

1 **THE HIGH COURT OF MADHYA PRADESH**
M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C.
No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C.
No.26889/2018 & M.Cr.C. No.35289/2018

M.Cr.C. No.28634/2018
Anil Vanshkar Vs. State of M.P. and Another

Shri Sameer Kumar. Shrivastava, learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-State.
None for respondent No.2 though served.
Shri V.K. Saxeana and Shri R.K. Sharma, learned Senior Advocate assisted
by Shri M.K. Choudhary and Shri Vaibhav Saxena as Amicus Curiae.

M.Cr.C. No.31689/2018
Prem Singh Vs. State of M.P. and Another

Shri Anurag Sharma, learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-state.

M.Cr.C. No.39503/2018
Sonu Shakya Vs. State of M.P. and Another

Shri Deependra Singh Rahguvanshi, learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-state.

M.Cr.C. No.40066/2018
Raju @ Rajendra Vs. State of M.P. and Another

Shri Raghuveer Singh, learned counsel on behalf of Shri Atul Gupta,
learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-state.

M.Cr.C. No.26889/2018
Sanju @ Sanjay Parihar Vs. State of M.P. and Another

Shri Sameer Kumar Shrivastava, learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-state.

M.Cr.C. No.35289/2018
Alok Dangi Vs. State of M.P. and Another

Shri R.K. Sharma, learned Senior counsel assisted by Shri V.K. Agrawal,
learned counsel for the applicant.
Shri R.V.S. Ghuraiya, learned Public Prosecutor for the respondent-state.

Whether approved for reporting : Yes

Law laid down:

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(I) Considering the amendment vide Section 439(1-A) of Cr.P.C. on the touch stone of Article 21 of the Constitution of India, it appears that personal liberty of an individual cannot lie at the mercy of presence of an "Informant".

(II) Code of Criminal Procedure is a procedural law and by the amendment incorporated under Section 439(1-A) of Cr.P.C. impliedly penalises the applicant/ accused while withholding his bail application for an indefinite period which is not permissible in law.

(III) Personal liberty of a person cannot be sacrificed at the sweet will of the presence of Informant who may or may not appear.

(IV) Procedural law (like Cr.P.C. in the present case) cannot be converted into Penal Code by way of such amendment which may keep an individual in confinement for indefinite period or till presence of Informant is ensured before the Court.

(V) Provisions contained in Section 439 (1-A) of Cr.P.C. are held to be 'Directory' and not 'Mandatory'.

(VI) Any provisions in procedural law results in absurdity/ inconvenience and impossibility to do certain act then provisions should be construed as 'Directory' instead of 'Mandatory'.

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Gwalior, dated :15/11/2018

With consent, heard finally.

2. Looking to the commonality of issues involved in the cases as mentioned above, the issue is decided by passing a common order and facts of M.Cr.C. No.28634/2018 have been taken for discussion purpose.

3 **THE HIGH COURT OF MADHYA PRADESH**
M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C.
No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C.
No.26889/2018 & M.Cr.C. No.35289/2018

3. This is first application under Section 439 of Cr.P.C. preferred by the applicant seeking bail in respect of a case registered at Police Station Sironj, District-Vidisha vide Crime No.87/2018 for the alleged offence under Sections 363, 366, 376 of IPC and Section 3/4 and 5/6 of Prevention of Children from Sexual Offences, 2012 (hereinafter referred as POCSO Act). The applicant is in confinement since 05/03/2018.

4. Question involved for consideration before this Court is; Whether as per the recent amendment caused in Section 439 of Cr.P.C. by way of Section 439 (1-A), the Court is precluded from hearing the bail application in absence of Informant or any person authorized by him, even after service of notice of bail application. It is also to be decided whether, provisions under Section 439(1-A) of Cr.P.C. are held to be Mandatory or Directory and/ or Whether once Informant is served effectively and thereafter does not turn up to participate in the proceedings, then in presence of Government Advocate/ Public Prosecutor hearing on bail application can be proceeded or not.

5. For considering the said questions, on last date of hearing on 12/11/2018 (in M.Cr.C. No.28364/2018), Senior Advocate Shri V.K. Saxena and Shri R.K. Sharma, were appointed as Amicus Curiae and requested by this Court for assistance to consider the controversy at length.

6. As per the submission of the counsel for the applicant, he is in jail since 05/03/2018. On 17/07/2018, first bail application under Section 439 of Cr.P.C. preferred by applicant. On 09/08/2018, notice through Registered mode was issued for service of respondent No.2 (Informant) in compliance of which, process fee was paid. On 10/09/2018, service report of respondent No.2 remained awaited therefore, case was adjourned. Thereafter, on

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

26/10/2018, case was listed but was adjourned for procedural reasons and thereafter, on 12/11/2018, learned counsel for the applicant referred office report and pressed for hearing because according to the Track Consignment of the Department of Post, notice was delivered on 25/08/2018 itself, therefore, he pressed for hearing of the bail application. However, when confronted with the recently amended provisions under Section 439 (1-A) of Cr.P.C., then he sought time to address on this question first. Learned Senior Advocates Shri V.K. Saxena as well as Shri R.K. Sharma, who were present in the Court room, were requested by this Court to address on the point and they gracefully accepted the request and matter was fixed today for hearing.

7. Learned Senior Advocate Shri V.K. Saxena as well as Shri R.K. Sharma opened the arguments and submitted that amendment caused in Section 439 of Cr.P.C. is Directory and not Mandatory because no consequences have been prescribed in case Informant does not turn up.

8. Similarly, what prejudice would be caused to the prosecutrix, if she is not given the opportunity of hearing, is not explained in the said amendment act therefore, provisions is to be read as Directory and not Mandatory. It is further submitted that Cr.P.C. is procedural law and therefore, its provision cannot be mandatory unless prescribed and only substantive law can be mandatory. In support of their submission, learned Amicus Curiae relied upon the judgments of the Hon'ble Apex Court in the cases of **Topline Shoes Ltd. Vs. Corporation Bank, AIR 2002 (SC) 2487** as well as **State represented by Inspector of Police, Chennai Vs. N.S. Ganeswaran, (2013) 3 SCC 594.**

9. It is the further submitted that no prejudice would be caused to the victim if she did not turn up, because as per the provisions of

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

Cr.P.C. as contained in Section 24 of it, Government Advocate is duty bound to take care of the case therefore, Doctrine of Prejudice does not mandate the presence of prosecutrix at the time of hearing of bail application. Even her identity may create problem to herself. They relied upon the judgments rendered by the Hon'ble Apex Court in the case of **Basavaraj R. Patil and Others, Vs. State of Karnataka and Others, AIR 2000 SC 3214** as well as **Commissioner of Customs, Mumbai Vs. M/s. Virgo Steels, Bombay and Another., AIR 2002 SC 1745.**

10. Next argument of learned Senior counsel/ amicus curiae was that word "Informant" has been referred in the amendment act whereas in Cr.P.C., "Informant" is nowhere defined. In Section 2(w-a) of Cr.P.C., definition of "Victim" is provided which includes his guardian or legal heirs. Therefore, by the provisions of amendment act, applicant would not have to serve the victim or his/her guardian or legal heir but will have to serve the Informant who may not be related to prosecutrix and may not be interested in appearance to contest the bail application therefore, bail application shall be dragged unnecessarily therefore, both the counsel vehemently submits that liberal construction of the amendment act is required to be taken into consideration.

11. Lastly, learned Senior counsel/ amicus curiae referred the book "Principles of Statutory Interpretation" 14th Edition by Justice G.P. Singh J., page no.436 to bolster the arguments regarding the nature of provisions incorporated in Section 439 of Cr.P.C., and submit that two exceptions of mandatory provisions exist; (I) when performance of requirement is impossible and; (II) Waiver.

12. The discussion contained at page 453 of the same book was also pressed into service to submit that if by applying rigidness, injustice is apparent then mandatory provisions can be overlooked.

Learned counsel appearing for the applicant Shri S.K. Shrivastava also supplemented the arguments by making submission that since the case is not having the trappings of petition raising validity of the amendment act or for declaration of amendment as ultra vires, but is only for interpretation of provisions incorporated in Section 439 of Cr.P.C. therefore, as per the mandate of the Hon'ble Apex Court in the case of **Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and Others, (1989) 3 SCC 709**, this Court can hear the matter.

13. While referring the submission of "Objects" and "Reasons" of the Criminal Law (amendment Act), 2018, it is submitted that the statements of the Objects and Reasons nowhere provides any object and reason that the bail application of the accused under Section 439 of Cr.P.C. cannot be heard unless the Informant or any other person is present at the time of consideration of the bail application, specially when the Court has issued notice and despite service of the notice, Informant or any other person authorized by him has not appeared therefore, object and reason of the amendment act was never to preclude hearing for indefinite period.

While referring the language of Section 439 (1-A) of Cr.P.C., it is submitted that legislature has not used the word 'Victim' or 'Complainant' but used the word 'Informant' or 'any other person authorised by him', therefore, Informant may not always be complainant and he may not be interested in decision of bail application of the accused. Once the public prosecutor has been interested with the responsibility under Section 24 of Cr.P.C., then Public Prosecutor can take care of the case and presence of Informant is not required. Even otherwise, by using word 'Obligatory' a procedural duty has been cast upon the applicant, which comes to an end once notice has been sent and received by

the Informant.

14. While referring the book "Principles of Statutory Interpretation" by Justice G.P. Singh, J., 13th Edition pp. 412-414, counsel for the applicant stressed upon the legal position that whenever any situation comes in which provisions is held to be mandatory, which results in absurdity/ inconvenience/ impossibility to do certain act then the provisions should be held to be Directory instead of Mandatory.

15. Learned counsel for the applicant further referred the unworkability of Statue (amendment caused in Section 439 of Cr.P.C.) and submits that harmonious construction is required to be made. While referring judgments of the Apex Court in the case of **State of Madhya Pradesh Vs. Narmada Bachao Andolan and Another (and four other cases), 2011 (7) SCC 639** as well as **State represented by Inspector of Police Chennai Vs. N.S. Ganeswaran, 2013 (3) SCC 594**, he submits that provisions deserves harmonious construction while considering workability of the Statue. Code of Criminal Procedure being procedural law and therefore, applicant cannot be burdened with the duty, which is virtually impossible to perform. Principle of natural justice is followed once the notice of bail application is served over the prosecutrix/ Informant. Personal liberty of a person is involved in such cases.

16. Per contra, learned counsel for the respondent-State opposed the prayer made by the applicant and submits that looking to the new development in the society where offences against the women are on the rise and women under the age of 16 years and 12 years required effective deterrent through legal provisions therefore, this amendment has been incorporated, so that the offender/ accused may deter to commit such offence. It is clarified

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

by learned Public Prosecutor that duty of prosecution is only regarding intimation to the prosecutrix/ victim and after that, duty of Public Prosecutor cannot be enlarged. He further submits that the alleged offence against the applicant are serious in nature and against the society therefore, prosecutrix/ victim, if comes before the Court of law then, it would properly assist the prosecution. In short, he prayed for rejection of the submission advanced by counsel for the applicant and submits that matter can be heard only when respondent No.2/ prosecutrix appear herself or through counsel.

17. Heard the rival submissions of counsel for the parties and perused the relevant provisions.

18. Before proceedings, it is imperative that recent amendments in Section 376 of IPC and amendments in Sections 438 and 439 of Cr.P.C. be reproduced for ready reference:-

4. Amendment of Section 376:- *In Section 376 of the Penal Code--*

(a) *in sub-section (1), for the words "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine", the words, "shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine" shall be substituted;*

(b) *In sub-section (2), clause (1) shall be omitted;*

(c) *after sub-section (2), the following sub-section shall be inserted, namely,--*

"(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and

reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim."

5. Insertion of new section 376 AB:- After section 376 A of the Penal Code, the following Section shall be inserted, namely,--

"376 AB.- Punishment for rape on women under twelve years of age:- Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim."

6. Insertion of new section 376 DA and 376 DB:- After section 376 D of the Penal Code, the following sections shall be inserted, namely,--

"376 DA- Punishment for gang rape on women under sixteen years of age:- Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376 DB. Punishment for gang rape on women under twelve years of age:-

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim."

22. Amendment of Section 438:- *In Section 438 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:-*

"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376 AB or section 376 DA or section 376 DB of the Indian Penal Code."

23. Amendment of Section 439:- *In Section 439 of the Code of Criminal Procedure,-*

(a) in sub-section (1), after the first proviso, the following proviso shall be inserted,--

"Provided further that the High Court of the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376 AB or Section 376 DA or Section 376 DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application."

(b) after sub-section (1), the following sub-section shall be inserted, namely,--

"(1A) The presence of the informant or any person authorised by him shall be obligatory at

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or Section 376 DB of the Indian Penal Code.”

19. The case in hand is in respect of taking exception to the provisions of amendment act by which Section 439(1-A) is inserted but the applicant herein seeks interpretation of the said amendment so as to make it workable. Here the Court has to see what will be the real interpretation of the provisions as amended in the Cr.P.C. more particularly, under Section 439(1-A) of Cr.P.C. The Apex Court in the case of **Tinsukia Electric Supply (supra)** has held as under:-

“118. The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of a statute must be so construed as to make it effective and operative, on the principle “ut res magis valeat quam pereat”. It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co. Vs. Manchester Racecourse Co. Farwell J. said (pp.360-61).

“Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty.”

119. *In Fawcett properties Ltd. Vs. Buckingham County Council Lord Denning approving the dictum of Farwell, J. said: (All ER P.516)*

“But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

them, the courts have to say what meaning the statue to bear rather than reject it as a nullity.”

20. Form perusal of the said guidance, it is clear that here interpretation is to be made regarding connotation of provisions and legislative intent. The legislative intent of the amendment act (The Criminal Law (amendment) Act, 2018) can be gathered from the statements of Objects and Reasons and the statements of objects and reasons are reproduced herein below to gather the spirit as under:-

It is, therefore, proposed to introduce the Criminal Law (Amendment) Bill, 2018 to replace the Criminal Law (Amendment) Ordinance, 2018, which inter alia, provides for:-

(a) Punishment for the offence of rape from the minimum imprisonment of seven years to ten years, which is extendable to imprisonment for life;

(b) punishment for the offence of rape on a woman under sixteen years of age shall be rigorous imprisonment for a term not less than twenty years but may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine;

(c) punishment for the offence of rape on a woman under twelve years of age shall be rigorous imprisonment for a term not less than twenty years but may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine or with death;

(d) punishment for the offence of gang rape on a woman under sixteen years of age shall be imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine;

(e) punishment for the offence of gang rape on a women under twelve years of age shall be imprisonment for life, which shall mean imprisonment for the remainder of that person's

natural life and with fine or with death;

(f) investigation in relation to all rape cases shall be completed within a period of two months from the date on which the information recorded by the officer-in-charge of the police station;

(g) completion of inquiry or trial relating to the offence of rape, within a period of two months;

(h) dispose of an appeal against a conviction or a acquittal in rape cases within a period of six months from the date of filing of the appeal;

(i) the provisions of anticipatory bail shall not be applicable in cases of rape or gang rape of woman under sixteen and twelve years of age;

(j) consequential amendments in the Indian Penal Code, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offence Act, 2012 relating to the cases of rape, gang rape of the woman below the age of sixteen years, twelve years, repeat offenders, to extend the applicability of compulsory registration of FIRs, fine imposed to be paid to victim, facilitate better recording of evidence and protect the dignity of rape survivor and treatment free of cost in hospitals.”

21. Perusal of the statement of Objects and Reasons indicates that three essential Objects were taken into consideration; **(I)** to make the penal provisions more stringent or effective; **(II)** immediate arrest of the accused; **(III)** ensure speedy trial in such cases. These three Objects are enshrined in the amendment act because of the growing incidents of rape and gang rape on women under the age of 16 years and 12 years. For these three objects, amendments have been proposed in Criminal Law (amendment), Act, 2018. Interestingly, as proposed above, Clause-A to Clause-J, it is nowhere surfaced that bail application of accused under Section 439 of Cr.P.C. should not be heard unless the Informant or any other person is present at the time of consideration of the bail application, specially when the Court has issued the notice and

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

despite service of notice, Informant or any other person authorized by him has not appeared. Therefore, nowhere it can be gathered that amendment sought in Section 439 (1-A) of the Cr.P.C. was meant to delay the hearing of the bail application. Out of the three objects as referred above, object No.3 refers 'ensure speedy trial in such case' and amendment caused under Section 439 (1-A) may run contrary to the said object of speedy trial because accused also has right to free, fair, speedy and impartial trial and it is part of Article 21 of the Constitution of India and the Hon'ble Apex Court, time and again reiterated the said principle therefore, on the touch stone of Objects and Reasons, the amendment act does not clarify the objects of withholding of bail application of an accused till Informant appears and contest the case.

22. Perusal of the amended provisions under Section 439 (1-A) of Cr.P.C. indicates that words 'Informant' or 'any other person authorized by him', shall be "obligatory", all words connote to give information to the Informant to make himself present before the Court for consideration of bail application. The legislature has not used the word 'victim' or 'complainant', it has used the word 'Informant' or any other person authorized by him. The term 'Informant' has not been defined in Cr.P.C., although, term 'victim' is being defined in Section 2(w-a) of Cr.P.C. As per Section 154 (2) of Cr.P.C., the Informant is that person who gives information about the commission of cognizable offence under Section 154(1) of Cr.P.C. The Informant is not always the complainant and *vice versa* therefore, still interest of the victim does not serve to the fullest because the Informant may not be interested in decision of the bail application of the accused or about the fate of it, because he might have been the person who has seen the commission of the cognizable offence and informed the police accordingly,

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

whereas victim or prosecutrix was the real sufferer therefore, presence of Informant if treated obligatory, even then at times interest of the victim or prosecutrix may suffer. If at all the legislative intent was to give a chance to the victim to portray her agony at the time of hearing of bail application then the word victim should have been incorporated. At times, this amendment may expose prosecutrix to the world at large thus the spirit of law as per the mandate of the Hon'ble Apex Court in the case of **Lalit Yadav Vs. State of Chattisgarh, (2018) 7 SCC 499**, wherein the Apex Court in categorical terms has held that identity of the prosecutrix should not be disclosed, gets defeated by this amendment at times. Besides that if she appears through her counsel then again she will have to pay some fee to the counsel to represent her case. It is a sort of Double Whammy.

23. One more aspect deserves consideration, is whenever a cognizable case is reported, the investigation sets into motion and at all times, it is the Public Prosecutor who takes care of the interest of complainant as he is the one who is incharge of the case before the competent Criminal Court as per Section 24 of Cr.P.C. r/w Section 301 (2) of Cr.P.C. The said provisions give liberty to the counsel for the victim to assist Public Prosecutor (See: **Shiv Kumar Vs. Hukum Chand and Another, 1999 (7) SCC 467, Bisheshar and Others Vs. Rex through Bachcho Lal Pandey, AIR (36) 1949 Allahabad 213 para 9**). Therefore, Public Prosecutor can said to be person authorized by the Informant to appear on her behalf if the Informant is not appeared even after service of notice.

24. The term "Obligatory" also connotes in the present fact situation that once it is performed by way of service of notice to the prosecutrix then obligation is discharged because otherwise

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

ensuring the presence means giving a duty to the applicant which is impossible in nature and applicant cannot be expected to do the impossible duty to bring the complainant to the Court so that the bail application can be heard and decided.

25. As per the Advanced Law Lexicon 4th Edition by P. Ramnathan Aiyar, term “**Obligation**” is defined as under:-

“Obligation., defined. Act 1, 1877, S.3.

Obligation includes every duty enforceable by law. [Specific Relief Act (47 of 1963), S.2(a)]

A duty; the bond of legal necessity which binds together two or more determinate individuals [Art. 49, Const.]

26. Similarly, Black Law Dictionary 10th Edition by Bryan A. Garner term “Obligation” is defined as under:-

“Obligation” (18c) 1. A legal or moral duty to do or not do something. The word has many wide and varied meanings. It may refer to anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality.

27. By bare reading of above definitions, it appears that obligation is more of Duty rather of Necessity which can be discharged by a particular act. Here legislature has not used the word “Necessary” or the provision does not start with the Non-Obstante Clause making it a mandatory ritual; come what may, therefore, nature of duty is to be seen whether it is 'Mandatory' or 'Directory'.

28. Use of word “Shall” not always necessarily connote the Mandatoriness of the provisions. The Apex Court and the Jurists from time to time carved out the principles through which word “Shall” may be read as “May” and *vice versa*. Mere insertion of word “Shall” does not connote that every such provision should be

treated as mandatory in nature. In the case in hand, when the Informant is not appearing despite being served, then provisions cannot said to be mandatory rather it should be treated as directory since the complainant now itself is not turning up inspite of being served.

29. As per the Principles of Interpretation of Statue by Justice G.P. Singh 13th edition pp. 412-414, entire law has been discussed that whenever any situation comes in which the provisions is held to be mandatory which result in absurdity/ inconvenience and impossibility to do certain acts then provisions should be construed as directory instead of mandatory even if the word “shall” is used. The judgment of the Apex Court in the case of **Smt. Bachchan Devi & Anr. Vs. Nagar Nigam, Gorakhpur & Anr., AIR 2008 SC 1282** sets the proposition about the exigency when “shall” be used and “may” and *vice versa*. The Principles of Statutory Interpretation by Justice G.P. Singh, 14th edition, out of pp. 436 and 453 discussed two exceptions of mandatory provisions as well as exigencies for reading the same. These two exceptions are (I) when the performance of requirement is impossible; and another is (II) Waiver; if no public interests are involved. This discussion persuades this Court to hold the exact nature of provisions contained in Section 439 (1-A) of Cr.P.C. as directory because the Author of the celebrated Book as referred above opines that with rigid adherence, if Injustice is apparent then mandatory provisions can be overlooked. The guidance given by the Author is worth following it in the present set of facts. This Court intends to tread on the same path as charted out during the discussion by the Author and supported by the judgments of the Apex Court in the case of **Smt. Bachchan Devi & Anr. (supra)** as well as **Narmada Bachao Andolan (supra)** wherein guidance have been given in

following terms:-

INTERPRETATION OF STATUTE:

70. *In Principles of Statutory Interpretation by Justice G.P. Singh (12 Edn. 2010), the learned Author has stated as under:*

"In selecting out of different interpretations `the court will adopt that which is just, reasonable and sensible rather than that which is none of those things'.....A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results." (pp. 131-132)

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71. *In Directorate of Enforcement v. Deepak Mahajan, AIR 1994 SC 1775, this Court held as under:*

"Though the function of the courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute.

In Maxwell on Interpretation of Statutes, Tenth Edn. at page 229, the following passage is found:

'Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.' But to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislative inane."

72. Therefore, an interpretation having a social justice mandate is required. The statutory provision is to be read in a manner so as to do justice to all the parties. Any construction leading to confusion and 61 absurdity must be avoided. The Court has to find out the legislative intent and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provision of the existing law nugatory. The construction that results in hardship, serious inconvenience or anomaly or gives unworkable and impracticable results, should be avoided. (Vide: *Corporation Bank v.*

Saraswati Abharansala & Anr. (2009) 1 SCC 540; and [Sonic Surgical v. National Insurance Co. Ltd.](#), (2010) 1 SCC 135).

73. A reasonable construction agreeable to justice and reason is to be preferred to an irrational construction. The Court has to prefer a more reasonable and just interpretation for the reason that there is always a presumption against the law maker intending injustice and unreasonability/irrationality, as opposed to a literal one and which does not fit in with the scheme of the Act. In case the natural meaning leads to mischievous consequences, it must be avoided by accepting the alternative construction. (Vide: [Bihar State Council of Ayurvedic and Unani Medicine v. State of Bihar](#); AIR 2008 SC 595; and [Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India](#) (2009) 2 SCC 1).

74. The Court has not only to take a pragmatic view while interpreting a statutory provision, but must also consider the practical aspect of it. (Vide: [Union of India v. Ranbaxy Laboratories Ltd.](#), AIR 2008 SC 2286).

75. [In Narashimaha Murthy v. Susheelabai](#), AIR 1996 SC 1826, this Court held :

"The purpose of the law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and eternal sense of it that makes the law meaningful."

76. [In Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate](#), AIR 1958 SC 353, it has been held thus:

"..the definition clause must be read in the context of

the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act."

77. *In Sheikh Gulfan v. Sanat Kumar Ganguli, AIR 1965 SC 1839, it has been held as follows:*

"19...Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material..."

78. *Any interpretation which eludes or frustrates the recipient of justice is not to be followed. Justice means justice between both the parties. Justice is the virtue, by which the Court gives to a man what is his due. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. The underlying idea is of balance. It means to give to each his right. Therefore, while tempering the justice with mercy, the Court has to be very conscious that it has to do justice in exact conformity with the statutory requirements.*

79. *Thus, it is evident from the above referred law, that the Court has to interpret a provision giving it a construction agreeable to reason and justice to all parties concerned, avoiding injustice, irrationality and mischievous consequences. The interpretation so made must not produce unworkable and impracticable results or cause unnecessary hardship, serious inconvenience or anomaly. The court also has to keep in mind the object of the legislation. 64 INSTANT CASE:*

80. REHABILITATION PROVISIONS AS PER NWDT AWARD AND STATE-WISE COMPARATIVE PROVISIONS S.No. Item NWDT Award Madhya Gujarat Maharashtra Pradesh

1.(a) Tenure xx xx xx xx Holder

(b) Xx xx xx xx xx

(c) Xx xx xx xx xx

(d) Major No provision for Major son will 2 hec. of

land I hec. of land to sons of land allotment. be treated as to each major each unmarried above all separate family. son of all daughter and categories They will be categories. major son of of oustees entitled to cash all categories of compensation oustees with - as according to cut- off date for the category major sons and to which they unmarried belong. daughters.”

30. In addition to it, the Apex Court in the cases of **M/s. Virgo Steels (supra)** and **N.S. Gnaneswaran (supra)** has also referred the tests to determine whether the provisions is Mandatory or Directory.

31. Another factor requires consideration is the age of the prosecutrix because in rural areas when age proof regarding prosecutrix is not through documentary evidence then ascertainment of age and applicability of the amendment act would be a dispute in itself and therefore, it may hamper hearing of the bail application, even if the prosecutrix is more than 16 years of age because of initial fact allegedly figured in the FIR or statements under Section 161 of Cr.P.C., she was considered as female below 16 years of age. This aspect also needs consideration.

32. One more aspect which is foremost for consideration, is the question of Personal Liberty as it enshrined in the Fundamental Law of the Land i.e. under Article 21 of the Constitution of India. The personal liberty of a person cannot be sacrificed at the altar of any procedural ambiguity contained in any procedural law and personal liberty of an individual cannot lie at the sweet will of the presence of Informant who may or may not appear, thus punishing the accused without resorting to penal provisions, same is illegal and antithesis to Rule of Law. Procedural law (like Cr.P.C. in the present case), cannot be converted into penal code by way of such amendment which may keep an individual in confinement for

M.Cr.C. No.28364/2018 & M.Cr.C. No.31689/2018 & M.Cr.C. No.39503/2018 & M.Cr.C. No.40066/2018 & M.Cr.C. No.26889/2018 & M.Cr.C. No.35289/2018

indefinite period or till presence of Informant is ensured before the Court. This position would render the provisions of grant of bail under Section 439 of Cr.P.C. nugatory and void. This aspect further aggravates the agony of the accused because of the fact that for same nature of offence (rape with women of 16 years of age), provision of Section 438 is barred now by the effect of amendment act. Remedy of Section 438 of Cr.P.C. is barred and remedy of section 439 (1-A) of Cr.P.C. appears to be anathema to the Rule of Law and acts contrary to the Article 21 of the Constitution of India as well as to the Principle of Fair Trial and Right to Access Justice.

33. When language is seen on the anvil of Workability and Harmonious Construction, then; only one interference comes out that presence of Informant means effective service over the Informant or the prosecutrix as the case may be, and if after effective service (like Registered mode or personal service by police authorities), is effected then bail application can be heard on its own merits with the assistance of the Public Prosecutor.

34. Even otherwise, Cr.P.C. is a procedural law and it is settled in law that procedural law are hand maid to justice and they ought to be interpreted in a manner which should result smooth facilitation or regularization of proceedings rather than taking a proceeding to a stand still. The Apex Court in the cases **Mahadev Govind Garge and Others Vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 SCC 321**, has expressed that how procedural law is to be interpreted. Augmented and strengthened by the guidance referred above, this Court comes to the conclusion that once Informant/ prosecutrix is served through effective mode as referred above, then bail application can be heard on its own merits with the

assistance of a public prosecutor. Presence of Informant is confined to this extent only.

35. This Court records its appreciation for the assistance given by learned Senior counsel Shri V.K. Saxena and Shri R.K. Sharma and Shri S.K. Shrivastava, advocate for resolving the issue.

36. Since this question has been decided and matters are yet to be heard on merits, therefore, matters be placed **on 29/11/2018** for hearing on merits.

(Anand Pathak)
Judge