

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1286 OF 2017

Bhushan Govardhan Bihani,
Age 29 years, Occu. Business
and Director of Salasar Wheels
Private Ltd., R/o 12/13,
Moti-Mahal, Maheshnagar,
near RTO Office, Ahmednagar,
District Ahmednagar

..Petitioner

Versus

1. The State of Maharashtra
Through the Secretary,
Home Department, Mantralaya,
Mumbai
2. The Superintendent of Police,
Ahmednagar
3. Police Station, MIDC,
Ahmednagar
4. The Inspector General of Police,
For State of Maharashtra,
Mumbai

..Respondents

Mr R.R. Mantri, Advocate for petitioner
Mr D.R. Kale, A.P.P. for respondents

- WITH-

CRIMINAL APPLICATION NO. 6057 OF 2017
IN
CRIMINAL WRIT PETITION NO. 1286 OF 2017

Sachin s/o Diliprao Gaikwad,
Age 28 years, Occu. Business,
R/o Shrigonda, Taluka Shrigonda,
District Ahmednagar

..Applicant

Versus

1. Bhushan Govardhan Bihani
Age 28 years, Occu. Business
R/o Shrigonda, Tq. Shrigonda,
District Ahmednagar
2. The State of Maharashtra,
through its Secretary,

Home Department,
Maharashtra State, Mantralaya,
Mumbai-32

3. The Superintendent of Police,
Ahmednagar
4. The Police Station,
MIDC at Ahmednagar

Mr N.V. Gaware, Advocate for applicant
Mr D.R. Kale, A.P.P. for respondents

- WITH -

CRIMINAL APPLICATION NO.6132 OF 2017
IN
CRIMINAL WRIT PETITION NO.1286 OF 2017

Suvrendra s/o Dilip Gandhi,
Age 35 years, Occu.Business
and Social work,
R/o Devendra Bungalow,
Anand Rushiji Marg, Ahmednagar
District Ahmednagar

.. Applicant

Versus

1. Bhushan Govardhan Bihani
Age 28 years, Occu.Business
R/o Shrigonda, Tq. Shrigonda,
District Ahmednagar
2. The State of Maharashtra,
through its Secretary,
Home Department,
Maharashtra State, Mantralaya,
Mumbai-32
3. The Superintendent of Police,
Ahmednagar
4. The Police Station,
MIDC at Ahmednagar

.. Respondents

Mr V.D. Salunke, Advocate for applicant
Mr D.R. Kale, A.P.P. for respondents

**CORAM : S.S. SHINDE AND
A.M. DHAVAL, JJ**

**DATE OF RESERVING
THE JUDGMENT : 20.12.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 23.02.2018**

JUDGMENT (Per A.M. Dhavale, J.)

1. Rule. Rule made returnable forthwith. With the consent of parties, matters are taken up for final disposal at admission stage.

2. In Writ Petition no.1286 of 2017, the petitioner seeks directions to the State (respondent no.1) to transfer the complaints dated 10.10.2016, 21.11.2016 and 28.12.2016 made by his father after registration as F.I.R. to the Central Bureau of Investigation (hereinafter referred as 'CBI' for brevity). Criminal Applications no.6057 of 2017 and 6132 of 2017 are for intervention by the persons named in the complaints as the accused.

3. In nutshell, the complainant's allegations disclose that somewhere in December 2014 to March 2015, Mr Deelip Gandhi, Member of Parliament of Ahmednagar constituency purchased a Ford Endeavour vehicle from him as he is authorised dealer in Ford brands. MR Deelip Gandhi registered it late for getting the choice number and thereafter had complained about the performance of the vehicle, which could have been attended by the manufacturer, but he was complaining against the petitioner. It is alleged that on 29.9.2015, Sachin Gaikwad, Suvendra son of Mr Deelip Gandhi, Pawan Gandhi and other persons associated with Mr Gandhi forcibly kidnapped MR Ostwal and Mr Rasal, who were working as Sales Manager and

Manager in the show room of the petitioner. There are allegations about beating, threats, extortion of money, valuable securities and documents in respect of ten Eco Ford vehicles and delivery thereof. Out of ten vehicles, nine vehicles were returned and one vehicle was retained by Deelip Gandhi for his daughter Swati for part payment of around Rs.5 lakhs was made. Mr Deelip Gandhi used his position as a Member of Parliament and made complaints to the Minister and also to the Income Tax and Sales Tax departments to harass and pressurise the petitioner. There were regular threatening calls by Mr Pawan Gandhi and other associates of Mr Deelip Gandhi. The petitioner was frightened and could not dare to lodge F.I.R. for a long time. The complainant made complaint to the Prime Minister dated 10.10.2016 and the same was forwarded to the Superintendent of Police, Ahmednagar. On 21.11.2016 he mustered up courage and lodged complaint to the Superintendent of Police, Ahmednagar, but no F.I.R. came to be registered. The Police have carried out enquiry and have submitted a report that there was no substance in the complaint of the petitioner. Hence, the petitioner claimed that registration of crime and investigation by CBI is necessary.

4. P.S.I. Gore on behalf of respondent no.2 filed affidavit, which shows that the Superintendent of Police had directed the P.S.O., M.I.D.C. police station to conduct enquiry and submit detailed report. Accordingly, enquiry was held. Several statements of material witnesses were recorded. The petitioner did not co-operate and did not produce CCTV footage and call details. The petitioner had not gone to the M.I.D.C. police station to lodge the F.I.R. His complaint

was belated and was made after Sachin Gaikwad lodged the F.I.R. against him at Shrigonda police station. Respondent no.2 - Superintendent of Police, Ahmednagar has also filed his affidavit on similar line. He submitted that the complaint application of the petitioner dated 21.11.2016 was disposed of in view of civil nature of dispute.

5. The two applicants intending to intervene have claimed that the petitioner had sold old car under the guise of supplying a new car purchased. The complainant himself is guilty of cheating and has filed false complaint. He has charged exorbitant road tax and has not exhausted alternative remedy. Sachin Gaikwad has claimed that amount of Rs.25 lakhs was taken by the petitioner from him as hand loan for which he has documentary evidence. There was no case of extortion or intimidation.

6. Heard learned Advocate Mr R.R. Mantri, learned A.G.P. Mr D.R. Kale for respondent-State and Mr V.D. Salunke and Mr N.V. Gaware, learned Advocates for intervenors.

7. The points for our consideration are as follows :

- | | |
|--|-----------------------------|
| (I) Whether Sachin Gaikwad and Suvendra Gandhi deserve to be added as parties ? | .. In the negative |
| (II) Whether the writ jurisdiction can be invoked when the petitioner has not exhausted alternative remedy ? | .. Yes, as exceptional case |

(III) Whether direction for registration of F.I.R. and investigation is necessary ?

..In the affirmative

(IV) What order ?

..Directions issued for registration of F.I.R. and investigation by special team of State C.I.D.

- REASONS -

7. This is a stage where the F.I.R. is yet to be registered. It is the complaint that though report showing allegations of cognizable offences was lodged with the Superintendent of Police, no F.I.R. has been registered and no investigation has been carried out.

8. Per contra, it is alleged that petitioner has come up with false facts and in fact, it was a civil dispute.

9. Mr R.R. Mantri relied on **Divine Retreat Centre Vs. State of Kerala & Ors., 2008 AIR SCC 542**, wherein the High Court had taken suo moto cognizance of an anonymous complaint and formed a Special Investigation Team. The Apex Court held that the High Court ought not to have entertained such a petition under Section 482 of Cr.P.C. The investigation was transferred to CBI. In the peculiar facts, it was held that "no judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting ones own reputation".

10. In **State of Punjab Vs. Davinder Pal Singh Bhullar & Ors., etc., 2012 AIR (SC) 364**, the High Court had suo moto reopened the proceedings, which had been closed when the High Court has become functus officio. The Apex Court observed that though the impugned order gave impression that the High Court was trying to procure the presence of the proclaimed offenders but, in fact, it was to target the police officers, who had conducted the inquiry against Mr. Justice X. The order reads that particular persons were eliminated in a false encounter by the police and it was to be ascertained as to who were the police officers responsible for it, so that they could be brought to justice. There was enquiry with directions of investigation to be carried out by CBI without basis. The observations regarding principles of natural justice and opportunity of hearing were made in the context of the peculiar facts.

11. In **Dinubhai Solanki Vs. State of Gujarat's** case (cited supra), relying on **Union of India Vs. W.N. Chadha, 1993 Supp. (4) SCC 260**, it was observed that the accused has no right to have any say as regards the manner and method of investigation. The accused has no participation as a matter of right during the course of 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. In paragraph 97, it was observed that giving of opportunity to accused would frustrate the proceedings and a prompt action as law demands, and would defeat the ends of justice and the provisions of law. In Dinubhai's case (cited supra), son of respondent no.6, R.T.I. activist was murdered and sole appellant in P.I.L. With two persons had joined

in the P.I.L. as respondents and one of them was accused under Section 302 of IPC. The Apex Court, after having resume of several pronouncements of Supreme Court observed that the High Court has disclosed the facts only for supporting the observation that the investigation had not been conducted impartially and fairly. No specific conclusion was reached by the High Court. The High Court had transferred the investigation to CBI for the reasons disclosed, which do not disclose recording of findings. The Apex Court dismissed the appeal challenging the order of transfer of case to CBI.

12. In the present case, the police are supporting the case of the accused persons and are not interested in registering the F.I.R. and investigating the crime. Hence, as held in Dinubhai Solanki's case (cited supra), there is no necessity to give any opportunity of hearing to the applicants Sachin Gaikwad and Suvendra Gandhi and, therefore, their applications deserve to be rejected and are accordingly rejected.

13. In **Lalita Kumari Vs. Govt. of U.P. & Ors., AIR 2014 SC 187**, It is held : Recording of F.I.R. on receipt of cognizable offence is mandatory under Section 154 of Cr.P.C. There is no discretion to the Police Officer to hold preliminary enquiry. The police officer has to record information despite he being unsatisfied by its reasonableness or credibility. Such information cannot be recorded in general diary by police and it is not permissible to hold preliminary enquiry and thereafter register the F.I.R. The police cannot refuse to register the F.I.R. on the ground that he doubts its credibility and reasonableness. The enquiry relates to judicial act and not to the steps taken by the

police before or after registration of F.I.R. This is so even in case of preliminary enquiry under Section 159 of Cr.P.C. Preliminary enquiry before registration of F.I.R. is permissible if the information received does not disclose commission of cognizable offence. It should not exceed seven days. In case the complaint is closed after the preliminary enquiry, the copy of closure entry must be supplied to the informant. Some illustrative cases in preliminary enquiry are :

- 1) Matrimonial disputes, family disputes
- 2) Commercial offences
- 3) Medical negligence cases
- 4) Corruption cases
- 5) Cases with abnormal delay and laches in initiating criminal prosecution (e.g. delay over three months without satisfactory explanation).

14. In **Sakiri Vasu Vs. State of U.P. & Ors., 2008 AIR (SC) 907**, it is laid down that if the police failed to register the F.I.R. of any person, he has to approach the Superintendent of Police under Section 154 (3) of Cr.P.C. by application in writing and if the grievance still persists, the aggrieved person has to file application under Section 156 (3) of Cr.P.C. before the Judicial Magistrate. Such Magistrate can direct F.I.R. to be registered and to carry out proper investigation. The Magistrate can also monitor the investigating agency to ensure proper investigation. It is held that Section 156 (3) Cr.P.C. is wide enough to include all such powers in a Magistrate to ensure proper investigation and including directions to register the F.I.R. It is

observed that High Court should discourage the practice of filing Writ Petition under Section 482 Cr.P.C. simply because, a person has a grievance of non registration of F.I.R. or not proper investigation. If the aggrieved person without availing the remedies under Sections 154 (3) and 156(3) of Cr.P.C. or lodging private complaint files petition under Section 482 Cr.P.C., it is observed that though alternate remedy is not absolutely barred, but it should not be ordinarily interfered. Directions for enquiry by CBI can be made only by the High Court, only when there is prima facie material showing rare and exceptional case.

15. In **Kunga Nima Lepcha & Ors. Vs.State of Sikkim, AIR 2010 SC 1671**, the Apex Court observed that the alleged act were easily coming within statutory offences of 'possession of assets disproportionate to known sources of income' as well as 'criminal misconduct' under the Prevention of Corruption Act. It was not proper for it (Apex Court) to give directions for initiation of such investigation under writ jurisdiction. The Supreme Court and High Court have granted remedies relating to investigation for to monitor the progress of ongoing investigations to transfer ongoing investigations from one investigating agency to another, when specific violation of fundamental rights was shown. The consequence of apathy or partiality on the part of investigating agency was among the other reasons necessitating judicial intervention. It was observed that judicial intervention is warranted when there are material threats to witnesses, destruction of evidence or undue pressure from powerful interests. In this circumstance, the writ Court can only play to a

corrective role to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is upto the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation. It must also be borne in mind that there are provisions in the Code of Criminal Procedure which empower the courts of first instance to exercise a certain degree of control over ongoing investigations. The scope for intervention by the trial court is hence controlled by statutory provisions and it is not advisable for writ courts to interfere with criminal investigations in the absence of specific standards for the same. IF the Supreme Court gives directions for prosecution, it could cause serious prejudice to the accused, as the directions of this Court may have far reaching persuasive effect on the Court which may ultimately try the accused.

16. In **Abhimanyu Ravan Ingale Vs. State of Maharashtra, Criminal Writ Petition No.720 of 2014 decided on 15.1.2015 by Division Bench of this Court (S.S. Shinde and A.I.S. Cheema, JJ)**, there was agitation by ladies against illegal liquor business resulting into assault and disturbance of law and order. The police allegedly assaulted ladies and enquiry by CBI was sought. There was allegation against the police that they tried to destroy the evidence and did not take cognizance of serious complaints by the ladies.

17. After considering the rival submissions and the relevant case law, in the light of departmental action taken against the police

officers, it was found that there were no extra-ordinary facts requiring investigation by CBI and it was observed that the Magistrate was competent to address to the grievances of the informant and the informant ought to have approached to the Magistrate.

18. It is not proper for the petitioner or his Advocate to directly approach the High Court bypassing the alternative remedies. However, as held in **Dinubhai Boghabhai Vs. State of Gujarat & Ors., 2014 AIR (SCW) 1722 & Fairwind's Asset Managers Ltd. Vs. State of Maharashtra, decided by Division Bench (Naresh H. Patil and Prakash D. Naik, JJ) of this Bench in Criminal Writ Petition No.779 of 2016 on 25.8.2016**, this Court is not precluded from invoking the inherent jurisdiction even in cases, where the alternative remedy is not exhausted. This can be, however, done only in exceptional case and not as a matter of routine.

19. Such exceptional mode of invoking the jurisdiction even when the alternative remedies are not exhausted can be followed when the alternative remedy would not work and it is essential to invoke such powers in this case to maintain the faith in the judicial system for following reasons:

20. In the present case, the alleged main incident took place on 29.9.2015. The petitioner's father made complaint to the Superintendent of Police, Ahmednagar and to the Prime Minister, on 22.11.2016 and 14.3.2017. No doubt, there was delay but he has given facts in detail which gives rise to a possibility that he was under fear and due to threats by some of the accused persons there was delay.

21. In the present case, the main allegations are against Member of Parliament and his associates. There are serious allegations of extortion, kidnapping, intimidation, compelling the petitioner and his witnesses to execute valuable securities and transfer of huge cash. There is allegation that there is tape recorded evidence and various SMS to substantiate these facts. We refrain from making statement about the correctness of these facts, but we find that the allegations did disclose serious cognizable offences and the recording of F.I.R. was a must. Of-course, if the allegations are not true, the police were at liberty to file appropriate Summary 'A', 'B' or 'C', but the decision was to be taken by the Judicial Magistrate, First Class or Chief Judicial Magistrate on submission of report of sufficient evidence or deficient evidence. The police had no authority to take the decision on their own.

22. The police in the present case have shown adamant attitude and have declined to register the F.I.R. on wrong assumption that they have right to hold preliminary enquiry or determine whether the allegations are true or false. The preliminary enquiry can be only held for determining whether cognizable offence was disclosed or not and it has to be completed within seven days, but in the present case, preliminary enquiry was held to find out veracity of the allegations and it was continued for indefinite period whereby valuable time was lost. In the present case, the police have already arrived at conclusion that no offence was made out. This has been held without carrying out investigation and without recognising the right of the Judicial Magistrate to take ultimate decision as to whether the cognizance should be taken or not.

23. The conduct of police officers in the present case indicates that they were either afraid or reluctant to register the F.I.R. and carry out the investigation in a fair and impartial manner. The police are insisting for CCTV footage and call details record. It is common knowledge that in most of the investigations such type of evidence may not be available. The police could not take the role of Judicial Magistrate to determine whether the evidence is sufficient or not for taking cognizance. Since the Superintendent of Police is head of the police department in a district, once he has taken a decision, no police officer of any inferior rank will be in a position to take a decision contrary to the decision taken by the Superintendent of Police. We find that there is very little possibility of fair and impartial investigation if this writ petition is dismissed and the petitioner is directed to take recourse under Section 156(3) Cr.P.C., We also find that lodging of complaint by the petitioner will not suffice, as some investigation is essential to unearth the truth.

24. In the present case, the petitioner and the parties are served and their arguments are heard. The intervening parties have also got some opportunity of hearing, have filed their affidavit-in-reply to put up their case. At this stage, if the petitioner is directed to file application before the Magistrate and the Magistrate directs registration of F.I.R., it will be again subject of challenge by way of revision before the Sessions Judge and thereafter again to this Court. Considering the time lost, we find that it will not be just to direct the petitioner to approach the Magistrate and invite further loss of time.

25. In the facts and circumstances of the present case, we find that the F.I.R. must be registered and the investigation should be carried out by a Special Team and not by police officer sub-ordinate to Superintendent of Police. Considering the nature of facts, we find that this is not a fit case for directing the investigation by CBI. It has no international ramification and public interest. Notwithstanding the society should not have a feeling that if some offences are committed by a Member of Parliament, who is the highest representative of people in a district, there will be no fair and partial investigation. We hasten to state that we are not expressing any opinion with regard to merits of the case. It may be possible that the petitioner or his father might have provided old car showing it as a new and might have filed a false complaint. In appropriate case, the police are at liberty to file 'B' Summary. We find that the society has a right for fair and impartial investigation, even if the complaint made by any person is against a politically influential person. At the same time, there is no adverse presumption against any political party. We are interested only in fair and impartial investigation following of the due process of law in the matter. We find that if we do not exercise the powers under Article 226 of the Constitution, this is not possible. We, therefore, allow the writ petition in following terms :

- ORDER -

(I) The Writ Petition is allowed;

(II) The petitioner or his father should approach the concerned police station within twenty-four hours and file F.I.R.in terms of earlier oral or written complaint made to the Superintendent of Police as per letter dated 21.11.2016 (Annexure 'F') and if the F.I.R. is already not registered, respondent no.3 shall register the same immediately as per Section 154 of Cr.P.C.

(III) We direct the respondent no.4 - Inspector General of Police that the said crime shall be handed over for investigation to State C.I.D. The Investigating Officer shall then expeditiously conduct the investigation to find out the truth without getting influenced in any way by any observations made in this order and then shall file final report under Section 173 of Cr.P.C. either of sufficient evidence or deficient evidence (Summary 'A', 'B' or 'C') as the facts disclosed in the investigation may reveal. The compliance of these directions shall be reported by Police to the Chief Judicial Magistrate, Ahmednagar immediately.

(IV) The Criminal Applications for intervention stand disposed of.

(V) Rule is made absolute in above terms with no order as to costs.

26. The parties shall act on the authenticated copy of this order, which shall be provided to them.

(A.M. DHAVAL, J.)

(S.S. SHINDE, J.)