
(2017) 10 DEL CK 0026

In the Delhi High Court

Case No : 1938 of 2017 & CrI MAs 11712 of 2017, 11713 of 2017, 12919 of 2017 and 14169 of 2017

Subramanian Swamy & Anr.

APPELLANT

Vs

Delhi Police & Ors.

RESPONDENT

Date of Decision : 26-10-2017

Acts Referred:

Constitution of India, Article 226, Article 32 - Power of High Courts to Issue certain writs - Remedies for enforcement of rights conferred by this Part
Code of Criminal Pro

Citation : (2017) 10 DEL CK 0026

Hon'ble Judges : S. Muralidhar And I.S. Mehta

Bench : DIVISION BENCH

Advocate : Varun Jamwal, Parul Jamwal, Sanjay Jain, Vinod Diwakar, Adrija Thakur, Sanjay Pal, Nihil Goel, Ashutosh Ghade, Vikas Pahwa, Kinnor Ghosh, Karan Khanuja

Judgement

1. This petition under Article 226 of the Constitution of India, described as a Public Interest Litigation ("PIL") has been filed by Dr. Subramanian Swamy (Petitioner No.1) and Mr. Ishkaran Singh Bhandari (Petitioner No.2) praying for the following reliefs: "A) Issue an appropriate Writ, Order or Direction, for a court monitored investigation by constituting a multi-disciplinary SIT consisting of Intelligence Bureau, Enforcement Directorate, RAW, Delhi Police and headed by CBI in the murder case of Late Sunanda Pushkar.

B) In the alternative to prayer "A" above, call for a time bound CBI investigation and

C) Pass any other and further orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of this case."

2. Although notice was not formally issued in this petition even on the first date of its hearing, i.e. 12th July 2017, counsel appeared on behalf of all three

respondents, i.e. Delhi Police (Respondent No.1), Ministry of Home Affairs ("MHA") (Respondent No.2) and Central Bureau of Investigation ("CBI") (Respondent No.3).

3. The principal grievance in this petition is that the investigation by Respondent No.1, Delhi Police, into the death of the late Ms. Sunanda Pushkar which took place in New Delhi on 17th January 2014 is being unreasonably delayed and that it is an "extreme example of the slow-motion of the criminal justice process and the extent to which it can be subverted."

4. The petition is replete with broad and sweeping allegations. One sample is in para 9 (N) which reads as under: "Nine months after she was found mysteriously dead in a hotel room, the Delhi Police woke up to find that some of the personnel belongings (clothes, footwear, handbag) of Sunanda Pushkar have been missing all this while. This clearly shows a botched investigation, done at the behest of rich and influential." (emphasis in the original)

5. Then there are allegations against named individuals. In para 10 it is averred that: "That inordinate delay and deliberate attempts made by Dr. Tharoor to mislead the investigation in the matter can be made more clear from the list of events above mentioned as it indicates that..."

6. Again in para 10 (vii) it is averred as under: "The HOD of the forensic department was under a tremendous pressure of Director of AIIMS, Dr. Tharoor and Gulam Nabi Azad to give autopsy report as natural death and clean chit as communicated by Dr. Gupta."

7. In Ground A it is contended: "Because the incident took place on January 17, 2014 and till May 26, 2014 Dr. Shashi Tharoor was a Minister in the UPA government having a great influence in the system, he thereafter made attempts to influence the Government to hush up the murder case of Late Sunanda Pushkar, and remains even today in continuous interference in the police investigation."

8. Despite the above grave allegations against named persons, the Petitioners have not thought it fit to arraign them as Respondents. There is no valid explanation offered for the failure to do so. But the non-joinder of necessary parties is only one of the problems with this petition.

9. Dr. Swamy, who appears in person, informed the Court that he is a member of the Bharatiya Janata Party which, he was candid to admit, is not stated anywhere in the petition. He was also candid in saying that the persons named above are members of the Indian National Congress which, again, he has not disclosed anywhere in the petition. Since the foundation of the petition concerns the alleged conduct of the named persons, and considering that this petition is projected as a PIL, the failure to disclose a material fact is a serious omission which cannot be easily condoned.

10. The third issue concerns the failure to disclose the complete facts. Nothing

has been placed on record to probablise, let alone substantiate, the vague and sweeping allegations made in the petition. Dr. Swamy was asked whether he had any basis for alleging that the investigation was "botched" by the Delhi Police at the "behest of rich and influential". He was also specifically asked if, indeed, he had any information in his possession as to who these persons are. In response, Dr. Swamy stated that he would file a further affidavit to substantiate the above as well as other sweeping allegations referred to hereinbefore.

11. When the second Petitioner, Mr. Bhandari, who also appears in person, was confronted with the same query, he was contrite and admitted to the lapse on his part in not paying attention to what was required under the law. Mr. Bhandari describes himself as a lawyer with ten years" standing.

12. On his part, Mr. Sanjay Jain, the learned Additional Solicitor General of India ("ASG"), stated at the outset that neither Delhi Police nor the Central Government (on both of whose behalf he is appearing) subscribed to the view expressed by Dr. Swamy and Mr. Bhandari in Ground A that the husband of the late Ms. Sunanda Puskhar has made attempts "to influence the Government to hush-up the case" and "remains even today in continuous interference in the police investigation". The learned ASG pointed out that the various status reports filed in the present petition from time to time speak to the contrary. He adverted to the latest affidavit dated 10th October 2017 filed by Mr. Ishwar Singh, the Deputy Commissioner of Police ("DCP"), who is heading the Special Investigation Team ("SIT") that has been constituted to investigate FIR No. 4/2015 registered at Police Station-Sarojini Nagar, Delhi in which it is, inter alia, stated as under: "(iii) That the said procedure involves appreciation and analysis of the evidence available on record by experts from the field of forensic psychology before proceeding with structured interviews/examination of various categories of persons concerned with the matter and depending upon exigencies of availability etc., is reasonably expected to be completed on or before 30/11/2017.

(iv) That no efforts shall be spared in taking investigation of this case to its logical conclusion at the earliest."

13. The failure by Dr. Swamy to disclose the full facts and information in his possession, assuming that his assertion in this regard is right, is the third, and perhaps fatal, lapse. It is contrary to the assertion made by him in the affidavit in support of the petition.

14. PILs filed in the Delhi High Court have to conform to the Delhi High Court (Public Interest Litigation) Rules, 2010 ("PIL Rules"). Proforma-A annexed to the PIL Rules sets out the form of the affidavit that has to be sworn by each petitioner in a PIL. Both Petitioners have filed identical affidavits, para 5 of which, reads as under: "5. I have done whatsoever inquiry/investigation which was in my power to do, to collect all data/material which was available and which was relevant for the court to entertain the present petition. I further confirm that I have not concealed in the present petition any data/material/information which

may have enabled this court to form an opinion whether to entertain the petition or not and/or whether to grant any relief or not." (emphasis supplied)

15. Although Dr. Swamy claims in the said affidavit that he has not concealed any data/material/information which may have enabled this Court to form an opinion as to whether it should entertain the petition, when asked specifically about the basis of the allegations made by him in the petition, his response is to seek further time to file another affidavit. This is a clear admission that what should have disclosed in the first place to this Court was not disclosed by him.

16. The Court is left with a distinct impression, from what has been observed hereinbefore, that this is perhaps a textbook example of a "political interest litigation" dressed up as a PIL. The Court should be careful in not letting the judicial process be abused by political personae for their own purposes, whatever the nature of the matter may be. That is not to say that no political person can file a PIL. It is only that, in such instances, particularly where the principal allegations are against political opponents, the Court should be cautious in proceeding in the matter. The Court has to be satisfied that the allegations are based on some credible material and are made with a sense of responsibility.

17. The credibility of the judicial process hinges upon the Petitioners in a PIL, including Dr. Swamy who likes to be thought of as a veteran PIL Petitioner, to act responsibly when they make averments in their petitions. The PIL-petitioner must, as should for that matter every writ petitioner, state on affidavit which part of the averments (with reference to para numbers or parts thereof) made (including those in the synopsis and list of dates and not just the petition itself) is true to the Petitioner's personal knowledge derived from records or based on some other source and what part is based on legal advice which the Petitioner believes to be true. This is a basic requirement of any writ petition that is supported by an affidavit.

18. Although the proforma affidavit devised by the Delhi High Court as part of the PIL Rules does not specifically require the Petitioner to do so, the Court considers this to be an appropriate occasion to direct that hereafter, if not already done, every writ petition (which includes a PIL petition) filed in the Registry (and not obviously a letter or post card) should be supported by an affidavit which, apart from complying with the legal requirements in terms of the governing Rules of the High Court, should clearly state which part of the averments (with reference to para numbers or parts thereof) made (including those in the synopsis and list of dates and not just the petition itself) is true to the Petitioner's personal knowledge derived from records or based on some other source and what part is based on legal advice which the Petitioner believes to be true.

19. Mr. Shiv Menon, son of late Sunanda Puskhar, has filed an application in this Court seeking impleadment. Inter alia, he has pointed out in the said application that the very issue concerning the investigation into the death of his mother late

Sunanda Puskhar formed the subject matter of W.P.(C) 769/2015 filed by the "Anti-Corruption Front". A Division Bench of this Court comprising the Chief Justice and Justice Rajiv Sahai Endlaw by a detailed order dated 11th February, 2015 dismissed the petition as being "thoroughly misconceived". The Court refrained from imposing costs but cautioned that "petitioners filing such frivolous PILs in future shall be dealt with seriously." Mr. Sanjay Jain, learned ASG recalled that he himself had appeared in that case for the Central Government. Another learned ASG had appeared for the CBI.

20. For all of the above reasons, the Court is therefore not satisfied for the aforementioned reasons that this petition can be entertained as a PIL.

21. There is yet another aspect of the matter and that concerns the main prayer that the investigation should be entrusted to another SIT headed by the CBI. In *State of West Bengal v. Committee for Protection of Democratic Rights* (2010) 3 SCC 571, a Constitution Bench of the Supreme Court while considering whether directions could be issued by High Courts under Article 226 of the Constitution of India to direct the CBI to investigate cognizable offences without the consent of the State Government explained the scope and permissibility of this power of the High Court as under: "70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. Insofar 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." (emphasis supplied)

22. In *Manohar Lal Sharma v. Principal Secretary* (2014) 2 SCC 532 the Supreme Court cautioned against court-supervised investigations and observed: "38. The monitoring of investigations/inquiries by the Court is intended to ensure that proper progress takes place without directing or channeling the mode or manner of investigation. The whole idea is to retain public confidence in the impartial inquiry/investigation into the alleged crime; that inquiry/investigation into every accusation is made on a reasonable basis irrespective of the position and status of that person and the inquiry/investigation is taken to the logical conclusion in

accordance with law. The monitoring by the Court aims to lend credence to the inquiry/investigation being conducted by the CBI as premier investigating agency and to eliminate any impression of bias, lack of fairness and objectivity therein.

39. However, the investigation/inquiry monitored by the court does not mean that the court supervises such investigation/inquiry. To supervise would mean to observe and direct the execution of a task whereas to monitor would only mean to maintain surveillance. The concern and interest of the court in such "court directed" or "court monitored" cases is that there is no undue delay in the investigation, and the investigation is conducted in a free and fair manner with no external interference. In such a process, the people acquainted with facts and circumstances of the case would also have a sense of security and they would cooperate with the investigation given that the superior courts are seized of the matter. We find that in some cases, the expression "court monitored" has been interchangeably used with "court supervised investigation". Once the court supervises an investigation, there is hardly anything left in the trial. Under the Code, the investigating officer is only to form an opinion and it is for the court to ultimately try the case based on the opinion formed by the investigating officer and see whether any offence has been made out. If a superior court supervises the investigation and thus facilitates the formulation of such opinion in the form of a report under Section 173(2) of the Code, it will be difficult if not impossible for the trial court to not be influenced or bound by such opinion. Then trial becomes a farce. Therefore, supervision of investigation by any court is a contradiction in terms. The Code does not envisage such a procedure, and it cannot either. In the rare and compelling circumstances referred to above, the superior courts may monitor an investigation to ensure that the investigating agency conducts the investigation in a free, fair and time-bound manner without any external interference." (emphasis supplied)

23. On a careful examination of the status reports filed in the Court in this petition, the Court is unable to be persuaded that the investigation being carried out by the SIT is "botched up" or under the influence of anyone. The Court is not satisfied that the high threshold of "rare and compelling circumstances" laid down in the above decisions is met in this case.

24. The Court would like to clarify that nothing said in this order should be construed as it having expressed any opinion on the investigation underway. The Court takes on record the assurance of Mr. Ishwar Singh, DCP heading the SIT "that no efforts shall be spared in taking the investigation of this case to its logical conclusion at the earliest".

25. Before concluding, the Court would also like to advert to another disturbing feature. It appears that one day prior to this petition being heard by the Court first on 12th July 2017, the entire petition was available on the internet. Dr. Swamy maintains that he only uploaded the "memo of parties" page whereas Mr. Vikas Pahwa, learned Senior Counsel appearing for Mr. Menon asserted that Dr Swamy had made available to one of the websites the entire text of the petition

and it was thus accessible.

26. Be that as it may, when the Court is seized of petition of this nature where allegations of a very serious kind are made against individuals the PIL petitioner should be extremely circumspect in placing such a petition in the public domain even before it is properly considered by the Court. Placing of such material on the net or in the social media can have irreversible consequences. This caution should be exercised particularly in matters where the reputation and privacy of the individuals may be involved.

27. The Court refrains from imposing any costs since it expects both Dr. Swamy and Mr. Bhandari to act in future with the circumspection required of PIL Petitioners.

28. The petition is dismissed and the pending applications are disposed of with the above observations.

29. The Registry is directed to take note of what has been observed in para 18 of this order and issue appropriate practice directions.