

REPORTABLEIN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION**WRIT PETITION (CRIMINAL) NO. 260 OF 2018**

Romila Thapar and Ors. Petitioner(s)

:Versus:

Union of India and Ors.Respondent(s)

J U D G M E N T**A.M. Khanwilkar, J.**

1. Five illustrious persons in their own field have filed this petition on 29th August, 2018 complaining about the high-handed action of the Maharashtra Police in raiding the homes and arresting five well known human rights activists, journalists, advocates and political worker, with a view to kill independent voices differing in ideology from the party in power and to stifle the honest voice of dissent. They complain that the five activists, namely, Gautam Navalakha, Sudha Bharadwaj, Varavara Rao, Arun Ferreira and Vernon Gonsalves were arrested on 28th August, 2018 from their

homes at New Delhi, Faridabad, Mumbai, Thane and Hyderabad, respectively, without any credible material and evidence against them justifying their arrest, purportedly in connection with FIR No.0004/2018 dated 8th January, 2018 registered with Police Station Vishram Bagh, Pune City. This action was to silence the dissent, stop people from helping the poor and downtrodden and to instill fear in the minds of people and was a motivated action to deflect people's attention from real issues. The petitioners have made it clear in their petition that they were seriously concerned about the erosion of democratic values and were approaching this Court "not to stop investigation into allegations" "but" to ensure independent and credible "investigation into the arrest of stated five human rights activists." They claim that anything short of that relief will damage the fabric of the nation irreparably.

2. The FIR in connection with which the said five persons came to be arrested has been appended and marked as

Annexure P-2. It was registered on the basis of the statement given by one Tushar Ramesh Damgule, which reads thus:

“Translation: FIR COPY

I, Tushar Ramesh Damgule [Age 37] Occupation – Reconstruction, Residing at survey no.70, Santosh Nagar, Kafraj Pune, 411016, Mobile Number – 9850065423) personally states that, I am residing at the above mentioned address from last 20 years. I am completed Masters in Arts (History). I am running construction business by the name of Rao enterprises, from last 4 years. Somewhere in last week of December, I read one post of Facebook, that Elgar Parishad organized 31/12/2017 at Shaniwar Wada. Therefore on 31st December 2017, I personally went to Shaniwar Wada, opposite Ground, Pune, on around 2’o clock in this concern programme conduct by Sagar Gokhale, role describer Sudhir Dhavale, singer and artist Jyoti Jagtap, Ramesh Gaychor and other speakers like Jignesh Mewani, Umar Kahlid, Vinay Ratansingh, Prasanth Dontha etc. orators were seated on the stage. The said ground was crowded fully. I had read information and news related Kabir Kala Manch and their representatives by social media and newspapers. So, known them. On the programme of following other subjects, had express statement again and again malice statement such as “Bima Koregaon ne Diladhada, Navi Peshawar Mainatgada, Udavathikrya Rai Rai re, Gadun Taka Peshwai Re Garjana Sidnakache, Aalee Nvyane Peshwai re Garaj Tila Thokyachee, Re Saimka Garaj Tila Thokyachee”. After this, some other orators had their speeches, as well as in that, Kabir Kala Manch’s artist such as Jyoti Jagtap, Ramesh Gaichor and other six seven person sing the song again “Bhima Koregaon ne diladhada, Navi Peshwa Navi Peshawar Mainat Gada, Udavathikrya Rai Rai re, Gadum Taka Peshwai Re Garjana Sidnakache, Aalee Nvyane Peshwai re Garaj Tila Thokyachee, Re Saimka Garaj Tila Thokyachee...” as well as, the same had presented in the form of Pathnatya (Raadaramaj) and Dance Event with malice and enmity intentions. After in Second session, said Sudhir Dhawade while expressing role, he made the malice and disputable statement that “Jab Julm Ho to, Bagawat Honi Chahiye shahar mein, Jab Julm Ho to bagawat honi chahiye shahar mein aur agar bagawat na ho to, behatar hai

kee, rat dhalane se phle ye shahar jalke rakh ho jaye, ye shahar jalke rakh ho jaye....” Then he said some other malice statement that “ye jo satrahai, ye satra hia, tayat hi apane aap mein ladai ka ellanhai, ye nave peswai ko haemin Samshan Ghat mein, kabrastan meindajana hai..” Afterwards, other speakers also expressed themselves in grudge words in the same Programme, some objectionable and provocable books kept for selling. After ending the program, I left from the there. On the date of 1st January, 2018 as usual year, huge crowd gathered to salute and honour the victory stambh/monument at Bheema Koregaon. But because of the Elgar Parishad which was held at Shaniwar Wada on 31st December, 2017, Kabir Kala Manch’s Sudhir Dhawale, Sagar Gorakhe, Harshali Potdar, Jyoti Jagtap, Ramesh Gaichor and other six seven persons tried to express malice statement and tried to incite disputable words, sentences between two society groups, raise some provocable slogans, songs and road drama imposed wrong and false History above mentioned Sudhir Dhawale, Harshali Potdar and other Kabir Kala Manch’s Activists been interrogated by legal inspection and sources. **Therefore, I state that, banned Maoist Organisation (CPI) have organized role is to boast and implicate the strong Maoist thoughts in depressed class and misdirect or misguide them and turn them towards unconstitutional violence activities, carrying the same thoughts, Kabir Kala Manch’s Sudhir Dhawale and his other activist had presented different areas in Maharashtra, malice speeches, had spread false History, disputable statements and incite objectionable slogans, sung songs and road-dramas. They distributed some objectionable and provocable pamphlets, books too. So remarkably it reflected at Bheema Koregaon and nearer places by stone throwing, castes clashes and arson incidents.**

Therefore, an organization –Elgar Parishad, on the day of 31st December, 2017 at 2.00 p.m. to 10.00 p.m. at Shaniwar Wada, Pule, role defines Kabir Kala Manch’s Sudhir Dhawale, programme conductor Sagar Gorakhe, and other artists HarshaliPotdar, Jyoti Jagtap, Ramesh Gaichor and others had presented objectionable songs as well as “Jab Julm ho to, Bagawat Honi Chahiye shahar mein, Jab Julm Ho to bagawat honi chahiye shahar mein aur agar bagawat na ho to, behatar hai kee, rat dhalane se phle ye shahar jalke rakh ho jaye, ye shahar jalke rakh ho jaye...” such type of disputable, objectionable passing statements, tried to incite disputable words, sentences between two society

groups, raised some provocative slogans, songs and road drama, imposed wrong and false History misguided the society. The same had been disputable and stone-throwing and arson incidents converted into disputable and cast clashes in society's specific groups, with human injuries, violence, severe damages etc.

Therefore, I lodged the complaint against (1) the role definer Kabir Kala Manch's Sudhir Dhawale, (2) Programme conductor Sagar Gokhale (3) Harshali Potdar (4) Ramesh Gaichor (5) Deepak Denglr (6) Jyoti Jagtap. I read this typed statement and whatever I stated is same true and correct.

This statement given,

Date: 08/01/2018

In front of:

(M.B. Talware)

Police - Sub-Inspector

Vishram Baug, Police Station, Pune.”

(emphasis supplied)

3. According to the petitioners, none of the five persons arrested in connection with the stated FIR was present during the event organized on 31st December, 2017 at Pune by “Elgar Parishad” (with which they have no concern) nor any allegation is found against them in the FIR. Nevertheless, the Pune Police swiftly moved against them, for reasons best known on fabricated charges under various provisions of the Unlawful Activities (Prevention) Act, 1967 (“**UAPA**”) and under the Indian Penal Code.

4. According to the petitioners, since the FIR dated 2nd January, 2018, at Pimpri Police Station (Rural) for offences punishable under Sections 307, 143, 147, 148, 149, 295(A), 435, 436 of IPC, Sections 3(2)(v) & 3(1)(10) of the Scheduled Castes Scheduled Tribes Act and Section 4(25) of the Arms Act of the Maharashtra Police Act, 1989, was registered against the Hindutva right wing leaders Milind Ekbote and Sambhaji Rao Bhide, based on an eye-witness account that they along with fringe groups had incited the violence against the Dalit congregation, instead of taking action against those who were behind the Bhima Koregaon violence, a false and fabricated complaint was engineered in the form of FIR No.0004/2018 and came to be registered on 8th January, 2018 at Vishram Bagh Police Station (Pune City), in respect of which the five named activists and others have been arrested. This fabricated FIR against the activists came to be registered in the name of the complainant who happens to have close links with the named accused in FIR No.2 dated 2nd January, 2018 registered at Pimpri Police Station (Rural). The Pune Police thus embarked upon a motivated process and arrested five

human rights activists who had no concern with the incident referred to in the FIR No.4/2018.

5. It is further stated in the writ petition that the Pune Police investigating the Bhima Koregaon violence was systematically leaking documents to selective media with a view to spread false propaganda against the activists and to prejudice the public opinion against those arrested. The leaked documents allegedly found from the computer recovered during the search of the house of Rona Wilson, were addressed to Comrade Prakash and signed by 'R', which apparently mentions about senior comrades proposing concrete steps to end the Modi-era by planning a Rajiv Gandhi style incident to assassinate the Prime Minister. The police had deployed systematic strategy to put out highly provocative but completely unsubstantiated, unverified and unproven allegations through select media channels to prejudice the public opinion against those already arrested. Further, the organizers of Elgar Parishad had immediately refuted the tall claim of the Pune Police and went on record that the event

referred to in the FIR under investigation was organized by them (Elgar Parishad) and no other organization was concerned therewith, much less any banned organization had any role in that regard. This statement was issued by a former Judge of this Court and another former Judge of the Bombay High Court who are the organizers of Elgar Parishad, emphatically condemning the letters leaked to the media by the Police as the same were never produced in evidence before the Court and that it was a ploy of the Government as it had felt threatened because of the mobilization of people by Elgar Parishad to raise their voice against the establishment and resist communal forces. The organization of Elgar Parishad had also denied of having received funds from any of the accused persons named in the FIR.

6. According to the petitioners, similar arbitrary arrests by the Pune City Police were caused across the country, particularly of those who spoke for the poor and marginalized and to malign human rights defenders, lawyers, activists and the progressive ideas and human rights ideology that they

espouse, so as to have a chilling effect in the minds of the activists and dissuade them from criticizing the policies and programmes of the Government.

7. The petitioners then state that without providing any evidentiary link between the persons arrested and raided *inter alia* Gautam Navlakha and Sudha Bhardwaj with FIR No.4 of 2018, they were served with the arrest memos signed by the persons who were brought as part of the entourage of the Pune Police as so-called “independent and respectable persons” to authenticate the arrest memos. The seizure memos were prepared in Marathi and signed by the Panchas who were brought by the Pune Police as part of the entourage. No translated copy of the FIR or the seizure memo was made over to Gautam Navlakha or Sudha Bhardwaj even though they were not conversant with Marathi. In this backdrop, Gautam Navlakha filed habeas corpus petition before the Delhi High Court, being Writ Petition No.2559 of 2018 challenging the transit remand order passed by the Chief Metropolitan Magistrate on 28th August, 2018. Similar petition was filed in

the Punjab and Haryana High Court to direct the jurisdictional Court which had allowed the prayer to grant transit remand, to keep Sudha Bhardwaj at her residence under supervision of the local police. Even the petition filed in the Punjab and Haryana High Court is still pending. Nevertheless, the petitioners rushed to this Court by way of the present writ petition filed as a public interest litigation, to espouse the cause of the five persons arrested by the Pune Police, praying for an independent and comprehensive enquiry into the stated arrest as follows:

“PRAYERS

It is therefore prayed that this Hon’ble Court be pleased to grant the following prayers:

- i) Issue an appropriate writ, order or direction, directing an independent and comprehensive enquiry into arrest of these human rights activists in June and August 2018 in connection with the Bhima Koregaon violence.
- ii) Issue an appropriate writ, order or direction, calling for an explanation from the State of Maharashtra for this sweeping round of arrests;
- iii) Issue an appropriate writ, order or direction, directing the immediate release from custody of all activists arrested in connection with the Bhima Koregaon violence and staying any arrests until the matter fully investigated and decided by this court.
- iv) Pass any such other order as may be deemed appropriate.”

8. As aforesaid, the petition was filed on 29th August, 2018 and mentioned for urgent directions before the Chief Justice of India on the same day. This Bench considered the urgent mentioning and passed the following order on the same day:

“Taken on Board.

Issue notice.

Mr. Tushar Mehta and Mr. Maninder Singh, learned Additional Solicitor Generals being assisted by Mr. R. Balasubramanian, learned counsel shall file the counter affidavit by 5.9.2018. Rejoinder thereto, if any, be filed within three days therefrom.

We have considered the prayer for interim relief. It is submitted by Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the petitioners that in pursuance of the order of the High Court, Mr. Gautam Navalakha and Ms. Sudha Bharadwaj have been kept under house arrest. It is suggested by him that as an interim measure, he has no objection if this Court orders that Mr. Varavara Rao, Mr. Arun Ferreira and Mr. Vernon Gonsalves, if arrested, they are kept under house arrest at their own homes. We order accordingly. The house arrest of Mr. Gautam Navalakha and Ms. Sudha Bharadwaj may be extended in terms of our orders.

Needless to say, an interim order is an interim order and all contentions are kept open.

Let the matter be listed on 6.9.2018.”

This interim arrangement has been continued from time to time and remains in force until the disposal of this petition.

9. The State of Maharashtra has filed a counter affidavit of Dr. Shivaji Panditrao Pawar, Assistant Commissioner of Police (Investigating Officer), Swargate Division, Pune City, Pune. Besides taking objection regarding the maintainability of the writ petition being filed by third parties who are strangers to the offence under investigation, he has highlighted that in light of the material gathered during the investigation conducted so far, it would be desirable to dismiss the writ petition. He has stated that the entire writ petition is based upon individual perception of the writ petitioners that the arrested persons are “all outstanding, well-known and well respected human rights activists” and therefore, their arrest requires to be enquired into and they should be released on bail. Having said that, he has asserted that in the instant case, the five named persons have been arrested not because they expressed dissenting views or difference in their political or other ideologies but the investigation done so far has unraveled their involvement in a serious offence, including of being active members of Communist Party of India (Maoist), which has been banned as a terrorist organization since 2009,

and of their involvement in planning and preparation of large scale violence and destruction of property, resulting into chaos in the society. Each of them is part of a well thought out criminal conspiracy and had supported the event arranged at Pune by the Elgaar Parishad through a frontal organization called "Kabir Kala Manch".

10. It is then stated that one Tushar Ramesh Damgule had lodged an FIR on 8th January, 2018, naming six persons as accused for the offence registered thereunder by the Vishram Bagh Police Station. Out of the six named accused, only one person came to be arrested on 6th June, 2018, namely, Sudhir Dhawale in connection with the registered offence. As the investigation progressed and material was gathered during the ongoing investigation, Section 120-B was added on 6th March, 2018 and two more persons were found to be suspected accused namely, Surendra Gadling, R/o Nagpur and Rona Wilson, R/o Delhi. On 17th April, 2018 the Investigating Agency conducted searches at the residence of eight persons, namely:

- 1) Rona Wilson, R/o Delhi
- 2) Surendra Gadling, R/o Nagpur
- 3) Sudhir Dhawala and Harshali Potdar, R/o Mumbai
- 4) Sagar Gorakhe, R/o Pune
- 5) Dipak Dhengale, R/o Pune
- 6) Ramesh Gyachore and Jyoti Jagtap, R/o Pune

Further, the entire search procedure was videographed right from the time the Investigating Agency knocked at the doors of the respective individuals till the material recovered were seized, sealed, and punchnamas were drawn in the presence of independent punchas. During the said search, documents were recovered from their respective computers/ laptops/pen drives/ memory cards. Different documents were found to have been copied on different dates. The seized items were immediately sent for investigation to Forensic Science Laboratory, which in turn gave “clone copies/mirror images” to the investigating agency so as to ensure that pendency of FSL Report does not hamper the investigation. It is then stated that documents recovered from the seized items unraveled the information implicating the accused not only as active

members of CPI (Maoist) but being involved in an ongoing sinister design of having committed and in the process of committing criminal offences having the potential of destabilizing the society. The documents clearly reflect the preparation, planning and coordination not only amongst the stated accused persons but with others subsequently arrested, to carry out violence including planned ambush/rebellion against the enemy (which is our country and security forces).

11. He has further stated that all the documents recovered during the search from the custody and possession of the respective accused will be produced before the Court, perusal of which would reveal that the accused persons are not merely political dissenters but involved in sinister design, planning, preparation and commission of criminal offences to destabilize the society. After the incriminatory material came to light, further offences under Sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of the UAPA are added on 17th May, 2018 against the following individuals:

- 1) Surendra Gadling, R/o Nagpur

- 2) Rona Wilson, R/o Delhi
- 3) Shoma Sen R/o Nagpur
- 4) Mahes Raut R/o Nagpur and Gadchiroli
- 5) Comrade M. alias Milind Teltumbade [underground]
- 6) Comrade Prakash alias Navin alias Rituparn Goswami R/o Assam [underground]
- 7) Comrade Manglu [underground]
- 8) Comrade Dipu and other underground members.

The affidavit further states that during the on-going investigation, following persons came to be arrested on 6th June, 2018:

- 1) Surendra Gadling, R/o Nagpur
- 2) Rona Wilson R/o Delhi
- 3) Sudhir Dhanwale

Further, two more persons were arrested and also searched on 6th June, 2018, namely, Shoma Sen, R/o Nagpur and Mahesh Raut, R/o Nagpur and Gadchiroli. It is then stated that the searches carried out against these persons were also videographed from the beginning to the end as was done on the earlier occasion in respect of the searches carried of other accused. Even during this search, it is alleged that the

material seized was in the form of computers, laptops, pen-drives and memory cards which have been forwarded to Forensic Science Laboratory, which in turn provided clone copies to the Investigating Agency for facilitating further investigation.

12. It is then stated in the affidavit that the further investigation unraveled that the five persons who came to be arrested on 28th August, 2018 were also involved in the criminal conspiracy and their role was not merely peripheral in nature. Based upon the incriminating material, they were arrested from the residential or work places under similar fashion in the presence of independent panchas who were Government Officers. It is also stated that one of them, namely, Vernon Gonsalves has been convicted by the Special Court, Nagpur for offences under the UAPA.

13. The sum and substance of the reply affidavit is that sufficient material has become available during the investigation, which is still in progress, to indicate the complicity of the concerned accused who have been arrested

including the five named persons in respect of whom the present writ petition has been filed by third parties. They are arrested not because of their political activities but for their involvement in the planning and execution of offences to destabilize the society and their association with the banned organization. Their involvement is noticed in selecting and encouraging cadres in the banned organizations to go underground in 'struggle area', mobilizing and distributing money, facilitating selection and purchase of arms, deciding the rates of such arms and suggesting the routes and ways of smuggling such arms into India for its onward distribution amongst the cadres. Some of them have suggested training and laying booby traps and directional mines. Their involvement is also for providing strategic inputs in furtherance of the objective of armed rebellion, on lines of strategic documents of the banned terrorist organization. It is stated that all the material collected during the investigation will be eventually placed on record of the jurisdictional Court along with the police report to be filed in due course. Further, the question of showing that material to anyone muchless

accused, would defeat the investigation in progress and that is not the requirement of law. The affidavit also emphasizes that house arrest of the concerned accused merely restricts physical movement but there is no way of ensuring that these persons would not indulge in destruction of evidence and alert other potential accused while sitting at home. As a matter of fact, their custodial interrogation may become necessary during further investigation and for which reason the Investigating Agency be granted liberty to take them in police custody in accordance with law.

14. The petitioners have filed exhaustive rejoinder affidavit. Besides the rejoinder affidavit, formal applications have been filed on behalf of Sudha Bharadwaj, Varavara Rao, Arun Ferreira and Vernon Gonsalves, who are presently under house arrest, that they be permitted to pursue the writ petition as filed by them. This application is in response to the issue of locus of five petitioners as being strangers to the offence under investigation. Besides, an application has been filed by the petitioners for permitting them to amend the

prayer clause of the writ petition and permit the petitioners to seek following modified prayers:

“(i) Issue an appropriate writ, order or direction for setting up of a Special Investigating Team (SIT) comprising of senior police officers with impeccable career records of professionalism, integrity and independence, reporting directly to this Hon’ble Court, for conducting a fair and independent investigation and inquiry into the offences stated in the zero FIR lodged at Pimpri Police Station on 02.01.2018 (now Cr. Case No.2/2018), and the FIR 4/2018 lodged and all other related matters and allegations; or

(ii) Issue an appropriate writ, order or direction for the investigation into the offences alleged in the zero FIR lodged at Pimpri Police Station on 02.01.2018 (now Cr. Case No.2/2018), and the FIR 4/2018 lodged at Vishrambagh Police Station on 08.01.2018, and all other related matters and allegations, to be carried out by an independent agency which shall be monitored directly by this Hon’ble Court through regular filing of status reports of the investigation by the investigating agency; and/or

(iii) Issue an appropriate writ, order or direction directing that all electronic devices, records and materials allegedly seized from the detenues or even otherwise, if relied upon/being relied upon for denial of liberty to the detenues, to be examined by a Forensic Sciences Laboratory outside the State of Maharashtra to ensure fair play and in the interest of justice; and/or

(iv) Issue an appropriate writ, order or direction, directing the release from custody of the arrested activists as per law, upon such terms and conditions as may be deemed necessary and appropriate, to the satisfaction of this Hon’ble Court; and/or

(v) Pass any such further order(s) as this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the present case, and in the interest justice.”

15. During the arguments, Dr. Abhishek Manu Singhvi, Dr. Rajeev Dhawan, Dr. Ashwani Kumar learned senior counsel and Mr. Prashant Bhushan, learned counsel appearing for the writ petitioners and Mr. Anand Grover, learned senior counsel appearing for the arrested persons, have argued that the stated five persons have not been named in the FIR nor were they present during the event referred to in the FIR. Registration of two FIRs in respect of the same incident, first on 2nd January, 2018 at Pimpri (Urban) Police Station and the second, at Visharam Bagh Police Station, Pune City, was impermissible and was a ploy to deflect the inaction of the Pune Urban Police for the reasons best known to them. Moreover, the offences under the draconian law (UAPA) have been added without due authorization of the competent authority. It is contended that liberty of individual and dignity of the accused are the facets of core constitutional values. They submit that this case is not about ordinary criminal

jurisprudence but of actualization of constitutional values and to expose the unjustified incarceration of innocents who happen to be human rights activists. They submit that the liberty and dignity of the accused persons must be preserved. According to them, the Investigating Agency was not discharging its statutory obligation of fairness in investigation but was indulging in selective leaks of documents which contain unsubstantiated insinuations against the accused persons solely with a view to malign their reputation and create public opinion against them. The Pune Police had the audacity to rush to the Press for divulging the documents which they claim to have recovered during the seizure from one of the accused and not the five persons arrested on 28th August, 2018. They submit that the clarificatory statement issued by the two former Judges cannot be discarded. However, no effort has been made by the Investigating Agency to ascertain the factual position from those two Judges. According to them, it is a case of persecution of the five persons named in the writ petition as multiple cases have been registered against them since 2005 and each of them

have been acquitted in the concerned case. 25 criminal cases were registered against Varavara Rao, 11 cases have been registered against Arun Ferreira and 18 cases against Varnon Gonsalves. They have been acquitted in all the cases except one against Gonsalves, which matter is pending in appeal. They have relied upon the report prepared by the Committee headed by the Deputy Mayor which clearly points towards the complicity of Sambhaji Rao Bhide and Milind Ekbote in particular, for having caused incitement and violence on 1st January, 2018. However, no action has been taken by the Pune Police against the persons who were responsible for causing riots and violence. It is submitted that it is unfathomable that two FIRs are registered in respect of the same incident and two different investigating agencies are going ahead with the investigation. More so, the basis of arrest of five persons on 28th August, 2018 was their involvement in planning the assassination of the current Prime Minister but there is no allegation to that effect in the FIR nor has any fresh FIR been registered by the Police, although the same is a serious matter warranting investigation by an Investigating

Agency no less than National Investigating Agency or at least the CBI. The persons arrested, however, are well-known for their track record of human rights activism and have been unjustly put behind bars on the basis of unsubstantiated allegations and without any evidence against them. The entire sub-text of creating a real threat is a figment of imagination of the Investigating Agency and that has been done for reasons best known to them. Obviously, it is politically motivated. The transit remand applications preferred by the Investigating Agency also do not mention the letters indicative of involvement of the persons concerned in planning and execution of Maoist plot nor have those letters been produced before the Court thus far. The letters which were flashed to the media are obviously fabricated. Further, no plausible explanation is forthcoming as to why the Investigating Agency had taken panchas along with them for conducting search outside the State of Maharashtra. The role of the investigating team in FIR No.4 of 2018 in the manner in which they caused arrest of five persons named in the writ petition, has been seriously questioned and it is earnestly prayed by the learned

counsel that the modified reliefs as claimed ought to be granted. The counsel have filed exhaustive written submissions to buttress the plea for entrusting the investigation of the case to an independent Investigating Agency.

16. Mr. Tushar Mehta, learned Additional Solicitor General appearing for the State of Maharashtra on the other hand, submitted that the Court should be loath to entertain the writ petition of this nature when the investigation of a serious crime is in progress as per the statutory provisions and the material gathered during the investigation justifies the arrest of the concerned accused. He submitted that the investigation is being conducted responsibly and impartially and strictly in accordance with the provisions of Cr.P.C. by an officer of the rank of Assistant Commissioner of Police under the supervision of Deputy Commissioner of Police and further monitored by Joint Commissioner and finally by the Commissioner of Police who is of the rank of Additional Director General of Police. There is no allegations against the

investigating officer of working under dictation or that he had any personal malice against the named accused. Further, there is active involvement and monitoring of senior police officials and pre-existing safeguards have been put in place by the State in order to ensure a fair investigation and in order to maintain independent and impartiality of all sorts, coupled with the fact that the action of the Investigating Agency would be monitored by the jurisdictional Courts at different stages, the question of appointing Special Investigation Team or to allow investigation by independent Investigating Agency under the monitoring of the Court, should be eschewed. He submitted that the Court may look at the documents already gathered during the investigation to satisfy its conscience as to whether the arrest of concerned accused was justified or otherwise. In any case, there is robust mechanism of overseeing the actions of the Investigating Agency by the jurisdictional Courts while considering not only the application for police remand or judicial remand and bail application but also the remedy of discharge and quashing of the prosecution. In other words, the issues raised by the

petitioners may be germane for pursuing relief of bail or discharge/quashing, but not relevant to consider prayer for change of investigating agency, that too at the instance of accused themselves. He has handed over a compilation of documents or incriminatory material collected during the investigation allegedly showing the involvement of the concerned accused, for our perusal. He has also handed over the Case Diary and two Registers of documents recovered during the search from the accused persons. He further states that the subject FIR in respect of which action is being taken against the accused was registered on 8th January, 2018 for offences punishable under Section 153-A, 505 (1B), 17, 34 IPC. After the investigation progressed, further offences were added including the offences under Sections 13,16,17,18, 18B, 20,38,39 & 40 of UAPA on 16th May, 2018, on the basis of the material collected during the on-going investigation. Initially, the offence was registered only against 6 accused and as the investigation progressed, as of now there are 22 accused named, including the 5 accused referred to in this petition who were added as accused on 22nd August, 2018

for the reasons stated in the Case Diary, and only thereafter the investigating team proceeded to arrest them on 28th August, 2018. He submits that the Investigating Agency had to proceed against the named accused after the revelation of their involvement with the banned organization, as was noticed from the documents and material recovered during the searches conducted in respect of the premises of co-accused. The named accused (A16 to A20) cannot be heard to question that part of the investigation regarding the manner of search, which the concerned co-accused alone may do at the appropriate stage before the jurisdictional court.

17. He submits that even though the Court may have jurisdiction to examine all aspects of the matter, considering the fact that the investigation is at a nascent stage and is being done by senior police officials under the supervision of their superior officers up to the level of Commissioner of Police, it is not a case for grant of reliefs as prayed. The accused persons must take recourse to the remedy prescribed by law instead of directly approaching this Court under Article

32 of the Constitution and can get complete justice from the jurisdictional Court. He submits that in criminal matters, interference in the garb of public interest litigation at the instance of strangers has always been discouraged and rejected by this Court. Further, the present petition is nothing but abuse of the process and as the named accused Varavara Rao, Sudha Bharadwaj and Gautam Navalakha have filed their respective petitions before the jurisdictional High Courts, which proceedings are pending for adjudication, the same persons have now filed affidavits before this Court for transposing them as petitioners and allowing them to adopt the prayer of the writ petitioners. They ought to elect their remedy to be pursued and in particular, before the jurisdictional Courts. Therefore, this petition must be discouraged. He submits that the modified relief claimed in the writ petition to release the accused persons is in the nature of habeas corpus which is not maintainable in respect of the arrest made during the ongoing investigation. He submits that no right can enure in favour of the accused to seek relief of investigation of the crime through an independent agency and

for the same reason, even strangers to the offence under investigation or next friends of the accused, cannot be permitted to pursue such a relief in the guise of PIL. He submits that the foundation of the present writ petition is the perception of the writ petitioners (next friends) that the accused are innocent persons. He submits that that basis is tenuous. For, there are enough examples of persons having split personality. In a criminal case, the action is based on hard facts collected during the course of investigation and not on individual perception. He contends that the argument of the writ petitioners that liberty of the five named accused cannot be compromised on the basis of surmises and conjectures is wholly misplaced and can be repelled on the basis of the material gathered during the ongoing investigation indicating the complicity of each of them. He relies on Section 41 of Cr.P.C. which enables the police to arrest any person against whom a "reasonable suspicion" exists that he has committed a cognizable offence. Therefore, the integrity of the Investigating Agency cannot be doubted as there is enough material against each of the accused. He further submits that

the argument of the writ petitioners based on the circumstances pressed into service for a direction to change the Investigating Agency is completely against the cardinal criminal jurisprudence and such a relief is not available to persons already named as accused in a crime under investigation.

18. Mr. Harish Salve, learned senior counsel appearing for the complainant at whose instance FIR No.4/2018 came to be registered at Vishram Bagh Police Station (Pune City), submits that there is no absolute right, much less a fundamental right, to market ideas which transcend the line of unlawful activity. The Court must enquire into the fact as to whether the investigation is regarding such unlawful activity or merely to stifle dissenting political voice. If it is the former, the investigation must be allowed to proceed unhindered. In any case, the affected persons, namely, the named accused must take recourse to remedy prescribed by law before the jurisdictional Court as it is not a case of unlawful detention or action taken by an unauthorized Investigating Agency.

According to him, the Court must lean in favour of appointing a SIT or an independent Investigating Agency or Court monitored investigation only when the grievance made is one about the investigation being derailed or being influenced by some authority. In the present case, the grievance is limited to improper arrest of individuals without any legal evidence to indicate their complicity in the commission of any crime or the one registered in the form of FIR No.4/2018. The allegation of motivated investigation is without any basis. No assertion is made by the writ petitioners or the named accused that the investigation by the Pune City Police is mala fide in law. If the allegation is about mala fide in fact, then the material facts to substantiate such allegation, including naming of the person at whose instance it is being so done, ought to have been revealed. That is conspicuously absent in this case. According to the learned counsel, the reliefs claimed in the writ petition do not warrant any indulgence of this Court.

19. After the high-pitched and at times emotional arguments concluded, each side presenting his case with equal

vehemence, we as Judges have had to sit back and ponder over as to who is right or whether there is a third side to the case. The petitioners have raised the issue of credibility of Pune Police investigating the crime and for attempting to stifle the dissenting voice of the human rights activists. The other side with equal vehemence argued that the action taken by Pune Police was in discharge of their statutory duty and was completely objective and independent. It was based on hard facts unraveled during the investigation of the crime in question, pointing towards the sinister ploy to destabilize the State and was not because of difference in ideologies, as is claimed by the so called human rights activists.

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

¹ (2011) 5 SCC 79

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. Chadha*³, *Mayawati v. Union of India*⁴, *Dinubhai Boghabhai Solanki v. State of Gujarat*⁵, *CBI v. Rajesh Gandhi*⁶, *Competition Commission of India v. SAIL*⁷ and *Janta Dal v. H.S. Choudhary*.^{8”}

(emphasis supplied)

² (2016) 1 SCC 1

³ 1993 Supp. (4) SCC 260

⁴ (2012) 8 SCC 106

⁵ (2014) 4 SCC 626

⁶ (1996) 11 SCC 253

⁷ (2010) 10 SCC 344

⁸ (1991) 3 SCC 756

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 Gujarat*¹⁰, 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 Maharashtra*¹¹, 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

⁹ (2018) 7 SCC 365

¹⁰ Supra @ Footnote 5

¹¹ (2009) 6 SCC 65

¹² (2008) 3 SCC 542

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

¹³ (2010) 3 SCC 571

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.

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.

28. Be that as it may, we are conscious of the fact that prayer clause (i) and (ii) also make reference to FIR No.2/2018

registered at Pimpri (Urban) Police Station on 2nd January, 2018. However, that is an independent FIR registered at a different police station against the Hindutva right wing leaders Milind Ekbote and Sambhaji Rao Bhide. It is, at best, in the nature of a cross FIR in respect of the same incident against the alleged aggressors filed by an eye-witness. Neither the writ petitioners nor the named accused in FIR No.4/2018 in that sense, can pursue relief in respect of FIR No.2/2018 registered at Pimpri (Urban) Police Station. Admittedly, Criminal Writ Petition No.1875 of 2018 has already been filed in the Bombay High Court by Anita R. Sawale (the complainant in FIR No.2/2018) herself for issuing directions to the Investigating Agency in that crime. As presently advised, we find force in the argument of the State that the crime under investigation in FIR No.4/2018, inter alia is to investigate the allegations that a banned organization, CPI(M), organises events such as referred to in FIR No.2/2018 to propagate ill-will in different classes and turn them into unconstitutional and violent activities. Further, such activities were purportedly carried out by Kabir Kala Manch, Sudhir Dhawale and other activists in

different areas in the State of Maharashtra by delivering vituperative speeches and to spread false history, disputable statements and incite objectionable slogans, sing songs and road dramas and distribution of objectionable and provocative pamphlets and books also. And that the incidents such as at Bhima Koregaon and nearby places of stone throwing, castes clashes and arson incidents is the outcome of such conspiracy. Taking any view of the matter, the reliefs claimed in the modified prayer clauses (i) and (ii) in respect of FIR No.2/2018, cannot be taken forward at the instance of the named five accused persons in FIR No.4/2018 registered at Vishram Bagh Police Station (Pune City) on 8th January, 2018 or for that matter their next friends.

29. A fortiori, it must follow that the writ petitioners, who are strangers to the offence under investigation (in FIR No.4/2018); and since they are merely espousing the cause of the arrested five accused as their next friends, cannot be heard to ask for the reliefs which otherwise cannot be granted to the accused themselves. What cannot be done directly,

cannot be allowed to be done indirectly even in the guise of public interest litigation.

30. We find force in the argument of the State that the prayer for changing the Investigating Agency cannot be dealt with lightly and the Court must exercise that power with circumspection. As a result, we have no hesitation in taking a view that the writ petition at the instance of the next friend of the accused for transfer of investigation to independent Investigating Agency or for Court monitored investigation cannot be countenanced, much less as public interest litigation.

31. As the answer to point Nos. (i) and (ii) are in the negative and against the writ petitioners and named accused, we do not wish to dilate on the circumstances pointed out to us by the accused regarding the manner of their arrest. For, any observation in that regard by this Court may prejudice the said accused including the co-accused who are not before this Court or the prosecution, which must be eschewed. We are of the considered opinion that the investigation of the offence in

question is at a nascent stage and, therefore, it is not desirable to elaborate further as the modified reliefs (i) and (ii) as prayed cannot be granted for the reasons noted hereinbefore.

32. That takes us to the third modified relief claimed in the writ petition to issue directions that all electronic devices, records and materials, allegedly seized from the detinue/accused, be examined by Forensic Science Laboratory outside the State of Maharashtra to ensure fair play and in the interest of justice. Even this prayer cannot be taken forward. If any one of the twenty two named accused have any grievance or apprehension about the same, he is free to make that request before the jurisdictional Court, which can be considered at the appropriate stage in accordance with law. We are not expressing any opinion either way in the present writ petition in that regard.

33. The fourth modified relief is to direct release of the arrested activists from custody as per law. The accused persons must pursue this relief before the appropriate court, which can be considered by the concerned court on its own

merits in accordance with law. As noted earlier, the concerned accused persons have already taken recourse to remedy before the jurisdictional High Courts. Hence, they are free to pursue all legal remedies available to them as per law. We are not expressing any opinion either on the issue of maintainability thereof or on merits of the reliefs that may be claimed therein. All questions will have to be considered by the concerned Court in accordance with law. Accordingly, even the fourth modified relief cannot be considered in the present writ petition.

34. In view of the above, we have advisedly refrained from dealing with the factual issues raised by the parties and including the named accused represented by their counsel before us, as any observation made by this Court may cause serious prejudice to them or the co-accused who are not before this Court or, for that matter, the prosecution case, resulting in serious miscarriage of justice. Similarly, we do not wish to burden the judgment with the other reported judgments relied upon by the counsel for the parties and dealing with legal

propositions canvassed by them, which are not necessary to be answered in the present writ petition.

35. We may hasten to mention that we have perused the Registers containing relevant documents and the Case Diary produced by the State of Maharashtra. But we have avoided to dilate on the factual position emerging therefrom, lest any prejudice is caused to any accused or the prosecution, in any manner.

36. The record/files/documents and the Case Diary handed over to the Court in a sealed cover by the State be returned to the counsel for the State in a sealed cover.

37. Accordingly, this writ petition is disposed of with liberty to the concerned accused to take recourse to appropriate remedy as may be permissible in law. The interim order passed by this Court on 29th August, 2018 shall continue for a period of four weeks to enable the accused to move the concerned court. The said proceedings shall be decided on its own merits uninfluenced by any observation made in this

judgment, which is limited to the reliefs claimed in the writ petition to transfer the investigation to an independent Investigating Agency and/or Court monitored investigation. The Investigating Officer is free to proceed against the concerned accused as per law. All the accompanying applications are also disposed of in terms of this judgment.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

**New Delhi;
September 28, 2018.**