IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.05.2021

\+ **W.P. (CRL) 1347/2020 & CRL. M.A. 11897/2020**

SHIFA-UR-REHMAN ..... Petitioner

versus

STATE OF N.C.T. OF DELHI ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Abhishek Singh, Advocate with Mr Amit Bhalla and Mr Shreshtha Arya, Advocates.

For the Respondent : Mr S.V. Raju, ASG with Mr Amit Mahajan, SPP and Mr Rajat Nair, SPP,Mr Shantanu Sharma, Mr Dhruv Pande, Mr A. Venkatesh, Mr Guntur Pramod Kumar, Ms Sarica Raju, Mr Manan Popli, Mr Rajeev Ranjan, Mr Shaurya R. Rai and Mr Bhushan Oza, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner is the President of the Alumni Association of the Jamia Milia Islamia. He was arrested on 26.04.2020 in connection with FIR No. 59/2020 registered with PS Crime Branch on 06.03.2020. The present petition has been filed impugning an order

dated 13.08.2020 (hereafter 'the impugned order'), passed by the learned Additional Sessions Judge. By the impugned order, the learned court had allowed the respondent's application under Section 43D of the Unlawful Activities (Prevention) Act, 1967 (hereinafter 'UAPA') and extended the period of investigation in connection with FIR No. 59/2020 till 17.09.2020. The learned court also extended the period of detention of the persons accused, including the petitioner, who was arrayed as accused no. 6 in the said proceedings.

2. The petitioner claims that the impugned order has been passed in violation of the principles of natural justice and in violation of his rights under Article 21 of the Constitution of India. The petitioner claims that he was not afforded adequate opportunity to oppose the respondent's application for extension of period for completion of the investigation as he was not granted access to legal assistance. Despite orders passed by the concerned courts, he was not provided any opportunity to consult or instruct his lawyers.

3. The petitioner also impugns an order dated 14.08.2020, whereby he was remanded to police custody. He, consequently, prays that his custody beyond the period of 24.08.2020 – which was the last date for completing the investigation in terms of the earlier orders passed by the concerned court – be declared as illegal.

4. The controversy in the present case arises in the following context:

5. The FIR in question, FIR No. 59/2020 under Sections 147/148/149/120-B of the Indian Penal Code, 1860 (hereinafter 'IPC'), was registered with the Crime Branch on 06.03.2020. It was reported that riots had taken place in Delhi on 23rd, 24th and 25th February, 2020 as a consequence of a pre-planned conspiracy. Subsequently, on 15.03.2020, further offences under Section 120-B read with Sections 302, 307, 124A, 153A, 186, 353, 395, 427, 435, 436, 452, 454, 109 and 114 of the IPC; Sections 3 and 4 of the Prevention of Damage of Public Property Act, 1984; and Sections 25 and 27 of the Arms Act, 1959 were added. Thereafter, on 19.04.2020, offences under Sections 13/16/17 & 18 of the UAPA were also included.

6. The petitioner was arrested on 26.04.2020. He states that at the material time, he was in Mawana. He received a telephonic call from Delhi Police calling upon him to report to PS Mawana. He complied with the same and proceeded to PS Mawana. He claims that he was arrested outside PS Mawana and thereafter, brought to Delhi. He was produced before the court on the next day, that is 27.04.2020, and was remanded to police custody for a period of ten days – till 06.05.2020.

7. On 06.05.2020, the police moved another application seeking extension of the petitioner's custody. The said application was allowed by the concerned court and the petitioner's custody was extended for a further period of ten days (that is, till 16.05.2020). Thereafter, he was remanded to judicial custody.

8. The period of ninety days for the completion of investigation as contemplated under Section 167 of the Code of Criminal Procedure, 1973 (Cr.PC) expired on 26.07.2020. Since the FIR also included offences punishable under UAPA, the provisions of Section 167 of the Cr.PC, as modified by virtue of Section 43D(2)(b) of UAPA, are applicable. In terms of proviso as inserted by Section 43D(2)(b) of UAPA, the period of detention could be extended beyond the period of ninety days for a period of one hundred and eighty days provided that the conditions as stipulated therein, were satisfied.

9. The period of ninety days expired on 26.07.2020. In the aforesaid context, on 13.06.2020, the petitioner's advocate received a notice informing that an application for extension of the period of investigation up to 17.09.2020 in respect of two of the accused, Ishrat Jahan @ Pinki and Khalid, was moved before the concerned court on 08.06.2020 and the court had issued notice to the accused. The said matter was thereafter, listed on 14.06.2020. Since that day was a Sunday, the court had taken up the matter *suo moto* on 11.06.2020 and directed that the said application be put up on 15.06.2020.

10. On 15.06.2020, the court partly allowed the application and permitted the Investigating Agency to conclude its investigation within a period of sixty days, that is, by 14.08.2020.

11. On 30.06.2020, the petitioner filed an application before the concerned court seeking facilities in order to consult with his counsel. The petitioner sought consultation with his counsel through

videoconferencing as well as by way of telephonic conversation with him. The said application erroneously stated that the petitioner was housed in Tihar Jail No. 6. The learned court allowed the said application on 01.07.2020, *inter alia*, directing that "*the application of the applicant/accused be sent to the Jail Superintendent with directions to consider the prayer of the Ld. Counsel for applicant/accused as per rules*". The court further directed that the order be communicated to the Jail Superintendent "*for compliance*". The petitioner/his counsel did not receive any response in compliance with the said order and therefore, on 06.07.2020, the counsel for the petitioner sent an email to the Jail Authorities referring to the order dated 01.07.2020 passed by the concerned court and once again requesting the jail authorities to consider the request and abide by the orders dated 01.07.2020.

12. The petitioner's counsel did not receive any response to the said application as well. Accordingly, on 13.07.2020, the petitioner's counsel filed a second application, *inter alia*, seeking that directions be issued to the Jail Superintendent, Jail No.1, Tihar Jail to arrange weekly videoconferencing for a period of thirty minutes with the petitioner's counsel for a legal consultation in the aforesaid matter.

13. The said application was allowed by an order dated 14.07.2020 and it was directed that the application be sent to the Jail Superintendent, Jail No.1 with a request to consider the prayer of the learned counsel for the petitioner as per rules.

14. On 15.07.2020, the petitioner's counsel received an email from the Jail Authorities in response to his earlier email informing him that CJ-06 is a jail for female detenus; the petitioner is lodged in CJ-1 and therefore, the mail be sent to the concerned Jail.

15. On 20.07.2020, the petitioner's counsel sent an email addressed to various authorities once again requesting that the concerned authorities comply with the order dated 14.07.2020.

16. The period of ninety days as contemplated under Section 167 Cr.PC would expire on 26.07.2020 and in the aforesaid context, on 23.07.2020, the State moved an application under Section 43D of UAPA seeking extension of the period of investigation and the petitioner's detention beyond the period of ninety days for a period of one hundred and eighty days. Notice of the said application was issued and the learned court directed the same be served to the petitioner through the Jail Superintendent.

17. Immediately thereafter, on 24.07.2020, the petitioner's counsel moved an application seeking a copy of the application filed by the Investigating Officer under Section 43D of UAPA. The petitioner also sought directions to be issued to the concerned jail authorities to provide the petitioner the requisite facilities to consult with his advocates. The prayers made in the said application are set out below:-

> "A. Direct the investigating agency/IO to provide a copy of the application filed under U/S 43D of UAPA;

> B. Direct the concerned jail authorities to provide facility to the applicant to talk to his advocates;
>
> C. grant time of at least 3 days to file a reply to the application filed under U/S 43D of UAPA, after the applicant is provided facility to talk/conferring with his advocates."

18. On 24.07.2020, the court considered the State's application for extension of time for completing the investigation and partly allowed the same by, *inter alia*, directing that "*the Investigating Officer is permitted to conclude the pending investigation qua accused Shifa-ur-Rehman till 24.08.2020*". It is relevant to note that the petitioner had contested the said application, *inter alia*, on the ground that the extension of time should not be allowed unless the petitioner has had an effective opportunity to oppose the same. The petitioner had also sought a copy of the application, which was denied to him in view of the decision of this Court in ***Sharjeel Imam v. State of NCT of Delhi (Crl. M.C. 1475/2020) decided on 10.07.2020***. The court noted that the petitioner was not granted an opportunity to consult with his advocate but was of the view that the same was not a ground to reject the application moved by the IO.

19. Once again, on 04.08.2020, the counsel for the petitioner sent an email requesting the concerned jail authorities to consider the petitioner's prayer for grant of facility of consultation/communication with the counsel by way of video conferencing.

20. On 10.08.2020, the State filed another application along with the report of the prosecutor under Section 43D of UAPA seeking further extension of time for completing the investigation and detention of the accused till 17.09.2020. Notice of the said application was issued to the accused including the petitioner and the application was taken up by the concerned court on 13.08.2020.

21. The petitioner once again contested the same, *inter alia*, on the ground that the petitioner was not supplied with a copy of the application and had been denied the opportunity to consult with his lawyer, which violated the petitioner's right under Article 21 of the Constitution of India. In addition, it was also contended on behalf of the petitioner that the State's application for seeking extension of time for a period of one hundred and eighty days had been considered and partly allowed by an order dated 24.07.2020. The time for completing the investigation had been extended till 24.08.2020. It was thus, implicit that the application for extension of time beyond that date had been rejected. Therefore, the application filed by the IO seeking further extension was not maintainable as it would amount to seeking a review of the said order dated 24.07.2020.

22. By the impugned order, the learned court allowed the State's application (cum-prosecutor's report) seeking further extension of time to complete the investigation and the time period for completing the investigation was extended till 17.09.2020. Thereafter, by an order dated 14.08.2020 (which is also impugned in the present petition), the

learned court passed an order remanding the accused, including the petitioner, to judicial custody till 11.09.2020.

23. Mr. Singh, learned counsel appearing for the petitioner had advanced arguments on, essentially, three fronts. First, he submitted that the impugned order is violative of Article 21 of the Constitution of India. The impugned order has been passed in violation of the principles of natural justice as the petitioner had been deprived of his right to consult his lawyer and make any meaningful submissions to oppose the State's application for extension of time to complete the investigation. Second, he submitted that the petitioner had been deprived of the copy of the application and thus was not given a fair opportunity to be heard. Third, that the impugned order amounted to reviewing an earlier order dated 24.07.2020, which is impermissible. He referred to the decisions of the Supreme Court in ***Abdul Basit and Ors. v. Mohd. Abdul Kadir Choudhary and Anr.: 2014 10 SCC 754*** and ***State rep. by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran and Ors.: AIR 2009 SC 46*** and submitted that the said order could not be altered, modified or reviewed except in accordance with Section 362 of the Cr.PC.

24. In addition to the above, Mr. Singh also contended that the reasons for extending time for completion of the investigation as recorded in the impugned order are not specific reasons as contemplated under Section 43-D of UAPA. He also submitted that the said reasons are not sufficient for extending the petitioner's detention. He referred to the decision of the Supreme Court in ***Sanjay***

Kumar Kedia v. Intelligence Officer, Narcotic Control Bureau and Ors: 2009 17 SCC 631, in support of his contention.

25. Mr. Raju, learned ASG countered the aforesaid submissions. First, he submitted that the petitioner had no right to be heard to oppose the application seeking extension of time for completion of investigation and consequently, extending the period of custody. Second, he submitted that even assuming that the petitioner was entitled to consultation with his advocate, the impugned order could not be interfered with as the petitioner had not shown that any prejudice was caused to him. He submitted that even in cases where it is found that the principles of natural justice have been violated, it is not necessary that the orders passed in violation thereof can be interfered with. The orders can be interfered with only if any real prejudice is established. He relied on the decisions of the Supreme Court in ***Aligarh Muslim University and Others v. Mansoor Ali Khan: (2000) 7 SCC 529, State Bank of Patiala and Ors. v. S.K. Sharma: (1996) 3 SCC 364, K.L. Tripathi v. State Bank of India and Ors.: (1984) 1 SCC 43*** and ***Willie (William) Slaney v. State of Madhya Pradesh: (1955) 2 SCR 1140***, in support of his contention.

26. Next, he referred to Section 465 (1) of the Cr.PC and submitted that not granting the petitioner access to his counsel was a mere irregularity and the impugned order could not be interfered with unless it was demonstrated that the same has caused failure of justice. He referred to the decisions of the Supreme Court in ***State of Madhya Pradesh v. Bhooraji and Ors.: (2001) 7 SCC 679*** and ***Paul Varghese***

v. State of Kerala and Anr.: (2007) 14 SCC 783, in support of his contention.

Reasons and Conclusion

27. In view of the above, the following questions require to be addressed by this Court:

(i) Whether the petitioner is entitled to consult with an advocate of his choice and whether his right in this regard has been violated?

(ii) Whether the impugned order is illegal as it amounts to reviewing the earlier order dated 24.07.2020?

(iii) Whether any relief can be granted to the petitioner?

28. The present petition was moved on 31.08.2020 and notice was issued. Since one of the issues – whether the accused is entitled to be heard to oppose an application seeking extension of time for completing of the investigation – was also involved in another matter (***Khalid v. State (Govt of NCT of Delhi): Crl. M.C. 16972/2020, decided on 08.09.2020***), which was being at the material time, the present petition was directed to be listed along with that petition.

29. During the course of the hearing, the learned counsel appearing for the State sought time to take instructions to ascertain as to how the petitioner's request for access to his lawyer was treated and whether the orders passed by the learned ASJ on 01.07.2020 and 14.07.2020 were complied with. Thereafter, the concerned authorities filed a status report. The status report acknowledges that the order dated 01.07.2020 passed by the learned ASJ was received by the jail

authorities. However, the legal interview of the petitioner with his counsel could not be arranged since the petitioner's counsel had erroneously sent the email requesting for the same to Central Jail No. 06 instead of Jail no. 1. It is stated in the Status Report that from 06.07.2020 to 15.07.2020, the counsel for the petitioner did not follow up with the jail authorities. He did so only on 20.07.2020. It is stated that the petitioner was provided the facility of telephonic conversation with his family on five occasions till 01.06.2020 and thereafter, the petitioner made calls to his family once a week. The Status Report further states that the petitioner chose to call his family instead of his counsel. It is stated that although an email was received from the petitioner's counsel on 20.07.2020 and video conferencing was fixed on 21.07.2020 and 05.08.2020, but the interview could not be held because on the first occasion, the petitioner was not well and refused to attend the videoconferencing facility fixed on 21.07.2020. It is stated that on the second occasion, that is, on 05.08.2020, video conferencing could not be arranged due to telephone connectivity failure.

30. This Court considered the aforesaid Status Report and on 15.09.2020 passed the following order:-

> "A status report has been filed, which inter alia, states that the facility for video conferencing was provided on 21.07.2020. However, the same was declined by the petitioner. Prima facie, this Court finds it difficult to accept the said statement. The respondents are at liberty to place on record all documents and material to support the said

> statement made in their status report. The parties are also at liberty to file copies of authorities that they seek to rely in support of their contentions, before the next date of hearing.
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> List on 17.09.2020."

31. It is relevant to note that the concerned jail authorities have not filed any material or any document to support their assertion that video conferencing facility was arranged on 21.07.2020 but the petitioner was not well on that date and had, therefore, refused to join the said proceedings. The learned counsel appearing for the petitioner had made a categorical statement that he had not received any intimation regarding video conferencing facility on 21.07.2020 or on 05.08.2020. The said contention was not disputed by the learned counsel for the respondent. It is apparent from the above that the Status Report filed by the concerned Superintendent is incorrect. There is no material on record to show that the petitioner was unwell on 21.07.2020. More importantly, the Circular dated 06.07.2020 issued by the Director General of Prisons requires that the link for video conferencing through which an advocate can establish the link for videoconferencing be sent by e-mail. There is no material to show that any such e-mail had been sent by the concerned jail authorities. It is, thus, apparent that the petitioner had not been granted any opportunity to consult with his lawyer at the material time.

32. The contention that it was incumbent upon the counsel for the petitioner to once again request the jail authorities for fixing a videoconferencing after securing an order from the Trial Court, is

plainly unmerited. The order dated 01.07.2020 is unambiguous and the learned court had expressly directed that the application of the learned counsel be considered as per the rules. It had also directed that the copy of the order be sent to the Jail Superintendent for compliance. It was incumbent on the jail authorities to thereafter, comply with the order and arrange for the videoconferencing facility. However, it is apparent that the jail authorities had completely disregarded the said order. They had also received the order dated 14.07.2020, which once again required them to comply with the same. This order was also disregarded by the concerned jail authorities.

33. The contention that the petitioner had sent an email to the wrong person and therefore, his request could not be processed, also cannot be accepted. In its first application the petitioner had mentioned Jail No. 06 instead of Jail No.01. However, that did not dilute the import of the order passed pursuant to the said application. It was incumbent upon the recipient to forward the same to the concerned authorities where the petitioner was housed. Surely, it was not open for the recipient authority to ignore the same. However, the concerned jail authorities completely disregarded the order dated 01.07.2020 passed by the learned ASJ. They did not even respond to the email sent by the counsel for the petitioner within a reasonable time. The official from Jail No. 6 had responded to the email dated 06.07.2020 after nine days, that is, on 15.07.2020, pointing out that Jail No. 06 houses female prisoners. By that time, the petitioner's counsel had already moved the second application and secured an

order dated 14.07.2020 directing the concerned jail authorities to consider the application for arranging videoconferencing. As noticed above, the order dated 14.07.2020 was also disregarded. The petitioner had sent a reminder dated 20.07.2020 and it is apparent that the concerned jail authorities had ignored that email as well. The averment that the jail authorities had arranged for videoconferencing on 21.07.2020, is incorrect.

34. Article 22(1) of the Constitution of India expressly provides that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice".

35. In ***State of Madhya Pradesh v. Shobharam and Ors.: (1966) AIR SC 1910***, the Supreme Court had held that the right under Article 22(1) of the Constitution extends to any person who is arrested, regardless of the arrest being made under a general or a special statute. In ***Moti Bai v. The State: (1954) RLW 611***, the Rajasthan High Court had held that in order for the 'right to consult a legal practitioner of one's choice' be properly effectuated, such legal practitioner must be allowed the facility to consult the accused he has to defend. The police must not obstruct such interviews arbitrarily or on fanciful grounds.

36. In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.: (1981) 1 SCC 608***, the Supreme Court held as under:

> "11. … The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21."

37. In ***Mohd. Ajmal Amir Kasab v. State of Maharashtra: (2012) 9 SCC 1***, the Supreme Court held as under:

> "474… it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."

38. In ***Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi): (2012) 9 SCC 408***, the Supreme Court set aside the conviction of the appellants on the ground that the accused was denied the right to a counsel and thus, was not given a fair and impartial trial. In a recent decision rendered by the Supreme Court in ***Anokhilal v. State of Madhya Pradesh: 2019 SCC OnLine SC 1637***, it has held that not only must the legal aid provided by the State be free, it should also be real and meaningful assistance.

39. In another recent case (***Subedar v. State of Uttar Pradesh: CRL. A. No. 886 of 2020 decided on 18.12.2020***), the Supreme Court set aside the decision of the High Court of Judicature at Allahabad confirming the appellant's conviction of the appellant had been confirmed. The Supreme Court accepted the appellant's contention of the appellant that his appeal before the High Court had been disposed of in the absence of any representation on his behalf and held as under:

> "It is well accepted that right of being represented through a counsel is part of due process clause and is referable to the right guaranteed under Article 21 of the Constitution of India.
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> In case the Advocate representing the cause of the accused, for one reason or the other was not available, it was open to the Court to appoint an Amicus Curiae to assist the Court but the cause in any case ought not to be allowed to go unrepresented.
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> In the circumstances, we have no other alternative but to set-aside the judgment passed by the High Court and to restore Criminal Appeal No.2798 of

> 1988 to the file of the High Court to be disposed of afresh."

40. Undeniably, the petitioner has a right to consult a legal practitioner of his choice. As discussed above, the petitioner was effectively denied this constitutional right to consult with his advocate.

41. The next question to be examined is whether the impugned order granting further time to the IO to complete the investigation is illegal as it amounts to a review of the order dated 24.07.2020.

42. By an earlier application, the IO had sought one hundred and eighty-days' time to complete the investigation, but the learned court had ordered that *"the Investigating Officer is permitted to conclude the pending investigation qua accused Shifa-ur-Rehman till 24.08.2020"*. Thus, at the material time, the learned court had not acceded to the IO's request for further time as sought but had granted limited time. However, this did not preclude the IO from seeking further time if warranted. The proviso to Section 167 of the Cr.PC, as introduced by Section 43D(2)(b) of UAPA, makes it expressly clear that the court can extend the period for completing the investigation for a period up to one hundred and eighty days days, if the stipulated conditions are met. A court is not disabled from considering and allowing multiple applications for extensions, provided it is satisfied with the report regarding the progress of investigation and the specific reasons for detention of the accused. However, it cannot extend the period beyond one hundred and eighty days. Thus, the contention that the court could not have granted further time to complete the

investigation because it had granted extension earlier is, unpersuasive. Grant of further time if circumstances so warrant does not amount to review of an earlier order. The impugned order is premised on account of the court's satisfaction based on a fresh report and cannot be considered as a review of the earlier order dated 24.07.2020.

43. The next question to be examined is whether in the facts and circumstances of the case, any relief ought to be granted to the petitioner. As held in ***Khalid v. State (Government of NCT of Delhi)*** (*supra*), the petitioner had a right to be heard before the court passed the impugned order and this includes the right to be represented by counsel. As held above, the petitioner's constitutional right under Article 22(1) of the Constitution of India, was violated.

44. Insofar as the petitioner's constitutional right under Article 22(1) of the Constitution of India is concerned, the said grievance stands redressed. This Court had, during the course of the proceedings, ensured that the petitioner had full access to his counsel and was provided full opportunity to consult and instruct him. In the circumstances, the only question that remains to be addressed is whether the impugned order extending the period for completion of the investigation requires to be set aside on the ground that at the material time, the petitioner did not have access to his counsel.

45. Mr Raju had contended that merely because there have been some violations in following the principles of natural justice, it does not necessarily follow that the impugned order is required to be set

aside. He had referred to the principle of "useless formality" and submitted that even if the petitioner was granted full access to his counsel and full opportunity of being heard by the learned court, the order passed would not have been any different. He submitted that the order extending the time for completion of the investigation was premised on the court being satisfied regarding the progress of investigation and the specific reasons that required the detention of the petitioner. Since the court was satisfied regarding the two aspects, the court had passed the impugned order. He submitted that even if the petitioner was heard, there was nothing that he could state that would dissuade the court from extending the time for completion of investigation.

46. The 'Useless Formality' theory was considered by the Supreme Court in ***M.C. Mehta v. Union of India and Ors.: (1999) 6 SCC 237***. The relevant paragraphs of the said decision are set out below:

> "21. It is, therefore, clear that if on the *admitted* or *indisputable* factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of the principles of natural justice.
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> 22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not

one of “real substance” or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. See *Malloch* v. *Aberdeen Corpn*. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278, HL] (per Lord Reid and Lord Wilberforce), *Glynn* v. *Keele University* [(1971) 1 WLR 487 : (1971) 2 All ER 89] , *Cinnamond* v. *British Airports Authority* [(1980) 1 WLR 582 : (1980) 2 All ER 368, CA] and other cases where such a view has been held. The latest addition to this view is *R.* v. *Ealing Magistrates' court, ex p Fannaran* [(1996) 8 Admn LR 351, 358] (Admn LR at p. 358) (see de Smith, Suppl. p. 89) (1998) where Straughton, L.J. held that there must be “*demonstrable beyond doubt*” that the result would have been different. Lord Woolf in *Lloyd* v. *McMahon* [(1987) 2 WLR 821, 862 : (1987) 1 All ER 1118, CA] (WLR at p. 862) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy* v. *Grant* [1959 NZLR 1014] however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is “real likelihood — not certainty — of prejudice”. On the other hand, *Garner Administrative Law* (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. *On the other side* of the argument, we have apart from *Ridge* v. *Baldwin* [1964 AC 40 : (1963) 2 All ER 66, HL] , Megarry, J. in *John* v. *Rees* [(1969) 2 WLR 1294 : (1969) 2 All ER 274] stating that there are always “open and shut cases” and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the

authority to consider. Ackner, J. has said that the "useless formality theory" is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that "convenience and justice are often not on speaking terms". More recently Lord Bingham has deprecated the "useless formality" theory in *R.* v. *Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990 IRLR 344] by giving six reasons. (See also his article "Should Public Law Remedies be Discretionary?" 1991 PL, p. 64.) A detailed and emphatic criticism of the "useless formality theory" has been made much earlier in "Natural Justice, Substance or Shadow" by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that *Malloch* [(1971) 1 WLR 1578 : (1971) 2 All ER 1278, HL] and *Glynn* [(1971) 1 WLR 487 : (1971) 2 All ER 89] were wrongly decided. Foulkes (*Administrative Law*, 8th Edn., 1996, p. 323), Craig (*Administrative Law*, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority de Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (*Administrative Law*, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a "real likelihood" of success or if he is

entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are *not* all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their "*discretion*", refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , *Rajendra Singh* v. *State of M.P.* [(1996) 5 SCC 460] that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the "useless formality" theory and leave the matter for decision in an appropriate case, inasmuch as, in the case before us, "*admitted and indisputable*" facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."

47. In ***Aligarh Muslim University and Ors. v. Mansoor Ali Khan: (2000) 7 SCC 529***, the Supreme Court held that there is no absolute rule and prejudice must be shown depending on the facts of each case. The relevant extract from the said judgement is reproduced below:-

"24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

"[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. … There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364]. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P. [(1996) 5 SCC 460]

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of

> "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case."

48. In ***P.D. Agrawal v. State Bank of India and Ors.: (2006) 8 SCC 776***, the Supreme Court had referred to the earlier decisions in the case of ***State Bank of Patiala v. S.K. Sharma: (1996) 3 SCC 364*** and ***Rajendra Singh v. State of M.P. and Ors.: (1996) 5 SCC 460*** and observed that the law had undergone "a sea change". The relevant extract from the said decision is set out below:

> "39. Decision of this Court in S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] whereupon Mr Rao placed strong reliance to contend that non-observance of principle of natural justice itself causes prejudice or the same should

> not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice, as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364] and Rajendra Singh v. State of M.P. [(1996) 5 SCC 460] the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of audi alteram partem, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula."

49. In a recent decision in the case of ***State of U.P. v. Sudhir Kumar Singh and Ors.: CA No. 3498/2020, decided on 16.10.2020***, the Supreme Court analyzed several earlier decisions and noted that there are several cases where the Rule of *Audi Alteram Partem* was breached but the courts had refrained from interfering on the ground that no prejudice would be caused to the person alleging breach of natural justice because the order under challenge was based on admitted facts.

50. After analyzing the judgments, the Supreme Court summarised the principles as under:

> "(1)Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.
>
> (2)Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.
>
> (3)No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.
>
> (4)In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

> (5)The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

51. Thus, in cases where the relevant facts are admitted and the matter is crystal clear, the courts may come to the conclusion that it would be futile to issue a writ because given the admitted facts, no other conclusion is possible. As explained by the Supreme Court in ***State of U.P. v. Sudhir Kumar Singh and Ors.*** (*supra*), the courts have in given cases refrained from passing orders "*under the broad rubric of the Court not passing futile orders as the case is based on admitted facts, being admitted by reason of estoppel, acquiescence, non-challenge or non-denial.*"

52. Having stated the above, it is also necessary to mention that the Supreme Court has, in several decisions, cautioned that the Useless Formality theory is an exception and must not be readily resorted in all cases. The same is applicable in exceptional cases where the court is convinced that on the admitted and undisputed facts, no other decision is possible. In such exceptional cases, the courts may refrain from setting aside the orders or remanding it for consideration afresh as that would be a futile exercise.

53. The above principles would not be applicable where the person complaining of violation of principles of natural justice or the Rule of *Audi Alteram Partem* disputes the premises on which the order

challenged is passed. In such cases, where it is clear that order(s) has been passed in breach of principles of natural justice, the order(s) passed must be interfered with. This is because it is not permissible for the court reviewing such orders to second guess what orders would the primary authority would have passed in the event the person complaining of breach of principles of natural justice was granted full opportunity to present its case or contest the premises on which the order sought to be impugned has been passed.

54. In the case of ***Regina v Chief Constable of the Thames Valley Police, Ex parte Cotton: (1990) IRLR 64***,Lord Bingham held as under:-

> "As to the fairness of the Chief constable making such a decision, the absence of prejudice may be a relevant factor in the denial of a remedy, but to deny a remedy as a matter of discretion in such a case should be a rarity. While cases may arise where denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this.
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by Megarry J in John v Rees [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.

3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.

4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

5. This is a field in which appearances are generally thought to matter.

6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

55. In ***R. v. Secretary of State for the Environment ex. p. Brent LBC: (1982) QB 593***, the court quashed a Secretary of State's order reducing a local authority's rate support grant for failure to grant them a hearing at the proper time. Even though it was 'certainly probable' that the decision would have been the same, since all the arguments had been fully rehearsed at an earlier stage. The court's observations are set out below:

"…it would of course be unrealistic not to accept that it is certainly probable that, if the representations had been listened to by the Secretary of State, he would nevertheless have adhered to his policy. However, we are not satisfied that such a result must inevitably have

> followed … It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations … Thus, even if the ultimate outcome of our decision were to be that the Secretary of State, having fairly considered the applicants' representations, nevertheless decides to abate their rate support grants, we are not prepared to hold that it would have been a useless formality for the Secretary of State to have listened to the representations. The importance of the principles to which we have referred to above far transcend the significance of this case. If our decision is inconvenient, it cannot be helped. Convenience and justice are often not on speaking terms: Lord Atkin in *General Medical Council v. Spackman[1943] A.C. 627* , 638."

56. Similarly, in the case of ***R. v. Ealing Magistrate's Court ex p. Fanneran: (1996) 8 A.L.R. 351 at 356,*** the court observed as under:

> "I must say at once that the notion that when the rules of natural justice have not been observed, one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it is demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold a conviction even if natural justice had not been done."

57. The Supreme Court in the case of ***Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati and Ors.: (2015) 8 SCC 519*** held as under:

> "42. So far so good. However, an important question posed by Mr Sorabjee is as to whether it is open to the authority, which has to take a decision, to

> dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in General Medical Council v. Spackman [1943 AC 627]."

58. The petitioner's contention must be examined in the light of the principles as noticed above. It is now settled that the petitioner is not entitled to demand the public prosecutor's report regarding the progress of investigation, which is required to be considered by the court. This is because the said report is made at the stage when the investigation is incomplete and providing the same may in certain cases adversely affect, frustrate or impede the investigation by the Investigation Agency. The principle that a person against whom an adverse order may be passed, is required to be provided full material on the basis of which such order may be premised, is required to be curtailed to the aforesaid extent but no further. The petitioner has to be afforded an opportunity – however truncated it is – to present his reasons why further time for investigation may not be granted. The contention that the petitioner has no right to oppose the extension of

time for completion of investigation is not persuasive. The conclusion of the learned court to the aforesaid effect is erroneous and therefore set aside. This said issue was considered by this court in ***Khalid v. State (Government of NCT of Delhi)*** (*supra*). It may be possible in some cases for the petitioner to bring on record certain facts which may have a bearing on the question regarding the necessity for his detention or the progress of the investigation. As an illustration, in a given case he may point out that he has been in custody for several days but no inquiries have been made from him. He may also point out that the nature of the allegations against him are such that a protracted investigation is unnecessary. The court would surely take into consideration the submissions while examining the prosecutor's report regarding progress of investigation as well as the specific reasons for seeking further detention of the suspected person in custody.

59. At this stage, it is not possible for this Court to second guess what the view of the concerned court would have been had the petitioner been given an opportunity to present his case after consultation with his advocate.

60. In the given facts, this Court is unable to accept that not providing the petitioner an opportunity to consult with his counsel, has not prejudiced him in any manner. In such cases, it is difficult to second guess the value of such consultation and this Court does not propose to examine the same. It is also not possible to examine as to

what submissions would have been made by the counsel for the petitioner or what would be their persuasive value before the concerned court. This Court has not examined the prosecutor's report seeking extension of time for completion of the investigation or the merits of specific reasons why the detention of the petitioner is required.

61. This Court is unable to accept that in such cases, it is permissible to not comply with the principles of natural justice on the ground that even if same were complied with, it would serve no useful purpose. The right of a person in detention to consult a legal practitioner of his choice is a right guaranteed by the Constitution of India and it is not open for the State to dilute this constitutional on the ground that no purpose would have been served even if such consultation is permitted.

62. Having noted the above, this Court is of the view that the relief as sought for cannot be granted to the petitioner at this stage. This is because the extended time for completion of the investigation is over. It is not feasible to now put back the parties in the same position to be heard afresh. The charge-sheet has been filed and the petitioner has been informed of the case against him. Mr. Singh had contended that the impugned order ought to be set aside as this would entitle the petitioner to a default bail. This, obviously, cannot be accepted as that would mean that the State's application for extension of time, which was allowed, should be considered as rejected. Since it is the

petitioner's case that he had not been granted full opportunity of a hearing as he did not have the benefit of consulting his Advocate, the only relief that could be granted is to ensure that he has such access. This relief has been granted and the court has ensured that the petitioner is allowed full opportunity to consult his advocate.

63. Considering the above, this Court is of the view that even though certain rights of the petitioner have been violated, further relief as sought by the petitioner cannot be granted at this stage. The *challan* has been filed. The petitioner has been informed about the case against him and the reasons for his detention. He is not impeded in any manner to avail of his remedies including to apply for bail, if not only done. Needless to state that if such an application is made the same is required to be considered on merits.

64. The petition is, accordingly, disposed of. The pending application is also disposed of.

VIBHU BAKHRU, J

MAY 07, 2021
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