

State Of Maharashtra vs Farook Mohammed Kasim Mapkar & Ors on 30 July, 2010

Equivalent citations: AIR 2010 SUPREME COURT 2971, 2010 AIR SCW 4911, (2010) 93 ALLINDCAS 58 (SC), 2010 (5) AIR BOM R 530, (2010) 2 MADLW(CRI) 1341, (2011) 1 MAD LJ(CRI) 254, (2010) 7 SCALE 657, (2011) 1 ALLCRIR 311, 2011 CALCRILR 1 135, 2010 ALLMR(CRI) 2932, (2011) 1 BOMCR(CRI) 121, (2010) 3 CURCRIR 256, 2010 (8) SCC 582, (2010) 4 ALLCRILR 26, (2010) 3 DLT(CRL) 491, (2010) 2 DLT(CRL) 1000, (2010) 170 DLT 347, (2010) 3 RECCRIR 880, (2010) 70 ALLCRIC 866, 2011 CRI LJ (SUPP) 701 (SC), 2010 (3) SCC (CRI) 1017

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Bench: Anil R. Dave, P. Sathasivam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1376 OF 2010
(Arising out of S.L.P. (Crl.) No. 6477 of 2009)

The State of Maharashtra

.... Appellant (s)

Versus

Farook Mohammed Kasim Mapkar
& Ors.

.... Respondent(s)

JUDGMENT

P. Sathasivam, J.

1) Leave granted.

2) This appeal is directed against the final judgment and order dated 18.12.2008 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1437 of 2007 whereby the High Court directed the State of Maharashtra to handover the complaint of Farook Mohammed Kasim

Mapkar-Respondent No. 1 herein dated 28.08.2006 to the Central Bureau of Investigation (in short 'the CBI'), to register a case in respect of the incident dated 10.01.1993 near Hari Masjid, Mumbai, and to investigate the same.

3) After the demolition of Babri Masjid on 06.12.1992, communal riots occurred in various parts of the country including Mumbai. At the material time, Respondent No.2 was the PSI attached to R.A.K. Marg Police Station, Bombay. On 10.01.1993, Respondent No.2 and his staff, while on patrol duty, received a message from Wireless Control Room that a mob of 2000 to 2500 people armed with deadly weapons is resorting to rioting and arson near Hari Masjid, Sewree, Bombay. Respondent No. 2 rushed to the site and found that the mob had become violent and destroying vehicles and other properties and setting up fire at the slum colonies in the nearby areas. Mr. K.L. Bishnoi, Dy. Commissioner of Police - Zone III, also arrived at the site and tried to control the mob in order to restore peace. However, the mob turned more violent and even started attacking the police by resorting to firing from the side of Hari Masjid. Therefore, in order to maintain law and order and to save innocent people, Mr. K.L. Bishnoi, Dy. Commissioner of Police, ordered Respondent No.2 to open fire. In obedience to the orders of the superior Police Officer, Respondent No. 2 and his staff opened fire which resulted in the death of six persons. In respect of the said incident, F.I.R. came to be lodged on 10.01.1993 bearing C.R. No. 17 of 1993 under Sections 143 to 149, 151, 153(B) and 307 of the Indian Penal Code read with Sections 3 and 25 of the Arms Act and under Section 37(i) of the Bombay Police Act at the R.A.K. Marg Police Station against 50 accused persons and about 2000-2400 unknown wanted accused persons and Respondent No.1 was specifically named in the F.I.R. In the year 1994, after completion of the investigation, charge sheet came to be filed before the Competent Court. As far as Respondent No.1 is concerned, the trial against him was separated by the Additional Sessions Court by order dated 05.08.2005. The trial of other six accused was also separated. The 11th Ad-hoc Additional Sessions Judge at Sewree, Mumbai, conducted trial and by order dated 04.02.2006 acquitted 22 accused persons. On 05.08.2006, Respondent No.1 filed a complaint with R.A.K. Marg Police Station and sought registration of FIR against Respondent No.2 and other police officers in respect of the Hari Masjid incident and the same was entered into Police Station record vide Toorant Application Register at S.No. 263/06 dated 05.08.2006. On 14.09.2006 and 04.10.2006, the advocate of Respondent No.1 sent two letters to the police station in connection with the registration of F.I.R. In October, 2006, Respondent No.1 was requested on two different occasions to attend the police station with a view to record his statement, however, he informed telephonically that the letters sent by his advocate dated 14.09.2006 and 04.10.2006 may be treated as his statement and F.I.R. On 25.10.2006, Respondent No.2 was called and his statement was recorded. On 09.07.2007, the Additional Sessions Judge directed the I.O. to submit a separate charge sheet against Respondent No.1 as the trial of Respondent No.1 was separated by earlier order dated 05.08.2005. On 01.08.2007, Respondent No.1 filed Criminal Writ Petition No. 1437 of 2007 before the High Court of Bombay and sought a writ of mandamus directing the Government to prosecute Respondent No.2. By the impugned order dated 18.12.2008, the High Court allowed the writ petition by treating the writ petition as public interest litigation and directed the CBI to register the case and investigate the said incident. Challenging the said order, the State of Maharashtra filed this appeal by way of special leave.

4) Heard Mr. Shekhar Naphade, learned senior counsel for the State of Maharashtra, Mr. Colin Gonsalves, learned senior counsel for the Respondent No. 1 herein (writ petitioner) and Mr. Mohan Jain, learned Additional Solicitor General for CBI-Respondent No. 3.

5) Main grievance of the State of Maharashtra with regard to entrusting the investigation to CBI are as follows:-

(i) Since, this Court has seized the matter in issue by entertaining two writ petitions under Article 32 and pending decision, the High Court ought not to have exercised jurisdiction under Article 226.

(ii) The State of Maharashtra itself constituted Special Task Force (STF) and proceeded with the investigation.

(iii) When adequate remedy is available under the Code of Criminal Procedure (hereinafter referred to as 'the Code'), writ petition under Article 226 before the High Court is not the proper remedy and the High Court ought not to have entertained the same.

6) As against the above submissions, Mr. Mohan Jain, learned Additional Solicitor General, appearing for the CBI and Mr. Gonsalves, learned senior counsel for the Respondent No. 1 herein submitted that after considering the extraordinary circumstance, utmost public importance as well as the conduct of the State in showing leniency towards their police officers, particularly in favour of Respondent No. 2, the High Court is justified in issuing appropriate direction in writ petition filed by Respondent No.1 who made a complaint in respect of the incident that took place on 10.01.1993 near Hari Masjid at Mumbai. They also submitted that the writ petitions under Article 32 pending before this Court relate to implementation of the Srikrishna Commission Report and there is no bar for entertaining a writ petition in respect of the specific grievance of the Respondent No. 1 about the conduct of the Special Task Force (STF), particularly, the highhanded action of its police officers. Even otherwise, according to them, the writ petition came to be filed in the High Court of Bombay on 01.08.2007 whereas the writ petitions were filed in this Court after a year in 2008 that too not by the Respondent No. 1 but by NGOs.

Finally, both the counsel submitted that inasmuch as the Government of Maharashtra itself by notification dated 07.02.2008 consented to the exercise of the powers and jurisdiction of the members of Delhi Special Police establishment (CBI) for inquiry into the said incident relating to Hari Masjid incident, the State is not justified in challenging the order of the High Court.

7) We have carefully considered the rival contentions and perused the relevant materials.

8) With regard to the first objection of the State of Maharashtra about the propriety of the High Court in exercising jurisdiction under Article 226 when the same matter was seized by this Court in

a petition under Article 32, first of all, it is to be noted that the writ petition came to be filed before the High Court of Bombay by Respondent No. 1 herein in 2007. On the other hand, in their reply filed by the State of Maharashtra through their officer, Shri D.T. Shinde, Deputy Commissioner of Police, , Detection-I, Crime Branch, Mumbai, on 18.09.2007, wherein it was stated that after Srikrishna Commission's Report two writ petitions came to be filed in the Supreme Court. The said affidavit further shows that both were filed by NGOs, namely, W.P. No. 527 of 1998 was filed by Action Taken Committee for the implementation of Srikrishna Commission Report and the second W.P. No. 542 of 1999 was filed by the Human Rights Union of Supreme Court's Lawyers. The prayer(s) in both these writ petitions were for implementation of the report of the Commission and for other reliefs including action to be taken against the police officers. It is true that both these petitions were pending when the High Court disposed of the writ petition filed by the Respondent No. 1 herein. Mr. Naphade, learned senior counsel for the State very much relied on the decision of this Court in Chhavi Mehrotra vs. Director General, Health Services, 1995 Supp (3) SCC

434. In the said decision, writ petition was moved by one Ms. Chhavi Mehrotra before this Court under Article 32 for directions for consideration of her admission to the MBBS course against 15 per cent all-India quota of 1992. This writ petition along with other similar petitions came for consideration and certain comprehensive directions were issued in matters for admission of students in the waiting list to various colleges in the country. During the pendency of the said writ petition, it is seen that the petitioner moved an independent Writ Petition No. 1508 of 1993 before the Lucknow Bench of the High Court and obtained certain directions. When this was brought to the notice of this Court, it was observed "it is a clear case where the High Court ought not to have exercised jurisdiction under Article 226 where the matter was clearly seized of by this Court in a petition under Article 32....." There is no dispute about the proposition and this Court reiterated that judicial discipline would require that in a hierarchical system, such conflicting exercise of jurisdiction should be avoided. However, the dictum laid down in that case is not applicable to the case on hand, because in Chhavi Mehrotra (supra), the same petitioner after filing writ petition under Article 32 and getting certain directions approached the High Court under Article 226 and the High Court had issued more directions. When this was brought to the notice of this Court, after pointing out the practice and procedure, this Court dissatisfied with the High Court's move. In the case on hand, first of all, the writ petition came to be filed in the High Court in the year 2007 by the Respondent No. 1 herein well prior to the filing of two writ petitions under Article 32 in this Court, that too by different persons, namely, two NGOs i.e. Action Taken Committee for implementation of Srikrishna Commission Report and Human Rights Union of Supreme Court's Lawyers. Further, admittedly, there is no order by this Court prohibiting the High Court from entertaining writ petition or proceeding further about the said incident. In fact, we are told that those writ petitions are still pending. In such circumstances, we are of the view that the reliance placed on Chhavi Mehrotra (supra) is not applicable and there is no violation or deviation of any established practice and procedure particularly in the light of the peculiar facts of this case, where Respondent No. 1, who himself a victim and complainant in respect of Hari Masjid incident seeking direction for action against the officers, particularly, Respondent No. 2 herein. Accordingly, we reject the first contention.

9) As regards the second objection, namely, the State itself had constituted Special Task Force (STF) and proceeded with the investigation, certain factual details asserted by the Respondent No. 1 in his complaint dated 28.08.2006 are relevant. In the said complaint addressed to Sr. Inspector of Police, R.A.K. Marg Police Station on 10.01.1993 while the city was in the midst of communal disorder, according to the complainant, he went to Hari Masjid for performing his Namaz. While he was within the premises of the Masjid, 4-5 police personnel entered into the Masjid and started indiscriminate firing. The persons who were performing Namaz started running helter and skelter and took refuge in various rooms in the Masjid. They closed all the windows except one and through this open window, a police officer by name Nikhil Kapse-Respondent No. 2 herein started firing inside the premises and two persons lost their lives. One bullet hit the complainant on his back. The persons inside were asked to come out with hands held high. One person by name Namazi Shamsuddin had sustained bullet injury on his leg. While he was attending to his injury, Respondent No. 2 fired on his chest killing him on the spot. In all, 6 muslim persons lost their lives and seven were injured. He also narrated that police took several persons including him to R.A.K. Marg Police Station and how they were treated inhumanly. He was shown as accused no. 35 in C.R. No. 17 of 1993. In the meanwhile, by a Gazette Notification dated 25.01.1993, the State of Maharashtra appointed a Commission headed by Justice B.N. Srikrishna to enquire into the riots and various incidents which occurred during the riots in Mumbai. The report of the Commission was published on 16.12.1998. The High Court has also noted the Commission's finding about the role of Respondent No. 2 in Hari Masjid incident which was referred to in the Commission's report paragraph Nos. 24.23 to 24.25 and in para 4 of the High Court's order. It is also relevant to point out that similar objection was taken by the Public Prosecutor before the High Court stating that the Special Task Force only proceeded on the basis of the version given by the police witnesses. The High Court has observed that it is completely one-sided investigation and it is difficult to countenance an investigation where the statement of none of the injured witnesses was recorded and which was confined to reaching a conclusion on the basis of the statements of police officers who were present at the time of incident when the commission had prima facie indicted that some of these officers have committed serious offences. In view of the factual opinion about the investigation of Special Task Force by the Commission, we do not find any error in the decision of the High Court in ordering investigation by a special agency like CBI. Accordingly, we reject the second contention also.

10) Coming to the last submission about exercise of jurisdiction under Article 226 by the High Court, Mr. Naphade submitted that the writ petitioner ought to have availed Sections 173, 190 etc. of the Code and the High Court ought not to have issued a writ of mandamus. To strengthen his arguments, he relied on Gangadhar Janardan Mhatre vs. State of Maharashtra and Ors. (2004) 7 SCC 768, Hari Singh vs. State of U.P., (2006) 5 SCC 733 and Aleque Padamsee & Ors. vs. Union of India & Ors. (2007) 6 SCC 171.

11) In the first case, i.e. Gangadhar Janardan Mhatre (supra), after adverting to Sections 156(3), 169, 173, 178, 190 as well as 200 this Court concluded that instead of availing remedy under those provisions, writ petition in such cases is not to be entertained.

12) In *Hari Singh vs. State of U.P.*, (2006) 5 SCC 733, considering the very same provisions, this Court concluded that when the information is laid with the police but no action on that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. It was further held that in case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and submit a report. If he finds that complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. After pointing out the same, the Court has concluded the dismissal of writ petition filed under Article 32.

13) In *Aleque Padamsee & Ors. vs. Union of India & Ors.* (2007) 6 SCC 171, this Court, after adverting to the earlier decisions reiterated the same ratio.

14) The principles enunciated in the above decisions make it clear that if any person is aggrieved by the inaction on part of the police or not getting proper response, there are adequate remedies provided under the Code and it is for such person to seek relief with the aid of these provisions. However, we have already adverted to the specific allegation in the complaint of the Respondent No. 1, how the Special Task Force conducted investigation, as seen from the report of Srikrishna Commission. Further, in the case on hand, the Respondent No. 1 has asserted at many places which were supported by the Commission's report, more particularly, the information that the State Police did not examine the injured witnesses who were available at the spot and suffered a lot. In view of the demolition of Babri Masjid on 06.12.1992, and riots in various places all over India including Mumbai on 10.01.1993, specific assertion by the Respondent No. 1 who is an affected person coupled with the findings of Srikrishna Commission accepted by the State, we are of the view that it is an "extraordinary case" and we hold that the Respondent No. 1 herein is fully justified in approaching the High Court seeking extraordinary jurisdiction for direction for entrusting the investigation to independent and special agency like CBI. Accordingly, we reject the said contention also.

15) Finally, as rightly pointed out by Mr. Gonsalves, learned senior counsel for the Respondent No. 1, after the notification of the Government of Maharashtra dated 07.02.2008 consenting CBI to investigate the incident relating to Hari Masjid, it is not understandable as to the opposition of the direction of the High Court ordering CBI inquiry. It is useful to refer the Notification of the Government of Maharashtra which reads as under:

"GOVERNMENT OF MAHARASHTRA NOTIFICATION Home Department (Special) Mantralaya, Mumbai - 400 032 Dated: 7th February, 2008 No. MIS 0807/CR 276/Part-II/Spl-2. In pursuance of the provisions contained in Section 6 of the Delhi Special Police Establishment Act, 1946, (Act XXV of 1946), the Government of Maharashtra is pleased to accord consent to the exercise of the powers and jurisdiction of the members of the Delhi Special Police Establishment for the inquiry

into the incident as dealt with by Srikrishna Commission in its Report, Volume II in para Nos. 24.17 to 24.24 relating to Hari Masjid incident.

The consent is also accorded for the inquiry/investigation of attempts, abetments and conspiracies in relation to or in connection with the offence in the said case and any other offences committed in the course of same transaction or arising out of the same facts.

By order and in the name of the Governor of Maharashtra Sd/-

A.N. Naikaware Deputy Secretary to Government"

It is not in dispute about the said notification and the follow up action by the CBI after examining several persons. No doubt, learned senior counsel for the State by drawing our attention to certain affidavits filed by the officers of the CBI in the High Court submitted that the CBI itself was reluctant to accept the investigation due to various reasons. On going through those affidavits filed by some of the officers, we feel that there is no need to give much importance to the same.

16) About the direction by the High Court, in exercise of its jurisdiction under Article 226, requesting the CBI to investigate a cognizable offence within the territory of a State without its consent was considered recently by a Constitution Bench in a decision reported in State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors. (2010) 3 SCC 571 which reads as follows:-

"69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

In view of the above pronouncement, we hold that in order to protect civil liberties, fundamental rights and more particularly Article 21, this Court and High Courts can very well exercise the power, no doubt, must be sparingly, cautiously and in exceptional situations as observed in para 70 of the said judgment.

17) In the light of the above discussion, we are unable to accept the stand of the State of Maharashtra and we are in agreement with the decision rendered by the High Court in ordering investigation by the CBI. Taking note of the fact that the incident related to 1993 and also of the fact that the CBI has already examined several persons, we direct the CBI to continue and complete the investigation into the incident and file a final report to the Court concerned within a period of 6

months. With the above direction, this appeal is dismissed.

.....J. (P. SATHASIVAM)J. (ANIL R. DAVE) NEW
DELHI;

JULY 30, 2010