

(2017) 04 GUJ CK 0132
In the Gujarat High Court
Case No : 1791 of 2017

KAVINABEN TEJASBHAI SAYAR

APPELLANT

Vs

STATE OF GUJARAT & 3

RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 226, Article 39A - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Amendment of the Schedule - Power of High Courts to Issue certain writs - Equal justice and free legal aid
Code of Criminal Procedure, 1973, Section 482, Section 173(8), Section 164, Section 210, Section 202 - Saving of inherent powers of High Court - Report of police officer on completion of Investigation - Recording of confessions and statements - Procedure to be followed when there is a complaint case and police investigation in respect of the same offence - Postponement of issue of process
Indian Penal Code, 1860, Section 376, Section 342, Section 354, Section 328, Section 120(b), Section 376D, Section 228A - Punishment for rape - Punishment for wrongful confinement - Assault or criminal force to woman with intent to outrage her modesty - Causing hurt by means of poison, etc., with intent to commit an offence - Concealing design to commit offence punishable with imprisonment - Intercourse by any member of the management or staff of a hospital with any women in that hospital - Disclosure of identity of the victim of certain offence, etc

Citation : (2017) 04 GUJ CK 0132

Hon'ble Judges : J.B.Pardiwala

Bench : Single Bench

Advocate : BHARAT B NAIK, MEHUL H RATHOD, MITESH AMIN

Judgement

1. By this writ application under Article 226 of the Constitution of India, the writ applicant, a victim of rape, has prayed for the following reliefs: "10(A) Yours Lordships may be pleased to issue a writ of mandamus or any other appropriate

writ, order or direction in the nature of mandamus directing the respondent no.1 to set up the Special Investigation Team chaired by a Lady Police Officer of the rank of Inspector General or Dy. Inspector General who is serving outside the Kachchh District and manned by such officers who are serving outside the Kachchh District for investigation of the offence in pursuance of the FIR;

OR IN THE ALTERNATIVE

(B) Your Lordships may be pleased to issue an appropriate writ, order or direction, directing the respondents to transfer the investigation to other investigating agency viz. CID, (Crime) led by a female investigating officer and/or to the Centre Bureau of Investigation, Gandhinagar with a further direction to submit regular reports of progress in the investigation to this Hon"ble Court.

(C) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus directing the respondent no.1 to register the FIR against the persons who have disclose the identity of the petitioner in the press conferences and against the persons who are present in the said press conferences;

(D) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus directing the respondents to register FIR against the persons who are pressurizing / threatening the petitioner and her family members for destroying the case in pursuance of FIR by not giving correct information to the investigating officer.

(E) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or directing in the nature of mandamus in the nature of mandamus directing the respondent no.4 immediately to carry out the interrogation of Ms. Payal of Nalia and of Mr. Atul Thakkar of Bhuj on the basis of the information provided by the informant to the investigating officer and with further direction to initiate proceedings for their arrest and further directed to submit report to this Hon"ble Court;

(F) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or directing in the nature of mandamus directing the respondent no.1 to cause departmental inquiry against the officer of respondent no.2 to 4 for not obeying the mandatory provisions of Section 157(1) of Cr.P.C. and for registering the FIR late with a direction to take appropriate disciplinary proceedings against the arraying officers;

(G) During pendency and final hearing of this petition Your Lordships may be pleased to direct the respondent authorities to submit their action taken report before this Hon"ble Court for passing further interim directions;

(H) Your Lordships may be pleased to pass such other and further order in the interest of justice which may be deed fit to this Hon"ble Court."

2. Let me preface my judgment with a recent pronouncement of the Supreme

Court in the case of Dharam Pal vs. State of Haryana and others [Criminal Appeal No.85 of 2016 decided on 29th January 2016]. His Lordship Justice Dipak Mishra observed as under: "2. Cry for fair trial by the accused as well as by the victim sometimes remains in the singular and individualistic realm, may be due to the perception gatherable from the facts that there is an attempt to contest on the plinth of fairness being provoked by some kind of vengeance or singularity of "affected purpose"; but, irrefutably a pronounced and pregnant one, there are occasions when the individual cry is not guided by any kind of revengeful attitude or anger or venom, but by the distressing disappointment faced by the grieved person in getting his voice heard in proper perspective by the authorities who are in charge of conducting investigation and the frustration of a victim gets more aggravated when he is impecunious, and mentally shattered owing to the situation he is in and thereby knows not where to go, the anguish takes the character of collective agony. When the investigation, as perceived by him, is nothing but an apology for the same and mirrors before him the world of disillusionment that gives rise to the scuffle between the majesty and sanctity of law on one hand and its abuses on the other, he is constrained to seek intervention of the superior courts putting forth a case that his cry is not motivated but an expression of collective mortification and the intention is that justice should not be attenuated.

3. Justice, which is "truth in action" and "the firm and continuous desire to render to everyone which in his due" becomes a mirage for the victim and being perturbed he knocks at the doors of the High Court under Article 226 of the Constitution alleging that principle of fair and proper investigation has been comatosed by the investigating agency, for the said agency has crucified the concept of faith in the investigation which is expected to maintain loyalty to law and sustain fidelity to its purpose. In the case at hand, the assertions made with immense anguish gave rise to the question before the High Court whether some progress in trial would act as a remora in the dispensation of justice and the situation should be allowed to remain as it is so that an organic disorder is allowed to creep in and corrode and create a culdesac in administration of justice. The further question posed whether the nonapproach to the court prior to the stage of commencement of trial would be a peccadillo so as to usher in an absolutely indifferent, unconcerned and, in a way, biased investigation to rule and in the ultimate eventuate lead to guillotining of justice. The High Court having negatived the stand put forth by the appellant, the husband of the deceased, he has approached this Court by way of special leave.

8. The issue that arises for consideration is whether such a situation calls for issuance of direction for transfer of the investigation to the CBI. The High Court has declined to so direct as trial has commenced and some witnesses have been examined. The High Court has gone by the principle of "stage". When the matter was listed on 18.09.2015, this Court had directed a copy of the petition to be served on Mr. P.K. Dey, learned counsel who ordinarily appears for the CBI. The stand of the CBI is that the case does not fall within the guidelines laid down by

this Court in *State of West Bengal & others v. Committee for Protection of Democratic Rights, West Bengal and others*[(2010) 3 SCC 571].

9. Learned counsel for the State has supported the order passed by the High Court and also emphasized that regard being had to the stage of the trial, there is no need for directing for investigation by another agency.

10. First, we intend to deal with the stand of the CBI and the principles laid down in *Committee for Protection of Democratic Rights (supra)*. In the said case, the Constitution Bench, after examining the rival contentions in the context of the constitutional scheme, recorded the following conclusions:"

(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.

(vi) If in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, the Court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the Court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State police, the Court can also exercise its constitutional power of judicial review and direct CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts. Therefore, [pic]exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure." [emphasis added]

11. After recording the conclusions, the Constitution Bench added a note of caution which we may profitably reproduce:"

Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain selfimposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must

be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations." [underlying is ours]

14. In the context, we may profitably refer to a twoJudge Bench decision in *Narmada Bai v. State of Gujarat and others* [(2011) 5 SCC 79]. The Court, in the factual matrix of the case, has emphasized that if the majesty of the rule of law is to be upheld and if it is to be ensured that the guilty are punished in accordance with law notwithstanding their status and authority which they might have enjoyed, it is desirable to entrust the investigation to CBI.

15. A threeJudge Bench in *K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai and others* [(2013) 12 SCC 480] reiterating the said principle stated that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instill confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. The Court, after referring to earlier decisions, has laid down as follows:"

In view of the above, the law can be summarised to the effect that the Court could exercise its constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."

20. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.

21. We may further elucidate. The power to order fresh, denovo or

reinvestigation being vested with the Constitutional Courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that Sun rises and Sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the "faith" in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a Constitutional Court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "id est fixe" but in our view the imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier facts are selfevident and the grieved protagonist, a person belonging to the lower strata. He should not harbor the feeling that he is an "orphan under law".

3. Article 21 of the Constitution of India guarantees fair trial. A fair trial is impossible if there is no fair investigation. In order to be a fair investigation, the investigation must be conducted thoroughly, without bias or prejudice, without any ulterior motive and every fact, surfacing during the course of investigation, which may have a bearing on the outcome of the investigation and, eventually, on the trial, must be recorded contemporaneously by the Investigating Officer at the time of investigation. A manipulated investigation or an investigation, which is motivated, cannot lead to a fair trial. Necessary, therefore, it is that the Courts are vigilant, for, it is as much the duty of the Court commencing from the level of the Judicial Magistrate to ensure that an investigation conducted is proper and fair as it is the duty of the Investigating Officer to ensure that an investigation conducted is proper and fair. A fair investigation would include a complete investigation. A complete investigation would mean an investigation, which looks into all the aspects of an accusation, be it in favour of the accused or against him.

4. Article 21, undoubtedly, vests in every accused the right to demand a fair trial. This right, which is fundamental in nature, casts a corresponding duty, on the

part of the State, to ensure a fair trial. If the State is to ensure a fair trial, it must ensure a fair investigation. Logically extended, this would mean that every victim of offence has the right to demand a fair trial meaning thereby that he or she has the right to demand that the State discharges its Constitutional obligation to conduct a fair investigation so that the investigation culminates into fair trial. The State has, therefore, the duty to ensure that every investigation, conducted by its chosen agency, is not motivated, reckless and that the Investigating Officer acts in due obedience to law. It is only when the State ensures that the investigation is fair, can it (the State) be able to say, when questioned, that the trial conducted was a fair trial. Article 21, therefore, does not vest in only an accused the right to demand fair trial, but it also vests an equally important right, fundamental in nature, in the victim, to demand a fair trial. Article 21 does not, thus, confer fundamental right on the accused alone, but it also confers, on the victim of an offence, the right, fundamental in nature, to demand a fair trial. When the police registers a case, the State assumes the responsibility of conducting an investigation. Having assumed the responsibility of investigating the truth or veracity of the allegations, which the police receive, the State cannot act, nor can its Investigating agency act, without a sense of impartiality. It is not merely a trial, which has to be impartial. No less important it is that the investigation, too, is impartial. Fairness of trial will carry with it the fairness of investigation and fairness of investigation will carry with it the impartiality in investigation, besides the investigation being efficient, unbiased, not aimed at helping either the prosecution or the defence. In short, an investigation must not suffer from any ulterior motive or hidden agenda to either help a person or harm a person. This is the principle, which Article 21 of the Constitution of India, read with Article 14 thereof, enshrines, when we say that our Constitution guarantees fair trial.

5. The alleged violation of the above stated principles is at the heart of the controversy in the present writ application.

6. The case put up by the writ applicant in her own words is as under: "4.1 The petitioner submits that she is an unfortunate girl who is victim of repetitive gang rape and other offences at the hands of the highly influential persons who are running organized sex racket by trapping and blackmailing the young girls mostly coming from poor families.

4.2 The petitioner submits that as per her information there are about 30 to 35 other young girls, who are also victim of said organized sex racket run by the accused and others.

4.3 The petitioner submits that, the modus operandi of the accused persons are very well organized. It is submitted that initially the young girls mostly coming from poor and needy families are targeted. Thereafter, such girls are lured tempted to have sexual relations with them. If girl doesn't volunteer then they are being raped linked petitioner. It is submitted that, in most of the cases sexual acts are videographed and then such girls are threatened and blackmailed to

make them as part of this organized sex racket. It is submitted that all those girls are afraid of coming out openly against accused and others because of their threat and the influential position. It is submitted that, in the instant case, the petitioner has shown courage and lodged criminal complaint and the respondent authorities are adopting eye wash technique in the name of investigation to demoralized the petitioner. It is submitted that, if fair and impartial investigation is carried out then many other offenders can be caught and many innocent girls lives can be saved.

4.4 The petitioner submits that her misery starts from her childhood. It is submitted that her parents took divorce, when she was of two years of age and her custody was with her mother. It is submitted that her mother remarried to one Hemant Khimji and all were residing at Nalasopara. It is submitted that relations between the petitioner and her stepfather was strenuous and the family was facing financial crunch. It is submitted that, the mother of petitioner got her married to one Tejasbhai at early age. Thereafter, the petitioner's mother and stepfather shifted to Kachchh. It is submitted that due to some family disputes with the inlaws, the petitioner had to leave her matrimonial house and went to Nalia and started residing with her mother somewhere in last quarter of 2015.

4.5 Petitioner submits that, at Nalia, the petitioner was facing hostile attitude from the family and also facing severe financial crunch. It is submitted that, for livelihood the petitioner was in search of some job and one of the accused Babahia gave reference of another accused Shantibhai and said Shantibhai gave job to the petitioner at Bharat Gas Agency at Nalia. It is submitted that once the petitioner was in need of money and hence, she requested said Shantibhai for giving her advance from salary. It is submitted that said Shantibhai told her to collect the amount from his residence and accordingly, the petitioner went at the given address for collecting advance amount. It is submitted that, said Shantibhai gave her intoxicated cold drink and upon drinking said cold drink, the petitioner immediately lost senses and became incapable of resisting to any force. It is submitted that by taking undue advantage of petitioner's incapability to resist said Shantibhai and other two persons gang raped the petitioner and also videographed the act. The petitioner was then threatened of viraling the video to her husband and others. The petitioner was also threatened of involving her into the false cases at the hands of the police and to kill her younger brother and to ruin family completely by their money and muscles power. It is submitted that, the petitioner was completely in frightened condition and could not disclose anything about the incident to anyone.

4.6 The petitioner submits that thereafter, time and again the accused persons were calling the petitioner under the threat of viraling the video and ruining the family and compel her to have sex with themselves and other influential persons, mostly from political circle. It is submitted that the petitioner was always kept under constant threat to succumbed to their illegal demand of sex. Such incidence continued for about period of 1 year.

4.7 The petitioner submits that on one hand she was being victimized by accused and other unknown persons to who petitioner can identify if shown to her and on other hand she was facing hostile atmosphere from her family at Kutchh. Under the circumstances, compelled her to marry with one Kalpeshbhai Momaya aged about 31 years (double the age of the petitioner) against her wish. The said marriage was resulted into divorce only after marriage life of two days and as per the practice prevailing in the community the divorced was also executed between the parties on 14.02.2016. It is submitted that, the accused persons and their associates now prompted said Kamleshbhai to register a criminal complaint against the petitioner and to malign her publicly, petitioner craved leave to reply and refer upon the same at the time of hearing of this petition.

4.8 The petitioner submits that during this period she was constantly trying to reconcile with her first husband Tejasbhai. It is submitted that the relation with her husband Tejasbhai were sorted out and both of them have started residing together. It is submitted that even at that point of time, the accused persons are constantly contacting the petitioner telephonically and threatening her for their illegal demands and were frequently calling her to Bhuj. The petitioner had no option but to succumb to their demand which made the life of the petitioner unbearably miserable and therefore, the petitioner has thought of committing suicide and she wrote suicide note addressing to her father which came to the notice of husband of the petitioner and after knowing everything the husband has supported her and gave courage to file the complaint. It is submitted that such positive attitude of the husband changed the life of the petitioner and she made up her mind to file complaint.

4.9 The petitioner submits that, the petitioner and her husband came to Bhuj somewhere in October/November, 2016 and tried to give complaint to the Naliya Police Station, but the police authority did not register the same and the petitioner was sent pillar to post and finally, on 12.01.2017 the petitioner gave application in writing to the respondent no.3 disclosing the commissioning of the offences, but for the reasons best known to the respondent no.3, no steps were initiated for registering the same as FIR. A copy of application dated 12.01.2017 is enclosed herewith and marked as AnnexureA to this petition.

4.10 The petitioner submits that after filing of the said application, the life of the petitioner became more miserable as the contents of this application were leaked to the accused. It is submitted that, petitioner was constantly tracked and pressurized by the accused and others to destroy the case and not to proceed further with the application.

4.11 The petitioner submits that under the circumstances, she gave copy of complaint to the DSP, Kutchh and to DIG, Border Range, Kutchh on 18.1.2017. It is further submitted that only thereafter, on 19.01.2017 the respondent no.3 inwarded the application dated 12.01.2017. Copies of the application dated 12.01.2017 submitted to the DSP and DIG on 18.01.2017 are enclosed herewith and marked as AnnexureB colly to this petition.

4.12 The petitioner submits that, the respondent nos.2 and 3 gave application in writing of the commissioning the offence of gangrape and organized sex racket run by highly influential persons, but the respondent nos.2 and 3 for the reasons best known to them did not thought it fit to register the same as FIR nor thought is fit to commence the investigation forthwith. It is not a case of mere lethargic attitude of the respondent nos.2 and 3 but the systematic technique of delaying the registration of FIR so as to protect their political bosses and to grant them time to demoralized the petitioner from proceeding further in respect of application and for destroying the evidences.

4.13 The petitioner submits that after inwarding the application on 19.01.2017 the Nalia Police Authority telephonically contacted the petitioner and called her to come to police station for recording her statement on 22.01.2017, 23.01.2017, 24.01.2017, 25.01.2017. It is submitted that except one day i.e. 25.01.2017 no female police officer / constable was kept present at the time of recording statement. It is submitted that on all those dates the petitioner and her husband were detained morning to evening and treated like criminals. Not only these but under the guise of recording statement, very odd and indecent questions were put to the petitioner. However, the petitioner gave all and every minute details related to the incidents and also stated three unknown persons.

4.14 The petitioner submits that, calling of victim of rape to the police station is in clear violation of proviso of Section 157(1) of Cr.P.C. It is submitted that, such attitude and acts of Police is a clear case of indirectly demoralizing the petitioner so as to protect the skin of wrong doers who are highly influential persons.

4.15 The petitioner submits that, finally, on 25.01.2017 (i.e. after period of 13 days) the FIR was registered wherein name of Ms. Payal of Naliya and three unidentified persons are not shown as accused in the FIR. It is submitted that, though Ms. Payal is specifically named in the application dated 12.01.2017. Moreover, at the time of recording further statement, during 22.01.2017 to 25.01.2017 the petitioner gave all the details about role played Ms. Payal and other three unidentified persons but, in the FIR they are not shown as accused. A copy of FIR is enclosed herewith and marked as AnnexureC to this petition.

4.16 The petitioner submits that for reasons best known to the respondents in the FIR Section 376D of the IPC was not applied though since beginning it is a clear case of gang rape. However, on 01.02.2017, the report was submitted to the Ld. Magistrate, to add section 376D into the FIR. Copy of the report dated 01.02.2017 is enclosed herewith and marked as AnnexureD to this petition.

4.17 The petitioner submits that even after filing of the FIR, neither serious investigation was commenced nor any accused is arrested / interrogated till 06.02.2017. It is submitted that as there was much hue and cry in the media about the inaction of the police authorities and only thereafter, some of the accused were arrested on 06.02.2017 and 07.02.2017. It is pertinent to note that, the main accused were still neither interrogated nor arrested.

4.18 The petitioner submits that, on 08.02.2017 the P.S.I., LCB, BhujKutchh as a member of Special Investigation Team filed remand application wherein the respondent no.4 was shown as Chairperson of SIT and that said SIT is created by the respondent no.3 and the investigation is taken over by the SIT w.e.f. 29.01.2017. It is submitted that, the creation of SIT is nothing but an eye wash technique adopted by the respondent no.2 to show that the fair and impartial investigation is going on. The doubt of the petitioner is supported by the following facts which are illustrative,

Atleast from 18.01.2017 the respondent no.2 had a knowledge of the incident but he has not issued any direction to the respondent no.2 or any other officer to register the same as FIR or to commence investigation forthwith under Section 154(3) of the Cr.P.C.

No direction was given for showing name of Ms. Payal of Naliya as accused, though she was specifically named in application.

No steps were initiated for registering FIR for the offences punishable under Section 228(A) of I.P.C. against the persons who have disclosed the clear identity of the victim petitioner in the press conferences.

In spite of representation of the petitioner no steps are taken to register the complaint against the persons who are pressurizing the petitioner for destroying the case.

4.19 The petitioner submits that, during the investigation she gave full details about Ms. Payal of Naliya and other three unidentified persons but neither they were added as accused in the FIR nor any investigation is carried out in that direction.

4.20 The petitioner submits that, after some time she was given a blank identify card of BJP's workshop with an instruction to the petitioner to fill up her name and other details in the said card and to affix her photograph. It is submitted that, when the petitioner was ordered to go to some hotel for the purpose she had to show that card in the Hotel to a particular person. It is submitted that, on the basis of the said card the petitioner was sent to a particular room without making any entries at the reception. It is submitted that, initially the photocopy of said card was taken by the police and leak the same. Petitioner crave leave to refer and rely upon the photocopy of the said card at the time of hearing of this petition as original identity card is given to the police during investigation.

4.21 The petitioner submits that, the police Authority initially taken photocopy of the identity card from the petitioner (subsequently original is also collected as muddamal). It is submitted that, the photocopy of the said card was not given to anyone by the petitioner except the police authority, shockingly the photocopy of said identity card has reached to Shri Keshubhai Patel, the President of District Unit of BJP. It is submitted that, the said Shri Keshubhai Patel, President of District Unit of BJP, has held press conference on 09.02.2017 wherein many

political leaders and the 4 MLAs" were present. It is submitted that in presence of all, said Keshubhai disclosed the identity of the petitioner by showing the photocopy of identity card to the media personnel. Copy of newspaper cutting of the said press conference is enclosed herewith and marked as AnnexureE to this petition.

4.22 The petitioner submits that, leakage of photocopy of identity card to the President of District Unit of BJP speaks voluminous about the collusion of the police authority with their political bosses. It seems tht, the entire machineries are functioning for protecting the skin of political giants at the cost of protecting citizen by way of fair and impartial investigation.

4.23 The petitioner submits that disclosing the identity of a victim girl of the rape / gang rape is an offence punishable u/s. 228(A) of IPC, inspite of that the police authority did not register any FIR against the said Keshubhai and other political leaders who were present in the said press conference. It is submitted that unless such FIR is registered and investigated, the truth will never come out as to how the identity card of the victim has reached to those political leaders. It is submitted that the said disclosure of identity added miseries to the victim in the society, in the family and wherever she was going. It is submitted that, disclosure of an identity of the victim girl is an offence was clearly brought to the notice of the political leaders who have hold the conference but without carrying for same petitioner's identity was disclosed. It is submitted that, till date no complaint is registered by the police, which clearly established that, there are no chances of fair and impartial investigation by the respondent Nos.2, 3 and 4.

4.24 The petitioner submits that another glaring example of pressurizing and demoralizing the petitioner is that Shri Kamlesh Momaya with whom the petitioner was compelled to marry and subsequently divorced has suddenly wake up for no reason. It is submitted that, his Advocate Shri S.T. Patel (who is also an Advocate for some of the accused in the present case) has also held press conference and disclosed the further identity of the petitioner, but no FIR is registered for the offenens punishable under Section 228(A) of the I.P.C. against the Advocate Shri S.T. Patel or Shri Kamlesh Momaya. Copies of the news of press conference held by Shri S.T. Patel is enclosed herewith and marked as AnnexureF to this petition.

4.25 The petitioner submits that, over and above this said Kamlesh Momaya has filed two criminal complaint against the petitioner being Criminal Inquiry No.6 of 2017 on 20.02.2017 to the J.M.F.C., Naliya for the offences under Sections 420, 406, 419, 384, 504 and 120(B) of IPC and thereafter on 21.02.2017 another Criminal Inquiry No.7 of 2017 was given. It is submitted that, in both the Criminal Inquiry Ld. J.M.F.C., Naliya ordered to inquire under Section 156(3) of Cr.P.C."

7. In the aforesaid context, the writ applicant lodged a First Information Report registered with the Naliya Police Station being C.R. No.I3 of 2017 dated 25th July

2017 for the offence punishable under Sections 354, 376, 365, 328, 342 and 120B of the Indian Penal Code. At a later stage, vide report dated 1st February 2017, Section 376D of the Indian Penal Code came to be added.

8. Mr. Bharat B. Naik, the learned senior counsel assisted by Mr. Mehul Rathod, the learned counsel appearing for the writ applicant submitted that the manner in which the investigation has proceeded so far speaks volumes about political interference as many political heads are involved in the matter and many other names are likely to surface, if the investigation is carried out in a fair and transparent manner. Mr. Naik submits that the writ applicant is a victim of an organised sex racket. In such circumstances, the State was expected to act promptly and with all seriousness.

9. The learned senior counsel submits that the inaction on the part of the Investigating Agency, till this date, in not registering an F.I.R. for the offence punishable under Section 228A of the Indian Penal Code by itself is a pointer that there is a pressure on the Investigating Agency. Mr. Naik, elaborating his submissions, submitted that on 9th February 2017, the President of District Unit of B.J.P. namely, Keshubhai Patel convened a Press conference presided over by four members of the Legislative Assembly and many other political leaders, and in the said Press conference, Keshubhai Patel disclosed the identity of the writ applicant by showing photocopy of the Identity Card of the victim to the media. According to Mr. Naik, the Identity Card was issued by the District Unit of B.J.P. The issue of such Identity Card was also a part of the conspiracy, as on the strength of such Card, the victim used to get entry into many government premises without any question. The accused persons ravished the victim time to time at such different places at Kachchh.

10. Mr. Naik submits that the victim filed an application in this regard dated 9th March 2017 and prayed that an appropriate action be taken against all the persons responsible for disclosing her identity. Having realised the consequences of the same, an enormous pressure was exerted on the victim to withdraw such complaint and succumbing to such pressure and threats, ultimately, she withdrew such complaint on 16th March 2017. Mr. Naik submits that on the very same day, i.e. on 9th March 2017, an F.I.R. should have been registered for the offence punishable under Section 228A of the Indian Penal Code and there was no need for the authority concerned to wait or carry out any preliminary inquiry having regard to the serious nature of the allegations.

11. Mr. Naik submits that so far eight persons have been arrested. One Vipul Thakkar supposed to be a prime accused and one lady known as Bhabhi are yet to be apprehended.

12. Mr. Naik submits that the victim is residing at Mumbai. She is being called to Gujarat for the purpose of investigation and is made to sit for the whole day at the police station without any substantial interrogation or investigation. Mr. Naik submits that the manner in which the State has dealt with this crime reflects on

the insensitiveness on the part of the Government towards a victim of rape and that too a part of a huge sex racket. Mr. Naik submits that the District Superintendent of Police, Kachchh has constituted a Special Investigation Team of three members. All the three police officers are from Kachchh. Mr. Naik submits that this is a fit case which should be transferred to the C.B.I. or the State C.I.D. (Crime). Mr. Naik submits that free and fair investigation is enshrined in Articles 14, 21 and 39A of the Constitution of India. It is the duty of the State to ensure that a citizen of the country should have the free and fair investigation and trial. The preamble and the constitution are compulsive and not facultative, in that free access to the form of justice is integral to the core right to equality, regarded as a basic feature of our Constitution. Mr. Naik submits that therefore, such a right is a constitutional right as well as a fundamental right. Such a right cannot be confined only to the accused, but also to the victim depending upon the facts of the case. Therefore, such a right is not only a constitutional right, but also a human right. In the procedure which comes in a way of a party in getting a fair trial would be in violation of Article 14 of the Constitution.

13. In such circumstances referred to above, Mr. Naik prays that there being merit in this writ application, the same be allowed and the investigation be transferred either to the C.B.I. or the State C.I.D. (Crime).

14. On the other hand, this writ application has been vehemently opposed by Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State. Mr. Amin submits that there is absolutely no basis for the apprehension expressed by the writ applicant that she would not get justice. Mr. Amin submits that the investigation is being conducted by a Special Investigation Team constituted by the Superintendent of Police, Kachchh and one of the members of the Team is a lady police officer. The State has taken up the investigation as a challenge and will see to it that not a single guilty person escape from the clutches of the law. Mr. Amin submits that till this date, eight persons have been arrested and all are in the judicial custody. All possible steps are being taken to know the identity of one Vipul Thakkar and a lady known as Bhabhi. According to Mr. Amin, the victim has not been able to satisfactorily give any information as regards these two persons so that they can be identified and nabbed. Mr. Amin seeks to rely upon the following averments made in the affidavit in reply filed on behalf of the State: "4 The petitioner herein original complainant has invoked extraordinary writ jurisdiction of this Hon"ble Court under Article 226 read with Article 21 of the Constitution of India and has substantially prayed for issuance of writ of mandamus or any other appropriate writ, order or directions directing respondent no.1 to set up a Special Investigation Team chaired by a Lady Police Officer of the rank of Inspector General or Deputy Inspector General, who is serving outside the Kachchh District and manned by such officers who are serving outside the Kachchh District for the investigation of the offence in pursuance of the FIT. The petitioner has alternatively prayed for directions directing respondent to transfer the investigation to other investigating agency

viz. CID (Crime) led by a female investigating officer and/or to the Centre Bureau of Investigation, Gandhinagar with a further direction to submit reports of progress in the investigation to this Hon"ble Court. The petitioner has also prayed for direction directing the respondent No.1 to register the FIR against the persons who have disclosed the identity of the petitioner in the press conference and against the persons who are present in the said press conference. The petitioner has further prayed for directions directing respondents to register FIR against the persons who are pressurizing / threatening the petitioner and her family members for destroying the case in pursuance of FIR by not giving correct information to the investigating officer. The petitioner has also prayed for directions directing the respondent no.4 to immediately carry out the interrogation of Ms. Payal of Naliya and of Mr. Atul Thakkar of Bhuj on the basis of information provided by her to the investigating officer and with further direction to initiate proceedings for their arrest and further direction to submit report to this Hon"ble Court. The petitioner has further prayed for directions directing respondent no.1 to initiate departmental inquiry against the officer of respondent no.2 to 4 for not obeying mandatory provisions of section 157(1) of Cr.P.C. and for registering the FIR with a direction to take appropriate disciplinary proceedings against the erring officers. The petitioner has also prayed for interim relief to direct the respondent authorities to submit their action taken report before this Hon"ble Court for passing further interim directions.

5. At the outset, I strongly deny such and every contentions, allegations and averments made by the petitioner against the respondents. That initially pursuant to the registration of the FIR bearing ICR No.03/2017 registered with the Naliya Police Station for the alleged offences under Section 376, 354, 328, 342, 120(b) of the Indian Penal Code, the investigation was undertaken by the Police Sub Inspector of Naliya Police Station. However, thereafter the investigation was done by the Special Investigating Team so constituted by the Superintendent of Police, West Kutch Bhuj and the investigation was done under the supervision of the Sub Divisional Police Officer, Nakhatrana Division (A Dy. S.P. Rank officer) Kutch. That during pendency of this petition, on 16.03.2017, a notification is issued by the State Government thereby Constituting Commission of inquiry for the purpose of inquiring above incidents and the State has further resolved to appoint the said commission of inquiry to be headed by retired Judge of High Court of Gujarat. Here with annexed and marked as Annexure R1 is the copy of the said notification dated 16.03.2017 constituting Commission of Inquiry. In view of this subsequent development, I humbly say and submit that the State Government is taking the issue of the petitioner seriously and assures that the real culprits would not be spared. Now so far as, various contentions, allegations and averments so made by the petitioner against respondents are concerned, I may briefly reply which is summarized as under:

5.1 So far as allegations made by the petitioner against the respondents in para 4.9 of the memo of the petition that though the petitioner with her husband came to Bhuj in October / November, 2016 the police authority did not register

the same and set her pillar to post and finally her complaint was registered on 12.01.2017, is incorrect and I strongly deny the same. I humbly say and submit that no application was received by the Naliya Police Station on 12.01.2017, the application was first received on 19.01.2017 and it is the application which bears the date as 12.01.2017. In fact, the victim had personally remained present on 19.01.2017 and tendered written application and had gone away. Again no such grievance is made by the petitioner in her written complaint dated 12.01.2017 which was first time received by the Naliya Police Station. In fact thereafter, the further statement of the victim lady has been recorded on 27.01.2017 where she has not made such grievance nor has she made such grievance when her statement under section 164 of Cr.P.C. was recorded before the Learned Judicial Magistrate First Class, at Naliya. Even thereafter her statements have been recorded on 01.02.2017, 03.02.2017, 13.02.2017 and 18.02.2017. I further humbly say and submit that prompt action have been taken by the investigating officer upon registration of FIR in as much as that her statement was recorded under section 161 of the Code of Criminal Procedure and thereafter her statement was also recorded before the Learned Judicial Magistrate First Class at Naliya under section 164 of Cr.P.C. and she was also taken for Medical examination.

5.2 So far as allegations made by the petitioner in para 4.12 regarding organized sex racket as well as prayer of registering the FIR about same is concerned, I strongly deny that respondent no.2 and 3 are delaying the registration of FIR so as to protect their political bosses and are helping them to destroy evidences. I humbly say and submit that pursuant to the content of the nature of allegations made in the FIR as well as the facts narrated in the statement of the victim lady, the investigating officers have looked into that allegations in as much as that 3 different women / girls having name "Payal" are interrogated. Even one lady addressed as "Bhabhi" is also interrogated. That investigating officer has visited Lohana Bhavan, Bhuj where persons attached to the same are interrogated and other acquainted persons are also interrogated. That no material for registering FIR in respect of same has come up forth till date, however, investigating is still going on and if any such material is found then the investigating officer is bound to look into the same. I further humbly say and submit that as per description of girl named "Payal" given by the victim, her description has been prepared and same details have been uploaded on the website of West Kutch Bhuj District Police but till date no response has been received and in such circumstances, the identity of so called "Payal" has remained unsolved. It may kindly be appreciated that the investigating officer has tried to gather further details about the descriptions of said "Payal" as well as one "Vipul Thakkar", by sending one woman PSI (who is member of the Special Investigation Team) with an expert person who can prepare sketch to Mumbai at where this woman PSI contacted the petitioner - original complainant, however the petitioner - original complainant is not cooperating to give further details to prepare their sketches. I further humbly say and submit that help of even social media is taken in this

regard. It is further submitted that one person named Atul Thakkar is arraigned as accused in FIR. It is alleged against this accused that he runs sex racket at Lohana Bhavan, Bhuj. As submitted herein above on thorough investigation including various persons of Lohana Bhavan, Bhuj, it is still not substantiated vide any material that sex racket is being run at Lohana Bhavan, Bhuj. Neither identity or "Payal" is becoming clear, further more after this allegation made in the FIR by petitioner, identity of person figuring in FIR as "Bhabhi" has been found regarding allegation so made by the complainant of running sex racket at Lohana Bhavan, Bhuj. The investigating officer has further investigated in this direction by interrogating various women working at Lohana Bhavan, Bhuj. In this circumstance, though no substantial material has been found in respect of aforesaid allegations made in the FIR however, the investigating officer is still looking into these allegations and the investigation is in progress. I further say and submit that there are many platforms / forums being created by the State Government where a citizen can make his/her complaint like Pragati Setu, Taluka Swagat, Jilla Swagat, State Swagat, Mahila Lokdarbar, Abhayan Helpline 181, but no such complaint as alleged by the complainant has emerged on these platforms / forums and therefore, not found during the course of investigation.

In view of the aforesaid facts and circumstances, I humbly say and submit that the investigation is still going on and in the case of even single evidence having found by the investigating officer, the officer is duty bound to look into.

5.3 So far as allegations made by the petitioner in para 4.14 regarding name of Payal and three unidentified persons being not shown as accused in the Fir, I humbly say and submit that at the time of registration of FIR, the victim has mentioned about only one unidentified person and later on, during course of investigation, it became clear that his name is Ajit, who is shown as accused in the FIR. However, as and when the other unidentified persons will be identified, then based on material having collected, the police authority is bound to arraign such persons as accused.

5.4 So far as allegations made by the petitioner, regarding no steps having taken for registering FIR for offences punishable under section 228(A) of Indian Penal Code is concerned, I humbly say and submit that initially no application / complaint was received from the petitioner - original complainant with regard to same. However, on application dated 09.03.2017 was made by the petitioner to the "A" Division Police Station, Bhuj city which was subsequently withdrawn by the petitioner on 16.03.2017.

5.5 So far as allegations made by the petitioner in para 4.20 regarding details of the BJP's workshop card are concerned, I humbly say and submit that at the initial stage of registering of FIR, the victim is silent about such identity card and thereafter when her further statement was recorded on 27.01.2017 and thereafter when her statement under section 164 of Cr.P.C. was recorded on 01.02.2017, she remained silent on this aspect but somehow for the reasons best known to her, the reference to such card and its use is first time disclosed

by her post investigation on 03.02.2017. I strongly deny the allegation made by the petitioner in para 4.23. It may kindly be noted that the said card has been recovered from victim by drawing panchnama dated 13.02.2017 and the press conference was held on 09.02.2017, which clearly indicates that the said card was in possession of the victim petitioner - original complainant on the day of Press Conference. It may also be noted that in fact the application raising grievance about disclosure of identity of the petitioner was made on 09.03.2017 which was made after filing of this petition and before the investigating officer could have looked into the application, the petitioner had herself withdrawn the application on 16.03.2017.

5.6 So far as allegations made by the petitioner in para 4.24 against one person named Kalpesh Momaya is concerned, I humbly say and submit that registering FIR against Kalpesh Momaya is the part of the duty of the police and same is being performed in as much as that a complaint is filed before the Hon'ble Court wherein the Hon'ble Judicial Magistrate First Class Court, at Naliya has issued directions for investigation under section 156(1) of the Code of Criminal Procedure. I further humbly say and submit that police is duty bound to register the same as M. Case. So far as allegations made by the petitioner regarding Kalpesh Premchand Momaya, her first husband is concerned, I humbly say and submit that she had tendered a written complaint before the Jakhau Police station wherein she has alleged that the said person Kalpesh Momaya is trying to defame her in public by giving details to media. That the said complaint is investigated by the PSI of Jakhau Police Station and her statement has been recorded before the PSI Shri N.H. Jadeja on 15.03.2017. Another written application dated 13.02.2017 has also been given to the Kothara Police Station, by the victim alleging that she has been threatened and pressurized to drop the complaint Vashi saying that he approached to the parents of the victim and advised them to drop the complaint and to accept money. That her statement in respect of same has been recorded by the PSI of Kothara Police Station. That as per her say she has recorded the conversation between herself and her mother but till date she has not produced the C.D. containing the said conversation. That in respect of such allegations the mother of the victim was called upon and she has given her statement on 10.03.2017 wherein she has stated that no such conversation has taken place with Bharatbhai Vashi or with Jayantibhai Thakkar. I further humbly say and submit that investigation in respect of both these applications is still going on.

5.7 So far as allegations made by the petitioner in para 6.0(b) regarding lukewarm approach of Police and destruction of evidence is concerned, I humbly say and submit that so far as 17 mobile phones from 7 accused persons have been recovered and one SIM Card has also been recovered. The said mobile phone instruments and SIM card so recovered are sent to FSL and are subjected to examination and report is being analyzed. I further humbly say and submit that no material so far collected by the police has been destroyed.

5.8 So far as allegations made by the petitioner in para 6.0(e), more particularly regarding delay in registration of FIR is made, I humbly say and submit that written complaint was tendered however victim did not remain present or personally visit police station on 12.01.2017, for recording her statement. In fact her mobile phone CDR record indicates that she was not even present at Naliya as per location is revealed to be present at Bhuj.

5.9 I strongly deny the allegations being made by the petitioner in para 6.0(f) and (g) in as much as that she has referred to specific dates about such ill treatment whereas the police record indicates that she had remained present on 23.01.2017 and not any other dates.

5.10 So far as allegations made by the petitioner in para 6.0(h) regarding conversation being permitted to be heard by third person on telephone is concerned, I humbly say and submit that between 22.01.2017 to 25.01.2017, the statement of the victim and her husband had been recorded only on 23.01.2017, when they had remained present at Naliya Police Station. That one Police Officer ASI namely Virchandbhai Patani had recorded their statements. That one undated application has been received by the office Superintendent of Police, West KutchBhuj on 02.02.2017 and immediately inquiry was handed over to P.I. Mundra Police Station to look into the same. That upon preliminary inquiry being made by the P.I. Mundra Police Station so submitted indicates that so far as allegations regarding recording of statement of victim in absence of lady constable is found to be truthful otherwise all other allegations are found to be incorrect. I further humbly say and submit that in respect of the absence of lady constable at the time of recording victim's statement is concerned, the said Virchandbhai Patani has been issued a Show Cause Notice (SCN) to punish with Cash penalty of "One Basic Salary". I strongly deny that provision of section 157(1) of the Code of Criminal Procedure has been breached, in fact every investigation so far made, is done either in presence of lady police constable or lady officer or woman representative of NGO. Even when the medical examination of the victim was done, a lady head constable had been deputed with the victim.

5.11 So far as allegations made in para 6.0(k) regarding no inclusion of section 376(d) of the Indian Penal Code in FIR is concerned, I humbly say and submit that initially when the FIR was registered on 25.01.2017, the said section was not incorporated in the FIR however when the investigation was taken over from the P.S.I. D.M. Zala of Naliya Police Station by the officer of Special Investigation Team, the officer in charge of investigation, after considering the further statement of victim had reported to the Learned Judicial Magistrate First Class at Nalia vide report dated 01.02.2017 and therefore section 376(3) of IPC has been added. However, because of non inclusion of the said section at initial stage, has in no manner affected the investigation. So far as allegations made by the petitioner in para 6.0(q), more particularly regarding not conducting Test Identification Parade is concerned, I humbly say and submit that except for one,

all other accused persons are identified and as far as on unidentified disabled accused person is concerned, his identity is established through photograph as "Ajit".

5.12 So far as allegations made by the petitioner in para 6.0(r) regarding presence of Smt. Ankoliya is concerned, the same is natural as she is Chairman of State Woman Commission and in fact she had expressed her desire to meet the victim. Again presence of police at DSP office is bound to be there, on the contrary it suggest that the victim and her husband were given police protection. So far as statement of the husband of the victim before the media is concerned, the same was expressed by the husband of the victim on his own volition and nobody has completed him to make such statement.

6 Now I may briefly summarize the investigation done so far. I humbly say and submit that pursuant to the application which was received by the Superintendent of Police, West Kutch Bhuj specific directions were issued to the Police Sub Inspector, Naliya Police Station on 24.01.2017. That the FIR came to be registered on 25.01.2017 and the initial investigation was looked after by the Police Sub Inspector of Naliya Police Station. That considering the nature of allegations the Superintendent of Police, West KutchBhu had himself taken step to constitute SIT on 28.01.2017, which initially consisted of one Police Inspector of Local Crime Branch, West KutchBhuj District and two lady Police Sub Inspectors, one from Parole Furlough Squad and the other from Mahila Police Station, Bhuj. Thereafter, on 03.02.2017 three more Police Sub Inspectors of different Police Stations/Branch were allotted and on 10.02.2017 one Police Inspector cadre officer of District Traffic Branch was also allotted. Thereafter, even before filing of this petition, vide order dated 18.02.2017, the Additional Director General of Police (CID, Crime and Railways) pursuant to the instruction of Director General of Police, State of Gujarat had further constituted team of four senior Police officers viz. 1. Inspector General of Police, (Crime2), CID Crime, 2. Superintendent of Police (Administration), CID Crime, 3. Deputy Superintendent of Police, CID Crime Boarder Zone, KutchBhuj and 4. Detective Police Inspector, CID Crime, KutchBhuj to supervise and examine the progress and quality of the investigation. Here with annexed and marked as Annexure R2 is the copy of the order dated 18.02.2017 of the Additional Director General of Police (CID Crime and Railways). This supervisory team has further on various dates examined the material of the investigation and has also given various instructions with regard to further progress of investigation. Total 32 instructions given by this Supervisory team have been fully implemented. That the said supervisory team is taking keen interest in the progress of investigation and in maintaining the quality of investigation by devoting sufficient time.

That the members of the Special Investigation Team so constituted along with other Police Officers were sent in different directions in groups to arrest the accused persons and total 8 accused persons were arrested. The investigating officer had applied for remand of 8 accused persons and after considering the

nature of allegations, the Hon''ble Court was pleased to grant 14 days remand of 5 accused and 11 days remand of 3 accused. That the accused persons were interrogated. That as far as accused named Vipul Thakkar is concerned various steps have been taken by the investigating officer to arrest him. The investigating officer has interrogated 18 such persons having name of "Vipul Thakkar" even photograph of few such persons have been shown to the petitioner however his identity is still not detected. From the material collected so far which includes the instruction, elaboration of this accused given by the petitioner, identity of this accused is still not clearly emerging. The investigating officer is sincerely making all efforts to arrest the accused named "Vipul Thakkar" and investigation is still in progress in this direction. That accused so arrested, the investigating officer has undertaken necessary steps in order to send accused to LVA Test, SDS test, Narco test, Lie Detention Test, BEOSP test as well as psychological interrogation by the FSL office at Gandhinagar. I humbly say and submit that the application was preferred before the Learned Judicial Maistrate, First Class at Naliya seeking permission of the Hon''ble Court to conduct the aforesaid tests on the accused persons so far arrested. However, the accused persons had objected to performance of such tests and therefore, the learned Judicial Magistrate, First Class was pleased to reject said application. The Investigating officer had thereafter preferred revision application before the Learned Sessions Judge, at Bhuj, whereby, the learned Sessions Judge was pleased to confirm the order passed by the learned Judicial Magistrate, First Class, Naliya. I further say and submit that the Investigating Officer, is in process of filing writ petition before the Hon''ble High Court. The muddamal including 17 Mobile Phone instrument and SIM Card so recovered during investigation has been send to FSL at Gandhinagar and the result is still awaited. That panchnama of different scenes of crime so shown by the victim have been drawn and acquainted persons / witnesses" statements have been recorded. I further say and submit that till today the CDR of more than 265 mobile phone numbers have been analysed. More than 486 persons have been interrogated, out of which 195 persons have been interrogated to check whether the sex racket is bearing run at Lohana Samaj Bhuvan, Bhuj or by girl naming "Payal" of Naliya. Total 15 places have been raided to arrest all the accused. More than 49 panchnama have been drawn. That the victim and her husband have been contacted and during their stay in West Kutch district, necessary Police protection has been provided. Also whenever the victim and husband are at Mumbai, necessary arrangement for their protection is done by remaining in contact with Mumbai police.

In these facts and circumstances, I humbly say and submit that all necessary and precautions steps are being taken by the investigating officer during the course of investigation. I assured this Hon''ble Court that I am conducting the investigation best of my ability and all the members of the SIT are fully acquainted with each and every material and at present the investigation in progress and we all would make best efforts to collect material evidences as well as to do needful in accordance with law in order to bring the real culprits for trial.

I therefore humbly pray to the Hon''ble Court to pass appropriate orders taking into consideration subsequent development."

15. Mr. Amin, in such circumstances, submits that at this point of time, there is not at all to transfer the investigation, and probably, transfer at such a crucial stage may hamper the investigation and the accused persons might have advantage of the same, because now only about twenty days are left for the statutory provisions of ninety days to expire, and therefore, chargesheet will have to be filed.

16. In rejoinder to the aforesaid reply of the State, the writ applicant has stated as under: "5 Without prejudice to what is stated hereinabove, I say and submit that in the affidavit in reply, the respondent no.4 has avoided to deal with the important factual aspects and also kept cryptic silence on certain issues. Moreover, a distorted version of facts were placed before this Hon''ble Court as under:

(a) That, in paragraph No.5.1 of the reply, the respondent no.4 has denied the receipt of application dated 12.01.2017 by the Naliya Police Station on the same date and stated that the said application was received by Naliya Police Station on 19.1.2017, which bears the date as 12.1.2017.

I say and submit that on 12.01.2017 the application was submitted to the Naliya Police Station and the PSO has received the said application but did not put date of receipt on the said application. It is submitted that, the respondents are now taking undue advantage of not posting date of receipt on the acknowledge on the said application and submit that, the application was received first time on 19.01.2017. From the following facts it would be clear that the false statement is made before this Hon''ble Court in the affidavit in reply.

The FIR was registered on 25.01.2017 which bears the date at the bottom as 12.01.2017.

No denial was made by authority of Naliya Police Station.

As no actions were initiated by Naliya Police Station on 18.01.2017 the application was forwarded to office of DSP, Kutchh and DIG Boarder Range on 18.01.2017 and therefore the Naliya Police Station had to inward the application on 19.01.2017.

There was much hue and cry in the Media about non registering of FIR.

The respondent no.4 has taken over investigation vide order dated 28.01.2017 and no details were furnished as to what had happened during 19.01.2017 to 28.01.2017 by Naliya Police Station.

(b) At this stage, without admitting the correctness of the date of receipt of application, for the sake of argument, if the date of giving application of such a heinous crime is take as true at this stage, then also there is no explanation in the entire affidavit about delay of 7 days (i.e. from 19.01.2017 to 25.01.2017) in

registering FIR. The deponent of the affidavit has kept cryptic silence on such fatal delay.

(c) That it is specifically stated in the petition that the contents of application dated 12.01.2017 was leaked to the accused after the same was submitted to the Naliya Police Station, which added miseries to the petitioner as the accused have started pressurizing and harassing the petitioner for withdrawing the application and for destroying the important piece of evidence i.e. Video Clips, Mobile Phones, etc. as once mobile phone in which a video clips are captured is destroyed then by no means it can be retrieved. It is submitted that, no satisfactory explanation is given to such statement of petitioner.

(d) That on 18.1.2017, the complaint made to the DSP, KachchhBhuj i.e. respondent no.2 herein but no actions were initiated by him as envisaged under Section 154 of CrPC in such a serious nature of complaint. It is submitted that, such inaction would amount to disobeying the legal provisions knowingly that such inaction is likely to cause injury to the petitioner. Such inaction is offence under section 166 of IPC but no explanation is given by the respondent no.4 in affidavit in reply in this regard.

(e) That no explanation was rendered in the affidavit in reply for failure of statutory duty in not registering the FIR for the offence punishable u/s. 228A of the IPC which is cognizable offence against the persons who have disclosed the identity of the victim by calling press conference on 09.02.2017 though it was specifically brought to the notice of respondents.

However, in para 5.4 of the reply, it is stated that on 9.3.2017 (i.e. after issuance of notice by this Hon"ble Court) the petitioner has given application for registering the FIR for the said offences but the same was withdrawn by the petitioner on 16.3.2017. It may further be noted that on 16.3.2017, the petitioner was pressurized to withdraw the application when she has contacted "A" Division, Bhuj Police Station as instructed offence u/s. 228A is not compoundable offence u/s. 320 of CrPC either with the permission and without the permission of the competent court.

(f) That in respect of allegation about lady named Payal who is not named in the FIR though specific averments are made in the application dated 12.1.2017. In para No.5.2 of the reply, it is stated that three girls named Payal were interrogated, but no material for registering FIR came up. It is submitted that, for every small thing the petitioner was called at police station for hours together and she was never called for identification of lady called Payal. Such lapse on the part of investigating authority creates serious doubt about fair and impartial investigation.

(g) That, in the affidavit in reply, the respondent no.4 has stated that they have interrogated 18 such persons having name of "Vipul Thakkar" and also shown photographs of few such persons to the petitioner, but the identity of said "Vipul Thakkar" is still not detected.

6 Now I am dealing with the affidavit in reply on merits as under:

6.1 With reference to contents of para no.1 to 4 of the reply, I say and submit that the contentions are formal and hence, I do not deal with the same at this stage.

6.2 With reference to contents of para no.5 of the reply, I say and submit that on the plain reading of the application dated 12.1.2017 it becomes clear that since day one my complaint is of committing offence of gang rape (i.e. u/s. 376D of IPC) by influential persons. In spite of that, the respondent authority has failed to apply the said section at the initial stage and subsequently, the application was made (i.e. 01.02.2017) to the learned JMFC, Naliya, to add Section 376D to the FIR. Thus, from beginning the respondent authority was adopting lukewarm approach to discourage the petitioner.

6.3 With reference to the later part of contents of para no.5 of the reply, I say and submit that it is true that on 16.03.2017, the State Government has issued notification under the Commission of Inquiry Act, 1952, appointing a commission of Inquiry consisting of Hon''ble Justice A.L. Dave, a former Judge of this Hon''ble Court. However, I say and submit that the terms of reference of the commission is different. It is submitted that the terms of reference of the commission was of inquiring into various aspect of the incident of rape of a young woman of Kutch district and identifying lapses if any, on the part of the police or any other authority or person that contributed to the occurrence and to fix the responsibility for the lapses and the negligence on the part of the police or any other authority. It is submitted that the appointment of inquiry commission is for the purpose of State Government and does not affect the right of petitioner to get fair and impartial investigation.

6.4 With reference to contents of para no.5.1 of the reply, I reiterate that the application was given to the Naliya Police Station on 12.01.2017, but the recipient i.e. PSO, Naliya Police Station, has not put the date of receipt on the acknowledgment of the said application and now the respondents are taking undue advantage of the said situation and submitting before this Hon''ble Court that the application was received on 19.01.2017 for the first time. However, without admitting correctness of the date of receipt as stated in the reply, I say and submit that even if the application is received for the first time on 19th, then also the FIR of such a serious and heinous crime was registered on 25.01.2017. Thus, it is established fact that the respondent authorities have shown gross delay even in registering the FIR for reasons best known to them and no explanation was given for such delay in the reply. I further say and submit that on 18.01.2017, the DSP, Kutch, and DIG, Boarder Range, was informed about non registering FIR, and only thereafter the FIR was registered. However, I say and submit that even the DSP has not acted upon the application dated 18.01.2017 immediately and thereby committed breach of Section 154 of the CrPC.

6.5 With reference to contents of para no.5.2 of the reply, I say and submit that

the respondent has submitted that several girls named as "Payal", a lady called as "Bhabhi" and a person known as "Vipul Thakkar" were interrogated but, their identification are still remain undetected. I say and submitted that such statement in the reply are nothing but an eyewash technique adopted by the investigating officer to mislead the Hon"ble Court. I say that, for every small matter I was called to police station time and again and kept waiting hours together but at no point of time, the petitioner was called for identification parade of such persons for the reasons best known to them and no explanation was given for not carrying out identification parade.

6.6 With reference to contents of para no.5.3 of the reply, I say and submit that it is a well settled principle of law that the FIR is not a complete encyclopedia of all the facts related to offence. I say and submit that at the relevant point of time I was under tremendous social and mental pressure and under constant pressure and threats for not insisting for registering the FIR. I further say that, even at the time of recording statement also multiple questions were asked to me and due to my pathetic mental condition some facts might have been left out at some point of time but such left facts cannot be permitting to be used by the respondent authorities in denying fair and impartial investigation of my version of facts just because it was not disclosed in the FIR or earlier point of time.

6.7 With reference to contents of para no.5.4 of the reply, I say and submit that in the present petition, I prayed for issuing direction for registering the complaint against the persons who have disclosed by identity and who were present the press conference dated 09.02.2017 wherein my identity was disclosed. I say and submit that on 06.03.2017, this Hon"bel Court issued notice and as submitted before this Hon"ble Court, I gave an application on 09.03.2017 to Bhuj A Division City Police Station, for registering the complaint under Section 288(A) of IPC against the persons who have disclosed my identity in press conference. I say and submit that I was told that FIR would be registered and the copy would be given to me later on. It is submitted that on 16.03.2017, when I visited again to inquire about my FIR, I was pressurized by the officers present in the police station that the persons who have disclosed the identity were influential persons and all concerns have to face the dire consequences if the complaint would be registered against them and under such pressure to face the dire consequences in the event of registration of FIR, I had to give application that presently I am not interested in filing complaint. However, at this stage, I say and submit as under:

That, the police authority is under statutory obligation to register FIR of any offences no sooner the commission of offences are brought to their notice. Even the Police was to register the first information reply when it came to their notice from news paper on their own.

In the instant case, from 09.02.2017, it was within the knowledge of the authority that an offence under section 228(A) of IPC was committed by the MLAs and District President of BJP by holding Press Conference, but no complaint

is registered till date.

It is further submitted that the offence committed under section 228(A) of IPC is not compoundable under section 320 of the Code of Criminal Procedure.

In view of such provisions of law, the respondent authority cannot take shelter of my application dated 16.03.2017 which was given under compulsion and threat for not registering FIR against the offenders. A copy of my application dated 09.03.2017 is annexed herewith and marked as Annexure:RJI.

6.8 With reference to contents of para no.5.5 of the reply, I deny what is stated in this para. I reiterate that whatever questions were put to me, I gave honest reply to each question and always cooperated with the investigation. The fact of identity card was also disclosed before the Investigating Authority at much earlier point of time and the photocopy of identity card was also given as demanded, I say and submit that something is not recorded by the police or not taken original for investigation at the first instance, is not the fault of informant. Such submissions in the affidavit in reply makes my apprehensions strong that the investigating authority wants to save the skin of highly influential persons even at the cost of poor girls who are victim of organized sex racket. I reiterate that initially the photocopy of identity card was taken from me and the same was used by the political influential persons and MLAs in a press conference dated 09.02.2017 for disclosing my identity and only thereafter the police has asked for original from by drawing panchnama on 13.02.2017. Thus, I deny the contentions of the said paragraph. Even after seizing the identity card there is no investigation about that with local office of BJP till date and not a word is stated in affidavit.

6.9 With reference to contents of para no.5.6 of the reply, I deny the same and reiterate what is stated in the petition, more particularly in para no.4.24. It is submitted that I gave full details in my application dated 13.02.2017. I have also given proof of oral conversation which was recorded in my mobile. The entire conversation was listened by the investigating officer but at no point of time C.D. was demanded from me. I say and submit that my mother is also kept in constant threat and pressure and therefore, I cannot say in what circumstances she has given statement on 10.03.2017 as stated in the reply. However, I say and submit that no complaint is filed even in this regard even despite my repeated requests to the authorities. Thus, all the persons who are running the organized sex racket by victimizing young girls coming from poor families, the persons who have disclosed identity of the victim girl and the persons who are pressuring me and my family to settled the issue by accepting money are being protected best known to them and therefore also it is a fit case, wherein the Hon"ble Court may be pleased to issue directions as prayed for.

6.10 With reference to contents of para nos.5.7 to 5.9 of the reply, I deny the said contention and submit that sufficient time was given to the accused persons to destroy their mobile phones. I say and submit that once the mobile phone is

destroyed, then in no circumstances the video clips which are recorded in the particular mobile phones can be retrieved. I say and submit that as the State authority it is the prime duty of the police to register the FIR immediately and to commence investigation and to collect evidences without vesting any time so as to prevent the distraction of evidences. I say that, in the instant case, the FIR was registered late and even thereafter sufficient time was given to the accused for destroying material peace of evidence like Mobile Phone etc. Not only these but the contents of my application was leaked to the accused and I was illtreated time and again by calling in the police station and that too in absence of lady police officer.

6.11 With reference to contents of para no.5.10 of the reply, I reiterate what is stated in the memo of petition and more particularly para no.6(H). I further say and submit that in the said paragraph, at least, partly, the deponent has admitted that there there is a violation of Section 157(1) of IPC, but no complaint is filed for the same against such wrong doers. I further say and submit that there was many incidences that the respondent authorities have given me illtreatment and tried to shield the accused and even in the cases when the police officers have acted in violation of legal provisions. No steps were taken against such defaulting officers for not registering such complaints. I reiterate that there are many other young poor girls who are victims of this organized sex racket, but, considering my plight of facing odds from the State Authorities, they are afraid of coming out and therefore, this is a fit case that this Hon''ble Court may be pleased to allow this petition.

6.12 With reference to contents of para no.5.11 of the reply, I say and submit that the respondent has not applied Section 376D of IPC at the initial stage and now it is submitted before the Hon''ble Court that non inclusion of Section 376D at initial stage has in no manner affected the investigation. I deny this contention and submit to this Hon''ble Court that such attitude of the authorities speaks volumes about their attitude of shielding the wrong doers and therefore, this is a fit case that this Hon''ble Court may be pleased to allow this petition.

6.13 With reference to contents of para nos.5.12 to 5.13 of the reply, I say and submit that I deny the contentions and reiterate what is stated in the memo of petition and more particularly para 6(R). I say and submit that my husband was pressurized to give statement to the media that we are satisfied with the steps taken by the police."

17. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the investigation should be transferred.

18. The Gujarat Police Manual 1975 (Volume III), prescribing the powers and duties of the police, requires by Rule 2 of the first chapter that: "2. Prevention and investigation of crime.

By far the most important of the duties of a police officer is to obtain, to the best

of his ability, intelligence concerning a cognizable offence or designs to commit such offences, and to lay such information and to take such other steps consistent with law and with the orders of his superiors as shall be best calculated to bring offenders to justice or to prevent the commission of offences."

19. Detailed procedure regarding investigation prescribed in Chapter V of the Police Manual provides as under, as the first rule: "137. Investigation to be impartial and local

(1) Police inquiries should always be impartial. It is the duty of the police to do all it can to find out the truth. An investigating officer is to aim at discovering the actual facts and arresting the real offenders. He ought not prematurely to commit himself to any view of the facts for or against any person. He should consider carefully any evidence tendered to him on behalf of an accused person. He should not make up his mind on any point hastily but, keep, as far as possible, open mind to be influenced by evidence only."

20. Rule 170 of the Manual, which prescribes guidelines for the examination of witnesses, includes the instruction that witnesses should be interrogated minutely and thoroughly before their statements are reduced in writing. They shall, however, not be prevented by any caution or otherwise from making any statement which they may be disposed to make of their own free will. While prescribing the procedure for interrogation, it is made clear in black and white, that the investigation is but a search for the truth. Naturally, the investigator is a fact finder. His aim, however, is not merely to find out the truth but also to bring the culprit to book by collection of legal evidence. Classifying the witnesses, it is prescribed that the disinterested witnesses consists of persons who have neither to gain nor to lose anything from the result of investigation; devoid as they are of any personal motive or consideration for manipulating things, and hence, their evidence deserves the highest credence.

21. Rule 229 of the Police Manual clearly mandates that every investigation must be completed without unnecessary delay. It is the duty of subdivisional police officers to see that the investigations are promptly and vigorously carried out by officer incharge of police stations. In no case, an officer incharge of a police station should fail to make a final report within 14 days of submitting the First Information Report in a case, without satisfying the subdivisional police officer that there is sufficient cause for further delay; and in no case must the completion of investigation be delayed beyond one month from the date of First Information Report. A supplementary report may be afterwards sent in, when necessary. It is prescribed in Rule 240 of the Manual that the case diary should show how the case progresses during the course of investigation and must reflect the mind of the investigating officer.

22. Free and Fair Investigation and Trial is enshrined in Article 14, 21 and 39A of the Constitution of India. It is the duty of the state to ensure that every citizen of the country should have the free and fair investigation and trial. The preamble

and the constitution are compulsive and not facultative, in that free access to the form of justice is integral to the core right to equality, regarded as a basic feature of our Constitution. Therefore such a right is a constitutional right as well as a fundamental right. Such a right cannot be confined only to the accused but also to the victim depending upon the facts of the case. Therefore such a right is not only a constitutional right but also a human right. Any procedure which comes in a way of a party in getting a fair trial would in violation of Article 14 of the Constitution.

23. The Hon'ble Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* [(2004) 4 SCC 158] has observed as follows: "36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, allcomprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

24. Similarly in *Tashi Delek Gaming Solutions Ltd. v. State of Karnataka* [(2006) 1 SCC 442], the Hon'ble Apex Court has observed as follows: "37. If the agent was to be prosecuted for violation of the term of the notification, he could challenge the validity thereof. A fortiori, a quia timet application would also be maintainable. A person must be held to have access to justice if his right in any manner whether to carry on business is infringed or there is a threat to his liberty. Access to justice is a human right.

38. In *Dwarka Prasad v. B.D. Agarwal* [(2003) 6 SCC 230] this Court opined: (SCC pp.24546, para 38)

"A party cannot be made to suffer adversely either indirectly or directly by reason of an order passed by any court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Any

procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [see *Clark (Procurator Fiscal, Kirkcaldy) v. Kelly* [(2003) 1 All ER 1106(PC)]."

25. In *Nirmal Singh Kahlon v. State of Punjab* [(2009) 1 SCC 441], the Hon"ble Apex Court was pleased to observe that the right to fair investigation and trial is applicable to the accused as well as the victim and such a right to a victim is provided under Article 21 of the Constitution of India. The observation of the Hon"ble Apex Court is extracted hereunder: "28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a Central agency which has acquired specialisation in such cases."

26. In *Azija Begum v. State of Maharashtra* [(2012) 3 Supreme Court Cases 126], the Apex Court has held as follows: "13. The issue is akin to ensuring an equal access to justice. A fair and proper investigation is always conducive to the ends of justice and for establishing the rule of law and maintaining proper balance in law and order.

27. In *Subramanian Swamy v. CBI* [(2014) 8 Supreme Court Cases 682], the Apex Court has ruled that any investigation into crime should be fair and should not be tainted. It has been further held that Rule of Law is a facet of equality under Article 14 of the Constitution of India.

28. In *Dayal Singh v. State of Uttaranchal* [(2012) 8 SCC 263], the Supreme Court has held that the Court is bound to record any deliberate dereliction of duty, designed defective investigation, intentional acts of omission and commission.

29. Therefore, fairness in an action leading to upholding the rule of law is a sine qua non of a criminal investigation.

30. An investigator is the kingpin of the criminal justice delivery system. (See *Amitbhai Anilchandra Shah v. CBI*, (2013) 6 Supreme Court Cases 348).

31. A bias attributed on the part of the investigator may lead to a deception leading to injustice. A duty is imposed upon the investigator to give an impression that it has been done without an element of unfairness or ulterior

motive. He must dispel a possible suspicion to the genuineness of the investigation done. An attempt of an investigation officer is to make a genuine endeavour to bring out the truth.

32. Considering the same, the Apex Court in *Babubhai v. State of Gujarat* ((2010) 12 Supreme Court Cases 254) has held as follows: "32 The Investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth. (Vide *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, *Jamuna Chaudhary v. State of Bihar*, (1974) 3 SCC 774, SCC at p. 780, para 11 and *Mahmood v. State of U.P.* (1976) 1 SCC 542)"

33. Considering the duty of a investigator to conduct a proper investigation, the Apex Court in *Manohar Lal Sharma Vs. Principal Secretary and others* [(2014) 2 Supreme Court Cases 532], made its observation in the following paragraph. "A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and uninfluenced by external influences."

34. In the overall view of the matter and having regard to the materials on record, I am of the view that at this point of time, the investigation should not be transferred to the C.B.I. or to the State C.I.D. (Crime).

35. I expect the Special Investigation Team to complete the investigation in a fair, impartial and transparent manner without being influenced, in any manner, by any consideration and in the right direction. As noted above, so far eight persons have been arrested in connection with the crime. All those eight persons are in the judicial custody. The statutory period of ninety days will be over within next twenty days. By the end of the statutory time period, the Special Investigation Team will have to file the chargesheet. Even after the filing of the chargesheet, the Special Investigation Team can undertake the further investigation in accordance with law. The two to three instances, which have been highlighted by the learned senior counsel appearing for the writ applicant, no doubt, assume importance, but solely relying on those, I do not propose to disturb the investigation at this stage. In future, even after the filing of the chargesheet, if this Court finds the investigation to be tainted or perfunctory in any manner, then appropriate orders of further investigation through any other higher agency can be passed. There is no doubt that the High Court, in exercise of its powers under Article 226 of the Constitution of India, can issue appropriate directions at the instance of the victim, if the Court is convinced that the power

of investigation has been exercised by an Investigating Officer mala fide or that the investigation is not proceeding in the right direction or the Investigating Agency is under some sort of pressure. However, such power is to be exercised in the rarest of the rare case where a clear case of abuse of power and noncompliance with the provisions falling under Chapter XII of the Code is made out, requiring the interference of the High Court. In an appropriate case when the Court feels that the investigation by the Investigating Agency is not in the proper direction and in order to do complete justice in the case, it is open to this Court to hand over the investigation to the Investigating Agency like C.B.I. It cannot be said that the investigation, in the present case, is not proceeding in the right direction. As such no bias or any prejudice is attributed to the members of the Special Investigation Team. They are doing their best and I am sure that they will continue till the completion of the investigation and filing of the chargesheet. Nothing substantial or something shocking to the conscience of this Court has been pointed out, warranting interference at this stage. Of course, I propose to issue certain directions to take care of the apprehension expressed by the victim.

36. In the aforesaid context, let me look into the few decisions of the Supreme Court.

37. In *Divine Retreat Centre v. State of Kerala* [(2008) 3 SCC 542], the High Court had, exercising power under section 482 of Cr.P.C., directed investigation of a crime to be taken away from the investigating officer concerned and entrusted it to a special investigation team constituted by it, with a further direction to investigate into various other allegations levelled in an anonymous petition filed against an institution. Such proceeding before the High Court was initiated suo motu by the Court on the basis of an anonymous petition addressed to the Hon'ble Judge concerned. Neither had the anonymous petition nor the complaint made by the victim of the offence was directed against the investigating officer complaining of any bias or any attempt on his part to destroy the available evidence and it was in that context that the Apex Court observed that investigation of an offence is the field exclusively reserved for the police officers whose powers in that field are unfettered, so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions under Chapter XII of Cr.P.C. The Court hastened to add that the unfettered discretion did not mean any unaccountable or unlimited discretion. The power to investigate must be exercised strictly on the condition on which that power is granted by the Code itself. The High Court, in exercise of its inherent jurisdiction, cannot change the investigating officer in the midstream and appoint any agency of its own choice to investigate into a crime on whatsoever basis; and anonymous communication addressed to a named Hon'ble Judge could not be converted into suo motu proceedings for setting the law in motion. It is categorically observed: "40.Neither are the accused nor the complainant or informant entitled to chose their own investigating agency to investigate a crime in which they may be interested.

41. It is altogether a different matter that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an investigating officer mala fide. That power is to be exercised in the rarest of the rare case where a clear case of abuse of power and noncompliance with the provisions falling under Chapter XII of the Code is clearly made out, requiring interference of the High Court. But even in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code."

38. In *State of Punjab v. Davinder Pal Singh Bhullar* [2012 Cri.L.J. 1001], after conclusion of the trial and acquittal of three accused persons and 20 days after the dismissal of the appeal by the High Court, the High Court had again taken up the case suo motu and directed the authorities to furnish full details of the proclaimed offenders and the bench marked the matter "Partheard". After considering the affidavit filed by the SSP, the High Court had directed the Chandigarh Administration to constitute a special investigation team to inquire into all aspects of the proclaimed offenders and submit a status report. As notice was also issued to the CBI, it submitted its report requesting the High Court note to hand over the inquiry to the CBI as it was already overburdened and suffering from shortage of manpower and resources and the case did not have any interState ramifications. However, the High Court directed the CBI to investigate the allegations of one B.S. Multani regarding his missing son. In the same matter, the bench entertained another application filed by Shri Davinder Pal Singh Bhullar (a convict in another case and lodged in Tihar Jail) regarding the allegations that his father and maternal uncle had absconded in the year 1991. The High Court directed the CBI to investigate the allegations made in the complaint filed by Shri Bhullar and to get his statement recorded under section 164 of Cr.P.C., so that the witness may not resile under duress or be won over by any kind of inducement. Then, the CBI, after making a preliminary investigation registered an FIR against SSP, UT, Chandigarh, the then DSP and others and then the High Court had also issued further directions to complete the investigation and submit a further report. In the context of such facts, the Apex Court observed: "45. In *Divine Retreat Centre (Supra)*, this Court held that the High Court could have passed a judicial order directing investigation against a person and his activities only after giving him an opportunity of being heard. It is not permissible for the court to set the criminal law in motion on the basis of allegations made against a person in violation of principles of natural justice. A person against whom an inquiry is directed must have a reasonable opportunity of being heard as he is likely to be adversely affected by such order and, particularly, when such an order results in drastic consequence of affecting his reputation.

"46. In *D. Venkatasubramaniam & Ors. v. M.K.Mohan Krishnamachari & Anr.*, (2009) 10 SCC 488, this Court held that an order passed behind the back of a

party is a nullity and liable to be set aside only on this score. Therefore, a person against whom an order is passed on the basis of a criminal petition filed against him, he should be impleaded as a respondent being a necessary party.

"47. This Court in *Disha v. State of Gujarat & Ors.*, AIR 2011 SC 3168, after considering the various judgments of this Court, particularly, in *Vineet Narain & Ors. v. Union of India & Anr.*, AIR 1996 SC 3386; *Union of India vs. Sushil Kumar Modi* (1998) 8 SCC 661; *Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India*, (2006) 6 SCC 613; *Rubabbudin Sheikh v. State of Gujarat & Ors.*, AIR 2010 SC 3175; and *Ashok Kumar Todi vs. Kishwar Jahan & Ors.*, (2011) 3 SCC 758; held that the court can transfer the matter to the CBI or any other special agency only when it is satisfied that the accused is a very powerful and influential person or the State Authorities like high police officials are involved in the offence and the investigation has not been proceeded with in proper direction or the investigation had been conducted in a biased manner. In such a case, in order to do complete justice and having belief that it would lend credibility to the final outcome of the investigation, such directions may be issued.

"48. Thus, in view of the above, it is evident that a constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie, a case against the accused. However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible."

39. In a decision dated 18th July 2011 of the Division Bench of the Bombay High Court, in Criminal PIL Petition Nos.28 and 29 of 2011 and Criminal Application No.13 of 2011 [Per: Hon"ble Mrs. Justice Ranjana Desai (As Her Ladyship then was)], the Court observed that in the Constitution Bench judgment in *Committee for Protection of Democratic Rights, West Bengal*, the Supreme Court had, inter alia, observed that the State has a duty to enforce human rights of a citizen by providing fair and impartial investigation against any person accused of commission of a cognizable offence which may include its own officers. Victim's rights also need to be protected. The Supreme Court further observed that being the protectors of civil liberties of the citizens, the Supreme 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. The Supreme Court concluded 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, shall be valid in law. The Supreme Court had, however, added a caveat that the very plenitude of the power under the said articles requires great caution in its exercise. Although no inflexible guidelines could be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. The extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. After reference to several relevant judgments, the Court culled out, in para 18, the principles that could be deduced and, inter alia, laid down: "(g) In an appropriate case, where high officials are involved in crime, when the court feels that the police investigation is not in the proper direction in order to do complete justice, investigation can be transferred to CBI even after the chargesheet is submitted."

40. Earlier, in *Union of India v. W.N. Chadha* [1993 Supp. (4) SCC 260], the Apex Court has observed: "80. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In *A.S. de Smith's Judicial Review of Administrative Action*, 4th Ed. at page 184, it is stated that in administrative law, a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the heading "Exclusion of the audi alteram partem rule".

"81. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and selfdefeating or plainly contrary to the common sense of the situation" and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

"82. Bhagwati, J. (as the learned Chief Justice then was) in *Maneka Gandhi* speaking for himself, *Untawalia* and *Murtaza Fazal Ali*, JJ. has stated thus:

"Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of BorthyGest, from "fair play in action", it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion."

41. In *R.S. Sodhi, Advocate v. State of U.P.* [1994 Supp (1) SCC 143], the Apex

Court ordered : "2. We have examined the facts and circumstances leading to the filing of the petition and the events that have taken place after the so-called encounters. Whether the loss of lives was on account of a genuine or a fake encounter is a matter which has to be inquired into and investigated closely. We, however, refrain from making any observation in that behalf; we should, therefore, not be understood even remotely to be expressing any view thereon one way or the other. We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we have thought it both advisable and desirable as well as in the interest of justice to entrust the investigation to the Central Bureau of Investigation forthwith and we do hope that it would complete the investigation at an early date so that those involved in the occurrences, one way or the other, may be brought to book. We direct accordingly. In so ordering we mean no reflection on the credibility of either the local police or the State Government but we have been guided by the larger requirements of justice. The writ petition and the review petition stand disposed of by this order."

42. In *Mohammed Anis v. Union of India* [1994 Supp (1) SCC 145], the Supreme Court ordered: "Fair and impartial investigation by an independent agency, not involved in the controversy, is the demand of public interest. If the investigation is by an agency which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to public interest as well as the interest of justice."

43. In *Rubabbuddin Sheikh v. State of Gujarat* [(2010) 2 SCC 200], the Apex Court observed: "53. It is an admitted position in the present case that the accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local police may

carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

"60.Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

"81. In the present circumstances and in view of the involvement of the police officials of the State in this crime, we cannot shut our eyes and direct the State Police authorities to continue with the investigation and the charge sheet and for a proper and fair investigation, we also feel that the CBI should be requested to take up the investigation and submit a report in this Court within six months from the date of handing over a copy of this judgment and the records relating to this crime to them.

"82. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police authorities. The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this court will pass further necessary orders in accordance with the said report, if necessary. We expect that the police authorities of Gujarat, Andhra Pradesh and Rajasthan shall cooperate with the CBI authorities in conducting the investigation properly and in an appropriate manner."

44. In *Narmadabai v. State of Gujarat and others* [(2011) 5 SCC 79], both oral and documentary evidence raised strong suspicion that the encounter was fake and stagemanaged as predicted by Tulsiram Prajapati prior to his death in a number of communications. Although chargesheet was filed by the State after a gap of 3 1/2 years after the incident, yet the Court was satisfied that the investigation conducted and concluded by the State Police could not be accepted. Therefore, it was found to be not desirable to allow the Gujarat State Police to continue with the investigation and accordingly, to meet the ends of justice and in the public interest, CBI was held to be required to be directed to take over the investigation. The Apex Court directed police authorities of the State to handover all records of the case to CBI and directed CBI to investigate all aspects of the case and file report to the Court concerned having jurisdiction, within a period of six months. It was clarified that the observations made by the Court were only

for the limited purpose of deciding the issue whether investigation was required to be handed over to CBI or not and they were not to be construed as expression of opinion on the merits of the case.

45. In *Samaj Parivartan Samudaya and others v. State of Karnataka and others* [(2012) 7 SCC 407], a Bench of three Judges, after reference to the provisions of Sections 173(8), 202 and 210 of Cr.P.C., observed that, all these provisions clearly indicated the legislative scheme under Cr.P.C. that initiation of an investigation and filing of a chargesheet do not completely debar further or wider investigation by the investigating agency or police, or even by a specialized investigation agency. The Court further observed: "66. Wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that the rule of law prevails over the abuse of process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes.In respect of the past actions, the only option is to examine in depth the huge monetary transactions which were effected at the cost of national wealth, natural resources, and to punish the offenders for their illegal, irregular activities. The protection of these resources was, and is the constitutional duty of the State and its instrumentalities and thus, the Court should adopt a holistic approach and direct comprehensive and specialized investigation into such events of the past."

46. I am at one with Mr. Naik, the learned senior counsel appearing for the writ applicant as regards the failure on the part of the Special Investigation Team to register the F.I.R. against the persons concerned for the offence punishable under Section 228A of the Indian Penal Code. In this regard, prima facie, material is on record. On 9th March 2017 i.e. the date on which the victim gave a complaint in writing, the necessary action should have been taken in accordance with law.

47. The victim is very much sure about a person by name Vipul Thakkar and a lady known as Bhabhi involved in the sex racket. I expect the Special Investigation Team to gear up the investigation and try to gather the information in this regard so that both the persons can be identified and put to trial. I propose to give one more opportunity to the Special Investigation Team to look into all the aspects which have been highlighted by the victim in her affidavit in rejoinder and see to it that the deficiencies or the loopholes, if any, are taken care of and cured in accordance with law. Any dereliction of duty, in this regard, will be viewed very strictly and the erring officers concerned may be personally held responsible for the same in accordance with law.

48. This writ application is disposed of with the following directions: [I] The Special Investigation Team shall see to it that the First Information Report as regards the offence punishable under Section 228A of the Indian Penal Code is registered against the persons concerned in accordance with law and proper investigation is carried out in accordance with the law.

[II] The Investigating Agency shall see to it that Vipul Thakkar and a lady known as Bhabhi are identified at the earliest and appropriate steps are taken to arrest both the persons.

[III] The Special Investigation Team shall see to it that no untoward harassment is caused to the victim, and at the same time, I expect the victim also to extend full cooperation for proper and effective investigation.

49. With the above, this writ application is disposed of with liberty to the writ applicant to file a fresh writ application in future for further investigation through any higher agency, in case of necessity and if appropriate case is made out in that regard.