

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

WP(C).No. 17742 of 2014 (P)

PETITIONER(S):

C.K.ZEENATH,
W/O. ABDUL HAKKIM @ DAMODARAN, MANIYADATHU HOUSE,
THEKKEMAMBALAM, PAYYANNOOR P.O., KANNUR DISTRICT.

BY ADVS.SRI.P.P.THAJUDEEN
SRI.MANSOOR.B.H.

RESPONDENT(S):

1. STATE POLICE CHIEF/DIRECTOR GENERAL OF POLICE,
LAW AND ORDER, POLICE HEAD QUARTERS,
THIRUVANANTHAPURAM-695 001.
2. STATION HOUSE OFFICER,
PAYYANNOOR POLICE STATION, KANNUR DISTRICT-670 117.
3. DEPUTY SUPERINTENDENT OF POLICE,
THALIPARAMBU, KANNUR DISTRICT-670 141.
4. SUPERINTENDENT OF POLICE,
CBCID, KOZHIKODE-673 517.
5. DEPUTY SUPERINTENDENT OF POLICE,
CBCID, SUB UNIT, KANNUR-670 118.
6. THE DIRECTOR,
CENTRAL BUREAU OF INVESTIGATION, NEW DELHI-110 001.

* ADDITIONAL R7 IMPEADED

7. UNION OF INDIA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT OF INDIA,
MINISTRY OF PERSONNEL,
P.G AND PENSIONS (DEPARTMENT OF PERSONNEL AND TRAINING),
NEW DELHI - 110 001.

* ADDL.R7 IMPEADED AS PER ORDER DATED 11.08.2015 IN IA 11431/15.

R1 TO R5 BY STATE ATTORNEY SRI.VIJAYARAGHAVAN
R6 BY ADV. SRI.P.CHANDRASEKHARA PILLAI, C.B.I.
R7 BY ADV. SRI.KRISHNADAS P NAIR, CGSC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
08-09-2015 ALONG WITH WP(C) 20627/2014 THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 17742 of 2014 (P)

APPENDIX

PETITIONER(S)' EXHIBITS

**P1 : TRUE PHOTOCOPY OF THE FIR IN CRIME NO.142/2014 OF PAYYANNUR POLICE,
SUBMITTED BEFORE SUB DIVISIONAL MAGISTRATE COURT, THALASSERI.**

P2 : TRUE PHOTOCOPY OF THE POST MORTEM CERTIFICATE.

**P3(A): TRUE PHOTOCOPY OF THE NEWS ITEMS PUBLISHED BY DESHABHIMANI
DAILY, DTD.11.2.2014 ABOUT THE INCIDENT.**

**P3(B): TRUE PHOTOCOPY OF THE NEWS ITEMS PUBLISHED BY MALAYALA
MANORAMA DAILY, DTD.19.2.2014.**

**P3(C): TRUE PHOTOCOPY OF THE NEWS ITEMS PUBLISHED BY MATHRUBHUMI
DAILY, DTD.20.2.2014.**

**P3(D): TRUE PHOTOCOPY OF THE NEWS ITEMS PUBLISHED BY MATHRUBHUMI
DAILY, DTD.4.3.2014.**

RESPONDENT(S)' ANNEXURES:

ANNEXURE R4(a); TRUE COPY OF THE POSTMORTEM CERTIFICATE.

ANNEXURE I: TRUE COPY OF THE ORDER NO.G.O.(MS)NO.227/14/HOME DTD.14.11.14.

//TRUE COPY//

P.S.TO JUDGE

Msv/

ALEXANDER THOMAS, J.

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W.P.(C).Nos.17742/2014 & 20627/2015

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Dated this the 8th day of September, 2015

J U D G M E N T

It is averred in W.P.(C).No.20627/2015 that one Abdul Hakkim @ Damodaran of Maniyadath House, Thekkemambalam, Payyannur, Kannur district, was found dead in the compound of the Juma Masjid, at Kotti in Kannur district on 10.2.2014 and that his body was found in a charred condition inside the mosque compound. On the basis of the First Information Statement (referred in Ext.P-1) lodged by the deceased's brother, Crime No.142//2014 was registered on 10.2.2014 by Payyannur Police Station, under Sec.174 of the Code of Criminal Procedure, for “unnatural death”. Based on Ext.P-2 post-mortem report, offence under Sec.302 was incorporated and the investigation was continued on the basis that above said Abdul Hakim @ Damodaran was murdered by some one. The investigation was initially done at the behest of the local police and later it was transferred to the Crime Branch, CID of the State Police. That in view of the demands made from all sections of the

society and polity and community at large, the State Government had issued Ext.P-3 notification as per G.O(Ms).No.227/2014/Home dated 14.11.2014 by taking recourse to the enabling provisions under Sec.6 of the Delhi Special Police Establishment Act, 1946 (DSPE Act). By Ext.P-4 Government letter No.48655/M3/2014/Home dated 3.12.2014, the Government of Kerala in the Home Department through the Additional Chief Secretary to Government had requested the Government of India in the Ministry concerned that Ext.P-3 notification has already been issued and thereby the State Government had requested the Central Government to take necessary steps to entrust the investigation of the said crime with the Central Bureau of Investigation (CBI). Later, by Ext.P-5 Government letter dated 7.5.2015, the Government of Kerala in the Home Department through the Additional Chief Secretary again pointed out these details to the Central Government and had requested to inform whether the case in Crime No.142/2014 of Payyannur Police Station, which was referred to the CBI as per Ext.P-3 notification, has been taken up by the CBI for investigation, etc. It appears that the Central Government as per the impugned Ext.P-7 letter No.228/87/2014-AVDII dated 29.5.2015 had

informed the State Government that the matter has been considered by the Government of India in the Department concerned, after consultation with the CBI and that the CBI has opined that this is not a fit case or rare exceptional nature warranting CBI investigation and that this case has no interstate or international ramifications and that in view of these reasons, the CBI is unable to take up the case for investigation. It is these proceedings at Ext.P-7 that are under challenge in this case.

2. The petitioner in W.P.(C).No. 20627/2015 is said to be the Convener of an Action Council formed by the residents of the Payyannur Municipality and is impugned the Central Government's decision at Ext.P-7 and also seeks appropriate direction in the matter for the effective conduct of the investigation of the case through the respondent CBI by taking recourse to the enabling powers under Art.226 of the Constitution of India. The prayers in W.P.(C).No. 20627/2015 are as follows:

- “(i) call for the records leading to Exhibits P7 and to quash the same by the issue a writ of Certiorari or other appropriate writ, direction or order,
- (ii) to issue a writ of Mandamus or other appropriate writ, direction or order ignoring Ext.P7 and directing the 2nd respondents to entrust the investigation to the 5th respondent Central Bureau of Investigation and also to direct them to take up the investigation of Crime No.142/2014 of Payyannur

Police Station forthwith.”

3. The petitioner in W.P.(C).No. 17742/2014 is the widow of the deceased Abdul Hakim @ Damodaran. According to her, the deceased (who is her husband) was an employee of the Kotti Juma Masjid, Payyannur, Kannur district, and was in charge of the chitty conducted by the managing committee of the Masjid and collection of donation towards the construction of Maddressa building within the premises of the Masjid. That the deceased's body was found charred and burnt at the rear side of the Maddressa building situated within the premises of the Masjid. That her husband was a Hindu by birth, who was later converted to Islam. That no effective leads could be gathered in the investigation done either by the local Police or by the Crime Branch CID. In the light of these aspects, the petitioner in W.P.(C).No.17742/2014 has prayed for the following reliefs in this Writ Petition, which read as follows:

- “1. To issue a writ of mandamus commanding the first respondent to entrust the investigation in Crime No. 142/2014 of Payyannur Police station to Central Bureau of Investigation.
2. To direct respondents 2 to 5 to file a report regarding the investigation so far conducted in Crime No.142/2014 of Payyannur Police station.
3. Pass such other writ order or directions as this Honourable court deems fit to the facts and circumstances of the case.”

4. Later the petitioner had filed I.A.No.11431/2015 in that Writ Petition to implead the Government of India as additional respondent No.7 in that Writ Petition and had also filed I.A.No. 12757/2015 in that W.P.(C). for amending the factual averments, grounds and prayers in the Writ Petition. The prayers that are sought for after the amendment of the W.P.(C). are as follows:

- “1. To issue a writ of mandamus commanding the first respondent to entrust the investigation in Crime No. 142/2014 of Payyannur Police station to Central Bureau of Investigation.
2. To direct respondents 2 to 5 to file a report regarding the investigation so far conducted in Crime No.142/2014 of Payyannur Police station.
3. Pass such other writ order or directions as this Honourable court deems fit to the facts and circumstances of the case.
4. To call for the records leading to Ext.P4 and quash the same by issuing a Writ of certiorari or any other writ.
5. To issue a writ of mandamus commanding the 6th respondent to take over the investigation in Crime No.142/2014 of Payannoor Police Station.”

5. The Deputy Superintendent of Police, State Crime Branch CID has filed statement dated 4.8.2014 in W.P.(C).No.17742/2014 and later the Inspector of Police, State Crime Branch had also filed statement dated 18.6.2015 in the case, whereby the notification issued by the State Government under Sec.6 of the DSPE Act giving consent for the investigation of the crime by the CBI has been

produced.

6. The respondent CBI has filed statement on 21.8.2015 in W.P.(C).No.20627/2015, opposing the prayers in the Writ Petition. The respondent Central Government has also filed statement dated 17.8.2015, opposing the prayers in the Writ Petition, wherein they have inter alia stated in paragraphs 16 to 20 thereof as follows:

“16. In the opinion of the Hon'ble Supreme Court, When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in the opinion of the Hon'ble Supreme Court, would not amount to infringement of either the doctrine of separation of power or the federal structure.

17. In the final analysis, Hon'ble Supreme Court's answer to the question is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State (sic) will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, the Hon'ble Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

18. However, the Hon'ble Court has drawn a line of caution for the Courts that they deem it necessary to emphasize that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-

imposed limitations on the exercise of these Constitutional powers. The very plentitude of the power under the said Articles requires great caution in its exercise. In so far 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 leveled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill 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.

19. In the light of above judgment and the provisions of the Act, mere issue of notification by the State Government conveying its consent for investigation of a cognizable offence and the offence having been notified u/s. 3 of the Act with Central Government's notification u/s.5 of the Act in reference to earlier consent by that State does not impinge upon requirement of issue of notification by the Central Government u/s 5 of DSPE Act for investigation of that particular offence for which an FIR has been registered within jurisdiction of the State, after consideration of the facts about necessity to provide credibility and instill confidence in investigations or the incident having national and international ramifications or requirement of an order necessary for doing complete justice and enforcing the fundamental rights.

20. Though the Government will follow the direction of the Hon'ble Court yet in view of the above, in particular the facts of the case, it is most respectfully prayed that this Hon'ble Court may be pleased to dismiss the present writ petition."

7. The respondent CBI in the statement has stated that the present crime does not satisfy the legal or factual requirements warranting CBI investigation and that Ext.P-7 rejection order dated 29.5.2015 was issued by the Central Government after due

application of mind and there is no error in the exercise of discretion in that regard, etc. However, in the concluding paragraph in page 4 of the statement, the respondent CBI has stated as follows:

“It is also humbly submitted that if subsequent circumstances reveal which satisfies the Hon'ble Court to order a CBI investigation on finding that the officials of the State Police Deptt. are not able to meet with the lawful requirement after best efforts, CBI is prepared to take up the investigation, if the Hon'ble Court desires or orders consequently. But, it is humbly submitted that at present, on evaluation of the crime factors, a CBI investigation is not required and the prayer of the petitioner is not sustainable in that respect.”

8. Sri.K.Gopalakrishna Kurup, learned Senior Counsel, instructed by Sri.Abhishek Kurian, learned counsel appearing for the petitioner in W.P.(C).No.20627/2015 and Sri.B.H.Mansoor, learned counsel appearing for the petitioner in W.P.(C).No.17742/2014 have taken this Court in detail to the legal principles laid down by the Constitution Bench of the Apex Court in the case, STATE OF WEST BENGAL AND OTHERS v. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL AND OTHERS reported in (2010) 3 SCC 571, and have argued that the present case is a fit case, which this Court may direct that the investigation be entrusted to the respondent CBI.

9. It is submitted by the learned counsel for the petitioners

that in spite of the prolonged investigation undertaken by various wings of the State Police, there has been no tangible progress in the outcome of the investigation so far and that the Police could not identify even the assailants or collect any material in respect of anyone in connection with the murder of Abdul Hakim @ Damodaran. They would also submit that the peculiar facts and circumstances of the case also give reasons to suspect that the objective of the assailants was to disrupt the communal harmony and disturb the peace and tranquility in the area and to distract the attention of the Police and that due to timely intervention of all social, political and cultural organizations in the area, such unfortunate incidents were averted and the residents of the Payyannur Municipality came out to co-operate with efforts of the investigating agency to find out the real culprits and they accordingly, formed an Action Council insisting for a proper investigation in the case. That they made repeated representations before the Chief Minister and the Home Minister of the State and that the petitioner in W.P.(C).No.20267/2014, is the Convener of the Action Council and the local MLA representing the Payyannur constituency, is the President of the Action Council. That the said

Council represents all socio-cultural and political shades of opinions in the area. That even after a lapse of more than a year, no progress is seen in the investigation in the case and that there is every reason to suspect that the investigation has not proceeded in the right direction and that the State Police agency could not collect any material which would help to identify the assailants and that though there could be eye witnesses to the incident, due to some reason or the other they would not come forward to make any disclosure. Therefore it is only to be suspected that such eye witnesses are under constant threat and therefore it requires an effective and impartial investigation at the hands of the third agency like the respondent CBI. It is further pointed out by the petitioner in W.P.(C).No.17742/2014 that one Sri.K.V.Santhosh, Dy. Supdt. of Police, Crime Branch, Hurt & Homicide Wing, had earlier taken over the investigation from the local Police and had conducted detailed investigation and he had also filed a statement dated 4.7.2015 before this Court in W.P.(C).No.17742/2014, wherein in paragraph 13 thereof it has been stated that there are suspected persons and after collecting cogent and credible evidence regarding their involvement, the Police will proceed to arrest the culprits and will

file final report as expeditiously as possible, etc. But on 11.11.2014, as per orders of the higher authorities, the said Deputy Superintendent of Police was removed from the investigation charge and it was entrusted to his subordinate official, who belongs to the rank of Inspector of Police, CBCID and that there are every reasons to suspect that the transfer of the investigating officer is only due to extraneous reasons, etc. That the deceased Abdul Hakim @ Damodaran originally belonged to Hindu religion and he later converted to Islam and he was an employee of the Kotti Juma Masjid and was in charge of the collection of chitty amounts conducted by the mosque and collection of donations towards the construction of Maddressa building in the mosque premises. That the petitioner suspects the involvement of the managing committee members of the mosque in the murder of her husband and that disputes are pending between some of the managing committee members and the deceased, with regard to the conduct of chittys as well as release of money for the purpose the construction of Maddressa and that thorough investigation has been stalled which has resulted in serious miscarriage of justice so far and that the efficacy of rule of law and proper and fair conduct of the criminal investigation

requires that the further investigation in this crime be entrusted to an impartial and outside party like the respondent CBI.

10. Heard Sri.K.Gopalakrishna Kurup, learned Senior Counsel instructed by Sri.Abhishek Kurian. learned counsel for the petitioner in W.P.(C).No.20627/2015, Sri.P.Vijayaraghavan, learned State Attorney appearing for the respondent State officials, Sri.Haridas. P.Nair, learned Central Government Counsel, appearing for the 1st respondent Union of India in W.P.(C).No.20267/2015, Sri.Krishnadas P.Nair, learned Central Government Counsel appearing for the Union of India in W.P.(C).No.17742/2014, Sri.P.P.Thajudeen & Sri.B.H.Mansoor, learned Advocates appearing for the petitioner in W.P.(C).No.17742/2014 and Sri.P.Chandrasekhara Pillai, learned Standing Counsel appearing for the CBI.

11. The scope and width of the powers conferred on this Court for directions for entrustment of criminal investigation being conducted by the State Police agencies to the Central Bureau of Investigation may be initially considered. There is a catena of decisions of the Apex Court and various High Courts, including this Court on this aspect of the matter. But this Court would primarily endeavour to make a focus on this issue based on the Five Judge

Constitution Bench landmark decision of the Apex Court in the case STATE OF WEST BENGAL AND OTHERS v. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL AND OTHERS reported in (2010) 3 SCC 571. It has been held by the Apex Court in paragraphs 51 and 39 thereof that the Constitution of India expressly confers the power of judicial review on the Supreme Court and High Courts under Articles 32 and 226 respectively and that the judicial review is an embedded and inalienable component of the basic structure of the Constitution, which cannot be ousted or abridged even by a Constitutional amendment. It has been further amplified in paras 68 and 52 thereof that no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights and such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Therefore, to borrow the words of Lord Steyn, judicial review is justified by a combination of *“the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review”*.

12. It has been cogently held in para 57 of the said Constitution Bench decision that the powers of judicial review

conferred on the High Court are, in a way, wider in scope and the High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, “for any other purpose”. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but “for any other purpose” as well, i.e. for enforcement of any legal right conferred by a Statute, etc. and that what has been stated in regard to exercise of jurisdiction by the Supreme Court under Art.32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Art.226 of the Constitution of India. In paras 43 and 44 thereof it has been held by the Apex Court that the doctrine of separation of powers cannot curtail the power of judicial review conferred on the Constitutional courts in situations where the fundamental rights, which include Arts.14, 19(1)(a) and 21, are sought to be abrogated or abridged on the ground that the exercise of such power would impinge upon the said doctrine. It has been held unequivocally in paragraph 69 of the

decision that being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Art.21 of the Constitution in particular, zealously and vigilantly. Therefore, a direction by the High Court in exercise of its jurisdiction under Art.226 of the Constitution to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. That when the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. Irrespective of there being any statutory provision regarding the consent of the State Government concerned, acting as a restriction on the powers of the Courts, the restriction imposed by Sec.6 of the Special Police Act on the powers of the Union, cannot be

read as restriction on the powers of the Constitutional Courts.

13. Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution and therefore it was held therein that exercise of power of judicial review by the High Court would not amount to infringement of either the doctrine of separation of power or the federal structure. Accordingly, the Constitution Bench made the following broad conclusions in paragraph 68 of the said reported judgment:

“(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the

Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "*the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review*".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any

statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.”

14. The Apex Court in the case Prof.K.V.Rajendran v. Superintendent of Police, CBCID, reported in 2013 (2) KLD 453 (SC), has held in para 10 thereof that courts could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigation agency like CBI only in rare and exceptional cases.

15. One of the objectives would be that it is so necessary to do justice and instill confidence in the investigation or that the investigation is prima facie found to be tainted or biased. It has also been held in paragraph 6 of that decision that where the investigation has already been completed and final report/charge sheet has already been filed, ordinarily, then the superior courts should not re-open the investigation and it should be left to the court where the final report/charge sheet has been filed, to proceed with the matter in accordance with law, etc.

16. It has been referred to in the earlier portion of this judgment, that it has been clearly held by the Constitution Bench of

the Apex Court in the case Committee for Protection of Democratic Rights' case (supra), Art.21 of the Constitution of India in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law and that the said provision not only takes within its fold enforcement of the rights of an accused but also the rights of the victim and the State has a duty to enforce human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers and in certain cases even a witness to the crime may seek for and shall be granted protection by the State [see para 68(ii)]. It has been further held in sub paras (v) and (vi) that restriction on the Parliament by the Constitution and restriction on the executive by Parliament under an enactment do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution of India and that if in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, the courts would be precluded

from exercising the same power which the Union could exercise in terms of the provisions of the statute and that exercise of such power by the constitutional courts would not violate the doctrine of separation of powers and that if in such a situation, the Court fails to grant relief, it would be failing in its constitutional duty.

17. On a perusal of the averments and materials on record made available in this case and on a close scrutiny of the contentions and averments made by the parties, this Court is of the considered opinion that the present case is a rare and peculiar case, which requires investigation at the hands of a third agency like the respondent CBI. The body of the deceased was found charred and fully burnt. It has been reported by the learned State Attorney that the results of the DNA test made available on 15.5.2014 have disclosed that the charred body was that of the deceased Abdul Hakim @ Damodaran (deceased in this case), but that no substantial progress could be made in the investigation of the case so far and no fruitful results have been borne out so far. The matter has gained the attention of the entire public at large in Payyannur Municipal area and that it is not disputed that all shades of social political and cultural opinions in the locality have reinforced their

energies and had formed an Action Council to ensure effective conduct of the investigation in this case and the petitioner in W.P. (C).No.20627/2015 is the Convenor of the Action Council formed in that regard of which the local MLA is the president. Moreover, the petitioner in W.P.(C).No. 17742/2014 (wife of the deceased) had submitted a detailed representation to the Home Department praying that the further investigation in this case be entrusted to the respondent CBI. It is considering all the relevant aspects of the matter, that the State Government has issued Ext.P-3 proceedings dated 14.11.2014 [produced in W.P.(C).No. 20627/2015], which was forwarded to the Central Government in the Ministry concerned as per Ext.P-4 therein and later reminders thereto, also submitted as per Ext.P-5. Thus it is evident that the State Government in exercise of discretion under Sec.6 of the Delhi Special Police Establishment Act, 1946 has granted its consent to the respondent CBI for taking over the further investigation of the instant crime. The opinion formed by the State Government in this regard, as reflected in Ext.P-3 supra, cannot be brushed aside by this Court. The nitty-gritty of the details as to what prevented the effective and impartial conduct of the investigation in the instant case need not detain us

as Ext.P-3 has been issued in November, 2014 and the matters should not delay any further delay as the investigation has to be taken to its logical conclusion. In this view of the matter, taking an overall appreciation of the facts and circumstances of this case, as well as the opinion formed by the State Government in exercise of its discretion under Sec.6 of the DSPE Act, this Court is of the considered opinion that this is a fit and rare case, wherein the investigation should be conducted by the respondent CBI, in the interest of justice.

18. The learned Advocates appearing for the writ petitioners have also relied on a decision of the Allahabad High Court in the judgment and order dated 21.4.2014 in Criminal Miscellaneous Writ Petition No.6593/2010 in the case Chandar Sheel Dwivedi v. State of U.P. And Ors. The said decision is based on the interpretation of Sec.3, Secs.4 & 5 and Sec.6 of the Delhi Special Police Establishment Act, 1946. In this regard, it would be profitable to make a reference to the provisions contained in Secs.3, 4, 5 and 6 of the DSPE Act, which read as follows:

Section 3.

"3:Offences to be investigated by special police establishment.- The Central Government may, by notification in the

Official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment."

Section 4.

"4:Superintendence and administration of special police establishment- (1)The Superintendence of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1998) shall vest in the Commission.

(2) Save as otherwise provided in sub-section (1) the superintendence of the said police establishment in all other matters shall vest in the Central Government.

(3) The administration of the said police establishment shall vest in an officer appointed in this behalf by the Central Government (hereinafter referred to as the Director) who shall exercise in respect of that police establishment such of the powers exercisable by an Inspector-General of Police in respect of the police force in a State as the Central Government may specify in this behalf."

Section 5.

"5:Extension of powers and jurisdiction of special police establishment to other areas.- (1) The Central Government may by order extend to any area (including Railway areas), in a State, not being a Union territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3.

(2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject to any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of the police force of the area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

(3) where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the

officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

Further Sec.6 of the DSPE Act reads as follows:

"6:Consent of State Government to exercise of powers and jurisdiction.- Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union territory or railway area, without the consent of the Government of that State."

Ext.P3 dated 14.11.2014 (published in the Kerala Gazette dated 16.11.2014 as produced in W.P.(C).No. 20627/2015 reads as follows:

"GOVERNMENT OF KERALA
Home (M) Department
NOTIFICATION

14th November, 2014

G.O.(Ms). No.227/2014/Home
Dated Thiruvananthapuram

28th Thulam 1990/

23rd Karthika 1936.

S.R.O.No.708/2014.- In exercise of the powers conferred under section 6 of the Delhi Special Police Establishment Act, 1946 (Central Act 25 of 1946), the Government of Kerala hereby accord consent to the members of the Delhi Special Police Establishment to exercise powers and jurisdiction in the whole of the State of Kerala to investigate the offences involved in Crime No.142/2014 of Payyannoor Police Station registered in connection with the murder of Abdul Hakkim @ Damodaran.

By order of the Governor,

DR.NIVEDITA P.HARAN
Additional Chief Secretary to Government

Explanatory Note

(This does not form part of the notification, but is intended to indicate its general purport)

The wife of the deceased has requested the Government to entrust the investigation of the case in Crime No.142/2014 of Payyannoor Police Station, relating to the murder of Abdul Hakkim @ Damodaran, to the members of the Delhi Special Police Establishment. Government have examined the matter and have decided to transfer the case to the Central Bureau of Investigation. For the

said purpose, consent of the State Government under section 6 of the Delhi Special Police Establishment Act, 1946 (Central Act 25 of 1946) is necessary.

The notification is intended to achieve the above object.”

The impugned Ext.P-7 rejection proceedings issued by the Central Government read as follows:

“No.228/87/2014-AVD II

Government of India
Ministry of Personnel, PG and pensions
(Department of personnel and Training)

New Delhi, dated 29.5.2015

To

The Chief Secretary,
Government of Kerala,
Secretariat, Thiruvananthapuram-695 001.

Subject;- Regarding request for CBI investigation into Crime No. 142/2014 of Payyannoor Police Station registered in Kannur in connection with the murder of Abdul Hakkim @ Damodaran.

Sir,

I am directed to refer to your letter no.48655/M3/2014/Home dated 3.12.2014 and 30.1.2015 on the above mentioned subject.

2. The matter has been considered in this Department in consultation with the CBI. CBI has opined that this is not a case of rare and exceptional nature warranting CBI investigation. Moreover, this case has no interstate or international ramifications.

3. In view of the reasons mentioned above, CBI is unable to take up this case for investigation.

4. Hence, the request of the State Government of Kerala cannot be acceded to.

Yours faithfully,
Sd/-

(Ajit Kumar)

Under Secretary to the Government of India”

19. It is to be noted that merely because the case has no inter-state or international ramifications does not necessarily mean that such cases are not worthy of entrustment of the investigation to the CBI. This Court has already held that in view of the aspects mentioned hereinabove, this case comes within the category of rare and exceptional case. In this regard the State Government has also disclosed in Ext.P-8 that the instant case is a sensational murder case and that the demand for the investigation by the CBI is sought from various quarters and media and that the State is of the considered opinion that this case can be successfully investigated by the CBI.

20. In this view of the matter, the impugned Ext.P-7 proceedings dated 29.5.2015 produced in W.P.(C).No.20627/2015 [Ext.P-4 in W.P.(C).No. 17742/2014] is quashed.

21. In the aforementioned Chandar Sheel Dwivedi's case (supra) the Allahabad High Court has held that the case therein is one of the offences which are included under the notification issued by the Central Government under Sec. 3 of the DSPE Act and further that by notification issued under Secs.4 and 5, the Central Government has extended the jurisdiction of the DSPE Act to the

area to the State of Uttar Pradesh including Allahabad and lastly the Central Government has granted its consent for investigation of the offence by the CBI of the case therein as per order dated 22.4.2012 and that as all the requirements of the DSPE Act are satisfied, and as there is no further power with the Central Government or for that purpose with the CBI to refuse to investigate the offence as referred to by the State Government, etc. After referring to paragraph 69 of the Apex Court's Constitutional Bench decision in State of West Bengal & Others v. Committee for Protection of Democratic Rights, the Allahabad High Court has held as follows:

“We, therefore, issue a writ of mandamus directing the C.B.I. through its Joint Director, Lucknow to investigate the case crime No.262/2010 and to complete the investigation preferably within six months from the date a certified copy of this order is produced before him.

Having regard to the interim order which was granted in the petition and which has counted till date as well as for the fact on record we further direct that the petitioner may not be arrested till the submission of the police report in Case Crime No. 144 of 2010 under Sections 307, 394, 504, 506 I.P.C. and case crime no.146/2010 under Sections – 452, 504 & 506 IPC.”

22. In the view that this Court has already taken that the present case is a rare and exceptional case, where discretion can be exercised by this Court for ordering entrustment of the investigation to the respondent CBI it may not be really necessary to go into the details of the Allahabad High Court judgment referred to above. In

this view of the matter, as impugned Ext.P-7 proceedings dated 29.5.2015 has already been quashed, it is further ordered in the interest of justice that the State Crime Branch Police authorities shall forthwith entrust the entire records in relation of Crime No. 142/2014 of Payyannur Police Station to the competent authority of the respondent CBI without further delay. This shall be done by the State Crime Branch Police authorities within a period of two weeks from the date of receipt of a certified copy of this judgment. The competent authority of the respondent CBI will ensure that the further investigation in the instant case is commenced without any further delay, immediately on receipt of the case records from the State Police authorities as directed above. The respondent CBI authorities concerned will ensure that expeditious steps are taken to complete the investigation as expeditiously as possible. The respondent State of Kerala and all their subordinate authorities concerned are directed to ensure that all necessary co-operation is extended to the competent authority of the respondent CBI officials concerned to ensure that the investigation is commenced and concluded without any further delay. Before parting with this case, it is only to be observed by this Court that the public of the locality

concerned has been clamouring and demanding for an impartial and proper investigation at the hands of the respondent CBI. The body of a 45 year old man was found charred and fully burnt inside the mosque premises. This incident has happened on 9.2.2014. The respondent CBI authorities will focus all their energies and attention to ensure that the unvarnished truth of the matter is unraveled by their dedicated and meticulous investigation in the matter so that the maximum confidence is instilled in the public about the efficacy of the criminal investigation. It is to be borne in mind that if the people lose faith in the credibility of the Police investigation, then it would result in directly eroding the people's faith in the rule of law based constitutional governance system envisaged by the founding fathers of our nation. Therefore, this Court hopes and trusts that the officers of the respondent CBI would rise to the occasion to ensure that the unvarnished truth of the matter is revealed so as to uphold the interest of fairness of the investigation process.

With these observations and directions, both the Writ Petitions (Civil) stand finally disposed of.

sd/+

///True copy///

Sd/-
ALEXANDER THOMAS, JUDGE

P.S. to Judge

