

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

Reserved on: 12.09.2022
Pronounced on: 30.09.2022

MAT 883 of 2022
With
CAN 1 of 2022
CAN 2 of 2022

Sri Sasti Gayen

...Appellants

-Vs-

State of West Bengal and Ors.

...Respondents

With

MAT 944 of 2022
With
CAN 1 of 2022

State of West Bengal and Anr.

...Appellants

-Vs-

Protima Dutta & Ors.

...Respondents

Present:-

Mr. Siddharth Dave, Sr. Advocate
Mr. Aniket Sureka,
Mr. Asis Dutta, Advocates

... for the appellants
in MAT 883 of 2022

Mr. Pradip Kumar Roy,
Ms. Rajneeta Rohatgi,
Mr. Snehasish Mukherjee,
Mr. Vijay Verma, Advocates

...for the appellants in MAT 944 of 2022 and
for the State respondents in MAT 883 of 2022

Mr. Dhiraj Trivedi,
Mr. Sunil Gupta, Advocates

... for the CBI

Mr. Sabyasachi Chatterjee,
Mr. Debolina Sarkar, Advocates

... for the respondent no. 1
in MAT 944 of 2022

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

**THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE**

Prakash Shrivastava, CJ:

1. These appeals are directed against order of the learned Single Judge dated 9th of June, 2022 disposing of WPA No. 12526 of 2012 and directing transfer of investigation and prosecution to the Central Bureau of Investigation (CBI).

2. MAT 883 of 2022 is at the instance of the accused whereas MAT 944 of 2022 is at the instance of the State of West Bengal.

3. WPA No. 12526 of 2012 was filed by the widow of Tapan Dutta, who was shot dead on 6th of May, 2011 while he was returning to his house riding a motorcycle. FIR No. 205 of 2011 was registered by the Bally Police Station, Howrah under Sections 302/34/120B of the IPC read with Sections 27 and 35 of the Arms Act. On the same day, at about 23:25 hrs., one Bablu Prasad, pillion rider on the motorcycle on which the deceased was travelling when he was gunned down, also registered a written complaint.

4. Learned Single Judge has noted that Tapan Dutta (husband of the writ petitioner) was a prominent member of the ruling party in the State and he had started agitation against the illegal filling up of water bodies in the Bally-Jagacha area in Howrah district and had formed an association called "Bally Jagacha Jalabhumi Bachao Committee". The water bodies were filled up by a property developer

named “Anmol South City Ltd.”, a joint venture between the State Government and certain private persons including the Anmol Group of Companies and Maa Tara Developers. It has been noted that the writ petitioner had disclosed the names of 12 persons who were responsible for the death of her husband and had supplied large number of documents and had informed that the motive behind the murder of her husband was his opposition and agitation against the landfill. Arup Roy (a Minister in the State Cabinet) was also named as one of the 12 suspicious persons.

5. The widow of the deceased had filed WPA No. 12526 of 2012 on 18th of June, 2012 with the prayer to transfer the investigation to the CBI and had not pressed earlier W.P. 12171(W) of 2012 filed for the same cause.

6. During the pendency of the writ petition, the CID, West Bengal had completed the investigation and filed the charge-sheet on 13th of August, 2011 and supplementary charge-sheet on 26th of September, 2011. No charges were framed against most of the persons named by the writ petitioner in her written complaint. Sessions Trial No. 88 of 2012 was concluded with the judgment dated 7th of January, 2015 passed by the Additional District and Sessions Judge, Fast Track Court-I, Howrah whereby all the 5 accused persons were acquitted under Section 235 of the Cr.P.C. and trial against the absconding accused was deferred. In the appeals being Criminal Appeal No. 688 of 2016, at the instance of the daughter of the deceased and being G.A. No. 3 of 2015 at the instance of the State, the Division Bench vide order dated 10th of April, 2017 had set aside the judgment and order of acquittal and had directed the Trial Court to invoke the power

conferred under Section 311 of Cr.P.C. for the limited purpose mentioned in the order and also directed the Trial Court to consider the prayer of either of the parties, if made, for adducing further evidence in accordance with law.

7. The Writ Petition No. 12526 of 2012, after a chequered history, came to be heard by the learned Single Judge, who by the order under appeal has allowed the prayer and has directed transfer of prosecution and investigation to the CBI.

8. Submission of Mr. Mukul Rohatgi, learned Senior Advocate for the appellant in MAT 944 of 2022 is that by the impugned order, learned Single Judge has set at naught, the direction issued by the Division Bench in criminal appeal by which the case was remanded back to the Trial Court. Further submission of learned counsel for the appellant is that in the criminal appeal preferred by the daughter of the deceased against the judgment of acquittal, there was a prayer for further investigation by independent and impartial agency and the said prayer was not granted by the Division Bench while allowing the criminal appeal and remanding the matter back to the Trial Court, therefore, same prayer could not be allowed by the learned Single Judge. His further submission is that learned Single Judge in the impugned order has not framed any issue relating to the effect of the order of the Division Bench in the criminal appeal and the learned Single Judge has also committed an error in considering the deficiencies in judgment of acquittal rendered by the Trial Court because that judgment has already been set aside in appeal by the Division Bench. He submits that full trial has taken place, therefore, now the investigation cannot be transferred to CBI. In support of his

submission, he has placed reliance upon the judgments of the Hon'ble Supreme Court in the matter of **Arnab Ranjan Goswami vs. Union of India and Others** reported in (2020) 14 SCC 12, in the matter of **State of West Bengal and Others vs. Committee for Protection of Democratic Rights, West Bengal and Others** reported in (2010) 3 SCC 571 and in the matter of **Secretary, Minor Irrigation & Rural Engineering Services, U.P. and Others vs. Sahngoo Ram Arya and Another** reported in (2002) 5 SCC 521.

9. Mr. Siddharth Dave, learned Senior Advocate appearing for the appellant (accused no. 2) in MAT 883 of 2022, has also submitted that the order of the learned Single Judge under challenge, in substance, modifies the order of the Division Bench because in pursuance to the order of the learned Single Judge under appeal, now the trial will commence afresh. He has further submitted that there is difference between initial investigation, further investigation, fresh and renewed investigation and that under Section 173 of the Cr.P.C, power to direct further investigation can be exercised only till the stage of framing of the charge. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Vinubhai Haribhai Malaviya and Others vs. State of Gujarat and Another** reported in (2019) 17 SCC 1. His further submission is that when the charge-sheet was filed before the Magistrate, no protest petition was filed by the writ petitioner and that once the trial is concluded, the power to transfer investigation ends. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Vinay Tyagi vs. Irshad Ali alias Deepak and Others** reported in (2013) 5 SCC 762.

He has also referred to page 443 of CAN 2 of 2022 which is an order passed in the appeal of the co-accused where the jurisdictional issue was left upon and has also referred to the order on page 428 of CAN 2 of 2022, wherein there is a direction to expedite the trial.

10. Mr. Bikash Ranjan Bhattacharyya, learned Senior Advocate appearing for the respondent (writ petitioner) has supported the judgment of the learned Single Judge and has referred to various orders passed in the writ petition by different Courts from time to time and has submitted that with the lapse of time the writ petition has not become infructuous. He has further submitted that in the memo of appeal in MAT 944 of 2022, no substantial ground has been raised and that conduct of the parties is relevant and once the acquittal has been set aside by the Division Bench, the matter is again at the stage of trial and that the Division Bench hearing criminal appeal had no jurisdiction to direct investigation by an independent agency. He has further submitted that the accused has no choice of investigating agency.

11. We have heard the learned counsel for the parties and perused the record.

12. This being an intra-court appeal against the order of the learned Single Judge, it is required to be considered in the light of settled parameter for interference in such appeals. Hon'ble Supreme Court in the matter of **B. Venkatamuni vs. C.J. Ayodhya Ram Singh and Others** reported in (2006) 13 SCC 449 while considering the scope of interference in intra-court appeal has held that:

“11. In an intra-court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but the following dicta of this Court in

Umabai v. Nilkanth Dhondiba Chavan could not have been ignored by it, whereupon the learned counsel for the respondents relied: (SCC p. 261, para 52)

“52. It may be, as has been held in *Asha Devi v. Dukhi Sao* that the power of the appellate court in intra-court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well known that entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even as noticed hereinbefore, a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint.”

13. In the matter of **Management of Narendra & Company Private Limited vs. Workmen of Narendra & Company** reported in **(2016) 3 SCC 340** again considering the scope of interference in intra-court appeal, Hon’ble Supreme Court has reiterated that:

“5. Once the learned Single Judge having seen the records had come to the conclusion that the industry was not functioning after January 1995, there is no justification in entering a different finding without any further material before the Division Bench. The Appellate Bench ought to have noticed that the statement of MW 3 is itself part of the evidence before the Labour Court. Be that as it may, in an intra-court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely because another view or a better view is possible, there should be no interference with or disturbance of the order passed by the Single Judge, unless both sides agree for a fairer approach on relief.”

14. The present appeals are required to be considered in the light of the scope of interference as settled by the Hon’ble Supreme Court.

15. The first issue raised by learned counsel for the appellants is that after a lapse of about 10 years, prayer made in the writ petition by

the widow of the deceased to transfer the investigation to the CBI, could not have been considered by the learned Single Judge.

16. The record reflects that the incident had taken place on 6th of May, 2011 when the husband of the writ petitioner was shot dead. The widow had promptly filed the petitions on 18th of June, 2012 disclosing the circumstances and making the prayer for transfer of investigation to the CBI. She was diligently prosecuting WPA No. 12526 of 2012. The proceeding in the petition placed before us reflect the petition was taken up regularly and the following important orders were passed in the writ petition from time to time:

- a. 20th July, 2012 – Learned Single Judge had directed to list the writ petition under the heading for ‘Hearing’ on Friday.
- b. 14th January, 2013 – Learned counsel for the petitioner had commenced the argument but due to paucity of time, he could not conclude it and the matter was adjourned.
- c. 28th January, 2013 – Learned counsel for the petitioner was heard but could not conclude his argument due to paucity of time.
- d. 4th March, 2013 – Learned counsel for the petitioner could not conclude his argument due to paucity of time.
- e. 26th July, 2013 – Writ petition was listed before different Bench, therefore, it was released.
- f. 13th January, 2015 – After giving substantial hearing for two days to the advocate for the State, new Advocate being the learned Additional Advocate General had appeared on 13th of January, 2015 and stated that he would represent the State and advance submission on its behalf. His prayer was

opposed by the learned Senior Counsel for the petitioner citing the delay in progress of the proceedings. However, time was granted to the learned Additional Advocate General to advance argument and to adequately prepare himself for the case.

- g. Thereafter, on 20th of January, 2015 and 3rd of February, 2015, the petition was part-heard and the hearing was concluded on 19th of February, 2015
- h. Meanwhile, the judgment of acquittal was passed in the criminal trial and appeal against acquittal was filed, therefore, learned Single Judge by order dated 4th of May, 2015 passed in WPA 12526 of 2012 had expressed that the petition be referred to the Division Bench for hearing along with the pending criminal appeal but while directing so, learned Single Judge had considered the aspect of delay in deciding the writ petition in the order dated 4th of May, 2015 by observing that:

“24. However, the vital question is whether by reason of delay in disposal of the writ petition, the petitioner ought to suffer and face dismissal of her writ petition on the ground of the same having become infructuous, or whether there is any avenue by which the victim’s interest could be protected by the Writ Court, being the protector of fundamental rights of the citizens of the country, having regard to the representation made before the Bench that the judgment of the learned Sessions Judge acquitting the accused is the subject matter of an appeal under section 378, Cr.P.C. before this Court at the instance of the State.

25. That the petitioner was right in apprehending that the investigation would be flawed with a view to cover up misdeeds of some persons whom she perceived to be influential has turned into

reality with the acquittal of the accused persons. In view of section 300, Cr.P.C., it would not be proper to make any observation in regard to the trial that was conducted. The State having preferred an appeal against the judgment of the learned Sessions Judge acquitting the accused, it would definitely fall for consideration of this Court in its appellate jurisdiction as to how and to what extent the power under section 386, Cr.P.C. ought to be exercised.

26. Strong reliance has been placed by Mr. Bhattacharya on Zahira Habibulla H. Sheikh (*supra*), commonly known as the Best Bakery case. The Supreme Court in its decision reported in (2005) 1 SCC 115 : *Satyajit Banerjee v. State of West Bengal*, however, has opined that the law laid down in the Best Bakery case, in the extraordinary circumstances obtaining therein, cannot be applied to all cases against the established principles of criminal jurisprudence. What may be permissible for the Supreme Court in a case of exceptional nature for doing complete justice between the parties under Article 142 of the Constitution may not be permissible for a Judge exercising Article 226 powers. Even otherwise, the cited decision was rendered on several criminal appeals and not on any writ petition and cannot, therefore, be of any assistance to the petitioner.

27. It appears on reading the decision in *N.R. Govindaraji* (*supra*) that a conviction was recorded against one Rajasekaran under section 304-A, IPC, which was challenged before the High Court under Section 482, Cr.P.C. the case run in the 482 petition was that the offending vehicle was being driven not by the said Rajasekaran but by the said Govindaraji. Therefore, the conviction of Rajasekaran should be set aside and instead Govindaraji should be proceeded against. The High Court accepted the contention and directed initiation of criminal proceedings against Govindaraji. Such order of the High Court was under challenge before the Supreme Court, which interdicted and set it aside. On the authority of this judgment, it is indeed impermissible to hold on this writ petition at this stage that the acquitted persons were not the real culprits and that the real culprits having been left out with a purpose, the CBI ought to be directed to take up investigation.

28. Despite number of authorities having been cited by either side in respect of the powers of an appellate court under section 386, Cr.P.C., the decision reported in (2006) 7 SCC 296 : Popular Muthiah v. State has not been cited. This decision is an authority for the proposition that even in exercise of the jurisdiction conferred on a High Court by section 386, Cr.P.C., power can *suo motu* be exercised by the High Court in the interest of justice in relation to substantive as also procedural matters. However, there is no clear enunciation of law as to whether a particular agency could be entrusted with further investigation, should the appellate court return a finding that investigation was flawed and that further investigation ought not to be entrusted to the same agency that investigated the FIR. Paragraph 46 of the decision, to an extent, is suggestive of leaving further investigation to the police since investigation of an offence is its statutory power, unless there exists an extra-ordinary situation. It is not too certain as to whether the 'extra-ordinary situation' is referable to the power of directing further investigation while hearing an appeal under section 386, Cr.P.C. or is referable to a particular agency being entrusted with further investigation, should the situation warrant such an order. Popular Muthiah (supra) did not consider N.R. Govindaraji (supra), and the law in this regard, it seems to this Bench, is in a nebulous state.

29. Although Mr. Gupta and Mr. Moitra have argued with vehemence that the judgment and order of the learned Sessions Judge being the subject matter of the appeal ought not to be looked into at all, this Bench is not persuaded to agree with such a contention. Definitely the Writ Court cannot examine the judgment of the learned Sessions Judge to find holes in it as if it were exercising appellate powers but such judgment can most certainly be looked into for the limited purpose of ascertaining whether laxity in the process of investigation led to formation of opinion that investigation was defective, resulting in the accused obtaining the benefit of doubt. Since the learned Sessions Judge did notice deficiencies and expressed dissatisfaction in regard to the process of investigation, one never knows whether there could be a situation for the appellate court under section 386, Cr.P.C. to direct further investigation, and further as

to whether the appellate court could direct a particular agency to conduct further investigation. In view of the nebulous state of law noticed above, this Bench is of the considered view that such direction without the legal position being clouded further, could be facilitated if this writ petition is kept pending for being decided along with the pending appeal for upholding the victim's right.

30. In any event, since the petitioner prayed for investigation by the CBI apprehending that there would be no fair investigation and that the investigation was flawed is indeed a finding rendered by the learned Sessions Judge himself and particularly having regard to the fact that the judgment of the learned Sessions Judge is the subject matter of challenge before the Division Bench of this Court, it would be in the interest of justice if this writ petition is referred for hearing along with the appeal filed by the State Government in terms of Rule 26 of the Writ Rules, whereby a single Judge of the High Court has the power to refer a writ petition for hearing by a Division Bench, for enabling the appellate court to consider the desirability of passing such order as it may consider appropriate in the circumstances. It is ordered accordingly.”

- i. The matter had also travelled to the Hon'ble Supreme Court against the order dated 4th of January, 2017 passed in WPA 12526 of 2012 and the Hon'ble Supreme Court by order dated 27th of January, 2017 in Criminal Appeal No (s). 179 of 2017 (arising out of SLP (Crl.) No. 821 of 2017) in the matter of Sasti Gayen vs. Protima Dutta and Others had directed that the pending criminal appeals shall be heard in the first instance, and thereafter, the writ petition, if required, may be considered. Hon'ble Supreme Court in this regard in Criminal Appeal No. 179 of 2017 had directed as under:

“4. On due consideration and taking into account the order of acquittal passed by the learned trial Court, which is presently under challenge in the

High Court, we are of the view that the said appeal shall be heard in the first instance and, thereafter, if required the writ petition seeking order for further investigation by the CBI may be considered by the High Court.”

j. Thereafter, Criminal Appeal No. 688 of 2016 and GA No. 3 of 2015 against the order of acquittal were decided by the Division Bench by the judgment dated 10th of April, 2017. The Division Bench had set aside the acquittal order and had remanded the matter back to the Trial Court with certain corrections. The Division Bench had also noted certain deficiencies in the investigation.

k. The judgment of the Division Bench dated 10th of April, 2017 was subject matter of challenge in SLP (Crl.) No. 3661-3662 of 2017 at the instance of the appellant in MAT 883 of 2022. The Hon’ble Supreme Court had dismissed the SLP by order dated 8th of May, 2017 by observing as under

“We do not find any legal and valid ground for interference. The Special Leave Petitions are dismissed. We make it clear that all contentions available in law with regard to the issue of further investigation by the CBI raised in the Writ Petition which is pending before the High Court are open to the argued.”

l. The Division Bench had heard the writ petition partly on 11th of May, 2017, 18th of May, 2017 and 19th of May, 2017. Meanwhile, order dated 11th of May, 2017 passed in CAN 4437 of 2017 in W.P. No. 12526(W) of 2012 became subject matter of challenge in Special Leave to Appeal (Crl.) No. 4375 of 2017 and Hon’ble Supreme Court by order dated

30th of May, 2017 while issuing notice in the SLP had directed that:

“The High Court shall not take up the case till the next date of hearing.”

- m. By order dated 13th of June, 2017, the High Court taking note of the order of Hon’ble Supreme Court dated 30th of May, 2017 had adjourned the hearing in the writ petition.
- n. The above interim order was continued by the Hon’ble Supreme Court by order dated 5th of July, 2017. Therefore again, the Division Bench of the High Court by order dated 10th of July, 2017 had adjourned the writ petition.
- o. Hon’ble Supreme Court by order dated 9th of August, 2017 had disposed of the Special Leave to Appeal (Crl.) No. 4375 of 2017 (Criminal Appeal No (s). 1361 of 2017) giving right of hearing to the appellant in the pending writ petition by directing as under:

“4. Having considered the matter, we are of the view that in the light of our previous order dated 08.05.2017 passed in Special Leave Petition (Crl.) Nos. 3661-3662 of 2017, the appellant ought to be heard by the High Court in the Writ Petition No. 12526(W) of 2012 which is presently pending before it. We order accordingly.

5. However, we make it clear that it will not be necessary for the High Court to implead the appellant as a party to the writ petition but he may be heard on all questions of law as may be open to him to be agitated in the High Court in accordance with our order dated 08.05.2017.”

- p. The Division Bench on 16th of August, 2017, taking note of the order of the Hon’ble Supreme Court had fixed the matter for hearing on 6th of September, 2017. Thereafter, on 28th of

September, 2018, the Division Bench had directed delisting of the petition and on 19th of November, 2019, the Division Bench had directed to place the writ petition before the Division Bench hearing Group-IX matters as per determination.

- q. By order dated 14th of March, 2022, the Division Bench of the High Court on the objection of the accused persons and the State had transferred the writ petition to the Single Bench for hearing and disposal and thereafter, the matter has been heard by the learned Single Judge and disposed of by the order under appeal.

17. The above sequence of events clearly indicate that the writ petitioner, i.e., widow of the deceased was diligently prosecuting the writ petition at all stages yet on account of the several orders passed by the Courts at different stages, the writ petition could not be heard expeditiously. Therefore, the writ petitioner cannot be blamed for the delay and it does not furnish any ground to dismiss the writ petition.

18. The next argument advanced by learned counsel for the appellants is that at this stage, the investigation cannot be transferred to the CBI.

19. The record reflects that the judgment of acquittal passed by the Trial Court has been set aside by the Division Bench by the judgment dated 10th of April, 2017 in Criminal Appeal No. 688 of 2016 and GA No. 3 of 2015. While setting aside the acquittal, the Division Bench has remanded the matter to the Trial Court by noting several deficiencies in investigation as under:

“The learned court below further found that Ext. 10 was a seizure list in respect of the seizure which had taken place on May 12, 2011 at the house of the deceased containing petitions dated March 19, 2010, and September 5, 2010, i.e. prior to the murder of the deceased, written in the letter heads of “Jala Bhumi Bachao Committee of the deceased addressing IG, South Bengal, SP Howrah, I.C., Liluah P.S., respectively, as also three photographs of Jaypur Bill in question taken on February 27, 2010, by the deceased showing some filling and construction work. Though the learned court below observed that those documents were indeed very vital in order to ascertain the existence of Jaypur Bill in question and the apprehension of the deceased relating to the same prior to his death, the court expressed its helplessness consequent upon non-production of those documents before the court during trial by the prosecution.

From the above observation of the learned court below there was not even an iota of doubt that the prosecution failed to produce some evidence which was necessary for a just and proper disposal of the case.”

20. The Division Bench further found that:

“That apart, we cannot ignore the fact of seizure of one blood stained empty bullet and empty cartridge from the place of occurrence seized on the date of incident. The same have also been brought on record as Mat Exbts. I and III and the signature of the above prosecution witness was also proved and exhibited as Exbt. -2/2 by him. Neither the same was sent for obtaining Ballistic Report from the Forensic Science Laboratory at Calcutta nor the above seized articles were taken into consideration by the learned Court below for a just decision in the matter in accordance with law as discussed hereinabove.”

21. The Division Bench while remanding the matter back to the Trial Court had directed that:

“In view of the discussion and observation made hereinabove, the impugned judgement and order of acquittal are quashed and set aside with direction upon the trial court to invoke the power conferred under section 311 for limited purpose of bringing the seized document contained in Ext. 10 in accordance with law as also to allow the prosecution and/or the appellant in the former appeal (PW 25) to adduce further evidence by way of re-calling as also allowing the

accused persons to cross-examine her and, thereafter, to record further statements of the respondent Nos. 2 to 6 under section 313 Cr.P.C. afresh. Needless to mention that in the event prayer is made by either of the parties for adducing further evidence, the same shall be considered by the learned Trial Judge in accordance with law in order to unearth the truth.

It will not be out of context to record here that this judgement is passed pending an application filed by the appellant under Article 226 of the Constitution of India in the matter of Protima Dutta Vs. State of West Bengal (in Re: WP 12526(W) of 2012) with a prayer for a direction upon the Central Bureau of Investigation to investigate in connection with the aforesaid FIR bearing Bally P.S. Case No.205 of 2011, dated May 6, 2011.”

22. In pursuant to the above order of Division Bench, the trial is pending presently.

23. Learned Single Judge while considering the issue of “speedy trial” versus “fair trial” has duly taken note of the judgments of the Hon’ble Supreme Court in respect of the stage when fresh, de novo or reinvestigation can be directed by the Constitutional Court. Taking note of the judgment of the Hon’ble Supreme Court in the case of **Pooja Pal vs. Union of India and Others** reported in (2016) 3 SCC 135 and **Dharam Pal vs. State of Haryana and Others** reported in (2016) 4 SCC 160, learned Single Judge has noted as under:

“107. In **Pooja Pal Vs Union of India** reported in (2016) 3 SCC 135, the Supreme Court, in the context of the competent interests to be maintained in ensuring a ‘speedy trial’ versus a ‘fair trial’, in the powers of the High Court to order fresh investigation by a different investigation agency, noted as follows:

“82. The exhaustive references of the citations seemingly repetitive though, assuredly attest the conceptual consisting in the expositions and enunciations on the issue highlighting the cause of

justice as the ultimate determinant for the course to be adopted.

83. A “speedy trial”, albeit the essence of the fundamental right to life entrenched in Article 21 of the Constitution of India has a companion in concept in “fair trial”, both being inalienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the State Police notwithstanding, has to be essentially invoked if the statutory agency already in charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fructuously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analysed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

86. A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the

basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore, cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though well-demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard-and-fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice.

101. Judged in these perspectives, we are of the firm opinion that notwithstanding the pendency of the trial, and the availability of the power of the courts below under Sections 311 and 391 of the Code read with Section 165 of the Evidence Act, it is of overwhelming and imperative necessity that to rule out any possibility of denial of justice to the parties and more importantly to instil and sustain the confidence of the community at large, CBI ought to be directed to undertake a de novo investigation in the incident. We take this view, conscious about the parameters precedentially formulated, as in our comprehension in the unique facts and circumstances of the case any contrary view would leave the completed process of crime detection in the case wholly inconsequential and the judicial process impotent. A court of law, to reiterate has to be an involved participant in the quest for truth and justice and is not expected only to officiate a formal ritual in a proceeding far-seeing an inevitable end signalling travesty of justice. Mission justice so expectantly and reverently entrusted to the judiciary would then be reduced to a teasing illusion and a sovereign and premier constitutional institution would be rendered a suspect for its existence in public estimation.

Considering the live purpose for which judiciary exists, this would indeed be a price which it cannot afford to bear under any circumstance.”

108. The commencement of trial and examination of witnesses cannot in and of itself, negate or create and impediment to the powers of the High Court under Art. 226 as was observed in **Dharam Pal vs. State of Haryana**, reported in **(2016) 4 SCC 160**, as follows:

“**24.** Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.”

“**25.** We may further elucidate. The power to order fresh, de novo or reinvestigation being vested with the constitutional courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic set-up has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that sun rises and sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It

has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the “faith” in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a constitutional court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the “tour de force” of the prosecution and if we allow ourselves to say so it has become “idée fixe” but in our view the imperium of the constitutional courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier, facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an “orphan under law”.

109. In the facts of the case it is noticed that the omissions of the petitioner, therefore, are hardly relevant in the process of ascertaining and finding the truth. The failure of the investigators and prosecutors, as already found by the Sessions Court and the High Court calls for necessary intervention by this Court, in the facts of this case. After all, the responsibility of punishing the real wrong doers, with or without exercise of powers under Section 311 and 319 of the CrPC, is that of all stakeholders under the Cr.PC.

110. The contention of Mr Chakraborty that change of an investigator and prosecutor has never happened in a proceeding under article 226 after the trial has been completed, cannot inhibit, and should not stand in the way of ordering measures for ensuring that the wheels of justice move in the right direction. The truth and nothing but the truth has to be ascertained. This is indeed a rare and extraordinary case calling for extraordinary measures.”

24. Thus, Hon’ble Supreme Court in the matter of **Pooja Pal (supra)** has settled that the fair trial includes fair investigation and if the investigation is not effective, purposeful, objective or fair, it

becomes the obligation of the Court to order further investigation or reinvestigation as the case may be to discover the truth and prevent miscarriage of justice. It has further been held in this case that notwithstanding the pendency of trial and availability of power of the Trial Court under Sections 311 and 391 of the Cr.P.C. read with Section 161 of the Evidence Act, if it is imperative necessity to rule out any possibility of denial of justice to the parties and to instil and sustain the confidence of community at large, CBI can be directed to investigate the incidents.

25. In the case of **Dharam Pal (supra)** again, it has been clarified that the commencement of trial and examination of some witnesses cannot be an absolute impediment for exercise of the constitutional power to order fresh, de novo or reinvestigation.

26. Hence, in view of the above judicial pronouncement in appropriate case, Constitutional Courts can order fresh, de novo or reinvestigation even after commencement of trial and examination of some witnesses in order to ensure fair and just investigation.

27. A minute perusal of the order of the learned Single Judge reveals that the relevant issues relating to transfer of investigation have been duly examined in detail by the learned Single Judge. Each of the following issues has been considered in the light of the judicial pronouncements:

- i. The need for an impartial and effective investigating agency in the criminal justice delivery system and the circumstances which warrant the need for change of investigating agency.

- ii. The role of an effective and independent prosecutor and prosecution in criminal trials
- iii. Nature and scope of Section 311 of the Cr.P.C. and the extreme care and caution be exercised in invoking and yielding these powers.
- iv. Jurisdiction of the High Court under Article 226 of the Constitution in respect of the criminal proceedings, in the backdrop of the inherent power vested on High Court under Section 482, 382 and 386 of the Cr.P.C.

28. While considering the first issue about circumstances warranting change of investigating agency, learned Single Judge has taken note of various judicial pronouncements and has noted the omissions on the part of CID, West Bengal recorded by the Trial Judge and as also found by the Division Bench and has reached to the conclusion that the investigation by the CID was perfunctory and the petitioner's contention and apprehensions have been vindicated. Learned Single Judge in this regard has reached to the following conclusion:

“83. In the light of the omissions on the part of the CID, West Bengal recorded by the trial judge and as found by the Division Bench of this Court, referred to hereinabove, it is quite clear that investigation in the instant case by the CID, West Bengal, has been perfunctory. The petitioner's contentions and apprehensions have thus been vindicated. The State agencies have clearly failed to effectively investigate the crime and being the actual culprits to book. There is thus, an urgent and immediate need to instill public faith in the investigation and trial, which provides sufficient impetus for the change in the investigation agency.”

29. While considering the second issue about role of prosecutor, learned Single Judge has again noted various judicial pronouncement

and found that the prosecutor had failed to adequately discharge the duty in the present case and had reached to the conclusion that the change of prosecuting agency is imperative to ensure that the truth emerges in the matter. In this regard, learned Single Judge has found that:

“92. In light of the findings of both the Trial Judge as well as the Division Bench of the High Court on the failure of and the laxity exhibited by the Prosecutor in placing evidence before the Court, and adequately questioning witnesses; combined with the above decisions and Law Commission Reports, this Court is of the view that the Prosecutor has failed in adequately discharging duties. The prosecution must be kept away from the reach of any State or political influence in view of the likely involvement of powerful and politically influential persons. This Court is this of the view that a change in the Prosecution or Prosecution Agency is vital and imperative to ensure that the truth emerges in the matter.”

30. While considering the third issue about nature and scope of the powers of the Trial Court under Section 311 of Cr.P.C., learned Single Judge has considered various judgments on the point and thereafter, found that Section 311 of Cr.P.C. cannot be disguised for retrial or filling up lacunae in the case of prosecution or defence. The learned Single Judge has also found that there are limitations in exercise of power under Section 311 of the Cr.P.C. and the task of the learned Trial Judge will be extremely onerous without effective investigation and prosecution and thereafter, has reached to the following conclusions:

“102. It can be concluded from the above decisions, that while the powers of the Trial Court under S. 311 are partly discretionary, and partly mandatory, it must be exercised with extreme care, caution and circumspection. Its indiscriminate use, especially in situations where there are glaring holes in the efforts of the investigation and the prosecution case- as in the case before us- it would only be

equivalent to attempting to filling up the “lacunae” in the prosecution case.

103. Section 311 therefore aims at empowering any Criminal Court with the means to ascertain and arrive at the truth. The real offenders must be found, tried and the charges must be proved against them. The innocent must be determined and left out. The Court alone cannot discharge this onerous task given the huge restrictions, and requirements for care and caution, involved. It must therefore be assisted by an effective prosecutor. It must be suitably and properly guided by an able, sincere and honest prosecutor.

104. in the backdrop of the above dicta/decisions of the Supreme Court, relating to Section 311 of the Cr.PC, this court is of the view that the task imposed on a Trial judge would be extremely onerous, if the burden is placed entirely on the Trial Court to proceed with the Trial without an honest, effective and comprehensive/dedicated assistance of an agency to assist with effective investigation, as well as an effective prosecution.

105. This becomes all the more relevant in light of the fact that the all Courts in the country, and Trial Courts in particular, are already extremely over-burdened with the ever increasing case load.”

31. While considering the fourth issue about scope of jurisdiction under Article 226 of the Constitution, learned Single Judge has found that the powers vested in the Court under Article 226 of the Constitution will be rendered essentially defunct unless it is exercised to its full potential to ensure that the person responsible for the murder of Tapan Dutta and the motive behind the same are unearthed. Learned Single Judge has duly taken note of the circumstances of the case which required transfer of investigation to the CBI as under:

“113. This Court’s mind is not free from doubt that the murder in question might have been the result of a rivalry and a conspiracy. The victim may have been obstructing huge monetary and/or political gain that some persons were after. Such persons are politically powerful and well connected. A fair and effective investigation may

indeed open a can of worms, or expose any likely role of influential persons. The pressure on the State police and the investigation agencies to shield certain persons and their nefarious actions cannot therefore be ruled out. Change of the investigating and prosecuting agency in the instant case is also necessary to instill faith in the family of the victim and the public at large.

114. This Court directs that, investigation and prosecution in the matter is to be transferred to the Central Bureau of Investigation forthwith. The CBI may, in its discretion, conduct further investigation, as it deems necessary.”

32. We find that the above conclusions which have been drawn by the learned Single Judge are duly supported by the relevant judicial pronouncements and they are neither arbitrary, illegal nor erroneous. Thus, in exercise of the appellate power, we do not find adequate ground to interfere with the above conclusions.

33. One of the argument of learned counsel for the appellant is that in the memo of criminal appeal filed by the daughter of the deceased against the judgment of acquittal, there was a prayer for further investigation by independent agency which was not granted by the Division Bench while passing the final order in the criminal appeal, therefore same relief in the writ petition cannot be granted.

34. It is worth noting that the Division Bench of this Court at that time of deciding appeal against the judgment of acquittal was exercising the Criminal Appellate Jurisdiction and therefore, such a relief could not be granted which was otherwise available for consideration in the pending writ petition under Article 226 of the Constitution. That apart, the appeal was at the instance of the daughter of the deceased whereas the WPA No. 12526 of 2012 was not only prior in point of time but was at the instance of the wife of the deceased. This issue has also been duly considered by the learned

Single Judge and it has been found that the change of investigating agency was not an issue nor ever argued by the parties in Criminal Appeals and that the principle of constructive *res judicata* and issue of estoppels and the principles of autrefois acquit under Section 300 of the Cr.P.C. is not applicable and that doctrine of merger cannot be applied to extinguish the observation of the Sessions Judge regarding faculty investigation.

35. We are also unable to accept the contention of the learned counsel for the appellant (accused no. 2) in MAT 883 of 2022 that the order of the learned Single Judge under challenge in substance modifies the order of the Division Bench in Criminal Appeal. The Division Bench after finding lacunae in the investigation and trial had remanded the matter back with a certain direction. The Division Bench had issued the limited directions as it was exercising the Criminal Appellate Jurisdiction but the learned Single Judge while exercising the writ jurisdiction in order to do complete justice and ensure fair trial, after taking note of the circumstances of the case and the lapse on the part of investigation agency, has issued appropriate direction for further investigation and prosecution by the CBI. In view of the judgment already taken note of by the learned Single Judge, reliance of learned counsel for the appellant on Section 173 of the Cr.P.C. is of no help because direction to transfer investigation to CBI cannot be issued by the Magistrate. The direction issued by the learned Single Judge is an exercise of the power under Article 226 of the Constitution and not under Section 173 of the Cr.P.C. The mere fact that the writ petitioner could not file a protest petition before the Magistrate on filing of the charge-sheet will not prejudice her claim in

the writ petition which was promptly filed at the initial stage itself in the year 2012.

36. So far as the judgments in the matter of **Arnab Ranjan Goswami (supra)**, **Committee for Protection of Democratic Rights, West Bengal (supra)** and **Sahngoo Ram Arya (supra)** relied upon by learned counsel for the appellant is concerned, there is no dispute to the proposition that the power to transfer investigation to the CBI is to be exercised by the Courts sparingly and in exceptional circumstances. The circumstances which are noted by the learned Single Judge in the order under appeal justify the exercise of power and transfer of investigation in the present case.

37. So far as the judgment in the matter of **Vinubhai Haribhai Malaviya (supra)** relied upon by learned counsel for the appellant accused is concerned, the same relates to the power exercisable by the Magistrate under Sections 153 and 173 of the Cr.P.C. whereas learned Single Judge in the present case has exercised the power under Article 226 of the Constitution.

38. Learned counsel for the appellant has also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Vinay Tyagi (supra)**. In that case also, it has been concluded that in an appropriate case when the Court feels that the investigation by the appellate authorities was not in proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to the specialized agency.

39. In view of the above factual and legal position, we find that no error has been committed by the learned Single Judge in

transferring the investigation and prosecution to the CBI and no case for interference is made out.

40. The appeals are accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Later,

After the judgment was pronounced, the learned Counsel for the appellant in MAT 944 of 2022 has prayed for stay.

Having regard to the detailed reasons assigned in the judgment, we do not find any ground to accept the prayer. Accordingly, prayer for grant of stay is rejected.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
30.09.2022

PA(RB)

(A.F.R./N.A.F.R.)