

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.589 OF 2017

VIPUL SHITALPRASAD AGGARWAL)...APPLICANT

V/s.

**CENTRAL BUREAU OF INVESTIGATION)
AND OTHERS)...RESPONDENTS**

Mr.Shirish Gupte, Senior Advocate, a/w. Ms.Supriya Kak & Mr.Shailesh D. Chavan I/b. Karansingh Rajput, Advocate for the Applicant.

Mr.Anil Singh, Additional Solicitor General of India, a/w. Mr.S.D.Patil, Advocate for the Respondent No.1 – CBI.

Mr.Gautam Tiwari i/b.Probus Legal, Advocate for the Respondent No.3.

Ms.Anamika Malhotra, APP for the Respondent No.2 – State.

CORAM : A. M. BADAR, J.

DATE : RESERVED ON : 2nd August 2018

PRONOUNCED ON : 10th September 2018

JUDGMENT :

1 By this revision petition, revision petitioner/accused no.24 Vipul Shitalprasad Aggarwal is challenging the orders dated 7th April 2015 and 7th November 2017 passed by the learned Special Judge for the Central Bureau of Investigation (CBI) at Greater Mumbai, below Exhibits 549 and 1370 respectively. By these impugned orders, claim for discharge under Section 227 of the Code of Criminal Procedure from offences punishable under Sections 120B, 364, 365, 368, 341, 342, 384, 302 read with 201 of the Indian Penal Code and under Section 25 of the Indian Arms Act in Sessions Cases Nos.177 of 2013, 178 of 2013, 577 of 2013 and 312 of 2014 made by the revision petitioner/accused no.24, came to be rejected by the learned Special Judge for the CBI, Greater Mumbai.

2 In order to have a better understanding of the subject matter, it is necessary to state case of the prosecution against the accused persons in brief. The prosecution case is to the following effect :

- (a) Sohrabuddin Shaikh (since deceased) was a dreaded criminal, against whom offences of murder, abduction and extortion etc. were registered in the States of Gujarat and Rajasthan. He was an absconding accused in Crime No.214 of 2004 regarding murder of Hamid Lala committed in jurisdiction of Hathipole Police Station of Udaipur in Rajasthan and in Crime No.1124 of 2004 registered at Navrangpura Police Station, Ahmedabad, Gujarat, in respect of firing at the office of the Popular Builder. In the year 1994/95 upon his arrest, Gujarat Police seized 24 AK 56 rifles, large number of hand grenades and a large cache of ammunitions from the well of his farm house, which was supposedly sent to him by Dawood Ibrahim at the instance of ISI for spreading terror in India. Police from States of Gujarat, Rajasthan and Madhya Pradesh were desperately searching for his whereabouts. Kausarbi (since deceased) was wife of deceased Sohrabuddin Shaikh. Tulsiram Prajapati (since deceased) was an aide of deceased Sohrabuddin Shaikh and they both were undertaking

criminal activities jointly. Award of Rs.25,000/- and Rs.20,000/- was already declared on Sohrabuddin Shaikh and Tulsiram Prajapati respectively. According to the prosecution case, in the year 2004, gang of Sohrabuddin Shaikh became very active in Rajsamand, Nathdwara, Sukher and Udaipur districts of Rajasthan i.e. the areas which are known for marble mining and trade including export of the marble. Hamid Lala gang was protecting the marble traders for consideration. Gang of Sohrabuddin Shaikh and Tulsiram Prajapati wanted to take control over the area for financial gains by getting rid of Hamid Lala gang. Accordingly, Hamid Lala was murdered by Sohrabuddin Shaikh and his gang. Sohrabuddin Shaikh also started extorting large sum of money from A.K.Marbles and M/s.Sangam Textiles. In view of criminal background and nuisance of Sohrabuddin Shaikh and Tulsiram Prajapati, the accused persons from Gujarat and Rajasthan Police force entered into criminal conspiracy to eliminate Sohrabuddin Shaikh and then acted in connivance in abduction and

killing of Sohrabuddin Shaikh. Acting in furtherance of the conspiracy, they also killed Kausarbi and Tulsiram Prajapati.

- (b) According to the prosecution case, senior police officers from the States of Gujarat and Rajasthan entered into a criminal conspiracy to eliminate Sohrabuddin Shaikh. For this purpose, they sought help from his associate Tulsiram Prajapati for nabbing Sohrabuddin Shaikh by misleading Tulsiram Prajapati that due to political pressure, they need to arrest Sohrabuddin Shaikh for few months, and subsequently, he will be released on bail. Criminal conspiracy to eliminate Sohrabuddin Shaikh came to be hatched by senior officers including the discharged accused and other Police Officers, by being in constant touch with each other. For that purpose, discharged accused D.G.Vanzara, Rajkumar Pandiyan and Dinesh M.N. as well as others were in constant touch and were visiting various places in other States. There was meeting of minds between them. Everyone had interest in nabbing Sohrabuddin

Shaikh. For achieving this ultimate aim of the criminal conspiracy hatched by the accused persons, teams of police officers from States of Gujarat and Rajasthan were formed. Police came to know that Sohrabuddin Shaikh along with his wife Kausarbi had gone to Hyderabad for celebrating the festival of Eid with his friend Kalimuddin of Hyderabad. Police received the tip that on 22nd November 2005, Sohrabuddin Shaikh along with his wife Kausarbi was to go from Hyderabad to Sangli for gynecological treatment of Kausarbi, and they were to undertake this journey by luxury bus of Sangita Travels, Ahmedabad, in company of Tulsiram Prajapati. It is alleged that Police therefore, decided to abduct Sohrabuddin Shaikh during this journey.

- (c) According to prosecution case, in pursuant to conspiracy hatched discharged accused no.3 Dinesh M.N. visited Anti Terrorist Squad, Ahmedabad, about two months prior to fake encounter of Sohrabuddin Shaikh. Discharged accused no.3 Dinesh M.N. was at Ahmedabad from 24th November

2005 to 26th November 2005 when Sohrabuddin Shaikh died in fake encounter by teams of Gujarat and Rajasthan Police. Infact, he was present on the spot of encounter of Sohrabuddin Shaikh. He met discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, for hatching the conspiracy.

- (d) How abduction took place is reflected from CBI statement of Nathuba Jadeja (PW105) and Gurudayal Singh (PW106), recorded by the Investigating Agency i.e. Central Bureau of Investigation (CBI) on 11th May 2010 and 4th March 2010 respectively. These two witnesses at the relevant time i.e. in November 2005, were working with the Anti Terrorist Squad, Ahmedabad, as drivers. They are star witnesses of the prosecution. Further part of the prosecution case is therefore, extracted from the CBI statement of PW105 Nathuba Jadeja.

- (e) As reflected from police statement of PW105 Nathuba Jadeja recorded by the CBI, at about 6.00 p.m. of 20th November 2005, discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police with the Anti Terrorist Squad, Ahmedabad, called him and directed him to accompany Police Inspector named N.H.Dhabi on a tour. Accordingly, along with Police Officials named Ajay Parmar, Santaram Sharma and co-driver Gurudayal Singh (PW106), Nathuba Jadeja (PW105) travelled by Qualis vehicle from Ahmedabad to Hyderabad. They reached Hyderabad at about 8.00 – 8.30 p.m. of 21st November 2005 and went to the campus of Central Industrial Security Force, Hyderabad. By that time, discharged accused no.2 Rajkumar Pandiyan had already reached Hyderabad by taking a morning flight by seeking permission of discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat. Police Inspector N.H.Dhabi and Santaram Sharma went to meet discharged

accused no.2 Rajkumar Pandiyan at a bungalow in the campus of the Central Industrial Security Force, at Hyderabad. Police Official Santaram Sharma stayed at that bungalow. Thereafter, Police Officials N.H.Dhabi and Parmar stayed in one room, whereas PW105 Nathuba Jadeja and PW106 Gurudayal Singh stayed in the another room of the guest house in the campus of the Central Industrial Security Force at Hyderabad, for the night halt.

- (f) Statement of PW105 Nathuba Jadeja recorded by the CBI further reflects that on 22nd November 2005, at about 8.30 – 9.00 a.m., Police Officials N.H.Dhabi, Parmar as well as drivers PW105 Nathuba Jadeja and PW106 Gurudayal Singh left the Central Industrial Security Force campus and went to IPS Officers mess, where N.H.Dhabi and Parmar met discharged accused no.2 Rajkumar Pandiyan. Thereafter, Police Officials Parmar and Santaram Sharma, along with PW105 Nathuba Jadeja and PW106 Gurudayal Singh went to Airport for purchasing air ticket for the return journey of

discharged accused no.2 Rajkumar Pandiyan. Ajay Parmar went inside the Airport for purchasing the ticket. Then, they returned to the Officers Mess. Santaram Sharma and Ajay Parmar then bought two number plates. Subsequently, number plates of Qualis came to be changed by substituting it with the number plate having registration number of Andhra Pradesh by PW105 Nathuba Jadeja and PW106 Gurudayal Singh, on instructions of Police Officer Parmar.

- (g) CBI statement of PW105 Nathuba Jadeja shows that at about 7.00 p.m of 22nd November 2005, discharged accused no.2 Rajkumar Pandiyan accompanied by seven to eight other persons left for intercepting the luxury bus in which Sohrabuddin Shaikh was travelling, by two Tata Sumo vehicles. PW105 Nathuba Jadeja was following them by driving the Qualis vehicle. One of the Tata Sumo vehicles was driven by PW106 Gurudayal Singh. During the course of chasing the luxury bus, after a brief halt at the hotel, discharged accused no.2 Rajkumar Pandiyan, Police Officers

named N.H.Dhabi and Santaram Sharma along with two others sat in the Qualis driven by PW105 Nathuba Jadeja. The luxury bus was further chased by those two Tata Sumo vehicles as well as the Qualis vehicle driven by PW105 Nathuba Jadeja. After midnight, discharged accused no.2 Rajkumar Pandiyan directed PW105 Nathuba Jadeja to intercept the luxury bus by overtaking it by the Qualis vehicle. Accordingly, on intercepting it near Zahirabad, the luxury bus stopped. Discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and others approached the bus. Then Sohrabuddin Shaikh, his wife Kausarbi as well as Tulsiram Prajapati were made to alight from the said bus. Sohrabuddin Shaikh and Tulsiram Prajapati were then made to sit in the Qualis vehicle driven by PW105 Nathuba Jadeja, whereas Kausarbi was made to sit in the Tata Sumo vehicle driven by PW106 Gurudayal Singh. During return journey towards Ahmedabad, 2 kilometers after Bharuch, Kausarbi was also shifted to the Qualis vehicle driven by PW105 Nathuba Jadeja. Tulsiram

Prajapati was shifted to another vehicle by Rajasthan Police. He was taken to Udaipur where he was kept in illegal custody for five days. Thereafter, he was shown to be arrested by a team led by PW22 Bhawarsingh Hada, Station House Officer, Hathipole Police Station, Udaipur. Tulsiram Prajapati was then allowed to go by setting him free. He came to be apprehended on 26th November 2005 from the house of Chandan Kumar Jha at Bhilwara by PW38 Sudhir Joshi, Deputy Superintendent of Police, Udaipur, Rajasthan.

- (h) As seen from the CBI statement of PW105 Nathuba Jadeja, after reaching Ahmedabad, on instructions of Police Officials named Parmar and Chaubey, the Qualis vehicle was driven to the farm house at Adluj Road and Sohrabuddin Shaikh along with his wife Kausarbi were kept in the said “Disha Farm House” in night hours of 23rd November 2005. Police Officials named N.H.Dhabi, Parmar and Chaubey stayed at the said farm house. Discharged accused no.2 Rajkumar Pandiyan was dropped at his house. On his instructions, the Qualis vehicle was driven towards the

police chowki near Judges bungalow. It was parked in one of the bungalows by PW105 Nathuba Jadeja. This is how, according to the prosecution case, Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati were abducted from the luxury bus near Zahirabad, while they were undertaking journey from Hyderabad to Sangli and subsequently Sohrabuddin Shaikh and Kausarbi were dumped in the “Disha Farm House” near Ahmedabad.

- (i) According to the prosecution case reflected from the statement of PW105 Nathuba Jadeja, fake encounter of Sohrabuddin Shaikh was done by the accused persons in the night intervening 25th November 2005 and 26th November 2005. At about 1.30 a.m. to 2.00 a.m. of 26th November 2005, PW105 Nathuba Jadeja drove Maruti car which was occupied by Police Officers from Rajasthan Police as well as accused Police Officer N.H.Dhabi. PW105 Nathuba Jadeja was made to stop that Maruti car in between Narol circle and Vishala circle. At about 2.00 a.m. of 26th November

2005, another Maruti car driven by Bhailal (PW107) came from Narol and stopped there. N.H.Dhabi and Police Personnel from Rajasthan Police alighted from the car. After sometime, PW105 Nathuba Jadeja heard sound of shots being fired. On instructions, he and co-driver Bhailal (PW107) reversed the Maruti car. PW105 Nathuba Jadeja then saw Sohrabuddin Shaikh lying there in injured condition. Discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, and discharged accused no.3 Dinesh M.N. (who is referred as the Superintendent of Police Udaipur by PW105 Nathuba Jadeja) along with other Police personnels namely Chaubey, Santaram Sharma etc. were found to be present there. One motorcycle was also found lying there. Police Officials N.H.Dhabi and Ajay Parmar took Soharabuddin Shaikh to the hospital in Maruti car driven by Bhailal (PW107). In this way, fake encounter of Sohrabuddin Shaikh came to be effected in between

Narol circle and Vishala circle, in the night intervening 25th November 2006 and 26th November 2006, by the accused persons.

- (j) According to the prosecution case reflected from the CBI statement of PW105 Nathuba Jadeja, thereafter, Kausarbi also came to be murdered by the accused persons and her dead body came to be disposed off by burning it at the river bed of the river at Village Ellol. PW105 Nathuba Jadeja was asked by discharged accused no.1 D.G.Vanzara, Deputy Inspector General, to accompany the tempo along with Police Official Chauhan. Firewood came to be loaded in that tempo and during the journey to Village Ellol, that tempo faced problem of malfunctioning of gear. Another tempo was summoned and firewood came to be shifted in that tempo. Further journey started thereafter and at about 10.00 to 11.00 p.m. of 28th November 2005, that tempo also got stuck in the sand in the bed of the river at Village Ellol. Then, discharged accused D.G.Vanzara, discharged

accused Rajkumar Pandiyan and discharged accused N.K.Amin came there. Firewood from the tempo came to be stacked near the river bed. Dead body of Kausarbi was brought there by a jeep. As stated by PW105 Nathuba Jadeja, it was kept on the funeral pyre by him as well as by Chauhan, Chaubey and Rathod. Discharged accused D.G.Vanzara, Deputy Inspector General, burnt it by setting the pyre on fire. Thereafter, ashes and bones came to be collected in a bag and by the jeep, that bag was carried away by Police Officials named Chaubey and Chauhan.

- (k) Prosecution case, as reflected from the statement dated 4th March 2010 of PW106 Gurudayal Singh recorded by the CBI is to the effect that on instructions of N.H.Dhabi, Police Inspector, Anti Terrorist Squad, at 7.30 p.m. of 20th November 2005, he, alongwith N.H.Dhabi, Santaram Sharma and Ajay Parmar started their journey in the Qualis vehicle driven by PW105 Nathuba Jadeja and then after 2.00 a.m., he drove that vehicle. They reached Hyderabad

and stayed in the rooms at the campus of Central Industrial Security Force for the night halt on 21st November 2005. On 22nd November 2005, they went to the IPS Mess where discharged accused Rajkumar Pandiyan was camping. In the afternoon, he along with Parmar, Nathuba Jadeja (PW105) and Santaram Sharma went to the Airport for purchasing Air tickets for discharged accused Rajkumar Pandiyan. Parmar went inside the Airport for purchasing the Air ticket. Thereafter, on instructions from N.H.Dhabi, he and PW105 Nathuba Jadeja changed the number plates of the Qualis vehicle by affixing number plates starting with "AP-11". In the evening of 22nd November 2005, he sat in the Tata Sumo vehicle along with three officers and followed the luxury bus. He has then spoken about intercepting the luxury bus by the Qualis and abduction of three persons including a lady from that bus by discharged accused Rajkumar Pandiyan and others. As per his version, abducted lady and Santaram Sharma sat in the Tata Sumo in which he was travelling. Thereafter, two kilometer

after Bharuch, that burkha clad lady and Santaram Sharma sat in the Qualis vehicle. This witness further stated that on reaching Ahmedabad, he went to his room in the Anti Terrorist Squad campus, and thereafter, proceeded on leave due to sickness of his nephew. Thus, statement of this witness PW106 Gurudayal Singh shows that while leaving Ahmedabad by the Qualis vehicle, he was not driving it but it was being driven by PW105 Nathuba Jadeja, whereas PW105 Nathuba Jadeja is stating that PW106 Gurudayal Singh was driving it. He has stated that he was one of the member of the police team which travelled from Hyderabad in three vehicles and abducted Sohrabuddin Shaikh and two others, but he was not driving the vehicle during that period.

- (1) After murdering Sohrabuddin Shaikh in the fake encounter, accused no.7 Police Inspector Abdul Rehman from Rajasthan Police filed First Information Report (FIR) with Crime Investigation Department, Crimes, (CID Crimes), Gujarat,

alleging that absconding accused Sohrabuddin Shaikh was coming by highway from Surat and upon being asked to surrender he opened fire, and therefore, in retaliation the police also opened fire, due to which Sohrabuddin Shaikh came to be killed. Accordingly Crime No.05 of 2005 came to be registered. Accused no.4 Parmar, Police Officer, investigated the FIR and reported the encounter to be genuine and submitted Abate Summary.

- (m) According to the prosecution case though Sohrabuddin Shaikh and others were already nabbed by Gujarat Police in the night intervening 22nd November 2005 and 23rd November 2005, discharged accused Dinesh M.N. travelled to Ahmedabad on 24th November 2005 on the false pretext that he has secret information and he wants to arrest Sohrabuddin Shaikh. He used to meet discharged accused D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, as well as discharged accused Rajkumar Pandiyan, Superintendent of Police, Anti

Terrorist Squad, Ahmedabad, Gujarat, for conspiring to eliminate Sohrabuddin Shaikh.

- (n) According to the prosecution case apart from active role in eliminating Sohrabuddin Shaikh, discharged accused D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, also played vital role in encountering Tulsiram Prajapati. After arrest of Tulsiram Prajapati from Bhilwara in Rajasthan in November 2005, discharged accused D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, paid visit to Udaipur from 27th December 2005 to 30th December 2005 in furtherance of conspiracy hatched by accused persons. He also telephonically communicated with PW22 Bhawarsingh Hada, Police Inspector, after arrest of Tulsiram Prajapati for ascertaining gang activities of Tulsiram Prajapati.

- (o) According to the prosecution case, Tulsiram Prajapati used to disclose his apprehension of killing in fake encounter by police to inmates of jail at Udaipur, including his nephew PW3 Kundan Prajapati and PW4 Vimal Shrivastava, PW42 Rafique @ Bunty, PW Mohd. Azam and PW37 Sharafat Ali. He had expressed same apprehension of killing in fake encounter to his Advocate PW35 Salim Khan. Tulsiram Prajapati had submitted several applications before the concerned court as well as National Human Rights Commission, New Delhi, expressing apprehension of killing by police in fake encounter. Thus, according to the prosecution case, under the conspiracy hatched by accused persons, Tulsiram Prajapati was systematically eliminated by sending him to Ahmedabad from Udaipur in custody of four selected guards of choice of discharged accused Dinesh M.N.
- (p) According to the prosecution case on 25th December 2006 Tulsiram Prajapati was given in custody of specially formed escort team headed by Assistant Sub-Inspector Narayan

Singh and comprising of Police Constables Dalpat Singh, Kartar Singh and Yaduveer Singh. On instructions of discharged accused Dinesh M.N., Tulsiram Prajapati was produced before the court at Ahmedabad in Popular Builder Firing case on 26th December 2006. The prosecution case indicates that during return journey undertaken on 26th December 2006 from Ahmedabad to Udaipur by Udaipur Express, Tulsiram Prajapati was infact not with the escort team headed by Assistant Sub-Inspector Narayan Singh. At about 3.00 a.m. of 27th December 2006, a show of escape of Tulsiram Prajapati from the custody of the police guards was made. When the train became slow because of turning near Shamalji Railway Station, Tulsiram Prajapati was shown to have escaped from custody of the police guards. It is alleged that two criminals threw chilli powder in eyes of police guards Yaduveer Singh and Kartar Singh when they accompanied Tulsiram Prajapati towards urinal and then along with those two criminals, Tulsiram Prajapati was shown to have escaped from their custody. Farce of trying

to nab him by chasing him and firing bullets was made. According to prosecution, he was actually not in the custody of those guards. Thereafter, he was infact killed in fake encounter at about 5.00 a.m. of 28th December 2006 by one of the accused named Ashish Kumar Pandya, Police Sub-Inspector of Gujarat Police.

- (q) According to the prosecution case, on 25th December 2006, discharged accused D.G.Vanzara who was then posted as Deputy Inspector General of Police, Border Range, Bhuj, summoned PW132 Khanji Jadeja, Police Sub-Inspector, and told him to go to the house of accused Ashish A. Pandya at Meghpar and to ask said Ashish A. Pandya to contact him. Along with PW133 Meghjibhai, Head Constable, PW132 Khanji Jadeja then went to house of accused Ashish A. Pandya and informed his wife and parents to tell him to contact discharged accused D.G.Vanzara. Thereafter, at about 5.00 a.m. of 28th December 2006, Tulsiram Prajapati was killed in an encounter by accused Ashish A.

Pandya, Police Sub-Inspector. This was done in pursuant to the plan hatched by accused persons.

- (r) The prosecution further averred that after fake encounter of Tulsiram Prajapati by accused no.7 Ashish Kumar Pandya, said Ashish Kumar Pandya in presence of the revision petitioner and in consultation with discharged accused D.G.Vanzara gave false FIR to Ambaji Police Station that Tulsiram Prajapati was killed in a genuine encounter. To avoid blame of shoddy investigation, the revision petitioner intentionally instructed PW143 Mayur Chawda, the then Deputy Superintendent of Police to supervise that investigation though said PW143 Mayur Chawda was Probationary Deputy Superintendent of Police.

- (s) According to the prosecution case, discharged accused D.G.Vanzara had called back accused no.7 Ashish Kumar Pandya, Police Sub-Inspector, who was on leave. Said accused no.7 Ashish Kumar Pandya ultimately shot down

Tulsiram Prajapati in a fake encounter at about 5.00 a.m. of 28th December 2006. Revision petitioner/accused no.24 Vipul Aggarwal, who then was the Superintendent of Police, Banaskantha, had deliberately and knowingly approved the office note and ordered the destruction of leave record of accused no.7 Ashish Kumar Pandya, despite the fact that the revision petitioner was well aware about pendency of the Criminal Writ Petition No.115 of 2007 filed by Narmadabai – mother of Tulsiram Prajapati. This was done for ensuring that material evidence of criminal conspiracy is destroyed to screen the offenders from the legal consequences of their crime.

- (t) Version of other side in respect of encounter of Tulsiram Prajapati reflected from the charge-sheet also needs to be put on record. The FIR of encounter of Tulsiram Prajapati came to be lodged by Police Sub-Inspector Ashish Kumar Pandya (co-accused) on 28th December 2006 while at the Cottage Hospital at Ambaji. He reported that at about

11.00 p.m. of 27th December 2006, information was received from the police control room about escape of Tulsiram Prajapati from custody of Udaipur police. Hence, he along with his staff as well as Assistant Sub-Inspector Narayan Singh, Police Constables Kartar Singh and Yaduveer Singh of the escort team of Udaipur Police from Rajasthan reached Ambaji and searched absconding accused Tulsiram Prajapati by checking various places including guest houses. Then, after 4.30 a.m. of 28th December 2006, they started patrolling on the road leading towards Sarhad Chapri. At about 5.00 a.m., they saw three persons on the road who were trying to stop the Matador pick up vehicle. That Matador vehicle did not stop. When the police jeep following the Matador vehicle reached at that spot, those three persons tried to stop that jeep. At that time, Assistant Sub-Inspector Narayan Singh of Udaipur Police identified one from those three persons as Tulsiram Prajapati. Then, according to the FIR lodged by Police Sub-Inspector Ashish Kumar Pandya, Tulsiram Prajapati took out a firearm and

fired a bullet which hit on left side of mudguard of the police jeep. Thereafter, Tulsiram Prajapati along with those two persons started running away. Police Sub-Inspector Ashish Kumar Pandya further reported that he got down from the jeep and asked those three persons to surrender. At that time, Tulsiram Prajapati turned back and fired one round from the firearm. That bullet hit left upper arm of Police Sub-Inspector Ashish Kumar Pandya (co-accused), and therefore, he fired two rounds from his service revolver. Apart from him, Assistant Sub-Inspector Narayan Singh and Police Constable Yaduveer Singh also fired from their service weapons causing fall of Tulsiram Prajapati. He was, then, taken to Simji Hospital. Tulsiram Prajapati was declared dead at that hospital. Accordingly, Crime No.115 of 2006 came to be registered at Police Station Ambaji on the basis of this report lodged by Police Sub-Inspector Ashish Kumar Pandya.

- (u) The charge-sheet in the instant case reveals that Police Sub-Inspector Ashish Kumar Pandya (co-accused) was admitted to the Government hospital Palanpur on 28th December 2006 with the history of fire arm injury caused at about 5.00 a.m. of that day. Initially, he had taken treatment at Shri Arasuri Ambaji Mata Devasthan Trust Hospital, Ambaji, on 28th December 2006 itself. Certificate of that hospital shows that Police Sub-Inspector Ashish Kumar Pandya had sustained a circle wound (2.5 x 2.5 cm) on upper part of left arm with active bleeding and blackness of skin. Small carbon particles were found near that wound. He had also sustained an irregular wound (3 x 1 cm) vertical 1 cm, posterior to wound no.1. Bleeding was found present apart from sand particles in that wound. Similar are the findings of the Government hospital Palanpur. Medical Officer had opined that the injury was a fire arm injury. Medical Officer of Palanpur had informed police that entry wound was having inverted margin and blackening of skin in wound and tissues were present. Thus, Ashish Kumar Pandya,

Police Sub-Inspector of Gujarat Police (co-accused), had also suffered gunshot injuries in alleged fake encounter of Tulsiram Prajapati.

- (v) Spot of the incident of alleged encounter of Tulsiram Prajapati was inspected. It was found that the shot from the firearm had damaged left side signal light of the jeep of the police party. Its glass was found broken. One cartridge was found lying near the edge of the road. One gun was also found lying on the spot of the incident. It was having wooden grip and the same was of 0.314 bore having body made up of steel. One cartridge was also found loaded in the barrel of that gun. This was the situation prevalent on the spot of the incident which was on the main road leading from Ambaji to Sarhad Chapri, where according to the prosecution case, Tulsiram Prajapati was eliminated in the fake encounter. During inquest proceedings, the Executive Magistrate recovered a mobile phone, three bullets and sundry items from dead body of Tulsiram Prajapati.

(w) It is alleged that fake encounter of Tulsiram Prajapati was done as Tulsiram Prajapati was disclosing to all and sundry as to how he was used by Gujarat Police for nabbing Sohrabuddin Shaikh and as he was an eye witness to abduction of Sohrabuddin Shaikh and his wife Kausarbi. While in Central Jail, Udaipur, Tulsiram Prajapati used to disclose role of discharged accused D.G.Vanzara and others in abducting and killing of Tulsiram Prajapati and Kausarbi apart from apprehending danger to his life from discharged accused D.G.Vanzara and others. Hence, he came to be murdered.

3 At the outset, let us know what role in the alleged conspiracy to kill Sohrabuddin Shaikh and Tulsiram Prajapati is attributed to the petitioner by the prosecuting agency i.e. the CBI. The prosecuting agency has summarized its case in the "Brief facts of the case" after Column No.20 of the printed format of the charge-sheet. So far as revision petitioner/accused no.24 Vipul

Shitalprasad Aggarwal, the then Superintendent of Police, Banaskantha is concerned, the allegations against him are summarized in paragraphs 6.45 and 6.52 to 6.54 of the “Brief facts of the case.” Those read thus :

“6.45 On 25.12.2006, in furtherance of the criminal conspiracy, accused D.G.Vanzara (A-2) the then DIG, Border Range in order to engage Aashish Pandya (A-7), the then Sub-Inspector of Police, Special Operation Group, Palanpur in the conspiracy, directed Police Sub-Inspector K.R.Jadeja and Police Constable Meghjibhai Maheshwari to go to Village Meghpar (of Aashish Pandya) and inform his family members to contact him immediately. Subsequently, call detail records of mobile phones as mentioned below shows that in the evening of 25.12.2006, pursuant to the criminal conspiracy, Vipul Aggarwal (A-5) had conversation with D.G.Vanzara (A-2) and thereafter with accused Aashish Pandya (A-7), who subsequently called Shri D.G.Vanzara (A-2) and accordingly reported for duty on 26.12.2006.”

Sr. No.	Called No.	Calling No.	Duration (in seconds)	Date and Time
1	Vipul Aggarwal	D.G.Vanzara	73	25-12-2006 19:01:38 Hrs.
2	Aashish Pandya	Vipul Aggarwal	63	25-12-2006 19:25 Hrs.
3	Aashish Pandya	D.G.Vanzara	56	25-12-2006 19:29:46 Hrs.
4	Aashish Pandya	Vipul Aggarwal	76	25-12-2006 19:30 Hrs.

6.52 Immediately after the murder of Tulsiram Prajapati on 28.12.2006, Vipul Aggarwal (A-5), the then SP, Banaskantha, who was very near to Ambaji area himself took Dy.SP (Probationer), Mayur Chavda to the scene of crime, near Sarhad Chapri in his own vehicle. The way Vipul Aggarwal (A-5) was leading and explaining the incident, it was clear that he had already been to the scene of crime.”

“6.53 He knowingly directed Dy.SP (Probationer), Mayur Chavda who had joined the District two days before i.e. on 26.12.2006 for one year field training for the visitation of the offence (scene of crime) in a sensitive case. Vipul Aggarwal (A-5) while directing Mayur Chavda was conscious of the fact that Dy.SP (Probationer) were not supposed to handle any sensitive work relating to cases independently.”

“6.54 Accused Aashish Pandya (A-7) was called back from his leave by accused DG Vanzara (A-2) for participating in the criminal conspiracy as aforesaid and taking it towards its culmination point by murdering Tulsiram Prajapati. Aashish Pandya (A-7) had submitted a Casual Leave Application prior to his departure for such leave, but subsequently, accused Vipul Aggarwal (A-5) had deliberately and knowingly allowed/ordered the destruction of the said leave records pertaining to him in spite of and because of the fact that he was aware that Criminal Writ Petition No.115 of 2007 (filed by Naramadabai, mother of Tulsiram Prajapati) was pending hearing and disposal in the Hon'ble Supreme Court, where he too was one of the Respondents in the said Writ Petition, and did so for the purpose of ensuring that material evidence that could show that the accused Aashish Pandya (A-7) had actually suddenly returned from his leave to participate in the criminal conspiracy was destroyed to screen the offenders from the legal consequences of their crimes.”

4 Even in submission of the learned counsel appearing for all parties, the revision petitioner/accused no.24 is being

prosecuted for his alleged involvement in committing the subject crime in the following manner :

- “i) On the instruction of Mr.D.G.Vanzara, the accused sent message to Mr.Ashish Pandya, the main shooter of Tulsiram Prajapati, to cancel his leave and join duty.
- ii) Mr.Ashish Pandya gave false FIR in consultation with Shri D.G.Vanzara in the presence of this accused at Ambaji Police Station that Tulsiram Prajapati was killed in genuine encounter.
- iii) In order to avoid blame of shoddy investigation of that case the accused intentionally instructed Mr.Mayur Chawda, Dy.S.P. on probation to supervise that investigation. It was against settled norms that a trainee officer should not be assigned the duty to supervise investigation in serious cases.
- iv) In 2008, when the Writ Petition filed by Narmadabai Prajapati, mother of Tulsiram Prajapati, for handing over the investigation to CBI was pending for consideration before the Hon'ble Supreme Court, the

accused ordered to destroy the relevant leave record of Ashish Pandya, thereby causing disappearance of material evidence.”

5 Revision petitioner/accused no.24 Vipul Aggarwal, initially preferred an application (Exhibit 549) before the learned trial court seeking his discharge on the ground that record of the case and the documents submitted therewith do not demonstrate sufficient ground for proceeding against him. After rejection of that application on 7th April 2015 by the learned trial court and subsequent to allowing similar applications filed by accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, accused no. 3 Dinesh M.N., the then Superintendent of Police, Udaipur, Rajasthan, and accused no.2 Rajkumar Pandiyan, the then Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, revision petitioner/accused no.24 Vipul Aggarwal again preferred an application for discharge (Exhibit 1370) on the ground that the accused persons allegedly having more serious

role than him are discharged. However, that application at Exhibit 1370 also came to be rejected vide order dated 7th November 2017. Both these orders are challenged in the instant revision petition. The learned trial court vide order dated 7th April 2015 while rejecting the application for discharge preferred by revision petitioner Vipul Aggarwal has held that PW230 Arvindbhai Patel, Police Inspector of Ambaji Police Station, has stated that accused Ashish Pandya, Police Sub-Inspector, lodged the FIR after fake encounter of Tulsiram Prajapati in consultation with D.G.Vanzara (the discharged accused no.1) and revision petitioner Vipul Aggarwal. It took two hours to record that FIR by accused Ashish Pandya, Police Sub-Inspector, and the said FIR was found to be false in the course of investigation by the CID, Crimes, Gujarat, as well as the CBI. The learned trial court further observed that PW230 Arvindbhai Patel, Police Inspector, and others have stated that in the night of 28th December 2006, revision petitioner Vipul Shitalprasad Aggarwal, the then Superintendent of Police, Banaskanth, personally patrolled the area. The learned trial court then posed a question as to if revision

petitioner Vipul Aggarwal had knowledge of escape of Tulsiram Prajapati, then why he did not disclose that fact to Officers of the Ambaji Police Station. It is further observed by the learned trial court that at Ambaji Trust Hospital, revision petitioner Vipul Aggarwal contacted accused Ashish Pandya, Police Sub-Inspector, at the instance of D.G.Vanzara, the then Deputy Inspector General of Police, Border Range, Bhuj. Revision petitioner Vipul Aggarwal was knowing that accused Ashish Pandya, Police Sub-Inspector, was called back on duty. It is further held that revision petitioner Vipul Aggarwal asked PW143 Mayur Chawda, the then Deputy Superintendent of Police, to supervise the investigation by withdrawing himself from the investigation and that said PW143 Mayur Chawda was Probationer Deputy Superintendent of Police. Second application for discharge (Exhibit 1370) came to be rejected subsequently on 7th November 2017 by the learned trial court by holding that there is no similarity of facts between the case against revision petitioner Vipul Aggarwal, the then Superintendent of Police, Banaskantha at Palanpur and other discharged accused viz. D.G.Vanzara, the then Deputy Inspector

General, Anti Terrorist Squad and Range Deputy Inspector General of Police, Bhuj, Gujarat, Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, and Dinesh M.N., Superintendent of Police, Udaipur. It is further held that the order rejecting the application for dropping proceedings filed by revision petitioner Vipul Aggarwal for want of sanction under Section 197 of the Code of Criminal Procedure is under consideration of this court in Criminal Revision Application No.377 of 2015.

6 I have heard Shri Gupte, the learned senior advocate appearing for the revision petitioner. He vehemently argued that both the impugned orders rejecting application for discharge moved by revision petitioner are per se illegal. They are suffering not only from illegality, but also from perversity. The learned senior counsel argued that there is no iota of material on record to demonstrate that on instructions of D.G.Vanzara, the then Range Deputy Inspector General of Police, Border Range, Bhuj, the revision petitioner, who happened to be the Superintendent of

Police, Banaskantha, had given message to Ashish Pandya, Police Sub-Inspector, to cancel his leave and join duty. Statement of PW132 Khanji Jadeja, Police Sub-Inspector, and that of Meghjibhai Maheshwari, Head Constable, are clear. Both of them are not naming the revision petitioner as the person who communicated the message to co-accused Ashish Pandya, Police Sub-Inspector to cancel his leave. The learned senior counsel further argued that statement of Kanji Solanki, Police Inspector, given to the CBI is false on the face of record. This falsehood can be seen from statements of Dhrutiben Ashish Pandya, who happens to be wife of co-accused Ashish Pandya, Police Sub-Inspector. The learned senior counsel further argued that the allegation that false FIR came to be lodged by co-accused Ashish Pandya, Police Sub-Inspector, in consultation with the revision petitioner as well as discharged accused D.G.Vanzara are not borne from the record of investigation. With similar allegations, the same learned Judge was pleased to discharge co-accused D.G.Vanzara, the then Range Deputy Inspector General of Police. Therefore, the same evidence cannot be made use for holding that

there are sufficient grounds for proceeding against revision petitioner Vipul Aggarwal. My attention is also drawn to statement of PW143 Mayur Chawda, Deputy Superintendent of Police, Banaskantha, to demonstrate that the same does not reflect sufficient material to frame the Charge against the revision petitioner. It is argued that PW143 Mayur Chawda was posted as Deputy Superintendent of Police at Banaskantha, and though on probation, he was having full powers conferred on the post of Deputy Superintendent of Police. Therefore, he was entitled to take up visitation of criminal offences entrusted to him. The learned senior counsel further argued that PW143 Mayur Chawda, Deputy Superintendent of Police, joined the office of the Superintendent of Police, Banaskantha on 26th December 2006 and on the very same day visitation of Crime No.114 of 2006 was entrusted to him as Deputy Superintendent of Police, Palanpur Shri Chhabia was on leave. Then, on 28th December 2006, encounter of Tulsiram Prajapati took place and as PW143 Mayur Chawda was the available Deputy Superintendent of Police at Ambaji, naturally visitation of that crime was entrusted to him by

the revision petitioner. No criminality in such official act can be inferred.

7 So far as destruction of casual leave record is concerned, the learned senior counsel placed reliance on the rules regarding destruction of government record and submitted that as casual leave record falls under Category D, the same was rightly destroyed by way of routine official procedure. The note sheet submitted to him was approved by the revision petitioner, he being the Superintendent of Police, Banaskantha. This action was as per the relevant Rules.

8 The learned senior counsel further argued that wireless message regarding escaping of Tulsiram Prajapati from custody of Police Guards was duly circulated throughout Banaskantha District by Office of Superintendent of Police, Banaskantha, in the night intervening 27th December 2006 and 28th December 2006. This action goes a long way to show that the

revision petitioner was not concerned with the alleged criminal conspiracy.

9 Shri Gupte, the learned senior counsel, relied on judgment of the Honourable Supreme Court in the matter of **Popular Muthaiah vs. State**¹ and argued that while exercising its revisional or appellate powers, the High Court can exercise its inherent powers, both in relation to substantive as well as procedural matters. Reliance is further placed on judgment of the Honourable Supreme Court in the matter of **Rukmini Narvekar vs. Vijaya Satardekar & Another**² for arguing that in very rare and exceptional cases, the defence material which can show that the prosecution version is totally absurd or preposterous can be looked into at the time of framing of the Charge. With this, Shri Gupte, the learned senior counsel, argued that replies given to the queries made under Right to Information Act, 2005, by the authorities of the State unerringly point out that leave record of the year 2006 came to be destructed in the year 2008 in order to

1 (2006) 7 SCC 296

2 (2008) 14 SCC 1

follow directives of the State given under “Nirmal Gujarat” Scheme. Similarly, it also shows that immediately after escape of Tulsiram Prajapati, at about 2.00 a.m. of 28th December 2006, wireless message was transmitted by Superintendent of Police, Banaskantha, to all concerned in the district for taking up search of the escaped accused namely Tulsiram Prajapati. Therefore, statement of PW230 Arvindbhai Patel, the then Police Inspector of Ambaji Police Station, to the effect that escaping of Tulsiram Prajapati was not made known is per se false.

10 The learned senior counsel further argued that while exercising inherent powers vested in this court, this court relying on judgment of **Popular Muthaiah (supra)** as well as in the matter of **Zahira Habibullah H. Sheikh and Another vs. State of Gujarat and Others**³ can look into the deposition of PW143 Mayur Chawda, the then Deputy Superintendent of Police, Banaskantha, which shows that he was holding additional charge of the post of Deputy Superintendent of Police, Palanpur, and as such, took up visitation of Crime Nos.114 of 2006 and 115 of

3 2004 CRI.L.J.2050

2006, both of Ambaji Police Station. Version of this witness before the court does not show that there was consultation by revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha with D.G.Vanzara, Deputy Inspector General of Police, for lodging report of encounter of Tulsiram Prajapati.

11 The learned senior counsel further argued that alleged fake encounter of Tulsiram Prajapati took place at about 5.00 a.m. of 28th December 2006 whereas destruction of leave record of co-accused Ashish Pandya, Police Sub-Inspector, along with other records took place in January 2008. Therefore, Section 120B of the Indian Penal Code cannot be invoked against revision petitioner/accused no.24. In support of this contention, reliance is placed on judgment of Honourable Supreme Court in **Ram Narayan Popli vs. CBI**⁴.

12 The learned senior counsel placed reliance on judgment in the matter of **Yogesh @ Sachin Joshi vs. State of**

4 (2003) 3 SCC 641

Maharashtra⁵ and Sajjan Kumar vs. CBI⁶ to buttress his contention that even if it is assumed that material collected during investigation point out suspicion against the accused, the same cannot be held as sufficient to frame the Charge.

13 As against this, Shri Anil Singh, learned ASGI, argued that impugned orders rejecting application for discharge moved by the revision petitioner are perfectly legal. The material collected during investigation shows that co-accused Ashish Pandya, Police Sub-Inspector, joined duty by canceling his leave and had lodged false FIR of encounter of Tulsiram Prajapati in consultation with the revision petitioner, who happened to be the Superintendent of Police. The learned ASGI further argued that entrustment of visitation of Crime No.115 of 2006 to Probationer Deputy Superintendent of Police PW143 Mayur Chawda reflects involvement of the revision petitioner in the criminal conspiracy hatched by accused persons for eliminating Tulsiram Prajapati. The learned ASGI submitted that prayer for dropping the

5 (2008) 10 SCC 394

6 (2010) 9 SCC 368

proceedings for want of sanction under Section 197 of the Code of Criminal Procedure, as made by the revision petitioner is rejected even by this court, and therefore, the revision petitioner should face trial.

14 I have heard Shri Tiwari, the learned counsel appearing for respondent no.3 Rubabuddin, who happens to be the First Informant and brother of deceased Sohrabuddin Shaikh. He supported the impugned orders rejecting discharge by arguing that the revision petitioner was instrumental in securing presence of co-accused Ashish Pandya, Police Sub-Inspector, who eliminated Tulsiram Prajapati and filed false FIR in consultation with the revision petitioner as well as D.G.Vanzara, the then Range Deputy Inspector General of Police. The revision petitioner had also destructed leave record of Ashish Pandya, Police Sub-Inspector. Shri Tiwari, the learned counsel placed reliance on statement of Dhrutiben Ashish Pandya and Khanji Solanki to demonstrate that the revision petitioner made a telephone call to Ashish Pandya, Police Sub-Inspector, for

directing him to resume duty by cancelling leave. Statement of PW132 Khanji Jadeja and PW133 Meghajibhai Maheshwari are also pressed in service by the learned counsel to demonstrate that there is sufficient material to proceed against the revision petitioner. It is argued that overlooking the protocol and breaching the protocol, investigation of Crime No.115 of 2006 registered after murdering Tulsiram Prajapati was entrusted to Probationer Deputy Superintendent of Police PW143 Mayur Chawda. Reliance is also placed on statement of Jayprakash Patel, Police Sub-Inspector, working in office of the Superintendent of Police, Banaskantha to show that leave record of co-accused Ashish Pandya was destructed. Thus, in submission of the learned counsel for respondent no.3, the revision petitioner had played major role in recalling co-accused Ashish Pandya, Police Sub-Inspector, and destruction of his leave record.

15 To demonstrate that material forming strong suspicion against the accused in respect of commission of crime is sufficient to frame the Charge, Shri Tiwari, the learned counsel appearing

for the respondent no.3 has relied on judgments in Sitaram Sao @ Mungeri vs. State of Jharkhand⁷, Mathuradas vs. State⁸, Haroon Haji Abdulla vs. State of Maharashtra⁹ and State vs. S. Selvi and Others¹⁰. Reliance is also placed on judgment of the learned Single Judge of Delhi High Court in Aruna Chadha vs. State of Delhi¹¹.

16 I have carefully considered the rival submissions and also perused the record and proceedings. As the claim of revision petitioner/accused no.24 Vipul Aggarwal, who at the relevant time was serving as Superintendent of Police, Palanpur, District Banaskantha, is rejected by the learned Additional Sessions Judge on two occasions, and as those orders are subject matter of challenge before this court, it is apposite to quote provisions of Section 227 and 228 of the Code of Criminal Procedure, 1973 (Cr.P.C. for the sake of brevity). Section 227 and relevant portion of section 228 of the Cr.P.C. reads thus:

7 AIR 2008 SC 391

8 104 (2003) DLT 147

9 AIR 1968 SC 832

10 AIR 2018 SC 81

11 Criminal Revision No.305 of 2013 decided on 25th July 2013

“Section 227 : Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

“Section 228 : Framing of charge - (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which –

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with

the procedure for the trial of warrant - cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

17 Bare perusal of provisions of these sections of the Cr.P.C. goes to show that when the judge considers that there is no ground for proceeding against the accused, he is required to discharge the accused by recording his reasons. However, if the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, then he is required to frame charge. By now it is well settled that at this stage detailed scrutiny of material gathered by the prosecution in order to examine whether the same is sufficient for recording the conviction or not is absolutely not essential. What is required is examination of the material from the angle whether the same constitutes sufficient ground for proceeding against the accused. Some prima facie material raising strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him.

18 It is necessary to quote a decision of the Hon'ble Apex Court in the matter of State of Maharashtra v. Priya Sharan Maharaj and Ors.¹². After referring to Section 227 of the Cr.P.C. and power of the Sessions Court to discharge the accused, this is what is observed by the Hon'ble Supreme Court:-

“8. The law on the subject is now well-settled, as pointed out in Niranjan Singh Punjabi v. Jitendra Bijaya, (1990) 4 SCC 76 : (AIR 1990 SC 1962), that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for

¹² AIR 1997 SC 2041

proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.”

19 In a later decisions reported in the matter of Dilawar Babu Kurane v. State of Maharashtra¹³, the Hon'ble Supreme Court observes thus:

“12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before

13 AIR 2002 SC 564

him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

Similar is the ratio of judgment in the matter of **S.Selvi & Others (supra)** and **Arun Chadha (supra)**. Similarly, if at the stage of framing of the Charge, even if two views are possible, then view favourable to the prosecution needs to be accepted as held in the matter of **Mathuradas (supra)**. In the matter of **Yogesh @ Sachin Joshi (supra)** following are the observations of the Honourable Supreme Court found in paragraph 16. It reads thus:

“16 It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of

judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. [See: **State of Bihar vs. Ramesh Singh ((1977 4 SCC 39)** and **Union of India vs. Prafulla Kumar Samal (1979) 3 SCC 4).**”

20 The law regarding framing of Charge or discharge of the accused is summarized by the Honourable Supreme Court in the matter of **Sajjan Kumar (supra)**, paragraph 21 of which reads thus :

“21 On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge :

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weight the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to

consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if

the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

21 What is impugned in this revision petition are the orders rejecting applications for discharge filed by the revision petitioner in Sessions Case Nos.177 of 2013, 178 of 2013, 577 of 2013 and Sessions Case No.312 of 2014. The claim for discharge was for offence punishable under Sections 120B, 364, 365, 368, 341, 342, 384, 302 read with 201 of the Indian Penal Code as well as under Section 25 of the Indian Arms Act. It is well settled that

the revisional jurisdiction of this court is required to be exercised when it is shown that there is glaring defect of procedure or manifest error in the point of law which has resulted in miscarriage of justice. Finding of fact cannot be upset in the revisional jurisdiction, unless and until it is shown to be perverse. Sufficiency of evidence for recording a finding of fact cannot be reassessed in the revisional jurisdiction. However, if it is pointed out that a particular finding is arrived at by the learned Court below without there being any evidence to support such finding, the revisional Court is required to interfere in upsetting such perverse finding. Keeping in mind these parameters of the revisional jurisdiction of this Court, let us consider the case in hand and examine whether the impugned order of rejection of discharge applications suffer from perversity or error of law requiring interference at the hands of this Court.

22 It is apposite to note that the crime in question was initially investigated by Gujarat Police. Later on, under orders of the Honourable Supreme Court, further investigation came to be

entrusted to the CBI. There is no order of reinvestigation. Therefore, statement of witnesses initially recorded by Gujarat Police, so also the charge-sheet filed by it are not redundant and cannot be kept out of consideration. They continue to be relevant and cannot be termed as tainted or unreliable. This point is clear from the judgment of the Honourable Apex Court in the very same matter. (Refer **Vipul Shital Prasad Agarwal vs. State of Gujarat and Others**¹⁴)

23 After rejection of applications for discharge filed by the revision petitioner before the learned trial court, he approached this court for assailing those orders and vide interim order dated 13th November 2017, this court directed the learned trial court not to frame the Charge against the revision petitioner. This revision petition has come up for hearing after about 9 months. It is reported by the parties that in between, the Charge against rest of the accused persons has been framed and explained to them. They pleaded not guilty and claimed trial. It is also reported that the trial thereafter began and by now more than 150 witnesses are

14 AIR 2013 SC 73

already examined by the prosecuting agency in support of the Charge.

24 Now let us examine the circumstances pressed into service by the prosecution for framing Charge against revision petitioner/accused no.24 Vipul Aggarwal, the then Superintendent of Police, Banaskantha at Palanpur. The first circumstance on which the prosecution is relying to demonstrate that there is sufficient material to frame the Charge is telephonic conversation between revision petitioner Vipul Aggarwal, Superintendent of Police, and co-accused Ashish Pandya, Police Sub-Inspector, as well as discharged accused D.G.Vanzara, the then Deputy Inspector General of Police, Border Range, Bhuj. This circumstance is found in paragraph 6.45 of "Brief facts of the case" of the charge-sheet. In this paragraph, it is averred by the investigating agency that in pursuant to the criminal conspiracy hatched by accused persons, revision petitioner Vipul Aggarwal had conversation with discharged accused D.G.Vanzara, the then Deputy Inspector General of Police, and co-accused Ashish

Pandya, Police Sub-Inspector. In addition to this, it is sought to be argued on behalf of prosecuting agency as well as the First Informant that, infact, the revision petitioner had telephonically contacted co-accused Ashish Pandya, Police Sub-Inspector, for recalling him on duty. In this regard, statements of PW132 Khanji Jadeja, Police Sub-Inspector, and statements of PW133 Meghjibhai Maheshwari are relevant. Statements of PW132 Khanji Jadeja, Police Sub-Inspector, are recorded on 19th July 2011 and 13th March 2012. Statements of PW133 Meghjibhai Maheshwari, Head Constable, are recorded on 19th July 2011 as well as on 12th March 2012. Their statements reflect that discharged accused D.G.Vanzara, the then Range Deputy Inspector General of Police, Bhuj, had directed them to go to the residence of co-accused Ashish Pandya, Police Sub-Inspector, situated at Village Meghpar, and to tell him to contact him (discharged accused D.G.Vanzara). Both these witnesses went to Village Meghpar by car of PW248 H.B.Jhala, Police Inspector, and informed family members of co-accused Ashish Pandya, Police Sub-Inspector, to contact discharged accused D.G.Vanzara. Statements of both

these witnesses do not reflect that there were any directions to them in this regard by revision petitioner/accused no.24 Vipul Aggarwal, Superintendent of Police. Statement dated 18th June 2011 of PW134 Khanji Solanki, Police Inspector, is sought to be made use to show that revision petitioner Vipul Aggarwal, Superintendent of Police, had telephonically contacted co-accused Ashish Pandya, Police Sub-Inspector, for recalling him on duty. It is stated by PW134 Khanji Solanki, Police Inspector, that as per directions of R.K.Patel, Police Inspector, CID Crimes, Gujarat, he recorded statement of Dhrutiben Ashish Pandya – wife of co-accused Ashish Pandya, Police Sub-Inspector, and during the course of recording of her statement, Dhrutiben told him that her husband Ashish Pandya, Police Sub-Inspector, had received a telephonic call from the Superintendent of Police to resume duty for secret operation. However, the statement dated 7th May 2010 of Dhrutiben Ashish Pandya recorded by this witness is not mentioning the fact that her husband Ashish Pandya, Police Sub-Inspector, had received a telephonic call from the Superintendent of Police, Banaskantha, to resume duty for secret operation.

Another statement of Dhrutiben Ashish Pandya given to the CBI on 27th August 2011 is also not containing this fact. Thus, version of PW134 Khanji Solanki, Police Inspector, to the effect that Dhrutiben told him that her husband Ashish Pandya got a telephonic call from the revision petitioner, who then was serving as Superintendent of Police, to resume duty, cannot constitute sufficient ground for proceeding against the revision petitioner. Even that is not the case of the prosecution as reflected from paragraph no.6.45 of the charge-sheet narrating brief facts of the prosecution case. What is stated by PW134 Khanji Solanki, Police Inspector, is seen to be factually incorrect, in the wake of statements of Dhrutiben Pandya.

25 Then comes the telephonic calls exchanged between revision petitioner Vipul Aggarwal, the then Superintendent of Police, co-accused Ashish Pandya, Police Sub-Inspector, and discharged accused D.G.Vanzara, the then Range Deputy Inspector General of Police, Border Range, Bhuj. It is seen from the details given in paragraph 6.45 – brief facts of the prosecution

case that revision petitioner Vipul Aggarwal had called discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, at 19:01:38 hours of 25th December 2006 and duration of the call was 73 seconds. Co-accused Ashish Pandya, Police Sub-Inspector, had called revision petitioner Vipul Aggarwal on 25th December 2006 twice. The first call lasted for 63 seconds and it was made at 19:25 hours. The second call lasted for 76 seconds and it was made at 19.30 hours. It is also stated by the prosecuting agency that co-accused Ashish Pandya, Police Sub-Inspector, had called discharged accused D.G.Vanzara at 19:29:46 hours of 25th December 2006 and that call lasted for 56 seconds. On the face of record, these call details are incorrect because if co-accused Ashish Pandya had called discharged accused D.G.Vanzara at 19:29:46 hours for 56 seconds, then how he can call revision petitioner Vipul Aggarwal on the same day at 19.30 hours, is not explained by the prosecution. However, this is insignificant aspect of the matter. It is seen from the charge-sheet that what were the details of conversation between revision petitioner Vipul Aggarwal and co-accused Ashish Pandya,

Police Sub-Inspector, as well as discharged accused D.G.Vanzara, are not stated by the investigating agency. No material as regards the conversation between these three persons is available. According to the prosecution case, Dinesh M.N., the then Superintendent of Police, Udaipur, Rajasthan, had played a pivotal role in hatching the conspiracy, and it was he who informed Gujarat Police that Tulsiram Prajapati had escaped from the custody of Police Guards. If all this was going under the planned criminal conspiracy then, it was incumbent on the part of the prosecution to collect the call data records of discharged accused Dinesh M.N., Superintendent of Police, Udaipur, in order to demonstrate that revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, Border Range, Bhuj, and co-accused Ashish Pandya, Police Sub-Inspector, who actually fired at Tulsiram Prajapati were having conversation with each other as well as with discharged accused Dinesh M.N. at the crucial moment of 25th December 2006 as well as 28th December 2006 for furtherance of their criminal conspiracy.

Thus, merely on the basis of call data records of discharged accused D.G. Vanzara, accused persons cannot be prosecuted for such a serious offence, without there being details of conversation. The Call Data Records (CDRs) of discharged accused Dinesh M.N. are not produced with the charge-sheet. The learned trial court has missed this crucial aspect of the matter and has not even deliberated on it in the impugned order. Otherwise also, discharged accused D.G.Vanzara was the Range Deputy Inspector General of Police, under whom revision petitioner Vipul Aggarwal and co-accused Ashish Pandya, Police Sub-Inspector, were serving. As such, telephonic conversation amongst them without material regarding details of conversation and topic of conversation does not lead to inference of criminal conspiracy allegedly hatched by them.

26 Now let us examine whether as stated in paragraph nos.6.52 to 6.54 of “Brief facts of the case” in the charge-sheet, it is shown that revision petitioner Vipul Aggarwal had already been to the scene of the incident and had deliberately and knowingly

directed PW143 Mayur Chawda, the Deputy Superintendent of Police on probation, to conduct visitation of offence in sensitive case of murder of Tulsiram Prajapati, despite the fact that probationer Deputy Superintendent of Police was not supposed to handle sensitive cases independently. What is tried to be indicated indirectly in paragraph 6.52 of the “Brief facts of the case” of the charge-sheet is to the effect that revision petitioner Vipul Aggarwal was infact on the scene of the crime at the time of commission of the crime. Though these were the only allegations leveled against revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, in the charge-sheet, the learned trial court while rejecting the discharge application of the revision petitioner vide order dated 7th April 2015 has given a finding that the FIR lodged by co-accused Ashish Pandya, Police Sub-Inspector, was found to be false in investigation by the CID and the CBI. It is further held that the same was lodged in consultation with revision petitioner Vipul Aggarwal and discharged accused D.G.Vanzara, as seen from statement of PW230 Arvindbhai Patel, Police Inspector, Ambaji. The learned trial court further held that

in the night of 28th December 2006, revision petitioner Vipul Aggarwal, as stated by PW230 Arvindhbai Patel, Police Inspector, Ambaji, and others, was personally patrolling the area. The learned trial court then posed a question as to when revision petitioner Vipul Aggarwal had knowledge of escape of Tulsiram Prajapati, why he did not disclose that fact to the Officers of Ambaji Police Station. It is further held in the impugned order dated 7th April 2015 by the learned trial court that revision petitioner Vipul Aggarwal contacted co-accused Ashish Pandya, Police Sub-Inspector, at Ambaji Trust Hospital, at the instance of discharged accused D.G.Vanzara. He was knowing that co-accused Ashish Pandya, Police Sub-Inspector, was called back on the duty. It is further held by the learned trial court that by withdrawing himself from the investigation, revision petitioner Vipul Aggarwal, Superintendent of Police, had asked probationer Deputy Superintendent of Police PW143 Mayur Chawda to supervise the investigation. With this, the learned trial court found that there are sufficient grounds for proceeding against revision petitioner Vipul Aggarwal and there is ground for

presuming that he had committed the alleged offence. Let us, therefore, examine whether these findings are in consonance with the material collected during the course of investigation or whether they are perverse.

27 Revision petitioner Vipul Aggarwal was the Superintendent of Police of District Banaskantha with Head Quarter at Palanpur where encounter of Tulsiram Prajapati took place on 28th December 2006. Being the Superintendent of Police of Banaskantha, he was not supposed to carry out the investigation of Crime No.115 of 2006 registered at the Police Station Ambaji. It was the job of the Inspector of Police of that Police Station or Inspector of the Local Crime Branch. There was no question of revision petitioner Vipul Aggarwal withdrawing himself from investigation of this Crime No.115 of 2006 or entrustment of investigation to PW143 Mayur Chawda, Deputy Superintendent of Police. Investigation of this crime was never entrusted to PW143 Mayur Chawda, Deputy Superintendent of Police. He was to supervise investigation of the said crime. The

finding to that effect recorded by the learned trial court for rejecting the applications for discharge is erroneous and perverse.

28 As the learned trial court has heavily relied on statement of PW230 Arvindbhai Patel, the then Police Inspector of Ambaji Police Station, Gujarat, within which jurisdiction encounter of Tulsiram Prajapati took place, at about 5.00 a.m. of 28th December 2006, careful examination of statement of this witness is necessary. At this juncture, it is worthwhile to note that this court is exercising its revisional jurisdiction in order to ascertain whether impugned orders rejecting claim for discharge made by revision petitioner Vipul Aggarwal are perverse and illegal. In the matter of **Popular Muthaiah (supra)** relied by Shri Gupte, the learned senior counsel appearing for the revision petitioner, the Honourable Supreme Court has held that this court can exercise its inherent powers both in relation to substantive as also procedural matters. Paragraphs 27 and 29 from that judgment needs reproduction and those read thus :

“27 While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefor is filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of the Parliament, while making the new law the emphasis of the Parliament being “a case before the court” in contradistinction from “a person who is arrayed as an accused before it” when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of [Section 386](#) of the Code of Criminal Procedure, the same, in our considered view, cannot be held to limit its other powers and in particular that of [Section 482](#) of the Code of Criminal Procedure in relation to the matter which is not before it.”

“29 The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.”

Similarly, it is apposite to quote observations of Honourable Apex Court in the matter of **Rukmini Narvekar (supra)** relied on behalf of the revision petitioner. As observed by the Honourable Apex Court in this verdict, there can be some very rare and exceptional cases where the defence material can show that prosecution version is totally absurd or preposterous. Such defence material then can be looked into at the time of framing of the Charge. Paragraph 20 and 22 from this judgment read thus :

“20 We have carefully perused the decision of this Court in the **State of Orissa vs. Debendra Nath Padhi [(2005) 1 SCC 568]**. Though the observations in paragraph 16 of the said decision seems to support the view canvassed by by Shri Rohatgi, it may be also pointed out that in paragraph 29 of the same decision it has been observed that the width of the powers of the

High Court under [Section 482](#) of Cr.P.C and [Article 226](#) of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of the court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal's case (supra). Thus we have to reconcile paragraphs 16 and 29 of the decision in [State of Orissa vs. Debendra Nath Padhi \(supra\)](#).”

“22 Thus in our opinion while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of D.N. Padhi's case (supra), there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the

material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted.”

Keeping in mind these observations, let us proceed further to examine material collected by the prosecution on these aspects.

29 Firstly, let us consider whether the material furnished by the prosecution to demonstrate entrustment of Crime No.115 of 2006 registered at Ambaji Police Station on the basis of FIR lodged by co-accused Ashish Pandya, Police Sub-Inspector, after encounter of Tulsiram Prajapati on 28th December 2006, to PW143 Mayur Chawda, Probationary Deputy Superintendent of Police for visitation was improper and illegal. Statement of this witness PW143 Mayur Chawda shows that he is direct recruit to the said post of the Deputy Superintendent of Police and after completing academic and physical training at the Gujarat Police Academy of

Karai, vide Notification dated 13th December 2006, he came to be posted as the Deputy Superintendent of Police, Head Quarter, Banaskantha District, at Palanpur. In pursuant to this notification, he joined the said post by visiting Office of the Superintendent of Police, Banaskantha at Palanpur on 26th December 2006. This witness stated that revision petitioner Vipul Aggarwal, who then was working as the Superintendent of Police, Banaskantha, gave him oral orders to take up visitation of Crime No.114 of 2006 registered at Ambaji Police Station. It was in respect of murder of local tribal leader named Andabhai. PW143 Mayur Chawda then went from Palanpur to Ambaji on 26th December 2006 itself. There he did visitation (supervision) of that crime and took a night halt at Ambaji itself. As per version of this witness, on 27th December 2006 also he did visitation (supervision) of that crime and took night halt at Ambaji. Statement of this witness recorded on 27th July 2010 also makes it clear as to how he was entrusted with visitation (supervision) of this crime. This witness has stated that Ambaji Police Station where Crime No.114 of 2006 was registered, comes within jurisdiction of the Deputy Superintendent

of Police Palanpur. On 26th December 2006, Shri Chhabia, Deputy Superintendent of Police, Palanpur, was on leave and therefore, he was entrusted with the work of visitation of Crime No.114 of 2006, by the revision petitioner. It is, thus, clear that this act of the revision petitioner, who was the Superintendent of Police, Banaskantha, does not reflect any *mensrea*. In a very routine manner, due to absence of the concerned officer, visitation of this crime went to PW143 Mayur Chawda, Deputy Superintendent of Police, Head Quarter, Banaskantha. There was no criminal intent in this administrative decision taken by the Superintendent of Police.

30 What happened on 28th December 2006 is also narrated by PW143 Mayur Chawda, probationer Deputy Superintendent of Police to the Investigator. He stated that on 28th December 2006, PW230 Arvindhbai Patel, Police Inspector of Ambaji Police Station telephonically informed him that Police Sub-Inspector Ashish Pandya is injured in the firing by criminals and is brought at Ambaji Cottage Hospital. It was further informed to

him that the Superintendent of Police (revision petitioner Vipul Aggarwal) is present at that hospital. Therefore, as per version of this witness PW143 Mayur Chawda, he went to the Cottage Hospital, Ambaji, and found that medical treatment of co-accused Ashish Pandya, Police Sub-Inspector, was going on. He also found revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, present there. This witness further stated that Police Inspector of Ambaji Police Station (PW230 Arvindbhai Patel) was recording the FIR of Police Sub-Inspector Ashish Pandya. Then, as per version of PW143 Mayur Chawda, revision petitioner Vipul Aggarwal told him to take up visitation (supervision) of that offence bearing Crime No.115 of 2006 registered under Section 307 of the Indian Penal Code. This witness then gave necessary instructions to Police Inspector PW230 Arvindbhai Patel regarding investigation. It is worthwhile to note that in this first version, PW143 Mayur Chawda, the then Deputy Superintendent of Police, has not stated that discharged accused D.G.Vanzara, Deputy Inspector General of Police, was telephonically dictating the FIR to injured Police Sub-

Inspector Ashish Pandya and revision petitioner Vipul Aggarwal, Superintendent of Police, was also talking with D.G.Vanzara, Deputy Inspector General of Police, during the course of that telephonic conversation.

31 PW143 Mayur Chawda, the then Deputy Superintendent of Police further stated that then in the vehicle of revision petitioner Vipul Aggarwal, Superintendent of Police, he went to the spot of the incident where Scientific Officer named Shaikh was present. The revision petitioner guided this witness as to how to verify the spot panchnama and its contents and then left the spot in fifteen minutes. As per version of PW143 Mayur Chawda, Deputy Superintendent of Police, thereafter investigation of this Crime No.115 of 2006 came to be handed over from PW230 Arvindbhai Patel, Police Inspector, Ambaji Police Station, to Police Inspector of Local Crime Branch named B.J.Patel. This witness has also spoken about recording of statement of relatives of deceased Tulsiram Prajapati. He has also stated that at the time of entrustment of second visitation (supervision) he

requested revision petitioner Vipul Aggarwal, but the revision petitioner told him that there will not be any problem. This is what PW143 Mayur Chawda has stated to the Investigator on 27th July 2010. This statement does not reflect that the FIR was being lodged by injured Police Sub-Inspector Ashish Pandya in consultation with either discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, or revision petitioner Vipul Aggarwal, Superintendent of Police. This statement also makes it clear that as Deputy Superintendent of Police, Palanpur named Shri Chhabia was on leave, visitation of Crime No.114 of 2006 of Ambaji Police Station in respect of murder of Andabhai came to be entrusted to him. Statement of this witness PW143 Mayur Chawda further makes it clear that as he was available at Ambaji on 28th December 2006, visitation (supervision) of another offence bearing Crime No.115 of 2006 registered on the basis of FIR lodged by co-accused Ashish Pandya, Police Sub-Inspector, was also entrusted to him. This happened because of absence due to leave of Shri Chhabia, the then Deputy Superintendent of Police, Palanpur. Thus, statement of PW143 Mayur Chawda, the

then Deputy Superintendent of Police, Palanpur, Banaskantha, shows that as he was the only available Deputy Superintendent of Police present at Ambaji for visitation (supervision) of Crime No.114 of 2006, visitation (supervision) of another offence i.e. Crime No.115 of 2006 which took place on 28th December 2006 also came to be entrusted to him by revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, in a very routine manner. At the time of entrusting visitation (supervision) of Crime No.114 of 2006 to PW143 Mayur Chawda on 26th December 2006, even Tulsiram Prajapati had not escaped from custody of Police Guards. Knowledge that such future events leading to death of Tulsiram Prajapati on 28th December 2006 may take place cannot be attributed to revision petitioner Vipul Aggarwal in order to infer his liability in the criminal conspiracy allegedly hatched by accused persons. Action of revision petitioner – the then Superintendent of Police, Banaskantha, in entrusting visitation of Crime No.115 of 2006 to PW143 Mayur Chawda, Deputy Superintendent of Police, Head Quarter, cannot be held either as inappropriate or illegal. On the contrary, it was

done in normal course as per exigencies of administration. No criminality can be attracted to such discharge of official duty by the Superintendent of Police, Banaskantha. This administrative action of the Superintendent of Police, therefore, cannot form a ground to prosecute him for such a serious offence.

32 On 8th June 2011 another statement of PW143 Mayur Chawda came to be recorded by the CBI. Apart from what has been stated by him in his earlier statement, this witness has stated to the Investigator, that when he visited the Cottage Hospital, Ambaji, on 28th December 2006, he saw revision petitioner Vipul Aggarwal and co-accused Ashish Pandya, Police Sub-Inspector talking with discharged accused D.G. Vanzara on telephone and D.G.Vanzara was dictating the contents of the FIR. Co-accused Ashish Pandya, Police Sub-Inspector, prepared the FIR in 1½ hours. PW230 Arvinbhai Patel, Police Inspector, then took that FIR to Police Station for registration of the crime. When the revision petitioner had entrusted visitation (supervision) of Crime No.115 of 2006 to him, he told the revision petitioner that he is

already having visitation (supervision) of one case but the revision petitioner told him that there will not be any problem.

33 If both these statements of PW143 Mayur Chawda are read in tandem and accepted as they are, then also nothing is reflecting therefrom to raise suspicion against the revision petitioner as regards to the allegations contained in paragraph 6.52 of the “Brief facts of the prosecution case” found in the charge-sheet. Taking PW143 Mayur Chawda, Deputy Superintendent of Police, in the official vehicle to the spot of incident by the Superintendent of Police and guiding as well as explaining the Deputy Superintendent of Police as to what should be the contents of panchnama and how it needs to be verified, by no stretch of imagination can constitute prima facie case against the Superintendent of Police showing his involvement in the alleged offence of murdering three persons by indulging in conspiracy. Statements of prosecution witnesses including that of PW143 Mayur Chawda do not indicate even remotely that the revision petitioner/accused no.24 had already been to the scene of

incident. Statements of witnesses make it clear that averments in paragraph 6.52 of the charge-sheet are figment of imaginations of the Investigator unsupported by the material collected during investigation. Statement of witnesses are not even suggesting that the revision petitioner was present on the scene of crime at the time of happening of the incident. The learned trial court overlooked this material aspect and rejected the application for discharge. The impugned orders are, therefore, perverse.

34 Next material witness PW230 Arvindbhai Patel, the then Police Inspector, Ambaji Police Station, has stated to the Investigator that on 28th December 2006, Police Station Officer Nanchandbhai gave message to him that co-accused Ashish Pandya, Police Sub-Inspector, and one unknown person sustained bullet injuries and they are admitted at the Cottage Hospital, Ambaji. He, therefore, went to that hospital and found co-accused Ashish Pandya, Police Sub-Inspector in injured condition due to sustaining bullet injury. He stated that Ashish Pandya, Police Sub-Inspector, was taking medical treatment in that hospital. This

witness further stated that revision petitioner Vipul Aggarwal, Superintendent of Police, was also present there. As per version of this witness, he wrote complaint of Ashish Pandya, Police Sub-Inspector, as narrated by Ashish Pandya, Police Sub-Inspector, and sent it to the Police Station for registration of the offence against Tulsiram Prajapati and others under Sections 307 and 427 of the Indian Penal Code and under Section 25 of the Arms Act. This witness PW230 Arvindbhai Patel further stated that revision petitioner Vipul Aggarwal told him that as PW143 Mayur Chawda, Deputy Superintendent of Police is doing visitation (supervision) of Crime No.114 of 2006, the task of visitation (supervision) of Crime No.115 of 2006 of the same police station is also entrusted to PW143 Mayur Chawda. PW230 Arvindbhai Patel further stated that then he conducted investigation of Crime No.115 of 2006 and subsequently entrusted the same to B.J.Patel, Police Inspector of the Local Crime Branch.

35 PW230 Arvindbhai Patel, Police Inspector, Ambaji Police Station, also stated that in the night intervening 27th and

28th December 2006, revision petitioner Vipul Aggarwal was patrolling in the area and at 5.00 a.m. of 28th December 2006, Vipul Aggarwal, Superintendent of Police, was at the Police Station, Danta. As per version of this witness, though it is general practice that when the accused absconds, the information is given to the District Control Room, and from there it is given to all Police Stations of the District, Ambaji Police Station had not received information from the Control Room about escape of Tulsiram Prajapati. Lastly, this witness has stated that revision petitioner Vipul Aggarwal, Superintendent of Police, and injured Police Sub-Inspector Ashish Pandya were in constant touch with discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, on telephone when the FIR was being lodged. It took 2 hours to register the FIR due to long conversation between them.

36 Second statement of PW143 Mayur Chawda, Deputy Superintendent of Police, as well as statement of PW230 Arvinbhai Patel, Police Inspector, as such, shows that the injured

Police Sub-Inspector Ashish Pandya lodged the FIR of Crime No.115 of 2006 in consultation with discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, Bhuj, and revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha. Revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, was talking to discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, Bhuj, on telephone during the course of recording of the FIR by injured Ashish Pandya, Police Sub-Inspector. It needs to be noted that at the relevant time, discharged accused D.G. Vanzara was holding the post of the Deputy Inspector General of Police of Border Range, Bhuj, and revision petitioner Vipul Aggarwal being the Superintendent of Police, Banaskantha, was working under him. Injured Police Sub-Inspector Ashish Pandya was also working under discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, Border Range, Bhuj. The incident in question was that of encounter of a dreaded criminal Tulsiram Prajapati, allegedly after his escape from the custody of Police Guards, while travelling from Ahmedabad to Udaipur, by Udaipur

Mail. In the alleged fake encounter, said First Informant Ashish Pandya, Police Sub-Inspector, had also received gunshot injuries. Record of investigation itself reveals that Ashish Pandya, Police Sub-Inspector, had suffered bullet injuries in this encounter. Statement of PW230 Arvindbhai Patel, Police Inspector of Ambaji Police Station, who immediately rushed to the Cottage Hospital in the morning hours of 28th December 2006 also shows that he saw co-accused Ashish Pandya, Police Sub-Inspector, in injured condition because of sustaining bullet injuries at the Cottage Hospital, Ambaji. PW230 Arvindbhai Patel, Police Inspector further stated that at that time medical treatment of co-accused Ashish Pandya, Police Sub-Inspector, was going on in that hospital. The charge-sheet also reveals that co-accused Ashish Pandya, Police Sub-Inspector, had sustained circle wound of size 2.5 x 2.5 cm on upper part of his left arm and with active bleeding and blackening of the skin, apart from other injuries. In this fact situation, giving information of this serious incident to the concerned Range Deputy Inspector General of Police, soon after the incident, by co-accused Ashish Pandya, Police Sub-Inspector,

cannot be construed as material raising strong suspicion so as to prosecute revision petitioner Vipul Aggarwal. Revision petitioner Vipul Aggarwal was Superintendent of Police of Banaskantha District, which was falling under the jurisdiction of the Border Range, Bhuj. As such, conversation of revision petitioner Vipul Aggarwal with the Range Deputy Inspector General of Police D.G.Vanzara after happening such serious incident, cannot be construed as prima facie and sufficient material for framing of the Charge against revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha. After such serious incident, conversation by the subordinate officers with the superior officer normally should not create any suspicion. On the contrary, it becomes the duty of the subordinate officer to apprise his superior officer about happening of such serious incident in his territorial jurisdiction. The learned trial court has not even deliberated on this aspect and has straightaway concluded that co-accused Ashish Pandya, Police Sub-Inspector, had conversation with two superior officers, including revision petitioner Vipul Aggarwal, Superintendent of Police, and that is how false FIR

came to be lodged by co-accused Ashish Pandya, Police Sub-Inspector, by taking time of two hours. The FIR lodged by co-accused Ashish Pandya, Police Sub-Inspector, is not yet declared to be a false FIR by the competent court. Infact, it is not even delayed by two hours as alleged. PW273 Nanchand Shrimali, Station House Officer of Ambaji Police Station has stated to the Investigator that thirty minutes after 5.15 a.m. of 28th December 2006, the revision petitioner – Superintendent of Police telephonically called Ambaji Police Station and told him to inform PW230 Arvindbhai Patel, Police Inspector, to come to the Cottage Hospital, Ambaji. At that time, PW230 Arvindbhai Patel, Police Inspector, was not present at the Police Station. This witness gave message to PW230 Arvindbhai Patel and then PW230 Arvindbhai Patel, Police Inspector, went to the Cottage Hospital, Ambaji. Thus, it was after 5.45 a.m. of 28th December 2006, that the message was given to PW230 Arvindbhai Patel to reach the Cottage Hospital, Ambaji. He must have taken some time to reach there. At that time, co-accused Ashish Pandya, Police Sub-Inspector, was taking medical treatment. In such situation, the

FIR was being written. As per version of PW273 Nanchand Shrimali, Station House Officer, Ambaji Police Station, at 8.00 a.m. of 28th December 2006, PW230 Arvindbhai Patel reached Police Station with the written FIR. Thus, if time for travelling as well as the time spent for medical treatment of Ashish Pandya, Police Sub-Inspector, is taken into consideration, it cannot be said that the FIR came to be recorded with due deliberation with discharged accused D.G.Vanzara by taking time of about two hours. To crown this all, what was the exact conversation and consultation between co-accused Ashish Pandya, Police Sub-Inspector, revision petitioner Vipul Aggarwal and discharged accused D.G.Vanzara is also not reflected from statements of either PW143 Mayur Chawda, Deputy Superintendent of Police or PW230 Arvindbhai Patel, Police Inspector. Thus, the learned trial court erred in holding this material as prima facie material, sufficient to frame the Charge against the revision petitioner. With this material, no prudent person can come to the conclusion that there is prima facie case of conspiracy to commit murders against revision petitioner Vipul Aggarwal, who at the

relevant time being the Superior Officer, was attending the injured Junior Police Officer at the hospital and simultaneously informing the incident to the Range Deputy Inspector General of Police, Bhuj. The finding arrived at by the learned trial court that there is sufficient material to frame the Charge, as such, against the revision petitioner, is therefore, totally perverse.

37 This court while exercising revisional jurisdiction can also exercise its inherent powers conferred by Section 482 of the Code of Criminal Procedure for preventing abuse of the process of the court and to secure the ends of justice. Similarly, this court can also look into additional evidence while exercising revisional powers. In the matter of Zahira Habibullah H. Sheikh (supra) it is held thus in paragraphs 50 to 52 :

“50 Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court

can deal with an appeal. [Section 391](#) is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in [Section 386](#) and [Section 391](#) have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. [Section 391](#) is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of [Section 391](#) is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the

Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under [Section 391](#) is desirable.”

“51 The legislative intent in enacting [Section 391](#) appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under [Section 391](#).”

“52 There is no restriction in the wording of [Section 391](#) either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the

discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.”

38 Section 401 of the Code of Criminal Procedure deals with revisional powers of this court. It provides that the High court may, in its discretion, exercise any of the powers conferred on court of appeal by Sections 386, 389, 390 and 391 of the Code of Criminal Procedure or on a court of Sessions by Section 307 of the Code of Criminal Procedure. Those powers can be exercised in the interest of justice, if the court thinks it necessary to prevent escape of a guilty man, so also for vindication of an innocent person wrongfully accused. There is no restriction in the wording of Section 391 and such powers can be exercised to subserve the ends of justice. Viewed from this angle, if subsequent developments which took place during the course of trial are

considered, then it is revealed that PW143 Mayur Chawda, the then Deputy Superintendent of Police, Banaskantha, has been examined by the prosecution in the trial court as its witness. This position is not disputed by the learned ASGI appearing for the CBI, so also the learned counsel appearing for the respondent no.3/First Informant. The revision petitioner has placed on record copy of deposition of PW143 Mayur Chawda, the then Deputy Superintendent of Police, Banaskantha, recorded by the learned Additional Sessions Judge, City Civil and Sessions Court, Mumbai. Perusal of this deposition of PW143 Mayur Chawda shows that as Shri Chhabia, the then Sub-Divisional Police Officer, Palanpur, was on leave on 26th December 2006, revision petitioner Vipul Aggarwal, Superintendent of Police, had orally told PW143 Mayur Chawda to take charge of the post of the Sub-Divisional Police Officer, Palanpur, and to go for visitation (supervision) of Crime No.114 of 2006 registered with Ambaji Police Station, due to murder of the tribal leader named Andabhai. Deposition of PW143 Mayur Chawda, the then Deputy Superintendent of Police, further shows that he was camping at Ambaji till 28th December

2006. In the morning of 28th December 2006, he got information about exchange of firing between police and criminals at Ambaji. He, further, stated that he then went to the Ambaji Hospital and met revision petitioner Vipul Aggarwal and also saw Police Sub-Inspector, Ashish Pandya, in injured condition at that hospital. This witness has deposed before the court that as he was holding the charge of the post of the Sub-Divisional Police Officer, Palanpur, he took visitation (supervision) of Crime No.115 of 2006 registered on the basis of the report lodged by Police Sub-Inspector, Ashish Pandya. PW143 Mayur Chawda further stated before the court that investigation of that crime was initially conducted by PW230 Arvinbhai Patel, Police Inspector, and then by B.J.Patel. He did visitation (supervision) of that crime on 28th December 2006 and 29th December 2006. As stated by this witness before the court, on 30th December 2006, Sub-Divisional Police Officer Shri Chhabia joined the duty, and therefore, he gave the charge to Shri Chhabia. This makes it clear that PW143 Mayur Chawda, the then Deputy Superintendent of Police did visitation (supervision) of Crime No.115 of 2006 registered on the

basis of report lodged by Police Sub-Inspector Ashish Pandya, only for two days i.e. 28th December 2006 and 29th December 2006. Thereafter, the visitation of that crime was done by Sub-Divisional Police Officer, Palanpur, Shri Chhabia. PW143 Mayur Chawda, the then Deputy Superintendent of Police had not deposed before the court that he had seen revision petitioner Vipul Aggarwal, Superintendent of Police, and Police Sub-Inspector Ashish Pandya discussing on telephone with discharged accused D.G.Vanzara, Range Deputy Inspector General of Police, about how to lodge the FIR, or that the said FIR was written under dictation of discharged accused D.G.Vanzara. It is worthwhile to note that the prosecution has accepted this evidence adduced by PW143 Mayur Chawda before the court and he is not even cross-examined by the prosecution. In the wake of this evidence, even otherwise to prevent the abuse of process of the court, the impugned orders rejecting discharge applications require interference at the hands of this court.

39 The learned trial court held that action of the revision petitioner – Superintendent of Police, Banaskantha, in asking PW143 Mayur Chawda, the Probationer Deputy Superintendent of Police to supervise the investigation of Crime No.115 of 2006 by withdrawing himself from investigation amounts to sufficient ground for framing the Charge against revision petitioner Vipul Aggarwal. While discussing the prosecution case and material collected during investigation, in foregoing paragraphs it is already held that in a very routine manner because of absence due to leave of Shri Chhabia, the Deputy Superintendent of Police, Palanpur, initially, visitation (supervision) of Crime No.114 of 2006 registered with Ambaji Police Station was entrusted to PW143 Mayur Chawda on 26th December 2006. As PW143 Mayur Chawda was very much present at Ambaji for visitation (supervision) of Crime No.114 of 2006, visitation (supervision) of Crime No.115 of 2006 came to be entrusted to him by the revision petitioner, who was working as the Superintendent of Police of Banaskantha. On 28th December 2006 also, Shri Chhabia, Deputy Superintendent of Police, within whose jurisdiction the offence

took place, was on leave. There is no material on record to show that it was the duty of the Superintendent of Police heading the district to supervise the investigation by way of visitation. At this juncture, taking aid from the observations of the Honourable Apex Court in the matter of **Rukmini Narvekar (supra)**, considering peculiar facts of the instant case, the defence material needs to be looked into, as that material is indicating that the prosecution version is totally absurd and preposterous. The defence material is nothing else but unimpeachable documents of the State itself as well as information furnished by the State in response to the query made under the Right to Information Act. Vide reply dated 21st March 2011 to the query under Right to Information Act, the Public Information Officer of the Home Department of State of Gujarat, informed that the Probationer Deputy Superintendent of Police is entitled to wield all powers and duties assigned to the post after completion of academic and physical training. In the case in hand, after completion of academic and physical training at Gujarat Police Academy of Karai, vide Notification dated 13th December 2006, PW143 Mayur Chawda was posted as the Deputy

Superintendent of Police, Head Quarter of Banaskantha District, Palanpur. As such, he was having all powers conferred to the post of the Deputy Superintendent of Police of District Banaskantha, which includes the power to do visitation. He was appointed to that post in the year 2005 after his selection through the Public Service Commission. Hence, entrustment of visitation (supervision) of Crime No.115 of 2006 to this witness by the revision petitioner who was holding the post of the Superintendent of Police, Banaskantha, by no stretch of imagination leads to the inference of involvement of the revision petitioner who happens to be the Superintendent of Police in the criminal conspiracy to eliminate three persons. Such inference would be opposed to the common sense and broader probabilities of the prosecution case. Ultimately, the investigation of Crime No.115 of 2006 was initially conducted by the Inspector of Police, Ambaji Police Station, and subsequently, it was conducted by the Police Inspector of Local Crime Branch, Banaskantha. PW143 Mayur Chawda was only to supervise that investigation by way of visitation. No material can be found from the charge-sheet which

would lead to the inference that supervision of PW143 Mayur Chawda has resulted in shoddy investigation of that crime, or that, he has not efficiently supervised the investigation of that crime. Hence, this action of the revision petitioner, being the Superintendent of Police of the concerned district, cannot be held to be forming sufficient ground for framing the Charge of such serious offence against him. Ultimately, the Head of the District Police Force, considering the administrative needs and exigencies of administration, is required to take administrative decisions on the spur of moment, and if he is subjected to criminal prosecution because of error, if any, in taking administrative decisions by him, then it will result in collapsing the entire administrative set up of the State. Such administrative decision cannot subject the author thereof to criminal prosecution, much less for a serious offence, like one involved in the instant case.

40 The learned trial court unnecessarily posed a question unto itself as to why revision petitioner Vipul Aggarwal, Superintendent of Police, did not disclose the fact of escape of

Tulsiram Prajapati from the custody of police guards to the officers of Police station Ambaji, though he was patrolling in the area in the night of 28th December 2006. Brief facts of prosecution case found in the charge-sheet is not indicating this aspect as an incriminating circumstance against revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha. This is obviously so, because as the Superintendent of Police, in-charge of the district, the incumbent is supposed to undertake patrolling of the entire district frequently during his tenure. In answer to the query made under the Right to Information Act, the Public Information Officer and the Deputy Superintendent of Police, Banaskantha, vide communication dated 17th November 2010 has categorically informed that from his joining as the Superintendent of Police, Banaskantha, revision petitioner Vipul Aggarwal had done night patrolling on 21 occasions for the period from 5th October 2005 to 27th December 2006. Night patrolling is the part of the duty of the Superintendent of Police. Statement of PW273 Nanchand Shrimali, Night Duty Officer of Ambaji Police Station makes it clear that this fact was known to PW230 Arvindbhai

Patel, Police Inspector, Ambaji. At 5.15 a.m. of 28th December 2006, PW230 Arvindhbai Patel, Police Inspector, telephonically called the police station and warned PW273 Nanchand Shrimali, Night Duty Officer to be alert as Superintendent of Police Vipul Aggarwal was departing from the Danta Police Station.

41 PW230 Arvindhbai Patel, Police Inspector, in his statement dated 24th May 2011 has categorically stated that though it is general practice to inform the concerned police stations through District Control Room regarding escaping of the accused, in the case in hand, Police Station Ambaji had not received information about escaping of Tulsiram Prajapati. This is the case sought to be made out against the revision petitioner for demonstrating material to frame the Charge against him. Here again, the documents of the State itself would show that the prosecution case, on this aspect, is totally absurd and preposterous. Even statement of PW273 Nanchand Shrimali forming the part of the charge-sheet would falsify the prosecution case on this aspect. The charge-sheet contains a wireless message

as document “D 214.” This wireless message bears no.NR 368. It was transmitted from the Police Control Room, Palanpur, which is District Head Quarter of Banaskantha District. It was addressed to all officers in-charge of police stations, Sub-Divisional Police Offices and Circle Police Inspectors. This wireless message was transmitted at 2.00 a.m. of 28th December 2006 and transmission was complete at 2.15 a.m. of 28th December 2006. The wireless message is to the effect that accused Tulsiram Prajapati has escaped from the custody of police at 3.00 a.m. of 27th December 2006 while he was being taken from Ahmedabad to Udaipur by the train and two unidentified persons threw chilli powder in eyes of the guard party and fired at the guard party. They, then, escaped with accused Tulsiram Prajapati in between Raigad and Shamalji. This wireless message directs all Police Officers to search absconding accused Tulsiram Prajapati and others in their area and to take necessary legal action against them. The Public Information Officer and the Deputy Superintendent of Police, Banaskantha, in his reply dated 17th November 2010 to the query under the Right to Information Act has informed that this wireless

message no.NR 368 was sent at 2.15 a.m. of 28th December 2006 and it was received by the Police Station Ambaji. However, the wireless operator of Ambaji Police Station failed to forward it to the Police Station Officer of Ambaji Police Station. Therefore, no action was taken and no staff was alerted. This fact is also clear from statement of PW273 Nanchand Shrimali, Night Duty Officer of Ambaji Police Station. He stated that the Wireless Duty Staff had given him this wireless message about escaping of Tulsiram Prajapati at about 8.00 a.m. of 28th December 2006. Thereafter, he had handed over that wireless message to PW230 Arvindbhai Patel, Police Inspector of Ambaji Police Station. Thus, the factual position which emerges from this record is to the effect that the Police Control Room of Banaskantha had duly transmitted wireless message about escaping of Tulsiram Prajapati and for apprehending him at 2.00 a.m. of 28th December 2006 and despite receipt of this wireless message immediately by Police Station Ambaji, the staff of that police station had not taken any action on it. Therefore, it appears that PW230 Arvindbhai Patel, who was head of that police station at the relevant time, is feigning

ignorance about receipt of this wireless message bearing no.NR 368. The learned trial court totally overlooked contents of the charge-sheet in the form of text of wireless message transmitted by the Police Control Room of Banaskantha District, as well as statement of PW273 Nanchand Shrimali, Night Duty Officer of Police Station Ambaji. This has resulted in giving perverse finding that though the revision petitioner was patrolling the nearby area, he failed to inform officers of Ambaji Police Station regarding escape of Tulsiram Prajapati. This perverse finding has resulted in miscarriage of justice as by overlooking material evidence found in the charge-sheet, the applications for discharge moved by the revision petitioner came to be rejected.

42 Now comes the last circumstance relied by the prosecution for framing the Charge of such a serious offence against the then Superintendent of Police, Banaskantha. It is averred in paragraph 6.54 of the “Brief facts of the prosecution case” found in the charge-sheet that though co-accused Ashish Pandya, Police Sub-Inspector, was called back from his leave by

discharged accused no.1 D.G.Vanzara, for participating in the criminal conspiracy, by cancelling the leave, subsequently, revision petitioner Vipul Aggarwal, Superintendent of Police, Banaskantha, had deliberately and knowingly ordered destruction of leave records pertaining to co-accused Ashish Pandya, Police Sub-Inspector. This was done despite the fact that revision petitioner Vipul Aggarwal was aware that Criminal Writ Petition bearing No.115 of 2007 filed by Narmadabai Prajapati was pending hearing before the Honourable Supreme Court. In this manner, the revision petitioner destroyed evidence of the subject trial to screen the offenders from the legal consequences of their crime. It needs to be noted that Tulsiram Prajapati died at about 5.00 a.m. of 28th December 2006. Even if it is assumed that he died because he was murdered under conspiracy by the accused persons, that conspiracy, ultimately, came to an end on 28th December 2006 itself. In the matter of **Ram Narayan Popli** (**supra**) the Honourable Apex Court has explained that a conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity.

During this subsistence, whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120B of the Indian Penal Code. In this view of the matter, after death of Tulsiram Prajapati on 28th December 2006, the conspiracy, if any, hatched by the accused persons, came to an end upon its execution. Thus, even if it is assumed that the revision petitioner had knowingly destructed record of casual leave of the co-accused Ashish Pandya, Police Sub-Inspector subsequently, then also, this fact by itself is not sufficient to frame a Charge against him for the offence under Section 302 read with 120B of the Indian Penal Code. The conspiracy, if any, was not subsisting in the year 2008 when the leave record of Ashish Pandya, Police Sub-Inspector, came to be destructed.

43 Now let us examine whether there is prima facie material for framing the Charge against the revision petitioner for the offence punishable under Section 201 of the Indian Penal Code. For making out this offence, it needs to be firmly established that the person charged with such offence had the

knowledge or reason to believe that an offence has been committed. Similarly, it is required to be shown that the offender had caused disappearance of evidence and such act had been done with the intention of screening the offender from legal punishment. In this regard, the prosecution is placing reliance on the documents forming the part of the charge-sheet which is at “D 221”. It is a note sheet moved by the Clerk working in the office of the Superintendent of Police, Banaskantha. By this note sheet, the Clerk concerned has made a tabular chart pointing out 43 documents which are comprising of casual leave records of 42 Police Officers and miscellaneous files of wireless messages in respect of casual leaves of Police Inspectors / Police Sub-Inspectors. The note sheet mentions the fact that leave records pertains to year 2006. The proposal in the note sheet is to the effect that the documents at Serial No.1 to 43 are of Class “D” Category and are destructible in the year 2007. In that note sheet, the concerned Clerk made a submission to the Superintendent of Police that appropriate orders for destruction of those files bearing Serial Nos.1 to 43 be passed. The revision petitioner, being the

then Superintendent of Police, Banaskantha, accordingly approved the said proposal by saying “Yes” to it on 2nd January 2008. Out of those 43 files of casual leaves, file at Serial No.26 from the chart in the note sheet was pertaining to the casual leave record and report of casual leave pertaining to Ashish Pandya, Police Sub-Inspector for the year 2006. All those files were then destroyed.

44 Gujarat State has its own Rules for destruction of government record. Copy of those Rules is placed on record. Rule 123 deals with Classification of Record from “A” to “D” Class. The record falling in “A” Category is required to be preserved indefinitely. The record classified as “B” Category record is required to be preserved for thirty years. The record falling in “B1” Category is required to be preserved for fifteen years. The record falling in “C” Category is required to be preserved for five years, whereas the record falling in “D” Category is required to be destroyed as soon as the purpose is fulfilled and in any case, not later than one year after the end of the year in which they are

filed. Schedule to the Rule contains Entry No.27 which pertains to the documents in respect of casual leave of the staff. Entry No.27 in the Schedule to the Rules mentions that the documents pertaining to the casual leaves are classified in “D” Class. Thus, record of casual leave of the staff is destructible as soon as its purpose is fulfilled and in any case not later than one year after the end of the year in which such applications are filed. In the case in hand, the leave applications and leave records of the year 2006 of not only co-accused Ashish Pandya, Police Sub-Inspector, but of several other Police Officers from Banaskantha District, were ordered to be destructed strictly in terms of the provisions of these Rules. There is no material in the charge-sheet to show that the Investigating Officer, Superior Police Officers or the State had ever directed the revision petitioner, who was holding the post of the Superintendent of Police, Banaskantha, to preserve the leave record of co-accused Ashish Pandya, Police Sub-Inspector, though it was due for destruction.

45 At this juncture, replies from the Public Information Officer and the Deputy Superintendent of Police, Banaskantha, dated 4th October 2010 and 17th November 2010 are material and are demonstrating that the prosecution case on this aspect is preposterous. It is informed in these replies that as per “Nirmal Gujarat Drive” initiated by the Government in 2006-2007 and 2007-2008 extra staff was allocated to the Registry Branch of the Office of the Superintendent of Police, Banaskantha. In addition, two Police Constables were also called to assist the staff in classifying and destroying the records. It is further informed that there were no instructions from revision petitioner Vipul Aggarwal for specifically destroying any particular record. The reply dated 4th October 2010 in terms states that the casual leave records for calendar year 2006 and in respect of officers in Banaskantha District were due for destruction at the end of the year 2007 and there is nothing on record to show that the Superintendent of Police, namely Vipul Aggarwal had specifically ordered destruction of records. The reply further mentions that as per

office procedure, a note was prepared by the concerned Clerk and through official channel, the file was put up before Superintendent of Police Vipul Aggarwal for his formal orders on destruction of record. That is how the record pertaining to co-accused Ashish Pandya, Police Sub-Inspector, along with several police officers came to be destroyed strictly as per provisions of the Rules regarding destruction of Government record. No criminal intent can be inferred from this official act of revision petitioner Vipul Aggarwal, particularly in the wake of the fact that he was not directed by his superiors to preserve the record of casual leave of co-accused Ashish Pandya, Police Sub-Inspector. Ingredients of Section 201 of the Indian Penal Code are not reflected from this material. The official act of destruction of destructible official record is not seen to have been done with the intent of screening the offenders from legal punishment with a knowledge that an offence has been committed. Thus, destruction of destructible official record done in the course of official duty by the Superintendent of Police, Banaskantha, is not forming any ground to frame the Charge against him by raising strong

suspicion against him. This act is not making out prima facie case against the revision petitioner.

46 In view of the foregoing discussion, it is manifestly clear that impugned orders rejecting applications for discharge moved by the revision petitioner are perverse. Those cannot, therefore, be sustained. Even after evaluating the entire material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of the ingredients constituting the alleged offence, I am unable to come to the conclusion that such material and documents are enough even to raise suspicion against Vipul Aggarwal, the then Superintendent of Police, Banaskantha. The charge-sheet is not reflecting that the revision petitioner/accused might have committed the alleged offence. The material collected by the prosecution during investigation is not forming sufficient ground for proceeding against the revision petitioner/accused, and therefore, he is entitled for discharge. In the result, the following order :

ORDER

- i) The revision petition is allowed.
- ii) The impugned orders passed by the learned court below on Exhibit 549 on 7th April 2015 and Exhibit 1370 on 7th November 2017 are quashed and set aside.
- iii) Both those applications stand allowed.
- iv) The revision petitioner/accused is discharged under Section 227 of the Code of Criminal Procedure of offences punishable under Sections 120B, 364, 365, 368, 341, 342, 384, 302 read with 201 of the Indian Penal Code and under Section 25 of the Indian Arms Act in Sessions Cases Nos.177 of 2013, 178 of 2013, 577 of 2013 and 312 of 2014.

(A. M. BADAR, J.)

**Arti Vilas
Khatate**

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