

## Amitbhai Anilchandra Shah vs Cbi & Anr on 8 April, 2013

**Equivalent citations: 2013 AIR SCW 2353, 2013 (6) SCC 348, 2013 CRI. L. J. 2313, AIR 2013 SC( CRI) 1169, 2013 (3) ABR 1116, (2013) 126 ALLINDCAS 97 (SC), (2013) 55 OCR 291, (2013) 3 ALLCRILR 36, (2013) 2 CRIMES 171, (2013) 5 SCALE 407, (2013) 4 CRILR(RAJ) 1111, (2013) 2 RECCRIR 819, (2013) 2 CURCRIR 326, (2013) 2 BOMCR(CRI) 593, (2013) 2 DLT(CRL) 684, 2014 (1) SCC (CRI) 309, 2013 (2) KLT SN 65 (SC), AIR 2013 SUPREME COURT 3794**

**Author: P. Sathasivam**

**Bench: P. Sathasivam, B.S. Chauhan**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

1

2 WRIT PETITION (CRIMINAL) NO. 149 OF 2012

Amitbhai Anilchandra Shah

.... Petitioner(s)

Versus

The Central Bureau of  
Investigation & Anr.

.... Respondent(s)

WITH

3 WRIT PETITION (CRIMINAL) NO. 5 OF 2013

J U D G M E N T

P. Sathasivam, J.

1) Amitbhai Anilchandra Shah has filed the present Writ Petition being No. 149 of 2012 under Article 32 of the Constitution of India owing to the filing of fresh FIR being No. RC-3(S)/2011/Mumbai dated 29.04.2011 by the Central Bureau of Investigation (CBI) and charge sheet dated 04.09.2012 arraying him as an accused in view of the directions given by this Court to the Police Authorities of the Gujarat State to handover the case relating to the death of Tulsiram Prajapati - a material witness to the killings of Sohrabuddin and his wife Kausarbi to the CBI in Narmada Bai vs. State of Gujarat & Ors., (2011) 5 SCC 79.

2) In Narmada Bai (supra), this Court, taking note of the fact that the charge sheet has been filed by the State of Gujarat after a gap of 3½ years and also considering the nature and gravity of the crime, rejected the investigation conducted/concluded by the State Police and directed the State police authorities to handover the case to the CBI. After investigation, the CBI filed a fresh FIR dated 29.04.2011 against various police officials of the States of Gujarat and Rajasthan and others for acting in furtherance of a criminal conspiracy to screen themselves from legal consequences of their crime by causing the disappearance of human witness, i.e., Tulsiram Prajapati, by murdering him on 28.12.2006 and showing it off as a fake encounter. Though the said FIR did not specifically name any person, in the charge sheet dated 04.09.2012 filed in the said FIR before the Court of Judicial Magistrate First Class, Danta District, Banaskantha, Gujarat, the petitioner herein was arrayed as A-1. Further, due to lack of jurisdiction, the charge sheet was presented before the 2nd Additional Chief Judicial Magistrate, (First Class), (CBI Court No.

1), Ahmedabad, Gujarat.

3) Being aggrieved by the fresh FIR dated 29.04.2011 and charge sheet dated 04.09.2012, the petitioner herein has filed the above said writ petition on the ground of it being violative of his fundamental rights under Articles 14, 20 and 21 of the Constitution and contrary to the directions given in Narmada Bai (supra).

Writ Petition (Criminal) No. 5 of 2013:

4) Sangiah Pandiyan Rajkumar IPS-who was arrayed as A-3 in the charge sheet dated 04.09.2012 has filed the above said writ petition praying for similar relief as sought for in Writ Petition (Crl.) No. 149 of 2012.

Since the grievance of the above-said petitioner is similar to that of the petitioner in W.P. (Crl.) No. 149 of 2012, there is no need to traverse those details once again.

5) Heard Mr. Mahesh Jethmalani, learned senior counsel for the petitioner in W.P. (Crl.) No. 149 of 2012, Mr. K.V. Viswanathan, learned senior counsel for the petitioner in W.P. (Crl.) No. 5 of 2013, Mr. H.P. Rawal, learned Additional Solicitor General for the CBI and Mr. Tushar Mehta, learned Additional Advocate General for the State of Gujarat. Discussion:

6) A perusal of the prayer in the writ petition clearly shows that the petitioner is not seeking quashing of investigation, however, praying for quashing of second FIR being

No. RC-3(S)/2011/Mumbai dated 29.04.2011 and also praying that the charge sheet dated 04.09.2012 in respect of the said FIR be treated as supplementary chargesheet in first FIR being No. RC No. 4S of 2010 so that his fundamental right under Article 21 is not infringed.

7) Mr. Mahesh Jethmalani, learned senior counsel for the petitioner pointed out that the reliefs sought for are in consonance with the law laid down by this Court in C. Muniappan & Ors. vs. State of Tamil Nadu (2010) 9 SCC 567. He very much relied on para 37 of the said judgment which holds as under:

“.....Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge sheet could not be filed”

8) It is also pointed out by learned senior counsel for the petitioner-

Amit Shah that the above said prayer is based upon CBI's own finding that the offence covered by the Second FIR is part of the same conspiracy and culminated into the same series of acts forming part of the same transaction in which the offence alleged in the first FIR was committed. It is also pointed out that it is the case of the CBI itself before this Court that even the charges will have to be framed jointly and one trial will have to be held as contemplated under Section 220 of the Code of Criminal Procedure, 1973 (in short 'the Code'). It is further pointed out that as per the CBI, the alleged criminal conspiracy commenced when Sohrabuddin and Kausarbi (whose deaths were in question in the first FIR) and Tulsiram Prajapati (whose death was in question in the second FIR) were abducted from Hyderabad after which Sohrabuddin was allegedly killed on 25/26.11.2005 and Kausarbi and Tulsiram Prajapati were killed thereafter since they were, as per CBI, the eye-witnesses. Finally, it is highlighted that the competent jurisdictional court has already taken cognizance of all the three alleged killings in the chargesheet/challan filed by the CBI in the first FIR itself.

9) Before going into the factual matrix as projected by learned senior counsel for the petitioner, it is desirable to refer to the stand taken by the CBI.

10) It is the definite case of the CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are distinct offences arising out of separate conspiracies though inter-connected with each other as the motive behind the murder of Tulsiram Prajapati was to destroy the evidence in respect of the abduction of Sohrabuddin and Kausarbi, as he was a prime witness to the said incident. It is not in dispute that as per the scheme prescribed in the Code, once a complaint is received with respect to a cognizable offence, the investigating authority is duty bound to register an FIR and, thereafter, initiate investigation.

11) Mr. Rawal, learned Additional Solicitor General appearing for the CBI, by drawing our attention to Section 218 of the Code submitted that a distinct charge is to be framed for a distinct offence, i.e., there has to be a separate charge for separate offence and each distinct charge has to be tried separately. He further pointed out that the concept of joint trial, which is an exception and not the

rule cannot be made applicable to the stage either of investigation or the filing of charge sheet of a report under Section 173(2) of the Code. He also highlighted that in the Code, there is no concept of joint investigation. The only exception is under Sections 219 and 220 of the Code that a person can be tried at one trial for more offences than one committed within a period of one year. He also pointed out that there is no bar in law to file separate FIR/complaint in respect of two distinct offences and similarly there is no bar to file two separate charge-sheets for seeking prosecution of accused in two distinct offences. He further highlighted that in *T.T. Anthony vs. State of Kerala* (2001) 6 SCC 181, the principle that was laid down with regard to the bar of filing of the second FIR was only in respect of the same incident or occurrence. According to him, whether the offences are distinct or same would necessarily have to be examined in the facts and circumstances of each case. He also submitted that the facts urged in the affidavit were on the basis of mere suspicion, hence, CBI cannot be held to be bound by its initial response in the status report or the affidavit since on a complete investigation, it is revealed that not only both the offences are distinct and separate but both the conspiracies were also hatched at different points of time. It is also pointed out by the CBI that the abduction and subsequent murder of Sohrabuddin and the murder of Tulsiram Prajapati after a period of more than one year are separate and distinct offences. According to him, the material available with the CBI would show distinct and separate conspiracy to eliminate Sohrabuddin and, thereafter, another conspiracy was hatched in order to eliminate Tulsiram Prajapati as soon as the accused persons apprehended that Tulsiram Prajapati would spill the beans with respect to elimination of Sohrabuddin in a fake encounter.

12) It is the definite case of the CBI that the investigation has revealed that subsequent to the murder of Hamid Lala, Sohrabuddin and Tulsiram Prajapati continued their criminal activities in the States of Maharashtra, Rajasthan and Gujarat. However, Sohrabuddin remained elusive and beyond the reach of the Gujarat Police. It was, therefore, that the accused Amit Shah (petitioner herein), D.G. Vanzara, S. Pandiyan Rajkumar, Dinesh Man and others entered into a conspiracy to abduct and murder Sohrabuddin. Accordingly, D.G. Vanzara, with the aid of Abhay Chudasma, S.P. Valsad had Tulsiram Prajapati, an associate of Sohrabuddin, in order to trace Sohrabuddin. Whilst giving such directions, D.G. Vanzara also assured Tulsiram Prajapati that he would ensure safe passage for him as he would be implicated in some petty cases. It was after this assurance from D.G. Vanzara and Abhay Chudasma that Tulsiram Prajapati agreed to help them in tracing and locating Sohrabuddin. Accordingly, Tulsiram Prajapati, in accordance with his clandestine agreement with the Gujarat Police, informed them in advance about the plan of Sohrabuddin to travel to Sangli from Hyderabad and, thereafter, Sohrabuddin was abducted and murdered. By pointing out the above factual details, it is the stand of the CBI that the first conspiracy took place to eliminate Sohrabuddin with the help of Tulsiram Prajapati who agreed to trace and locate him after the assurances given by the Gujarat Police. Thus, in the aforesaid conspiracy, Tulsiram Prajapati can be said to be a part of the said conspiracy though not knowing the motive about the same.

13) It is further pointed out that in pursuance of the aforesaid criminal conspiracy, Sohrabuddin, Kausarbi and Tulsiram Prajapati were brought to Valsad, Gujarat in vehicles by Gujarat Police. From Valsad, Tulsiram Prajapati was allowed to return to Bhilwara, Rajasthan by the police party. Subsequently, Sohrabuddin was murdered and shown as if he was a Lashkar-e- Taiba terrorist killed in an encounter with a police party on 26.11.2005 at Ahmedabad while his wife Kausarbi was

murdered on 29/30.11.2005 and her body was disposed off. Tulsiram Prajapati was shown to be arrested on 29.11.2005. Since then, he had been lodged in Udaipur Jail till he met his fate.

14) The most vital evidence that seems to have triggered Tulsiram Prajapati's death is a letter of Shri V.L. Solanki dated 18.12.2006 seeking permission to interrogate Tulsiram Prajapati and Sylvester lodged in Udaipur Jail. On the very same letter, Ms. Geetha Johri, head of the SIT is alleged to have recorded that even she may be given permission to accompany the IO for interrogation. Thereafter, the said letter is alleged to have been endorsed by Ms. Geetha Johri to Shri G.C. Raiger, Additional DGP, CID. It is further pointed out that the said letter of Shri V.L. Solanki containing the note of Ms. Geetha Johri was not found in the official file. In its place, a fabricated note dated 05.01.2007 along with a noting of Shri G.C. Raiger dated 06/08.01.2007 was found in the file in which it was recorded as under:-

“13(d) To go to Udaipur to interrogate accused Sylvester and Tulsi Prajapati (both being allegedly primary witnesses in the case) of whom Tulsi was recently encountered at BK by border range.”

15) It is also pointed out by the CBI that at the time of the murder of Sohrabuddin, there was no conspiracy to murder Tulsiram Prajapati and it is only subsequent to his murder when the accused persons feared of Tulsiram Prajapati being a threat to them and would spill the beans as he was a material witness in the first conspiracy inasmuch as tracing and locating of Sohrabuddin on the assurances of the accused, another conspiracy was hatched to murder a potential witness to the murder of Sohrabuddin. By highlighting these factual details, it is pointed out by the CBI that there were two distinct and separate conspiracies.

16) With these factual aspects, as projected by the CBI, let us analyze further details highlighted by learned senior counsel for the petitioner as well as the specific stand of the CBI in the earlier proceedings asserted before this Court in the form of affidavit/counter affidavit and status reports.

Entrustment of investigation to the CBI in respect of Ist FIR:

17) Initially, Gujarat police conducted investigation into the killing of two individuals and filed charge sheet in the FIR being Crime Register No. 5/2006. This Court, in the writ petition filed in Rubabbuddin Sheikh vs. State of Gujarat and Others (2010) 2 SCC 200 did not accept the investigation of the Gujarat Police and consequently directed the CBI to conduct investigation. This order was passed by this Court on 12.01.2010.

In the said decision, this Court expressed a suspicion that the alleged killing of Tulsiram Prajapati could be the part of the same conspiracy. It is useful to refer the relevant excerpts from the above decision which are as under:

“(i) The writ petitioner also seeks the registration of an offence and investigation by CBI into the alleged encounter of one Tulsiram, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kausarbi, and was thus a material witness against the police personnel.

(ii) The report expressly states that no link of Tulsiram Prajapati had been established in this case. The third person who was abducted was not to be the said Tulsiram Prajapati.

(iii) On 02.08.2007, the seventh action taken report was filed, which stated that the third person who was picked up was one Kalimuddin, who was suspected to be an informer of the Police.

(iv) From the charge-sheet, it also appears that the third person was “sent somewhere”. However, it appears that the literal translation of the charge-sheet in Gujarati would mean that he was “anyhow made to disappear”.

(v) It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted.

The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram.

(vi) Similarly, it was submitted that non-identification of the third person who was abducted along with Sohrabuddin and Kausarbi would also not affect the prosecution case.”

18) After expressing and arriving at such a conclusion, this Court concluded that “the possibility of the third person being Tulsiram Prajapati cannot be ruled out and that his killing could be an attempt to destroy a human witness” and after saying so, transferred the investigation to the CBI. Ultimately, this Court directed the CBI “to unearth the larger conspiracy”. The following categorical observations and directions in paras 65, 66 and 82 are relevant which are noted hereunder:-

“65. It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram. In our view, the facts surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness.

66. So far as the call records are concerned, it would be evident from the same that they had not been analysed properly, particularly the call data relating to three senior police officers either in relation to Sohrabuddin's case or in Prajapati's case. It also

appears from the charge-sheet as well as from the eight action taken reports that the motive, which is very important in the investigation reports was not properly investigated into as to the reasons of their killing.

The motive of conspiracy cannot be merely fame and name. No justification can be found for the Investigating Officer Ms Johri walking out of the investigation with respect to Tulsiram Prajapati's death without even informing this Court.

82. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police authorities. The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this Court will pass further necessary orders in accordance with the said report, if necessary. We expect that the Police Authorities of Gujarat, Andhra Pradesh and Rajasthan shall cooperate with the CBI Authorities in conducting the investigation properly and in an appropriate manner.”

19) The observations, findings and directions in Rubabbuddin Sheikh (supra) clearly show that the alleged killing of Tulsiram Prajapati was thus perceived even by this Court to be an act forming part of the very same transaction and same conspiracy in which the offence of killing of Sohrabuddin and Kausarbi took place. The CBI also, upon investigation held that “strong suspicion expressed by this Court in the above judgment was true and filed charge sheet/s”.

20) Pursuant to the decision in Rubabbuddin Sheikh (supra) dated 12.01.2010, the CBI filed a fresh FIR, viz., first FIR. It is also clear that during the investigation, the CBI came to the conclusion that this first FIR was a part of the series of acts concerning with the alleged offence of abduction and killing of two individuals, viz., Sohrabuddin on 25/26.11.2005 and Kausarbi on 29.11.2005 culminating with the killing of one more person, viz., Tulsiram Prajapati as part of the very same conspiracy.

21) Now, let us discuss the charge sheet dated 23.07.2010 filed by the CBI in the first FIR. As rightly pointed out by Mr. Mahesh Jethmalani, learned senior counsel for the petitioner-Amit Shah, in this chargesheet itself, the CBI categorically mentioned that the killing of Tulsiram Prajapati is also a part of the very same conspiracy which is mentioned in the first FIR above. Though, before us, a different stand was taken by the CBI, the following excerpts of the charge sheet clearly show that CBI was very categorical that killing of Tulsiram Prajapati is also a part of the very same conspiracy, which are as under:-

“11.....Shri Naymuddin, brother of Shri Sohrabuddin had gone to see off Shri Sohrabuddin, sister-in-law Smt. Kausarbi and Tulsiram Prajapati at Indore Bus Stand.

19. Investigation further revealed that the Police Party also followed the luxury bus. About 15 to 20 kilometers from the hotel, on the instructions of Shri Rajkumar Pandiyan (A-2) their vehicles overtook the luxury bus and stopped the bus. Two police persons entered into the bus and asked the driver to switch on the light. While the third police person was having torch in his hand remained near the door of the bus. The police persons told there is police checking. All the three police personnel were in civil dress. They picked up Tulsiram Prajapati who was sitting in the bus. After sometime, they again came into bus and picked up Sohrabuddin. When Sohrabuddin was made to get down from the bus, Kausarbi also got down.....

20. Investigation further disclosed that Shri Sohrabuddin and Tulsiram Prajapati abducted by police party were made to sit in the Qualis while Kausarbi was made to sit in one of the Tata Sumo vehicles along with Santram Sharma (A-11).....All of them reached Valsad where at one big hotel, both the Tata Sumo Vehicles were stopped and they took lunch. Tulsiram Prajapati was shifted to another vehicle which was brought by Rajasthan Police personnel. They took him straight to Udaipur where he was kept in illegal custody for five days. Thereafter, he was shown arrested by a team lead by Shri Bhanwar Singh Hada, Inspector/SHO P.S. Hathipole, Udaipur Rajasthan from Bhilwara.

32. Investigation further disclosed that in the early part of November, 2005, Shri Tulsiram Prajapati was contacted by accused Abhay Chudasama (A-15) and brought to Ahmedabad where he was produced before accused D.G. Vanzara (A-1). They asked him to make Sohrabuddin available before them as there was lot of political pressure.

Tulsiram Prajapati was assured that Sohrabuddin would get a safe passage and at the most Sohrabuddin would be put in jail so as to keep him away from glare for 3-4 months. No physical harm would be done to Sohrabuddin. Having got the assurance from accused D.G. Vanzara (A-

1), Tulsiram Prajapati helped accused Abhay Chudasama (A-15) in tracking down Sohrabuddin.”

22) Apart from the above specific stand, it is also relevant to point out that the CBI filed supplementary chargesheet dated 22.10.2010 in the first FIR which made the following charges:-

“Investigation has also revealed that after the Gujarat Police Officers had eliminated Shri Tulsiram Prajapati on 28.12.2006 in a fake encounter, Smt. Geeta Johri, the then IGP prepared a note sheet on 05.01.2006 mentioning therein inter alia the permission to go to Udaipur to interrogate the aforesaid two associates of Sohrabuddin viz., Sylvester and Tulsiram Prajapati, of whom, she mentioned that Tulsiram Prajapati was encountered by the Police....” The above extracts culled out from the chargesheet and supplementary chargesheet filed in the first FIR by the CBI would clearly show that killing of Tulsiram Prajapati was a fake encounter and was part of the same series of acts so connected together that they form part of the same



conspiracy as alleged in the first FIR. In view of the same, there cannot be a second FIR dated 29.04.2011 and fresh chargesheet dated 04.09.2012 for killing of Tulsiram Prajapati.

23) It is also relevant to point out that when Writ Petition (Crl.) No. 115 of 2007 was pending, the CBI, by way of an affidavit dated 19.08.2010, furnished the following information:-

(i) Tulsiram Prajapati's killing is a part of the same series of acts in which killing of Sohrabuddin and Kausarbi took place.

(ii) All the three killings are part of the same conspiracy.

(iii) Trial of all the three offences shall have to be one trial under Section 220 of the Code.

(iv) CBI be given formal permission to investigate Tulsiram Prajapati killing as "further investigation" in the first FIR filed by CBI which investigation was going on.

(v) If CBI is not formally given investigation of Tulsiram Prajapati, prosecution would face questions of "issue estoppel" & "Res-

judicata".

In the said affidavit, the CBI even prayed for "further investigation" in the first FIR which becomes evident from the prayer made by the CBI in the last paragraph of the affidavit which reads as under:-

"12. That on 12.08.2010, the Hon'ble Supreme Court (Mr. Justice Aftab Alam and Mr. Justice R.M. Lodha) has granted three more months to complete the investigation. Hence, it is prayed that orders for transferring Tulsiram Prajapati case to the CBI may be issued for expeditious completion of investigation."

24) As rightly pointed out by Mr. Mahesh Jethmalani, the above prayer of the CBI makes it clear that the CBI had also prayed for entrustment of Tulsiram Prajapati's encounter "to complete the investigation" for which three months time was granted in W.P. (Crl.) No. 6 of 2007 to complete the investigation in the first FIR. On reading the abovesaid affidavit as a whole and the paragraphs quoted above in particular, it leaves no room for doubt that the CBI itself prayed for "further investigation" so as to enable it to "complete the investigation in first FIR" filed by the CBI, i.e., FIR dated 01.02.2010 by investigating Tulsiram Prajapati encounter.

In this regard, the order of this Court dated 12.08.2010 relied upon by the CBI is relevant and the same is quoted hereunder:-

“Order “In pursuance of the order passed by this Court on January 12, 2010, the CBI has submitted a status report. In the status report, it is stated that they have been carrying on investigations as directed by this Court, but on certain aspects of the matter the investigation remain incomplete. A prayer is, therefore, made to grant them six months further time to complete the investigation. It is further prayed that three other cases that were registered in connection with the alleged escape of Tulsiram Prajapati from police escort and his death in a police encounter may also be transferred for investigation to the CBI because the death of Tulsiram Prajapati in the alleged encounter formed an inseparable part of the investigation which is entrusted to the CBI by this Court.

Today, Mr. Jethmalani, senior advocate, appeared on behalf of one of the accused-Amit Shah. Mr. Jethmalani strongly criticized the manner of investigation by the CBI and alluded to some larger political conspiracy. He submitted that he proposed to take steps of recall/modification of the order dated January 12, 2010 passed by this Court by which the investigation of the case was taken away from the Gujarat Police and was handed over to the CBI.

Today, we can proceed only on the basis of the previous order passed on January 12, 2010 by which the CBI was directed to investigate all aspects of the case, relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. By that order, the CBI was asked to complete the investigation within six months from the date it took over the case from the State police and to file its report to this Court when this Court would pass further necessary orders in accordance with the said report, if necessary.

As on date, the investigation ordered to be made remains incomplete. In continuation of the previous order, therefore, the time allowed to the CBI to complete the investigation is extended by three months from today, at the end of which they would file a status report before this Court.

Put up on receipt of the status report.”

25) It is clear that in both the status report(s) as well as in the affidavit filed in W.P. (Crl.) No. 115/2007, the CBI prayed for entrusting the investigation relating to Tulsiram Prajapati on the ground that his encounter was a part of the very same offence in the first FIR which CBI was investigating. It is not in dispute that this Court, after entrusting the investigation to the CBI by order dated 12.01.2010 was monitoring the said investigation in W.P. (Crl.) No. 6 of 2007. Even in the said writ petition, the CBI filed status report(s) contending that Tulsiram Prajapati's killing was a part of the very same conspiracy and series of the very same transactions in which Sohrabuddin and Kausarbi were abducted and killed. The following averments in the affidavit dated 19.08.2010 in W.P. (Crl.) No. 115 of 2007 made by the CBI are relevant which are as under:-

“47. During the investigation of Sohrabuddin and Kausarbi matter it has emerged that there are clear circumstances indicating that the encounter of Tulsiram Prajapati on 28.12.2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and influential accused persons. The CBI investigation has been conducted into this aspect in view of the following observations of the Hon’ble Supreme Court in its order dated 12.01.2010.

48. The investigation has disclosed that Tulsiram Prajapati @ Praful @ Sameer @ Babloo s/o Gangaram Prajapati, r/o Shantinagar PS Neel Ganga District Ujjain, M.P. was a close associate of Sohrabuddin.

Both hailed from same Ujjain district of MP and knew each other since the days Sohrabuddin was lodged in Sabarmati Jail in the Arms recovery case. Tulsiram was working with him as his sharp shooter....

51. The investigation has further revealed that Tulsiram was picked up by the Police of Gujarat and Rajasthan to trace Sohrabuddin about 20 days prior to the encounter of Sohrabuddin. Both Sohrabuddin and his wife Kausarbi were abducted on the information of Tulsiram. He was promised by accused Shri D.G. Vanzara (A-1) and accused Shri Abhay Chudasama (A-15) that no physical harm would be caused to Sohrabuddin because Sohrabuddin was their old associate. Further, Tulsiram was shown to have been arrested on 29.11.2005 at Bhilwada (Rajasthan) by the Rajasthan police i.e., after the fake encounter of Sohrabuddin on 26.11.2005.

52. The investigation has further revealed that after the fake encounter of Sohrabuddin and murder of Kausarbi said deceased Tulsiram Prajapati knew that his death was imminent at the hands of the Gujarat Police in connivance with the Rajasthan Police as he was the only surviving prime witness to the abduction and killing of Kausarbi and Sohrabuddin. The grave apprehensions of Tulsiram Prajapati were expressed by him in his applications filed in the court of ACJM City (North) No. 1, Udaipur, on 27.01.2006 and 02.02.2006 and his letters addressed to the National Human Rights Commission (NHRC) dated 18.05.2006 and to the Collector, Udaipur dated 11.05.2006. In addition, he made verbal/oral prayer before the Hon’ble Principal Judge, Ahmedabad on 28.11.2006. Out of sheer desperation, he made the fervent appeal before the Hon’ble Judge that he would be alleged to have shown as escaped from the police escort party custody and subsequently killed in a fake encounter. True to his apprehension, the premonition came true as the events such as his alleged escape from the escape custody on 26.12.2006 registered with Ahmedabad Railway PS vide CR No. 294/2006 on 27.12.2006 and alleged fake encounter on 28.12.2006 registered with Ambaji Police Station vide CR No. 115/2006 dated 28.12.2006.

54. Shri V.K. Goda, who had demitted the office of IG of Police, Udaipur on 31.10.2005 on superannuation has stated during his examination by the CBI that he had received a letter in the month of November 2005 addressed to him in his named cover by the family members of Tulsiram Prajapati which was duly forwarded by the then MLA. The letter could not be made available to the CBI. As per the statement of Shri Godila, the contents of the letter revealed that the family members

of Tulsiram Prajapati apprehended that Shri Tulsiram Prajapati was illegally detained by Police and was in their illegal custody. The letter also revealed that the state of despair of family members of Shri Tulsiram Prajapati as they apprehended death for which they immediately wanted action by the then IG of Police, Udaipur through the people representative. This is an additional corroboration that Tulsiram Prajapati was in the Police Custody just prior to the encounter of Sohrabuddin. This seen in conjunction with other evidence indicates that Tulsiram Prajapati was the person who revealed the location of Sohrabuddin to the accused police officers of Rajasthan and Gujarat.

55. The investigation has further disclosed that while lodged in Udaipur Jail, in addition to the above mentioned prayers made by Tulsiram to the Human Rights Commission, different courts, he explained the true fact behind the fake encounter of Sohrabuddin to his jail inmate friends. The police kept the telephone number being used by some of the criminals inside the jail and outside the jail under interception and allegedly had received the information that Tulsiram was trying to run away from the custody. Both accused Shri. Dinesh MN (A-3) and IG, Udaipur Shri Rajeev Dasot sent letters for permission to intercept the telephone numbers alleged having such information. Thereafter, when Tulsiram Prajapati was brought to Ahmedabad on 28.11.2006 along with co-accused Mohd. Azam in connection with Case No. 1124/2004 (Popular Builders Firing Case) in JM Court No. 13, Ahmedabad, around 50 police commandoes were detailed for the escort party. On both these occasions, the mother, wife and daughter of Azam Khan accompanied them from Udaipur to Ahmedabad and back. Later on the police decided to kill Tulsiram and whereas on subsequent hearing fixed for 26.12.2006, Shri Tulsiram Prajapati was deliberately sent alone on 25.12.2006. His usual companion/co-accused Azam Khan was detained in a scooter theft case. Interestingly, the above scooter theft case registered in Ambamata PS of Udaipur (Rajasthan) vide Case No. 95/2004 was already detected, vehicle recovered and handed over to the complainant in 2004 itself. Thus, foisting a case against Mohd. Azam and sending Tulsiram Prajapati alone were to facilitate the murder of Tulsiram Prajapati. It has also come into evidence that this time before leaving Udaipur Jail on 25.12.2006, Tulsiram had expressed apprehension of his being killed in an encounter. Contrary to the earlier two occasions, this time only four police personnel were sent from the jail as his escort. On the way back from Ahmednagar to Udaipur, he was shown having run away from the custody on the night intervening 26/27.12.2006. Next day, he was killed in an alleged encounter.

56. The investigation disclosed that the Udaipur Police had sent letter No. 1120 dated 27.12.2006 to SP Banaskantha, alleging that the call details of Tulsiram show that he is hiding somewhere in Banaskantha. As per the documents received by the CBI from the office of IG, Udaipur, this letter was sent through fax at around 2332 hours on 27.12.2006. As per the telephone call details available, the phone was not used after the evening of 26.12.2006 so there was no reason for Udaipur Police to have information that Tulsiram was hiding somewhere in Banaskantha. This letter was nothing but an attempt to provide the Banaskantha police an opportunity to stage-manage the encounter of Tulsiram Prajapati in their district. Further, the available call details show that on 27.12.2006 accused Shri Dinesh M.N. (A-3) was constantly in touch with other accused Rajkumar over telephone till confirmation of this fax.

57. In the investigation conducted by the CBI, it has clearly emerged that killing of Tulsiram Prajapati was an integral part of the criminal conspiracy hatched by the accused arising out the same transaction. After the abduction and fake encounter of Sohrabuddin and Kausarbi, the Supreme Court was seized of the matter, which had directed the State of Gujarat to investigate in detail the above episode. During such inquiry ordered by Gujarat Government in obedience to the Hon'ble Supreme Court, it emerged that police officials of ATS, Ahmedabad were involved in the abduction and killing of Sohrabuddin and Kausarbi.....

59. When it became clear and evident that.....

(i) That Tulsiram Prajapati was the sole surviving witness to the abduction of Sohrabuddin and his wife Kausarbi.

(ii) That the Mobile Call Detail Records pertaining to the case contained important piece of evidence not only against accused Shri Amit Shah (A-16), Minister of State (MoS), Government of Gujarat, but other police officers of Gujarat and Rajasthan, who worked at his behest to cover up the fake encounter that killed Tulsiram Prajapati on 28.12.2006.

60. The analysis of Mobile Call Details for the week in which the planning and execution of Tulsiram Prajapati's encounter took place, reflects flurry of call exchanged by accused Shri Amit Shah (A-16), MoS, accused Shri D.G. Vanzara (A-1), DIG Border Range, accused Shri Rajkumar Pandian (A-2), SP, ATS, Shri Vipul Agarwal, SP, Banaskantha and accused Shri Dinesh MN (A-3), SP, Udaipur, Rajasthan, suggesting a sinister plan to eliminate the sole witness in the state-executed Sohrabuddin encounter.

67. Thus, in view of the aforesaid provision, it is eminently required in the interest of justice that the Tulsiram Prajapati fake encounter case be investigated and tried along with Sohrabuddin fake encounter case as the evidence procured so far shows that Tulsiram Prajapati's encounter took place as he was the prime witness to the Sohrabuddin's abduction. As such both these cold blooded murders are inter-connected, they ought not to be tried separately as it may give rise to conflicting findings, raise issues of issue estoppels and/or res judicata and end up derailing or frustrating the interest of justice."

26) As rightly pointed out, this was the stand of the CBI prior to passing of the order in the decision dated 08.04.2011 in W.P. (Crl.) No. 115 of 2007. As a matter of fact, based on the above assertion of the CBI, this Court, in the above matter, entrusted the investigation of Tulsiram Prajapati's killing also to the CBI. It is also not in dispute that the above extracted status reports were part of record of proceedings in W.P. (Crl.) No. 115 of 2007.

27) Mr. Mahesh Jethamalani, learned senior counsel for the petitioner- Amit Shah also brought to our notice that he was arrested in the first FIR and chargesheet dated 23.07.2010 and was further interrogated even on the question of alleged killing of Tulsiram Prajapati. It is also brought to our notice that when the petitioner-Amit Shah filed regular bail application, the CBI opposed the same contending that the alleged killing of Tulsiram Prajapati as a part of the same series of acts, viz.,

killing of Sohrabuddin and Kausarbi. The following objections were taken by the CBI while considering the bail application which are as under:-

“The applicant took several steps by systematically eliminating evidence of the murder of Sohrabuddin. One witness after the other were killed either surreptitiously (Kausarbi) or another stage managed encounter (Tulsiram Prajapati)

38. Learned senior counsel Mr. Tulsi submitted that the case of the prosecution is that the applicant is part and parcel of the larger conspiracy in the killing of Sohrabuddin, his wife and Tulsiram Prajapati and also the conspiracy with regard to extortion of money.” All the above assertions by the CBI support the stand of the petitioner.

It is also relevant to note the stand taken by the CBI and reliance placed on the same by this Court in the order dated 08.04.2011 in W.P. (Crl.) No. 115 of 2007, i.e., Narmada Bai (supra). The relevant excerpts are quoted verbatim hereunder:-

“2(g) It is the further case of the petitioner that the deceased being a key eye witness to the murder of Sohrabuddin and his wife Kausarbi, the team of Mr. D.G. Vanzara and others planned to do away with him to avoid his interrogation by Ms. Geeta Johri, Inspector General of Police. Hence, the petitioner has preferred this petition before this Court praying for direction to CBI to register an FIR and investigate the case.

(5) Stand of the CBI – respondent No.21:

(a) The investigation conducted in R.C. No. 4(S)/2010, Special Crime Branch, Mumbai, as per the directions of this Court in its order dated 12.01.2010, vide Writ Petition (Crl.) No. 6 of 2007 revealed that the alleged fake encounter of Tulsiram Prajapati on 28.12.2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and the influential accused persons.....

(c) The murder of Tulsiram Prajapati took place on 28.12.2006, case was registered on 28.12.2006 and Gujarat CID commenced investigation on 22.03.2007. However, even after a lapse of 3 years, no action was taken against any of the accused. As directed by this Court, only on the investigation of Tulsiram Prajapati's case, the “larger conspiracy” would be established and the mandate and tasks assigned by this Court to the CBI would be accomplished both in letter and spirit towards the goal of a fair trial, upholding the rule of law. If Tulsiram Prajapati's fake encounter case is not transferred to the CBI for investigation, it may lead to issue-estoppel or res judicata against prosecution.

13. As pointed out by the learned counsel for the petitioner and the CBI, the said judgment records that there is strong suspicion that the ‘third person’ picked up with Sohrabuddin was Tulsiram Prajapati.

14) Pursuant to the said direction, the CBI investigated the cause of death of Sohrabuddin and his wife Kausarbi. The CBI, in their counter affidavit, has specifically stated that as per their investigation Tulsiram Prajapati was a key witness in the murder of Sohrabuddin and he was the 'third person' who accompanied Sohrabuddin from Hyderabad and killing of Tulsiram Prajapati was a part of the same conspiracy. It was further stated that all the records qua Tulsiram Prajapati's case were crucial to unearth the "larger conspiracy" regarding the Sohrabuddin's case which despite being sought were not given by the State of Gujarat.

15 vi) The CBI submitted two reports- Status Report No.1 on 30.07.2010 and a week thereafter, they filed the charge-sheet. In pursuance of the charge-sheet, accused No.16-Amit Shah was arrested on 25.07.2010 and released on bail by the High Court of Gujarat on 29.10.2010. The order releasing him on bail is subject matter of challenge in SLP (Crl.) No. 9003 of 2010. The Status Report No.1, filed by the CBI before the Bench on 30.07.2010 informed the Court that Tulsiram Prajapati was abducted along with Sohrabuddin and Kausarbi and he was handed over to the Rajasthan Police.

17. Inasmuch as the present writ petition is having a bearing on the decision of the writ petition filed by Rubabuddin Sheikh and also the claim of the petitioner, the observations made therein, particularly, strong suspicion about the 'third person' accompanied Sohrabuddin, it is but proper to advert factual details, discussion and ultimate conclusion of this Court in Rubabuddin Sheikh's case.

In Writ Petition No. 6 of 2007, Rubabuddin Sheikh prayed for direction for investigation by the CBI into the alleged abduction and fake encounter of his brother Sohrabuddin by the Gujarat Police Authorities and also prayed for registration of an offence and investigation by the CBI into the alleged encounter of one Tulsiram Prajapati, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kasurbi, and was thus a material witness against the police personnel.

19) It is clear that the above judgment records that there was a strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. It was also observed that the call records of Tulsiram were not properly analyzed and there was no justification for the then Investigation Officer – Ms. Geeta Johri to have walked out of the investigation pertaining to Tulsiram Prajapati. The Court had also directed the CBI to unearth "larger conspiracy" regarding the Sohrabuddin's murder. In such circumstances, we are of the view that those observations and directions cannot lightly be taken note of and it is the duty of the CBI to go into all the details as directed by the Court.

23) If we analyze the allegations of the State and other respondents with reference to the materials placed with the stand taken by the CBI, it would be difficult to accept it in its entirety. It is the definite case of the CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are one series of acts, so connected together as to form the same transaction under Section 220 of the Cr.P.C. As rightly pointed out by the CBI, if two parts of the same transaction are investigated and prosecuted by different agencies, it may cause failure of justice not only in one case but in other trial as well. It is further seen that there is

substantial material already on record which makes it probable that the prime motive of elimination of Tulsiram Prajapati was that he was a witness to abduction of Sohrabuddin and Kausarbi.

37).....In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States, i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, we feel that the CBI should be directed to take the investigation.

28) The findings rendered by us in Narmada Bai (supra) clearly show the acceptance of the contentions raised by the CBI that killing of two individuals and killing of third person, viz., Tulsiram Prajapati were part of the very same conspiracy and in the same series of acts so connected together that they will have to be tried in one trial under Section 220 of the Code.

29) After the investigation of the second FIR, the CBI filed chargesheet dated 04.09.2012 wherein, among others, petitioner-Amit Shah was also arrayed as one of the accused. By pointing out various averments/assertions in the chargesheet dated 04.09.2012, learned senior counsel for the petitioner pointed out that the CBI has merely conducted further investigation and it should be considered “supplementary chargesheet in the first FIR.” The following stand of the CBI in the chargesheet dated 04.09.2012 are also relevant which are as under:-

“2....The investigation established that it was in furtherance of a criminal conspiracy by the principal accused persons that Sohrabuddin was abducted and then murdered by showing it off as an encounter and further for the purpose of screening themselves from the legal consequences of their crime, the accused caused the disappearance of material witnesses to the pivotal fact of abduction of Sohrabuddin by murdering them, first his wife, Kausarbi and then Tulsiram Prajapati who was accompanying Sohrabuddin and his wife Kausarbi at the time they were abducted, and, who had in fact facilitated his abduction at the behest of accused D.G. Vanzara (A-2).....

4. Investigation of RC 4(S)/2010/SCB/Mumbai disclosed that the third person who was abducted along with Sohrabuddin and Kausarbi was Tulsiram Prajapati. The investigation further disclosed that he was a material witness/eye-witness to the abduction of Sohrabuddin and his wife and the same was within the knowledge of accused Amit Shah (A-1), D.G. Vanzara (A-2), S. Pandian Rajkumar (A-3) and Dinesh M.N. (A-4) and others.

6.4....In the meantime, in accordance with his clandestine agreement with Gujarat Police, Tulsiram Prajapati informed them in advance about the plan of Sohrabuddin to travel to Sangli from Hyderabad.

6.8 In pursuance of the criminal conspiracy to screen themselves from the legal consequences of the crime, the accused acted in concert with each other to keep Tulsiram Prajapati, a significant material eye witness to the abduction of



Sohrabuddin and Kausarbi by the accused policemen of Gujarat police under their continuing control and beyond the reach of others. Accordingly, Dinesh M.N. (A-4), the then SP Udaipur, who had also participated in the murder of Sohrabuddin on 26.11.2005, ensured by directing Rajasthan Police to detain Tulsiram Prajapati on the very same day i.e., 26.11.2005 for achieving the common object of keeping Tulsiram Prajapati under their control.

6.13 On 08.02.2006, Tulsiram Prajapati was brought from Central Jail, Udaipur to Ujjain, Madhya Pradesh. When he met Narmada Bai and Pawan Kumar Prajapati, he told them that he was under severe stress because he apprehended that the Gujarat and Rajasthan Police would kill him in a false encounter. He also confessed to them that Gujarat Police had used him for tracing and abducting Sohrabuddin and his wife. He had also expressed his apprehension that the police would kill him because he was a witness to the abduction of Sohrabuddin and his wife Kausarbi.

6.26.....With the object of shielding themselves from the grave implications of abduction and murder of Sohrabuddin and his wife Kausarbi, the accused expedited the pace of their criminal conspiracy as aforesaid to abduct and murder Tulsiram Prajapati as soon as possible.

6.34.....during the relevant period to show that they were acting in concert with each other in furtherance of the criminal conspiracy as aforesaid to murder Tulsiram Prajapati who was no longer under their control and further with the efforts being made by Inspector V.L. Solanki to examine him and record his statement with regard to the abduction of Sohrabuddin were anxious to expedite the criminal conspiracy towards its culmination point.” 6.51....This establishes the fact that the country made weapon was planted to cover up the murder of Tulsiram Prajapati in pursuance of a criminal conspiracy spanning more than a year and to show it as the result of a shootout/an encounter.

6.54.....for participating in the criminal conspiracy as aforesaid and taking it towards its culmination point by murdering Tulsiram Prajapati.....

6.62.....by so doing had intentionally provided the requisite time needed by the co-accused to take the necessary efforts to cause disappearance of human witness Tulsiram Prajapati to their crime of abduction of Sohrabuddin and his wife precedent to their murders by murdering him as well and thereby had facilitated the criminal conspiracy towards its culmination point.....

6.69.....Besides this, accused Geetha Johri (A-18), in furtherance of a criminal conspiracy as aforesaid made all attempts to delink Tulsiram Prajapati case from the Sohrabuddin fake encounter case to establish that the third person who traveled with Sohrabuddin and Kausarbi in the bus in the night of 22/23.11.2005 and was abducted was somebody else and not Tulsiram Prajapati himself. She projected that the third

person who was abducted along with Sohrabuddin and his wife Kausarbi was one Kalimuddin of Hyderabad in spite of the fact that she had knowledge that the third person was Tulsiram Prajapati as made know to her by her Investigating Officer V.L. Solanki.....”

30) The above details mentioned in the chargesheet dated 04.09.2012 clearly show that what the CBI has conducted is mere ‘further investigation’ and the alleged killing of Tulsiram Prajapati was in continuance of and an inseparable part of the conspiracy which commenced in November, 2005 by abduction of Sohrabuddin, Kausarbi and Tulsiram Prajapati and which culminated into the final stage of alleged killing of Tulsiram Prajapati who was kept under the control of accused police officers since he was a material eye-witness like Kausarbi. To put it straight, apart from the consistent stand of the CBI, the chargesheet dated 04.09.2012 itself is conclusive to show that the said chargesheet, in law and on facts, deserves to be treated as ‘supplementary chargesheet in the first FIR’.

Legal aspects as to permissibility/impermissibility of second FIR :

31) Now, let us consider the legal aspects raised by the petitioner-Amit Shah as well as the CBI. The factual details which we have discussed in the earlier paragraphs show that right from the inception of entrustment of investigation to the CBI by order dated 12.01.2010 till filing of the charge sheet dated 04.09.2012, this Court has also treated the alleged fake encounter of Tulsiram Prajapati to be an outcome of one single conspiracy alleged to have been hatched in November, 2005 which ultimately culminated in 2006. In such circumstances, the filing of the second FIR and a fresh charge sheet for the same is contrary to the provisions of the Code suggesting that the petitioner was not being investigated, prosecuted and tried ‘in accordance with law’ .

32) This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In T.T. Anthony (supra), this Court has categorically held that registration of second FIR (which is not a cross case) is violative of Article 21 of the Constitution. The following conclusion in paragraph Nos. 19, 20 and 27 of that judgment are relevant which read as under:

“19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further

investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.

27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution.” The above referred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions.

33) Mr. Rawal, learned ASG, by referring T.T. Anthony (supra) submitted that the said principles are not applicable and relevant to the facts and circumstances of this case as the said judgment laid down the ratio that there cannot be two FIRs relating to the same offence or occurrence. Learned

ASG further pointed out that in the present case, there are two distinct incidents/occurrences, inasmuch as one being the conspiracy relating to the murder of Sohrabuddin with the help of Tulsiram Prajapati and the other being the conspiracy to murder Tulsiram Prajapati - a potential witness to the earlier conspiracy to murder Sohrabuddin. We are unable to accept the claim of the learned ASG. As a matter of fact, the aforesaid proposition of law making registration of fresh FIR impermissible and violative of Article 21 of the Constitution is reiterated, re-affirmed in the following subsequent decisions of this Court:

1. Upkar Singh vs. Ved Prakash (2004) 13 SCC 292
2. Babubhai vs. State of Gujarat & Ors. (2010) 12 SCC 254
3. Chirra Shivraj vs. State of A.P. AIR 2011 SC 604
4. C. Muniappan vs. State of Tamil Nadu (2010) 9 SCC 567.

In C. Muniappan (supra), this Court explained “consequence test”, i.e., if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as a part of the first FIR. In the case on hand, in view of the principles laid down in the above referred decisions, in particular, C. Muniappan (supra) as well as in Chirra Shivraj (supra), apply with full force since according to the CBI itself it is the case where:-

- (i) The larger conspiracy allegedly commenced in November, 2005 and culminated into the murder of Tulsiram Prajapati in December, 2006 in a fake encounter;
- (ii) The alleged fake encounter of Tulsiram Prajapati was a consequence of earlier false encounter of Sohrabuddin and Kausarbi since Tulsiram Prajapati was an eye witness to the abduction and consequent murders of Sohrabuddin and Kausarbi; and
- (iii) Tulsiram Prajapati was allegedly kept under the control of accused police officers, as a part of the same conspiracy, till the time he was allegedly killed in a fake encounter.

In view of the factual situation as projected by the CBI itself, the ratio laid down by this Court in C. Muniappan (supra), viz., merely because two separate complaints had been lodged did not mean that they could not be clubbed together and one chargesheet could not be filed [See T.T. Anthony (supra)].

34) In view of the consistent stand taken by the CBI, at this juncture, CBI may not be permitted to adopt a contradictory stand.

35) Learned counsel for the petitioner has placed reliance on the following decisions of this Court which explained “same transaction”:

- i) Babulal vs. Emperor , AIR 1938 PC 130
- ii) S. Swamirathnam vs. State of Madras, AIR 1957 SC 340
- iii) State of A.P. vs. Kandimalla Subbaiah & Anr., AIR 1961 SC 1241
- iv) State of A.P. vs. Cheemalapati Ganeswara Rao & Anr., AIR 1963 SC 1850

36) In Babulal (supra), the Privy Council has held that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it.

The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it.

37) In Swamirathnam (supra), the following conclusion in para 7 is relevant:

“7. On behalf of the appellant Abu Bucker it was contended that there has been misjoinder of charges on the ground that several conspiracies, distinct from each other, had been lumped together and tried at one trial. The Advocate for Swamirathnam, however, did not put forward this submission. We have examined the charge carefully and find no ground for accepting the contention raised. The charge as framed, discloses one single conspiracy, although spread over several years. There was only one object of the conspiracy and that was to cheat members of the public. The fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy did not change the conspiracy and did not split up a single conspiracy into several conspiracies. It was suggested that although the modus operandi may have been the same, the several instances of cheating were not part of the same transaction. Reliance was placed on the cast of Sharpurji Sorabji v. Emperor, AIR 1936 Bom 154 (A) and on the cast of Choragudi Venkatadari, In re. ILR 33 Mad 502 (B). These cases are not in point. In the Bombay case, no charge of conspiracy had been framed and the decision in the Madras case was given before Section 120-B was introduced into the Indian Penal Code. In the present case, the instances of cheating were in pursuance of the conspiracy and were therefore parts of the same transaction.”

38) In Kandimalla Subbaiah (supra), this Court held where the alleged offence have been committed in the course of the same transaction, the limitation placed by Section 234(1) cannot operate.

39) In Cheemalapati Ganeswara Rao (supra), while considering the scope of Section 239 of the old Code (Section 220 in the new Code), this Court held:

“28. The decision of the Allahabad High Court in T.B. Mukherji case directly in point and is clearly to the effect that the different clauses of Section 239 are mutually exclusive in the sense that it is not possible to combine the provisions of two or more clauses in any one case and to try jointly several persons partly by applying the provisions of one clause and partly by applying those of another or other clauses. A large number of decisions of the different High Courts and one of the Privy Council have been considered in this case. No doubt, as has been rightly pointed out in this case, separate trial is the normal rule and joint trial is an exception. But while this principle is easy to appreciate and follow where one person alone is the accused and the interaction or intervention of the acts of more persons than one does not come in, it would where the same act is committed by several persons, be not only inconvenient but injudicious to try all the several persons separately. This would lead to unnecessary multiplicity of trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separate trials. Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves. We entirely agree with the High Court that joint trial should be founded on some “principle”. ....

40) Learned ASG placed reliance on the following decisions:

- i) Anju Chaudhary vs. State of U.P. & Anr., 2012(12) Scale 619
- ii) Babubhai vs. State of Gujarat (2010) 12 SCC 254
- iii) Surender Kaushik & Ors. vs. State of U.P. & Ors., JT 2013 (3) SC
- iv) Nirmal Singh Kahlon vs. State of Punjab (2009) 1 SCC 441
- v) Ram Lal Narang vs. State (Delhi Admn.), (1979) 2 SCC 322
- vi) Upkar Singh vs. Ved Prakash & Ors. (2004) 13 SCC 292
- vii) Kari Choudhary vs. Mst. Sita Devi & Ors. (2002) 1 SCC 714.

41) In Anju Chaudhary (supra) this Court was concerned with a case in which the second FIR was not connected with the offence alleged in the first FIR. After carefully

analyzing the same, we are of the view that it has no relevance to the facts of the present case.

42) In the case of Babubhai (supra), the very same Bench considered the permissibility of more than one FIR and the test of sameness. After explaining FIR under Section 154 of the Code, commencement of the investigation, formation of opinion under Sections 169 or 170 of the Code, police report under Section 173 of the Code and statements under Section 162 of the Code, this Court, has held that the Court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents having two or more parts of the same transaction. This Court further held that if the answer is in affirmative, the second FIR is liable to be quashed. It was further held that in case the contrary is proved, where the version in the second FIR is different and is in respect of the two different incidents/crimes, the second FIR is permissible. This Court further explained that in case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted. It is clear from the decision that if two FIRs pertain to two different incidents/crimes, second FIR is permissible. In the light of the factual position in the case on hand, the ratio in that decision is not helpful to the case of the CBI.

43) The CBI has also placed reliance on a recent decision of this Court in Surender Kaushik (supra). A careful perusal of the facts which arose in the said case would disclose that three FIRs which formed the subject matter of the said case were registered by three different complainants. Two of the FIRs consisted of cross cases inasmuch as the complainant of the first FIR was accused in the other while the accused in the first FIR was the complainant in the second FIR. The third FIR was filed by a third person citing both the complainants of first two FIRs as accused persons. In view of the above peculiar facts situation arising in the said case that the second and third FIRs were not quashed by the High Court, which decision was upheld by this Court, we are satisfied that the said decision has no relevance to the facts of the present case.

44) In the case of Nirmal Singh Kahlon (supra), this Court has carved out an exception for filing a second FIR. As per the exception carved out in the said case, the second FIR lies in a case where the first FIR does not contain any allegations of criminal conspiracy. On the other hand, in the case on hand, the first FIR itself discloses an offence of alleged criminal conspiracy and it was this conspiracy which the CBI was directed to unearth in the judgment dated 12.01.2010 based on which the CBI filed its first FIR, hence, the CBI cannot place reliance on this judgment to justify the filing of the second FIR and a fresh charge sheet.

45) Ram Lal Narang (supra) was cited to be an authority carving out an exception to the general rule that there cannot be a second FIR in respect of the same offence. This Court, in the said decision, held that a second FIR would lie in an event when pursuant to the investigation in the first FIR, a larger conspiracy is disclosed, which was not part of the first FIR. In the case on hand, while

entrusting the investigation of the case relating to the killing of Sohrabuddin and Kausarbi to the CBI, this Court, by order dated 12.01.2010, expressed a suspicion that Tulsiram Prajapati could have been killed because he was an eye witness to the killings of Sohrabuddin and Kausarbi.

46) The CBI also filed an FIR on 01.02.2010 based upon the aforesaid judgment dated 12.01.2010 and conducted the investigation reaching to a conclusion that conspiracy to kill Sohrabuddin and Kausarbi and conspiracy to kill Tulsiram Prajapati were part of the same transaction inasmuch as both these conspiracies were entered into from the very outset in November, 2005. Based upon its investigation, the CBI filed a status report (s) before this Court and an affidavit in Writ Petition (Crl.) No. 115 of 2007 bringing to the notice of this Court that killing of Tulsiram Prajapati was also a part of the same transaction and very same conspiracy in which killings of Sohrabuddin and Kausarbi took place and unless the CBI is entrusted with the investigation of Tulsiram case, it will not be able to unearth the larger conspiracy covered in the first FIR. The fact that even as per the CBI, the scope of conspiracy included alleged killing of Sohrabuddin and Kausarbi and alleged offence of killing of Tulsiram Prajapati and the same is unequivocally established by the order passed by this Court on 12.08.2010 in Writ Petition (Crl.) No. 6 of 2007 which is fortified by the status report dated 11.11.2011 filed by the CBI has already been extracted in paragraphs supra.

47) In the light of the factual details, since the entire larger conspiracy is covered in the first FIR dated 01.02.2010 and in the investigation of the said FIR, the CBI, after investigating Tulsiram Prajapati's encounter recorded a finding in supplementary charge sheet dated 22.10.2010 filed in the killings of Sohrabuddin and Kausarbi case that the said encounter was a fake one, we are satisfied that the decision in Ramlal Narang (supra) would not apply to the facts of the case on hand. Even otherwise, as pointed out by learned senior counsel for the petitioner, in Ramlal Narang (supra), the chargesheet filed pursuant to the first FIR was withdrawn which was a fact which weighed with this Court while delivering the judgment in the second case.

48) Upkar Singh (supra) also carves out a second exception to the rule prohibiting lodging of second FIR for the same offence or different offences committed in the course of the transaction disclosed in the first FIR. The only exception to the law declared in T.T. Anthony (supra), which is carved out in Upkar Singh (supra) is to the effect that when the second FIR consists of alleged offences which are in the nature of the cross case/cross complaint or a counter complaint, such cross complaint would not be permitted as second FIR. In the case on hand, it is not the case of the CBI that the FIR in Tulsiram Prajapati's case is a cross FIR or a counter complaint to the FIR filed in Sohrabuddin and Kausarbi's case being FIR dated 01.02.2010.

49) The ratio laid down in Kari Choudhary's case (supra) is heavily relied on by learned ASG appearing for the CBI. In that decision, it was held that when there are two rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. While there is no quarrel as to the above proposition, after carefully considering the factual position, we are of the view that the said decision is not helpful to the case on hand.

Maintainability of writ petition under Article 32:



50) Regarding the maintainability, namely, filing a writ petition under Article 32 of the Constitution of India, learned ASG submitted that it is only on complete examination and appreciation of facts, materials and evidence that it can be decided as to whether these distinct conspiracies form part of the same transaction in view of the law laid down by this Court. He further pointed out that the CBI which is the investigating agency, after a full fledged investigation, came to a conclusion that the conspiracy to eliminate Tulsiram Prajapati was a distinct and separate offence, accordingly, such disputed questions of fact are not and ought not to be decided in a writ petition under Article 32. He also pointed out that apart from the fact that there are sufficient remedies to raise such a plea under the Code before a court of competent jurisdiction, such disputed questions of fact can only be adjudicated after carefully examining and appreciating the evidence led in. It is also pointed out that there is no question of any prejudice suffered on account of prayer of the petitioner since if the offences are distinct and separate which is so emerging from the present case, there can neither be joint trial nor could the charge sheet filed in the present case be treated as supplementary charge sheet.

As a concluding argument, Mr. Rawal, learned ASG submitted that this Court in exercise of its jurisdiction under Article 32 may not like to adjudicate such disputed questions of fact which require evidence to be led and its appreciation.

51) As against this, Mr. Mahesh Jethmalani, learned senior counsel for the petitioner submitted that the CBI is not faced with any prejudice which is to be caused to it, if the relief as prayed for by the petitioner is granted. Admittedly, the petitioner is not praying for quashing of the charge sheet dated 04.09.2012. During the course of argument, when this Court specifically put a question to learned ASG appearing for the CBI as to what prejudice would be caused to the CBI if instead of treating the charge sheet dated 04.09.2012 to be fresh and independent charge sheet, the same will be treated as a supplementary charge sheet in the first charge sheet, there was no definite answer as to what prejudice would be caused to the CBI. For the sake of repetition, it is relevant to mention that in our order dated 08.04.2011 in Narmada Bai (supra), while disposing of the said writ petition, this Court directed the CBI to take up the investigation as prayed accepting their contention that killing of Tulsiram Prajapati is a part of the same series of acts in which Sohrabuddin and Kausarbi were killed and, therefore, Tulsiram Prajapati encounter should also be investigated by the CBI. Accepting the above assertion of the CBI, this Court directed to complete the investigation within six months.

Summary:

52) a) This Court accepting the plea of the CBI in Narmada Bai (supra) that killing of Tulsiram Prajapati is part of the same series of cognizable offence forming part of the first FIR directed the CBI to “take over” the investigation and did not grant the relief prayed for i.e., registration of a fresh FIR. Accordingly, filing of a fresh FIR by the CBI is contrary to various decisions of this Court.

b) The various provisions of the Code of Criminal Procedure clearly show that an officer-in-charge of a police station has to commence investigation as provided in Section 156 or 157 of the Code on the basis of entry of the First Information Report, on coming to know of the commission of cognizable offence. On completion of investigation and on the basis of evidence collected, Investigating Officer has to form an opinion under Section 169 or 170 of the Code and forward his report to the concerned Magistrate under Section 173(2) of the Code.

c) Even after filing of such a report, if he comes into possession of further information or material, there is no need to register a fresh FIR, he is empowered to make further investigation normally with the leave of the Court and where during further investigation, he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports which is evident from sub-section (8) of Section 173 of the Code. Under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code. Thus, there can be no second FIR and, consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

d) Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the Station House Diary, the officer-in-charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report

(s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, is liable to be interfered with by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution.

e) First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR.

f) In the case on hand, as explained in the earlier paras, in our opinion, the second FIR was nothing but a consequence of the event which had taken place on 25/26.11.2005. We have already concluded that this Court having reposed faith in the CBI accepted their contention that Tulsiram Prajapati encounter is a part of the same chain of events in which Sohrabuddin and Kausarbi were killed and

directed the CBI to “take up” the investigation.

g) For vivid understanding, let us consider a situation in which Mr. ‘A’ having killed ‘B’ with the aid of ‘C’, informs the police that unknown persons killed ‘B’. During investigation, it revealed that ‘A’ was the real culprit and ‘D’ abetted ‘A’ to commit the murder. As a result, the police officer files the charge sheet under Section 173(2) of the Code with the Magistrate. Although, in due course, it was discovered through further investigation that the person who abetted Mr. ‘A’ was ‘C’ and not ‘D’ as mentioned in the charge sheet filed under Section 173 of the Code. In such a scenario, uncovering of the later fact that ‘C’ is the real abettor will not demand a second FIR rather a supplementary charge sheet under section 173(8) of the Code will serve the purpose.

h) Likewise, in the case on hand, initially the CBI took a stand that the third person accompanying Sohrabbuddin and Kausarbi was Kalimuddin. However, with the aid of further investigation, it unveiled that the third person was Tulsiram Prajapati. Therefore, only as a result of further investigation, the CBI has gathered the information that the third person was Tulsiram Prajapati. Thus a second FIR in the given facts and circumstances is unwarranted; instead filing of a supplementary charge sheet in this regard will suffice the issue.

i) Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second F.I.R to meet the ends of justice.

j) The investigating officers are the kingpins in the criminal justice system. Their reliable investigation is the leading step towards affirming complete justice to the victims of the case. Hence they are bestowed with dual duties i.e. to investigate the matter exhaustively and subsequently collect reliable evidences to establish the same.

Conclusion:

53) In the light of the specific stand taken by the CBI before this Court in the earlier proceedings by way of assertion in the form of counter affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge sheet is violative of fundamental rights under Article 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. This Court categorically accepted the CBI’s plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed the CBI to “take over” the investigation and did not grant the relief as prayed, namely, registration of

fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment.

54) In view of the above discussion and conclusion, the second FIR dated 29.04.2011 being RC No. 3(S)/2011/Mumbai filed by the CBI is contrary to the directions issued in judgment and order dated 08.04.2011 by this Court in Writ Petition (Criminal) No. 115 of 2009 and accordingly the same is quashed. As a consequence, the charge sheet filed on 04.09.2012, in pursuance of the second FIR, be treated as a supplementary charge sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial Court to decide the same in accordance with law. Consequently, Writ Petition (Criminal) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Criminal) No. 5 of 2013.

.....J. (P. SATHASIVAM) .....J. (DR. B.S.  
CHAUHAN) NEW DELHI;

APRIL 8, 2013.

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