REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL/CRIMINAL ORIGINAL JURISDICTION

TRANSFER PETITION (C) NO. 1343 OF 2008

ANITA KUSHWAHA ...APPELLANT

VERSUS

PUSHAP SUDAN ...RESPONDENT

WITH

TRANSFER PETITION (CRL.) NO. 116 OF 2011

AJAY KUMAR PANDEY ...APPELLANT

VERSUS

STATE OF J & K & ANR. ...RESPONDENTS

TRANSFER PETITION (C) NO. 562 OF 2011

SUPRIYA ...APPELLANT

VERSUS

PANKAJ DHAR ...RESPONDENT

TRANSFER PETITION (C) NO. 1161 OF 2012

RAKHEE CHOWDHARY BALDOTRA ...APPELLANT

VERSUS

YOGESH KUMAR BALDOTDRA ...RESPONDENT

TRANSFER PETITION (C) NO. 1294 OF 2012

SONALI PIMPLE @ SONALI MORE & ORS. ...APPELLANTS

VERSUS

C.K. MORE ...RESPONDENT

TRANSFER PETITION (C) NO. 1497 OF 2012

KALPANA TIWARI ...APPELLANT

VERSUS

RAJNI KANT TIWARI ...RESPONDENT

TRANSFER PETITION (C) NO. 1573 OF 2012

GEETA BHATIA ...APPELLANT

VERSUS

MADHAV BHATIA ...RESPONDENT

TRANSFER PETITION (C) NO. 426 OF 2013

BHAVIKA BHARTI ...APPELLANT

VERSUS

NAKUL MAHAJAN ...RESPONDENT

TRANSFER PETITION (C) NO. 1773 OF 2013

NEHA ...APPELLANT

VERSUS

SANDEEP VAISHNAVI ...RESPONDENT

TRANSFER PETITION (C) NO. 1821 OF 2013

GUNJAN WAZIR ...APPELLANT

VERSUS

VIVEK WAZIR ...RESPONDENT

TRANSFER PETITION (CRL.) NO. 99 OF 2014

GUNJAN WAZIR ...APPELLANT

VERSUS

VIVEK WAZIR & ORS. ...RESPONDENTS

TRANSFER PETITION (C) NO. 1845 OF 2013

TAMANA SODI ...APPELLANT

VERSUS

TILAK CHOWDHARY ...RESPONDENT

TRANSFER PETITION (C) NO. 14 OF 2014

MANJU BALA ...APPELLANT

VERSUS

VINOD KUMAR ...RESPONDENT

J U D G M E N T

T.S. THAKUR, CJI.

1. A three-judge bench of this Court has, by an order dated 21st April, 2015, referred these Transfer Petitions to a Constitution Bench to examine whether this Court has the power to transfer a civil or criminal case pending in any Court in the State of Jammu and Kashmir to a Court outside that State and *vice versa*.

Out of thirteen Transfer Petitions placed before us, pursuant to the reference order, eleven seek transfer of civil cases from or to the State of Jammu and Kashmir while the remaining two seek transfer of criminal cases from the State to Courts outside that State.

2. The transfer petitions are opposed by the respondents, *inter alia,* on the ground that the provisions of Section 25 of the Code of Civil Procedure and Section 406 of the Code of Criminal Procedure, which empower this Court to direct transfer of civil and criminal cases respectively from one State to the other, do not extend to the State of Jammu and Kashmir and cannot, therefore, be invoked to direct any such transfer. The Transfer Petitions are also opposed on the ground that the Jammu and Kashmir Code of Civil Procedure, 1977 and the Jammu and Kashmir Code of Criminal Procedure, 1989 do not contain any provision empowering the Supreme Court to direct transfer of any case from that State to a Court outside the State or *vice versa.* It is also contended on behalf of the respondents that, in the absence of any provision empowering this Court to direct transfer of civil or criminal cases from or to the State of Jammu and Kashmir, no such power can be invoked or exercised by this Court. It is further urged that the provisions of Article 139-A of the Constitution which empowers this Court to transfer a case pending before one High Court to itself or to another High Court also has no application to the cases at hand as the Constitution 42nd Amendment Act, 1977 which inserted the said provision itself has no application to the State of Jammu and Kashmir. It is argued that in the absence of any enabling provision in the Code of Civil and Criminal Procedure or in the Constitution of India or the State Constitution for that matter, a litigant has no right to seek transfer of a civil or a criminal case pending in the State of Jammu and Kashmir to a Court outside the State or *vice versa.*

3. On behalf of the petitioners, it was, on the other hand, submitted that while Sections 25 of the Code of Civil Procedure and 406 of Code of Criminal Procedure as applicable to the rest of the country have no application to the State of Jammu and Kashmir, there was no specific or implied prohibition in the said two codes against the exercise of power of transfer by the Supreme Court under the Constitution or under any other provision of the law whatsoever. It was urged that inapplicability of the Central Civil and/or Criminal Procedure Code to the State of Jammu and Kashmir or the absence of an enabling provision in the State Code of Civil and/or Criminal Procedure does not necessarily imply that this Court cannot exercise the power of transfer, if the same is otherwise available under the provisions of the Constitution. So also, the inapplicability of Article 139-A to the State of Jammu and Kashmir by reason of non-extension of the Constitution 42nd Amendment Act to that State does not constitute a disability, leave alone, a prohibition against the exercise of the power of transfer if such power could otherwise be traced to any other source within constitutional framework.

4. The Code of Civil Procedure, 1908 and so also the Code of Criminal Procedure, 1973 (hereinafter referred to as *"Central Codes")* as applicable to the rest of the country specifically exclude the application thereof to the State of Jammu and Kashmir. This is evident from Section 1 of Code of Civil Procedure, 1908 which deals with short title, commencement and extent reads :

> *"1. Short title, commencement and extent- (1) This Act may be cited as the Code of Civil Procedure, 1908. (2) It shall come into force on the first day of January, 1909. [2][(3) It extends to the whole of India except- (a) the State of Jammu and Kashmir; (b) the State of Nagaland and the tribal areas :*

Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification. Explanation-In this clause, "tribal areas" means the territories which, immediately before the 21st day of January, 1972 were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution. (4) In relation to the Amindivi Islands, and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh and the Union territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any rule or regulation for the time being in force in such Islands, Agencies or such Union territory, as the case may be, relating to the application of this Code."

(emphasis supplied)

5. To the same effect is Section 1 of the Code of Criminal Procedure, 1973 which reads as under:-

"Short title extent and commencement.

1. Short title extent and commencement.

(1) This Act may be called the Code of Criminal Procedure, 1973.

(2) <u>It extends to the whole of India except the State of Jammu and Kashmir:</u> Provided that the provisions of this

> *Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply- (a) to the State of Nagaland, (b) to the tribal areas, but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification. Explanation.-In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong."*
>
> *(emphasis supplied)*

6. Learned counsel for the respondents, in the light of the above, are perfectly justified in contending that the provisions of Section 25 of the Code of Civil Procedure, 1908 and that of Section 406 of the Criminal Procedure, 1973 as applicable to the rest of India, cannot be invoked by any litigant seeking transfer of any case to or from the State of Jammu and Kashmir. It is equally true that Jammu and Kashmir Code of Civil Procedure, SVT.1977 and Jammu and Kashmir Code of Criminal Procedure SVT.1989 also do not have any provision empowering this Court to direct transfer of any case civil or criminal from any Court in the State to a Court outside that State or *vice versa.* Resort to the Central or State Codes of Civil and Criminal Procedures for directing transfer of cases to or from the State is, therefore, ruled out. To that extent, therefore, the

contentions urged on behalf of the respondents are well-founded and legally unexceptionable.

7. The question, however, is whether independent of the provisions contained in the Codes of Civil and Criminal Procedure is there a source of power which this Court can invoke for directing transfer of a case from the State of Jammu and Kashmir or *vice versa.* On behalf of the petitioners, it was contended that even when the Central Codes of Civil and Criminal Procedure have no applicability to the State of Jammu and Kashmir and even when the State Codes of Civil and Criminal procedure do not contain any provision empowering this Court to direct transfer it does not mean that this Court is helpless in making an order of transfer in appropriate case where such transfer is otherwise called for in the facts and circumstances of a given case. It was argued with considerable forensic tenacity that access to justice being a fundamental right guaranteed under Article 21 of the Constitution of India, any litigant whose fundamental right to access to justice is denied or jeopardised can approach this Court for redress under Article 32 of the Constitution of India for protection and enforcement of his/her right. This Court can in any such case issue appropriate directions to protect such right which protection may in appropriate cases include a direction for transfer of the case from that State to the Court outside the State or *vice versa.* It was strenuously argued that Article 142 of the Constitution of India read with Article 32 amply empower this Court to intervene and issue suitable directions wherever such directions were considered necessary to do complete justice to the parties including justice in the matter of ensuring that litigants engaged in legal proceedings in any Court within or outside the State of Jammu and Kashmir get a fair and reasonable opportunity to access justice by transfer of their cases to or from that State, if

necessary.

8. Two distinct questions fall for consideration in the context of what is argued at the Bar. The first involves examination of whether access to justice is indeed a fundamental right and if so, what is the sweep and content of that right, while the second is whether Articles 32 and 142 of the Constitution of India empower this Court to issue suitable directions for transfer of cases to and from the State of Jammu & Kashmir in appropriate situations. Both these aspects, in our view, are well-traversed by judicial pronouncements of this Court as well as those of Courts in England in which the Courts have had an opportunity to examine the jurisprudential aspect of the Right of Access to Justice and its correlation with the right to life. Availability of Article 142 of the Constitution of India for directing transfer of cases in situations where such power is not *stricto sensu* available under an ordinary statute or the Constitution has also been judicially explored by this Court on several earlier occasions. We may deal with the said two aspects *ad seriatim.*

9. The concept of *'access to justice' as* an invaluable human right, also recognized in most constitutional democracies as a fundamental right, has its origin in common law as much as in the Magna Carta. The Magna Carta lays the foundation for the basic right of access to courts in the following words:

> *"No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.*
>
> *To no man will we sell, to no one will we deny or delay right to justice.*

Moreover, all those aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

Wherefore, it is our will, and we firmly enjoin, that the English Church be free, and the men in our kingdom have an hold all the aforesaid liberties, rights and concessions, well as peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all aspects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intention – Given under our hand – the above named and many others being witnesses – in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign."

10. The Universal Declaration of Rights drafted in the year 1948 gave recognition to two rights pertaining to 'access to justice' in the following words:

"Art.8: <u>Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law</u>.

Art.10: <u>Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him</u>."

11. To the same effect is Clause 3 of Article 2 of International Covenant on Civil and Political Rights, 1966 which provides that each State party to the Covenant shall undertake that every person whose rights or freedom as recognised is violated, shall have an effective remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, and the State should also ensure to develop the possibilities of judicial remedies.

12. De Smith's book on Judicial Review of Administrative Action (5th Ed., 1995) stated the principle thus:

> *"It is a common law presumption of legislative intent that access of Queen's Court in respect of justiciable issues is not to be denied save by clear words in a statute"*

13. ***Prof. M. Cappelletti Rabel*** a noted jurist in his book *'Access to Justice'* (Volume I) explained the importance of access to justice in the following words:

> *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes*

> *mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement – the most 'basic human right' – of a system which purports to guarantee legal right.*

14. Courts in England have over the centuries post *Magna Carta* developed fundamental principles of common law which are enshrined as the basic rights of all humans. These principles were over a period of time recognised in the form of Bill of Rights and Constitutions of various countries which acknowledged the Roman maxim '*Ubi Jus Ibi Remedium' i.e.* every right when it is breached must be provided with a right to a remedy. Judicial pronouncements have delved and elaborated on the concept of access to justice to include among other aspects the State's obligation to make available to all its citizens the means for a just and peaceful settlement of disputes between them as to their respective legal rights. In ***R v. Secretary of State for Home Dept., ex p Leech*** (1993 [4] All ER 539) Steyn LJ was dealing with a prisoner who complained that correspondence with his solicitor concerning litigation in which he was involved or which he intended to launch, was being censored by the prison authorities under the Prisons Rules, 1964. He challenged the authority of the Secretary of State to create an impediment in the free flow of communication between him and his solicitor about contemplated legal proceedings. The court held that access to justice was a basic right which could not be denied or diluted by any kind of interference or hindrance. The court said:

"It is a principle of our law that every citizen has a right of unimpeded access to a court. In ***Raymond v. Honey 1983 AC 1 (1982 [1] All ER 756)*** *Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right. In Raymond v. Honey, Lord Wilberforce said that there was nothing in the Prisons Act, 1952 that confers power to 'interfere' with this right or to 'hinder' its exercise. Lord Wilberforce said that rules which did not comply with this principle would be ultra vires. Lord Elwyn Jonesand Lord Russell of Killowan agreed... It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of the observations. Lord Bridge held that rules in question in that case were ultra vires... He went further than Lord Wilberforce and said that a citizen's right to unimpeded access can only be taken away by express enactment... It seems (to) us that Lord Wilberforce's observation ranks as the ratio decidendi of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication."*

15. The legal position is no different in India. Access to justice has been recognised as a valuable right by courts in this country long before the commencement of the Constitution. Reference in this regard may be made to ***Re: Llewelyn Evans AIR 1926 Bom 551*** in which Evans was arrested in

Aden and brought to Bombay on the charge of criminal breach of trust. Evan's legal adviser was denied access to meet the prisoner. The Magistrate who ordered the remand held that he had no jurisdiction to grant access, notwithstanding Section 40 the Prisons Act, 1894. The question that therefore fell for consideration was whether the right extended to the stage where the prisoner was in police custody. The High Court of Bombay, while referring to Section 340 of the Code of Criminal Procedure, 1898, held that the right under that provision implied that the prisoner should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purposes of preparing his defence. Madgavkar, J., comprising the Bench added that:

> *"… if the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice – advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance."*

16. Reference may also be made to ***P.K. Tare v. Emperor*** *(AIR 1943 Nagpur 26).* That was a case where the petitioner had participated in the Quit India Movement of 1942. The detention was challenged on the ground of being vitiated on account of refusal of permission by the authorities to allow them to

meet their counsel to seek legal advice or approach the court in person. The State opposed that plea based on Defence of India Act 1939, which, according to it, took away right of the detenu to move a habeas corpus petition under Section 491 of the Cr.P.C., 1898. Rejecting the contention and relying upon the observation of Lord Hailsham in ***Eshugbayi v. Officer Administering the Govt. of Nigeria,*** the court held that such fundamental rights, safeguarded under the Constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of utmost vigour, cannot be swept away by implication or removed by some sweeping generality. Justice Vivian Bose, giving the leading opinion of the court explained that the right to move the High Court remained intact notwithstanding the Defence of India Act, 1939. He further held that although courts allow a great deal of latitude to the executive and presumptions in favour of the liberty of the subject are weakened, those rights do not disappear altogether. The Court ruled that the attempt to keep the applicants away from the Court under the guise of these rules was an abuse of the power and warranted intervention. Justice Bose emphasized the importance of the right of any person to apply to the court and demand that he be dealt with according to law. He said:

> *"… … …the right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere; and it is zealously guarded by the courts."*

17. Decisions of this Court too have unequivocally recognised the right of a citizen to move the court as a valuable constitutional right recognised by Article 32 of the Constitution as fundamental right by itself. [See ***In re under Article***

143, Constitution of India [Keshav Singh case] (AIR 1965 SC 745) and ***L. Chandra Kumar v. Union of India (1997) 3 SCC 261***].

18. In ***Hussainara Khatoon v. State of Bihar (1980) 1 SCC 81*** this Court declared speedy trial as an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. It also pointed out that Article 39A made free legal service an inalienable element of reasonable, fair and just procedure and that the right to such services was implicit in the guarantee of Article 21.

19. In ***Imtiyaz Ahmad v. State of Uttar Pradesh & Ors.*** (2012) 2 SCC 688, a two-Judge Bench of this Court to which one of us *(Thakur J.)* was also a party, this Court examined the correctness of an interlocutory order passed by a learned Single Judge of the High Court of Allahabad, whereby, the Single Judge had stayed the order passed by the Additional Chief Judicial Magistrate, directing registration of a case against the respondents. Since the matter had remained pending before the High Court, and was not heard for a long time of over six years or so and since several other cases in different High Courts in India were similarly pending in which the proceedings before the Trial Court had been stayed, no matter the cases involved commission of heinous offences like murder, rape, kidnapping and dacoity etc., this Court enlarged the scope of the proceedings and directed the Registrar Generals of the High Courts to furnish a report containing statistics of cases pending in the respective Courts in which the proceedings had been stayed at the stage of registration of FIR, and framing of charges in exercise of powers under Article 226 of the Constitution or Section 482 or 397 of the Code of Criminal Procedure. On the basis of the statistics so

furnished by the High Courts, this Court held that administration of justice was facing problems of serious dimensions. This Court also noticed, on the basis of the material made available by the High Courts, that unduly long delay was being caused in the disposal of the cases resulting in a blatant violation of the rule of law and the right of common man to seek access to justice. Emphasizing the importance of access to justice and recognizing the right as a fundamental right relatable to Article 21 of the Constitution of India, this Court observed:

> *"......*
>
> *25. Unduly long delay has the effect of bringing about blatant violation of the rule of law and adverse impact on the common man's access to justice. A person's access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21. Denial of the right undermines public confidence in the justice delivery system and incentivises people to look for shot cuts and other fora where they feel that injustice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to the rule of law.*
>
> *26. It may not be out of place to highlight that access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and inequitable [see United Nations Development*

Programme, Access to Justice – Practice Note (2004)]

27. The present case discloses the need to reiterate that "access to justice" is vital for the rule of law, which by implication includes the right of access to an independent judiciary. It is submitted that the stay of investigation or trial for significant periods of time runs counter to the principle of rule of law, wherein the rights and aspirations of citizens are intertwined with expeditious conclusion of matters. It is further submitted that delay in conclusion of criminal matters signifies a restriction on the right of access to justice itself, thus amounting to a violation of citizen's rights under the Constitution, in particular under Article 21."

20. The Court held that rule of law, independence of judiciary and access to justice are conceptually interwoven. The Court also referred to the International Covenant on Civil and Political Rights and the statute of the International Criminal Court. It also referred to Article 47 of the Charter of Fundamental Rights of European Union, 2007 and European Convention on Human Rights and Fundamental Freedom, 1950. Reliance was placed upon the European Court of Human Rights decision in ***Delcourt v. Belgium****,* 1970 ECHR 1 to hold that access to justice was a valuable human and fundamental right relatable to Article 21 of the Constitution of India. Having said that, this Court issued directions for better maintenance of the Rule of Law and better administration of Justice by the High Courts. It also directed the Law Commission of India to undertake a study and submit its recommendations in relation to measures that

need to be taken by creation of additional courts and other allied matters including rational and scientific methods for elimination of arrears to help reduce delay and speedy clearance of the backlog of cases.

21. In ***Brij Mohan Lal v. Union of India and Ors.*** (2012) 6 SCC 502 this Court declared that Article 21 guarantees to the citizens the rights to expeditious and fair trial. The Court observed:

> *"137. Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. Even Article 39-A of the Constitution recognises the right of citizens to equal justice and free legal aid. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens."*

22. In ***Tamilnad Mercantile Bank Shareholders Welfare Association v. S.C. Sekar and Others*** (2009) 2 SCC 784, this Court declared that an aggrieved person cannot be left without the remedy and that access to justice is a human right and in certain situations even a fundamental right.

23. In order that the juristic content and basis of access to justice as a fundamental right is not provided only by judicial pronouncements, the

Commission for Review of the Constitution has recommended that access to justice be incorporated as an express fundamental rights as in the South African Constitution, 1996. Article 34 of the South African Constitution reads:

> *"Art.34: Access to Courts and Tribunals and speedy justice.*
>
> *(1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or tribunal or forum or where appropriate, another independent and impartial Court, tribunal or forum.*
>
> *(2) The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object."*

24. Insertion of Article 30 A in the Constitution in the following terms was accordingly proposed by the Commission:

> *"30 A: Access to Courts and Tribunals and speedy justice.*
>
> (1) *Everyone has a right to have any dispute that can*

be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.

(2) *The right to access to Courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."*

25. The recommendation has not yet led to the incorporation of the proposed Article 30 A, but, that does not in the least matter, for what the proposed article may have added to the constitutional guarantees already stands acknowledged as a part of the right to life under Article 21 of the Constitution by judicial pronouncements of this Court. The proposed incorporation of Article 30 A, would have simply formalised what already stands recognised by Judges and Jurists alike. V. Krishna Iyer J. has in his inimitable style explained the importance of access to justice in the following words :

"Access to justice is basic to human rights and directive principles of State Policy become ropes of sand, teasing

> *illusion and promise of unreality, unless there is effective means for the common people to reach the Court, seek remedy and enjoy the fruits of law and justice."*

26. ***To sum up :*** Access to justice is and has been recognised as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim of '*Ubi Jus Ibi Remedium',* the development of fundamental principles of common law by judicial pronouncements of the Courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognise and enforce.

27. This Court has by a long line of decisions given an expansive meaning and interpretation to the word 'life' appearing in Article 21 of the Constitution. In ***Maneka Gandhi v. Union of India (1978) 1 SCC 248,*** this Court declared that the right to life does not mean mere animal existence alone but includes every aspect that makes life meaningful and liveable. *(to be checked)*. In ***Sunil Batra v. Delhi Administration (1978) 4 SCC 494*** the right against solitary confinement and prison torture and custodial death was declared to be a part of right to life. In ***Charles Sobhraj v.***

Suptd. Central Jail (1978) 4 SCC 104 the right against bar fetters was declared to be a right protected under Article 21 of the Constitution. In ***Khatri II v. State of Bihar (1981) 1 SCC 627,*** the right to free legal aid was held to be a right covered under Article 21 of the Constitution. In ***Prem Shankar Shukla v. Delhi Administration*** **(1980) 3 SCC 526** the right against handcuffing was declared to be a right under Article 21. So also in ***Rudal Shah v. State of Bihar (1983) 4 SCC 141*** the right to compensation for illegal and unlawful detention was considered to be a right to life under Article 21 and also under Article 14. In ***Sheela Barse v. Union of India (1988) 4 SCC 226,*** this Court declared speedy trial to be an essential right under Article 21. In ***Parmanand Katara v. Union of India (1989) 4 SCC 248,*** right to emergency, medical aid was declared to be protected under Article 21 of the Constitution. In ***Chameli Singh v. State of U.P. (1996) 2 SCC 549*** and ***Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520,*** right to shelter, clothing, decent environment and a decent accommodation was also held to be a part of life. In ***M.C. Mehta v. Union of India (1997) 1 SCC 388,*** right to clean environment was held to be a right to life under Article 21. In ***Lata Singh v. State of U.P.*** **(2006) 5 SCC 475**,

right to marriage was held to be a part of right to life under Article 21 of the Constitution. In ***Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1,*** right to make reproductive choices was declared as right to life. While in ***Sukhwant Singh v. State of Punjab (2009) 7 SCC 559*** right to reputation was declared to be a facet of right to life guaranteed under Article 21. In the recent Constitution Bench Judgment decision of this Court in ***Subramanian Swamy v. Union of India*** [W.P (Crl.) No.184 of 2014], this Court held reputation to be an inherent and inseparable component of Article 21.

28. Given the fact that pronouncements mentioned above have interpreted and understood the word *"life"* appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands recognised as being a part and parcel of the Article 21 of the Constitution of India.

If *"life"* implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of *"access to justice"* will not affect the

quality of human life so as to take access to justice out of the purview of right to life guaranteed under Article 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered. The Citizen’s inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal

protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

29. What then is the sweep and content of that right is the next question that must be answered for a fuller understanding of the principle and its significance in real life situations.

30. Four main facets that, in our opinion, constitute the essence of access to justice are :

i) The State must provide an effective adjudicatory mechanism;

ii) The mechanism so provided must be reasonably accessible in terms of distance;

iii) The process of adjudication must be speedy; and

iv) The litigant's access to the adjudicatory process must be affordable.

(i) The need for adjudicatory mechanism: One of the most fundamental requirements for providing to the citizens access to justice is to set-up an adjudicatory mechanism whether described as a Court, Tribunal, Commission or Authority or called by any other name whatsoever, where a citizen can agitate his grievance and seek adjudication of what he may perceive as a breach of his right by another citizen or by the State or any one of its instrumentalities. In order that the right of a citizen to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach. So also the procedure which the court, Tribunal or Authority may adopt for adjudication, must, in itself be just and fair and in keeping with the well recognized principles of natural justice.

(ii) The mechanism must be conveniently accessible in terms of

distance:

The forum/mechanism so provided must, having regard to the hierarchy of courts/tribunals, be reasonably accessible in terms of distance for access to justice since so much depends upon the ability of the litigant to place his/her grievance effectively before the court/tribunal/court/competent authority to grant such a relief. (See ***D.K. Basu v. State of West Bengal*** (2015) 8 SCC 774.

(iii) The process of adjudication must be speedy. "Access to justice" as a constitutional value will be a mere illusion if justice is not speedy. Justice delayed, it is famously said, is justice denied. If the process of administration of justice is so time consuming, laborious, indolent and frustrating for those who seek justice that it dissuades or deters them from even considering resort to that process as an option, it would tantamount to denial of not only access to justice but justice itself. In *Sheela Barse's* case *(supra)* this Court declared speedy trial as a facet of right to life, for if the trial of a citizen goes on endlessly his right to life itself is violated. There is jurisprudentially no qualitative difference between denial of speedy trial in a criminal case, on the one hand, and civil suit, appeal or other proceedings, on the other, for ought we know that civil disputes can at times have an equally, if not, more severe impact on a citizen's life or the quality of it. Access to Justice would, therefore, be a constitutional value of any significance and utility only if the delivery of justice to the citizen is speedy, for otherwise, the right to access to justice is no more than a hollow slogan of no use or inspiration for the citizen. It is heartening to note that over the past six decades or so the number of courts

established in the country has increased manifold in comparison to the number that existed on the day the country earned its freedom. There is today almost invariably a court of Civil Judge junior or senior division in every taluka and a District and Sessions Judge in every district. In terms of accessibility from the point of view of distance which a citizen ought to travel, we have come a long way since the time the British left the country. However, the increase in literacy, awareness, prosperity and proliferation of laws has made the process of adjudication slow and time consuming primarily on account of the over worked and under staffed judicial system, which is crying for creation of additional courts with requisite human resources and infrastructure to effectively deal with an ever increasing number of cases being filed in the courts and mounting backlog of over thirty million cases in the subordinate courts. While the States have done their bit in terms of providing the basic adjudicatory mechanisms for disposal of resolution of civil or criminal conflicts, access to justice remains a big question mark on account of delays in the completion of the process of adjudication on account of poor judge population and judge case ratio in comparison to other countries.

(iv) The process of adjudication must be affordable to the disputants:

Access to justice will again be no more than an illusion if the adjudicatory mechanism provided is so expensive as to deter a disputant from taking resort to the same. Article 39-A of the Constitution promotes a laudable objective of providing legal aid to needy litigants and obliges the State to make access to justice

affordable for the less fortunate sections of the society. Legal aid to the needy has been recognized as one of the facets of access to justice in ***Madhav Hayawadanrao Hoskot vs. State Of Maharashtra*** (1978) 3 SCC 544 where this court observed:

> *"If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Art. 142, read with Arts. 21, and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice. This is a necessary incident of the right of appeal conferred by the Code and allowed by Art. 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State, must be paid for. Naturally, the State*

> *concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make availale legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court."*

31. Affordability of access to justice has been, to an extent, taken care of by the State sponsored legal aid programmes under the Legal Service Authorities Act, 1987. Legal aid programmes have been providing the much needed support to the poorer sections of the society in the accessing justice in Courts.

32. That brings us to the second facet of the question referred to us namely whether Article 32 of the Constitution of India read with Article 142 empowers the Supreme Court to direct transfer in a situation where neither the Central Code of Civil Procedure or the Central Code of Criminal Procedure empowers such transfer to/from the State of Jammu and Kashmir. The need for transfer of cases from one court to the other often arises in several situations which are suitably addressed by the courts competent to direct transfers in exercise of powers available to them under the Code of Civil Procedure (CPC) or the Code of Criminal Procedure (Cr.P.C.). Convenience of parties and witnesses often figures as the main reason for the courts to direct such transfers. What is significant is that while in the rest of the country the courts deal with applications for transfer of civil/criminal cases under the provisions of the CPC

and the Cr.P.C. the fact that there is no such enabling provision for transfer from or to the State of Jammu and Kashmir does not detract from the power of a superior court to direct such transfer, if it is of the opinion that such a direction is essential to subserve the interest of justice. In other words, even if the provision empowering courts to direct transfer from one court to other were to stand deleted from the statute, the superior courts would still be competent to direct such transfer in appropriate cases so long as such courts are satisfied that denial of such a transfer would result in violation of the right to access to justice to a litigant in a given fact situation.

33. Now if access to justice is a facet of the right to life guaranteed under Article 21 of the Constitution, a violation actual or threatened of that right would justify the invocation of this Court's powers under Article 32 of the Constitution. Exercise of the power vested in the court under that Article could take the form of a direction for transfer of a case from one court to the other to meet situations where the statutory provisions do not provide for such transfers. Any such exercise would be legitimate, as it would prevent the violation of the fundamental right of the citizens guaranteed under Article 21 of the Constitution.

34. That apart from Article 32 even Article 142 of the Constitution can be invoked to direct transfer of a case from one court to the other, is also settled by a Constitution Bench decision of this Court in ***Union Carbide Corporation v. Union of India*** (1991) 4 SCC 584. One of the questions that fell for consideration in that case was whether this Court could in exercise of its powers under Articles 136 and 142 withdraw a case pending in the lower court and dispose of the same finally even when Article 139-A does not empower the court to do so. Answering the question in the affirmative, this Court held that

the power to transfer cases is not exhausted under Article 139-A of the Constitution. This Court observed that Article 139-A enables the litigant to seek transfer of proceedings, if the conditions in the Article are satisfied. The said Article was not intended to nor does it operate to affect the wide powers available to this Court under Articles 136 and 142 of the Constitution. The following two passages from the judgments are apposite in this regard:

> ***"61.*** *To the extent power of withdrawal and transfer of cases to the apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power under Article 139-A must be held not to exhaust the power of withdrawal and transfer. Article 139-A, it is relevant to mention here, was introduced as part of the scheme of the Constitution Forty-second Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131-A, 139-A and 144-A. But Articles 131-A and 144-A were omitted by the Forty-third Amendment Act, 1977, leaving Article 139-A intact. That article enables the litigants to approach the apex Court for transfer of proceedings if the conditions envisaged in that article are satisfied. Article 139-A was not intended, nor does it operate, to*

> *whittle down the existing wide powers under Articles 136 and 142 of the Constitution."*

35. Dealing with the question whether a provision contained in an ordinary statute would affect the exercise of powers under Article 142 of the Constitution, this Court held, that the constitutional power under Article 142 was at a different level altogether and that an ordinary statute could not control the exercise of that power. Speaking for the majority, Venkatachaliah J., as His Lordship then was, observed:

> *"The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment or power – limited in some appropriate way – is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy.....*
>
> *But we think that such prohibition should also be shown*

to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

36. In the cases at hand, there is no prohibition against use of power under Article 142 to direct transfer of cases from a Court in the State of Jammu and Kashmir to a Court outside the State or

vice versa. All that can be said is that there is no enabling provision because of the reasons which we have indicated earlier. The absence of an enabling provision, however, cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simplicitor is not enough. What is equally important is to see whether there is any fundamental principle of public policy underlying any such prohibition. No such prohibition nor any public policy can be seen in the cases at hand much less a public policy based on any fundamental principle. The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the Court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter Central Code of Civil and Criminal Procedures do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this court to transfer cases. We accordingly answer the question referred to us in the affirmative.

37. The transfer petitions shall now be listed before the regular bench for hearing and disposal on merits keeping in view what has been observed above.

....CJI.
(T.S. THAKUR)

....J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

....J.
(A.K. SIKRI)

....J.
(S.A. BOBDE)

....J.
(R. BANUMATHI)

New Delhi
July 19, 2016

ITEM No. 1A Court No. 1 SECTION XVIA
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

TRANSFER PETITION (C) No. 1343 of 2008

ANITA KUSHWAHA Petitioner (s)

VERSUS

PUSHAP SUDAN Respondent(s)

with

T.P.(Crl.) No. 116 of 2011, T.P.(C) No. 562 of 2011, T.P.(C) No. 1161 of 2012, T.P.(C.) No. 1294 of 2012, T.P.(C) No. 1497 of 2012, T.P. (C) No. 1573 of 2012, T.P.(C.) No. 426 of 2013, T.P.(C.) No. 1773 of 2013, T.P.(C.) No. 1821 of 2013, T.P.(Crl.) No. 99 of 2014, T.P.(C) No. 1845 of 2013, T.P.(C.) No. 14 of 2014

Date : 19.07.2016 These matters were called on for pronouncement of judgment today.

For Appellant(s) Ms. Mona K.Rajvanshi, Adv.

Mr. Abhishek Atrey, Adv.

Mr. R.C.Kaushik, Adv.

Mr. Himanshu Shekhar, Adv.

Mr. Yash Pal Dhingra, Adv.

Mr. Sunil Kumar Verma, Adv.

Ms. Madhu Moolchandani, Adv.

Mr. Rajender Mathur, Adv.

Mr. Shailendra Bhardwaj, Adv.

Ms. Jaspreet Gogia, Adv.

Mr. Debasis Misra, Adv.

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Ms. Pragya Baghel, Adv.

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Mr. D.K.Sinha, Adv.

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Mr. S.N.Terdol, Adv.

Mr. Bimal Roy Jad, Adv.

Mr. C.D.Singh, Adv.

Mr. Venkita Subramonium T.R., Adv.

Ms. Laxmi Arvind, Adv.

Mr. Ashok Mathur, Adv.

Mr.Sunil Fernadese, Adv.

Hon'ble the Chief Justice pronounced the judgment of the Bench comprising Hon'ble the Chief Justice, Hon'ble Mr. Justice Fakkir Mohamed Ibrahim Kalifulla, Hon'ble Mr. Justice A.K.Sikri, Hon'ble Mr. Justice S.A.Bobde and Hon'ble Mrs. Justice R.Banumathi.

In terms of the signed judgment, these transfer petitions shall now be listed before the regular Bench for hearing and disposal on merits.

(Shashi Sareen) (Veena Khera)
AR-cum-PS Court Master

(Signed reportable judgment is placed on the file)