IN THE HIGH COURT OF JUDICATURE AT PATNA
(FROM COURT'S CHAMBERS VIA VIDEO APPLICATION)
Criminal Writ Jurisdiction Case No.1868 of 2019
Arising Out of PS. Case No.-263 Year-2012 Thana- BIHARSHARIF District- Nalanda

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RAJEETA PATEL @ RAJITA PATEL Wife of Vikki Anand Resident of Village - Uttaranama @Uttaranavo, P.O. and P.S.- Rahui, District- Nalanda

... ... Petitioner

Versus

1. THE STATE OF BIHAR
2. The Principal Secretary, Home Department, Govt. of Bihar, Patna
3. The Director General of Police, Govt. of Bihar, Patna
4. The Superintendent of Police, Nalanda at Biharsharif
5. The Dy. S.P. Nalanda, Biharsharif
6. The S.H.O. Bihar Police Station, Nalanda at Biharsharif
7. The Inspector General of Prisons Govt. of Bihar, Patna
8. The A.I.G. (Prison) Govt. of Bihar, Patna
9. The Jail Superintendent, Divisional Jail Nalanda at Biharsharif

... ... Respondents

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Appearance :

For the Petitioner/s : Mr.Bajarangi Lal, Advocate
Mr.Ganesh Sharma,Advocate
For the Respondent/s : Mr.Sheo Shankar Prasad, SC-8

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date : 12-10-2020

Heard Mr. Bajarangi Lal, learned counsel representing the petitioner and Mr. Sheo Shankar Prasad, learned SC 8 on behalf of the respondents.

2. This writ application has been preferred for a direction to the State of Bihar and its authorities who are respondent nos. 1 to 9 to grant a leave of 90 days to the husband of the petitioner who is in jail after being convicted and sentenced for life by a judgment and order dated 21.06.2016 and 22.06.2016 respectively for the offence under Section 302 of the Indian Penal Code in Session Trial No. 307

of 2013 arising out of Bihar P.S Case No. 263 of 2012.

Submissions of the Petitioner

3. It is the case of the petitioner that she is legally wedded wife of the convict Mr. Vicky Anand. Her marriage was solemnized on 25.04.2012, immediately after about 5 months of the marriage, the husband of the petitioner was made an accused in Bihar P.S. Case No. 263 of 2012 dated 27.09.2012 instituted for the offence under Section 341, 342, 307, 120B/34 of the Indian Penal Code. After 16 days of the hospitalization the victim of the crime died, therefore, Section 302/34 IPC was also added. A charge-sheet was filed against the husband of the petitioner and other accused, After trial, the husband of the petitioner has been convicted and sentenced to undergo rigorous imprisonment for life. It is further stated that a criminal appeal bearing No. 746 of 2016 has been filed against the said judgment of conviction and the appeal has been admitted by the Hon'ble Division Bench of this Court. The prayer for bail of the husband of the petitioner has, however, been rejected.

4. In the aforementioned circumstance it is the submission of the petitioner that her husband is in custody for seven years (at the time of filing of the writ application), the petitioner is aged about 25 years and because of this separation between the petitioner and her husband, since the petitioner and her husband are not living together, they are not blessed with a child. The petitioner is looking for her treatment for infertility and arrangements for

livelihood.

5. The submission of the petitioner is that even though her husband is a life convict still his fundamental right granted under Article 21 of the Constitution of India may be enforced and he would be entitled to get a leave of about 90 days for purpose of conjugal visits and to take care of the infertility problem by providing medical treatment of the petitioner so that she may beget a child. Her husband shall also make arrangements for her livelihood. It is lastly submitted that the petitioner has submitted the representation in this regard vide Annexure '3' series, copies of the representation together with proof of dispatch by speed post have been placed on the record.

6. In order to strengthen his submission, learned counsel for the petitioner has relied upon a Hon'ble Division Bench judgment of Madras High Court in Habeas Corpus Petition No. 1837 of 2017 and a judgment of the Hon'ble Punjab and Haryana High Court in the case of **Jasvir Singh and Ors. vs. State of Punjab& Ors.** reported in **2015 Criminal Law Journal 2282**.

Submissions of the State

7. On the other hand, Mr. Sheo Shanker Prasad, learned SC 8 has contested the writ application. His main contention is that under the Bihar Prison Manual 2012 there is no provision for release of the prisoner for medical treatment of infertility or for procreation purposes. It is submitted that in special circumstance there is a provision of 15 days parole by the State under Rule 793(V) of Bihar

Prison Manual 2012. In this regard he has brought on record the relevant provision by way of Annexure 'A' to the counter affidavit.

8. Rule 2 of the Bihar Prison Manual,2012 has enlisted the statutes including amendments thereafter and corresponding rules which shall have a bearing on the establishment and management of Prisons. Bihar Prisoner's (Parole) Rules 1973 is one of them.

9. Learned SC 8 has also attempted to distinguish the judgment of the Hon'ble Madras High Court and Punjab and Haryana High Court by saying that those judgments would not be applicable in the facts and circumstances of the present case as also in view of the specific provisions contained in the Bihar Prisoners (Parole) Rules 1973 (hereinafter referred to as 'the Parole Rules 1973').

Prisoner does not forfeit Part III rights.

Consideration

10. Having heard learned counsel for the petitioner and State this Court finds that the petitioner is seeking to enforce the fundamental rights as envisaged under Article 21 of the Constitution of India for her prisoner husband. On this issue there are several judicial pronouncements of the Hon'ble Supreme Court. Some of them are being discussed hereinafter:-

11. In the case of C**harles Sobraj Vs. Superintendent Central Jail Tihar, New Delhi** reported in **AIR 1978 1514** Hon'ble Apex Court while considering the complaints made by the petitioner against the prison authorities, observed in paragraph 4 and 5 as

under:-

> “ 4. Contemporary profusion of prison torture reports makes it necessary to drive home the obvious, to shake prison top brass from the callous complacency of unaccountable autonomy within that walled-off world of human held incommunicado. Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process. For if courts 'cave in' when great rights are gouged within the sound-proof, sight-proof precincts of prison houses, where, often, dissenters and minorities are caged, Bastilles will be re-enacted. When law ends tyranny begins; and history whispers, iron has never been the answer to the rights of men. Therefore we affirm that imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, courts will refuse to recognise the full panoply of Part III enjoyed by a free citizen.
>
> “5. This proposition was not contested by the learned Additional Solicitor General Sri Soli Sorabjee. Nor does its soundness depend, for us, upon the Eighth Amendment to the U.S. Constitution. Art. 21, read with Art. 19 (1) (d) and (5), is capable of wider application than the imperial mischief which gave it birth and must draw its meaning from the evolving standards of decency and dignity that mark the progress of a mature society, as Batra and Sobraj have

underscored and the American Judges have highlighted. Fair procedure is the soul of Art. 21, reasonableness of the restriction is the essence of Art. 19(5) and sweeping discretion degenerating into arbitrary discrimination is anathema for Art. 14. Constitutional karuna is thus injected into incarceratory strategy to produce prison justice. And as an annotation of Art. 21, this Court has adopted, in Kharak Singh's case (1964) 1 SCR 332 at p.357:(AIR 1963 SC 1295 at p. 1305) that expanded connotation of 'life' given by Field, J. which we quote as reminder :

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

12. Further in paragraph 12 and 14 the Hon'ble Apex Court recognized the prisoners' rights as a free citizen and observed that those rights are though limited but are not static and will riseto human heights when challenging situations arise. Paragraph 12 and 14 are thus quoted hereunder:-

"12. The court is reluctant to intervene in the day-to-day operation of the State penal system; but undue harshness and avoidable tantrums, under the guise of discipline and security, gain no immunity from court writs. The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of

confinement. Moreover, the rights enjoyed by prisoners under Arts.14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise. Cooper (1971) 1 SCR 512: (AIR 1970 SC 1318) and Maneka Gandhi (1978) 1 SCC 248: (AIR 1978 SC 597) have thus compulsive consequence benignant to prisoners.

"14. Starry abstractions do not make sense except in the context of concrete facts. That is why we agree with the propositions of law urged by Dr. Ghatate but disagree with the distress and discrimination his client wails about. True, confronted with cruel conditions of confinement, the court has an expanded role. True, the right to life is more than mere animal existence, or vegetable subsistence(4). True, the worth of the human person and dignity and divinity of every individual inform Arts. 19 and 21 even in a prison setting. True, constitutional provisions and municipal laws must be interpreted in the light of the normative laws of nations, wherever possible and a prisoner does not forfeit his Part III rights. But what are the facts here ?"

13. In the case of **Maneka Gandhi vs. Union of India** reported in **AIR 1978 SC 597** their Lordships of the Hon'ble Apex Court were considering the questions relating to basic human rights and dealing with Article 21 of the Constitution of India Hon'ble Justice Bhagwati (as his Lordship then was) speaking on behalf of himself, N.L. Untwalia, J.and S. Murtaza Fazal Ali, J. (majority view) in paragraph 54 observed as under:-

“54. It is obvious that Art. 21, though couched in negative language, confers the fundamental right to life and personal liberty. So Far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Art. 21 is : what is the meaning and content of the words 'personal liberty' as used in this article ? This question incidentally came up for discussion in some of the judgments in A. K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 and the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Art. 21 to freedom, of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Arts. 19 and 21. It was in Kharak Singh v. State of U.P., (1964) 1 SCR 332 : (AIR 1963 SC 1295) that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term, to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those- dealt with in the several clauses of Art. 19(1). In other

words, while Art. 19 (1) deals with particular species or attributes, of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words :

"No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so far as the attributes covered by Art. 19 (1) are concerned".

There can be no doubt that in view of the decision of this Court in R. C. Cooper v. Union of India (1970) 3 SCR 530: (AIR 1970 SC 564) the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in R. C. Cooper's case a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it

is sufficient to state for the present that according to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in A. K. Gopalan's case gave rise to the theory that the freedoms under Arts. 19, 21, 22 and 31 are exclusive-each article enacting a code relating to the protection of distinct rights, but this theory was over-turned in R. C. Cooper's case where Shah, J., speaking-on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters -cannot be accepted as correct". It was held in R. C. Cooper's case- and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J. and S. R. Das, J. in A. K. Gopalan's case- that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Art. 21, the

protection conferred by the various clauses of Art. 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedom under Art. 19, Clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Art. 21 would not require to be tested on the touchstone of Clause (d) of Art. 19(1) and yet it was held by a Bench of seven Judges, of this Court in Shambhu Nath Sarkar v. The State of West Bengal (AIR 1973 SC 1425)that such a law would have to satisfy the requirement inter alia of Article 19(1), Clause (d) and in Haradhan Saha v. The State of West Bengal (AIR 1974 SC 2154) 1974CriLJ1479 , which was a decision given by a Bench of five judges, this Court considered the challenge of Clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that Article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty

which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave length for comprehending the scope and ambit of the fundamental rights has been set by this Court in R. C. Cooper's case and our approach in the interpretation of the fundamental rights must now be in tune with this wave length. We may point out even at the cost of repetition that this Court has said in so many terms in R. C Cooper's case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that Article and Art. 19(1). The expression 'personal liberty' in Art. 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19, Now, it has been held by this Court in Satwant Singh's case (AIR 1967 SC 1836) that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act,

1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State Law.' Vide A. K. Gopalan's case. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that is lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Art. 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with this usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed

by the law. There was some discussion in A. K. Gopalan's case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazal Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willi's book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J. did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law." Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in A. K. Gopalan's case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Art. 21, having regard to the impact of Art. 14 on Article 21.

The interrelationship between Arts. 14, 19 and 21."

14. In case of **D. Bhuvan Mohan Patnaik & Ors. vs. State of Andhra Pradesh** reported in **AIR 1974 SC 2092** their

Lordship of the Hon'ble Apex Court were considering the case of three convicts. One of them was undergoing a sentence for 4 ½ and and 5 ½ years awarded to him in two sessions cases. The second petitioner before the Hon'ble Supreme Court was sentenced to death by the learned II Additional Sessions Judge, Visakhapatnam, but that sentence was commuted by the State Government to life imprisonment. The third petitioner was also a life convict. They came before the Hon'ble Apex Court praying for (1) that the armed police guards posted around the jail should be removed and (2) that the live wire electrical mechanism fixed on top of the jail wall should be dismantled. the Hon'ble Supreme Court took note of the right of a prisoner, liberty and the other fundamental freedom of a convict during the period of incarceration, paragraph 10 of the judgment reads as under:-

> "10. Counsel for the petitioners complained bitterly against the segregation of Naxalite prisoners in a "quarantine" and the inhuman treatment meted out to them as if they were inmates of a "fascist concentration camp." We would like to emphasise once again, and no emphasis in this context can be too great, that though the Government possesses the Constitutional right to initiate laws, it cannot, by taking law into its own hands, resort to oppressive measures to curb the political beliefs of its opponents. No person, not even a prisoner, can be deprived of his 'life' or 'personal liberty' except according to procedure established by

> law. The American Constitution by the 5th and 14th Amendments provides, inter alia, that no person shall be deprived of "life, liberty, or property, without the due process of law". Explaining the scope of this provision, Field J. observed in Munn v. Illinois (1877) 94 U.S. 113 that the term "life" means something more than mere animal existence and the inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. This statement of the law was approved by a Constitution Bench of this Court in Kharak Singh v. The State of U.P. (1964) 1 SCR 332 at P. 347=(AIR 1963 SC 11295 at P. 1302)=1963(2) Cri LJ 329 at p. 336. "

15. Having said so their Lordships held that the petitioners are not entitled to either of the two reliefs sought by them. In paragraph '19' of the judgment their Lordships held as under:-

> "19. The petitioners are, therefore, not entitled to either of the two reliefs sought by them and the rule must be discharged. But that is on the ground that the acts complained of are not shown to cause any interference with the fundamental rights available to them and not on the ground that prisoners possess no fundamental rights. The rights claimed by the petitioners as fundamental may not readily fit in the classical mould of fundamental freedoms, but "basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the

> very nature of a free society to advance in its standards of what is deemed reasonable and right.... To rely on a tidy formula for the easy determination of what is a fundamenal right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society." Per Frankfurter J. in Wolf v. Colorado (1949) 338 U.S. 25, 27 = 93 Law ed 1782."

16. This Court has hereinabove reminded itself with the wide spectrum of Article 21 of the Constitution of India *vis-à-vis* the limits and purpose of judicial jurisdiction. Now keeping in view the limits and purposes of judicial jurisdiction, this Court would be required to apply the principles laid down by the Hon'ble Supreme Court in the facts of the present case.

<u>Right of conjugal visits to a Prisoner in India</u>

17. The petitioner in the present case is looking for her treatment for infertility and is claiming conjugal visit of her husband as also arrangement for her livelihood through Article 21 of the Constitution of India.

18. This Court would, therefore, examine at first as to whether the prisoners in India have got a right of conjugal visit and treatment of the petitioner for infertility may be a ground to consider release of her husband on 'Parole' or 'Furlough' as the case may be.

<u>Universal Declarations of Human Rights</u>

19. The Preamble of universal declaration of human rights (1948) talks of recognition of the inherent dignity and of the equal

and inalienable rights of all members of the human family and it is the foundation of freedom, justice and peace in the world. The proclamation inter-alia reads as under:-

> "This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Article 3 and Article 5 of the Declaration are reproduced hereunder:-

> "**Article 3**
> Everyone has the right to life, liberty and the security of person."
> "**Article 5**
> No one shall be subjected to torture or to cruel, inhuman or degarding treatment or punishment."

20. The General Assembly of United Nations in it's 68th plenary meeting held on 14 December 1990 affirmed the Basic Principle for the Treatment of Prisoners. Those are extracted herein below:-

> **"Basic Principles for the Treatment of Prisoners**
> **1.** All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
> 2. There shall be no discrimination on the grounds

of race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.

3. It is, however, desirable to respect the religious beliefs and cultural preccepts of the group to which prisoners belong, whenever local conditions so require.

4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being development of all members of society.

5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocal thereto as well as such other rights as are set out in other United Nations covenants.

6. All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.

7. Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.

8. Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to

> contribute to their own financial support and to that of their families.
>
> 9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
>
> 10. With the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions."
>
> 11. The above Principles shall be applied impartially."

21. India is one of the signatories to the universal declaration of human rights. These rights are, thus, recognized by the Constitution of India in the form of fundamental rights and directive principles of the State policy.

22. In the case of **Francis Coralie Mulin versus the Administrator,Union Territory of Delhi** reported in **AIR 1981 SCC 746** the Hon'ble Supreme Court has interpreted the expression "personal liberty" contained in Article 21 of the Constitution in the context of the rights of a prisoner and it has been held that the prisoner has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration.

23. In the case of **State of Maharashtra versus Prabhakar Pandurag Sangzgiri and another** reported in **AIR 1966 SC 424** the Hon'ble Supreme Court took a view that the

prisoner has a right of publication of his books; In **Sheela Barse vs. State of Maharashtra** reported in **(1983) 2 SCC 96** the court read into Article 21 the right to legal aid to undertrial and convicted persons and issued several directions for providing effective legal assistance to prisoners and to provide protection to women prisoners in custody.

24. In India the Prisoners Act 1900 (hereinafter referred to as 'the Act of 1900') has been enacted to consolidate the several 'Acts' relating to prisoners confined by an order of a Court.

Prisoners Act 1900 with State Amendment

25. The Act of 1900, recognizes the release of prisoners on 'Parole' for a period not exceeding thirty days at a time. The State Government or any authority to which the State Government may delegate its' power in this behalf may on the recommendation of the District Parole Board constituted under Section 31A of the Act of 1900 direct a prisoner to be released in accordance with Section 31-B of the Act of 1900. Notwithstanding anything contained in Section 31-B, under Section 31-C the State Government has, for special reasons, power to release a prisoner for a period not exceeding 15 days. Part VI A of the Act of 1900 contains the State amendments and according to this in it's application to the State of Bihar, after Part VI, VI-A has been inserted. Section 31- B, Section 31-C and 31 -E falling in Part VI-A (Bihar Amendment) are as follows:

> "31-B. Release of prisoners on parole.—(1) The Government, or any authority to which the State Government may delegate is

powers in this behalf, may, on recommendation of this District Parole Board, direct that a prisoner may be released, either without conditions or upon such conditions as may be specified in the direction, for any period not exceeding thirty days at a time, excluding the time required for journeys and the days of departure from, and the arrival at, the prison:

Provided that no prisoner shall be released under this sub- section, unless —

(a) he has served a period of not less than one year excluding remissions of his sentence;

(b) his conduct in prison has been, in the opinion of the District Parole Board, uniformly good;

(c) there is, in the opinion of the District Parole Board, reasonable probability that during the period of his release he shall not commit any crime; and

(d) in the case of a second or subsequent release, not less than six months have elapsed from the date of the expiry of this previous release: Provided further that no prisoner shall be released under this sub-section more than three times.

(2) The provisions of sub-section (1) shall not apply to a prisoner, —

(i) who has been convicted of an offence specified in the Schedule annexed to this part; or

(ii) who has been classified as a habitual criminal under the rules made under the Prisons Act, 1894, and has had more than

three previous convictions.

(3) The period of release of a prisoner under sub-section (1) shall count towards the total period of his sentence, provided that he surrenders on the due date and his conduct has been satisfactory during the period he was outside the jail on parole.

31-C. Power to release prisoners for special reasons.— (1) Notwithstanding anything to the contrary contained in Section 31-B or in any other law for the time being in force, the State Government, or any authority to which the State Government may delegate its powers in this behalf, may, for any special reasons, direct that a prisoner may be released for a period not exceeding fifteen days (excluding the time required for journeys and the days of departure from, or arrival at, the prison), either without conditions or upon such conditions specified in the direction as the prisoner accepts, and may, at any time cancel his release.

(2) The authority directing the release of any prisoner under sub-section (1) may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub- section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to the penalty thereof: Provided that no prisoner shall,

> without the special sanction of the State Government, be released under this section, unless —
>
> (i) he has served at least six months of his sentence including remissions;
>
> (ii) his conduct has been, in the opinion of the Superintendent of the jail in which he is serving his sentence, uniformly good;
>
> (iii) he is not a habitual criminal under the rules made under the Prisons act, 1894; and
>
> (iv) the offence for which he has been convicted, does not, in the opinion of the authority directing the release, involve grave moral turpitude or mental depravity."

26. Section 31 E provides the rule making power to the State Government for the purposes of Part VI A. Section 31 – E reads as under:-

> "31-E. Power to make rules. — (1) The State Government may make rules for carrying out the purposes of this Part.
>
> (2) In particular and without prejudice to the generality of the foregoing provision such rules may provide for —
>
> (a) the procedure to be followed in respect of the proceedings for the release of prisoners;
>
> (b) the conditions of release of prisoners including conditions for supervision during the period of such release;
>
> (c) travelling allowances for prisoners during the period of release;
>
> (d) restrictions on the movements of prisoners

during the period of release; and

(e) travelling allowances for non-official members attending the meetings of the District Parole Board.

27. The schedule with reference to to Section 31-B (2) is as under:-

> "THE SCHEDULE[See Section 31-B (2)]
> 1. An offence punishable under Section 119 of the Indian Penal Code.
> 2. An offence punishable under Sections 121, 121-A, 122, 123, 128 or 130 of the Indian Penal Code.
> 3. An offence punishable under Section 131 or 132 of the Indian Penal Code.
> 4. An offence punishable under Section 194 or 195 of the Indian Penal Code.
> 5. An offence punishable under Section 232, 235, 238 or 240 of the Indian Penal Code.
> 6. An offence punishable under Sections 302, 303, 304, 306 or 307 of IPC.
> 7. An offence punishable under Sections 313, 314, or 316 of the Indian Penal Code.
> 8. An offence punishable under Sections 364, 366, 366-A, 366-B, 367 or 372, of the Indian Penal Code.
> 9. An offence punishable under Section 376 or 377 of the Indian Penal Code.
> 10. An offence punishable under Sections 392, 394, 395, 396, 397, 398, 399 or 400 of the Indian Penal Code.
> 11. Any conspiracy to commit or any attempt to commit or any abetment of any of the aforesaid offences".- Bihar Act 23 of 1956, S. 2 (10-10-1956)."

Bihar Prisoners (Parole) Rules 1973

28. By virtue of power conferred upon it under Section 31 E (2) the State of Bihar has framed Parole Rules 1973. Under the Parole Rules 1973 a District Parole Board has been constituted in accordance with Section 31A of the Act of 1900. The District Magistrate is the Chairman of the Parole Board, he will be the Chairman of the meeting. The Superintendent of the Police is the

Secretary of the Board and he will be convener of the meeting. The members nominated by the State Government from amongst the State Legislative Assembly shall remain as a member of Board till the period they remain Member of the Assembly. The quorum of the meeting shall be of three members. According to the Parole Rule '5' the Superintendent of Police has to himself examine the records of prisoners seeking temporary parole, he will get himself satisfied that the prisoner is fulfilling the conditions for release on 'parole' and that his conduct during prison period has been found good. Sub-Rule (2)to sub-Rule (7) of Rule 5 prescribe the conditions and the procedures required to be followed in order to consider the application for parole under Section 31-B and Section 31-C of the Act of 1900. Rule 6 of the parole rule 1973 enumerates the special reasons for which a prisoner may be released temporarily under Section 31-C of the Act of 1900. The categories prescribed under sub-Rule (2) of Rule 6 are as under:-

> "(क) कैदी के माता–पिता, पत्नी (या पति) या बच्चे की गंभीर बीमारी या मृत्यु;
> (ख) कौटुम्बिक संम्पति और मामले से संबंधित समस्याओं का निपटारा करना;
> (ग) अपने पुत्र या पुत्री का विवाह और अनिवार्य धार्मिक तथा सामाजिक संस्कारों का संपन्न किया जाना, तथा
> (घ) भावी नियोजक से साक्षात्कार करना;"

29. At the time of passing of the order for temporary release such conditions may be imposed as may be deemed necessary including that the prisoner shall furnish bail bond with

surety and during the temporary release he will be under supervision of a probation officer.

30. From a reading of the relevant provisions of the Act of 1900 and the Parole Rules 1973 framed by the State of Bihar again it appears that there are provisions for release of the prisoners on 'parole' on the recommendation of the District Parole Board for any period not exceeding thirty days at a time and also for release of prisoners for a special reason by the State Government for a period not exceeding 15 days. Till now, however, there is no statute or Rule Book recognising directly the conjugal visit as a reason for granting 'Parole' to a prisoner. Thus, till now this Court finds that conjugal visits for procreation does not specifically find place in the category 'special reasons' under sub-Rule (2) of Rule 6 of the Parole Rules 1973 for temporary release of the prisoner but this issue cannot rest here as the Court has to answer whether conjugal visit and treatment of the petitioner for her infertility is covered under Article 21 of the Constitution of India and the problem of infertility of the petitioner which requires a medical advice and treatment may be brought in any of the categories of special reasons in terms of sub-Rule (2) of Rule 6 of the Parole Rules 1973. Whether treatment of the petitioner for her infertility and a conjugal visit of her husband or artificial insemination in alternative are supplementary and complementary to each other and whether the fact that she is looking towards her husband to take care of her livelihood are not sufficient

cause being a family problem which needs to be resolved is a reason well covered under sub-Rule 2 (ख) of Rule 6 of the Parole Rules 1973. In Hindu families the child is given a very important place. According to Riga Veda, the husband accepts the palm of wife in order to get a high breed progeny. Marriage is a basic of all religion activities. In the words of K. M. Kapadia "marriage is primarily for the fulfillment of duties; the basic aim of marriage was dharma". (Refer https://www.sociologyguide.com)--Indian Society (index.php) —Marriage in Hinduism.

Some Judicial Pronouncements dealing with Conjugal Visits claim of Prisoner

31. In the case of **Ms. G. Bhargava, President M/s. Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh (PIL No. 251 decided on 16thJuly, 2012)** the Hon'ble High Court rejected the prayer made by the petitioner in a public interest litigation seeking a direction to the State to take immediate steps and allow the prisoners to have a conjugal visit to the spouses of prisoners across the State of Andhra Pradesh.

32. The Hon'ble High Court noticed that Chapter IV of Andhra Pradesh Prison Rule 1979 provide for the release of the prisoners on furlough/parole, therefore, this temporary period of release may be utilized by the prisoners for leading the family life with their spouses. The High Court did not agree to provide any facilities of conjugal visits to jails as it was matter of policy decision

which were in exclusive domain of the State.

33. It is evident from the judgment that Hon'ble Andhra Pradesh High Court recognised that temporary parole or furlough may be utilized by prisoner for leading the family life.

34. Learned counsel for the petitioner has relied upon the Division Bench judgment of the Hon'ble Madras High Court in Habeas Corpus petition 1837 of 2017 (**Mrs. Meharaj vs. The State of Tamilnadu & Ors.**). In the said case the prayer was to direct the respondents to grant leave for 30 days to the detenue for medical treatment and arrangement of livelihood. The Hon'ble Division Bench has noticed that Rule 20 of Tamil Nadu Suspension of Sentence Rules 1982 prescribed eight grounds under which the seventh ground was 'any other extraordinary reason'. The Hon'ble High Court considered whether the claim made by the petitioner is an extraordinary reason or not and held that in absence of any other rule, providing for release of the prisoners for the purpose of birth of a child with the available law, it must be interpreted that the request is covered under extraordinary reasons. Their Lordships of the Hon'ble Division Bench held "even assuming that this reason is not extraordinary, Article 21 of the Constitution of India would very much available for this Court to consider the claim made by the wife." (**emphasis supplied**) Having held that the prisoners have also a right to dignity and they cannot be deprived of the same, the Hon'ble Division Bench of Madras High Court considered the next

question as to whether permission should be granted in the name of parole or by way of suspending the sentence. Their lordships noticed that the Full Bench judgment of the Court and they found that the parole and suspension of sentence are different connotations operating in different manners and ultimately permitted the prisoner to go temporary leave for a period of two weeks by way of suspension of sentence.

35. This Court finds from the judgment of the Hon'ble Division Bench of Madras High Court that in the said case the term 'parole' used in Chapter XIX of the Tamil Nadu Prisons Rule was not relating to the temporary release of a prisoner but they were in the nature of a release by granting remission. Tamil Nadu Suspension of Sentence Rules 1982 was not prescribing conjugal visits as one of the grounds for suspension of sentence, therefore, the Hon'ble Madras High Court took a view that the purpose of procreation of a child was incorporated as a ground covered under extraordinary reasons which was the seventh ground under the Tamil Nadu Suspension of Sentence Rules 1982.

36. Thus, Hon'ble Madras high Court has also put this conjugal visit in the extraordinary category.

37. The another judgment on which reliance has been placed by learned counsel for the petitioner is that of the Punjab and Haryana High Court in the case of **Jasvir Singh& Ors.** (supra). The Hon'ble Single Judge of the Punjab & Haryana High Court(as his

Lordship then was) has eloquently gone into the issues and expanded the scope of the writ petition. It is a well discussed judgment directly covering all the issues which are arising in this case. In the case of **Jasvir Singh & Ors.** (supra), the petitioners in the case were the husband and the wife respectively who were tried together for an offence under Section 302, 364-A 201/ 120B of the IPC and were awarded death sentence by the learned trial Court which was affirmed by the Hon'ble High Court but while dismissing the Cr. Appeal the Hon'ble Supreme Court commuted the death sentence awarded to petitioner No. 2 (wife into life imprisonment). The petitioners pleaded enforcement of their right to have conjugal life and procreate within the jail premises.

38. The question framed in the said case were as under:-

> "i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?
>
> ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
>
> "iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
>
> iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are

entitled to such right(s)?"

39. His Lordship traced the historical perspective of the prisons in India and Prison Act, 1894, the subsequent Jail Committees' Reports, Post-Independence era and Jail Reforms leading to formation of All India Jail Reforms Committee headed by Justice A. Mulla who recommended in 1983 to have a National Policy on Prisons and suggested several Radical Reformations in the prison structure and administration. Thereafter, his Lordship noticed various judgments of the Hon'ble Apex Court on the applicability of Article 21 of the Constitution of India in respect of a prisoner, under trial as well a convict and observed in paragraph 34 as under:-

> "34. Though these decisions are truly milestones in the recognition and enforcement of prisoner's rights and prison reforms yet they are peripheral to the core issues directly canvassed before me. Sunil Batra-II, (AIR 1980 SC 1579) does notice the prevalence of homosexuality or sexual abuse of underage inmates by their adult counter-parts but the question of 'conjugal visits' or 'right to procreation' to be the 'right to life' or 'personal liberty' of a jail inmate was not raised there. Albeit, the book "Rape In Prison" by Anthony M. Scacco, Jr. referred to in that decision does acknowledge that "sex is unquestionably the most pertinent issue to the inmate's life behind bar.... There is a great need to utilize the furlough system in corrections. Men with record showing good behavior should be released for weekends at home with their families and relatives"."

40. Proceeding further his Lordship in the case of **Jasvir Singh and Ors.** (supra) went through the policies for conjugal or family visits around various jurisdiction and in this regard the academic research and opinion on conjugal visits are well discussed from paragraph 68 to 73 and this Court would quote the same for a ready reference:-

> "**68**. Learned Amicus Curiae referred to various scholarly articles, books and research papers, throwing invaluable light on the issue of conjugal visits/marital relationship of prisoners/human rights of prisoners. The article Marital Relationships of Prisoners in Twenty - Eight Countries by Prof. Ruth Shonle Cavan and Prof. Eugene S. Zemans, (Ruth Shonle Cavan, Eugene S. Zemans Marital Relationships of Prisoners in Twenty-Eight Countries, 49J. Crim. L Criminology & Police Sci. 133(1958-1959, gives insight of the policies and practices followed in as many as 28 countries in Europe, Asia, Africa and American continents. According to this article "...in only a few countries are provisions for marital contacts extended equally to all categories of prisoners. The limitation may be because of the unreliability or dangerousness of the criminal; or marital contacts may have some connotation of a privilege to be granted only to cooperative and conforming prisoners. In either case, the practice of home leaves or of family residence in a penal colony is not carried out haphazardly but tends to be integrated into the total prison regime it is worth noting that in general the countries from which we received responses do not favour private or conjugal visits within the prison,

with the exception of Mexico."

“**69**. The other research paper authored way back in the year 1964 titled Conjugal Visitations In Prisons - A Sociological Perspective, (Joseph K. Balogh, “Conjugal Visitations In Prisons- A Sociological Perspective”, 28 Fed. Probation 35 1964), is a study on the determination of changes of attitudes of prison administrators in USA towards the idea of conjugal visitations. The author concludes that "Conjugal visitations tend to magnify and accentuate problems relating to rehabilitation. It would appear that prison administrators are not in favour of conjugal visitations, foreign precedents to the contrary notwithstanding. This stand by prison administrators, however, is not without some foundation the attitude of the American public is characterised by apathy, un-familiarity, and disinterestedness in the problem as a whole...".

“**70**.Yet another article Attitudes toward Conjugal Visits for Prisoners (Norman S Hayner, “”Attitudes toward Conjugal Visits is a research compilation on conjugal visiting practices including those prevailing in Latin American countries like Brazil, Bolivia, Colombia, Chile etc. The practices in Canada and the California (USA) where conjugal visits had been started also found a mention there. After interviewing the Prison Administrators in California, the author found "deep cleavages and almost irreparable estrangement of wives and children toward the husband and father who is away in prison.....it is our contention that we do not protect society by contributing to the dissolution of the family unit. Family visiting is an attempt by California prison administrators to provide an

opportunity for the inmate to visit his wife and children in a relaxed normal like family setting".

"**71**. Learned Amicus Curiae referred to Nelson Mandela's autobiography Long Walk to Freedom wherein one of the tallest leaders of the world has described that Prison not only robs of one's freedom but it also attempts to take away one's identity as every inmate is asked to wear same uniform, eat the same food and follow the same schedule. The work of Sir Leon Radzinowicz and Joan King, titled The Growth of Crime: The International Experience especially the Chapter titled 'Prisons in the Pillory' has been usefully highlighted, where the authors while dealing with the issue of conjugal rights have strongly advocated the visits from wives and live-in relationship partners for long-term offenders as an effective solution to the problem of sexual tension and homosexual behavior amongst prisoners. The learned authors have backed with equal force that those prisoners who do not fall into the top security categories should be granted periodical home-leave as a better and more natural solution than conjugal visit in the unfamiliar and embarrassing atmosphere of a prison. In the case of maximum security prisoners, the authors have suggested a small scale experiment whereby selected prisoners with stable marriages could spend a day or weekend with their families in some kind of family hostel outside the prison walls as such a recourse will help maintain links and reduce tension."

"**72.**Learned Amicus Curiae also quoted an article by Professor Baroness Deech on Human Rights and Welfare (2009) which gives a meaningful insight of

the case of Yigal Amir, who assassinated the Prime Minister of Israel in the year 1955. Under the Israeli law although the prisoners are allowed to marry and have children, the convict was denied such right due to the heinous nature of the crime. Having married by proxy, the couple petitioned for the right to consummate their marriage and the wife was allowed a conjugal visit in late 2006. The Courts held that the prisoners have these human rights. The said case underlines the severity of the crime to not be a disqualification in granting rights of procreation/consummation as the same are "human rights".

“**73**. Learned Amicus Curiae lastly referred to an academic paper written by Brenda V. Smith, Analyzing Prison Sex: Reconciling Self-Expression with Safety, Humans Rights Brief (2006) as it gives an overview of the issue 'Human Rights Norms and Prison Sex' across various jurisdictions. The article is extremely informative and states - Many other countries permit sexual expression in institutional settings, define these visit under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners and family. For example, Brazil has implemented a "conjugal visit," which allows prisoners to visit with family and friends without physicalrestriction, and an “intimate visit”, which allows prisoners to received visits from their partners or spouses in individual prison cells. In the Czech Republic, the Director of prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives

> at a time. In Spain , inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally, Denark has implemented a "prison leave" system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark "see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact outside it is believed that fewer prisoners try to escape".

41. The conclusion reached by the Hon'ble Punjah & Haryana High Court in the case of **Jasvir Singh & Ors.** (supra) and directions issued in the said case are also required to be taken note of hereunder:-

> "**95**. For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-
>
> i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?
>
> Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21of our Constitution read with the Universal Declaration of Human Rights.
>
> ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
>
> The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict

between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State."

"**96.** In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst

others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

42. Learned counsel for the petitioner has heavily relied upon this judgment and this Court finds itself in complete agreement with the views expressed by Hon’ble Punjab & Haryana High Court in the case of **Jasvir Singh & Ors.** (supra). The “right to life” and “personal liberty” guaranteed in Article 21 of the Constitution of India would include the rights of convict or jail inmates for conjugal visits or artificial Insemination (in alternative). The petitioner is looking for the medical check ups and treatment for infertility and

also for arrangement of her livelihood. Here, this Court would take note of a report by the Indian Society For Assisted Reproduction. According to it 10-14 % of Indian population suffers from infertility. According to an estimate this amounts to roughly one in every six couples in urban India. (refer www.medilife.com infertility in India: silent truth behind the booming population.) These are in the nature of family problems of the convict. In the opinion of this Court, these grounds are well covered under Rule 6(2) (ख) of the Parole Rules 1973. Rule 6 (2) (ख)says "कौटुम्बिक संम्पति और मामले से संबंधित समस्याओं का निपटारा करना". It is definitely a family related problem which is to be resolved by husband of the petitioner.To that extent thus, the prayer of the petitioner that her husband is entitled for leave cannot be rejected at the outset. The word 'leave' is not significant. The request of the petitioner is to be considered as if it is a prayer for grant of 'Parole' or 'Furlough' under the Parole Rules 1973.

43. The question then arises as to whether the prayer of the petitioner to direct the respondents to grant 90 days leave is fit to be allowed. Since the Act of 1900 and the Parole Rules 1973 provide for the maximum period for which 'Parole' or 'Furlough' may be granted at a time the prayer for grant of 90 days leave has to be considered keeping in view the limits mentioned in the Act of 1900 and the Parole Rules 1973 only.

44. This Court has already noticed that Section 31-B and 31-C read with Rules 5 and 6 of the Parole Rule, 1973 duly provided

for a temporary release of a prisoner on Parole which may be in the nature of a temporary release for a period not exceeding 30 days at one time and such Parole is to be granted by the State Government on the recommendation of the District Parole Board subject to the Prisoners fulfilling the conditions mentioned in the provisions of Act of 1900 and the Parole Rule 1973.

45. Release may also be granted by the State Government for special reasons and such release will be temporary for a period not exceeding 15 days. The case of the petitioner would require a consideration also keeping in mind the judgment of the Hon'ble Supreme Court of India in the case of **Asfaq v. The State of Rajasthan & Ors. r**eported in **(2017) 15 SCC 55.** In the said casethe Hon'ble Supreme Court was considering a challenge to the judgment of the Hon'ble High Court dismissing the appellants prayer to the effect that he be released on parole for 20 days. The Hon'ble High Court dismissed the petition with the following observations:-

> "Having heard the rival submissions of the parties and after going through the relevant record, we are of the considered opinion that it is a case of serious and heinous crime where parole cannot be claimed as a matter of right. Further, in view of the fact that appeal has been decided by the Hon'ble Supreme Court, it would not be appropriate for exercise of discretion in favour of the Petitioner……..."

46. The Hon'ble Supreme Court held that the dismissal of

the writ petition filed by the appellant was not correct and it did not meet the test of law. Their Lordships were of the view that a serious and heinous crime cannot be a reason for denying a parole per se and went to notice the distinction between 'Parole' and 'Furlough'. Paragraph 9, 10, 11 and 13 are quoted hereunder for a ready reference:-

> "**9**. We may state at the outset that the reason because of which the High Court dismissed the writ petition filed by the Appellant herein is not an apposite one and does not meet the test of law. The petition is dismissed only on the ground that the Appellant is convicted in a case of serious and heinous crime and, therefore, parole cannot be claimed as a matter of right. As per the discussion that would follow hereinafter, the conviction in a serious and heinous crime cannot be the reason for denying the parole per se. (**emphasis supplied**) Another observation made by the High Court is that since this Court had decided the appeal of the Appellant affirming the conviction, it would not be appropriate for the High Court to exercise its discretion in favour of the Appellant and if he so desires he may approach this Court for the said purpose. This again amounts to abdication of the power vested in the High Court. Insofar as conviction for the offence for which he was charged, i.e. under the provisions of TADA, is concerned, no doubt that has been upheld till this Court. However, the issue before the High Court was entirely different. It was as to whether the Appellant is entitled to the grant of parole for twenty days which he was claiming. Merely

because the matter of conviction of the Appellant had come up to this Court would not mean that the Appellant has to be relegated to this Court every time, even when he is seeking the reliefs unconnected with the main conviction. It is more so when in the first instance it is the High Court which is supposed to decide such a prayer for parole made by the Appellant. With these remarks, we advert to the issue at hand."

"**10**. In the first instance, it would be necessary to understand the meaning and purpose of grant of parole. It would be better understood when considered in contrast with furlough. These terms have been legally defined and judicially explained by the Courts from time to time.

11. There is a subtle distinction between parole and furlough. A parole can be defined as conditional release of prisoners i.e. an early release of a prisoner, conditional on good behaviour and regular reporting to the authorities for a set period of time. It can also be defined as a form of conditional pardon by which the convict is released before the expiration of his term. Thus, the parole is granted for good behaviour on the condition that parolee regularly reports to a supervising officer for a specified period. Such a release of the prisoner on parole can also be temporarily on some basic grounds. In that eventuality, it is to be treated as mere suspension of the sentence for time being, keeping the quantum of sentence intact. Release on parole is designed to afford some relief to the prisoners in certain specified exigencies. Such paroles are normally granted in certain situations some of which may be as follows:

(i) a member of the prisoner's family has died or is

> seriously ill or the prisoner himself is seriously ill; or
> (ii) the marriage of the prisoner himself, his son, daughter, grandson, granddaughter, brother, sister, sister's son or daughter is to be celebrated; or
> (iii) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation of his land or his father's undivided land actually in possession of the prisoner; or
> (iv) it is desirable to do so for any other sufficient cause;
> (v) parole can be granted only after a portion of sentence is already served;
> (vi) if conditions of parole are not abided by the parolee he may be returned to serve his sentence in prison, such conditions may be such as those of committing a new offence; and
> (vii) parole may also be granted on the basis of aspects related to health of convict himself.
>
> **13.**As far as 'regular parole' is concerned, it may be given in the following cases:
>
> (i) serious illness of a family member;
> (ii) critical conditions in the family on account of accident or death of a family member;
> (iii) marriage of any member of the family of the convict;
> (iv) delivery of a child by the wife of the convict if there is no other family member to take care of the spouse at home;
> (v) serious damage to life or property of the family of the convict including damage caused by natural calamities;
> (vi) to maintain family and social ties;
> (vii) to pursue the filing of a special leave petition before this Court against a judgment delivered by the High Court convicting or upholding the conviction, as the case may be."

47. Their Lordships further noticed the need of a prisoner to maintain family and social ties and then the other competing public interest which are to be kept in mind while deciding as to whether in a particular case parole or furlough be granted or not. In paragraph 17 their Lordship held as under:

> "**17.**From the aforesaid discussion, it follows that

amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to maintain family and social ties. For this purpose, he has to come out for some time so that he is able to maintain his family and social contact. This reason finds justification in one of the objectives behind sentence and punishment, namely, reformation of the convict. The theory of criminology, which is largely accepted, underlines that the main objectives which a State intends to achieve by punishing the culprit are: deterrence, prevention, retribution and reformation. When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the society. (**emphasis supplied**) Another objective which this theory underlines is that even such convicts have right to breathe fresh air, albeit for periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners. They are ultimately aimed for the good of the society and, therefore, are in public interest."

48. The observations of the Hon'ble Supreme court in the case of **Asfaq** (supra) that the petition cannot be dismissed only on the ground that the appellant is a convict in a serious and heinous crime is a binding precedent. The said observation of the Hon'ble Supreme Court laying down some of the situation in which paroles

are normally granted are to be understood in the terms and spirit. One of the categories provided is when it is desirable to do so for any other sufficient cause. Further 'Parole' is to be granted in order to afford opportunity to a convict to solve their personal problems. The Hon'ble Supreme Court says that reformation theory justifies letting of even a life convict for short period on parole. (**emphasis is mine**). There are reasonings behind these observations of the Hon'ble Supreme Court, therefore, it is the ratio-decidendi of the judgment. It is well settled that even obiter-dictum of Hon'ble Supreme Court are binding on all.

49. This Court is therefore, persuaded to hold that right to have a conjugal visit or artificial insemination in alternative is included under Article 21 of the Constitution of India, this is, however, subject to the regulatory procedure as may be provided by law. Medical check ups and treatment of the petitioner for infertility is an essential part of this right and without allowing husband of the petitioner to get his wife treated for such purpose the concept of this right under Article 21 of the Constitution of India shall remain only a hollow and shallow concept. Thus, until the State of Bihar addresses the issues of conjugal visits or artificial insemination effectively by way of an appropriate legislation, the cases such as that of the present petitioner who is seeking to treat her medical conditions of infertility and is looking for a conjugal visit of her husband is to be taken not only covered under sub-Rule 2 (ख) of Rule 6 of the Parole

Rules 1973 as held hereinabove but is also a 'sufficient cause' in the broad categories laid down by Hon'ble Supreme Court which qualify as a ground to consider the case of the husband of the petitioner for grant of 'Parole' or 'Furlough'. The judgment of Hon'ble Supreme Court in the case of **Asfaq** (supra) is binding on the State. The problem of infertility which the petitioner is facing and for which she needs medical attention as also the arrangement of her livelihood are certainly the family related problems of the petitioner. The case of husband of the petitioner thus requires a consideration for purpose of his temporary release on 'parole' or 'furlough' subject to such conditions as may be imposed by the competent authority keeping in view the Act of 1900 read with Parole Rules 1973 and the judicial pronouncement of Hon'ble Apex Court in the case of **Asfaq** (supra).

50. The respondents State of Bihar and its' authorities are therefore, directed to consider the representation of the petitioner for grant of 'parole' or 'furlough' as the case may be in the light of this judgment. Letsuch consideration be given and final reasoned order be passed by the competent authority within a period of 30 days from the date of receipt/production of a copy of this order.

51. This Court, being a constitutional Court exercising it's power under Article 226 of the Constitution of India also directs the State of Bihar and its' authorities (Respondent Nos. 1 to 9) to look into the operative part particularly the directions contained in

paragraph '96' of the judgment of the Hon'ble Punjab & Haryana High Court in the case of **Jasvir Singh & Ors.** (supra) and take appropriate steps to carry on the same exercise, in the context of the State of Bihar, if not already undertaken either on its own initiative by the State Government or by virtue of any other judicial order on the subject. The respondents shall strictly abide by the time frame.

52. This writ application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

avin/-sushma

AFR/NAFR	AFR
CAV DATE	30.09.2020
Uploading Date	15.10.2020
Transmission Date	

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.