IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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R E P L Y

On behalf of Petitioners.

TO THE AFFIDAVIT OF COMPLIANCE OF THE ORDER DATED 04.05.2017 PASSED BY THIS HON'BLE COURT FILED BY THE RESPONDENTS.

IN

CRL. MISC. WRIT PETITION NO. 21733 OF 2008

(Under Article 226 of the Constitution of India)

DISTRICT- GORAKHPUR.

1. Parvez Parwaz son of Late Sibtey Hasan Khan
   Chief Editor, Encounter's India. Com
   Trukmanpur, P.S. Rajghat, District- Gorakhpur.
2. Asad Hayat son of Janab I. Dayal
   C/o Madarsa Jametur-Rehad, Ghulami Ka Pura
   District- Azamgarh. ---------- Petitioners.

VERSUS

1. State of U.P. through Principal Secretary (Home) Lucknow.
2. Director General of Police (Crime Branch)
   Criminal Investigation Department, U.P. Lucknow.
3. District Magistrate Gorakhpur.
4. Senior Superintendent of Police, Gorakhpur. ------- Respondents.

Affidavit of Parvez Parwaz, aged about years, son of , Resident of- Gorakhpur.

Caste-Muslim
Occupation-Private Work.
(Deponent)

I, the deponent above named do hereby solemnly affirm and states on oath as under:

1. That the deponent is petitioner No.1 in the present case and pairokar of the petitioner No.2 and is doing pairvi on his behalf also and as such he is fully acquainted with the facts deposed to below.

2. That deponent has read over and explained the contents of the affidavit of compliance of the order dt. 4.5.2017 passed by this Hon'ble Court, filed by respondents, in Hindi. He understood the contents of the same and is giving parawise reply.

3. That the contents of paragraph No.1 and 2 of the affidavit of compliance need no reply.

4. That in reply to the contents of paragraph No.3, 4, 5, 6 and 7 of the affidavit of compliance dated 10.05.2017, it is submitted that vide letter dt. 10.7.2015, the matter was sent to Home Department, Government of U.P. for giving sanction of prosecution of the accused persons as required u/s 196 of the Criminal Procedure Code, which apparently was not taken into consideration by the State Government for the reasons best known to it. Ultimately, the same was hurriedly taken cognizance of by the State Government when accused No.1 became Chief Minister of the State of U.P. and ultimately, an anti-dated cryptic order containing no reason at all, the

impugned order dt. 3.5.2017 was passed which is under challenge in the present writ petition by means of an amendment application, filed separately. From bare perusal of the contents of paragraph under reply, it clearly comes out that whatever inaction had been displayed by the State authorities is the basic case of the petitioners from the very beginning and the reference can be drawn from paragraph 8, 17, 18, 19, 20, 21, 26, 27, 34, 37, 38, 42 and 44 of the present writ petition filed in the year 2008. It is clearly indicative from bare perusal of the paragraph under reply as well paragraph nos. 8, 17, 18, 19, 20, 21, 26, 27, 34, 37, 38, 42 and 44 of the present writ petition that police authorities of the State were hand in gloves with the accused persons from the very beginning and were not only delaying the matter but also offering undue advantage to the accused persons who hold important positions being member of Parliament and other accused persons, who hold important positions and are very close to the accused No.1. Whatever documents had been relied upon in the affidavit under reply, if were available with the respondent authorities at all then there was no reason to keep the same in a closet and on hold except with an objective to provide benefit to the accused persons of case crime No.2776 of 2008. Although it is submitted that all the documents annexed with the affidavit under reply are manufactured pieces of paper and are shaped to provide benefit to the accused persons. Rest of the contents of

paragraphs under reply are not admitted and vehemently denied.

5. That in reply to the contents of paragraph No.8, 9, 10 and 11 of the affidavit of compliance dated 10.05.2017, it is submitted that it is glaringly evident from the averments made therein that only paper horse was running from one table to another table without obtaining any concrete result in the matter. The prime duty of police and state of unearthing the crime and its conspiracy went into background and mere technicalities played major role and just table work was done during all these years to delay and to destroy the evidences of crime and its conspiracy. The petitioners being ordinary citizen have no role to play in the diabolical crime except lodging of FIR. The State authorities slept over the matter for years together for very obvious reasons of helping the powerful accused persons who wield power and roam near the power circles. Rest of the contents of paragraphs under reply are not admitted and vehemently denied.

6. That in reply to the contents of paragraph No.12 of the affidavit of compliance dated 10.05.2017, it is submitted that all of a sudden after assumption of charge by accused No.1 as Chief Minister of State, alleged report of Central Forensic Lab New Delhi dt. 13.10.2014 emerged from somewhere after remaining hidden for more than 3 years. It is surprising and suspicious aspect of the matter glaringly displaying that everything started

moving very fast immediately after assumption of the New Government in the State of which accused No.1 became head.

i. That the matter, which remained in the closet of Home Department since 2012 to 24.3.2017, all of a sudden started moving in a very fast pace in a direction, ultimately exonerating accused No.1, who assumed charge of the Chief Minister of State of U.P on 20.03.2017. It is further submitted that alleged report dt. 13.10.2014 (Annexure No.7 to the affidavit of compliance) submitted by Central Forensic Science Lab, 2 folders were said to have been examined by CFSL Lab in question. It is categorically stated that a C.D. which the petitioner had submitted containing speeches of accused no.1 dt. 27.1.2007 was accompanied with an application dt. 28.4.2008 submitted before Chief Judicial Magistrate, Gorakhpur along with an affidavit dated 28.04.2018. In this affidavit the petitioner had stated whatever had been stated in the F.I.R. concerned and in paragraph No.8 of the said affidavit, it is mentioned that petitioner submitting a C.D. to prove the incident as well as place of incident also. The affidavit dt. 28.4.2008 is part of record of the present writ petition as annexure No.6 Page 70 to 77 of the paper book of the writ petition. It is submitted that later on the same CD was also handed over to the investigating officer after lodging of first information

report, for the purpose of investigation. This C.D. referred in the affidavit dt. 28.4.2008 Annexure No.6 to the present writ petition but the same was not examined by the forensic science lab as source. Instead some other CD having named as “Saffron War” was examined by the CFS lab as is evident from paragraph 7 of the report dated 13.10.2014 (Annexure 7-A to the affidavit of compliance filed by the Sri Rahul Bhatnagar the Principal Secretary Home dated 10.05.2017). Hence it is evident that the C.D. which petitioner has submitted before learned court below and also to the investigating officer was never placed for obtaining Forensic report before CFS Lab (kindly refer to CFSL report dated 13.10.2014), as such the report is nothing but only a piece of paper upon which no reliance can be placed for taking any decision including the impugned order dated 3.5.2017 as the same is a procured and manipulated document for which the respondents are liable to be hauled up and proper proceeding be initiated against them for misleading this Hon’ble Court.

ii. That The C.D. which was given by the petitioner No.1 contains speech delivered by accused No.1 on 27.1.2007, which is available on YouTube.com. The said C.D. was having duration of 10 minutes 47 seconds, having only one folder and not cracked. It is to be pointed out that petitioner No.1 had given the C.D.

by means of an application along with affidavit dt. 28.4.2008 in the court of learned C J M Gorakhpur. But what emerges from the report dt. 13.10.2014 “video that DVD” was sent to CFSL vide letter no. UCJM-!, Gorakhpur (U.P.) dt. 14.8.2014, which was received to CFL on 18.9.2014. Regarding this colossal delay there is no explanation submitted by the respondents at any stage as well by means of the affidavit dated 10.05.2017 which itself shows that a high level manipulation has been committed either by replacing the C.D. in question at the lower court level in obtaining the report dt. 13.10.2014, which refers having 2 folders in the C.D. Although the C.D. given by the petitioner was having only one folder, for the purpose of investigation which is C.D. referred in the affidavit dt. 28.4.2008 Annexure No.6 to the present writ petition. For better appraisal of the issue paragraph 7 of the CFSL report dated 13-10-2014 is quoted below;

> “7. Laboratory Procedure and Analysis
>
> Data from exhibited DVD was transferred but due to crack condition it was partly transferred on Mac. computer. All the videos of folder 2nd Apr 27 2013 were previewed many times with the help of final cut Express software on time line to check the authenticity /editing and tampering. (*Folder 1st B*

saffronwar could not be examine as not completely readable).”

iii. That from the letter dated 9th May 2017 (Annexure 9 page 24 to 26, to the affidavit of compliance dated 10.05.2017) addressed to respondent no.1 by the CBCID it is revealed that there were two reports of CFSL dated 13.10.2014 and 14.10.2014 were received by CB CID, but only one report was placed before this Hon’ble Court and not the other. This also indicates that the respondents are not approaching and exercising their power with clean and independent minds between respondents and accused persons and there is also meeting of minds to destroy evidences. No explanation has been provided by the respondents at any stage till date that why the report from CFSL lab was not obtained at all till 2014 although the CD was handed over to Court below and to I O of the case in the year 2008 itself. There was no impediment in the way to perform constitutional duties that too when mighty state machinery is placed at its disposal, by the Constitution of India, to tackle law and order and to control crimes as expeditiously and quickly as possible.

iv. That it is further stated that report of CFSL dt. 13.10.2014 had just emerged on 24.3.2017 i.e. after taking over charge by accused No.1 as Chief Minister of State of U.P. which is a fact pointing out against the

accused persons as well as manipulation committed by entire state authorities. It is further submitted that by means of application filed along with supplementary affidavit, the petitioners made a prayer for summoning India T.V. Channel Program dt. 30.8.2014 conducted by Rajat Sharma, in which an extra judicial confession was made by accused No.1 admitting whatever had been stated in the C.D. in question relating to his speech dt. 27.1.2007. It will be appropriate that entire program of 55 minutes of India T.V. namely Aap Ki Adalat dt. 30.8.2014 is summoned to clear entire picture and facts, which the respondents are trying to manipulate being subordinate to accused No.1, who had taken over charge as head of the State of U.P.

v. That in view of the above facts, it is stated that report dt. 13.10.2014 is a baseless report and is liable to be rejected and no reliance can be placed upon such a defective and baseless report.

vi. That consequently the impugned order dated 03.05.2017 passed by respondent no 1 (Annexure &-A to the affidavit of compliance) is liable to be quashed because the same solely relies upon the farce CFSL report dated 13.10.2014.

vii. That another glaring fact emerges from paragraph 7 of the CFSL report dated 13.10.2014 that some videos of folder **2nd Apr 27 2013** were previewed by the lab,

which video was never at any point of time handed over by petitioner to anyone. As stated in a preceding paragraph the only CD containing provocative hate speech by accused no 1 dated 27.01.2007 submitted by means of affidavit in the court below as well to the I. O. of the case.

viii. It is further submitted that vide annexure No.9 to the affidavit under reply, which is letter dt. 9.5.2017 submitted by C.B.C.I.D. to the respondent No.1 it is mentioned that voice sample report dt. 13.10.2014 and 14.10.2014 were received from CFSL, which were found to be edited and tampered, although it had also been mentioned that voice samples were found same and similar, but, two samples which were put for examination cannot be allegedly treated as lawful samples obtained directly from the source. There is mention in the report dt. 9.5.2017 of a case law of Hon'ble Apex Court i.e. Sanjay Singh Rama Rao Charan, the said case is not at all applicable in the facts and circumstances of the present case because D.V.D. or CD before learned court below, but, the said C.D. was never put for examination before the Lab concerned instead some other D.V.D. was sent for examination hence report in question is not only manipulative but is proving malafide and bias on the part of the respondents from very beginning. In view of

this impugned letter dated 09.05.2017 (Annexure-9 to the affidavit of compliance dated 10.05.2017 sweared by Sri Rahul Bhatnagar the Chief Secretary of State of Uttar Pradesh) is liable to be quashed as well any action in pursuance of the impugned letter dated 09.05.2017 is also liable to be set aside as unlawful and without jurisdiction.

ix. That the respondents prior to 20th March 2017 were informing the Hon'ble court that investigation is in progress and statements of some witnesses were recorded, as is evident from paragraph 5 of the affidavit dated 24th April 2015 sweared by Sri Chandra Bhushan Upadhyay the inspector CB CID. In paragraph 8 of the same affidavit it is sated that on the basis of ample, cogent and sufficient evidence statements of witnesses the investigating officer has prepared a draft final report and on 09.04.2015 sent it to higher authorities for approval and approval is awaited.

7. That in reply to the contents of paragraph No.13, 14 and 15 of the affidavit of compliance it is submitted that order dt. 3.5.2017 refusing to grant sanction for prosecution u/s. 153-A of the I.P.C. is a document which had no relevance in the eyes of law because there is clash of interest cropping up after 20.3.2017 as on that date accused No.1 has assumed the charge of Chief Minister of State of U.P. That it is most important aspect that the impugned order dated 3.05.2017 is an antedated and

manufactured document created by the respondents to help the accused no 1. This fact is is evident from the fact that when this matter was taken up on 4th May 2017 by this Hon'ble Court if the impugned order existed at all the same would have been referred by the respondents during the course of hearing but no such fact was brought to the notice of this Hon'ble Court on 4th May 2017. This fact was noticed by the Hon'ble Court in its order dated 11th May 2017. As the impugned order was not all in existence on 3rd May 2017 hence it was not brought to the notice of This Hon'ble Court on 4th May 2017.

i. Under the constitutional mechanism as provided under article 163 of The Constitution of India the Chief Minister is the head of the Council of Ministers of the State, under whom, entire state machinery functions. The grant of sanction for prosecution u/s. 196 (1) Cr. P. C. is a function to be performed by the State of U.P. in the present case. Hence, the state of U.P. Which is headed by accused No.1 and any order refusing sanction for prosecution u/s. 153-A Cr.P.C. while exercising power u/s. 196 Cr.P.C. cannot be passed, which attracts the basic principle of law i.e. "***Nemo judex in causa sua*** or ***nemo judex in sua causa***", a Latin phrase that means, "no-one should be a judge in his own cause,". It is also popularly known as the rule against bias. It is minimal requirement of the natural justice that the authority giving decision must be

composed of impartial persons acting fairly, without prejudice and bias.

ii. Bias means an operative prejudice, whether conscious or unconscious, as a result of some preconceived opinion or predisposition, in relation to a party or in issue. The Home Department of Uttar Pradesh is headed by the Chief Minister of U.P. The Principal Secretary (Home), the respondent no. 1 who passed the impugned order dated 3.5.2017, provides the departmental leadership to his team consisting of Secretaries, Special Secretaries and other officers. The Home Department handles all policy matters related to law & order and police administration. It is the pivotal point of communicating all security related issues with the Central government as well as other State governments. The accused No.1 has a personal interest in saving himself from criminal prosecution of a very serious nature of crime and hence order dt. 3.5.2017 which is now under challenge, is nothing but an order passed by accused in his own favour through its subordinate the Principal Secretary, Home. It will be appropriate here to mention that portfolio of the Home Affairs of State of U.P. is also being held by accused No.1 besides charge of Chief Minister and the Principal Secretary of the Home Affairs is under direct control of the accused No.1 on the day when the impugned order was passed. There is personal bias manifest itself and

affected the impugned order dt. 3.5.2017. As per law laid down by Hon'ble Apex Court in Mineral Water Development Corporation Ltd. vs. State of Bihar as well as in Baidyanath Mohapatra vs. State of Orissa and Additional District & Sessions Judge vs. Registrar General of High Court of M.P. and others. It is well established that fair decision cannot be delivered by a person who himself had got personal interest in probing and deciding the issue in question. In the case of Gullapalli Nageswara Rao vs. APSRTC also, the Hon'ble Apex Court had held that Secretary of the State who had passed the order was biased in favour of the State and hence decision which was taken was biased and could not be sustainable in the eyes of law. In the present case, the respondent No.1 who is working under the accused No.1 had assumed charge of a Judge, a Prosecutor of an accused, which are combined together and had taken impugned order dt. 3.5.2017 in favour of the accused, his immediate superior under whose direct subordination he is placed. The present case is a classic case, where accused No.1 had assumed charge of an authority and passed the impugned order in his favour which is unheard of in the annuls of justice, hence the same is liable to be quashed. It is further submitted that Principal Secretary Home, who had passed the order dt. 3.5.2017 apparently is a biased authority having close proximity with accused

No.1being his immediate subordinate in Home Ministry of State of U P whose Home Minister is accused no. 1, and hence any order passed by the respondent No.1 in favour of accused No.1 is not sustainable in the eyes of law. Moreover by bare reading of the impugned order dt. 3.5.2017, it reflects that it is a cryptic order and shows non-application of mind and is signed under administrative duress and departmental bias, although power granted by the statute under section 196 Cr.P.C. is very sensitive issue, which was not performed in the manner, which was supposed to be done. No reason had been given except certain case laws had been mentioned in the impugned order, which itself reflects that the impugned orders was passed by obtaining legal opinion from some expert legal mind and hence order is also not sustainable in the eyes of law because the same was not passed independently applying his own mind besides being biased and having clash of interest writ large on the face of record. The principle that 'No man shall be a judge in his own cause' i.e. to say, the deciding authority must be impartial and without bias. It Implies that no man can act as a judge for a cause in which be he has some Interest, may be pecuniary or or fear of prosecution or otherwise. Interest affords the strongest proof against impartiality. The emphasis is on the objectivity in dealing with and deciding a matter. Justice Gajendragadkar, as

then he was, observed in a case reported in AIR 1965 SC 1061, M/s Builders Supply Corporation v. The Union of India and others, “it is obvious that pecuniary interest, howsoever small it may be, in a subject matter of the proceedings, would wholly disqualify a member from acting as a judge". Lord Hardwick observed in one of the cases, “In a matter of so tender a nature, even the appearance of evil is to be avoided." Yet it has been laid down as principle of law that interest would disqualify a Judge to decide the matter even though it is not proved that the decision was in any way affected. This is thus a matter of faith, which a common man must have, in the deciding authority. In the present case this principle is directly applicable wherein the deciding authority has some personal Interest in the matter. This may be in the shape of some personal relationship with one of the parties which is ascetically evident from the records. In the present case the personal bias arises out of the close professional relationship between Principal Secretary Home of State of U P with the Chief Minster as well the Home Minister, the accused no. 1.