

Before

THE HONORABLE HIGH COURT OF PURVA PRADESH

2016

UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

IN THE MATTER OF:

HUMAN RIGHTS ORGANISATION - - - - - - PETITIONER

V.

STATE OF PURVA PRADESH - - - - - - RESPONDENT

WRITTEN SUBMISSION ON BEHALF OF THE PETITIONER

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS	-	-	-	-	-	-	-	II
INDEX OF AUTHORITIES	-	-	-	-	-	-	-	IV
STATEMENT OF JURISDICTION	-	-	-	-	-	-	-	VII
STATEMENT OF FACTS	-	-	-	-	-	-	-	VIII
QUESTIONS PRESENTED	-	-	-	-	-	-	-	X
SUMMARY OF ARGUMENTS	-	-	-	-	-	-	-	XI
PLEADINGS AND AUTHORITIES	-	-	-	-	-	-	-	1
I. WHETHER THE WRIT PETITION IS MAINTAINABLE UNDER ARTICLE 226?	-	-	-	-	-	-	-	1
II. WHETHER THE TRIAL OF THE ACCUSED WAS VITIATED BY ILLEGALITY?	-	-	-	-	-	-	-	2
A. COURT FAILED TO FOLLOW ESTABLISH PROCEDURE AND APPLIED UNCONSTITUTIONAL PROVISION TO DECIDE THE CASE.	-	-	-	-	-	-	-	
B. INEFFECTIVENESS OF DEFENCE COUNSEL DURING THE TRIAL CAUSED MR. X DEATH PUNISHMENT.	-	-	-	-	-	-	-	
C. CONFIRMATION OF THE DEATH SENTENCE BY HIGH COURT WAS PATENTLY ILLEGAL.	-	-	-	-	-	-	-	
III. WHETHER THERE HAVE BEEN VIOLATIONS OF CONSTITUTIONAL PROVISION IN THE PRESENT CASE?	-	-	-	-	-	-	-	4
A. MERCY PETITION REJECTED BY THE PRESIDENT OF INDICA IS NOT AS PER ARTICLE 72 OF CONSTITUTION OF INDICA AND SETTLED POSITION OF LAW.	-	-	-	-	-	-	-	
B. EXECUTION OF DEATH SENTENCE OF MR. X WILL VIOLATE ARTICLE 14 ENSHRINED UNDER CONSTITUTION OF INDICA.	-	-	-	-	-	-	-	
C. EXECUTION OF MR. X WOULD LEAD TO VIOLATION OF ARTICLE 21 & 22.	-	-	-	-	-	-	-	
PRAYER	-	-	-	-	-	-	-	XII

INDEX OF ABBREVIATIONS

¶	Paragraph
&	And
AIR	All India Reporter
AP	Andhra Pradesh
All.	Allahabad
Anr.	Another
Bom.	Bombay
CCR	Current Criminal Reports
Co.	Company
CrPC	Criminal Procedure Code
Crl.A.	Criminal Appeal
Edn. / Ed.	Edition
FIR	First Information Report
Govt.	Government
Hon`ble	Honorable
I.L.R	Indian Law Reporter
Id.	Ibid
L.J.	Law Journal
Ltd.	Limited
Mr.	Mister

Mad.	Madras
MP	Madhya Pradesh
No.	Number
HC	High Court
Ors.	Others
Pg.	Page
Raj.	Rajasthan
Re.	Reference
Pvt.	Private
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
SC	Supreme Court
Sd/	Signed
UP	Uttar Pradesh
UOI	Union Of India
V.	Versus
Vol.	Volume

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STATEMENT OF JURISDICTION

The counsels representing the petitioner have endorsed their pleadings before the Hon`ble High Court of Purva Pradesh under Article 226 of the Constitution of Indica in which the Hon`ble Court has the jurisdiction.¹

The present memorandum sets forth the facts, contentions and arguments.

¹Article 226, in The Constitution Of India 1950:

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

STATEMENT OF FACTS

For the sake of brevity and convenience of the Hon`ble Court the facts of the present case are summarized as follows:

1. Mr. X murdered his wife in a drunken rage at his house. The neighbours caught hold of Mr. X and handed him to the police. Mr X was tried by the Court and convicted of offences punishable under S.302 of IPC and sentenced to life imprisonment in 1984.
2. Mr. X was sent to the central prison in Purva Pradesh. While he was there, he became close friends with his cellmate, Mr Y. With time, X and Y became friends and Y suggested that X marry his daughter.
3. In the year 1987, X and Y obtained parole from the prison and the marriage between X and Y's daughter was solemnized. X's wife delivered twin baby boys.
4. However, by the year 1990, X had started suspecting the fidelity of his wife. One night, X was seized by rage. He seized an agricultural implement and hacked his wife to death. He then killed his two children who were sleeping.
5. According to the neighbours who rushed in, X was trying to commit suicide by hanging himself when they discovered him and overpowered him.
6. The lawyer did not cross examine witnesses of the prosecution nor did he produce any evidence on behalf of the defence. The Sessions Court sentenced X under S.302 and 303 of the IPC to death.
7. The matter was referred to a third judge of the High Court when division bench could not come on consensus, third judge felt that there was no discretion in the matter and confirmed the sentence of death. Mr X submitted a mercy petition to the President of Indica which came to be rejected in the year 1996.
8. Due to oversight on behalf of the prison authorities, Mr X was not kept in the death row cells at the prison, it is only in the year 2011, that the same was discovered and the prisoner was sent to death row confinement.
9. On 01.01.2013, the black warrant for the execution of Mr X was issued by the appropriate court. The very next day, lawyers representing a human rights organisation filed a writ petition claiming that Mr. X cannot be executed on the grounds that his trial is vitiated by illegality and his execution would violate several provisions of the Constitution of Indica.

QUESTIONS PRESENTED

The following questions are presented before this Hon'ble court for adjudication in the instant matter:

- I. WHETHER THE WRIT PETITION IS MAINTAINABLE UNDER ARTICLE 226?**
- II. WHETHER THE TRIAL OF THE ACCUSED WAS VITIATED BY ILLEGALITY?**
- III. WHETHER THERE HAVE BEEN VIOLATIONS OF CONSTITUTIONAL PROVISIONS IN THE PRESENT CASE?**

SUMMARY OF ARGUMENTS

I. THE PRESENT WRIT PETITION IS MAINTAINABLE UNDER ARTICLE 226.

It is humbly submitted before this Hon'ble Court that in present case writ petition is maintainable as PIL as it serves public purpose then such writ petition is maintainable as public interest litigation under Article 226. Also, the present writ petition does not hit by principles of res judicata when SLP is dismissed.

II. THE TRIAL OF THE ACCUSED WAS VITIATED BY ILLEGALITY.

It is humbly submitted before this Hon'ble court that trial of the accused was vitiated by enormous illegality. Accused was convicted by Sessions Court on the basis of section 303 of IPC which has been declared unconstitutional. Defense counsel was disinterested. Due to ineffectiveness of the defense counsel, accused was deprived of these significant rights during the trial. Section 303 of IPC is unconstitutional but still third judge of the high court did not intervene in the matter which shows gross illegality in the trial of the accused.

III. THERE HAVE BEEN VIOLATIONS OF CONSTITUTIONAL PROVISION IN THE PRESENT CASE.

It is humbly submitted before this honorable court that there have been grave violations of Mr. X's fundamental rights envisaged under Articles 14, 21 & 22 by High Court, Executive and State Government. President of India has rejected Mr. X mercy petition without taking relevant materials into consideration. High Court has confirmed his death sentence by overlooking the position of law related to Section 303 of IPC, 1860. State government was also not able to fix a date of execution leading to constant torture & fear to the accused.

PLEADINGS AND AUTHORITIES

I. THE PRESENT WRIT PETITION IS MAINTAINABLE UNDER ARTICLE 226.

1. It is humbly submitted before this Hon'ble Court that if a writ petition filed in interest of one person, serves public purpose then such writ petition is maintainable as public interest litigation under Article 226.² In the recent case of *PUDR v. Union of India*³, Allahabad High Court also accepted writ petition as PIL which was filed for one person because it was serving the public purpose⁴. Thus, in the present case writ petition is maintainable as PIL.
2. In addition to the above, the present writ petition does not hit by principles of res judicata because of the rejection of Mr. X's Special Leave Petition by Supreme Court. It is settled position of law that principle of res judicata is applicable to subsequent proceedings only when leave is granted to the Special Leave Petition.⁵ In the present case, Mr. X's Special Leave Petition was refused admission by Apex Court of India stating that it did not raise any issue of legal importance.⁶ However, Court never granted leave to the petition at first place which means it was never heard by the Court and rejected the petition prima facie.
3. Supreme Court in the case of *Kunhayammed v. State of Kerala*,⁷ elaborately considered the legal implications and the impact of an order rejecting the SLP under Article 136 of the Constitution of India and held, "*Whatever be the phraseology employed in the order of dismissal, it is non-speaking order, i.e., it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal*"
4. Thus, when SLP is dismissed, the same does not amount to confirmation by the Supreme Court against the order in which leave was sought for.

II. THE TRIAL OF THE ACCUSED WAS VITIATED BY ILLEGALITY.

²Indian Banks' Association, Bombay & Ors, v. Devkala Consultancy Service and Ors. AIR 2004 SC 2615.

³2015 CriLJ 4141.

⁴Maharaj Singh v. State of Uttar Pradesh, AIR 1976 SC 2602; *See also*: Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, S. P. Gupta v. Union of India, AIR 1982 SC 149.

⁵State of Manipur v. Thingujam Brojen Meetei, AIR 1996 SC 2124.

⁶Sudam v. State of Maharashtra, (2011) 7 SCC 125; *See also*: Pritam Singh v. The State, AIR 1950 SC 169.

⁷[2000] 245 ITR 360 (SC).

5. It is humbly submitted before this Hon`ble court that trial of the accused was vitiated by enormous illegality right from the commencement to the conclusion. *Firstly*, accused was sent to the police custody instead of judicial custody, *secondly*, he was convicted by Sessions Court under section 303 of I.P.C. which is an unconstitutional provision and finally High Court also confirmed death punishment without applying discretion and ignoring the illegalities in the trial.

A. Court failed to follow establish procedure and applied unconstitutional provision to decide the case.

6. In the present case, procedure adopted by court in trial and its decision is patently illegal. In order to understand illegality in the procedure, we have to understand basic objective of recording a statement under Section 164 of Cr.P.C. It is done so that such statement could be used as confession in case the person making them is ultimately charged with an offence.⁸ Thus, it can be deduced that all the confessions are statements.
7. In the present case Mr. X has made confession in police custody, however, when Mr. 'X' was produced before the magistrate under section 164 of the Cr.P.C., he refused to make any statement.
8. Now, from this instance it can be easily inferred that accused refused to make confession. As per section 164(3) of the Cr.P.C., once accused refuses to give confession, he has to be sent in judicial custody.⁹ However, in present case magistrate remanded him back to the police custody.¹⁰ This is gross violation of section 164(3) of the Cr.P.C. and such negligence committed by magistrate clearly establishes procedural illegality in the trial.
9. Furthermore, decision of Sessions Court i.e. conviction of Mr. X was entirely based on section 303 of I.P.C, and section 302 was only used for corroboration. If decision would have been given on the basis of section 302, then as required by section 354 (3) of the Cr.P.C., Sessions Court would have mentioned special reasons for awarding death sentence because capital punishment is exception and life imprisonment is rule. However, Sessions Court solely relied on section 303 of IPC instead of section 302 as section 303 excludes judicial discretion that is why, court did not give any reasons while giving death sentence.
10. Aforesaid mentioned proposition can be affirmed through this fact that Mr. X was charged under section 302 and 303 of IPC, during this entire period of four years in the proceedings this section 303 was kept as it is by Sessions Court. Though, Sessions Court is bound to

⁸State of Madras v. G. Krishnan, AIR 1961 Mad 92.

⁹Bhagvan Singh v. State of Punjab AIR 1952 SC 214.

¹⁰'Remand' meaning: *to send back* (as per Encyclopaedic law lexicon, pg. 4049).

remove such an illegal provision ¹¹ as it has been already declared void and unconstitutional.¹² Therefore, decision of the Sessions Court in the present case is illegal.

B. Ineffectiveness of defense counsel during the trial caused Mr. X, punishment of death.

11. Government counsel on the behalf of Mr. X was disinterested since the beginning of the trial. Defense counsel who had duty to defend accused, nowhere showed tendency to protect him. Due to ineffectiveness of the defense counsel, accused was deprived of his significant rights during the trial which finally resulted in his sentence to death.
12. It is the basic principle of jurisprudence that cross-examination is an acid-test of the truthfulness of the statement made by a witness, the objects of which are: (1) to destroy or weaken the evidentiary value of the witness of his adversary, (2) to elicit facts in favor of the cross-examining lawyer's client from the mouth of the witness of the adversary party (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness.¹³ Such an important exercise was missed by the defense counsel which is a gross negligence on his part.¹⁴ He also did not produce even single evidence on behalf of the accused to defend him despite of this fact that cross examination and production of the evidence are most fundamental aspects of fair trial.¹⁵
13. In addition to the above, defense counsel did not object to the illegal police custody of the Mr. X and decision of the Sessions Court which was based on an unconstitutional provision. It shows that he was ineffective during the trial which cost Mr. X death sentence. Therefore, the accused in criminal case should not suffer for the fault of his counsel.¹⁶

C. Confirmation of the death sentence by High Court was patently illegal.

14. Third judge of the High Court, whom this matter was referred, refused to entertain the matter stating that he had no discretion due to the applied provisions by the Sessions Court and the nature of the crime. He took the ground of applied provisions, mainly section 303 of IPC which states that whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death. However, this provision has already been declared

¹¹Saibanna v. State of Karnataka, App. (Cr.) 656 of 2004.

¹²Mithu v. State of Punjab, AIR 1983 SC 473; *See also*: Bhagwan Bax Singh & Anr. v. State of U.P., AIR 1983 SC 473.

¹³Kartar Singh v. State of Punjab (1994) 3 SCC 569.

¹⁴Sukanraj v. State of Rajasthan, AIR 1967 Raj 267.

¹⁵Mohd. Hussain Julfikar Ali v. The State (Govt. of NCT) Delhi, AIR 2012 SC 750; *See also*: Jayendra Vishnu Thakur v. State of Maharashtra, (2009) 7 SCC 104.

¹⁶Md. Sukur Ali v. State of Assam, AIR 2011 SC 1222; *See also*: Man Singh v. State of M.P., 2008 9 SCC 542; Bapu Limbaji Kamble v. State of Maharashtra, (2005) 11 SCC 412.

unconstitutional as it excludes judicial discretion.¹⁷ Thus, his non-intervention on this ground shows gross illegality in the trial of the accused.

15. In addition to the above, High Court judge can't confirm death sentence without appreciating the facts and evidence produced by both sides.¹⁸ It is well settled legal principle that in a reference under S.366 for confirming death sentence, the High Court has to consider the evidence afresh¹⁹, examine all relevant & material circumstances²⁰ and arrive at its independent finding²¹ with regard to the guilt of the accused. But in present case, High Court confirmed the death sentence ignoring the illegality involved in the trial.
16. Hence, confirmation of the death sentence by High Court was patently illegal.

III. THERE HAVE BEEN VIOLATIONS OF CONSTITUTIONAL PROVISION IN THE PRESENT CASE.

17. It is humbly submitted before this Hon'ble court that there has been grave violation of Mr. X's fundamental rights under Articles 14, 21 & 22 by High Court, Executive and State Government. President of India has rejected Mr. X mercy petition without taking relevant materials into consideration. High Court has confirmed his death sentence by overlooking the position of law related to Section 303 of IPC, 1860. State government was also not able to fix a date of execution leading to constant torture & fear to the accused.

A. Mercy petition rejected by the President of India is not as per Article 72 of Constitution of India and settled position of Law.

18. In the present case President of India has not taken into consideration that the trial of Mr. X was vitiated by illegality which is a relevant consideration to be taken into account before rejecting mercy petition. It is a settled position of Law that if the president has kept relevant materials out of consideration while passing the order on mercy petition it can be judicially reviewed.²²
19. In the Landmark Judgment of *Shatrughan Chauhan v. Union of India*,²³ Apex Court held that the power of the President per se under Article 72 of Constitution of India is beyond judicial scrutiny but the materials that were relied upon by him to arrive at the conclusion can be reviewed.

¹⁷Mithu v. State of Punjab Etc. 1983; See also: Shatrughan Chauhan & Anr. v. Union Of India, (2014) 3 SCC 1

¹⁸Subbaiah Ambalam v. State of Tamil Nadu, AIR 1977 SC 2046.

¹⁹Id.

²⁰State of U.P. v. Iftikhar Khan, AIR 1973 SC 863; See also: Masathi v. State of U.P., AIR 1965 SC 202.

²¹Rama Shankar v. State of W.B., AIR 1962 SC 1239.

²²Epuru Sudhakar v. Govt. of A.P., AIR 2006 SC 3385.

²³(2014) 3 SCC 1.

20. Thus, the judicial trend over the year establishes that the power of the President under Article 72 of Constitution of India is to pass the order on mercy petition after thorough application of mind taking into account all the relevant considerations which may or may not benefit the petitioner. Since, the above positions has not been followed by the President in the present case the order passed by the President is against the settled position of Law. Hence Mr. X should be given benefit of the same.

B. Execution of death sentence of Mr. X will violate Article 14 enshrined under Constitution of India.

21. It is humbly submitted before this Hon'ble court that in the present case confirmation of death sentence of Mr. X by the High Court of Purva Pradesh resulted in violation of fundamental right of Mr. X under Article 14 of Constitution of India.
22. It is imperative to mention here that Section 303 of IPC has already been held unconstitutional by a five judge constitutional bench of Supreme Court of India on the ground of being violative of Articles 14 of the Constitution.²⁴ The above position was affirmed in the recent case of *Sher Singh v. State of Haryana*.²⁵
23. In the present case, High Court forbid itself from applying its discretion on the basis of section 303 of IPC and confirmed death sentence awarded to Mr. X. High Court gave greater consideration to the fact that Mr. X is already under a sentence of life imprisonment for a previous matter and hence, he should be given death penalty.
24. Such discrimination to Mr. X is against the principle of equality because this classification under section 303 is based upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death.²⁶

C. Execution of Mr. X would lead to violation of Article 21 & 22.

25. It is a settled position of law that excessive delay in carrying out the death sentence is grave violation of the Article 21.²⁷ In the present case there was inordinate delay²⁸ as well as a constant torture of execution in Mr. X's mind, which is clearly a grave violation of his right to life.²⁹
26. Under Article 21 life includes the right to live with human dignity, which is more than just animal existence and free from exploitation.³⁰ The term life in the present case has to be

²⁴Mithu v. State Of Punjab, AIR 1983 SC 473

²⁵2015 (1) ACR 326 (SC)

²⁶*Supra* note 12.

²⁷*Supra* note 18

²⁸Annexure as Table 1

²⁹*Sher Singh v. State of Punjab*, (1983) 2 SCC 344.

³⁰*Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802

construed in a manner so as to include the hardships, pain and terror faced by Mr. X due to pending execution affecting his basic human dignity.³¹

27. In addition to the aforementioned submissions, it is imperative to note that there was clear violation of Article 21 because Mr. X was under constant mental torture³² since his mercy petition was rejected in the year 1996 and was well informed that he can be executed any day now.³³ Sessions Court was also negligent on its part because it was the duty of the Sessions Court to issue death warrant just after the confirmation of death sentence by the high court³⁴ but this was not done which led to further delay in the execution process. Furthermore, it was the duty of the State Government after the rejection of mercy petition in 1996 to fix the date of execution³⁵ but State Government failed to fix the date which caused much delay.
28. The above instances caused inordinate delays which have resulted into prolonged period of imprisonment where Mr. X is suffering from anguish, rising levels of agony and stress arising out of living in the ever present shadow of the noose. Prolonged detention to await the execution of death sentence has dehumanising effect on accused and also, it is unjust, unfair and unreasonable practice.³⁶
29. It is also a settled position of law that, when the law enjoins appointing a counsel to defend an accused, it means an effective counsel who can safeguard the interest of the accused in best possible manner.³⁷ Legal aid should serve its purpose in real sense³⁸ as it is given in fulfilment of constitutional obligation and not as charity³⁹.
30. An excessive delay in carrying out the death sentence is an essential mitigating factor in a plea for commutation of death sentence⁴⁰, therefore, the above submissions clearly establish that Mr. X cannot be executed as his trial was vitiated by illegality and his execution would violate Article 14, 21 & 22.

³¹Furman v. State of Georgia, 408 US 238.

³²Ediga Anamma v. State of A.P., 1974 AIR 799.

³³As per Rule 2 of “Procedure regarding petitions for mercy in death sentence” (framed by Ministry of Home Affairs, Govt. of India)

³⁴Section 413 of Cr.P.C, 1973.

³⁵Chapter XI Clause 11.44 of Central Prison Manual.

³⁶State of U.P. v. Lalla Singh, AIR 1978 SC 368.

³⁷Ram Awadh v. State of UP, MANU/UP/1029/1998; *See also*: Sunil Batra v. Delhi Administration, (1979) 1 SCR 392, McMillann v. Richardson, 397 US 759, 771 n. 14 (1970).

³⁸Ranchoddas Wasava v. State of Gujarat, AIR 1974 SC 1143

³⁹Sagri v. State of M.P., 1991 (1) Crimes 580 (MP).

⁴⁰Supra note 21; *See also*: Mahendra Nath Das v. Union of India, (2013) 6 SCC 253, State of U.P. v. Sahai, 1981 CriLJ 1034, Sadhu Singh v. State of U.P., AIR 1978 SC 1506.

PRAYER FOR RELIEF

Wherefore, in light of the facts stated, issues raised, authorities cited & arguments advanced, Hon`blePrincipalDistrictand Sessions Court may be pleased to *adjudge & declare that*:

1. Petition is allowed.
2. Trial of Mr. X is vitiated by illegality.
3. There is violation of Article 14, 21 and 22 of Constitution of India.
4. Delay in the execution of Mr. X is unexplained and unreasonable.
5. Mr. X will not be executed.

AND

Pass any other order that it may deem fit in the interest of justice, equity & good conscience.

All of which is most humbly prayed.

On behalf of

STATE OF KARNATAKA

Counsels for the State

Sd/

ANNEXURE

Table No.1

Total period of Jail till date	1990 to 02.01.2013	23 Years
Period under sentence of death	1996 to 02.01.2013	17 Years
Total delay in deciding mercy Petitions by the President	1994 to 1996	2 Years
Delay by Court in issuing of Black warrant by Court	1996 to 01.01.2013	17 Years