

(2012) 11 SC CK 0027

In the Supreme Court Of India

Case No : Criminal Miscellaneous Petition No. 11364 of 2012 and Special Leave Petition (Criminal) No. 3672 of 2012

Vipul Shital Prasad Agarwal

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 06-11-2012

Acts Referred:

Arms Act, 1959 — Section 25(1)(A), 27
Bombay Police Act, 1951 — Section 135
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 158, 161, 167(2), 170, 173<I

Citation : (2013) ACR 7 : AIR 2013 SC 73 : (2013) 1 AJR 544 : (2013) ALLMR(Cri) 1084 : (2013) CriLJ 336 : (2013) 1 GLR 913 : (2013) 1 JLJR 264 : (2013) 1 PLJR 203 : (2013) 1 RCR(Criminal) 5 : (2013) 1 RLW 769 : (2012) 11 SCALE 14 : (2013) 1 SCC 197

Hon'ble Judges : Altamas Kabir, C.J.;Surinder Singh Nijjar, J;J. Chelameswar, J

Bench : Full Bench

Advocate : Ajay Veer Singh Jain, Nitin Jain, Anista Jain, Uday Ram, Ashish Kumar Saini, Atul Agarwal and Mohd. Irshad Hanif, for the Appellant; Tushar Mehta, AAG, Hemantika Wahi, S. Panda, Jesal, Nandini Gupta, Maheen Pradhan, Subramonium Prasad and Vaibhav Srivastava, for the Respondent

Final Decision : Disposed Of

Judgement

Altamas Kabir, C.J.I.

1. This SLP is directed against the judgment and order dated 20th March, 2012, passed by the Gujarat High Court dismissing the petition filed by the Petitioner, Dr. Vipul Shital Prasad Agarwal, under Articles 226 and 227 of the Constitution, read with Section 482 of the Code of Criminal Procedure, 1973 (Code of Criminal Procedure), being SCRMA No. 2698 of 2011.

2. There are certain special features in this case which need to be recorded in order to decide this matter.

3. The Petitioner was at the relevant time posted as Superintendent of Police, Banaskantha, Gujarat. On 28th December, 2006, one Tulsiram Prajapati was killed in an encounter and a First Information Report (F.I.R.), being I.C.R. No. 115 of 2006, was registered with the Ambaji Police Station, Banaskantha, Gujarat, against unidentified persons Under Sections 307, 427 and 34 of the Indian Penal Code, 1860 (Indian Penal Code), Section 25(1)(A) of the Arms Act, 1959, and Section 135 of the Bombay Police Act, 1951.

4. In 2007, Nirmala Bai, the mother of the deceased, filed Writ Petition (Crl.) No. 115 of 2007, before this Court praying for an inquiry into the incident by the Central Bureau of Investigation (C.B.I.), and while the same was pending, the prosecution, upon completion of investigation, added Sections 302, 364, 307, 333, 334, 427, 365, 368, 193, 197, 201, 120-B, 471 read with Section 34 I.P.C., together with Section 25(1)(a) and 27 of the Arms Act, 1959, as also Section 135 of the Bombay Police Act, against 12 police officers, including the Petitioner. Consequent thereupon, the Petitioner was arrested by the C.I.D. crime, on 3rd May, 2010, and charge-sheet was, thereafter, filed against the accused persons, including the Petitioner, on 30th July, 2010.

5. One of the strange features of this case, therefore, is that in the case which was registered against the victim, 12 police officers, including the Petitioner, came to be arraigned as accused in what was alleged to be a fake encounter. However, the fact remains that F.I.R. No. 115 of 2006 was lodged with the Ambaji Police Station on 28th December, 2006, resulting in the arrest of the Petitioner by the C.I.D. crime, on 3rd May, 2010, and the filing of charge-sheet on 30th July, 2010, within 90 days of his arrest.

6. While considering the writ petition filed by the mother of the deceased (Writ Petition (Crl.) No. 115 of 2007), this Court, by its judgment and order 8th April, 2011, refused to accept the investigation conducted and completed by the State C.I.D. and directed as follows:

39. In view of the above discussion, the Police Authorities of the Gujarat State are directed to handover all the records of the present case to the CBI within two weeks from this date and the CBI shall investigate all aspects of the case relating to the killing of Tulsiram Prajapati and file a report to the concerned court/special court having jurisdiction within a period of six months from the date of taking over of the investigation from the state Police Authorities. We also direct the Police Authorities of the state of Gujarat, Rajasthan and Andhra Pradesh to cooperate with the CBI Authorities in conducting the investigation.

7. We have intentionally quoted the aforesaid direction of this Court, since the main plank of the submissions made on behalf of the Petitioner in this SLP depends on an interpretation thereof.

8. Pursuant to the directions given by this Court, the C.B.I. registered a separate F.I.R. on 29th April, 2011, being R.C.-3(S)/2011/Mumbai dated 29th April, 2011. On 31st May, 2011, the C.B.I. applied before the Court of Sessions Judge

Palanpur, Banaskantha, Gujarat, in Sessions Case No. 58 of 2010, inter alia, for the following directions:

It is, therefore, humbly prayed that keeping in view the orders dated 08.04.2011 of the Hon'ble Supreme Court of India, the articles submitted by the Gujarat Police as per the list enclosed (as desired by this Hon'ble Court) along with the Charge Sheet No. 50/2010 dated 30.07.2010 vide CC No. 1439/10 dated 30.07.2010 and supplementary Charge Sheets in case FIR No. 115/2006 dated 28.12.2006 of PS Ambaji, District Banaskantha may be released and handed over to the CBI for the purpose of fresh investigation.

It is further prayed that in the light of order of the Hon'ble Supreme Court of India, no further proceeding may be allowed in the case till the investigation of CBI is finalized. and for this the applicant shall ever pray.

9. The said application was allowed by the Sessions Judge on 9th June, 2011.

10. Since the investigation was not completed and the Petitioner had been in custody for a long time, an application for bail was moved on his behalf in the Court of learned Sessions Judge, Palanpur, on 16th August, 2011, who rejected the same on the ground that the application ought to have been moved before the Judicial Magistrate, First Class, Danta, and not before the Sessions Court.

11. Having regard to the order of the learned Sessions Judge, the Petitioner moved an application before the Judicial Magistrate, First Class, Danta, on 2nd September, 2011, for bail, which was rejected on 7th October, 2011. The Petitioner then moved the Gujarat High Court by way of Special Criminal Application No. 2698 of 2011, for quashing and setting aside the aforesaid judgment and order dated 7th October, 2011, passed by the Judicial Magistrate, First Class, rejecting his prayer for bail. Another application for regular bail, being Criminal Misc. Application No. 04 of 2012, was also filed on behalf of the Petitioner before the Sessions Judge, Palanpur, on 2nd January, 2012, on the limited ground of delay in the trial. The said bail application was dismissed by the 2nd Additional Sessions Judge on 27th February, 2012. The High Court also rejected the Petitioner's application challenging the order of the Magistrate by its order dated 20th March, 2012. On 9th April, 2012, the Petitioner's Criminal Misc. Application No. 4729 of 2012, challenging the order of the 2nd Additional Sessions Judge dated 27th February, 2012, was dismissed by the High Court. It is against the said order that the present SLP has been filed.

12. The major thrust of the submissions made by Mr. Sushil Kumar, learned Senior Advocate, appearing for the Petitioner, was that the Petitioner was entitled to the benefit of statutory bail in terms of Sub-section (2) of Section 167 Code of Criminal Procedure Learned Counsel urged that since after registering a fresh F.I.R. and commencing of fresh investigation, as directed by this Court, the C.B.I. had failed to file charge-sheet pursuant to such F.I.R., within the stipulated period of 90 days, the Petitioner was entitled to bail on account of such default in view of the provisions of Sub-section (2) of Section 167 Code of Criminal

Procedure Learned Counsel also emphasized that the Petitioner was in custody since his arrest on 3rd May, 2010, and on the other hand, the trial was being delayed.

13. Mr. Sushil Kumar urged that since the earlier investigation by the State police had not been accepted by this Court and the C.B.I. was directed to conduct a fresh investigation, it would necessarily entail that the charge-sheet filed on the basis of the initial inquiry was also rejected by this Court, though not in explicit terms. Mr. Sushil Kumar submitted that there could not be two charge-sheets arising out of the two FIRs in respect of a single incident and charge would have to be framed on the basis of one of the said two charge-sheets filed and, since the first investigation had not been accepted, the logical consequence would be that the first charge-sheet also stood quashed which would give the second charge-sheet due legitimacy. Accordingly, since the charge-sheet had not been filed in respect of the second F.I.R. within a period of 90 days, as stipulated u/s 167(2) Code of Criminal Procedure, the Petitioner was entitled to be released on default bail, as a matter of right.

14. Mr. Sushil Kumar made it clear that he was basing his submissions mainly on the ground available u/s 167(2) Code of Criminal Procedure and the fact that the trial had been delayed for a long period during which the Petitioner has remained in custody.

15. Appearing for the C.B.I., Mr. Vivek Tankha, learned Senior Advocate, submitted that there was a basic fallacy in Mr. Sushil Kumar's submissions since the Petitioner was arrested in connection with the first F.I.R., being No. 115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days and that he had not been arrested in connection with the second F.I.R. filed by the C.B.I. Accordingly, the benefit of default bail u/s 167(2) Code of Criminal Procedure was not available to the Petitioner. Mr. Tankha also submitted that the investigation started by the C.B.I. was in continuation of the investigation initially commenced on the basis of F.I.R. No. 115 of 2006 of Ambaji Police Station and that the lodging of a fresh F.I.R. by the C.B.I. was only for the purpose of enabling the C.B.I. to take over the investigation from the State police in terms of the directions given by this Court.

16. On the question of delay in the trial, Mr. Tankha pointed out that the same had been stayed at the instance of a co-accused and C.B.I., therefore, had no hand as far as delay of the trial is concerned. According to Mr. Tankha, in any event, charge-sheet had already been filed even on the basis of the second F.I.R., which would have to be treated as a supplementary charge-sheet to the original charge-sheet filed in F.I.R. No. 115 of 2006. Mr. Tankha pointed out that it was also significant that the prayer for default bail in terms of Section 167(2) Code of Criminal Procedure had been made on behalf of the Petitioner in connection with F.I.R. No. 115 of 2006, of Ambaji Police Station dated 28th December, 2006, and not in connection with F.I.R. No. RC-3(S)/2011/Mumbai dated 9th April, 2011, filed by the C.B.I.

17. Mr. Tankha, therefore, contended that the SLP filed by the Petitioner was entirely misconceived and was liable to be dismissed.

18. We have carefully considered the submissions made on behalf of the respective parties and we have little hesitation in rejecting Mr. Sushil Kumar's submissions. One of the most significant features of this case is that the prayer for default bail was made on behalf of the Petitioner in F.I.R. No. 115 of 2006, lodged by the local police with the Ambaji Police Station, though the submissions in respect thereof have been made in connection with the subsequent F.I.R. lodged by the C.B.I. It is obvious that the Petitioner was fully aware of the situation while making the application for grant of bail, knowing that he was under arrest in connection with the first F.I.R. and not under the second F.I.R. lodged by the C.B.I. In the event the second investigation is treated to be a fresh investigation and the Petitioner had been arrested in connection therewith, the submissions made by Mr. Sushil Kumar would have been relevant. However, since the prayer for default bail was made in connection with F.I.R. No. 115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days, the argument with regard to the default bail was not available to the Petitioner and such argument has, therefore, to be rejected. The other submission of Mr. Sushil Kumar that since a fresh investigation was directed to be conducted by this Court, the earlier charge-sheet must be deemed to have been quashed, has to be rejected also on the same ground.

19. Even on the question of delay in concluding the trial, such delay has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the Petitioner.

20. Since no argument had been advanced on behalf of the Petitioner on the merits of the case, we also refrain from looking into the same and on the basis of our aforesaid observations, we are not convinced that the Special Leave Petition, along with the Criminal Miscellaneous Petition No. 11364 of 2012, warrants any interference by this Court. The SLP and the Criminal Miscellaneous Petition are, therefore, dismissed.

J. Chelameswar, J.

21. While I agree with the conclusion reached by Hon'ble the Chief Justice of India, I wish to add a few lines.

22. The necessary facts and submissions of the Learned Counsel for the Petitioner are clearly set out in the judgment of my Lord the Chief Justice. I wish to deal with only one submission made on behalf of the Petitioner - that the earlier judgment and order of this Court in Writ Petition (Criminal) No. 115 of 2007 dated 8th April 2011 directing the Central Bureau of Investigation (CB) to conduct an investigation pertaining to all aspects of killing of Tulsiram Prajapati would necessarily mean that the charge-sheet filed by the Gujarat Police (CID) stood rejected. In my view, the submission is misconceived for the following reasons.

23. Section 173 of the Code of Criminal Procedure, 1973 (for short "the Code of Criminal Procedure") obligates the police investigating a case to make a report to the Magistrate to take cognizance of the offence which is subject matter of the investigation. Sub-section (2) indicates the various pieces of information which are required to be contained in the said report. Section 173(2)(i)(d)¹ stipulates that the said report should state whether any offence appears to have been committed and, if so, by whom. If the Investigating Officer opines in the said report that an offence appears to have been committed by the persons named therein, he is also obliged to forward to the Magistrate all documents on which the prosecution proposes to rely along with the statements recorded u/s 161 of the Code of Criminal Procedure of all persons whom the prosecution proposes to examine as witnesses.² Sub-section (8) ³ recognizes the authority of the Investigating Officer/Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under Sub-section (2) of Section 173 had already been submitted. It may be worthwhile noticing that under Sub-section (3), even a superior police officer appointed u/s 158 of the Code of Criminal Procedure could direct the Investigating Officer to make a further investigation pending any orders by the concerned Magistrate on the report submitted. It is settled law that a Magistrate to whom report is submitted u/s 173(2) can direct the Investigating Officer to make a further investigation into the matter. *Kashmeri Devi v. Delhi Administration and Anr.* 1988 (Supp.) SCC 482 para 7.

7. Since according to the Respondents charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge-sheet has been submitted to exercise his powers u/s 173(8) Code of Criminal Procedure to direct the Central Bureau of Investigation for proper and thorough investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge-sheet, if any, in accordance with law. The appeal stands disposed of accordingly.

24. In my opinion, the mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the concerned Magistrate to whom the report is forwarded does not mean that the report submitted u/s 173(2) is abandoned or rejected. It is only that either the Investigating Agency or the concerned Court is not completely satisfied with the material collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report.

25. Therefore, the submission of Mr. Sushil Kumar, learned senior advocate appearing for the Petitioner, that the directions given by this Court earlier in Writ Petition (Criminal) No. 115 of 2007 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected is without any basis in law

and misconceived. Even the fact that the CBI purported to have registered a "fresh FIR", in my opinion, does not lead to conclusion in law that the earlier report or the material collected by the Gujarat Police (CID) on the basis of which they filed the charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI.

26. In my view, notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation u/s 173(8) of the Code of Criminal Procedure pursuant to the direction of this Court.

1 Section 173(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(d) whether any offence appears to have been committed and, if so, by whom.

2 Section 173(5). When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report.

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded u/s 161 of all the persons whom the prosecution proposes to examine as its witnesses.

3 Section 173(8). Notwithstanding in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of' Sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).