

(2011) 06 GUJ CK 0028

In the Gujarat High Court

Case No : Special Criminal Application No. 963 of 2007

Sabbir Jamalbhai Mehtar

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 16-06-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 32

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 174(1), 176(1), 176(4), 190

Penal Code, 1860 (IPC) — Section 120B, 121A, 123, 307, 323

Citation : (2011) 06 GUJ CK 0028

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : Mukul Sinha, for the Appellant; P.K. Jani, Public Prosecutor for Respondent 1, J.M Panchal, for Respondent 3 and K.J. Shethna for Respondent 4, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.

1.0. By way of this petition under Article 226 of the Constitution of India, Petitioner - younger brother of one Shri Sadik Jamal who is alleged to have been killed in a fake encounter on 13.01.2003 alleged to be by the officers of the Detection of Crime Branch, Ahmedabad (DCB, Ahmedabad) has prayed for an appropriate writ, direction or order directing the Respondents to register a case against one Shri P.P. Pande, Shri D.G. Vanzara and all other police officers who were involved in the conspiracy of killing of said Shri Sadik Jamal on 13.01.2003 by further directing the Respondents to hand over the investigation to the CBI for investigating into the matter or to any other agency deemed fit by this Court. Other interim directions are also sought in the present Special Criminal Application which are mentioned in para 6(B of the petition.

2.0. It is the case on behalf of the Petitioner and so pleaded in the petition that his elder brother Shri Sadik Jamal has been killed in fake encounter on

13.01.2003 by the officers of the DCB, Ahmedabad. According to the Petitioner, he works in a garage at Bhavnagar as a mechanic. That his brother was the citizen of India and his brother was deprived of his life and liberty in gross violation of the protection under Articles 14 and 21 of the Constitution of India. It is averred in the petition that due to fear, the Petitioner could not bring culprit to justice, but after intervention of the Hon"ble Supreme Court in fake encounter of one Shri Sheikh Sorabuddin by the officers of DCB/ATS, the Petitioner has found new hope of getting justice for his brother and therefore, he has approached this Court for appropriate reliefs referred to hereinabove.

2.1. It is the case on behalf of the Petitioner that his elder brother Sadik Jamal has studied upto 9th std. and thereafter he had given up his studies. That thereafter he was engaged in a small time work till 1997. That his brother Sadik Jamal got involved in minor altercations sometime in 1996 and thereafter he left the house and gone away to Mumbai. It is the case on behalf of the Petitioner that from the News appearing in the Newspaper, he had come to learn that on 13.01.2003, his brother Sadik Jamal was killed in so called encounter.

2.2. It is the case on behalf of the Petitioner that around 20 days prior to the so-called encounter i.e. from about 23.12.2002, the DSP, Bhavnagar had come to their house at Bhavnagar, started questioning the whereabouts of Sadik Jamal. That his father and his uncle were repeatedly called by the DSP, Shri Ghelot and detained for long hours without informing the Petitioner or his father as to the purposes of such inquiry and detention with such harassment continued on day to day basis till 12.01.2003 and the DSP has extracted few written statements from the Petitioner and relatives under threat and coercion. It is the case on behalf of the Petitioner that as they had no personal information about the whereabouts of Sadik Jamal, they had expressed their inability to the DSP. It is further submitted that during this period the DSP took away old photograph of Sadik Jamal and on 13.01.2003, the police raided their house at Bhavnagar destroying most of the household things, however, nothing incriminating or otherwise was found or taken by the police.

2.3. It is the case on behalf of the Petitioner that during the aforesaid period, initially, the DSP, on inquiry from his father, had informed them that they were investigating into some gambling case registered against Sadik Jamal at Bhavnagar on 09.11.2002. On inquiry the Petitioner found that an FIR being C.R. No. I-536/2002 was also registered on 09.11.2002 with "A" Division Police Station, Bhavnagar under the Gambling Act against Sadik. It is the case on behalf of the Petitioner that the said fact has come as shock and surprise to the Petitioner since his brother had not contacted them at Bhavnagar during that period.

2.4. It is further case on behalf of the Petitioner that later on the police had informed them that Sadik was in the custody of Mumbai police and they were investigating whether Sadik had been involved in any criminal activity in Gujarat. That the Petitioner's father had honestly informed the police about the previous

case against Sadik being FIR for the offences punishable under Sections 323, 504, 506(2) of IPC registered with "A" Division Police Station, Bhavnagar being C.R. No. II-691/1996. According to the Petitioner, apart from the aforesaid minor offence, Shri Sadik was not involved in any other offence.

2.5. It is the case on behalf of the Petitioner that on 16.01.2003, he and his father were informed by the DSP, Bhavnagar that his brother had been killed in encounter and that he had to go to Ahmedabad to collect the dead body of his brother. That his father along with three other persons proceeded to Ahmedabad and the body of his brother was given to them by DCB, Ahmedabad on 16.01.2003. It is the case on behalf of the Petitioner that while handing over the body to his father, Shri D.G. Vanzara had threatened his father that if he had ever made any complaint regarding the death of his son, the Petitioner would also meet the same fate. Therefore, it is the case on behalf of the Petitioner that because of the aforesaid threat, neither the Petitioner nor his father dared to approach any authority to complain about the brutal murder of Sadik Jamal.

2.6. It is the case on behalf of the Petitioner that his father and other relatives had carefully checked the body for injuries and as per their observations, the body of his brother bore 11 bullet injuries and 2 deep wounds in the right side of the groin. There was one bullet injury right in the middle of the forehead, but one bullet injury that appeared to have entered from below the jaw and went vertically upwards piercing the skull at the top of the head, 2 bullet injuries one on each knee, 2 bullet injuries one on each reverse side of the palm, 4 more bullet injuries from front of chest and stomach area and 1 bullet injury at the back below the left flank. It is the case on behalf of the Petitioner that two wounds that were noticed near the right side of the groin were deep and petrified apparently made by any sharp weapon and the wound was not treated at all. According to the Petitioner, the bullet injury below the jaw and went through the head upwards could have been made only from a very close range with a gun placed below the jaw. According to the Petitioner, similarly, the bullet in the centre of the forehead and four bullets on the knees and the palms could not have been made from a long distance indicating that Sadik Jamal was shot at in a stationary position in the custody of the police. According to the Petitioner, the body was badly disfigured.

2.7. It is further averred in the petition that thereafter the Petitioner had buried his brother Sadik in the local graveyard at Shahibaug, Ahmedabad. It is further averred in the petition that Petitioner was not given any document relating to the death of his brother by the DCB but was given death certificate dated 13.01.2003 signed by the Medical Officer, Civil Hospital, Ahmedabad. That the reasons shown in the death certificate was that death of Sadik was due to shock and hemorrhage following injuries sustained to the body by bullets of firearms.

2.8. It is further averred in the petition that as per the news releases that were published in different newspapers, he was pained to find that the DCB was accusing his brother of being terrorist in the league of per brothers like Daud

Ibrahim, Anish Ibrahim, Chhota Shakil etc.. It is the case on behalf of the Petitioner so pleaded in the petition that it is not true that his brother had ever planned or participated in any conspiracy to kill the leaders like Shri L.K. Advani, Shri Narendra Modi or Shri Pravin Togadia, as had been alleged by the police. It is the case on behalf of the Petitioner that recently he had filed an application to get the certified copy of the FIR being C.R. No. I-3/2003 registered with DCB Police Station, Ahmedabad City given by one Vijaysinh Gulabsinh Parmar, P.I., Crime Branch, Ahmedabad City in which the police has made the similar allegations.

2.9. It is the case on behalf of the Petitioner that as per Section 176(1) read with Section 174(1) of the Code of Criminal Procedure, it is mandatory for the Magistrate to hold inquiry upto the cause of the death and for that purpose, a Magistrate is empowered to record evidence to find out the cause of the death. According to the Petitioner, u/s 176(4) of the Code of Criminal Procedure, when an inquiry is to be held by Magistrate, he is required to inform the relative of the deceased whose names and addresses were known to the Magistrate. According to the Petitioner in the instant case, the father of the deceased Sadik Jamal was informed by the police at Bhavnagar to go and take the dead body of his brother at Ahmedabad. That neither the Petitioner nor his father, had received summons or any communication from any Magistrate or for that matter any person who may be empowered to hold inquiry in such type of deaths to give any evidence. According to the Petitioner, to the best of his information and knowledge, no inquiry was held u/s 176(4) of the Code of Criminal Procedure.

2.10. It is the case on behalf of the Petitioner that so far as the FIR against Sadik and 6 other persons is concerned, as per the information of the Petitioner, no investigation was held and the Registrar of the Metropolitan Magistrate Court at Ahmedabad who had the jurisdiction to try the case pursuant to the aforesaid FIR (Metropolitan Magistrate Court No. 11) was also not able to give any information regarding the progress of the case. According to the Petitioner, despite all efforts made by the Petitioner, no information was forthcoming regarding end result of the investigation, if any, into the aforesaid FIR or whether any charge-sheet was ever filed pursuant to the said FIR. According to the Petitioner, infact, he was informed by the clerk of the office of the Metropolitan Magistrate Court that there is no paper in the file except the FIR.

2.11. It is the case on behalf of the Petitioner and so pleaded in the petition that some time in December 2004, a stranger had approached his father and told him that one journalist namely Shri Ketan Tirodkar wanted them to go over to Mumbai and meet said Shri Tirodkar and his father was given a ticket. That Petitioner and his father had gone to Mumbai and met Shri Ketan Tirodkar. That the said Shri Ketan Tirodkar told the Petitioner and his father that he was friend of Sadik Jamal and he knew said Sadik Jamal for quite some time. That the Petitioner was informed that Sadik had been working in Mumbai and used to go to Bhavnagar once in while and that on last occasion Sadik visited Bhavnagar in

the month of November 2002, he had got involved in gambling case which was registered at Bhavnagar. According to the Petitioner, Shri Tirodkar also informed the Petitioner that employer of Sadik Jamal had not paid the salary of Sadik and Sadik was trying to recover the money due to him and he was planning to go back to Bhavnagar permanently. According to the Petitioner, Shri Tirodkar also informed the Petitioner that Sadik had requested Shri Tirodkar to get him out of the criminal cases pending against Sadik in Bhavnagar so that he could go back to Bhavnagar. According to the Petitioner, Shri Tirodkar considering the request of Sadik, contacted Shri Daya Nayak of Mumbai Police, whom he knew immediately and arranged the meeting between Daya Nayak and Sadik Jamal some time in the first week of December 2002, with a hope that as Shri Nayak had contacts with Gujarat police, he will be able to found a solution to Sadik's problem. According to the Petitioner, Shri Tirodkar informed the Petitioner that however for some ulterior reasons, instead helping Sadik, Shri Nayak detained and kept Sadik in his custody for 3 to 4 weeks and tortured Sadik to extract a confession that he was connected with "Terrorist organizations". According to the Petitioner, Petitioner was also told by said Shri Tirodkar that in the last week of December 2002, Shri Daya Nayak had also informed the Gujarat police that Sadik was in his custody and Gujarat police should also do their own inquiries. Ultimately, however, when Shri Nayak could not find anything incriminating against Sadik, he had contacted Shri D.G. Vanzara, DCB, Ahmedabad and handed over Sadik to Gujarat police on 02.01.2003.

2.12. According to the Petitioner and so pleaded in the petition, the said Shri Ketan Tirodkar who was a small time journalist had informed the Petitioner that he had filed a complaint in the MCOC Court at Mumbai on 22.11.2003 in which he had alleged that he had handed over Shri Sadik to Shri Daya Nayak of Mumbai ATS Squad sometime in the month of December 2002. That the said Shri Tirodkar has also alleged that he was present in the month of January 2003 when the Mumbai police had handed over Sadik to the team of Gujarat police officers from DCB, who had come over to Mumbai. According to the Petitioner and as per his information given by Shri Tirodkar, a team of officers from DCB, Ahmedabad headed by Shri Tarun Barot had reached Mumbai on 02.01.2003 and had brought back Shri Sadik to Ahmedabad on 03.01.2003. According to the Petitioner, his brother Sadik was kept in DCB office at Bungalow No. 15, Nr. IPS Mess, Shahibaug, Ahmedabad till 13.01.2003. According to the Petitioner, as per his information, Shri Sadik was taken out from the DCB office late in the night 12/13.01.2003 and was taken to Naroda area of Ahmedabad and was shot dead in cold blood at about 01.15 a.m. on 13.01.2003. According to the Petitioner, from the news report appearing in Gujarat Today dated 14.01.2003, Petitioner learnt that under the orders of Shri P.P. Pandey -the head of DCB, Shri D.G. Vanzara -DCP, P.I. Shri J.G. Parmar - Police Inspector, P.I. Shri I.A. Saiyed, PSI Shri K.M. Vaghela, PSI Shri G.H. Gohil, PSI Shri R.L. Mavani, Police Constable Shri Chhatrasinh and Police Constable Shri Ajaypalsinh had participated in the fake encounter and killing his brother Sadik Jamal. That by way of amendment

the Petitioner has relied upon the averments made in the complaint/application by Shri Ketan Tirodkar made in MCOC Special Case No. 4/2003 which has been filed by said Shri Ketan Tirodkar against Shri Daya Nayak and 4 others, which reads as under:

(7) In first week of January 2003, accused No. 1 told me that he wanted to oblige a big politician in Gujarat by giving an ISI agent or some similar militant for an encounter killing. He said that Pradeep Sharma and others from his unit were not to be told as they would snatch the credit. I had met one Sadik Mehtar aged about 18 years in Dubai, who was a house-help of said Tariq Praveen. This Sadik had lost some of his dear ones and his house in the Gujarat Ethnic riots. While in Dubai he had also worked at my apartment as a house-help ... Mumbai and was in touch with me. He had asked for help from me for putting up his case before the Amnesty International. I had promised him the help. Accused No. 1 saw him and thought him to be the only easy target available after some drafting to build his profile as a militant. So accused No. 1 and myself made a profile of Sadik about his being in Dubai in the company of "D" gang members Salim Chiplun and others and had come to India on the contract of LeT for eliminating Gujarat Chief Minister Narendra Modi.

(8) Then on 11.01.2003, as planned by accused No. 1 I asked Sadik to come to the Traffic Police Post on the Andheri Flyover where accused No. 1 had kept the Gujarat Police in wait. Sadik came there and we both boarded the vehicle and came towards National Park. Two persons and a lady were standing there, at the gate of National Park dressed like journalists, carrying shoulder bags. I introduced them to Sadik and alighted from the vehicle and they went away towards Gujarat. Two days thereafter I read in newspaper that Sadik was killed in police encounter in Gujarat.

2.13. It is the case on behalf of the Petitioner that a police complaint came to be filed against Shri Sadik Jamal and 6 other persons making serious allegations for the offence punishable under Sections 120B, 121A, 123, 307, 353 etc. of IPC which are of extreme grave nature, alleging that the accused had hatched a conspiracy of raging war against the Government of India and also hatched a criminal conspiracy of killing the Chief Minister of Gujarat State Shri Narendra Modi and still without any further investigation, a closure report has been submitted by the investigating agency and unfortunately the learned Magistrate has accepted the same as it is accepting the "A" summary report submitted by the investigating agency. It is submitted that as such the aforesaid allegations were required to be further investigated and inquired into by the investigating agency so that truth may come out. It is the case on behalf of the Petitioner that the aforesaid FIR/complaint being C.R. No. I-3/2003 against the brother of the Petitioner i.e. Sadik Jamal and other 6 persons was only an eyewash and to divert the real issue of killing said Shri Sadik Jamal in a fake encounter. Therefore, it is requested to direct the Respondents to register the case with respect to killing of Shri Sadik on 13.01.2003 in a fake encounter, against the

concerned police officers who had participated at the relevant time in the said encounter so that the real truth may come out and the guilty are punished.

3.0. Shri Mukul Sinha, learned Counsel appearing on behalf of the Petitioner has vehemently submitted that the manner in which the brother of the Petitioner has been killed in a fake encounter, the same is required to be investigated and inquired into. It is submitted that even the serious allegations were made against his brother as alleged in the complaint being C.R. No. I-3/2003 registered with DCB Police Station, Ahmedabad making allegations of hatching conspiracy and raging war against the Government of India and to kill Hon''ble Chief Minister Shri Narendra Modi and other politicians, the same is required to be investigated and inquired into. It is submitted that unfortunately without any investigation and/or inquiry, the investigating agency has submitted the "A" summary report before the concerned Magistrate with respect to the complaint/First Information Report being C.R. No. I-3/2003 registered with DCB Police Station, Ahmedabad and submitted the closure report which has been readily accepted by the learned Magistrate without further investigation and/or inquiry. It is submitted that nothing is on record that any further steps were made by the investigating agency to inquire into and/or to investigate the allegations against other accused persons. It is submitted that if the allegations in the said complaint have some substance, in that case, it is a very serious matter with respect to the entire country and therefore, the same is required to be thoroughly inquired into and investigated by the concerned investigating agency. It is further submitted that allegations of fake encounter in the State of Gujarat by high rank police officers in the State are not new one. It is submitted that atleast in three cases such as Sheikh Sorabuddin; Ishrat Jahan and Tulsiram, it is alleged that the aforesaid three persons are killed in a fake encounter by the high rank police officers of the State of Gujarat and so far as with respect to the allegation of killing Sorabuddin Sheikh and his wife and killing of Tulsiram is concerned, the same is being investigated by Central Bureau of Investigation pursuant to the order passed by the Hon''ble Supreme Court and so far as killing of Ishrat Jahan in a fake encounter by high rank police officer of the State of Gujarat, the same is being investigated by the Special Investigation Team constituted by the Division Bench of this Court. Therefore, it is submitted that even with respect to the allegations of killing Shri Sadik Jamal, brother of the Petitioner in a fake encounter, the same is also required to be investigated and/or inquired into so that the truth may come out. It is submitted that accusations are attracted against the local police personnel in which high rank police officers of the State of Gujarat have been made accused, it would be in the fitness of things to transfer the investigation with respect to the killing of Shri Sadik Jamal in a fake encounter to the CBI and/or any Special Investigation Team constituted by this Court.

3.1. Shri Mukul Sinha, learned Counsel appearing on behalf of the Petitioner has relied upon the following decisions of the Hon''ble Supreme Court in support of his above prayer to direct the Respondents to register case against the accused persons - police officers who were involved in the killing of Sadik Jamal in a fake

encounter and to hand over the investigation to CBI and/or any other SIT constituted by this Court.

1 Inder Singh Vs. State of Punjab and Others,

2 Rubabbuddin Sheikh Vs. State of Gujarat and Others,

3 State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others,

4 Narmada Bai v. State of Gujarat and Ors. 2011 STPL (Web) 358 SC

5 Ramesh Kumari Vs. State (N.C.T. of Delhi) and Others,

3.2. Shri Mukul Sinha, learned Counsel appearing on behalf of the Petitioner has submitted that in a similar set of facts and circumstances and the allegations with respect to fake encounter and killing of an innocent person in a fake encounter by the Gujarat police, the Hon"ble Supreme Court in the case of Rubabuddin Sheikh (Supra) has transferred the investigation to CBI. Therefore, it is requested to allow the present Special Criminal Application and grant relief as prayed for.

4.0. Petition is opposed by Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State. It is submitted that infact for the same incident, one complaint was registered being C.R. No. I-3/2003 and with respect to the same, a "closure report" was submitted by the investigating agency which has been accepted by the learned Magistrate and therefore, for the same incident, second complaint is not permissible and/or maintainable. In support of his above submission, Shri Jani, learned Public Prosecutor has relied upon the decision of the Hon"ble Supreme Court in the case of Laxmichand @ Balbutya v. State of Maharashtra reported in 2011 (1) GLR 1. Shri P.K. Jani has submitted that in view of the acceptance of "closure report" by the learned Magistrate, as such the remedy available to the Petitioner would be to go for the revision application before the learned Sessions Court or to go before the learned Magistrate. It is submitted that the order passed by the learned Magistrate accepting the "closure report" has become final and therefore, it is submitted that the prayer of the Petitioner to register the second complaint may not be granted. Shri Jani, learned Public Prosecutor appearing on behalf of the State has also relied upon the decision of the Hon"ble Supreme Court in the case of Reeta Nag Vs. State of West Bengal and Others, .

4.1. Shri Jani, learned Public Prosecutor appearing on behalf of the State has submitted that the present petition deserves to be dismissed on the ground of alternative remedy available to the Petitioner by way of filing a private complaint before the learned Magistrate u/s 190 of the Code of Criminal Procedure. It is submitted that if such a complaint is filed, in that case, the learned Magistrate will consider the same in accordance with law and on merits and may either inquire into the case himself and/or send it to the concerned police station for further investigation/inquiry u/s 156(3) of the Code of Criminal Procedure. It is,

therefore, requested not to entertain the present petition.

4.2. Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State has further submitted that even the present petition deserves to be dismissed on the ground of delay and laches. It is submitted that Sadik Jamal has been killed in an encounter in the month of January 2003 and thereafter the present petition for the aforesaid reliefs have been filed in the month of May 2007 which was moved in the month of October 2007. It is further submitted that nor there was any grievance made by the Petitioner at all with respect to the killing of his brother in alleged fake encounter.

4.3. It is further submitted on behalf of the State that the allegations in the present petition are based upon affidavit of one Shri Tirodkar who himself can be said to be an accused and/or part of the conspiracy to bring Sadik to Ahmedabad and therefore, no reliance can be placed upon the affidavit of said Shri Tirodkar. It is further submitted by Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State that as such the petition is based upon vague averments and on such vague averments, no relief can be granted to the Petitioner to register the complaint with respect to the alleged fake encounter and killing of his brother. Alternatively, it is submitted that if this Court is inclined to direct the Respondents to register the complaint with respect to the events leading to death of the Petitioner's brother, in that case, the investigation may be handed over to the Special Task Force (STF) constituted/appointed under the notification dated 02.04.2011. It is further submitted by Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State that infact the Petitioner has come out with altogether a new story in affidavit of Shri Tirodkar and in the amendment which was moved and granted by this Court on 08.10.2007.

4.4. Shri Jani, learned Public Prosecutor appearing on behalf of the State has submitted that in case this Court proposes to direct the Respondents to register the complaint with respect to the allegation of killing of Sadik Jamal alleged to be in a fake encounter, in that case, it is submitted that now the State Government has already issued notification dated 16.09.2010 by which the State Government has decided that the incident of death due to police encounters, etc. shall be investigated by the Special Task Force (STF) constituted under the aforesaid Government Notification dated 16.09.2010. It is further submitted by Shri Jani, learned Public Prosecutor appearing on behalf of the State that by aforesaid notification dated 16.09.2010, the State Government has constituted a monitoring authority and Special Task Force to go into and deal with and to investigate all cases of deaths which, according to the claim of any police officers of the State or near relatives of the victim was the result of an encounter by the police force, which shall now investigate into such offences.

4.5. It is further submitted by Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State that by notification dated 02.04.2011, the State Government has constituted a team of 5 high ranking officers in the Special Task Force (STF). It is further submitted by Shri P.K. Jani, learned Public Prosecutor

appearing on behalf of the State that by notification dated 07.04.2011 of the Home Department, State of Gujarat, the Government of Gujarat has constituted a Monitoring Authority to oversee and monitor the Special Task Force and its investigation and also to receive complaints/representations/suggestions from the relatives of the victims of death in a police encounter. Relying upon the affidavits dated 19.04.2011 and 21.04.2011 affirmed by one Shri D.R. Patel, Under Secretary (Law & Order), Home Department, State of Gujarat, it is submitted by Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State that the events leading to death of the Petitioner's brother will be inquired into by the STF as constituted on 02.04.2011 and shall be monitored by the Monitoring Committee as constituted vide notification dated 07.04.2011. Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State has further submitted that the State Government will abide and will accept the directions of this Hon'ble Court if the subject matter of the case is referred to Special Task Force in accordance with notification dated 16.09.2010 and consequent orders dated 02.04.2011 and 07.04.2011. Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State has stated at the Bar that any suggestion on behalf of the Petitioner to transfer the investigation leading to death of the Petitioner's brother, to CBI and/or SIT which may be constituted by this Court, is opposed by the State Government by submitting that it will demoralize the police force in the State.

4.6. Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State has relied upon the following decisions of the Hon'ble Supreme Court in the case of (1) State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, and (2) Kunga Nima Lepcha and Others Vs. State of Sikkim and Others, in support of his request not to transfer the investigation to CBI. By making above submissions and relying upon above decisions, Shri P.K. Jani, learned Public Prosecutor appearing on behalf of the State has requested to dismiss the present petition.

5.0. Petition is opposed by Shri Jayant M. Panchal, learned Counsel and Shri K.J. Shethna, learned Counsel appearing on behalf of Respondent Nos. 3 and 4 viz. Shri P.P. Pande and Shri D.G. Vanzara respectively.

6.0. Shri Mukul Sinha, learned Counsel appearing on behalf of the Petitioner has objected to hear Respondent Nos. 3 and 4 viz. Shri P.P. Pande and Shri D.G. Vanzara by submitting that as such they have no locus, as allegations are made against them and they can be said to be the accused persons. In support of his above submission, Shri Sinha, learned Counsel appearing on behalf of the Petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of Narendra G. Goel Vs. State of Maharashtra and Another, as well as the decision dated 30.12.2010 of this Court rendered in Criminal Miscellaneous Application No. 15591/2010 by further submitting that till the charge-sheet is filed, accused has no locus. However, ultimately, Shri Sinha, learned Counsel appearing on behalf of the Petitioner has left it to the Court whether to hear the

learned Counsel appearing on behalf of Respondent Nos. 3 and 4 or not.

Shri Panchal, learned Counsel appearing on behalf of Respondent No. 3 has heavily relied upon the decisions of the Hon'ble Supreme Court in the case of D. Venkatasubramaniam and Others Vs. M.K. Mohan Krishnamachari and Another, and Divine Retreat Centre v. State of Kerala and Ors. reported in (2008) 2 SCC : 2008 (2) GLH 105 by submitting that in the facts and circumstances of the case and looking to the vague allegations whether the investigation is required to be transferred to CBI or not, Respondent Nos. 3 and 4 can certainly oppose the same. It is submitted that till date as such Respondent Nos. 3 and 4 are not the accused and therefore, they can certainly oppose prayer of the Petitioner to transfer the investigation to CBI and/or even the registration of the complaint with respect to alleged fake encounter. It is submitted that as such the Petitioner himself has joined Respondent Nos. 3 and 4 and therefore, once the Petitioner himself has joined Respondent Nos. 3 and 4 as party, it is not open for the Petitioner to raise any objection with respect to hearing of the Respondent Nos. 3 and 4.

7.0. For the reasons stated hereinafter and even considering the decision of the Hon'ble Supreme Court in the case of Divine Retreat (Supra) this Court has heard the learned Counsels appearing on behalf of Respondent Nos. 3 and 4.

8.0. Shri Jayant M. Panchal, learned Counsel appearing on behalf of Respondent No. 3 has opposed the present petition on the following grounds:

1. That the Petitioner has no personal knowledge and he derived knowledge through Shri Ketan Tirodkar and newspaper report.
2. That the character of Shri Ketan Tirodkar is required to be considered. That Shri Ketan Tirodkar himself can be said to be an accused and/or part of the alleged conspiracy to bring Sadik Jamal to Ahmedabad.
3. That the allegations made in the petition are highly unnatural.
4. That Shri Ketan Tirodkar himself has inducted himself into several criminal activities.
5. That there is inconsistency in the complaint and the story itself is improbable.
6. That averments and allegations made in para 7 of the petition are just contrary to what Shri Ketan Tirodkar has said in the complaint before MCOC Court at Mumbai.
7. That different versions are given by Shri Ketan Tirodkar himself.
8. That the allegations made in the petition are absolutely vague and therefore, extraordinary powers under Article 226 of the Constitution of India may not be exercised by this Court.

8.1. Shri Panchal, learned Counsel appearing on behalf of Respondent No. 3 has submitted that the Petitioner has alternative remedy available under the Code of

Criminal Procedure to file private complaint before the learned Magistrate.

8.2. Shri Panchal, learned Counsel appearing on behalf of Respondent No. 3 has relied upon the decision in the case of Kunga Nima Lepcha and Others Vs. State of Sikkim and Others, on exercise of the powers by the High Court under Article 226 of the Constitution of India.

8.3. Shri Panchal, learned Counsel appearing on behalf of Respondent No. 3 has submitted that even the present petition deserves to be dismissed on the ground of delay. It is submitted that as per the allegations made in the petition, Shri D.G. Vanzara - Respondent No. 4 gave threats on 16.01.2003 not to file the complaint, therefore, even as per the Petitioner, he was aware that something is wrong for which he was given threats, still there was no complaint by the Petitioner till the petition.

8.4. Shri Panchal, learned Counsel appearing on behalf of Respondent No. 3 has relied upon the following decisions of the Hon'ble Supreme Court in support of his prayer to dismiss the present petition by further submitting that whatever is done by the police officers has been done as a part of their duty.

1 Hari Singh Vs. The State of U.P.,

2 Aleque Padamsee and Ors. v. Union of India and Ors. (2007) 3 SCC (Cri.)

3 Divine Retreat Centre v. State of Kerala and Ors. (2008) 2 SCC 9

4 Kunga Nima Lepcha and Others Vs. State of Sikkim and Others,

By making above submissions and relying upon above decisions, it is requested to dismiss the present petition.

9.0. Petition is opposed by Shri K.J. Shethna, learned Counsel appearing on behalf of Respondent No. 4 - Shri D.G. Vanzara by submitting that Petitioner has tried to take advantage of earlier two incidents i.e. Sheikh Sorabuddin and Ishrat Jahan and therefore, it is requested that all the cases may not be considered equal and the Petitioner may not be permitted to take disadvantage of the earlier other two incidents.

9.1. Shri Shethna, learned Counsel appearing on behalf of Respondent No. 4 has relied upon the following decisions of the Hon'ble Supreme Court in support of his submission that present petition is not maintainable and/or no relief can be granted to the Petitioner in the present writ petition.

1 Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others,

2 Aleque Padamsee and Others Vs. Union of India (UOI) and Others,

3 Sakiri Vasu Vs. State of U.P. and Others,

4 Minu Kumari and Another Vs. The State of Bihar and Others,

5 Anandwardhan and Another Vs. Pandurang and Others,

By making above submissions and relying upon above decisions, it is requested to dismiss the present petition.

10.0. In reply, Shri Mukul Sinha, learned Counsel appearing on behalf of the Petitioner has submitted that there cannot be a question of delay at all in a criminal matter. He has relied upon the decision of the Hon"ble Supreme Court in the case of P. Vijayan Vs. State of Kerala and Another, , more particularly, paras 17 to 20 and 24 to 26. He has also relied upon the decision of the Hon"ble Supreme Court in the case of Sajjan Kumar Vs. Central Bureau of Investigation, , more particularly, paras 31, 37 and 38 by submitting that as observed by the Hon"ble Supreme Court, "a crime never dies". It is submitted by Shri Sinha, learned Counsel appearing on behalf of the Petitioner that it is very surprising that the State is opposing to register the complaint and inquire and/or investigate into the case. It is submitted that as such the State cannot put up the defence of delay because no prejudice is likely to be caused to the State. It is submitted that at the most the accused can raise such a defence which is required to be considered at the time of trial, considering the facts and circumstances of the case and looking to the evidence on record. It is submitted that as such no prejudice shall be caused to the State if the FIR is lodged with respect to the killing of Sadik Jamal and the same is inquired into and investigated so that the real truth may come out and whoever is guilty is punished.

10.1. Shri Sinha, learned Counsel appearing on behalf of the Petitioner has further submitted in reply that as such there are no contradictions at all and whatever information and knowledge was available to the Petitioner, the same is disclosed which is now required to be further inquired into and/or investigated on registering the complaint. It is further submitted by Shri Sinha, learned Counsel appearing on behalf of the Petitioner that as such in a case like this, no direct evidence would be available, more particularly, when accused persons are high rank police officers.

10.2. Now, so far as the contention on behalf of the Respondents that as the learned Magistrate has already granted "A" summary/closure report and therefore, there cannot be second complaint with respect to the same incident is concerned, it is submitted by Shri Sinha, learned Counsel that as such the learned Magistrate has mechanically accepted the "closure report". It is further submitted that even the said complaint was not with respect to the killing of Sadik Jamal in fake encounter. It is submitted that as such no investigation has been carried out by the investigating agency with respect to the said complaint and without any further investigation or inquiry the "closure report" was submitted which has been accepted by the learned Magistrate without giving any opportunity to the Petitioner. Therefore, it is submitted that merely because the learned Magistrate has accepted the "closure report" with respect to the complaint being C.R. No. I-3/2003, which was against Sadik and other 6 persons for the offences punishable under Sections 120B, 121A, 123, 307, 353 etc. of

IPC, complaint if any with respect to the killing of Sadik Jamal in a fake encounter by the police officers cannot be termed as a second complaint at all and/or the "closure report" would not come in the way of the Petitioner and/or granting any relief by this Court in the present petition.

10.3. Now, so far as the submission on behalf of the State that the investigation leading to killing of Sadik Jamal be handed over to the Special Task Force constituted by the State Government vide notification dated 16.09.2010/02.04.2011 and the same may be monitored by the Monitoring Authority constituted under notification 07.04.2011 and not to transfer the investigation to CBI is concerned, Shri Sinha, learned Counsel appearing on behalf of the Petitioner has opposed the same by submitting that as such the STF is constituted by the police officers of the State of Gujarat and the allegations are against high rank police officers of the State of Gujarat and therefore, the investigation may not be given to the police officers of the State of Gujarat, so as to avoid any further allegations of bias. It is further submitted that as such constitution of such STF and the Monitoring Authority has no legal base at all. It is submitted that monitoring of any investigation by such Monitoring Authority is unknown to the provisions of the Code of Criminal Procedure. It is submitted that as such, such a Monitoring Authority has no jurisdiction and/or authority to interfere into the investigation carried out by the investigating agency, till charge-sheet is filed. It is submitted that even as held by the Hon''ble Supreme Court in catena of decisions, even the learned Magistrate has no jurisdiction and/or authority to interfere with the investigation carried out by the investigating agency. It is, therefore, requested to direct the Respondent - State authority to register the complaint with respect to killing of Sadik Jamal in alleged fake encounter and to transfer the investigation to CBI not only with respect to killing of Sadik but also with respect to the allegations made in the complaint being C.R. No. I-3/2003, as the allegations in the said complaint concerns the security of the Hon''ble Chief Minister, which is required to be investigated and inquired into. It is submitted that as such there is no inquiry at all conducted with respect to the allegations made in the complaint being C.R. No. I-3/2003 and only "A" summary has been submitted meaning thereby the accused are not found. It is submitted that nothing is on record that even the allegations in the said complaint were even inquired into and/or investigated. Therefore, it is requested to allow the present petition.

11.0. Heard the learned Counsels appearing on behalf of respective parties at length. At the outset it is required to be noted that the main relief sought in the present petition under Article 226 of the Constitution of India by the Petitioner is to direct the Respondents to register the complaint with respect to killing of his elder brother Sadik Jamal, who is alleged to have been killed in a fake encounter by the police officers of the State of Gujarat and thereafter to hand over the investigation of the same to an independent agency like Central Bureau of Investigation (CBI).

11.1. The thrust of the submissions made on behalf of the Petitioner is that it is apprehended that the elder brother of the Petitioner has been killed by the police officers of the State of Gujarat in a fake encounter and as the allegations are against high rank police officers of the State of Gujarat, with a view to see that investigation is conducted in a fair and impartial manner, the investigation carried out and conducted by an independent agency like CBI. The prayer is opposed by the learned Counsel appearing for respective Respondents on the grounds stated hereinabove, more particularly, on the ground of delay; on the ground of Petitioner having alternative remedy available by way of filing a private complaint before the learned Magistrate; on the ground that with respect to the very incident, complaint being C.R. No. I-3/2003, a "closure report" has been submitted by the investigating agency before the learned Magistrate which has been accepted and on the ground that the investigation with respect to the alleged fake encounter be handed over to the STF constituted by the State Government vide notification 02.04.2011 and the said investigation be monitored by the Monitoring Authority appointed and constituted by the State Government vide notification dated 07.04.2011. Petition is also opposed on the ground that there is no basis and/or material with respect to the apprehension on the part of the Petitioner that his brother has been killed in a fake encounter.

11.2. Now, so far as the apprehension on the part of the Petitioner that his brother has been killed in a fake encounter is well-founded or not is concerned, it is to be noted that there is some material with the Petitioner which has been disclosed in the petition that there is apprehension on the part of the Petitioner which is required to be inquired into and investigated by an independent agency. Whether there is substance in the apprehension or not, is not required to be considered at this stage, however, on the basis of the apprehension, the same is required to be further investigated and inquired into. It is to be noted that in the State of Gujarat itself, with respect to three cases in which three different persons have been killed in police encounters, the investigation is going on and in two cases i.e. in the case of Sheikh Sohrabuddin and Tulsiram Prajapati where the allegations are with respect to killing of three persons in fake police encounter, investigation is being carried out by CBI pursuant to the orders passed by the Hon'ble Supreme Court in the case of Rubabbuddin Sheikh Vs. State of Gujarat and Others, and in the case of Narmada Bai v. State of Gujarat and Ors. 2011 STPL (Web) 358 SC. With respect to one another person i.e. Ishrat Jahan who is also killed in police encounter, the investigation is being carried out by the SIT constituted by the Division Bench of this Court and the investigation is monitored by the Division Bench of this Court. Therefore, there is a reasonable apprehension on the part of the Petitioner that his brother also might have been killed by the high rank police officials of the State of Gujarat in a fake police encounter. Considering the aforesaid three incidents and killing of Sohrabuddin; his wife Kausarbi; Tulsiram Prajapati and Ishrat Jahan, when the brother of the Petitioner has also been killed in a police encounter in a similar circumstances and when it is apprehended that his brother also might have been

killed in a fake encounter, it cannot be said that such an apprehension is not well-founded. Whether the affidavit of Shri Tirodkar upon which reliance has been placed by the Petitioner apprehending that his brother has been killed in a fake encounter is true or not are all required to be investigated and/or inquired into by the investigating agency. Therefore, what has been stated by Shri Tirodkar is true or not and/or the credibility of Shri Tirodkar are all questions which are required to be considered by the investigating agency during the investigation and if the case is put to trial, the same is required to be considered at the time of trial considering the provisions of the Evidence Act, however, on the aforesaid ground the prayer of the Petitioner directing the Respondents to lodge the complaint and to investigate the same cannot be refused.

11.3. Now, so far as the contention on behalf of the Respondents with respect to delay and no grievance was made by the Petitioner for number of years is concerned, it is to be noted that in view of the subsequent development and coming into light the aforesaid three cases and with a reasonable apprehension and hope that the incident with respect to killing of his brother will also be inquired into thoroughly that too by independent agency, Petitioner has come before this Court in the year 2007. It is to be noted that on the ground of delay alone, registration of the complaint cannot be denied. Normally the aspect of delay is required to be considered at the time of trial and at the time of evaluating and appreciating the evidence. In the case of Sajjan Kumar (Supra) though it was the case of discharge, the Hon''ble Supreme Court had an occasion to deal with the question of delay in a criminal matter. It was contended on behalf of the accused before the Hon''ble Supreme Court that because of the long delay, the continuation of the prosecution and framing of charges merely on the basis of certain statements made after a gap of 23 years, was not permissible and the Hon''ble Supreme Court negated the same. The Hon''ble Supreme Court in the said decision considered another decision of the Hon''ble Supreme Court in the case of Janani Sahoo v. Chandra Shekhar Mohanty reported in (2007) 7 SCC 394, more particularly, para 14 of the said decision taking the view that a criminal offence is considered as a wrong against the State and the Society, even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of law has no power to throw away prosecution solely on the ground of delay. The Hon''ble Supreme Court in the said decision also observed that in criminal justice "a crime never dies".

Even in the case of P. Vijayan Vs. State of Kerala and Another, , the Hon''ble Supreme Court while considering the scope of Section 227 of the Code of Criminal Procedure upheld the order dismissing the petition filed for discharge on prayer of prosecution to proceed further even after 28 years. It is to be noted that in that case, till 1998, there was no allegation that the encounter was fake and only in the year 1998, reports appeared in various newspapers of Kerala that killing of Varghese in 1970 was fake encounter and the senior police officers were involved in the said fake encounter. It is to be noted that in P. Vijayan's case, the

High Court directed that the investigation with respect to killing of Varghese in the year 1970 in alleged fake encounter, be transferred to CBI in the year 1998.

11.4. It is to be noted that in the present case, it is the State who is opposing the petition and registration of the complaint with respect to allegation of killing of a person in a fake encounter, on the ground of delay. This Court fails to appreciate how the State can oppose registration of a complaint, involving serious allegations, on the ground of delay. As observed by the Hon''ble Supreme Court in the case of Japani Sahoo (Supra), a criminal offence is considered as a wrong against the State and the Society. In the said decision, the Hon''ble Supreme Court also noted the well known maxim *nullum tempus aut locus occurrit regi* (lapse of time is no bar to Crown in proceeding against offenders). Under the circumstances, the contention on behalf of the Respondents to dismiss the present petition on the ground of delay cannot be accepted.

11.5. Now, next ground on which the Respondents have sought to dismiss the present petition is "closure report" accepted by the learned Magistrate with respect to the complaint being C.R. No. I-3/2003 and that the contention on behalf of the Respondent -State that if a fresh complaint is ordered to be lodged, it will be a second complaint, which is not permissible and that the present petition deserves to be dismissed on the ground that the Petitioner has alternative remedy available under the provisions of the Code of Criminal Procedure by way of filing a private complaint before the learned Magistrate and/or to file revision application before the learned Sessions Court against the order passed by the learned Magistrate accepting the closure report is concerned, none of them have any substance.

At the outset it is required to be noted that as such no complaint has been registered at all with respect to the allegation of killing of Sadik in a fake encounter by the police officers of the State of Gujarat. The aforesaid complaint being C.R. No. I-3/2003 was by the police officer against the deceased Sadik Jamal and other 6 persons for the offences punishable under Sections 120B, 121A, 123, 307, 353 etc. of IPC. Therefore, the said complaint was not with respect to allegation of killing of Sadik in a fake encounter. Therefore, the contention on behalf of the Respondents, more particularly, State, that it will be a second complaint which is not permissible cannot be accepted. Even otherwise, it is to be noted that the "closure report" submitted by the investigating agency was not on merits, however, "A" summary was submitted meaning thereby one of the accused had died and other accused are not traceable. This Court has gone through the entire record of the case before the learned Magistrate arising out of the complaint being C.R. No. I-3/2003 and it appears that as such no further investigation has been carried out at all by the investigating agency even with respect to the allegations made in the said complaint and the "closure report" has been submitted by the investigating agency submitting "A" summary report - accused are not traceable and the same has been accepted by the learned Magistrate mechanically without issuing even any notice to the aggrieved

party, more particularly, the relatives of the deceased Sadik Jamal. Under the circumstances, present petition is not required to be dismissed on the aforesaid ground.

11.6. It is also required to be noted at this stage that even nothing is on record to suggest that an inquiry was conducted by the Magistrate as required u/s 176 of the Code of Criminal Procedure, with respect to the killing of Sadik Jamal in an encounter. As stated hereinabove and considering the report submitted by the investigating agency with respect to the complaint being I-C.R. No. 3/2003 and the police papers submitted alongwith it, it appears that as such there is no further investigation at all with respect to the allegations made in the complaint.

11.7. So far as the alternative remedy pleaded by the Respondents is concerned, it is to be noted that as such looking to the serious allegations made against the high rank police officers of the State of Gujarat and the investigation is to be conducted by the independent agency like CBI and for the reasons stated hereinafter, this Court proposes to transfer the investigation to CBI, the learned Magistrate would not have any jurisdiction to transfer the investigation to CBI as held by the Hon''ble Supreme Court in catena of decisions. As held by the Hon''ble Supreme Court in catena of decisions, in a complaint filed before the Magistrate, the Magistrate can only pass an order for conducting inquiry by himself or direct police officer of the concerned police station to hold the inquiry/ investigation u/s 156(3) of Code of Criminal Procedure and the learned Magistrate would not have any jurisdiction to transfer the investigation to be transferred to CBI. Even otherwise in the facts and circumstances of the case, the alternative remedy cannot be a bar, to consider the relief prayed in this petition by this Court while exercising powers under Article 226. Identical question came to be considered by the Hon''ble Supreme Court in the case of State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, and the scope of the High Court under Article 226 of the Constitution of India or the Supreme Court under Article 32 of the Constitution of India. In the said decision, the Hon''ble Supreme Court has considered the fair and impartial investigation to be human rights and has observed that State has a duty to ensure such investigation against any person including its own officers, accused of commission of cognizable offence. Therefore, in the facts and circumstances of the case, more particularly, in a case like this where the serious allegations are made against the local police with respect to killing of a person in an encounter against whom the allegations were made in the complaint being C.R. No. I-3/2003 with respect to raging war against the State etc., this Court is of the opinion that this is a fit case to exercise powers under Article 226 of the Constitution of India. On the aforesaid ground, even the submission made by Shri Shethna, learned Counsel appearing on behalf of Respondent No. 4 not to exercise powers under Article 226 of the Constitution of India cannot be accepted. The exercise of powers by High Court under Article 226 of the Constitution of India and to direct/transfer the investigation to CBI has been considered by the Hon''ble Supreme Court in the

aforesaid decision. The decision of the Hon''ble Supreme Court in the case of State of West Bengal (Supra) is a complete answer to the objections raised by the Respondents on entertaining the petition under Article 226 of the Constitution of India and to grant the relief to lodge the complaint and transfer the investigation to CBI.

11.8. Now, so far as the contentions on behalf of the Respondents not to transfer the investigation of the case to the CBI and the submission on behalf of the Respondent State to hand over the investigation of the case to Special Task Force (STF) constituted by the State Government vide notification dated 02.04.2011 and the said investigation to be monitored by the Monitoring Authority constituted by the State Government under notification dated 07.04.2011 is concerned, it is to be noted that as such in a somewhat similar set of facts and circumstances, when allegations were made against the police officers of the State Government with respect to killing of a person/persons in a fake encounter, the Hon''ble Supreme Court in the case of Rubabbuddin Sheikh (Supra) and in the case of Narmada Bai (Supra) has transferred the investigation to the CBI. The decisions which are relied upon by the learned Counsel appearing on behalf of the Respondents in support of their submissions not to transfer the investigation to CBI are already considered and dealt with by the Hon''ble Supreme Court in the aforesaid two decisions. It is to be noted that even in the aforesaid two cases, the charge-sheets were already filed and still thereafter the Hon''ble Supreme Court directed to transfer the investigation to CBI. In paragraphs 51 to 55, the Hon''ble Supreme Court has observed and held as under:

51. Having heard the learned senior counsel appearing for the parties and after going through the eight Action Taken Reports submitted by the Police Authorities before this Court and after considering the decisions of this Court cited at the Bar and the materials on record and considering the nature of offence sought to be investigated by the State Police Authorities who are themselves involved in such crime, we are unable to accept that the investigation at this stage cannot be handed over to the CBI Authorities or any other independent agency. We have already discussed the decisions cited by Mr. Mukul Rohatgi, learned senior counsel appearing for the State of Gujarat and have already distinguished the said cases and came to a conclusion that those decisions were rendered when CBI enquiries have already been made and at that stage this Court held that after the charge sheet is submitted, the CBI authorities would not be able to approach this Court or the High Court to have issuance of directions from this Court.

52. In R.S. Sodhi Vs. State of U.P. and others, on which reliance was placed by the learned senior counsel appearing for the writ Petitioner, this Court observed:

We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police

personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However, faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice, to entrust the investigation to the Central Bureau of Investigation.

(Emphasis supplied)

This decision clearly helps the writ Petitioner for handing over the investigation to the CBI Authorities or any other independent agency.

53. It is an admitted position in the present case that the accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ Petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ Petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ Petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

54. It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI authorities would be an appropriate authority to investigate the case.

55. In *Ramesh Kumari v. State (NCT of Delhi) and Ors.*, this Court at Paragraph 8 observed: 2006 (2) SCC 681

8 ...We are also of the view that since there is allegation against the police personnel, the interest of justice would be better served if the case is registered and investigated by an independent agency like CBI.

11.9. In the case of *Narmada Bai (Supra)*, the Hon''ble Supreme Court considering the recent decision in the case of *Rubabbuddin Sheikh (Supra)* and the following decisions, has directed to hand over the investigation of the case to

CBI.

- 1 Vineet Narain and others Vs. Union of India and another,
- 2 Union of India and Others Vs. Sushil Kumar Modi and Others,
- 3 Rajiv Ranjan Singh "Lalan" and Another Vs. Union of India (UOI) and Others,
- 4 Hari Singh Vs. The State of U.P.,
- 5 Aleque Padamsee and Others Vs. Union of India (UOI) and Others,
- 6 M.C. Mehta Vs. Union of India (UOI) and Others,
- 7 R.S. Sodhi Vs. State of U.P. and others,
- 8 Ramesh Kumari Vs. State (N.C.T. of Delhi) and Others,
- 9 Kashmeri Devi Vs. Delhi Administration and Another,
10. Gudalure M.J. Cherian and Others Vs. Union of India (UOI) and Others,
11. Punjab and Haryana High Court Bar Association, Chandigarh through its Secretary Vs. State of Punjab and others,

11.10. In the present case also, accusations are directed against the local police personnel in which high rank police officers of the State of Gujarat are involved. Therefore, as observed by the Hon'ble Supreme Court in the aforesaid decision, it would be appropriate for the writ Petitioner or even the public to come forward to say that if the investigation is carried out by the police personnel of the State of Gujarat, the writ Petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if the investigation is allowed to be carried out by the local police authorities, as observed by the Hon'ble Supreme Court, all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances, it would be fit and proper that the writ Petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of investigation credibility however faithfully the local police may carry out the investigation, more particularly, when the grave/serious allegations have been made against the high police officials of the State of Gujarat. Considering the aforesaid and the nature of accusations and the allegations, with a view to see that there are no further allegations of bias in conducting the investigation, without in anyway making any observation against the investigating agency of the State of Gujarat and/or local police with respect to their credibility in conducting the investigation and with a view to see that all concerned have a satisfaction with respect to the investigation being carried out in fair and impartial manner, this Court is of the opinion that the investigation of the case be handed over and/or transferred to CBI.

11.11. Now, so far as the request made on behalf of the State to transfer the

investigation to Special Task Force constituted by the State Government vide notification dated 02.04.2011 and the said investigation to be monitored by Monitoring Authority constituted under the notification dated 07.04.2011 is concerned, learned Counsel appearing on behalf of the Petitioner has submitted that he has its own doubts with respect to constitution of such a committee i.e. Monitoring Authority. As per the settled proposition of law, as such there cannot be any interference by anybody with respect to the investigation of a criminal case carried out by the investigating agency except the investigation being monitored by the High Court in exercise of powers under Article 226 of the Constitution of India or by the Hon"ble Supreme Court in an appropriate case. Be that as it may, when the aforesaid notifications are not under challenge before this Court, this Court refrains from making any further observations and dealing with the same in detail. It is to be noted that in the present case allegations are against the high rank police officers of the State and the police officers who are the members of the Special Task Force constituted by the State Government vide notification dated 02.04.2011 are all high rank police officers of the State of Gujarat and therefore, it is apprehended by the leaned counsel appearing on behalf of the Petitioner that still there will be likelihood of bias and reasonable apprehension on the part of the Petitioner with respect to conducting investigation in fair and impartial manner.

Therefore, with a view to avoid such eventuality and any further allegation of bias in future, in the facts and circumstances of the case, this Court is of the opinion that investigation be carried out by an independent agency like Central Bureau of Investigation.

12.0. In view of the above and for the reasons stated above and considering the serious allegations made with respect to killing of the brother of the Petitioner alleged to be in a fake encounter by the local police and considering the fact that accusations are directed against the local police personnel including high rank police officers of the State of Gujarat, without observing anything against the credibility of the local police to investigate in the case and with a view to see that all concerned feel that the investigation is conducted properly and in fair and impartial manner and to avoid any further allegations of bias in conducting the investigation, if it is carried out by the local police, the present petition is allowed and concerned Respondents, more particularly, DCB (Crime), Ahmedabad is hereby directed to register the case/complaint/FIR relating to the killing of Shri Sadik Jamal - brother of the Petitioner killed on 13.01.2003 and thereafter transfer the case to Central Bureau of Investigation (CBI) and CBI is hereby directed to take up the investigation of the said complaint/case and complete the same at the earliest and preferably within a period of six months from the date of taking over the investigation from the State police authorities. All concerned are directed to cooperate the CBI authorities in completing the investigation of the said case at the earliest. In case, there are any reservations on the part of the CBI agency to take up the investigation, it will be open for them to approach this Court for modification of the present order which shall be considered

accordingly so that the alternative prayer of the Petitioner to transfer the investigation to any other agency like Special Investigation Team (SIT) be considered. Rule is made absolute accordingly. Registry is directed to send a copy of this judgment forthwith to the State of Gujarat through DCB (Crime), Ahmedabad and the Secretary, Home Department, State of Gujarat and to the Director, Central Bureau of Investigation, New Delhi. Registry is also directed to return/send back the record and proceedings of the complaint being I-C.R. No. 3/2003 to the concerned learned Metropolitan Magistrate.