

(2013) 02 GUJ CK 0032

In the Gujarat High Court

Case No : Criminal Miscellaneous Application (For quashing and set aside FIR/ Order) No. 14965 of 2012

Dolatram Tekchand Harjani

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Arms Act, 1959 — Section 25(1)(a), 25(1)(a), 27(1)
Criminal Procedure Code, 1973 (CrPC) — Section 160, 227, 482
Evidence Act, 1872 — Section 25
Penal Code, 1860 (IPC) — Section 120B, 307

Citation : (2013) CriLJ 1779 : (2013) 3 GLR 2133

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : K.B. Anandjiwala, for the Appellant; Archana Raval, APP, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—The petitioner, who is, according to the submission by learned APP, absconding and despite efforts by the investigation officer, has not been available for investigation process/for recording statement, has taken out present petition u/s 482 of the Code of Criminal Procedure, 1973 claiming that the investigation in the matter of alleged offence under Sections 307, 120B of Indian Penal Code and Sections 25(1) (a) and (b) and 27(1) of Arms Act may be stopped and terminated/quashed by exercising power u/s 482 of the Code. It is prayed, inter alia, that: 6(i) that Your Lordships be pleased to quash and set aside the FIR registered at DCB Police Station, Vadodara vide C.R. No. 1-25/2012 qua the present petitioner;

6(ii) that Your Lordships be pleased to stay further proceedings qua the present petitioner in connection with the FIR being C.R. No. 1-25/2012 registered with DCB Police Station, Vadodara during the pendency of this petition;

The petitioner has preferred present petition in backdrop of the fact that a Police Inspector, DCB Police Station, Vadodara, has submitted FIR, alleging offence punishable under Sections 307 and 120B of Indian Penal Code and Sections 25(1)(a) & (b) and 27(1) of Arms Act, wherein the petitioner herein is one of the accused persons (the petitioner is accused No. 3 in the said FIR). 2. In present petition, the petitioner has, inter alia, claimed that the impugned FIR may be quashed because it is lodged on inadmissible evidence and the allegations are false and have been made only to harass the petitioner. It is also claimed that on the statement and allegations by a co-accused, the petitioner is falsely involved as accused person in the impugned FIR.

2.1. According to the FIR, one person (accused No. 1 in present case) who is in judicial custody as accused in several offences of serious nature allegedly asked two persons who also were in custody (after getting arrested in connection with offence under Sections 307 and 120B of Indian Penal Code and Sections 25(1)(a) & (b) and 27(1) of Arms Act and not seeking, for couple of days, released on bail) to kill a particular person (i.e. contract killing) who was to be witness against the said person (i.e. present accused No. 1) who is son of present petitioner. It is also alleged, as per FIR, that the said two persons were asked to collect Rs. 50,000/- (for the said job/contract killing) from his father i.e. present petitioner. It is further alleged that after the said meeting of said two persons with present accused No. 1, the said two persons got released on bail. It is also alleged that after being released on bail said two persons and the person connected with accused No. 1, received the amount as per instructions of accused No. 1 and thereafter a weapon (revolver) was purchased from Madhya Pradesh. It is also alleged that subsequently an attempt to kill (by firing gunshot) the target was made but the assailant missed the targeted person and the person at whom shot was armed turned out to be a mistake of identity (i.e. was not the person who was actually to be the target). It is also alleged that another attempt was also made, but it failed.

2.2. It appears that on the basis of such information received by police the FIR came to be filed and investigation commenced. The petitioner-accused No. 3 -- is aggrieved by it. Hence present petition.

3. Mr. Anandjiwala learned advocate, has appeared for the petitioner and has reiterated the contentions raised in the petition. He has also submitted that there is nothing on record to show that the petitioner had given any money to any one, much less to the other two accused persons whose names are mentioned in the FIR. He has also submitted that it is only on statement of co-accused that the petitioner's name is mentioned in the FIR though it is settled position that statement of co-accused is inadmissible in evidence. The learned counsel for the petitioner also contended that during the period in question, the petitioner was under detention (under PASA) and therefore also there is no justification for including petitioner's name in the FIR as one of the accused persons. He also submitted that the other person who, according to the allegation in FIR, was to

collect money from him (i.e. from the petitioner), was in custody from 17-12-2011 to 19-12-2011 and that therefore also, it becomes clear that the allegations in FIR are false. He also submitted that the FIR does not ingredients of alleged offence and/or does not disclose commission of any offence by the petitioner.

4. On the other hand, learned APP has submitted that the investigation is still in progress and that the petition to quash the FIR does not deserve to be entertained at this stage and the process of investigation may not be stayed.

4.1. Learned APP also submitted that the petitioner had preferred a petition for anticipatory bail which has been rejected and according to the investigating officer, the petitioner is absconding.

4.2. Learned APP referred to the statements recorded until now so as to submit that there is material which justify the need for investigation, also submitted that the allegations are about offence which are serious in nature and they require proper and complete investigation. Learned APP submitted that the petition may not be entertained.

5. I have extensively heard the learned counsel for the petitioner and the learned APP and have also examined the material shown by learned counsel for the petitioner and learned APP.

6. The relief prayed for in the petition amounts to scuttling the investigation at threshold or amidst the investigation process.

6.1. The investigation officer is still gathering the details and material and it is submitted by learned APP that complete material or evidence is still not available and the facts are still incomplete and hazy.

7. Moreover, the petitioner-accused is, according to investigation officer, absconding and his whereabouts are not known and are being searched.

7.1. The FIR appears to have been filed by police officer in view of and on the basis of the information received during investigation of other case.

8. It has emerged from the record and from the submission by learned APP and also from the submission by learned counsel for petitioner that attempt of firing a gunshot was made and according to FIR, such attempt was made in pursuance of the contract to kill a particular person at the instance of the accused No. 1 (i.e. the son of the petitioner-accused No. 3). It has also emerged from the record that the person at whom the shot was fired, has, in his statement to the investigation officer, admitted that a shot was fired at him, but it did not hit him. It has also emerged from the record and the submissions that due to mistake in identification of the person, the shot was fired at wrong person, i.e. at a person and other than the person at whom it was planned to be fired.

9.1. The learned counsel for the petitioner has submitted that the allegation that the contract to kill the person named in the FIR was given by the accused No. 1

and/or that the amount was to be collected, or it was collected from him (i.e. from the petitioner), is merely an allegation made by co-accused which is not admissible in evidence and that, therefore, investigation on the basis of statement of co-accused may not be permitted because such statement is inadmissible in evidence and FIR may be quashed. It is also claimed that there is nothing on record, or even in FIR to show that any amount was paid by the petitioner. The learned counsel for the petitioner, i.e. accused No. 3 also claimed that actually, at the relevant time, i.e. at the time when the amount was allegedly paid, the petitioner-accused No. 3 of the accused No. 1 was under detention and that, therefore, it follows that the allegations in the FIR are incorrect.

9.2. However, the learned APP has, on the other hand, submitted that according to the FIR, the accused No. 1 had informed that the payment for the alleged contract may be collected from his father i.e. the petitioner and that, therefore, it is a matter of investigation as to who had made the payment as allegedly instructed by the accused No. 1 and whether the petitioner, i.e. accused No. 3 had passed on further instructions to make the payment.

9.3. The learned APP has also submitted that the subsequent events viz. the incidence when a shot was fired at a person whose a contract and occurrence of other two attempts to kill a particular person pursuant to the alleged meeting in jail with the accused No. 1, when prima facie considered along with the allegations mentioned in the FIR, call-for and justify further and detailed investigation.

9.4. At this stage, it cannot be said that the submissions by the learned APP are without substance or merits.

9.5. Ordinarily, Court would not entertain a request to quash the FIR and/or investigation and/or the proceedings at the behest of a person who is not available or does not make himself available or does not co-operate in the process of investigation or in inquiry or does not respond to order u/s 160 of the Code or a person who is absconding and the Court would also ordinarily not entertain a petition by such person/accused.

9.6. In present case, the learned APP has submitted that though petitioner's application for anticipatory bail is rejected and the petitioner is not available and he has not made himself available for inquiry/investigation and he is absconding.

9.7. It is also submitted that even after order/summons u/s 160 of the Code, the petitioner has not appeared before investigation officer.

9.8. In the facts and circumstances of the case, as they emerge from the record at this stage, it appears that it would not be proper and justified to terminate the process of investigation which is in progress and not completed. At the end of the investigation, the investigation officer will file appropriate summary or final report depending on the outcome of the investigation process and after

examining the summary or report the learned Magistrate would pass appropriate order or directions.

9.9. The learned counsel has placed heavy reliance on the contention, which has been emphasized and re-emphasized, that solitary statement of (or allegation by) a co-accused is not admissible in evidence and therefore cannot be relied upon and resultantly FIR and investigation should be quashed. Mr. Anandjiwala learned counsel for the petitioner relied on the decision in case of Suresh Chhotalal Verma Vs. State of Gujarat, to support the said contention.

9.10. The said submission gives rise to an issue viz. does it mean that on the basis of, or in light of, a statement of co-accused even investigation cannot be initiated. On this count, it comes out that while raising the said contention, it is conveniently overlooked that such position or preposition does not mean that statement by a co-accused cannot act as or cannot be even treated as a piece of information or a clue to initiate and conduct inquiry/investigation so as to find out whether there is any independent, cogent, reliable and satisfactory material/evidence which may support, justify and provide cause for further investigation or a charge-sheet and a trial.

9.11. In present case, name of the petitioner is disclosed/mentioned in a statement of a co-accused with reference to offence under Sections 307 and 120B of IPC and Sections 25(1)(a) and (b) and 27(1) of Arms Act and therefore, police has commenced investigation.

9.12. Against such investigation process, the petitioner has taken out present petition u/s 482 of the Code and prayed that the investigation process may be stopped and it may be quashed. In support of the said request, the aforesaid contention is raised.

9.13. The position/preposition (raised in light of the provision u/s 25 of the Indian Evidence Act) that a statement by a co-accused is not admissible in evidence and therefore cannot be relied on, cannot be construed to mean that such statement cannot be even considered or treated as a clue or a piece of information to initiate and conduct inquiry/investigation or to direct the investigation/inquiry in particular direction. Such a statement can be treated as a clue or piece of information (and not "evidence") for initiating and conducting investigation/inquiry so as to find out as to whether there is any independent, satisfactory and reliable material which may support or justify or provide reason for continuing inquiry/investigation for initiating further investigation. At the stage when the investigation has commenced or the process is going on any occasion or any question of treating or considering such a statement as evidence does not arise and that, therefore, it would not be proper and just to terminate, i.e. to direct the investigation officer to close the investigation.

9.14. Moreover, in present case, on one hand certain incidents are said to have occurred after the alleged meeting with the accused No. 1 e.g., a gunshot was fired at a person whose appearance resembled the person who was the target of

the alleged contract to kill and was mistaken as the target (but the shot missed the person) and then it was not noticed that shot was fired at wrong person. The attempt was allegedly repeated but due to failure of weapon and problem with bicycle shot could not be fired, which, prima facie, suggest that the said attempts were pursuant to the alleged meeting and the name of petitioner has emerged in connection with the said offence and its conspiracy and on the other hand the petitioner, according to the investigation officer is not co-operating in inquiry/ investigation and is absconding, it would not be proper and/or just to stop, terminate and quash the investigation.

9.15. Furthermore, from the submissions by learned counsel for the petitioner and learned APP and from the material on record. it emerges that at this stage, the statements by the co-accused are, and have been treated and considered merely as a lead or clue or information in light of which investigation officer is conducting/directing the process of investigation and at this stage when investigation is in progress the Court would not be justified in passing any order which may obstruct or interfere with the process of investigation, much less an order which may prematurely terminate the investigation.

9.16. At this stage and in present proceedings u/s 482 of the Code, this Court cannot examine and decide as to whether the allegation can be proved in light of available evidence and/or the Court is not supposed to embark upon the inquiry whether the allegations in the FIR and the charge-sheet are reliable or not and thereupon the Court is also not supposed to render definite finding about the truthfulness or veracity of allegations. While considering the petition u/s 482, consideration has to be limited to examine whether allegations made in the FIR and the charge-sheet taken on their face value and accepted in their entirety make out ingredients of alleged offence or not.

9.17. There is no material or basis or justification to hold, or which may even suggest, that the investigation is unjustified or for harassment or baseless and a witch-hunt. If, on conclusion of investigation any material which may justify further proceedings/submission of charge-sheet does not emerge, then the investigation officer would file appropriate report but at this stage when investigation is being carried out Court cannot interject and stifle or scuttle investigation.

9.18. The Court cannot substitute its own assumptions or view about the suspects role/involvement on the basis of incomplete and/or hazy material for assessment of material by the investigation officer and on basis of such view and understanding the Court ought not terminate, scuttle or stifle investigation process.

9. At this stage, it would be relevant to refer to the observations by the Hon''ble Apex Court. Recently, in the decision in case between State of Orissa and Others Vs. Ujjal Kumar Burdhan, , the Hon''ble Apex Court has observed, inter alia, that:

7. It is true that the inherent powers vested in the High Court u/s 482 of the

Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extraordinary power has to be exercised sparingly with circumspection and as far as possible, for extra-ordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those incharge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.

8. In *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, , emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence, to be completed, this Court highlighted the necessity of a proper investigation observing thus:

An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed.... Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case.... If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed. the Court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence.

(Emphasis supplied)

In the decision in case between *Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others*, , The Hon"ble Apex Court has observed that:

27. The powers possessed by the High Court u/s 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy: more so. when the evidence has been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot

be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

(Emphasis supplied)

Earlier, in the decision in case between State of Bihar Vs. Murad Ali Khan and Others, , the Hon''ble Apex Court observed, with regard to jurisdiction u/s 482 of the Code, that:

14. It is trite jurisdiction u/s 482 Cr.P.C., which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court would not embark upon and enquire whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the Trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations. set out in the complaint or the charge-sheet do not in law constitute or spell-out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of the Court or not.

(Emphasis supplied)

16. In Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others, at p. 159.

.... As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further.

(Emphasis supplied)

In the case between Dr. Monica Kumar and Another Vs. State of U.P. and Others, , the Hon''ble Apex Court has observed with regard to jurisdiction u/s 482, that:

29. We may reiterate and emphasise that the powers possessed by the High Court u/s 482 Cr.P.C. are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when

the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its jurisdiction of quashing the proceeding at any stage. (See Janata Dal Vs. H.S. Chowdhary and Others, ; Dr. Raghubir Sharan Vs. The State of Bihar, ; Kurukshetra University and Another Vs. State of Haryana and Another, ; and Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, .

(Emphasis supplied)

In the case between State of Andhra Pradesh Vs. Golconda Linga Swamy and Another, in paragraph 8 the Hon''ble Apex Court observed as follows:--

8. As noted above, the powers possessed by the High Court u/s 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers u/s 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceeding.

(Emphasis supplied)

10. the learned APP appears justified in contending that it is only on completion of investigation process that it may become clear as to whether any amount as

alleged was paid or not and whether it paid from the residence of the accused No. 3, i.e. present petitioner or not So far as the decision relied upon by the learned counsel for the petitioner is concerned, it is passed with reference to oral evidence during the trial and in connection with the application made u/s 227 seeking discharge from prosecution. In the said decision, the Court has not held that the statement of co-accused cannot be considered as clue or information for initiating or conducting investigation and that, therefore, the said decision does not help the petitioner to support the relief prayed for in the present petition viz. that the investigation and the FIR/charge-sheet may be quashed.

11. It is also relevant to consider that the petitioner, according to the submission by learned APP. is absconding and investigation officer has not been able to record his statement.

12. The information related to the alleged offence came to the knowledge of the complainant -- a police officer -- during investigation of other offence, consequently he filed the complaint/FIR and the investigation is in progress.

13. Having regard to the facts and circumstances of the case and the fact that according to the submission by learned APP that the petitioner is absconding and his whereabouts are searched coupled with the fact that the petitioner's case and request for anticipatory bail also did not find favour with the Court and anticipatory bail petition by the petitioner has been rejected and consideration of material on record and the submissions by learned counsel for the petitioner and by learned APP bring out a plain fact-situation that the material and details which are presently available are incomplete and inadequate to lead the Court to even prima facie conclusion that any investigation is not justified and the process of investigation should be terminated.

14. From the available facts and material. It cannot be concluded that the complaint is filed maliciously and/or that there is no need for justification for further investigation.

15. This case does not appear, at this stage, one of the rare or exceptional cases, wherein the Court would be justified in exercising power u/s 482 in quashing the investigation,

16. In view of the above discussion and for the foregoing reasons. I am not inclined to entertain and accept present petition.

17. At this stage, the petition does not deserve to be entertained and is required to be rejected for the above-mentioned reasons. Consequently, the petition is rejected. Orders accordingly.