IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

ON THE 14th OF OCTOBER, 2024

WRIT PETITION No. 6380 of 2009

PAWAN KUMAR KURMI

Versus

THE STATE OF MADHYA PRADESH AND OTHERS

.....

Appearance:
Shri Aseem Trivedi – Advocate for the petitioner.
Shri Abhishek Singh – Government Advocate for the respondents/State.

.....

O R D E R

This petition under Article 226 of Constitution of India has been filed seeking following relief(s):-

(i) The Hon'ble Court pleased to direct the Respondent No.1 for independent enquiry by the Gazetted Officer or CBI in respect of petition on the basis of material produced by the petitioner before this Hon'ble Court concerned with the petitioner and suitable action after the enquiry report.

(ii) The Hon'ble Court pleased to direct the respondent provide the protection of his life and liberty and order in respect of petitioner he not harassed by the police authority.

(iii) The Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) The Hon'ble Court please to direct to respondent no.4 S.P. Sagar for Khatma proceeding after considering of statements given by the witnesses before the session court

in the ends of justice.

2. It is submitted by counsel for petitioner that petitioner is a practicing Advocate. A false FIR No.103/2009 was registered by Police Station Baheriya, District Sagar for offence under Sections 307, 147, 148, 149, 294, 323, 324, 450, 506 of IPC. The name of petitioner has been falsely implicated because there are two fractions in the village and the petitioner is a counsel for some of the members of one fraction of village. It was falsely alleged that petitioner had assaulted Jai Singh by *Lathis.* It is submitted that on 06/05/2009, petitioner had appeared before the Civil Court and therefore, it is clear that he was not present on the spot. Affidavits were also given by some of the witnesses to show that he was not present on the spot but he was present in the Court. It is further submitted that by order dated 03/08/2009 passed by Co-ordinate Bench of this Court, arrest of petitioner in Crime No.103/2009 was stayed. It appears that charge-sheet was filed by Police against remaining accused persons. Witnesses have been examined and they have turned hostile and accordingly, it is submitted that no useful purpose would be served by compelling the petitioner to undergo the trial.

3. *Per contra,* petition is vehemently opposed by counsel for the State. It is submitted that as per the written information received from SHO, Police Station Baheriya, District Sagar, the case was fixed before the Trial Court on 30/09/2024 but the case has been adjourned. It is further submitted that since one of the injured has expired, therefore offence under Section 302 of IPC was added.

4. Heard learned counsel for the parties.

5. The present petition has been filed for quashment of FIR or for transfer of investigation to CBI mainly on the ground that petitioner is an active practitioner and on the date of incident, he was not present on the spot and he was present in the Court premises and had appeared in some of the cases.

6. So far as the ground of plea of alibi is concerned, it is required to be proved by accused by leading cogent evidence. Plea of alibi means that it was humanly impossible for the accused to remain present at the place of incident. As per FIR in Crime No.103/2009, incident took place in village Gidwani. Although counsel for petitioner was not in a position to point out the distance between village Gidwani and District Court Sagar but petitioner has filed a copy of news clipping published in Dainik Bhaskar on 07/09/2009 as Annexure-P/21, in which it is mentioned that the village Gidwani is situated at a distance of 10 Kms from the district headquarters. Therefore, it is clear that distance of village Gidwani is approximately 10 Kms from Sagar. From the FIR in Crime No.103/2009, it is evident that the incident took place on 06/05/2009 at about 10:30 AM.

7. Petitioner has relied upon some of the order-sheets of the Trial Court to show that he was present in the Court premises on 06/05/2009.

8. In the order-sheets which have been filed and were recorded by different Courts on 06/05/2009, time of recording the said order-sheets has not been mentioned except in order dated 06/05/2009 which is at page 48 of the Writ Petition, in which petitioner has mentioned the time as 11 AM under his signature. It appears that the Court was vacant and the petitioner had filed an application for exemption from personal

appearance of the accused which was allowed. However, petitioner has put the time as 11 AM below his signature. Why petitioner has put the time 11 AM is known to the petitioner only. Furthermore, whenever Courts are vacant, files are sent to other Courts which are generally never taken at 11 AM.

9. Be that whatever it may be.

10. Even assuming that the order dated 06/05/2009 was written at 11 AM but since the distance of Gidwani is only 10 Kms from Sagar, then it was humanly possible for the petitioner to attend the case at 11 AM.

11. Under these circumstances, this Court is of considered opinion that while exercising power under Article 226 of Constitution of India, Court cannot accept the defence of plea of alibi.

12. So far as the contention of counsel for petitioner that since the co-accused persons have been acquitted, therefore no useful purpose would be served by compelling the petitioner to undergo the trial is concerned, the same is misconceived.

13. Petitioner has relied upon the judgment passed by Supreme Court in the case of **Central Bureau of Investigation Vs. Akhilesh Singh** reported in **(2005) 1 SCC 478.** In the said case, charge against the respondent was that he was involved in conspiracy. The main accused who was alleged to have hatched the conspiracy and had motive to kill the deceased was already discharged and that matter had attained finality and since no other material was placed before the Court to prove the complicity of respondent Akhilesh Singh and no direct evidence was relied upon by the prosecution to prove that he had supplied weapons and rendered assistance to assailants in carrying out the common object

of killing the deceased, then it was held that High Court had rightly quashed the charges framed against the respondent for offence under Section 120-B read with Section 302 and Section 109 of IPC.

14. Thus, it is clear that a person against whom identical charges were leveled was already discharged and in the case of **Akhilesh Singh (supra)** benefit of said order was extended to respondent Akhilesh Singh. However, in the present case, allegations are that the petitioner had actually participated in the assault and had assaulted one Jai Singh who ultimately died and for whom, offence under Section 302 of IPC was added. Therefore, facts of the present case are distinguishable from the facts of **Akhilesh Singh (supra).**

15. Petitioner has also relied upon the judgment passed by Punjab and Haryana High Court in the case of **Rashpal Singh Vs. State of Punjab and Another** in **CRM No.M36584 of 2011,** in which the matter was amicably settled by the parties.

16. Admittedly, offence under Section 302 of IPC is not compoundable. Furthermore, co-accused persons were acquitted because the witnesses had turned hostile.

17. The Supreme Court in the case of **A.T. Mydeen Vs. The Asstt. Commissioner, Customs Department**, decided on 31/10/2021 in **Cr.A. No.1306 of 2021** has held that the evidence lead by the prosecution in the trial of co-accused cannot be read in the case of another accused. Therefore, the contention of counsel for petitioner that since other co-accused persons have been acquitted, therefore FIR against petitioner should also be quashed, is misconceived and is hereby **rejected.**

18. So far as the enmity is concerned, it is a double-edged weapon and if the enmity can be a ground to falsely implicate the accused, then at the same time, it would also be a ground to commit offence. Therefore, it is a disputed question of fact which cannot be adjudicated by this Court while exercising power under Article 226 of Constitution of India.

19. Furthermore, the petitioner has no right to seek transfer of investigation.

20. The Supreme Court in the case of **Romila Thapar and others vs. Union of India and others** reported in **(2018) 10 SCC 753** has held as under:-

> "23. After having given our anxious consideration to the rival submissions and upon perusing the pleadings and documents produced by both the sides, coupled with the fact that now four named accused have approached this Court and have asked for being transposed as writ petitioners, the following broad points may arise for our consideration:
>
> 23.1. (i) Should the investigating agency be changed at the behest of the named five accused?
>
> 23.2. (ii) If the answer to Point (i) is in the negative, can a prayer of the same nature be entertained at the behest of the next friend of the accused or in the garb of PIL?
>
> 23.3. (iii) If the answer to Questions (i) and/or (ii) above, is in the affirmative, have the petitioners made out a case for the relief of appointing Special Investigating Team or directing the court-monitored investigation by an independent investigating agency?
>
> 23.4. (iv) Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law abiding person?
>
> 24. Turning to the first point, we are of the considered opinion that the issue is no more res integra. In Narmada Bai v. State of Gujarat, in para 64, this Court restated that

it is trite law that the accused persons do not have a say in the matter of appointment of investigating agency. Further, the accused persons cannot choose as to which investigating agency must investigate the offence committed by them. Para 64 of this decision reads thus: (SCC p. 100)

> "64. … It is trite law that the accused persons do not have a say in the matter of appointment of an investigating agency. The accused persons cannot choose as to which investigating agency must investigate the alleged offence committed by them."
>
> (emphasis supplied)

25. Again in Sanjiv Rajendra Bhatt v. Union of India, the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Para 68 of this judgment reads thus: (SCC p. 40)

> "68. The accused has no right with reference to the manner of investigation or mode of prosecution. Similar is the law laid down by this Court in Union of India v. W.N. Chadha, Mayawati v. Union of India, Dinubhai Boghabhai Solanki v. State of Gujarat, CBI v. Rajesh Gandhi, CCI v. SAIL and Janata Dal v. H.S. Chowdhary."
>
> (emphasis supplied)

26. Recently, a three-Judge Bench of this Court in E. Sivakumar v. Union of India, while dealing with the appeal preferred by the "accused" challenging the order of the High Court directing investigation by CBI, in para 10 observed: (SCC pp. 370-71)

> "10. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment. In para 129 of the impugned judgment, reliance has been placed on Dinubhai Boghabhai Solanki v. State of Gujarat, wherein it has been held that in a writ petition seeking impartial investigation, the accused was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed on Narender G. Goel v. State of Maharashtra, in particular, para 11 of the reported

> decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not heard, in our opinion, will be of no avail. That per se cannot be the basis to label the impugned judgment as a nullity."

27. This Court in Divine Retreat Centre v. State of Kerala, has enunciated that the High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint an investigating officer of its own choice to investigate into a crime on whatsoever basis. The Court made it amply clear that neither the accused nor the complainant or informant are entitled to choose their own investigating agency, to investigate the crime, in which they are interested. The Court then went on to clarify that the High Court in exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of the aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer mala fide.

28. Be that as it may, it will be useful to advert to the exposition in State of West Bengal and Ors. Vs. Committee for Protection of Democratic Rights, West Bengal and Ors.13 In paragraph 70 of the said decision, the Constitution Bench observed thus:

> "70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 13 (2010) 3 SCC 571 38 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 extraordinary 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."

29. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about mala fide exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. 39 Rather, averment in the petition as filed was to buttress the reliefs initially prayed (mentioned in para 7 above) – regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A16 to A20) has been seriously disputed by the Investigating Agency and have commended us to the material already gathered during the ongoing investigation which according to them indicates complicity of the said accused in the commission of crime. Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organization and its activities. This is not the stage where the efficacy

> of the material or sufficiency thereof can be evaluated nor it is possible to enquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court. Admittedly, the named accused have already resorted to legal 40 remedies before the jurisdictional Court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the Court for obtaining remand by the Police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.
>
> 30. In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation....."

21. The Supreme Court in the case of **Dinubhai Boghabhai Solanki v. State of Gujarat**, reported in **(2014) 4 SCC 626** has held as under:-

> **"50.** In *W.N. Chadha* [*Union of India* v. *W.N. Chadha*, 1993 Supp (4) SCC 260 : 1993 SCC (Cri) 1171] , the High Court had quashed and set aside the order passed by the Special Judge in charge of CBI matters issuing the order rogatory, on the application of a named accused in the FIR, Mr W.N. Chadha. The High Court held that the order issuing letter rogatory was passed in breach of principles of natural justice. In appeal, this Court held as follows: (SCC pp. 290-91 & 293, paras 89, 92 & 98)
>
> > "*89*. Applying the above principle, it may be held that when the investigating officer is not

deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all.

***

92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section 202 of the Code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances.

***

> *98*. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."

These observations make it abundantly clear that it would not be necessary to give an opportunity of hearing to the proposed accused as a matter of course. The Court cautioned that if prior notice and an opportunity of hearing have to be given in every criminal case before taking any action against the accused person, it would frustrate the entire objective of an effective investigation. In the present case, the appellant was not even an accused at the time when the impugned order was passed by the High Court. Finger of suspicion had been pointed at the appellant by independent witnesses as well as by the grieved father of the victim.

51. In *Rajesh Gandhi case* [*CBI* v. *Rajesh Gandhi*, (1996) 11 SCC 253 : 1997 SCC (Cri) 88] , this Court again reiterated the law as follows: (SCC pp. 256-57, para 8)

> "*8*. There is no merit in the pleas raised by the first respondent either. The decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with. We also fail to see any provision of law for recording reasons for such a decision. … There is no provision in law under which, while granting consent or extending the powers and jurisdiction of the Delhi Special Police Establishment to the specified State and to any specified case any reasons

> are required to be recorded on the face of the notification. The learned Single Judge of the Patna High Court was clearly in error in holding so. If investigation by the local police is not satisfactory, a further investigation is not precluded. In the present case the material on record shows that the investigation by the local police was not satisfactory. In fact the local police had filed a final report before the Chief Judicial Magistrate, Dhanbad. The report, however, was pending and had not been accepted when the Central Government with the consent of the State Government issued the impugned notification. As a result, CBI has been directed to further investigate the offences registered under the said FIR with the consent of the State Government and in accordance with law. Under Section 173(8) CrPC, 1973 also, there is an analogous provision for further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate."

The aforesaid observations would clearly support the course adopted by the High Court in this matter. We have earlier noticed that the High Court had initially directed that the investigation be carried under the supervision of the Special Commissioner of Police, Crime Branch, of the rank of the Additional Director General of Police. It was only when the High Court was of the opinion that even further investigation was not impartial, it was transferred to CBI.

52. Again in *Sri Bhagwan Samardha* [*Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj* v. *State of A.P.*, (1999) 5 SCC 740 : 1999 SCC (Cri) 1047] , this Court observed as follows: (SCC pp. 742-43, paras 10-11)

> "*10*. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal

> Procedure. Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in *Ram Lal Narang* v. *State (Delhi Admn.)* [(1979) 2 SCC 322 : 1979 SCC (Cri) 479] . The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.
>
> *11*. In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, we would not burden the Magistrate with such an obligation."

These observations also make it clear that there was no obligation for the High Court to either hear or to make the appellant a party to the proceedings before directing that the investigation be conducted by CBI.

53. We had earlier noticed that the High Court had come to the prima facie conclusion that the investigation conducted by the police was with the motive to give a clean chit to the appellant, in spite of the statements made by the independent witnesses as well as the allegations made by the father of the deceased. The legal position has been reiterated by this Court in *Narender G. Goel* [*Narender G. Goel* v. *State of Maharashtra*, (2009) 6 SCC 65 : (2009) 2 SCC (Cri) 933] : (SCC pp. 68-69, paras 11-13)

> "*11*. It is well settled that the accused has no right to be heard at the stage of investigation. The prosecution will however have to prove its case at

> the trial when the accused will have full opportunity to rebut/question the validity and authenticity of the prosecution case. In *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj* v. *State of A.P.* [*Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj* v. *State of A.P.*, (1999) 5 SCC 740 : 1999 SCC (Cri) 1047] this Court observed: (SCC p. 743, para 11)
>
> '*11*. … There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard.'
>
> *12*. The accused can certainly avail himself of an opportunity to cross-examine and/or otherwise controvert the authenticity, admissibility or legal significance of material evidence gathered in the course of further investigations. Further in light of the views expressed by the investigating officer in his affidavit before the High Court, it is apparent that the investigating authorities would inevitably have conducted further investigation with the aid of CFS under Section 173(8) of the Code.
>
> *13*. We are of the view that what is the evidentiary value can be tested during the trial. At this juncture it would not be proper to interfere in the matter."

22. This Court in the case of **Prabal Dogra vs. Superintendent of Police, Gwalior and State of M.P.** by order dated **30.11.2017** passed in **M.Cr.C.No.10446/2017** has held that accused has no say in the matter of investigation.

23. As no case is made out for quashment of FIR in Crime No.103/2009 registered at Police Station Baheriya, District Sagar,

accordingly, petition fails and is hereby **dismissed.**

24. Interim order dated 03/08/2009 is hereby **vacated.**

25. Petitioner is directed to surrender before the Trial Court on **04/11/2024**, failing which, the Trial Court shall be free to issue warrant of arrest against the petitioner.

(G.S. AHLUWALIA)
JUDGE

S.M.