

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 24.10.2018

PRONOUNCED ON: 31.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CrI.OP.No.22329 of 2018

1.R.Ravikumar
2.Suresh
3.Rajasekar
4.Abishek
5.Sukumaran
6.Murugesan
7.Paramasivam
8.N.Babu
9.J.Raja
10.Deenadayalan
11.Gunasekaran
12.Umapathy
13.Surya
14.Palani

... Petitioners

Vs

1.The Central Bureau of Investigation, Chennai-34
2.State represented by the Inspector of Police
W6, All Women Police Station, Ayanavaram
Chennai-23
3.Shivangi Khubchandani, Chennai-23
...Respondents

Prayer:- This Criminal Original Petition is filed to transfer the investigation in Cr.No.6 of 2018 from the file of the 2nd Respondent to the file of the 1st Respondent.

For Petitioners : Mr.Shaikii Meirunisa

Mr.K.Srinivasan, Spl (P.P. (CBI) -R1

For Respondents : Mr.K.Prabakar-APP-R2
Mr.S.M.Nandhi Devan-R3

ORDER

This Criminal Original Petition is filed to transfer the investigation in Cr.No.6 of 2018 from the file of the 2nd Respondent to the file of the 1st Respondent.

2. The facts, which are necessary for disposal of this Criminal Original Petition, as set out in this Petition, are as follows:-

a. The Petitioners are accused in Cr.No.6 of 2018 on the file of the 2nd Respondent, which was registered on the complaint given by the 3rd Respondent/ the defacto complainant, on 15.07.2018, alleging that her daughter, a minor girl was sexually assaulted by fifteen men, multiple times and some times 3-4 together at one time, in an apartment at Ayanavaram, for the offences under Sections 6, 10 and 12 of the Protection of Children from Sexual Offences Act and Sections 307 and 506(ii) of IPC and later altered to the offences under Sections 341, 342, 328, 376(AB) and 376(DB) and under Sections 6,10, 12 of the POSCO Act, 2012. The Petitioners were arrested on 15.07.2018 and remanded to judicial custody on 19.07.2018 and they are in judicial custody for more than 45 days.

b. The main contention of all the Petitioners is that they were taken by the Police under the guise of an enquiry with regard to a theft, but only during the remand, they were informed that they were being arrested for the above said alleged offences and they were harassed physically and mentally during the interrogation.

c. There are totally 3500 people approximately, such as, residents, servants, drivers, securities, house keepers, plumbers, electrician, other technicians, in and around the said apartment. Apart from them, daily about 500 people come to the apartment, as outsiders. There are totally 187 Cameras installed in the apartment and they are working in good condition. Two persons are appointed to maintain the CCTVs. Without these two persons' knowledge, no one can enter the room and manipulate or tamper with the CCTVs and their names are not mentioned in the First Information Report. More than 10 persons, who are alleged accused, are from UKFC Security Agency. Likewise, there are persons appointed to look after the maintenance of the Swimming Pool and GYM.

d. The other grounds raised by the Petitioners is that though it was alleged in the complaint that the alleged occurrence had happened between 14.01.2018 to 05.06.2018, the complaint was lodged on 15.07.2018 and that though the other Staff had been named in the complaint, except the alleged accused, who are the Petitioners, no other persons had been arrayed as the accused. Though in the complaint, 15 accused are mentioned, 18 persons were arrested and the Prosecution, during the bail arguments, stated that 6 others

were absconding and totally there were 23 accused.

e. The allegations with regard to sexual harassment and assault made in the complaint are not probable. The Petitioners have not at all involved in any of the offences as alleged by the Police. A false case had been foisted against the Petitioners, as they are all innocent of the offences alleged against them. The bail applications filed by them before the court below were dismissed. The Petitioners have been living with their family at the same address for several years and they have no antecedents. Some of the Petitioners, who were not even working in the said apartment, have been roped into this false case. Due to this false case, not only the Petitioners, but also their entire families are suffering. The victim girl had been tutored to give false statements against the Petitioners and to identify the Petitioners during the identification parade conducted on 25.07.2018. The entire case is very suspicious and questionable. This false case through media has prejudiced the minds of the public at large. All the Petitioners have been detained under the Goondas Act and are presently confined in the Central Prison, Puzhal, Chennai. In such circumstances, this Criminal Original Petition has been filed, seeking to transfer the case in Cr.No.6 of 2018 from the file of the 2nd Respondent to the file of the 1st Respondent, CBI, Chennai.

3. The 2nd Respondent has filed a counter affidavit, contending as follows:-

a. The final report was filed on 12.9.2018 within 60 days as required under law. There are 17 accused persons and they are/were all employees in the apartment, wherein the victim, 11 ½ years disabled child was residing with her family. The accused had acquaintance with the victim and by undue influence and threat, committed 'aggravated sexual assault' and 'aggravated penetrative sexual assault' on several occasions and it is a heinous crime. The allegations made in the Cr.OP are frivolous.

b. The Prosecution had arrested only 17 persons on 16.07.2018 at various places at various timings and they were remanded on 17.07.2018 after due investigation and not on 19.07.2018 as alleged. Out of 14 Petitioners, 7 were married and 7 are unmarried, but they commonly mentioned that their children had asked them to file this Petition. The Prosecution did not arrest 18 accused and never mentioned in any of the records that the victim had been sexually assaulted by 23 men in an apartment at Ayanavaram, Chennai.

c. During the arrest of the Petitioners on 16.07.2018, they had voluntarily given confession about their involvement in the offence and based on the confession of the 1st to 5th Petitioners, material evidences were recovered from them under a seizure mahazar in the presence of two independent witnesses. The Petitioners did not complain against the Police

for having harassed, before the Trial Court, during obtaining judicial custody and during further remand extensions. With respect to the 8th Petitioner, the Prosecution had made arrangements to give treatment to the 8th Petitioner and he was also admitted as an inpatient in the Government Stanley Hospital, Chennai for further treatment.

d. Out of 4 blocks, only C&D blocks contain 16 storey and other two blocks contain only 15 floors and the total dwelling units are 394 and not 420 flats as alleged. Numbers of persons residing and employed are exaggerated. The apartment has only 54 cameras and not 187 or 200 as alleged. Some of the cameras are not working and the recording capacity of hard disks ranges from 10 days to 20 days. As the accused persons are well acquainted with the topography of the area and locations of the CCTVs, they had chosen the area to commit the offence, where there is no CCTV coverage and the medical report supports the occurrence of sexual assault.

e. Due to fear instilled in the mind of the victim by the accused, she had not informed it to her parents or teachers. On 14th July 2018, when the 1st Petitioner had touched the victim in an inappropriate manner, the sister of the victim noticed and enquired the victim and thereafter, the entire incident came to light. After adequate counselling and treatment given to the victim, she narrated the whole incidents to the Investigating Officer.

f. The investigation was completed and the final report was taken on file by the Trial Court in SC.No.407 of 2018 and the case stands posted on 30.10.2018 for serving summons to the accused. The averments raised in the petition are matter of trial as charge sheet had already been taken on file. As held by the Honourable Supreme Court, the accused cannot choose the investigation agency and there is no valid reason given for change of investigation. In order to evade the clutches of law, the Petitioners have filed this Criminal Original Petition to stall the judicial proceedings. In such circumstances, this Criminal Original Petition is liable to be dismissed.

4. The learned counsel for the Petitioners, while reiterating the grounds in the petition, would submit that an exaggerated complaint has been given and innocents have been falsely roped in the case and that the offences could not have been committed in the manner as projected by the victim and insisted for transfer of investigation.

5. The learned Additional Public Prosecutor for the 2nd Respondent would submit that at the outset, the petition filed by the accused for transfer is not maintainable and that the investigation has been done in a proper manner and that the 2nd Respondent Police had, in due compliance of the mandate under the POSCO Act, completed the investigation in a fair manner and filed the final report before the Court on

12.09.2018 and as such, the prayer has become infructuous. He would further submit that the petition filed by the accused is vague and that no specific allegations or grounds have been made out against either the investigating agency or anyone else, warranting transfer of investigation and further, the grounds raised are all on facts that could be agitated before the Trial Court. He would submit that the petition is nothing but a dilatory tactics adopted to delay the trial and sought for dismissal of the petition.

6. The learned counsel for the 3rd Respondent (the mother of the victim girl), would submit that on a complaint given by the 3rd Respondent, the 2nd Respondent had registered the case and conducted the investigation and filed the final report on 12.9.2018. He would further submit that the victim girl aged 11 ½ years is a differently abled person and that the accused, who are the employees in the apartment complex and the persons known to them indulged in a heinous crime of 'aggravated sexual assault' and 'aggravated penetrative sexual assault' on several occasions, by using the acquaintance and under threat. He would further submit that the Superior Courts have repeatedly held that the Petitioners, who are accused, cannot have a say as to who should investigate the case and in what manner the case should be investigated. He would further submit that the investigation had already been completed and a charge sheet had been filed. In such circumstances, ordinarily the Superior Courts should not reopen the investigation and it should be left open to the Court, where the charge sheet has been filed, to proceed with the matter in accordance with and he would rely on the decisions of the Honourable Supreme Court reported in 1997 CrI.LJ 63 (CBI Vs. Rajesh Gandhi and another), AIR 2018 SC 2486 (E.Sivakumar Vs. Union of India and others) and 2013 AIR SCW 5144 (K.V.Rajendran Vs. Superintendent of Police, CBCID South Zone, Chennai).

7. This Court heard the submissions of the learned counsel on either side and considered the same, including the materials available on record, particularly, the CD File and statements recorded from the witnesses.

8. This is a petition filed by the accused, seeking transfer of investigation. In short, in the present petition, several facts/grounds in defence against the case of the Prosecution with regard to the manner of arrest of the accused in the apartment complex, number of persons living and working in the apartment complex, the manner in which the complaint had been preferred by the mother of the victim girl and doubts regarding the medical evidence of the victim with respect to the manner of sexual assault and regarding the back ground and the conduct of the accused, have been raised, thereby seeking transfer of investigation.

9. Apart from raising the above doubts by way of a common petition filed by the Petitioners, no allegation

or grievance had been made against the investigating agency that the investigation has been conducted in a mala fide manner or that the investigation was influenced by some body to implicate the innocents and protect actual offenders.

10. Though several factual issues were raised by the learned counsel for the Petitioners, this Court refrains from dealing with them and making any observations since any observation made by this Court may cause serious prejudice to the Petitioners as well as the Prosecution, which would result in serious miscarriage of justice.

11. Having gone through the materials on record and having heard the learned counsel on either side, this Court feels it unnecessary to refer to the judgements relied by the learned counsel on either side and burden this order. This is a case filed by the accused, seeking transfer of investigation, that too after the final report is filed. This Court has to see whether the petition is maintainable and whether the Petitioners have made any extraordinary or special grounds for transfer. It is opposite to refer to the recent judgement of the Honourable Supreme Court, reported in 2018 SCC Online SC 1691 (Romila Thapar and others Vs. Union of India and others) regarding change of investigation at the behest of the accused, wherein in paragraphs 24 to 29, it has been held as under:-

"24. After having given our anxious consideration to the rival submission and upon perusing the pleadings and documents produced by both the sides, coupled with the fact that now four named accused have approached this Court and have asked for being transposed as writ petitioners, the following broad points may arise for our consideration:-

(i) Should the Investigating Agency be changed at the behest of the named five accused?

(ii) If the answer to point (i) is in the negative, can a prayer of the same nature be entertained at the behest of the next friend of the accused or in the garb of PIL?

(iii) If the answer to question Nos. (i) and/or (ii) above, is in the affirmative, have the petitioners made out a case for the relief of appointing Special Investigating Team or directing the Court monitored investigation by an independent Investigating Agency?

(iv) Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law abiding person?

25. Turning to the first point, we are of the considered opinion that the issue is no more res integra. In *Narmada Bai v. State of Gujarat* (2011 5 SCC 79), in paragraph 64, this Court restated that it is trite law that the accused persons do not have a say in the matter of appointment of Investigating Agency. Further, the accused persons cannot choose as to which Investigating Agency must investigate the offence committed by them. Paragraph 64 of this decision reads thus:-

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

26. Again in *Sanjiv Rajendra Bhatt v. Union of India* (2016 1 SCC 1), the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Paragraph 68 of this judgement reads thus:

"68. The accused has no right with reference to the manner of investigation or mode of prosecution. Similar is the law laid down by this Court in *Union of India v. W.N. Chadha* (1993 Supp (4) SCC 260), *Mayawati v. Union of India* (2012 8 SCC 106), *Dinubhai Boghabhai Solanki v. State of Gujarat* (2014 4 SCC 626), *CBI v. Rajesh Gandhi* (1996 11 SCC 253), *Competition Commission of India v. SAIL* (2010 10 SCC 744) and *Janta Dal v. H.S. Choudhary*. (1991 3 SCC 756)" (emphasis supplied)

27. Recently, a three-Judge Bench of this Court in *E. Sivakumar v. Union of India* (2018 7 SCC 365), while dealing with the appeal preferred by the "accused" challenging the order of the High Court directing investigation by CBI, in paragraph 10 observed:

"10. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment. In paragraph 129 of the impugned judgment, reliance has been placed on *Dinubhai Boghabhai Solanki v. State of Gujarat*, wherein it has been held that in a writ petition seeking impartial investigation, the accused

was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed in *Narender G. Goel v. State of Maharashtra* (2009 6 SCC 65), in particular, paragraph 11 of the reported decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not heard, in our opinion, will be of no avail. That per se cannot be the basis to label the impugned judgment as a nullity."

28. This Court in the case of *Divine Retreat Centre v. State of Kerala* (2008 3 SCC 542), has enunciated that the High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint an investigating officer of its own choice to investigate into a crime on whatsoever basis. The Court made it amply clear that neither the accused nor the complainant or informant are entitled to choose their own Investigating Agency to investigate the crime in which they are interested. The Court then went on to clarify that the High Court in exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of the aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer mala fide.

29. Be that as it may, it will be useful to advert to the exposition in *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal* (2010 3 SCC 571). In paragraph 70 of the said decision, the Constitution Bench observed thus:

"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide

whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

12. With regard to the facts on hand as stated above, this petition has been filed by the the Petitioners/ Accused, who are facing charges under the POSCO Act. No specific material fact has been averred in the petition regarding mala fide exercise of power by the 2nd Respondent. In the opinion of this Court, all the grounds raised in the petition are matter for trial and further, no assertion has been made by way of affidavits. Further, the investigation has been completed, final report has been filed and the case has been taken up in SC.No.407 of 2018 on the file of the Magalir Neethimandram (Sessions Judge). The Petitioners have not made out any extraordinary or special grounds for transfer of investigation or further investigation.

13. The Code of Criminal Procedure is a complete Code in itself, protecting the rights of the accused. If the accused feel aggrieved by the non-examination of certain witnesses and also about the topography and about the CCTVs available in the scene of occurrence, they can file appropriate petition before the Trial Court, seeking appropriate relief during the course of the proceedings before the Trial Court, if necessary.

14. In view of the above, this Criminal Original Petition stands dismissed. No costs. This Court has taken a careful endeavour to refrain from making any observations that might prejudice both the parties. However, it is made clear that the observations made in this order are only

for the limited purpose of deciding this petition and that the Trial Court shall proceed with the trial, in accordance with law, uninfluenced by any of the observations made in this order.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To:

- 1.The Central Bureau of Investigation,
3rd Floor, Shastri Bhavan,
26,Haddous Road,
Nungambakkam Chennai-34
- 2.The Inspector of Police, W6, All Women Police Station,
Ayanavaram
Chennai-23
- 3.The Public Prosecutor, High Court, Madras

+1cc to Mr.Shaikii Meirunisa, Advocate, S.R.No.74705

CrI.OP.No.22329 of 2018

RJI(CO)
GSP(16/11/2018)



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