

(2008) 06 GUJ CK 0016
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 15506 of 2007 in Criminal Appeal No. 1324 of 2007, Criminal Miscellaneous Application No. 534 of 2008 in Criminal Appeal No. 17 of 2008 and Criminal Miscellaneous Application No. 535 of 2008 in Criminal Appeal No. 18

Vithalbhai D. Pandya

APPELLANT

Vs

Central Bureau of Investigation and Others

RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Limitation Act, 1963 — Section 5

Prevention of Terrorism Act, 2002 — Section 23, 34, 34(5)

Citation : (2008) 06 GUJ CK 0016

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : Y.V. Brahmbhatt and M.C. Barot, for the Appellant; Harin P. Raval, for Respondent 1 and Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—As common question of law and facts arise in these applications, they are being disposed of by this common Judgment and order.

2. All these applications are filed by the applicant original appellant under the provisions of Sub-section (5) of Section 34 of the Prevention of Terrorism Act, 2002 ("POTA" for short) praying for condonation of delay caused in filing appeals against the order dtd. 18/12/2006 passed below application Ex. 855, order dtd. 26/3/2007 passed below application Ex. 898 and final Judgment and order dtd. 25/6/2007 passed by the learned Special Court (POTA) in Special Case [POTA] 10 of 2003.

3. Criminal Misc. Application No. 15506 of 2007 is filed by the applicant - original appellant third party for condonation of delay of 188 days caused in preferring appeal u/s 34 of the POTA against the final Judgment and order dtd. 25/6/2007 passed by the learned Special Court [POTA].

4. Criminal Misc. Application No. 534 of 2008 is filed by the applicant - original appellant third party for condonation of delay of 254 days caused in preferring appeal u/s 34 of the POTA against the order dtd. 26/3/2007 passed by the learned Special POTA Court below Ex. 898 in POTA Case No. 10 of 2003.

5. Criminal Misc. Application No. 535 of 2008 is filed by the applicant - original appellant third party for condonation of delay of 352 days caused in preferring appeal u/s 34 of the POTA against the order dtd. 18/12/2006 passed by the learned Special POTA Court below Ex. 855 in POTA Case No. 10 of 2003.

6. Few facts leading to the applications and appeal in nutshell are as follow;

7. Mr. Haren Pandya, Former Home Minister of State of Gujarat and son of the applicant herein was shot dead on 26/3/2003 near Law Garden, Ahmedabad. He was removed to hospital and declared dead of having found to have succumbed to injuries. An FIR came to be registered on the very day i.e. on 26/3/2003 as C.R. No. I-272 of 2003 at Ellisbridge Police Station by the complainant Janaksinh K.Pamar. With the consent recorded by the Government of Gujarat and Union Government, the investigation was transferred to Central Bureau of Investigation ("the CBI" for short) on 28/3/2003 and the same was registered as R.C.2(S)/2003-SIU-I-SIU-II/CBI, New Delhi. On 2/6/2003 intimation was given by the investigating officer for addition of the offences under the provisions of the POTA in the FIR to the Court of learned Chief Metropolitan Magistrate as well as learned Principal Judge, City Civil & Sessions Court, Bhadra vide Ex. 744. Special Court came to be established u/s 23 of the POTA for conducting all cases under the POTA and the present case also came to be made over to Special Court under POTA. Original papers from the court of learned Chief Metropolitan Magistrate were sent to the court of learned Special Court, POTA on 16/7/2003. On 8/9/2003 a joint chargesheet in RC-2 and RC-5 (pertaining to attack on one Mr. Jagdish Tiwari) was submitted to the court of learned Special Court (POTA). Invocation of POTA came to be challenged by the accused and by order dtd. 1/10/2003 passed below application Ex. 36, application of POTA came to be upheld. Some proceeding was initiated for transferring the case, which came to be disallowed. On 11/12/2003 vide Ex. 57 the learned Special Court (POTA) framed charges against 15 accused, out of which 4 accused namely A-13, A-14, A-15 and A-19 were declared absconding and therefore, no charge could be framed against them. Admittedly in the chargesheet, the applicant herein was not shown as a witness by the prosecution though his statements were recorded by the investigating officer on 30/3/2003 and 1/6/2003. The wife of deceased Haren Pandya, Jagrutiben was cited as witness in the chargesheet. On 16/11/2006 the prosecution submitted closing pursis and pursis for dropping of the witnesses under the signature of the learned Special Public Prosecutor, CBI. Vide letter dtd. 27/11/2006 addressed to the Special Court (POTA), the applicant herein prayed for reinvestigation into the matter/incident of deceased Haren Pandya. Vide order dtd. 27/11/2006 in Special Case (POTA) No. 10 of 2003, the learned Special Court (POTA) passed an order to file the said letter observing

that as per the decision of the Apex Court in the case of Rajiv Ranjan v. State, third party has no locus in criminal trial, who may be the close relative of the deceased. That the learned Special Judge also directed to send a copy of the said order to the person concerned i.e. applicant herein. That thereafter, the applicant submitted an application Ex. 855 on 15/12/2006 inter-alia urging for further probe of CBI in to the alleged murder of Haren Pandya to get to the truth of the matter with the allegation of CBI not having investigated on the crucial aspect of the murder of deceased Haren Pandya. That by order dtd. 18/12/2006 after recording elaborate reasons, learned Special Judge (POTA) rejected the said application Ex. 855 (which is subject matter of Criminal Misc. Application No. 535 of 2008). While rejecting the said application, the learned Special Judge also passed an order directing the registry to provide an urgent copy of the said order to the applicant to enable him to move the higher forum if he so desires, with further direction to the Registrar, City Civil and Sessions Court to explain the applicant and if required avail legal aid to him to enable him to approach higher forum effectively and expeditiously. It appears that in view of the above directions, copy of the order passed below application Ex. 855 was forwarded to the applicant on 22/12/2006. The applicant did not challenge the order passed below application Ex. 855 dtd. 18/12/2006 rejecting his application for further investigation into the matter of deceased Haren Pandya. That thereafter the applicant submitted one another application Ex. 898 on 26/3/2007 on the similar grounds along with the extract of news paper named "Asian Edge" dtd. 27/3/2003 reiterating his request for further investigation and incorporating the persons named in the application alleging inter-alia that the murder of Haren Pandya was a political murder. The said application came to be dismissed by the learned Special Judge (POTA) vide order dtd. 26/3/2007 after recording elaborate reasons (subject matter of Criminal Misc. Application No. 534 of 2008). It also appears that while rejecting the said application Ex. 898 vide order dtd. 26/3/2007, the learned Special Judge (POTA) also passed an order that the copy of the said order as well as that of earlier order passed below application Ex. 855 shall also to be supplied to the applicant urgently to enable him to approach the higher forum if he so chooses as there is still time before the Court shall deliver the Judgment after completing the submissions of both the sides on 28/3/2007 and 4/4/2007. The learned Special Judge also passed order that the applicant shall also be provided legal aid by the Registrar, City Civil and Sessions Court, to approach the Hon"ble High Court if he so desires. It appears that the said order was communicated to the applicant in person as he was present before the court on that very day. It also appears from the endorsement made below the order Ex. 898 that both the orders i.e. order passed below application Ex. Nos. 898 and 855 were received by the applicant on 26/3/2007 and he has also acknowledged the receipt of the aforesaid two orders. Inspite of the receipt of the receipt of the aforesaid two orders, the applicant did not challenge the aforesaid two orders. It also appears that an application was submitted for obtaining certified copy of the closing pursis/pursis for dropping of the witnesses and the certified copies were ready for delivery on 23/4/2007 and actually delivered on 25/4/2007. Thereafter,

the trial court proceeded further against the accused persons and vide final Judgment and order dtd. 25/6/2007, the learned Special Judge (POTA) passed order of conviction/sentence against the accused persons (subject matter of Criminal Appeal No. 15506 of 2007). That thereafter after a period of almost about six months of the final Judgment and order of conviction in Special Case (POTA) No. 10 of 2003, the applicant preferred Criminal Appeal No. 1324 of 2007 challenging three orders i.e. order passed below application Ex. 855 dtd. 18/12/2006; order passed below application Ex. 898 dtd. 26/3/2007 and final judgment and order of conviction dtd. 25/6/2007. As there was delay, the applicant preferred three Criminal Misc. Applications being Criminal Misc. Application Nos. 15506, 15518 and 15519 of 2007 in Criminal Appeal No. 1324 of 2007. Subsequently, having realised that in one appeal three orders cannot be challenged and for each order separate appeal is required to be filed, Mr. Barot, learned advocate appearing on behalf of the applicant withdrew Criminal Misc. Application Nos. 15518 and 15519 of 2007, by submitting that he had already filed two separate appeals challenging order dtd. 18/12/2006 passed below application Ex. 855 and order dtd. 26/3/2007 passed below application Ex. 898 and that he will be submitting two applications for condonation of delay in each appeal and therefore, the aforesaid two Criminal Misc. Applications came to be disposed of as withdrawn with above liberty.

8. That thereafter, the applicant has preferred Criminal Misc. Application Nos. 534 and 535 of 2008 in respective appeals to condone the delay in preferring the appeals challenging the order dtd. 18/12/2006 passed below application Ex. 855 and order dtd. 26/3/2007 passed below application Ex. 898. Thus, the aforesaid three applications are filed in respective appeals u/s 34 of the POTA challenging three different orders i.e. order dtd. 18/12/2006 passed below application Ex. 855 and order dtd. 26/3/2007 passed below application Ex. 898 and final Judgment and order dtd. 26/3/2007 passed by the learned Special Judge [POTA] in Special Case (POTA) No. 10 of 2003, whereby two applications submitted by the applicant for further investigation by the CBI have been turned down.

9. So far as Criminal Misc. Application No. 15506 of 2007 in Criminal Appeal No. 1324 of 2007 is concerned, the same is to condone the delay of 188 days in preferring the Criminal Appeal challenging the final Judgment and order dtd. 25/6/2007 passed by the learned Special Judge (POTA) in Special Case (POTA) No. 10 of 2003.

10. So far as Criminal Misc. Application No. 534 of 2008 in Criminal Appeal No. 17 of 2008 is concerned, the same is to condone the delay of 254 days in preferring Criminal Appeal u/s 34 of the POTA challenging the order passed below application Ex. 898 dtd. 26/3/2007 in Special Case (POTA) Case No. 10 of 2003.

11. So far as Criminal Misc. Application No. 535 of 2008 is concerned, the same is by the applicant third party u/s 5 of the Limitation Act to condone the delay of 352 days in preferring Criminal Appeal u/s 34 of the POTA challenging the order

dtd. 18/12/2006 passed below application Ex. 855 by the learned Special Judge (POTA) in Special Case (POTA) No. 10 of 2003.

12. Mr. Barot, learned Senior advocate has appeared on behalf of the claimant. It is submitted by Mr. Barot that the applicant is the father of the deceased Haren Pandya who has been politically murdered, as he had political rivalry with the present and the then the Chief Minister Mr. Narendra Damodardas Modi. It is submitted that though the statements of the applicant was recorded by the C.B.I. - the investigating agency on 30/3/2003 and 1/6/2003, he was not cited as a witness in the chargesheet. It is also further submitted by him that even the wife of the deceased Haren Pandya namely Jagrutiben was named as a witness in the chargesheet but she was not examined by the prosecution and she was dropped as a witness. It is submitted that in "Tahelka" interview which was a special interview on the investigation of Haren Pandya published on 19/8/2006, the interview of the wife of the deceased Haren Pandya namly Jagrutiben was published. In the said interview, she had apprehended that she may not be examined as witness and the said apprehension has come true when the closing pursis was submitted by the prosecution at Ex. 833. It is further submitted that by Mr. Barot that one Mr. Nilesh Bhatt, Personal Secretary of deceased Haren Pandya was not cited as a witness. It is submitted that if all aforesaid three persons would have been examined as witnesses, true facts would have come out and the real culprits and/or mastermind of the murder would have been booked. It is submitted that after the order passed below application Ex. Nos. 855 and 898, the wife of the deceased Haren Pandya started collecting further material and she got an article in "Asian Age" news paper published in its daily edition dtd. 27/3/2003 i.e. on the next day of the murder of Haren Pandya and she apprehended that the murder of Haren Pandya is political murder. It is submitted that thereafter the applicant started collecting further materials and the chargesheet papers which the applicant could gather from the learned advocate appearing on behalf of the accused. Thereafter, he applied for the certified copy of the orders passed below Ex. Nos. 855 and 898 as well as final Judgment and order dtd. 25/6/2007 and also certified copies of the relevant documents inclusive of the closing pursis filed by the CBI at Ex. 833 and in collection of the said documents, time is consumed. It is further submitted that the applicant could get some of the documents such as chargesheet, closing pursis, evidence of officer Kuldip Sharma who had obtained sanction of POTA etc. and the said documents were bulky and he was also collecting news paper reports which were in Hindi and English along with the evidence. It is submitted that as the matter was investigated by CBI, the applicant was advised that all the news papers reports were also required to be translated in English and time is consumed for getting the documents translated in English and immediately thereafter, respective appeals and the applications for condonation are filed. Submitting accordingly, it is requested to allow the applications for condonation of delay in respective appeals.

13. Mr. Barot, learned senior advocate has submitted that the applicant has

made out sufficient ground to condone the delay in preferring the respective appeals. He has relied upon the following decisions of the Hon''ble Supreme Court in support of his prayer to condone the delay in preferring the appeals and in support of his submission that the expression "sufficient expression" is to be considered with pragmatism in justice oriented approach and should be construed liberally;

i. State of Nagaland Vs. Lipok AO and Others,

ii. N. Balakrishnan Vs. M. Krishnamurthy,

iii. Radha Krishna Rai v. Allahabad Bank and Ors. reported in (2000) 9 SCC 733.

iv. State of Haryana Vs. Chandra Mani and others,

v. Shakuntala Devi Jain Vs. Kuntal Kumari and Others,

vi. Unreported decision of this Court dtd. 18/12/2007 rendered in Criminal Misc. Application No. 4165 of 2007 in Criminal Appeal No. 2070 of 2006, whereby this Court has condoned the delay of 564 days in preferring Criminal Appeal challenging Judgment and order of acquittal.

14. Mr. Barot, learned senior advocate has submitted that as observed by the Hon''ble Supreme Court in the case of Sakuntala Devi Jain (supra) "the words sufficient cause" should be construed liberally so as to advance substantial justice. It is further submitted that in the case of Chandra Mani and Ors. (supra), while considering Section 5 of the Limitation Act and the sufficient cause of delay, the Hon''ble Supreme Court has observed that sufficient cause should be construed with pragmatism in justice oriented manner. It is further submitted by Mr. Barot, learned senior advocate for the applicant that in the case of N. Balakrishnan (supra), the Hon''ble Supreme Court has issued certain guidelines while exercising the discretion by the Court in an application for condonation of delay and has construed the words "sufficient cause" and it is observed by the Hon''ble Supreme Court that acceptability of explanation for the delay is the sole criterion, length of delay is not relevant. It is submitted that as observed by the Hon''ble Supreme Court in the said decision in absence of anything showing malafide or deliberate delay as a dilatory tactic, court should normally condone the delay.

15. It is further submitted that in the case of Radha Krishna Rai (supra), the Hon''ble Supreme Court condoned the delay of 1418 days. It is submitted that similar views have been expressed by the Hon''ble Supreme Court in the case of Lipok AO (supra). By making the above submissions and relying upon the above decisions, Mr. Barot, senior learned advocate has requested to condone the delay in preferring the appeals.

16. Mr. Barot, learned senior advocate has made the submissions on merits of the respective appeals also. Mr. Barot, learned senior advocate appearing on behalf of the applicant has addressed the court on merits in support of the prayer

of the applicant for further investigation or reinvestigation with respect to the murder of Mr. Haren Pandya. It is submitted that the investigation by CBI is not fair and is faulty. It is submitted that on the basis of the statements of some political leaders and the media reports, there was sufficient suspicion that the murder of Mr. Haren Pandya was due to political rivalry and there was a dispute between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister. Still the investigating officer/CBI has not investigated the case in that direction. It is submitted that statements of some persons inclusive of the applicant who happens to be father of the deceased Haren Pandya and Mr. Nilesh Bhatt, Personal Secretary of deceased Haren Pandya, were not recorded during investigation and/or even the person who was examined and cited as witness in the chargesheet was dropped. It is submitted that Jagrutiben widow of Mr. Haren Pandya was cited as a witness in the chargesheet, but she was not examined by the prosecution and she was dropped. It is submitted that even in the interview published in "Tahelka" on 19/8/2006, Jagrutiben widow of Mr. Haren Pandya had apprehended that she would be dropped as a witness and it has come true. It is further submitted that CBI has given more importance to killing of Mr. Hanren Pandya rather than the motive behind the murder and as there is no proper investigation by the CBI on the aspect of dispute between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister, the applicant was justified in making prayer for further investigation or reinvestigation and therefore, it is requested to allow the application and to condone the delay and to entertain and dispose of the appeals on merits. It is further submitted that even it is admitted by the investigating officer in his Cross-examination that he has not inquired into the allegation of political rivalry between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister and in that case the application of the applicant for further investigation/reinvestigation was required to be allowed and the learned trial court ought to have passed an order for further investigation or reinvestigation.

17. The applications are opposed by Mr. Harin P. Raval, learned Special Prosecutor and Assistant Solicitor General of India, appearing on behalf of the CBI investigating agency. It is submitted that the applicant has to make out a "sufficient cause" in support of his prayer to condone the delay in preferring the respective appeals. It is submitted that in this group of appeals, the applicant has challenged three orders namely [1] order dtd. 18/12/2006 passed below application Ex. 855 rejecting the application of the applicant for further investigation by CBI [2] order dtd. 26/3/2007 passed below application Ex. 898 rejecting the application of the applicant for further investigation and [3] final Judgment and order of conviction dtd. 25/6/2007 passed by the learned Special Court in Special Case [POTA] No. 10 of 2003. It is submitted that so far as order dtd. 18/12/2006 passed below application Ex. 855 is concerned, certified copy of the same was sent by the Registry on 22/12/2006 itself as per the directions issued by the learned Special Court so as to enable the applicant to challenge the said order before higher forum if he so advised and still the applicant did not challenge the order dtd. 18/12/2006 passed below application Ex. 855 and

allowed the trial to be proceeded further. It is submitted that so far as the order dtd. 26/3/2007 passed below Ex. 898 is concerned, copy of the same was delivered to the applicant in person on 26/3/2007 itself and still the applicant did not challenge the said order immediately. In spite of the fact that in the order passed below application Ex. 898 the learned trial court directed the registry to supply the copy of the said order to the applicant urgently so as to enable him to approach higher forum if he so chooses by further observing that there is still some time before the Court shall deliver the Judgment after completing submissions of both the sides on 28/3/2007 and 4/4/2007, the applicant did not challenge the said order and allowed the trial to be concluded. It is submitted that the final Judgment and order of conviction has been passed by the learned Special Court on 25/6/2007 convicting the accused persons. It is submitted that even the certified copy of the Closing Pursis/Pursis for dropping of the witnesses was applied by the applicant on 16/4/2007 and the certified copy of the same was delivered on 23/4/2007 and in fact delivered on 25/4/2007. It is submitted that the correct facts are not mentioned by the applicant in the application. It is submitted that the grounds stated in the application are that time was taken in collecting material, evidence, deposition and prosecution documents. However, no particulars are given in support of the said submission/ground. It is submitted that as such the orders passed below application Ex. Nos. 855 and 898 ought to have challenged by the applicant immediately. It is submitted that even after the final Judgment and order of conviction, after a period of almost 5 to 6 months, first time appeal came to be filed.

18. It is submitted that so far as challenge to the final Judgment and order of conviction dtd. 25/6/2007 is concerned, in fact, the applicant in the memo of appeal itself has stated that he does not challenge the final Judgment and order of conviction dtd. 25/6/2007, so far as conviction against the accused persons are concerned. It is submitted that in case when the final Judgment and order of conviction itself is not challenged, appeal u/s 34 of the POTA is not maintainable, more particularly when the applicant is neither complainant nor witness and/or accused. It is submitted that as such on final Judgment and order of conviction dtd. 25/6/2007, challenge to the order passed below application Ex. Nos. 855 and 898 have become infructuous and in fact the applicant is responsible for the same in not challenging the aforesaid two orders in time and/or immediately and before the trial is concluded and final Judgment is delivered. It is submitted that as such when the application Ex. 855 was submitted at the fag end of the trial when 122 prosecution witnesses and 7 defence witnesses were already examined by the learned Special Court and further statements of the accused running into 202 pages were recorded.

19. It is submitted that the certified copy of the final Judgment and order of conviction dtd. 25/6/2007 was applied by the applicant on 11/7/2007 which was ready for delivery on 23/7/2007 and in fact the certified copy of the same was actually delivered on 24/7/2007. It is submitted that appeal u/s 34 of the POTA against the said Judgment and order is filed on 23/11/2007. It is further

submitted that inspite of the fact that the copy of the order passed below application Ex. 855 was delivered to the applicant on 22/12/2006, the applicant again applied for the certified copy of the same on 16/10/2007 with a view to make out a ground for condonation of delay. It is submitted that the main contention on behalf of the applicant is that much time was consumed in collecting material, evidence, deposition and prosecution evidence, but no particulars are given. It is also stated by the applicant in the application that he was not having access to the chargesheet and he tried to manage from the defence advocate. It is submitted that so far as the said ground is concerned to challenge the impugned order, chargesheet papers were not needed. It is submitted that even otherwise, he could have applied for the certified copy which has not been applied by him. It is submitted that by not challenging the orders passed below application Ex. Nos. 858 and 898 immediately, inspite of the fact that he was aware of the fact that the trial is at the fag end and the learned Special Court may deliver Judgment at any time, still the applicant did not challenge the said two orders immediately and allowed the trial to be concluded. It is submitted that either the applicant can be said to be negligent throughly and/or not very much serious about challenging the aforesaid two orders. Therefore, it is submitted that the applicant has failed to make out sufficient cause which disentitles him discretionary relief of condonation of delay.

20. Mr. Raval, learned Special Public Prosecutor has relied upon the following decisions in support of his prayer to dismiss the applications for condonation of delay;

- i. Ajit Singh Thakur Singh and Another Vs. State of Gujarat,
- ii. Vanka Radhamanohari (Smt) Vs. Vanka Venkata Reddy and Others,
- iii. State of Karnataka and Others Vs. S.M. Kotrayya and Others,
- iv. State of Nagaland Vs. Lipok AO and Others,

21. It is submitted by Mr. Raval, learned Special Public Prosecutor appearing on behalf of the CBI that even otherwise on merits also the applicant has no case. It is submitted that the appeal u/s 34 of the POTA, at the instance of the applicant, who is neither complainant nor witness, is not maintainable. It is submitted that so stated in the memo of the appeal itself, the applicant is not challenging the Judgment and order of conviction dtd. 25/6/2007 convicting the accused persons and if that is so, in that case appeal u/s 34 of the POTA is not maintainable. It is submitted that even otherwise, once the trial is concluded and Judgment and order of conviction is passed, prayer for reinvestigation or further investigation by the third party who is neither complainant nor witness, is not maintainable. It is submitted that appeal against interlocutory order is also not maintainable. It is submitted that even otherwise on merits, the prayer for reinvestigation or further investigation is not sustainable, as except doubt and media reports, there is no concrete evidence and/or material in support of his suspicious is available with the applicant. It is submitted that on the basis of doubt and media reports and in

absence of any basis, no order for reinvestigation or further investigation can be passed. It is submitted that the CBI has thoroughly investigated the case from all angle inclusive of political rivalry, however, nothing has found. It is submitted that even as on today also, there is no material against Mr. Narendra Modi, the Chief Minister, against whom allegations are made. It is submitted that solely only on the basis of suspicion without there being any material, there cannot be reinvestigation and/or further investigation. It is submitted that even considering the fact that final Judgment and order of conviction is already passed and the accused are convicted, the prayer of the applicant at this stage for further investigation is not in the interest of prosecution and/or justice. It is submitted that to entertain the applications for further investigation/reinvestigation at this stage is likely to prejudice the prosecution and likely to benefit the accused who are already convicted. It is submitted that the applicant has not taken right remedy at the right time and allowed the trial to be concluded and final Judgment and order of conviction to be passed. Therefore, it is submitted that there is no substance in appeal even on merits, and to condone the delay in an appeal which has no substance on merits, will be exercise in futility. It is submitted that prima facie merits and the facts of the case can be considered while considering the application for condonation of delay and therefore, it is requested to dismiss all the three applications as even after condonation of delay, the appeals deserve dismissal.

22. Meeting with the submissions of Mr. Barot, learned senior advocate appearing on behalf of the applicant, Mr. Haren P. Raval, learned advocate appearing on behalf of the CBI has submitted that merely on the basis of allegation and suspicion without there being any material, there cannot be any further investigation or reinvestigation. It is submitted that the evidence of investigating officer is required to be considered and read as a whole and it is borne out that the investigating officer has also inquired into the allegation with regard to the political rivalry and the dispute between the Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister, but no material was found by the investigating officer and therefore, it is submitted that it is not that the CBI has not inquired into the allegations of political rivalry at all. So far as the contention on behalf of the applicant that Jagrutiben was not examined as a witness though she was cited as witness in the chargesheet is concerned, Mr. Harin Raval, learned Special Public Prosecutor has submitted that it is not that every person who is cited as a witness in the chargesheet is to be examined as witness during trial by the prosecution. It is submitted that if ultimately it is found after examining certain witnesses that sufficient material and evidence has come on record to prove the guilt of the accused persons, the prosecution may submit closing pursis and drop the witnesses and/or may not further examine the witnesses. It is submitted that even when it is found that certain persons who are named in the chargesheet may not support the case of the prosecution during trial, the prosecution may drop such witnesses. It is submitted that there is no law that the prosecution is supposed to and bound to examine all the persons cited as witness in the

chargesheet, during trial. Therefore it is submitted that merely because Jagrutiben widow of Mr. Haren Pandya was dropped as a witness, the same is not ground to infer malafide which warrants further investigation or reinvestigation. It is submitted that except media reports and statements of some political leaders with respect to the dispute between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister, there was no material with the applicant and/or even any material collected and/or available during the trial. It is submitted that merely on the basis of some suspicion without there being any further material, order for further investigation or reinvestigation cannot be passed. It is submitted that as such the CBI has investigated the matter from all angle and after conclusion of the trial the accused persons are convicted and final Judgment and order of conviction is passed and therefore, any order at this stage with respect to further investigation or reinvestigation would prejudice the prosecution and would be beneficial to the accused persons. It is submitted that the said aspect is required to be considered in light of the submissions of the very applicant in the appeal memo that he is not challenging the Judgment and order of conviction convicting the accused persons. Therefore, it is submitted that there are no merits in any of the appeals and therefore, to condone the delay would be exercise in futility and therefore it is requested to dismiss all the applications.

23. Heard the learned advocates appearing on behalf of the respective parties.

24. At the outset, it is required to be noted that in the respective appeals, the applicant who is neither a witness nor a complainant, has challenged three different orders namely [1] order dtd. 18/12/2006 passed below application Ex. 855 [2] order dtd. 26/3/2007 passed below application Ex. 898 [3] final Judgment and order of conviction dtd. 25/6/2007 passed by the learned Special Court in Special Case [POTA] No. 10 of 2003. Vide order dtd. 18/12/2006 passed below application Ex. 855 and order dtd. 26/3/2007 passed below application Ex. 898, the learned Special Court [POTA] has dismissed the said applications submitted by the applicant for reinvestigation/further investigation of the case related to murder of the son of the applicant namely Mr. Haren Pandya. It is also required to be noted at this stage that at the time when the first application Ex. 855 was submitted by the applicant for further investigation/reinvestigation, the same was after 122 prosecution witnesses and 7 defence witnesses were already examined by the Special Court [POTA] and further statements of the accused running into 202 pages had already been recorded and the trial was at the fag end. Even when the application Ex. 898 came to be dismissed by the learned Special Court [POTA] on 26/3/2007 it was specifically observed by the learned trial court that the applicant be supplied copy of the said order urgently to enable him to approach the higher forum if he so chooses, as there is still some time before the Court shall deliver the Judgment after completing the submissions of both the sides on 28/3/2007 and 4/4/2007. It is borne out from the record that the order passed below application Ex. 855 dtd. 18/12/2006 was sent to the applicant on 22/12/2006 and the copy of the order passed blow application Ex.

898 dtd. 26/3/2007 was received by the applicant on the very day i.e. on 26/3/2007. In the order dtd. 26/3/2007 it was specifically observed by the learned Special Judge that the applicant shall also be provided legal aid service to approach the Hon'ble High Court if he so desires. Still the applicant did not challenge the aforesaid two orders immediately. It appears that the submissions/arguments of both the sides were heard on 28/3/2007 and 4/4/2007. Thereafter, final Judgment and order of conviction convicting the accused persons is passed by the learned Special Court [POTA] on 25/6/2007 and all the aforesaid orders came to be challenged by the applicant in the month of November, 2007. Thus, it appears that the applicant has either not taken the matter very seriously in challenging the aforesaid orders passed below application Ex. 855 and 898 immediately and/or within reasonable time and allowed the trial to be proceeded and concluded. It is also required to be noted at this stage that the applicant has specifically averred in the Appeal Memo challenging the final Judgment and order dtd. 25/6/2007 that he is not challenging the final Judgment and order of conviction dtd. 25/6/2007 convicting the accused persons. If that is so, in that case, as such, the appeal against the final Judgment and order dtd. 25/6/2007 u/s 34 of the POTA would not be maintainable, as order of conviction is not challenged.

25. It also appears from the chronological events stated hereinabove that, copies of the orders passed below applications Ex. 855 and 898 were already received by the applicant immediately i.e. on 22/12/2006 and 26/3/2007 respectively and the applicant was made aware that the final submissions were to be made on 28/3/2007 and 4/4/2007. It is the contention on behalf of the applicant that it took time to get relevant documents of the chargesheet papers and he could get it from the advocate appearing on behalf of the accused. There are vague averments in the application so far as that aspect is concerned. As stated above, for whatever reason the applicant was negligent and has allowed the prosecution to be continued and concluded. Considering the averments in the application it appears that the applicant has failed to make out a "sufficient cause" to condone the delay in challenging the aforesaid orders, more particularly in challenging the aforesaid three orders even after a period of almost five months after the final Judgment and order convicting the accused persons. It also appears from the record and submissions that the certified copy of the relevant documents such as closing pursis submitted by the prosecution was already applied by the applicant somewhere in the month of April, 2007. Still, the applicant did not challenge the aforesaid orders within reasonable time.

26. In support of his prayer for further investigation and/or reinvestigation of the murder of Mr. Haren Pandya it is alleged that the same was a political murder. It is submitted by the applicant that the applicant was not cited as witness in the chargesheet and that the Jagrutiben widow of deceased Haren Pandya though was cited as witness, but was dropped. As stated above, chargesheet was filed on 8/9/2003 and the applicant was not cited as witness. Still the applicant did not do anything. Closing pursis and the pursis for dropping of the witness was

submitted by the learned Special Public Prosecutor on 16/11/2006 and the certified copy of the said pursis was applied by the applicant on 16/4/2007 which was actually delivered to the applicant on 25/4/2007. Still the applicant did not challenge the orders passed below applications Ex. 855 and 898 and allowed the trial to be concluded. It also appears that even the averments made in the applications explaining the delay are too vague and/or general in nature. Even the applicant has not stated correct facts with respect to the receipt of copies of the orders passed below applications Ex. 855 and 898 and the certified copy of the closing pursis/pursis for dropping of the witnesses.

27. Still construing the "sufficient cause" liberally, so as to advance substantial justice and with a view to see that the meritorious case is not defeated on the technical ground of delay, we have considered prima facie case on merits also. The learned senior advocate appearing on behalf of the applicant as well as learned Special Public Prosecutor appearing on behalf of the CBI have addressed the court on merits also and we have heard the learned advocates appearing on behalf of the respective parties on merits at length to appreciate the prima facie case on merits with a view to advance substantial justice and to see that the meritorious case is not defeated on the technical ground of delay.

28. It is the contention on behalf of the applicant in support of his prayer for further investigation and/or reinvestigation of the case of the murder of Mr. Haren Pandya that the investigation by the CBI was not fair and was faulty. It is submitted that the CBI has given importance to the killing of Mr. Haren Pandya rather than motive behind the murder. It is submitted that in the news paper report published in "Asian Age" soon after the murder of Mr. Haren Pandya, it was apprehended that Mr. Haren Pandya was murdered due to political rivalry. It is also submitted that even in the statements of some political leaders such as Mr. Keshubhai Patel, Mr. Amarshi Chaudhri, Mr. Shankarsinh Vaghela etc. there was suspicion that the murder of Mr. Haren Pandya was due to political rivalry and still the CBI has not investigated in that direction. It is further submitted that at least Mr. Narendra Modi, the Chief Minister ought to have been interrogated and that was the only way to investigate.

29. It is further submitted that Jagrutiben widow of Haren Pandya was already cited as a witness in the chargesheet, still she was not examined as a witness and she was dropped as witness. It is submitted that if she would have been examined as witness, truth might have come out. It is submitted that even Jagrutiben in her interview published in "Tahelka" on 19/8/2006 apprehended that she would not be examined as a witness and it has come true.

30. Mr. Barot, learned senior advocate appearing on behalf of the applicant has also relied upon the question asked to investigating officer in the Cross-examination. It is the case on behalf of the applicant that the investigating officer has specifically admitted that he has not inquired into the allegation of political rivalry between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister of Gujarat State. Therefore it is submitted that when there was suspicion which is

borne out from the press reports and the statement of some political leaders and the apprehension of the family members of deceased Haren Pandya, the CBI ought to have inquired into the allegation of political rivalry.

31. So far as the non-examination of Jagrutiben widow of Mr. Haren Pandya as a witness during trial though she was cited as a witness in the chargesheet is concerned, under the law, prosecution is not supposed to and bound to examine during trial all the witnesses cited in the chargesheet. The discretion is with the prosecution to whom examine as witness during trial. If after examination of some of the witnesses, the prosecution is of the opinion that a full proof case is already made out against the accused persons and further witnesses are not required to be examined, in that case, the prosecution may submit closing pursis and drop the witnesses also. If during trial the investigation, the prosecution apprehends that the person who is cited as a witness in the chargesheet may not support the case of the prosecution, in that case, the prosecution may drop said witness and in that case, the remedy is available and defence may request the Court to summon the said person as a defence witness but the prosecution is not bound to examine such person as a prosecution witness. Thus, non-examination of Jagrutiben widow of Mr. Haren Pandya as a witness itself is no ground for reinvestigation and/or further investigation. Mr. Barot, learned senior advocate has heavily relied upon the interview of said Jagrutiben published in "Tahelka" on 19/8/2006. However, considering the said interview as a whole, it is clear that in the said interview it is specifically admitted by said Jagrutiben that she has no proof/material with respect to the allegations of political rivalry. She has only stated that there was political rivalry between Mr. Haren Pandya and Mr. Narendra Modi, the Chief Minister of Gujarat State and the same was well known. Thus, except the allegation there was nothing with the said Jagrutiben and/or with the applicant. Only on the allegation/suspicion of political rivalry between Mr. Haren Pandya and the then Chief Minister Mr. Narendra Modi and in absence of any material, further investigation or reinvestigation cannot be ordered. Even the evidence of investigating officer is also required to be considered as a whole. In the cross-examination on behalf of the accused persons, investigating officer has stated that during the investigation, he did not get any material with respect to the allegation of political rivalry. He has also stated in the Cross-examination that only on the basis of vague allegation of Mr. Vithalbhair Pandya, father of the deceased Haren Pandya (applicant herein), further investigation with regard to allegation of political rivalry was not possible. The investigating officer has also further stated that if he would have got sufficient concrete material, he would have certainly interrogated Mr. Narendra Modi, the Chief Minister. Thus, considering the above, it cannot be said that there was no investigation by the CBI with regard to allegation of political rivalry at all. It appears from the evidence of the investigating officer that investigation was carried out but no material was found with respect to the allegation of political rivalry. It appears that except allegation of political rivalry, there is no concrete material with the applicant and/or Jagrutiben widow of deceased Haren Pandya on the basis of

which, order for further investigation or reinvestigation can be passed. Even today also, the applicant has no material to substantiate the allegation of political rivalry or allegation that the murder of Mr. Haren Pandya was due to political rivalry. Only on the basis of suspicion without there being any material, there cannot be an order for further investigation and/or reinvestigation. It is also required to be noted at this stage that as stated above when the first application was given by the applicant at Ex. 855 in the month of December, 2006, the trial was at the fag end. Even thereafter after rejection of the said application, another application Ex. 898 was given by the applicant which also came to be dismissed in the month of March, 2007. At that time also the applicant was made aware that final submissions are to be concluded on 4/4/2007, still the applicant did not challenge the same immediately and thereafter the trial is concluded and final Judgment and order has been passed on 25/6/2007 convicting the accused persons. Thus, the trial is already concluded and the accused persons are already convicted and at that stage the prayer of the applicant for further investigation and/or reinvestigation is to be considered. In backdrop of the above, Mr. Raval, learned advocate appearing on behalf of the CBI is right in apprehending and submitting that if at this stage the prayer of the applicant for reinvestigation and/or further investigation is granted, benefit would straightway go to the accused persons who are already found guilty for the commission of the offence of murder of Mr. Haren Pandya and the same would cause great prejudice to the prosecution.

32. Thus, considering the above, on merits the applicant has failed to make out a case for further investigation and/or reinvestigation. As stated above, we have considered the prima facie case on merits while considering the application for condonation of delay so that meritorious case is not defeated on the technical ground of delay and at the same time, if ultimately it is found that prima facie there is no substance in the appeal, to condone the delay would be exercise in futility. At the time of considering the application for condonation of delay prima facie case on merits can also be considered by the Court. The principle governing condonation of delay is mainly to see that a meritorious case is not defeated on the technical ground of delay and therefore, while considering the application for condonation of delay, prima facie case on merits can be looked into by the Court. If it is found prima facie that the applicant has meritorious case, to do substantial justice irrespective of the length of delay, the delay can be condoned. At the same time, if it is found that there is no case on merits, in that case, to condone the delay and thereafter to dismiss the main appeal would be exercise in futility, as no fruitful purpose would be served in condoning the delay and thereafter in dismissing the appeal. Hence, while considering the prima facie case on merits on the basis of the submissions made by the learned advocates appearing on behalf of the respective parties, we are of the considered opinion that the applicant has failed to make out a case on merits i.e. either for reinvestigation or further investigation. As stated above, even the applicant has failed to make out a sufficient cause to condone the delay in preferring the

appeals challenging the impugned orders passed below applications Ex. 855 and 898, more particularly when the applicant has allowed the trial to be concluded and even after conclusion of the trial and final Judgment and order of conviction convicting the accused, appeal has been preferred after a period of almost five months. Under the circumstances, we are of the considered opinion that no fruitful purpose would be served in condoning the delay in preferring the appeals now at this stage because, as stated above, prima facie we are of the considered opinion that no case is made out by the applicant on merits for further investigation or reinvestigation, more particularly when the trial is concluded and the accused are convicted.

33. For the reasons stated above, all the applications deserve dismissal and are accordingly dismissed. Rule is discharged in each of the applications. Consequently all the appeals are dismissed.