HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SB: HON'BLE MR. JUSTICE G.S. AHLUWALIA

WP No. 639 OF 2012

Anil Singh Bhadauria

-Vs-

State of M.P. and Others

Shri Anil Sharma, Counsel for the petitioner.

Smt. Nidhi Patankar, Government Advocate for the respondents No.1 to 3/State.

Shri Devendra Sharma, Counsel for the respondent No.4.

O R D E R
(21/12/2018)

PER JUSTICE G.S. AHLUWALIA:

This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

> ''7(i) This Hon'ble Court may issue command whereby entire enquiry made by the respondent No. 3 & 4 in relation to encounter dt. 22.11.2010 of Police Station Tentra be set aside and quashed.
> ii) The Hon'ble Court may further direct, to learned District & Sessions Judge Morena to conduct a fresh judicial inquiry by any Judge working under him, in relation to the encounter dt. 22.11.2010 at PS Tentra distt. Morena.
> iii) For placing petitioner in unnecessary harassment, as this Hon'ble Court may deem fit, may pass an exemplary costs.
> (iv) Any other relief which this Hon'ble Court deem fit and proper be also allowed.''

(2) The necessary facts for the disposal of the present petition in short are that the petitioner was posted as Sub-Inspector in Police Station Tentra, District Morena. In the intervening night of 21st and 22nd of November, 2010, the petitioner received an information about the presence and movement of 4-5 armed dacoits within the

territorial jurisdiction of Police Station Tentra. After recording the said information in *Rojnamcha Sahna,* he went for search of dacoits. The police party had an encounter with 5-6 armed dacoits, who after noticing the police party, without provocation opened fire at Police Party. It is alleged that in self- defence, the Police Force retaliated and caused gunshot fires. The firing continued for 10-15 minutes and thereafter, it stopped. The police party carried out for search and found four unidentified dead bodies, which were lying at various places. A *Panchnama* was prepared. The dead bodies were lifted and on the next day, the dead bodies were identified. The deceased were found to be criminals, having criminal history. The dead bodies were sent for postmortem examination. A magisterial enquiry was ordered and the District Magistrate was requested to conduct an enquiry with regard to encounter dated 22/11/2010. The District Magistrate, in it turn, entrusted the enquiry to the then SDM, Sabalgarh. The SDM, Sabalgarh recorded the statements of 19 witnesses. However, no opportunity was given to the petitioner to cross-examine those witnesses. It is further submitted that later on, these witnesses submitted their affidavits to the District Magistrate, Morena and Divisional Commissioner, Chambal Division, Morena. The SDM submitted the enquiry report, which according to the petitioner, was not accepted by the District Magistrate and the matter was remanded back with certain directions. Thereafter, the earlier SDM was transferred and Shri Abhishek Singh joined as SDM, Sabalgarh, however, he kept the enquiry pending and ultimately, the enquiry was transferred to Shri AB Singh, Joint Collector, Morena. Shri AB Singh, also did not permit the petitioner to cross-examine the witnesses and has submitted the enquiry report. Thus, it is submitted by the counsel for the petitioner that the Magisterial enquiry has been conducted in violation of order of remand as well as the enquiry is bad on the ground of violation of principle of natural justice.

(3) *Per contra,* it is submitted by the counsel for the State that the

petition is premature. Initially, the enquiry was conducted by Shri Vikash Narwal and before he could complete the enquiry, he was transferred. Thereafter, the enquiry was entrusted to Shri Ambhishek Singh but he too could not complete the magisterial enquiry and consequently, Shri AB Singh, Joint Collector was appointed as an enquiry officer and the enquiry report has been submitted on 19/01/2012 (Annexure R1). As per the findings recorded in the magisterial enquiry, the encounter has been found to be suspicious and accordingly, the matter was also referred to National Human Rights Commission on 20/01/2012 itself. The enquiry report has also been sent to Home Secretary, Ballabh Bhawan, Bhopal for further action. However, no final decision has been taken by the higher authorities. Therefore, this petition is premature. Furthermore, it is submitted by the counsel for the State that the affidavits of the witnesses submitted by the petitioner cannot be taken into consideration at this stage. So far as non-grant of opportunity to cross-examine the witnesses is concerned, it is submitted by the Counsel for the State that there is no provision of granting opportunity to cross-examine the witnesses in the magisterial enquiry.

(4) Heard the learned counsel for the parties.

(5) Certain guidelines have been issued for conducting the magisterial enquiry. Clause 6 of the guidelines deals with the procedure to be adopted while conducting the magisterial enquiry, which reads as under:-

> **''6. जांच की प्रक्रिया :**
> (क) यह जांच वरिष्ठ कार्यपालिक दण्डाधिकारी द्वारा तुरन्त ही यथासमय मौके पर की जानी चाहिए. यह वांछनीय है कि पुलिस की ओर से प्रकरण पर नंबर रखने के लिए तथा दण्डाधिकारी की सहायता हेतु उच्च पुलिस अधिकारी द्वारा सहायता दी जाये. प्राथमिक रूप से तथ्यों का अनुसंधान साक्ष्य का एकत्रीकरण गवाहों की प्रस्तुती एवं उसी प्रकृति के कार्य हेतु पुलिस अधिकारी की सहायता ली जानी चाहिए. जांच प्रारंभ करने के पूर्व कार्यपालिक दण्डाधिकारी द्वारा जांच की विषय वस्तु को ध्यान में रखते हुए विज्ञप्ति प्रसारित कर इच्छुक

व्यक्तियों/संगठनों की जांच में सहायता करने हेतु बलाना चाहिए. सामान्यतः एक ही साथ एक कार्यपालिक दण्डाधिकारी को एक से अधिक विषयों से संबंधित जांच नहीं सौपी जाना चाहिये.

(ख) इस जाच का विषय तथ्यों का अन्वेषण करना होता है इस जांच में विश्वसनीय आंकडे एकत्रित कर तथ्यों पर निष्कर्ष दिए जाते है. तथा सत्य की खोज की जाती है. यह जांच करते समय कार्यपालिक दण्डाधिकारी को न्यायालयीन शक्तियां प्राप्त नहीं होती है तथा वह न्यायालय के रूप में कार्य नही करता है.

(ग) कार्यपालिक दंडाधिकारी को यह जांच करते समय साक्ष्य अधिनियम दंडप्रक्रिया संहित आदिविधानों के सर्व मान्य तथा समय सिद्ध सिद्धांतों का अनुपालन करना चाहिए ये सिद्धांत शताब्दियों के अनुभव के आधार पर संगठित सिद्धांत है यद्यपि जांच करते समय कार्यपालिक दण्डाधिकारी इन सिद्धांतों की प्रक्रिया का पालन करने हेतु वाध्य नही है.

(घ) इस जांच के अन्तर्गत यदि किसी व्यक्ति के आचरण की जांच की जा रही है ओर यह संभावना हो कि इस जांच में किसी व्यक्ति की प्रतिष्ठा विपरीत रूप से प्रभावित हो सकती हो तो संबंधित व्यक्ति को सुनवाई का संमुचित अवसर दिया जाना चाहिए प्राकृतिक न्याय की सुरक्षा के अभाव में वैधानिक रूप से भले ही सही, किन्तु परिणामी रूप से संबंधित व्यक्ति को एक प्रकार से दण्डित कर दिया जाता है. अतः संबंधित व्यक्ति को प्राकृतिक न्याय का अवसर दिया जाना चाहिए दूसरे शब्दों में जांच एक पक्षीय नहीं होना चाहिए. ''

Clause 8 of the guidelines reads as under:-

''**8. जांच न्यायालय द्वारा परीक्षण :**

इस जांच तथा न्यायलय द्वारा किए जाने वाले परीक्षण में महत्वपूर्ण अंतर है इस जांच में तथ्यों की सत्यता को सुनिश्चित किया जाता है. किन्तु न्यायालय द्वारा ओरापी के अपराध को सिद्ध असिद्ध किया जाता है. न्यायालय द्वारा किए जाने साक्ष्य का स्तर ऊंचा होता है. न्यायालय पर साक्ष्य अधिनियम तथा भारतीय दंड प्रक्रिया संहिता के प्रावधान बंधनकारक है किन्तु इस जांच में ये प्रावधान बंधनकारक नही है. न्यायालय अंतिम निर्णय प्रदान करता है. जबकि जांच कर रहा कार्यपालिक दण्डाधिकारी आगामी कार्यवाही हेतु अपनी अनुशंसाएं प्रस्तुत करता है. ''

(6) So far as the magisterial enquiry is concerned, it is a fact-finding enquiry and no punishment can be imposed upon the persons who are found guilty, but it lays down a foundation to proceed further against the delinquent officers in accordance with the findings given by the enquiry officer. The enquiry report is not admissible as an

evidence. As per clause 6 of the guidelines issued for conducting the magisterial enquiry, there is no requirement to give an opportunity of cross-examining the witnesses. The only requirement is that a person should be given an opportunity of hearing. Clause 8 of the guidelines makes the position crystal clear. According to Clause 8 of the guidelines, there is an important difference between examination of the factual aspect by the Court and the Magisterial enquiry. The basic purpose of the Magisterial enquiry is to ascertain the facts, whereas the basic purpose of prosecution in the Court is to prove the guilt of an accused. The provisions of Evidence Act and CrPC are binding on the Court, whereas those provisions are not binding on the Magisterial enquiry. The judgment given by the Court is final, whereas the findings given by Executive Magistrate can be used only for making a recommendation for further action. Thus, it has been clarified in the guidelines itself that the basic purpose of conducting the magisterial enquiry is only to ascertain the facts before making a recommendation and not to establish the guilt of a person. Thus, the magisterial enquiry is not final and not binding on any Court of law. A person cannot be convicted merely on the ground that he has been found guilty in the magisterial enquiry and to establish the guilt of a person, the prosecution would be under an obligation to prove his guilt beyond reasonable doubt before the Court.

(7) As already clarified in the guidelines itself that the provisions of Evidence Act and CrPC are not applicable to the magisterial enquiry, therefore, the enquiry report Annexure R1 cannot be quashed at this stage.

(8) It is well-established principle of law that an accused has no right to suggest the manner and method of investigation by whom it should be done.

The Supreme Court in the case of **Romila Thapar and Others vs. Union of India and Others,** by judgment dated 28th September, 2018 passed in Writ Petition (Criminal) No.260 of 2018 has held as

under:-

> ''**20**. 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?
>
> **21.** Turning to the first point, we are of the considered opinion that the issue is no more res integra. In Narmada Bai Vs. State of Gujarat and Ors.1, 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)
>
> **22**. Again in Sanjiv Rajendra Bhatt Vs. Union of India and Ors.2, the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Paragraph 68 of this judgment 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. Chadha3, Mayawati v. Union of India4, Dinubhai Boghabhai Solanki v. State of Gujarat5, CBI v. Rajesh Gandhi6, Competition Commission of India v. SAIL7 and Janta Dal v. H.S. Choudhary."
>
> (emphasis supplied)

23. Recently, a three-Judge Bench of this Court in E. Sivakumar Vs. Union of India and Ors.9, 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 Vs. State of Gujarat10, 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 Vs. State of Maharashtra11, 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."

24. This Court in the case of Divine Retreat Centre Vs. State of Kerala and Ors.12, 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.

25. Be that as it may, it will be useful to advert to the exposition in State of West Bengal and Ors. Vs. Committee for Protection of Democratic Rights, West Bengal and Ors.13 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."

26. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about mala fide exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. 39 Rather, averment in the petition as filed was to buttress the reliefs initially prayed (mentioned in para 7 above) - regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A16 to A20) has been seriously disputed by the Investigating Agency and have commended us to the material already gathered during the ongoing

investigation which according to them indicates complicity of the said accused in the commission of crime.

Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organisation and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor it is possible to enquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court.

Admittedly, the named accused have already resorted to legal remedies before the jurisdictional Court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the Court for obtaining remand by the Police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.

27. In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation. The first two modified reliefs claimed in the writ petition, if they were to be made by the accused themselves, the same would end up in being rejected. In the present case, the original writ petition was filed by the persons claiming to be the next friends of the concerned accused (A16 to A20). Amongst them, Sudha Bhardwaj (A19), Varvara Rao (A16), Arun Ferreira (A18) and Vernon Gonsalves (A17) have filed signed statements praying that the reliefs claimed in the subject writ petition be treated as their writ petition.

That application deserves to be allowed as the accused themselves have chosen to approach this Court and also in the backdrop of the preliminary objection raised by the State that the writ petitioners were completely strangers to the offence under investigation and the writ petition at

> their instance was not maintainable. We would, therefore, assume that the writ petition is now pursued by the accused themselves and once they have become petitioners themselves, the question of next friend pursuing the remedy to espouse their cause cannot be countenanced. The next friend can continue to espouse the cause of the affected accused as long as the concerned accused is not in a position or incapacitated to take recourse to legal remedy and not otherwise.''

(9) Accordingly, this Court is of the considered opinion that the petition filed by the petitioner is premature as no final decision has been taken by the State on the enquiry report dated 19/01/2012 Annexure R1. The petitioner has also failed to establish that the enquiry officer was biased in any manner. On the contrary, it is clear that the enquiry was conducted as per the guidelines issued by the State for conducting the magisterial enquiry.

(10) Accordingly, this petition fails and is hereby **dismissed.**

(11) The interim order dated 20.04.2012 is hereby vacated.

(G. S. Ahluwalia)
JUDGE

MKB

150 YEARS OF CELEBRATING THE MAHATMA
MAHENDRA KUMAR BARIK
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