

(2023) 03 BOM CK 0059

In the Bombay High Court

Case No : Public Interest Litigation No. 17 Of 2022

Gouri Abhay Bhide And Others

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 14-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 32, 226

Code Of Criminal Procedure, 1973 — Section 36, 154(3), 156(3), 200, 482

Citation : (2023) 03 BOM CK 0059

Hon'ble Judges : Dhiraj Singh Thakur, J;Valmiki Sa Menezes, J

Bench : Division Bench

Advocate : Gouri Abhay Bhide, Abhay Bhide, A. S. Pai, M. H. Mhatre, Aspi Chinoy, Joel Carlos, Ashok Mundargi, Joel Carlos

Final Decision : Dismissed

Judgement

Dhiraj Singh Thakur, J

1. The present petition has been fled seeking a writ of mandamus inter alia to the Central Bureau of Investigation (CBI) and the Enforcement Directorate for taking cognizance of the complaint fled by the Petitioners with the Mumbai Police and for purposes of taking investigation in their hands. The complaint is stated to have been sent by the Petitioners through email to the Commissioner of Police Mumbai, as also the DCP, Economic Offences Wing (EOW) on 11th July, 2022 against Respondent Nos. 5, 6 and 7. Respondent Nos. 5 and 6 are stated to have been the office bearers of the political party 'Shivsena'. Respondent No. 5 is also stated to have been the Chief Minister of the State of Maharashtra for a period of 30/31 months, whereas Respondent No. 6 is stated to have been a minister in his cabinet. It is alleged that the complaint fled with the Mumbai Police although forwarded on the same date to the EOW, had not resulted in any investigation into the allegations levelled against the said Respondents.

2. Insofar as the allegations are concerned, the Petitioners state that the said Respondents have committed serious economic offences and offences of

corruption, despite which Respondent No. 4 i.e. the Police Commissioner, Mumbai had avoided to take legal action against the said Respondents on account of heavy political pressure. In the petition, it is further alleged that Respondent Nos. 5, 6 and 7 have assets, which are otherwise disproportionate to their known sources of income. The assets are stated to be Benami Transactions. It is alleged that the said Respondents run periodicals by the name 'Marmik' and 'Saamna' which are not subjected to the audit bureau of circulation and that during the Corona period, while the entire print media in India was facing heavy losses, the company, 'Prabodhan Prakashan Private Limited' practically owned by Thackeray family, had shown a turnover of Rs.42 crores and a book profit of Rs.11.5 crores.

3. In the backdrop of the aforementioned facts it is prayed that not only should cognizance be taken on the complaint fled by the Petitioners and further that the same should be monitored by this Court. Reliance was placed upon *Param Bir Singh V/s. The State of Maharashtra* to support the proposition that this Court in the aforementioned case had exercised the writ jurisdiction and referred the matter to the CBI.

4. Mr. Aspi Chinoy, learned Senior Counsel for the private Respondents on the other hand urged that if at all the Petitioners had any grievance that no action was being taken on the complaint fled by the Petitioners by the concerned agencies and investigation was not being conducted then the right remedy for the Petitioners was to approach the Magistrate concerned in terms of the provisions of the Code of Criminal Procedure. Reliance in this regard was placed by Mr. Chinoy upon the judgment in the case of *Sakiri Vasu V/s State of Uttar Pradesh and others* (2008) 2 SCC 409..

It was next contended by Mr. Chinoy that while courts have exercised the extraordinary writ jurisdiction relating to investigations in criminal cases, yet courts do not order initiation of an investigation. Reference was also made to *Kunga Nima Lepcha & others V/s. State of Sikkim & others* (2010) 4 SCC 513., which was subsequently followed in the case of *State of Jharkhand V/s. Shiv Shankar Sharma and others* 2022 SCC OnLine SC 1541..

5. We have heard Petitioner No. 1 appearing in-person as also learned Counsel for the Respondents.

6. At the very outset we may point out that after we had heard the matter and reserved the same for judgment, Ms A. S. Pai, learned Public Prosecutor informed us that a preliminary inquiry had been initiated by the EOW on the complaint which had been forwarded. This statement was made in the presence of the Petitioners, who however did not express any desire to withdraw the petition and, therefore, we have to proceed to decide the issues that arise in the present petition.

7. In *Sakiri Vasu V/s State of Uttar Pradesh and others* it was held that if anybody had a grievance that his FIR was not being registered at the police station or a proper investigation was not being conducted in that regard, the

High Court should ordinarily refuse to interfere in such matters and relegate the Petitioner to avail the alternate remedy, first under Section 154(3) and Section 36 of the Code of Criminal Procedure before the police officers concerned, and if that was of no avail, by approaching the Magistrate concerned under Section 156(3).

It was held:

"If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?"

8. In the present case the reliefs sought by the Petitioner inter alia are by way of a mandamus to the CBI for investigating the case based upon the complaint of the Petitioners. Such a direction clearly cannot be given by the Magistrate in view of the judgment of the Apex Court in CBI V/s. State of Rajasthan (2001) 3 SCC 333. . Yet it is equally settled that an aggrieved person can only claim that the offences he alleges be investigated properly but he has no right to claim that it be investigated by any particular agency of its choice (CBI V/s. Rajesh Gandhi (1996) 11 SCC 253.).

The Petitioners' choice as regards the investigating agency therefore would not determine the maintainability of the petition or make it obligatory for the writ Court to entertain the same and issue directions on that ground.

Equally settled is the principle that the remedy of writ is discretionary in character and except in cases which involve enforcement of fundamental rights, violation of principles of natural justice or where vires of an Act are challenged or the proceedings are wholly without jurisdiction, the parties in appropriate cases may be relegated to avail the alternate remedy if the same is adequate and efficacious. This has been held to be a matter of self imposed limitation, a matter of policy and convenience rather than a rule of law.

Reference in this regard can be made to M/S Radha Krishan Industries V/s. The State Of Himachal Pradesh and others (2021) 6 SCC 771. .

9. Assuming that a writ Court was to exercise jurisdiction under Article 226 of the Constitution of India, there are a plethora of judgments emphasizing the care and the caution, which needs to be exercised in such cases as the one we are confronted with in the present case, where a direction is sought for investigation by a central agency like the CBI.

In Common Cause, A Registered Society V/s. Union of India (1999) 6 SCC 667 :

1999 SCC (Cri.) 1196 the Apex Court while considering the legality of a direction issued to the CBI to investigate 'any other offence' held the same to be wholly erroneous and contrary to the concept and philosophy of 'LIFE' and 'LIBERTY' guaranteed to a person under Article 21 of the Constitution. It was held:

"174. The other direction, namely, the direction to CBI to investigate 'any other offence' is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of 'LIFE' and 'LIBERTY' guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of 'LIFE' has been explained in a manner which has infused 'LIFE' into the letters of Article 21."

10. The ratio of this decision was followed in *Secretary, Minor Irrigation, Rural Engineering Services, U.P. & Ors. V/s. Sahngoo Ram Arya & Another* (2002) 5 SCC 521. In this case the Apex Court was considering the order passed by the High Court whereby it had directed the CBI to hold an inquiry into the allegations made against the Respondent No. 2, who was a Minister. It was held that even when the High Court had the power under Article 226 of the Constitution of India to direct an inquiry by CBI, the said power could be exercised only in cases where there was sufficient material to come to a prima facie conclusion that there was need for such an inquiry and that it was not sufficient to have such material in the pleadings. It was also held that the High Court on consideration of such pleadings must draw a conclusion that the material before it was sufficient to direct such an inquiry by CBI. The Court observed:

6. It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or CBI to find out whether he has committed any offence or is living as a law-abiding citizen. Therefore, it is clear that a decision to direct an inquiry by the CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of 'ifs' and 'buts' and thought it appropriate that the inquiry should be made by the CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of *Common Cause*.

11. In *State of West Bengal & others V/s. Committee for Protection of Democratic Rights, West Bengal & Others* (2010) 3 SCC 571, the Apex Court held that while powers exercisable under Articles 32 and 226 of the Constitution

were very wide, the same had to be exercised with great caution. The Court observed thus:

"70.....In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

12. In *Kalyaneshwari V/s. Union of India & others*(2011) 3 SCC 287. the Apex Court underlined the importance of care and caution that is required to be exercised while entertaining public interest litigations and held that the same should not become a source of abuse of process of law. It was held that the judiciary had to be extremely careful to see that no private malice, vested interest or interest for seeking publicity lurks behind the veil of such public interest litigation.

13. In *Kunga Nima Lepcha & others V/s. State of Sikkim & others* the Apex Court was dealing with a public interest litigation under Article 32 of the Constitution of India, wherein allegations had been levelled against the Chief Minister of the State of Sikkim alleging misuse of his public office to amass assets disproportionate to his known sources of income. The relief sought by the Petitioners in the said petition was a writ of mandamus directing the CBI to investigate the allegations that had been levelled against him, his relatives and other officials and to take appropriate legal action by way of registration of an FIR under the provisions of the Prevention of Corruption Act, 1988. The Court held that the onus of launching the investigation into such matters was clearly on the investigating agencies and it was not proper for the Court to give directions for initiating such an investigation under its writ jurisdiction. It was held:

"16. While it is true that in the past, the Supreme Court of India as well as the various High Courts have indeed granted remedies relating to investigations in criminal cases, we must make a careful note of the petitioners' prayer in the present case. In the past, writ jurisdiction has been used to monitor the progress of ongoing investigations or to transfer ongoing investigations from one investigating agency to another. Such directions have been given when a specific violation of fundamental rights is shown, which could be the consequence of apathy or partiality on part of investigating agencies among other reasons. In some cases, judicial intervention by way of writ jurisdiction is warranted on

account of obstructions to the investigation process such as material threats to witnesses, the destruction of evidence or undue pressure from powerful interests. In all of these circumstances, the writ court can only play a corrective role to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is up to the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation.”

14. In *State of Jharkhand V/s. Shiv Shankar Sharma & Others* 2022 SCC OnLine SC 1541 the Apex Court was considering the legality of an order passed by the High Court of Jharkhand, whereby the Court, pursuant to the direction issued by the Apex Court decided the issue of maintainability and held the PILs to be maintainable. The PILs inter alia contained allegations regarding money laundering and investments in shell companies. The Petitioners had prayed that the source of income of private Respondents be investigated. The Apex Court while placing reliance on *Kunga Nima Lepcha & others V/s. State of Sikkim & others* held as under:

“11. Regarding the first Writ Petition No. (PIL) 4290 of 2021 the allegations which had been made of money laundering and money being invested in shell companies are again mere allegations. The petitioner has actually sought an investigation by the Court. It prays for a writ of mandamus in this regard to the Investigating Agencies such as CBI or Enforcement Directorate to investigate. This in our view is again an abuse of the process of the Court, as the petition is short of wild and sweeping allegations, there is nothing placed before the Court which in any way may be called to be prima facie evidence. Moreover, the locus of the petitioner is questionable and the clear fact that he has not approached the Court with clean hands makes it a case which was liable to be dismissed at the very threshold.

12. This Court in *Kunga Nima Lepcha v. State of Sikkim* under similar circumstances has held that a writ court is not an appropriate forum for seeking an initiation of such an investigation. A reference to the facts of *Kunga Nima Lepcha* (supra) would be relevant for our purposes. In the above case, a writ petition under Article 32 of the Constitution was filed directly before this Court where the petitioner had alleged that the incumbent Chief Minister of the State of Sikkim (impleaded respondent No.2) had misused his public office and had amassed assets disproportionate to his known source of income. It was also alleged that the Chief Minister has misappropriated a large volume of public money at the cost of Government of India and the Government of Sikkim. Thus, the relief sought by the petitioner was for issuance of writ of mandamus directing the CBI to investigate the allegations that have been made against the Chief Minister. This Court declined to intervene in the matter holding that a constitutional court is not a forum to seek redressal of this nature. The remedies evolved by way of writ jurisdiction are of extraordinary nature and reliefs cannot

be granted as a (2010) 4 SCC 513 matter of due course, where the statutory remedies are available to the petitioner. In Paras 14 to 17 of the judgment it was said as follows:"

It was held that the allegations made by the Petitioners were vague and general and an abuse of the process of the Court. While setting aside the order passed by the High Court of Jharkhand, it was held:

"27. Furthermore, the allegations which were made by the petitioner are vague, very much generalized and not at all substantiated by anything worthy to be called an evidence. Allegations of corruption and siphoning of money from shell companies are nothing but a bald allegation, without substantiating the allegations in any manner whatsoever and is therefore only asking the Court to direct Central Bureau of Investigation or the Directorate of Enforcement to investigate the matter. This is nothing but an abuse of the process of the court."

Testing the facts of the present case on the touch stone of the ratio of the aforementioned judgments, even in the present case it can be seen that the allegations are totally vague and general in character.

15. The Petitioners appearing in-person had placed reliance upon the case of Param Bir Singh V/s. The State of Maharashtra & Ors. to urge that in the said case the Court had been pleased to accept the plea of the Petitioners and referred the matter to the CBI based upon the allegations contained in the writ petition against the then Home Minister, Shri. Anil Deshmukh.

16. It can be seen that in the aforementioned judgment this Court did not direct the CBI to register an FIR but only directed the initiation of a preliminary inquiry into the complaint of the Petitioner. This Court while considering the ratio of the judgment in P. Sirajudding V/s. State of Madras(1970) 1 SCC 595 held that before a public servant is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct and a first information is lodged against him, there must be some suitable preliminary inquiry into the allegations by a responsible officer as lodging of such a report against such a person even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general.

The directions were so issued in the peculiar facts and circumstances of the case where the Court was considering the allegations made by none else then Shri. Param Bir Singh, who had also served as the Commissioner of Police, Mumbai. The complaint was in the shape of a letter addressed to the Chief Minister, Government of Maharashtra, wherein it was inter alia alleged that the then Home Minister had been calling police officers at his official residence and instructing them to carry out official assignments, financial transactions and collection schemes and that such officers were given targets to collect money.

The Petitioner in the said petition then lodged a complaint with the Malabar Hill Police Station and the Director, Anti Corruption Bureau of the CBI, on which no

action was taken which led the Petitioner to invoke the writ jurisdiction before the High Court. A direction was sought to the CBI / Enforcement Directorate to conduct an unbiased and fair investigation in various corrupt malpractices of Shri Deshmukh as also the role played by Shri Param Bir Singh.

17. A writ petition also was fled by Shri Param Bir Singh before the Apex Court. The Court while giving liberty to the Shri Param Bir Singh to withdraw the writ petition to approach the Bombay High Court nevertheless observed as under:

“We have no doubt that the matter is quite serious and affects the administration at large. It also appears that a lot of material which has come in public domain is a consequence of the persons falling out.”

18. It was in that backdrop, considering the peculiar facts and circumstances of the case, the nature of the allegations made against the then Home Minister Shri Deshmukh by none else then a Senior Police Officer who also had been the Commissioner of Police in Mumbai that this Court then proceeded to consider whether the complaint fled by the Petitioner Dr. Patil made out a prima facie case of a cognizable offence or not. The Court observed that the allegations made by Shri Param Bir Singh in his letter, annexed with the complaint by the Petitioner Dr. Patil fled with the Malabar Hill Police Station, Mumbai, was of a serious nature and that the issues were such that the very faith of citizens in the functioning of the police department was at stake and, therefore, while observing that such allegations could not remain unattended and were required to be looked into also held that prima facie the complaint indicated commission of a cognizable offence.

19. In the present case however no such circumstances exist as in the case of Param Bir Singh V/s. The State of Maharashtra & Ors..

The Petitioners have made vague and general allegations against the Respondent Nos. 5, 6, 7 and 8. What the Petitioners allege in the petition is as under:

“5.....It seems, it's a clear case of turning black money into white one. The unaccounted money gathered from BMC and other sources might have been dishonestly digested into the accounts of the above mentioned company and fictitious figures of profit have been shown for this digestion. This is not just a guess or baseless allegation. The Statement of Accounts of these companies will clearly reveal the fact. However, a thorough and impartial investigation needs to be there.”

“6..... The Petitioner herself gains nothing, nor aims at gaining anything by making this PIL. It is only because, her hard earned money, given as a common tax payer of this country and so also the money of crores of tax payers must have been misappropriated by using the official posts of Chief Minister and Cabinet Minister and enormous assets have been accumulated by Respondent Nos. 5 to 8 which are far more disproportionate to their known and disclosed sources of income.

20. In paragraph 11 the Petitioners state as under:

"i) Since my childhood I used to go to our family Printing press Shree Rajmudra in Prabhadevi Industrial Estate to meet uncle and grandfather. Many a times I saw Late Shrikant Thackeray having free chat with my grandfather Late Waman Bhide. Gradually I came to know that he is the younger brother of Late Balasaheb Thackeray, looking after printing and circulation work of their jointly owned weekly "Marmik". As I grew, I read, heard and noticed about the affairs of the Shivsena and the Thackerays. When I noticed about the assets declared by Aditya Thackeray in his election affidavit, I took my father Abhay Bhide to cross. My basic question was and is we both had printing press as business, but the Thackeray had additionally the weekly viz. Marmik and subsequently the Daily news paper "Saamna". I then seriously and secretly investigated about the Economics and Circulation and Advertisement relations and the ABC audit of the Newspapers. My findings were shocking. Marmik and Saamna were never subject to ABC audit. Nobody knows real print order. Here again my father came to my help. He told me about print order of the Marmik and also of Saamna, as at our another unit at Charkop, we had printed "Fulora" colour supplements.

The Petitioners state that upon receipt of additional information that there was an agreement appointing Prabodhan Prakashn Pvt Ltd as the "sole operating agency by Prabodhan Prakashan a supplement to the original complaint was mailed.

The Petitioners then go on to state that based upon the aforementioned information they drew a conclusion that Marmik and Saamna could not be the wealth earner for the family and that the only source to create wealth was through the Corporators and the Chairman of the Standing and Improvement Committees of the B.M.C..

21. Alongwith the petition, the Petitioners have annexed certain Exhibits to which the Petitioner No. 1 in her written submissions has made a reference.

Exhibit - A is the email sent on 11th July, 2022 by Petitioner No. 1 to the DCP, West Zone Mumbai Police. In this complaint it is alleged that the ownership of the land given by Maharashtra Government to Prabodhan Prakashan had gradually been transferred to the private limited company i.e. Prabodhan Prakashan Private Limited and that it was in violation of the terms and conditions on which the land stood allotted.

22. On the issue of disproportionate assets, the complaint reads as under:

"As far as other issues of Assets disproportionate to the income, Maharashtra EOW is very well competent to enquire and take proper course of action as per laws."

If thorough forensic audit of accounts of Prabodhan Prakashan, Marmik, all family members of the Thackeray family and their pseudo holding companies is done, you will be able to reach to the root of the corruption"

23. On the issue of the circulation and sale of Marmik and Saamna, the

Petitioners in the complaint state as under:

"....Even the circulation of the Marmik was hardly some thousand (two brothers equal partners) so also their Daily Newspaper "Saamna" does not have considerable circulation. It's 35 to 50 thousand only. I can confidently say this; as in our family's first printing press, we used to print some forms of Marmik. For a short period "Sanj Marmik" and even during the emergency period we had printed the entire issue for several months. Thereafter in our second unit at Kandivali, we had printed colour supplement Fulora for Saamna for some period. Besides, for the best reasons known to them they never get their sales certified by the Audit Bureau of Circulation. Bogus figures of sales and advertisement revenue needs to be investigated.

If all the dots are connected along with other circumstantial evidence/facts, the government will be able to achieve success in unearthing income from the contracts of the BMC and/or other means."

24. Exhibit- B to the petition levels general allegations questioning the source of income of the private Respondent Nos. 5 to 8. While Exhibit – C tries to explain the modus operandi for fund raising from the B.M.C., however, no specific role has been attributed to any of the private Respondents in the petition but what is sought to be explained is the manner in which the corrupt practices get executed in the B.M.C..

25. The petition as also the complaint thus are bereft of any evidence much less evidence which would give a basis to this Court to come to a conclusion that a prima facie case was made out for an investigation by the CBI or any other central agency. On a reading of the complaint and the petition, it appears that the Petitioners are only speculating on the sudden rise in the prosperity index of the private Respondents from their humble beginning and, therefore, entertain a suspicion that the life style maintained by the said private Respondents could only be attributed to the corrupt practices in the B.M.C.. In any case there is absolutely no evidence or live link between the alleged malpractices in the B.M.C. and private Respondents herein. The Petitioners thus are attempting to seek a roving probe, monitored by this Court into the suspicions so entertained by the Petitioners based on nothing but bald allegations. This is thus certainly not a case warranting the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India.

26. For the reasons mentioned hereinabove, we hold that the present petition is nothing but an abuse of the process of law which is, accordingly, dismissed, with costs of Rs.25,000/- to be deposited by the Petitioners in the Advocates Welfare Fund within a period of two months.