Patna	days
7	Hussainganj ps Case no. 42/05 Dt:24.	414 IPC & 25 (I-B)/26 Arms Act	5 years imprisonment		Bail 16.07.11	5 yrs 8 mon 9 days
8	Muffasil ps Case no. 131/04 Dt: 16.08.04	364/336/302/30 1 IPC	Life imprisonment		Bail 14.07.16 by HC Patna	6 yrs 10 months 5 days
9	Hussainganj ps Case no.41/05 Dt: 24.04.05	411/414 IPC	3 yrs imprisonment		Bail 28.10.09 by HC Patna	3 yrs 11 months 21 days
10	Pachruhi ps Case no. 102/04 Dt. 18.10.04	392/411 IPC	This case is merged in Hussainganj ps case no. 41/05		-do-	

ACQUITTED CASES

Sl.No.	FIR P.S.Case No……../dated	Under Section
1	Siwan Town PS Case No. 217/85 Dt. 02.09.85	307/323/341/34 IPC & 27 Arms Act
2	Siwan Town Case No.77/86 dt: 08.04.86	394 IPC
3	Siwan Town PS case no. 79/86 Dt. 10.04.86	399/402/411/412/414/216A IPC &25 A/26/35 Arms Act
4	Muffasil PS case no. 228/86	147/148/149/325/302 IPC & 27 Arms Act 3/5 Explosive Act
5	Hussainganj PS case no. 125/88, Dt. 12.09.88	363/34 IPC
6	Siwan Town PS case no. 183/88 Dt: 10.09.88	307 IPC & 27 Arms Act
7	Siwan Town PS case no. 57/89	307/302/34 IPC & 3/4 Explosive Act

	Dt: 15.03.89	
8	Muffasil PS case 91/89	307/34 IPC & 27 Arms Act
9	Mairwa (Jiradei) PS case no. 137/89 dt: 21.11.89	147/148/149/307/348/302/34 IPC & 3/4 Explosive Act
10	Siwan Town PS Case no. 108/94 /Dt: 22.05.94	147/148/149/324/307 IPC & 27 Arms Act
11	Pachurkhi PS case no. 60/945 Dt 13.01.94	147/323/427/379 IPC
12	Siwan Town PS case no. 155/94 Dt: 08.08.94	302/307/324/ 120 (B)/ 34 IPC & 27 Arms Act
13	Pachrukhi PS case no. 07/95 Dt; 20.01.95	143/144/427/435 IPC
14	Pachrukhi PS case 08/95 Dt; 20.01.95	302/34 IPC
15	Siwan Town PS caseno. 11/96 Dt: 18.01.96	341/342/323/307/34 IPC & 27 Arms Act
16	Hussainganj PS case no. 99/96 Dt. 02.05.96	147/148/149/324/307/302 IPC & 27 Arms Act
17	Andar PS case no. 32/96 Dt. 02.05.96	147/148/149/324/307/302 IPC & 27 Arms Act
18	Andar PS case no. 36/96 Dt. 02.05.96	147/148/149/307 IPC
19	Siwan Town PS case no. 205/90 dt: 03.09.90	365/387 IPC
20	Muffasil PS case no. 52/88	147/148/324/323/307/379/IPC

Pending cases

Sl.No.	FIR P.S.Case No./Dated	Under Section
1	Hussainganj ; 43/05; 24.04.05	25 (I-B) 25 Arms Act
2	Siwan Town ; 99/05; 22.04.05	420/467/468 IPC
3	Muffasil PS; 97/07; 02.05.07	353/506 IPC
4	Hussainganj PS 134/06; 13.10.05	392/411 IPC
5	Muffasil PS; 96/07; 02.05.07	353/506 IPC
6	Hussainganj PS; 39/05; 24.04.05	25 (I-B) a/26 Arms Act, 120 B
7	Muffasil PS; 289/10; 22.07.10	414/353 IPC
8	Andarps ; 41/99; 05.07.99	14/248/149/341/324 IPC & 27 Arms Act
9	C-2; 54/05; 25.04.05	9/44/46/48/49/49(B)/50/51
10	Hussaingani; 114/05; 26.08.05	25(1-b) A/25 Arms Act (1-B) (H) 25(4) 26(1)35 Arms Act
11	Siwan Town; 11/01; 18.01.01	147/148/186/353/452/506 IPC

12	Hussainganj PS; 48/05; 24.04.05	379 IPC & 39/44 Electricity Act
13	C-2; 27/09; 16.03.09	52 Prisoner Act 1984
14	Siwan Rail PS; 33/97; 02.09.97	147/148/149/341/323/353/ 504 IPC @ 27 Arms Act
15	Muffasil PS; 131/06; 17.06.06	189/353/506 IPC
16	Muffasil PS; 225/11; 12.07.11	353/504/506/34 IPC
17	Siwan Town; 229/05; 25.10.05	341/302/307/34 IPC
18	Muffasil PS; 333/11; 0510.11	188 IPC & 52 Prisoner Act 1894 u/s 420/468/471 IPC
19	Muffasil PS; 56/07; 20.03.07	147/149/341/342/323/307/337 IPC
20	Andar PS; 10/98; 29.01.98	147/148/149/341/506 IPC & 27 Arms Act
21	Town PS; 220/14; 17.06.14	302/34/120 B IPC & 27 Arms Act
22	C-2; 62/07; 03.08.07	52 Prisoner Act 1894
23	C-2; 67/08; 01.09.08	52 Prisoner Act 1894
24	Muffasil PS; 226/13; 01.06.13	188 IPC & 52 Prisoner Act 1894
25	Muffasil PS; 182/08; 02.08.08	341/504/353/34 IPC
26	Hussainganj PS; 34/01; 17.03.01	454/380 IPC
27	Siwan Town PS; 33/01; 17.03.01	147/148/149/307/353/323/333/379/ 380/447/452/427/435/120 –b IPC & 27 Arms Act
28	Muffasil PS; 08/01; 13.01.01	364 IPC
29	Barhariyaps ; 82/04; 08.08.04	302/120-B, 363 IPC & 27 Arms Act
30	Hussainganj PS	302/120-B
31	Muffasil PS; 150/09; 24.06.09	307 IPC
32	Siwan Town; 20/02; 05.03.02	302/ 120 (NB)/34 IPC
33	Siwan Town; 23/05; 10.02.05	147/148/149/341/379/364 IPC
34	Siwan Town ; 102/98; 13.07.98	302/34 IPC & 27 Arms Act
35	Muffasil PS; 32/01; 15.03.01	307/149 IPC & @7 Arms Act
36	Siwan Town; 145/98; 09.09.98	147/148/149/307/323/341/353/379/ 504 IPC & 27 Arms Act
37	Siwan Town; 147/98; 09.09.98	307/139 IPC & 27 Arms Act
38	Hussasinganj PS; 31/01; 17.03.01	25(1-B)A/26 Arms Act & 3/4 Explosive Act & 147/148/149/324/307/302/ 353/332/333/335/120-B IPC
39	Hussainganj PS; 32/01; 17.03.01	147/148/120-B/435/149/333/353/ 307 IPC & 27 Arms Act
40	Hussainganj PS; 33/01; 17.03.01	25(1-A)/26/27/35 Arms Act & 3/5 Explosive Act
41	Siwan Town; 69/06; 13.03.06	383/34 IPC

42	Siwan Town; 54/97; 31.03.97	302/307/120-B/34 IPC & 27 Arms Act
43	Mirgabj (Gopalganj) PS; 119/91; 31.05.91	302/34 IPC & 27 Arms Act
44	Jugsalai (Jamsedpur) PS; 182/05	176/177/179/419/420/468/201/120-B IPC
45	KMP (Muzaffarpur); 182/05	176/177/179/419/420/468/201/120-B IPC"

Be it noted, in certain cases trial has been stayed by the High Court and in certain cases bail has been granted.

16. On a perusal of the aforesaid chart, it is clear as noon day that respondent No. 3 has been involved in numerous cases; that he has been booked in at least 75 cases, out of which he stands convicted in 10 cases; that he is facing life imprisonment in two, which include murder case of the Petitioner's two sons, and 10 years rigorous imprisonment in one; that out of 45 pending cases, at least 21 are those where maximum sentence is 7 years and more, including 9 for murder and 4 for attempt to murder; that apart from the murder of the Petitioner's two sons, there are at least 15 out of total 45 pending cases which have been registered against him while he was in jail and out of these 15 pending cases, one is for the murder of the Petitioner's third son and two are for attempt to murder. He has been declared a history-sheeter Type 'A' (who is beyond reform).

17. Referring to the chart, it is urged with vehemence by Mr. Bhushan that the third respondent is a criminal of such nature who is beyond reform and his influence is writ large in the State of Bihar. It is contended by him that the said respondent has been a Member of Legislative Assembly for two times and Member of Parliament from Siwan on four occasions. In such a situation, contend Mr. Bhushan and Mr. Dave, it is absolutely difficult, nay, impossible to get justice because utmost fear prevails and nerve-wrecking terror reigns supreme in the locality. In such an atmosphere, justice will be the first casualty and, therefore, this Court, as the protector of the constitutional rights, should direct transfer of the third respondent to a jail outside Bihar wherever trial by video conferencing would be possible. Mr. Bhushan, in the course of his arguments, has commended us to certain authorities, which we shall refer to at the relevant stage. Mr. Gopal Singh, learned counsel for the State of Bihar submitted that the State of Bihar is wedded to rule of law and will religiously endeavour to carry out the directions of this Court that the Court may ultimately direct, regard being had to the concept of fair trial.

18. Mr. Naphade, learned senior counsel appearing for the third respondent, would contend that for the purpose of transferring an accused from the State of Bihar to a prison outside the State there must exist a law on the statute book which permits such transfer. In the absence of any law, it is not permissible in law to issue any direction for such transfer. According to Mr. Naphade, by transfer to a prison outside the State, the rights of an under-trial prisoner under Articles 14 and 21 are violated and when the third respondent is facing trial in 45 cases, his transfer should not be so directed. Learned senior counsel would urge that if an action of a

State is prejudicial to the right of an individual, it has to be backed by an authority of law and in the absence of the same, such an action is inconceivable. It is further propounded by Mr. Naphade that an order of transfer cannot be passed in exercise of power under Article 142 of the Constitution, as it will be inconsistent with the substantive provisions of the relevant statutory law. It is canvassed by Mr. Naphade that powers exercisable under Article 142 is to do complete justice, but it cannot assume a legislative character, for legislation is absolutely different than adjudication. It is his further submission that Article 142 does not empower this Court to enact law and transferring the third respondent from Bihar to any other prison outside the State would amount to the Court enacting the law and then exercising the judicial power to enforce the law.

19. Learned senior counsel would put forth that transferring the third respondent from his home State to another State would affect his right under Article 21 of the Constitution and such an order is only possible in accordance with the procedure established by law and in the absence of any law, the submission advanced on behalf of the petitioners is absolutely untenable. Criticising the rhetorical arguments assiduously structured by the learned senior counsel for the petitioners, it is astutely expounded by Mr. Naphade that the argument is fundamentally founded on equity which is given the colour of justice and fairness in trial, nullifying the fundamental principle that equity has to yield to the statutory provisions. Further, the third respondent, as an accused, has a right to be tried fairly under Article 21 and his right cannot be scuttled or corroded at the instance of the petitioners. Learned senior counsel would urge that in a case of the present nature, the question of balancing of rights does not arise, for the principle of balancing of rights applies where two fundamental rights compete but here it is the right of the third respondent which has to be protected under Article 21 which has been given the highly cherished value by this Court, and the Court is the sole protector of the said right.

20. First, we shall have a survey of the statutory law in the field. The Prisoners Act, 1900 was brought into existence to consolidate the law relating to prisoners confined by the order of a court. As Section 29 of the Prisoners Act, 1900 covered a different field, the Parliament thought it appropriate to bring in the Transfer of Prisoners Act, 1950 (for short, "the 1950 Act"). It is necessary to state what compelled the Parliament to bring the said legislation. The Statement of Objects and Reasons of the 1950 Act states as follows:-

> "Section 29 of the Prisoners Act, 1900, inter alia, provided for the inter-State transfer of prisoners between the States in Parts A, C and D of the First Schedule to the Constitution. There was no provision, however, either in the Prisoners Act, 1900 or any other law for the transfer of prisoners in those States to prisons in Part B States and vice versa. Cases may arise where the removal for the transfer of prisoners from Parts A, C and D States to Part B States and vice versa may be considered administratively desirable or necessary"

21. Section 3 of the 1950 Act reads as follows:-

> "3. Removal of prisoners from one State to another:-

(1) Where any person is confined in a prison in a State.-

(a) under sentence of death, or

(b) under or in lieu of a sentence of imprisonment or transportation or

(c) in default of payment of a fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour; the Government of that State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State. be addressed, whether the transfer would vitiate the basic tenet of Article 21 of the Constitution and should such a right be allowed to founder. In this regard, we have been commended to *Sunil Batra (II) v. Delhi Administration*[2] and *State of Maharashtra & ors v. Saeed Sohail Sheikh and Ors*[3]. .

23. In Sunil Batra (II) (supra), a writ petition was registered on receipt of a letter from the prisoner complaining of a brutal assault by Head Warder on another prisoner. The letter was metamorphosed into a proceeding under Article 32 of the Constitution. The Court referred to the decision in *Sunil Batra v. Delhi Administration & Ors*[4]. to opine that the said decision imparts to the habeas corpus writ a versatile vitality and operational utility that makes a healing presence of the law to live up to its reputation as bastion of liberty even within the secrecy of the hidden cell. The Court discussing about the perspective in the context of the prisoners right and the torture, reproduced a passage from Sir Winston Churchill that was referred to in Sunil Batra (supra). The said passage reads thus:-

> "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State — a constant heart-searching by all charged with the duty of punishment — a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it."

We may immediately say, we share the same thought without any reservation.

24. The Court observed that it was the import of the Preamble and Article 21 of the Constitution that the protection of the prisoner would come within the rights that is needed protection under Article 32. The three-Judge Bench referred to the facts and thereafter adverting to the rights of the prisoners opined thus:-

"40. Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure. The meaning of 'life' given by Field, J., approved *in Kharak Singh* [5] and *Maneka Gandhi* [6] bears excerption:

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

Therefore, inside prisons are persons and their personhood, if crippled by law-keepers turning law-breakers, shall be forbidden by the writ of this Court from such wrongdoing. Fair procedure, in dealing with prisoners, therefore, calls for another dimension of access to law-provision, within easy reach, of the law which limits liberty to persons who are prevented from moving out of prison gates."

25. The learned Judges affirmed the position, as had been held by Chandrachud, J., (as His Lordship then was) in *D. Bhuvan Mohan Patnaik & Ors v. State of A.P. & Ors*[7]:-

"Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to 'practise' a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law."

26. Eventually, they laid down:-

"48. Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and

effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice. The string of guidelines in Batra1 set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior, and early judicial consideration so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose."

27. Considerable emphasis was laid on the aspect that transfer to a distant prison where visits or society of friends or relations is snapped, is an affliction or abridgment and the same is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. This would be a relevant aspect as held in Saeed Sohail Sheik (supra). In the said case, the Court referred to Section 29 of the Prisoners Act, 1900. Interpreting the said provision the Court held:-

> "20. Reliance upon sub-section (2) of Section 29, in support of the contention that the transfer of an undertrial is permissible, is also of no assistance to the appellants in our opinion. Sub-section (2) no doubt empowers the Inspector General of Prisons to direct a transfer but what is important is that any such transfer is of a prisoner who is confined in circumstances mentioned in sub-section (1) of Section 29. That is evident from the use of words "any prisoner confined as aforesaid in a prison". The expression leaves no manner of doubt that a transfer under sub-section (2) is also permissible only if it relates to prisoners who were confined in circumstances indicated in sub-section (1) of Section 29. The respondents in the present case were undertrials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29 extracted above."

28. Thereafter, the Court referred to Section 26 of the Prisons Act, 1894 and Sections 167 and 309 of the CrPC and adverted to the nature of power exercisable by the Court while permitting or refusing the transfer. In that context it ruled:-

> "25 We have, however, no hesitation in holding that the power exercisable by the court while permitting or refusing transfer is "judicial" and not "ministerial" as contended by Mr Naphade. Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected, no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an ongoing trial. That transfer of an undertrial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations is settled by the decision of this Court in Sunil Batra (2) v. Delhi Admn"

29. In the ultimate analysis, the Court arrived at the conclusion that any order that the Court may make on a request for transfer of a prisoner is bound to affect him prejudicially, and, therefore, it is obligatory for the court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of

determination and decision-making an implicit duty to act fairly, objectively or in other words, to act judicially.

30. The aforesaid two pronouncements have been pressed into service to buttress the stand that transfer of prisoner to a distant place violates inherent constituent of Article 21 of the Constitution. It is also proponed that if the transfer is directed, it would affect the edifice of "fair trial" to which an accused is entitled to within the ambit and sweep of the said Article. The aforesaid two limbs of submission founded on the basic principle of right to life require to be appositely understood and appreciated. The first plank of submission in this regard that has been structured with phenomenal perceptiveness is that an order transferring a prisoner, a convict or under trial to a distance prison is absolutely unacceptable and, if such an order is passed, it would clearly violate the fundamental right of the accused which has been conferred on him under Article 21 in its expanded horizon. In Sunil Batra (II) (supra), we find that the transfer from one prison to another was not the real controversy. The controversy pertained to a different factual score. The observations made in para 49 of the said judgment really pertain to protection of prisoners in the jail. By taking recourse to the epistolary method of entertaining a petition under Article 32 of the Constitution, the Court expressed its concern about the ill treatment and torture to prisoners in the jail and reflected on prison reforms. It is worthy to note that that the Court has really stated that transfer in certain cases may be punitive in effect and such actions may tantamount to affliction on liberty or life in the wider sense. Simultaneously, the Court has ruled that such affliction or abridgement cannot be sustained unless Article 21 is satisfied and there has to be a correct legal procedure, and the procedure to be adopted has to be fair and reasonable, and the discretion should not be exercised in an unguided or unreasonable manner. Thus, the decision itself does not lay down the principle in absolute terms. Similarly, the authority in Saeed Sohail Sheik (supra) was dealing with transfer of a prisoner and focused on the nature of power exercised by the Court. Reference to Sunil Batra (II) (supra) was made to bolster that an order of transfer from one prison to another is not a ministerial act. Thus, the said authority is not a precedent for the proposition that an accused cannot be transferred to a prison at a distant place, when justice, fair and free trial so requires.

31. This aspect of Article 21, it is imperative, has to be tested on the bedrock of fair trial. The question that is required to be posed is if the accused is transferred to another jail in another State, would the same become an apology for trial or promote and safeguard free and fair trial. The argument that all relevant witnesses are in Siwan and the witnesses the defence intends to cite are in Siwan and in such a situation the trial after shifting cannot be characterized as fair trial refers to only one aspect. The concept of fair trial recognized under the Code of Criminal Procedure is conferred an elevated status under the Constitution, is a much broader and wider concept. If the transfer will create a dent in the said concept, there is no justification to accept such a prayer at the behest of the petitioners. In oppugnation, the conception of fair trial in criminal jurisprudence is not one way traffic, but includes the accused and the victim and it is the duty of the court to weigh the balance. When there is threat to life, liberty and fear pervades, it sends shivers in the spine and corrodes the basic marrows of holding of the trial at Siwan. This is quite farther from the idea of fair trial. The grievance of the victims, who have enormously and apparently suffered deserves to be dealt

with as per the law of the land and should not remain a mirage and a distant dream. As we find, both sides have propounded the propositions in extreme terms. And we have a duty to balance.

32. To appreciate the contention on this score, we may, at present, refer to certain authorities that have dealt with fair trial in the constitutional and statutory backdrop.

33. In *J. Jayalalithaa & Ors v. State of Karnataka & Ors.*[8] , the Court held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. It has been further observed that any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general and, therefore, in all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings. The Court further laid down that denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right, but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. Elevating the right of fair trial, the Court observed:-

> "Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by the rule of law. Denial of fair trial is crucifixion of human rights. [Vide *Triveniben v. State of Gujarat* [9], *Abdul Rehman Antulay v. R.S. Nayak*[10], *Raj Deo Sharma (2) v. State of Bihar*[11], *Dwarka Prasad Agarwal v. B.D. Agarwal*[12], *K. Anbazhagan v. Supt. of Police* [13], *Zahira Habibullah Sheikh (5) v. State of Gujarat* [14], *Noor Aga v. State of Punjab*[15], *Amarinder Singh v. Parkash Singh Badal*[16], *Mohd. Hussain v. State (Govt. of NCT of Delhi)*[17], *Sudevanand v. Stat*e[18] , *Rattiram v. State of M.P*[19]. and *Natasha Singh v. CBI* [20].]"

34. In this regard, we may sit in the time machine and refer to a three-Judge Bench judgment in *Maneka Sanjay Gandhi & another v. Rani Jethmalani*[21], wherein it has been observed that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from

the point of view of public justice and its attendant environment is necessitous, if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. The Court observed that accused cannot dictate where the case against him should be tried and, in a case, it the duty of the Court to weigh the circumstances.

35. In Rattiram (supra), speaking on fair trial, the Court opined that:-

> "39. ... Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."

In the said case, it has further been held that:-

> "60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in *Mangal Singh v. Kishan Singh*[22] wherein it has been observed thus:
>
> '14. ... Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.'
>
> 61. It is worth noting that the Constitution Bench in *Iqbal Singh Marwah v. Meenakshi Marwah*[23] though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.
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> xxxx
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> 64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice."

36. Be it noted, the Court in the said case had noted that there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."

37. In *Manu Sharma v. State (NCT of Delhi)*[24], the Court, emphasizing on the concept of fair trial, observed thus:-

> "197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

38. A three-Judge Bench in *Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi*[25] approvingly reproduced para 33 of the earlier judgment in Zahira Habibulla H. *Sheikh v. State of Gujarat (known as "Best Bakery" case*[26]) which is to the following effect:-

> "33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."

39. In Zahira Habibulla H. Sheikh (supra), it has been held:-

> "38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond

reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

40. In Mohd. Hussain @ Julfikar Ali (supra) the three-Judge Bench has drawn a distinction between the speedy trial and fair trial by opining that there is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end.

41. We have referred to the said authority as the three-Judge Bench has categorically stated that interests of the society at large cannot be disregarded or totally ostracized while applying the test of fair trial.

42. In *Bablu Kumar and Ors. v. State of Bihar and Anr.*[27] the Court observed that it is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a mock trial. The Court further ruled that a criminal trial is a serious concern of society and every member of the collective has an inherent interest in such a trial and, therefore, the court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The said observations

were made keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court.

43. Recently, in *State of Haryana v. Ram Mehar and Ors*[28]. , after analyzing the earlier judgments, the Court ruled that the concept of the fair trial is neither in the realm of abstraction or a vague idea. It is a concrete phenomenon; it is not rigid and there cannot be any straitjacket formula for applying the same. The Court observed that it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. The Court ruled that neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other, for once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. The Court opined that whole thing would be dependent on the fact situation; established norms and recognised principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalisation but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to the winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fair trial cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such. The Court further observed that there should not be any inference that the fair trial should not be kept on its own pedestal as it ought to remain but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. The process of the court cannot be abused in the name of fair trial at the drop of a hat, as that would lead to miscarriage of justice.

44. On a studied analysis of the concept of fair trial as a facet of Article 21, it is noticeable that in its ambit and sweep it covers interest of the accused, prosecution and the victim. The victim, may be a singular person, who has suffered, but the injury suffered by singular is likely to affect the community interest. Therefore, the collective under certain circumstances and in certain cases, assume the position of the victim. They may not be entitled to compensation as conceived under section 357A of the CrPC but their anxiety and concern of the crime and desire to prevent such occurrences and that the perpetrator, if guilty, should be punished, is a facet of Rule of Law. And that has to be accepted and ultimately protected.

45. It is settled in law that the right under Article 21 is not absolute. It can be curtailed in accordance with law. The curtailment of the right is permissible by following due procedure which can withstand the test of reasonableness. Submission that if the accused is transferred from jail in Siwan to any other jail outside the State of Bihar, his right to fair trial would be smothered and there will be an inscription of an obituary of fair trial and refutation of the

said proponement, that the accused neither has monopoly over the process nor does he has any exclusively absolute right, requires a balanced resolution. The opposite arguments are both predicated on the precept of fair trial and the said scale would decide this controversy. The interest of the victim is relevant and has to be taken into consideration. The contention that if the accused is not shifted out of Siwan Jail, the pending trials would result in complete farce, for no witness would be in a position to depose against him and they, in total haplessness, shall be bound to succumb to the feeling of accentuated fear that is created by his unseen tentacles, is not an artifice and cannot be ignored. In such a situation, this Court should balance the rights between the accused and the victims and thereafter weigh on the scale of fair trial whether shifting is necessary or not. It would be travesty if we ignore the assertion that if the respondent No. 3 is not shifted from Siwan Jail and the trial is held at Siwan, justice, which is necessitous to be done in accordance with law, will suffer an unprecedented set back and the petitioners would remain in a constant state of fear that shall melt their bones. This would imply balancing of rights.

46. Having noted thus, as presently advised, we shall first advert to certain authorities that pertain to balancing of rights. In *Sakal Paper (P) Ltd. & Ors v. Union of India & another*[29], the Court in the context of freedom of speech and expression, has held that freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. Analysing further, the Court held:-

> "It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

47. In *Subramanian Swamy v. Union of India* [31] the Court after referring to the said authority ruled that:-

> the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In *Acharya Maharajshri Narendra Prasadji Anandprasadji Mahairaj v. State of Gujarat*[33] , it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests. *In DTC v. Mazdoor Congress* [32] the Court has ruled that articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which

imply absence of unreasonable or unfair discrimination between individuals or groups or classes."

48. In this context, it is also appropriate to refer to certain other decisions where the Court has dealt with the concept of competing rights. We are disposed to think that dictum laid therein has to be appositely appreciated. In *Mr. 'X' v. Hospital 'Z'* [33], the issue arose with regard to right to privacy as implicit in the right to life and liberty as guaranteed to the citizens under Article 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held as a human being, Ms Y must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21, which guarantees "right to life" to every citizen of this country. The Court further held that where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms Ys right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive.

49. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognize and accept the right of one which has to be protected.

50. In this context, reference to the pronouncement in *Rev. Stainislaus v. State of M.P*[34]. and Ors. would be instructive. In the said case, the Constitution Bench was dealing with two sets of appeals, one arising from Madhya Pradesh that related to Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the other pertained to Orissa Freedom of Religion Act, 1967. The two Acts insofar as they were concerned with prohibition of forcible conversion and punishment therefor, were similar. The larger Bench stated the facts from Madhya Pradesh case which eventually travelled to the High Court. The High Court ruled that that there was no justification for the argument that Sections 3, 4 and 5 were violative of Article 25(1) of the Constitution. The High Court went on to hold that those Sections "establish the equality of religious freedom for all citizens by prohibiting conversion by objectionable activities such as conversion by force, fraud and by allurement". The Orissa Act was declared to be ultra vires the Constitution by the High Court. To understand the controversy, the Court posed the following questions:-

> "(1) whether the two Acts were violative of the fundamental right guaranteed under Article 25(1) of the Constitution, and
>
> (2) whether the State Legislatures were competent to enact them?"

51. It was contended before this Court that the right to propagate one's religion means the right to convert a person to one's own religion and such a right is guaranteed by Article 25(1) of the Constitution. The larger Bench dealing with the said contention held:-

> "We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25(1), for what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike." And again:-
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> "It has to be appreciated that the freedom of religion enshrined in the article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."

52. The aforesaid judgment clearly lays down, though in a different context, that what is freedom for one is also the freedom for the other in equal measure. The perception is explicated when the Court has said that it has to be remembered that Article 25(1) guarantees freedom of conscience to other citizens and not merely to followers of particular religion and there is no fundamental right to convert another person. The right is guaranteed to all citizens. The right to propagate or spread one's religion by an exposition of its tenets does not mean one's religion to convert another person as it affects the fundamental right of the other. We have referred to this authority as it has, in a way, dwelt upon the "intra-conflict of a fundamental right".

53. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same Article, like fair trial in this

case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system". An example can be cited. A group of persons in the name of "class honour", as has been stated in *Vikas Yadav v. State of U.P. & Ors*[35]. , cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law. In this regard, we are reminded of an ancient saying:-

"yadapi siddham, loka viruddham
Na adaraniyam, na acharaniyam"

The aforesaid saying lays stress on public interest and its significance and primacy over certain individual interest. It may not thus have general application, but the purpose of referring to the same is that on certain occasions it can be treated to be appropriate.

54. There may be a perception that if principle of primacy is to be followed, then the right of one gets totally extinguished. It has to be borne in mind that total extinction is not balancing. When balancing act is done, the right to fair trial is not totally crippled, but it is curtailed to some extent by which the accused gets the right of fair trial and simultaneously, the victims feel that the fair trial is conducted and the court feels assured that there is a fair trial in respect of such cases. That apart, the faith of the collective is reposed in the criminal justice dispensation system and remains anchored.

55. While appreciating the concept of public interest in such a situation, the Court is required to engage itself in construing the process of fair trial which ultimately subserves the cause of justice and remains closer to constitutional sensibility. An accused, in the name of fair trial, cannot go on seeking adjournments defeating the basic purpose behind the conducting of a trial as enshrined under Section 309 CrPC. He cannot go on filing applications under various provisions of CrPC, whether tenable or not, and put forth a plea on each and every occasion on the bedrock that principle of fair trial sanctions it. In such a situation, as has been held by this Court, the prosecution which represents the cause of

collective and the victim, who fights for remedy of his individual grievance, is allowed to have a say and the court is not expected to be a silent spectator. Thus, the discord that arises when there is intra-conflict in the same fundamental right especially, in the context of fair trial, it has to be resolved regard being had to the obtaining fact situation. An accused who has been able to, by his sheer presence, erode the idea of safety of a witness in court or for that matter impairs and rusts the faith of a victim in the ultimate justice and such erosion is due to fear psychosis prevalent in the atmosphere of trial, is not to be countenanced as it is an unconscionable situation. Such a hazard is not to be silently suffered because the "Majesty of Justice" does not allow such kinds of complaints to survive. Thus analysed, the submission of Mr. Naphade that shifting of the accused outside the Siwan Jail would affect his right under Article 21 of the Constitution does not commend acceptation.

56. The next limb of controversy relates to exercise of power and jurisdiction. The plea that is propounded by Mr. Naphade is that in the absence of any provision in the 1950 Act, there cannot be any direction for shifting. According to him, any State action which prejudices the right of an individual has to be backed by the authority of law and in the absence of law, such an order is not permissible. In this regard, he has drawn inspiration from a passage from the *State of M.P. & another v. Thakur Bharat Singh*[36]. It reads as follows:-

> "All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and exclusive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid."

57. The aforesaid contention has a fundamental fallacy and, therefore, the authority in Thakur Bharat Singh (supra) has no application. In the case at hand, no State action is under challenge. The plea of prejudice that has been advanced has no legs to stand upon as the petitioners have approached this Court for directions. It is well settled in law that there is a distinction between a judicial function and the legislative action, and similarly the executive action and a direction from the Court. It has been lucidly clarified by the Constitution Bench *in State of W.B. & Ors v. Committee for Protection of Democratic Rights, West Bengal & Ors*[37] . The question arose in the said case was whether the High Court in exercise of jurisdiction under Article 226 of the Constitution can direct the CBI established under the Delhi Special Police Establishment Act, 1946 (for short, 'Special Police Act') to investigate a cognizable offence which is alleged to have taken place within the territorial jurisdiction of a State without the consent of the State Government. After referring to various provisions of the Special Police Act, the Court posed the question "whether the restrictions imposed on the powers of the Central Government would apply mutatis mutandis to constitutional courts as well" and referring to various authorities, recorded number of conclusions, of which we reproduce the relevant ones:-

"(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that the Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on Parliament by the Constitution and restriction on the executive by Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution." And eventually, the Court answered the reference thus:-

> "In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

58. The aforesaid decision compels us to repel the submission of Mr. Naphade on this score which is to the effect that when no power is conferred under the 1950 Act, the Court cannot exercise the power or when the power is curtailed, the Court cannot issue directions. The controversy in the Constitution Bench pertained to direction by the High Court to transfer the investigation to the CBI in respect of the crime that occurs within the territory of the State and this Court held that the High Court has the authority to so direct despite the prohibition contained in the Special Police Act. Therefore, the non-conferment of power under the 1950 Act would not prohibit the High Court, in exercise of its power under Article 226 to transfer a case from one jail to another inside the State depending upon the circumstances.

59. The question that arises in the case at hand pertains to exercise of jurisdiction under Articles 32, 142 and 144 of the Constitution. It is submitted by Mr. Naphade that an order under Article 142 cannot be passed in violation of the rights under Part III of the Constitution nor such an order can be inconsistent with the substantive provisions of the relevant statute. He has drawn our attention to the Constitution Bench decision in *Prem Chand Garg & another v. Excise Commr*[38] In the said case, the majority ruled that:-

> "12 The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32."

60. Placing reliance on *A.R. Antulay v. R.S. Nayak & another* [39], Mr. Naphade would urge that the court cannot pass an order in exercise of jurisdiction under Article 142 of the Constitution which will affect the fundamental right of a person. In Antulay's case, the five-Judge Bench in *R.S. Nayak v. A.R. Antulay* [40], had transferred the case from Special Court under the Prevention of Corruption Act to the High Court in order to expedite the trial. In doing so, as felt by the later judgment rendered by seven Judges, the Court had ignored the mandatory provision of Section 7(2) of the Criminal Law Amendment Act, 1952 and,

therefore, two rights of Antulay were violated, one, the accused could only be tried by a Special Judge and secondly, he had a right of statutory appeal to the High Court. The Court ruled that there was breach of fundamental rights under Articles 14 and 21 of the Constitution. While elucidating the principle under Article 142, Sabyasachi Mukharji, J. (as His Lordship then was) ruled:-

> "The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J., speaking for the majority of the judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At page 899 of the Reports, Gajendragadkar, J., reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice". But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws (emphasis supplied). The court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32."

61. Relying on the aforesaid dictum, it is canvassed by Mr. Naphade that when the transfer of an accused from one State to another is not envisaged under the 1950 Act, and the concept of fair trial commands that an accused has to be tried fairly and should not be removed to a distant place where he would feel isolated and cut-off from his relations and familiar milieu, for it would tantamount to violation of the right as enshrined under Article 21 of the Constitution. He would further contend that power under Article 142 cannot be exercised that would create a dent in the fundamental right or would be inconsistent with the statutory provisions. Controverting the aforesaid submission, Mr. Bhushan, learned senior counsel for the petitioners has drawn our attention to a Constitution Bench judgment in Union Carbide Corporation (supra). In paragraph 83, M.N. Venkatachaliah, J, (as His Lordship then was) speaking for the majority, opined thus:-

> "It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex Court under Article 142(1) is unsound and erroneous. In both Garg as well as Antulay cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to

the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney General, referring to Garg case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise".

[Emphasis supplied]

62. It is urged by Mr. Naphade that the said judgment is per incuriam as it runs counter to what has been stated in Antulay (supra). Suffice it to say, we are bound by the view expressed in Union Carbide Corporation (supra) which has appreciated the ratio of Antulay's case in a particular manner. That apart, we have no hesitation in stating that what has been stated in Union Carbide Corporation (supra) by Venkatachaliah, J. is in accord with the constitutional scheme of justice.

63. Mr. Naphade, learned senior counsel has also drawn our attention to a Constitution Bench decision in *Supreme Court Bar Association v. Union of India and Anr*[41]. In the said case, the Court dealing with the plenary power under Article 142 of the Constitution opined that the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court

by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. Thereafter, the Court held:-

> "There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly...."

64. The Court thereafter referred to the authorities in *Delhi Judicial Service Association v. State of Gujarat & ors*[42] , *Re, Vinay Chandra Mishra*[43], Prem Chand Garg (supra), and Union Carbide Corporation (supra), specially para 83 of the last decision and proceeded to rule thus:-

> "55. Thus, a careful reading of the judgments in Union Carbide Corpn. v. Union of India; the Delhi Judicial Service Assn. case (supra) and *Mohd. Anis case*[44] relied upon in V.C. Mishra case (supra) show that the Court did not actually doubt the correctness of the observations in Prem Chand Garg case (supra). As a matter of fact, it was observed that in the established facts of those cases, the observations in Prem Chand Garg case had "no relevance". This Court did not say in any of those cases that substantive statutory provisions dealing expressly with the subject can be ignored by this Court while exercising powers under Article 142.
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> 56. As a matter of fact, the observations on which emphasis has been placed by us from the Union Carbide case, A.R. Antulay case and Delhi Judicial Service Assn. case go to show that they do not strictly speaking come into any conflict with the observations of the majority made in Prem Chand Garg case. It is one thing to say that "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under Article 142 to do complete justice between the parties in the pending "cause or matter" arising out of that statute, but quite a different thing to say

that while exercising jurisdiction under Article 142, this Court can altogether ignore the substantive provisions of a statute, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. This Court did not say so in Union Carbide case (supra) either expressly or by implication and on the contrary it has been held that the Apex Court will take note of the express provisions of any substantive statutory law and regulate the exercise of its power and discretion accordingly. ..."

[emphasis added]

65. In this context, we may refer with profit to a two-Judge Bench decision in *Narendra Champaklal Trivedi v. State of Gujarat*[45]. In the said case, question arose with regard to reduction of sentence that had been imposed under Section 13(3) of the Prevention of Corruption Act, 1988. The Court referred to the earlier decisions in *Vishweshwaraiah Iron & Steel Ltd. v. Abdul Gani & Ors , Keshabhai [46] Malabhai Vankar v. State of Gujarat*[47], *Laxmidas Morarji v. Behrose Darab Madan*[48] and held thus:

"... where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency. In fact, reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile."

Thus, the Bench did not think it apt to ignore the substantive statutory provisions.

66. In this regard, we may also refer to the authority in *Shamsu Suhara Beevi v. G. Alex and another*[49] . In the said case, the Court was dealing with a lis that pertained to an agreement of sale. There was no prayer for amendment of the plaint to include the relief of compensation for breach of contract in addition to the specific performance of the agreement. The relief was claimed under Section 28 of the Specific Relief Act, 1963 but not under Section 21 of that Act. The High Court came to the conclusion that Section 28 would not be applicable to the facts of the case but granted relief under Section 21 of the said Act. In that context, the Court ruled that the High Court would not have granted compensation under Section 21 in addition to the relief of specific performance in the absence of a prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance; that grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible; that

on equitable considerations court cannot ignore or overlook the provisions of the statute, and that equity must yield to law.

67. In the context of the aforesaid authorities, the submission of Mr. Naphade is to be appreciated. It is canvassed by him that Section 3 of the 1950 Act permits transfer of a prisoner outside the State under certain circumstances and, therefore, no other circumstance can be visualized while exercising power under Article 142 of the Constitution as that will be running counter to the substantive provisions of the statute. He further submits that this Court cannot legislate under Article 142 and equity must yield to the provisions of law.

68. There can be no doubt that equity cannot override law. As far as the first aspect is concerned, we need not advert to the broad platform on which Mr. Naphade has based his contention. Suffice it to note that Section 3 of the 1950 Act bestows power on the State Government to transfer an accused to another State after consulting the other State. Such an action by the State has to be totally controlled by the circumstances which find mention under Section 3. When the State passes an order with the concurrence of another State, it is obliged to be bound by the circumstances which are postulated under Section 3(1) of the 1950 Act, but when the issue of fair trial emerges before the constitutional court, Section 3 of the 1950 Act cannot be regarded so as to restrain the court from what is mandated and required for a free and fair trial. The statutory power is not such which is negative and curtails power of the court to act in the interest of justice, and ensure free and fair trial, which is of paramount importance for the Rule of Law. It only controls the power of the executive. Therefore, we are unable to accept the submission of Mr. Naphade in this regard.

69. Presently, we shall advert to the facts which we have stated in the beginning. The third respondent has already been declared as a history-sheeter type 'A', that is, who is beyond reform. Till today, he has been booked in 75 cases, out of which he had been convicted in 10 cases and presently facing trial in 45 cases. There is no dispute that he has been acquitted in 20 cases. Out of 45 cases, 21 cases are those where maximum sentence is 7 years or more. He has been booked in 15 cases where he has been in custody and one such case relates to the murder of the third son of the petitioner and other two cases are of attempt to murder. He is an influential person of the locality, for he has been a representative to the Legislative Assembly on two occasions and elected as a Member of Parliament four times. This is not a normal and usual case. It has to be dealt with in the aforesaid factual matrix. A history-sheeter has criminal antecedents and sometimes becomes a terror in society. In *Neeru Yadav v. State of U.P. and Anr.*[50], this Court, while cancelling bail granted to a history-sheeter, was compelled to observe:-

> "16 A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens

should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law."

We have referred to the aforesaid authority to highlight how the Court has taken into consideration the paramountcy of peaceful social order while cancelling the order of bail, for the order granting bail was passed without proper consideration of criminal antecedents of the accused whose acts created a concavity in the social stream.

70. Mr. Bhushan, learned senior counsel heavily relied on the authority in *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another*[51]. It is urged by him that factual matrix in the said case and the present case is identical. In the said case, the Court noticed that the respondent therein, Rajesh Ranjan alias Pappu Yadav while he was in judicial custody, was found addressing an election meeting. The Court called for a report from the authorities concerned requiring them to explain on what authority the said respondent was allowed to address a public meeting. The report filed by the CBI revealed that the respondent, in collusion with the police authorities accompanying him to Madhepura, had addressed a public meeting and the escort accompanying him took him to various places which the respondent wanted to visit beyond the scope of the production warrant. It had come to the knowledge of the Court that though his bail had been cancelled, the accused was never taken into jail and, in fact, when he was arrested after the cancellation of bail, he was taken to Patna and an urgent Medical Board was constituted to examine him which opined that the accused required medical treatment at Patna Medical College and permitted him to stay in the said Medical College. Taking various other facts into consideration, the Court opined that the respondent had absolutely no respect for the Rule of Law nor was he, in any manner, afraid of the consequences of his unlawful acts. It was also observed that, it was evident from the fact that some of the illegal acts of the respondent were committed even when his application for grant of bail was pending. When the issue of transfer from Beur Jail, Patna to a jail outside the State arose, a contention was advanced that it would affect his fundamental right as has been enunciated in Sunil Batra (II) (supra). The Court referred to Section 3 of the 1950 Act and in that context, opined that in an appropriate case, such request can also be made by an undertrial prisoner or a detenu and there being no statutory provisions contrary thereto, this Court in exercise of its jurisdiction under Article 142 of the Constitution may issue necessary direction.

71. The two-Judge Bench referred to the authorities in Supreme Court Bar Association (supra) and Union Carbide Corporation (supra) and ruled thus:-

"29. Despite some criticisms in some quarters as regards the correctness of the decision in Union Carbide (supra) we may notice that in Mohd. Anis v. Union of

India (supra) it was held that the power of the Supreme Court under Article 142(1) cannot be diluted by Section 6 of the Delhi Special Police Establishment Act, 1946."

72. The Court, thereafter, referred to the authorities in *State of Karnataka v. State of A.P.*[52] *& Ors , State of W.B. & Ors v. Sampat Lal & Ors*[53] *Ashok Kumar Gupta & another v. State of U.P. & Ors*[54] and eventually opined:-

"43. It is true that in a normal trial the Criminal Procedure Code requires the accused to be present at the trial but in the peculiar circumstances of this case a procedure will have to be evolved, which will not be contrary to the rights given to an accused under the Criminal Procedure Code but at the same time protect the administration of justice. Therefore, as held by this Court in the case of *State of Mahara,shtra v. Dr. Praful B. Desai*[55] *and Sakshi v. Union of India*[56] we think the above requirement of the Code could be met by directing the trial by video-conferencing facility. In our opinion, this is one of those rare cases wherein a frequent visit from the place of detention to the court of trial in Bihar would prejudice the security of both the respondent and others involved in the case, apart from being a heavy burden on the State exchequer. It is in this background CBI has submitted that the prisons at Chennai, Palayamkottai Central Jail, Vellore Central Jail, Coimbatore Central Jail all in the State of Tamil Nadu and Mysore Central Jail in the State of Karnataka have video-conferencing facilities. Therefore the respondent can be transferred to any one of those jails.

44. While it is true that it is necessary in the interest of justice to transfer the respondent out of the State of Bihar, we are required to keep in mind certain basic rights available to the respondent which should not be denied by transferring the respondent to any one of the jails suggested by CBI. It will cause some hardship to the wife and children of the respondent who we are told are normally residents of Delhi, his wife being a Member of Parliament and two young children going to school in Delhi. Taking into consideration the overall fact situation of the case, we think it appropriate that the respondent be transferred to Tihar Jail at Delhi and we direct the seniormost officer in charge of Tihar Jail to make such arrangements as he thinks are necessary to prevent the reoccurrence of the activities of the respondent of the nature referred to hereinabove and shall allow no special privileges to him unless he is entitled to the same in law. His conduct during his custody in Tihar Jail will specially be monitored and if necessary be reported to this Court. However, the respondent shall be entitled to the benefit of the visit of his family as provided for under the Jail Manual of Tihar. He shall also be entitled to such categorisation and such facilities available to him in law.

45. We also direct that the trial of the case in Patna shall continue without the presence of the appellant by the court, dispensing such presence, and to the extent possible shall be conducted with the aid of video-conferencing. However, in the event of the respondent making any application for his transfer for the sole purpose of being present during the recording of the statement of any particular witness, same will be

considered by the learned Sessions Judge on its merit and if he thinks it appropriate, he may direct the authorities of Tihar Jail to produce the accused before him for that limited purpose. This, however, will be in a rare and important situation only and if such transfer order is made the respondent shall be taken from Tihar Jail to the court concerned and if need be, detained in appropriate jail at the place of trial and under the custody and charge of the police to be specially deputed by the authorities of Tihar Jail who shall bear in mind the factual situation in which the respondent has been transferred from Patna to Delhi."

The aforesaid authority stands in close proximity to the case at hand. The present case, in fact, frescoes a different picture and projects a sad scenario compelling us to take immediate steps, while safeguarding the principle of fair trial for both the sides.

73. It is fruitful to note that in Dr. Praful B. Desai (supra) it has been clearly held that recording of evidence by way of video conferencing is valid in law.

74. In view of the aforesaid analysis, we record our conclusions and directions in seriatim:-

"(i) The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law, i.e., free and fair trial.

(ii) The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instill Rule of Law. A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings.

(iii) A wrongful act of an individual cannot derogate the right of fair trial as that interest is closer, especially in criminal trials, to the Rule of Law. An accused cannot be permitted to jettison the basic fundamentals of trial in the name of fair trial.

(iv) The weighing of balance between the two perspectives in case of fair trial would depend upon the facts and circumstances weighed on the scale of constitutional norms and sensibility and larger public interest.

(v) Section 3 of the 1950 Act does not create an impediment on the part the court to pass an order of transfer of an accused or a convict from one jail in a State to another

prison in another State because it creates a bar on the exercise of power on the executive only.

(vi) The Court in exercise of power under Article 142 of the Constitution cannot curtail the fundamental rights of the citizens conferred under the Constitution and pass orders in violation of substantive provisions which are based on fundamental policy principles, yet when a case of the present nature arises, it may issue appropriate directions so that criminal trial is conducted in accordance with law. It is the obligation and duty of this Court to ensure free and fair trial.

(vii) The submission that this Court in exercise of equity jurisdiction under Article 142 of the Constitution cannot transfer the accused from Siwan Jail to any other jail in another State is unacceptable as the basic premise of the said argument is erroneous, for while addressing the issue of fair trial, the Court is not exercising any kind of jurisdiction in equity.

75. In view of the aforesaid conclusions, we direct the State of Bihar to transfer the third respondent, M. Shahabuddin, from Siwan Jail, District Siwan to Tihar Jail, Delhi and hand over the prisoner to the competent officer of Tihar Jail after giving prior intimation for his transfer in Delhi. Needless to say, that the authorities escorting the third respondent from Siwan Jail to Tihar Jail would strictly follow the rules applicable to the transit prisoners and no special privilege shall be extended. The transfer shall take place within a week hence. Thereafter, the trial in respect of pending trials shall be conducted by video conferencing by the concerned trial court. The competent authority in Tihar Jail and the competent authority of the State of Bihar shall make all essential arrangements so that the accused and the witnesses would be available for the purpose of trial through video conferencing. A copy of this order shall forthwith be communicated to the Home Secretary, Government of Bihar, Superintendent of Siwan Jail and the Inspector General, Prisons, Tihar Jail, Delhi. All concerned are directed to act in aid of the aforesaid order as contemplated under Article 144 of the Constitution.

76. We have noted that the High Court of Patna has granted stay in certain proceedings. The High Court is requested to dispose of the said matters on their merits within four months hence. A copy of this order be sent to the Registrar General, High Court of Patna for placing the same before the learned Acting Chief Justice.

77. In view of the aforesaid analysis, Writ Petition (Criminal) No. 147 of 2016 stands disposed of. Similarly, Writ Petition (Criminal) No. 132 of 2016 also stands disposed of except for the prayer seeking direction to register FIR against Shri Tej Pratap Yadav, Health Minster of Bihar and S.P., Police of Siwan District, for which the matter be listed for further hearing at 2.00 p.m. on 21st of April 2017.

Judgment Referred.

[1](2016) 9 SCC 0443

[2] (1980) 3 SCC 0488
[3] (2012) 13 SCC 0192
[4] (1978) 4 SCC 0494
[5] Kharak Singh v. State of U.P. AIR 1963 SC 1295
[6] (1978) 1 SCC 0248
[7] (1975) 3 SCC 0185
[8] (2014) 2 SCC 0401
[9] (1989) 1 SCC 0678
[10] (1992) 1 SCC 0225
[11] (1999) 7 SCC 0604
[12] (2003) 6 SCC 0230
[13] (2004) 3 SCC 0767
[14] (2006) 3 SCC 0374
[15] (2008) 16 SCC 0417
[16] (2009) 6 SCC 0260
[17] (2012) 2 SCC 0584
[18] (2012) 3 SCC 0387
[19] (2012) 4 SCC 0516
[20] (2013) 5 SCC 0741
[21] (1979) 4 SCC 0167
[22] (2009) 17 SCC 0303
[23] (2005) 4 SCC 0370
[24] (2010) 6 SCC 0001
[25] (2012) 9 SCC 0408
[26] (2004) 4 SCC 0158
[27] (2015) 8 SCC 0787
[28] (2016) 8 SCC 0762
[29] AIR 1962 SC 0305
[30] (2016) 7 SCC 0221
[31] (1975) 1 SCC 0011
[32] 1991 Supp (1) SCC 0600
[33] (1998) 8 SCC 0296
[34] (1977) 1 SCC 0677
[35] (2016) 9 SCC 0541
[36] AIR 1967 SC 1170
[37] (2010) 3 SCC 0571
[38] AIR 1963 SC 0996
[39] (1988) 2 SCC 0602
[40] (1984) 2 SCC 0183
[41] (1998) 4 SCC 0409
[42] (1991) 4 SCC 0406
[43] (1995) 2 SCC 0584
[44] (1994) Supp. (1) SCC 0145
[45] (2012) 7 SCC 0080
[46] (1997) 8 SCC 0713
[47] (1995 Supp. (3) SCC 0704
[48](2009) 10 SCC 0425
[49](2004) 8 SCC 0569
[50](2014) 16 SCC 0508
[51](2005) 3 SCC 0284
[52](2000) 9 SCC 0572
[53] (1985) 1 SCC 0317
[54] (1997) 5 SCC 0201
[55] (2003) 4 SCC 0601
[56] (2004) 5 SCC 0518