

[2010] 5 S.C.R. 89

SHAMIMA KAUSER

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v.

UNION OF INDIA AND ORS.

(Criminal Appeal No. 818 of 2010)

APRIL 19, 2010

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**[B. SUDERSHAN REDDY AND SURINDER SINGH
NIJJAR, JJ.]**

Constitution of India, 1950 – Art. 136 – Interference with ad-interim order passed by High Court – Scope – Deaths in alleged encounters staged by Gujarat police – Writ petition seeking investigation by CBI – High Court passed order for constituting an Investigation Team – Meanwhile, Metropolitan Magistrate made inquiry u/s. 176 CrPC and submitted report whereunder the alleged encounters were found to be fake – Police officials indicted in the report – Application filed by State Government in the writ petition, with prayer to set aside the report of the Magistrate – Operation of the report stayed by High Court, with further direction to the Registrar General of the High Court to make detailed inquiry into the matter which led to holding of inquiry by the Magistrate u/s. 176, CrPC – On appeal, held: Order passed by High Court was ad-interim in its nature – Such ad-interim order not to be interfered with under Art. 136 – Interest of justice would be met if the main writ Petition itself is heard and disposed of by High Court alongwith the application filed by State Government – Meanwhile, Investigating Team already constituted by the High Court not to deal with the report of Magistrate in any manner whatsoever – Directions of High Court to Registrar General (of the High Court) to make detailed inquiry into the matter set aside – Code of Criminal Procedure, 1973 – s.176 – Interim order.

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Some persons died in alleged encounters by the

A Gujarat police. Appellants, i.e. the parents of the
deceased, filed writ petition seeking investigation into the
deaths, by CBI. The High Court passed order for
constituting an Investigation Team. Meanwhile, the
Metropolitan Magistrate made inquiry u/s. 176 CrPC
B pursuant to orders of the Chief Metropolitan Magistrate
and submitted report whereunder the alleged encounters
were found to be fake. Police officials were indicted in the
said report.

C The State Government filed application in the writ
petition, with prayer to set aside the report of the
Magistrate. The operation of the report was stayed by
High Court, with further direction to the Registrar General
of the High Court to make detailed inquiry into the matter
D which led to holding of inquiry by the Magistrate under
Section 176, CrPC. Hence the present appeals.

Disposing of the appeals, the Court

E HELD: 1. The order passed by the High Court is ad-
interim in its nature granting stay of the operation of the
report (submitted by the Magistrate) as at present. The
High Court had not yet finally disposed of the Criminal
Miscellaneous Application filed by the State of Gujarat.
F The effect of the order passed by the High Court is that
the operation of the report is kept in abeyance and
therefore no further action based on the said report could
be initiated in whatsoever manner. In that view of the
matter, such ad-interim order is not to be interfered with
by this Court, in exercise of its jurisdiction under Article
G 136 of the Constitution of India. [Para 10] [95-A-D]

H 2. Interest of justice would be met if the main Writ
Petition (Special Criminal application) itself is heard and
disposed of alongwith the Criminal Miscellaneous
Application filed by the State of Gujarat. In the meanwhile,

the Investigating Team already constituted by the High Court shall not deal with the report of the Magistrate in any manner whatsoever. The directions issued to the Registrar General (of the High Court) to make a detailed inquiry into the matter which led to holding of inquiry by the Magistrate under Section 176, CrPC is also set aside. [Para 10] [95-D-G]

3. The High Court is required to adjudicate the Writ petition (Special Criminal Application) on its own merits and shall consider the very maintainability of the Criminal Miscellaneous Application filed by the State of Gujarat. [Para 11] [96-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 818 of 2010.

From the Judgment & Order dated 9.9.2009 of the High Court of Gujarat at Ahmedabad in Misc. Criminal Application No. 10625 of 2009 in Special Criminal Application No. 822 of 2004.

WITH

CrI. A. No. 819 of 2010.

Kamini Jaiswal, Vrinda Grover, Shomona Khanna, Rebecca M. John, Divyesh Pratap Singh, Huzefa Ahmadi, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Taruna Singh, Charu Mathur for the Appellant.

H.P. Rawal, ASG, Harish N. Salve, Tushar Mehta, AAG, Hemantika Wahi, Pinky, Somanath Padhan, P.K. Dey, Rohit Sharma, S.N. Terdol, Gopal Jain, Nitin Mishra for the Respondents.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. CrI.M.P.No.19538/2009

A for permission to file Special Leave Petition is allowed.

2. Leave granted in both the appeals.

3. These appeals are being disposed of by a common order since the same impugned order dated 09.09.2009 made in MCRLA No. 10625/2009 in SCRLA No.822/2004 of the High Court of Gujarat is under challenge in both the appeals. The High Court by the impugned order granted stay of the report submitted by the learned Metropolitan Magistrate dated 07.09.2009 in Crime No.8/2004 registered with DCB Police Station, Ahmedabad. The impugned order is challenged by the appellants on various grounds. In order to consider the same it may be just and necessary to notice few relevant facts:

4. The appellant in Criminal Appeal @ S.L.P.(Crl.)No.7305/2009 is the mother of the deceased Israt Jehan who is alleged to have been killed by the Gujarat Police in an alleged encounter dated 15.06.2004. The appellant in Criminal Appeal @ Crl. M. P. No. 19538/2009 is the father of the deceased Javed Gulam Mohammed Sheikh @ Pranesh Kumar Pillai who is also alleged to have been killed by the Gujarat Police in a fake encounter. The appellants have been moving from pillar to post seeking justice and a proper inquiry into the matter. They have been consistently asserting before all the authorities that their children were the victims of a fake encounter staged in the year 2004 by the officers of the Gujarat Police. The appellant Shamima Kauser filed a Writ Petition under Article 226 of the Constitution of India, being Special Criminal Application No.822/2004, before the High Court of Ahmedabad, seeking an investigation into the death of her daughter, by the Central Bureau of Investigation, for the reason that she firmly believed that her daughter had been wrongfully done to death by the Gujarat Police in a fake encounter. The appellant in the other appeal filed Writ Petition in this court seeking appropriate directions to order investigation by the Central Bureau of Investigation into the "fake encounter killing" of his son Javed Gulam Mohammed Sheikh @ Pranesh Kumar

Pillai. The said Writ Petition was disposed of by this court granting liberty to the petitioner to approach the High Court of Gujarat seeking appropriate remedy since a Writ Petition arising out of a similar incident was already pending before the High Court. A

5. On 07.08.2009 a learned Single Judge of the High Court passed an order adjourning the Special Criminal Application No. 822/2004 filed by Shamima Kauser to explore the possibility of handing over the investigation to higher officer/s from the cadre of Additional Director General of Police. The material portion of the order reads as under: B C

“With a view to explore the possibility of handing over the investigation to higher officer/s. i.e. officer/s above the rank of Deputy Commissioner of Police, more particularly, from the cadre of Additional D.G., matter is adjourned to 12.08.2009. To be taken up at 1630 hours.” D

6. On 13.08.2009, the learned Single Judge having considered the list of police officers produced by the State of Gujarat passed a detailed order constituting a Team of Investigation “for the purpose of carrying out the investigation.” A team of three senior most officers was constituted for the aforesaid purpose. The High Court also granted permission to Shamima Kauser to make suggestions to the Investigating Team with regard to areas of investigation and to inspect the record qua the FSL report and the ballistic report. The High Court further directed the Investigating Team to consider all the aspects from every angle relevant for the purpose of finding out whether the incident was a genuine encounter or a fake one. The report was directed to be placed before the court on the next date of hearing. The appellant promptly submitted an application before the Investigating Team for inspection of documents and a further application suggesting some areas of investigation. E F G

7. On 07.09.2009, the Metropolitan Magistrate, Court H

A No.1, Ahmedabad, having made an inquiry under Section 176
of the Criminal Procedure Code pursuant to the orders dated
12.08.2009 of the Chief Metropolitan Magistrate submitted an
Inquiry Report in respect of death of (1) Israt Jehan, (2) Jishan
B (4) Javed Ghulam Sheikh. The learned Magistrate having made
a detailed analysis of the material available on record found
that they were killed by "the ——— police officers and police
personnel with their service revolver and unlicensed and illegally
held AK-56 rifle and with other weapons fired bullets on body
C of deceased and thereby murdered ——— in a systemic manner,
cold-bloodedly, mercilessly and cruelly."

8. On 09.09.2009, the State of Gujarat and as well as two
police officers whose names were mentioned in the report filed
Miscellaneous Applications in Special Criminal Application
D No.822/2004 with a prayer to set aside the report dated
07.09.2009 of the learned Magistrate whereunder the alleged
encounters were found to be fake. The matter was orally
mentioned for listing and they were taken up on the same day
at about 4.30 p.m. by the learned Single Judge and disposed
E of by the impugned order. However, the Criminal Miscellaneous
Applications filed by the individual police officers were
withdrawn and only Miscellaneous Criminal Application No.
10625/2009 filed by the State of Gujarat was heard and
disposed of.

F 9. The learned counsel for the appellant – Ms. Kaimini
Jaiswal, and Mr. Huzefa Ahmadi appearing on behalf of the
appellant in the other appeal expressed their serious objection
to the manner in which the learned Single Judge took up the
application filed by the State of Gujarat and granted stay of the
G report with a further direction to the Registrar General to make
a detailed inquiry into the matter which led to holding a parallel
inquiry and filing of the report by the learned Magistrate. The
learned Judge was of the opinion that the inquiry made by the
learned Magistrate was beyond "the provision of law." It was
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strenuously contended the very Miscellaneous Application filed by the State of Gujarat in the Writ Petition filed by one of the appellants herein was not maintainable. A

10. Notwithstanding various observations made by the Learned Single Judge in the impugned order the fact remains the order passed by the learned Single Judge is ad-interim in its nature granting stay of the operation of the report as at present. The learned Single Judge not yet finally disposed of the Criminal Miscellaneous Application filed by the State of Gujarat. The effect of the order passed by the learned Single Judge is that the operation of the report is kept in abeyance and therefore no further action based on the said report could be initiated in whatsoever manner. In such view of the matter we are not inclined to interfere with such ad-interim order in exercise of our jurisdiction under Article 136 of the Constitution of India. Interest of justice would be met if the main Writ Petition itself is heard and disposed of alongwith the Criminal Miscellaneous Application filed by the State of Gujarat. In the meanwhile, the Investigating Team already constituted by the High Court shall not deal with the report of the learned Magistrate in any manner whatsoever. However, the observations made in the impugned order with regard to the report of the learned Magistrate are set aside which are totally unnecessary. The observations so made if allowed to remain may result in far reaching consequences. We fail to appreciate as to why and what made the learned Judge to make such observations even while the very application filed by the State is kept pending for its adjudication. The directions issued to the Registrar General to make a detailed inquiry into the matter which led to holding of inquiry by the Magistrate under Section 176 of the Code of Criminal Procedure is also set aside. B
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11. We must express our reservations the manner in which the proceedings went on before the High Court resulting in the impugned order. In the circumstances we consider it appropriate to request the learned Chief Justice of the High H

- A Court to place Special Miscellaneous Application No.822/2004 along with Criminal Miscellaneous Applications including Criminal Miscellaneous Application No. 10625/2009 filed by the State of Gujarat for their disposal in accordance with law as expeditiously as possible preferably within six months from today. It is needless to observe that the observations made in the impugned order shall have no bearing whatsoever upon the merits of the case. The Division Bench is required to adjudicate the Special Criminal Application on its own merits uninfluenced by the previous order passed by the learned Single Judge in the matter. It is also needless to observe that the Division Bench shall consider the very maintainability of the Criminal Miscellaneous Application filed by the State of Gujarat.

12. Impleadment Application in Criminal Appeal @ S.L.P.(Cr.)No.7305/2009 : In view of the final orders passed in the Criminal Appeals no further order is required to be passed in this application. The application shall accordingly stand dismissed with liberty granted to the applicant to avail such remedies as may be available in law.

13. The appeals are accordingly disposed of.

B.B.B.

Appeals disposed of.