"NO COERCIVE STEPS": VIEW OF SUPREME COURT OF INDIA ON POWERS OF HIGH COURTS TO INTERFERE IN INVESTIGATION BY POLICE IN AN FIR:A CASE COMMENT

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I

In a recent judgment titled "*Neeharika Enterprises v. State of Maharashtra*[1]", the Supreme Court deprecated routine interference with police investigations pursuant to First Information Reports (FIR) in exercise of inherent powers of the High Court under Section 482 of the Code of Criminal Procedure, 1973 or under Article 226 of the Constitution of India. The principle that a High Court should not normally interfere and interdict the investigative powers of the police under Chapter XII of the Code is not novel. Judgments affirming and re-affirming this proposition are a legion[2]. Had the Supreme Court stopped there, *Neeharika Enterprises* would have been another brick in the wall.

However, while purporting to lay down the law, the Supreme Court held that a High Court must not pass non-speaking order's staying investigation and/or directing "*no coercive steps*" against the accused. Indisputably, the High Court in exercise of its inherent power under Section 482 of the Cr.P.C may, in an appropriate case, stay an investigation if, *prima facie*, no cognizable offence has been disclosed and/or any of the parameters laid down in *Bhajan Lal v. State of Punjab*[3] are satisfied. What is, however, of some surprise is the Supreme Court's

[1] Criminal Appeal 330 of 2021, dated 12.04.2021

[2] See King-Emperor v. Khwaja Nazir Ahmad AIR 1945 PC 18; R.P. Kapur v. State of Punjab AIR 1960 SC 866; Kurukshetra University v. State of Haryana (1977) 4 SCC 451; State of A.P. v. Golconda Linga Swamy (2004) 6 SCC 522; Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122; Sanapareday Maheedhar Seshagiri v. State of Andhra Pradesh (2007) 13 SCC 165; State of Andhra Pradesh v. Bajjoori Kanthaiah (2009)1 SCC 114; State of Maharashtra v. Arun Gulab Gawali (2010) 9 SCC 701; and State of Orissa v. Ujjal Kumar Burdhan (2012) 4 SCC 547.

[3] AIR 1992 SC 604

sudden disapproval of the practice of High Court's passing orders directing "*no coercive steps*" against an accused considering the fact that this jurisprudence had largely grown and developed in the Supreme Court itself. It is a matter of common experience that such orders have percolated from the Supreme Court to High Court's such as Bombay and Delhi, and is clearly alien to practitioners at Madras, or in any of the southern states for that matter.

II

On a complaint lodged by Neeharika Enteprises Limited (NEL) the Worli Police Station, Bombay registered an FIR against one P. Suresh Kumar and others for the usual cohort of the offences of criminal breach of trust, cheating and forgery with Section 120-B IPC thrown in for good measure. Suresh Kumar moved the Sessions Court, Bombay for anticipatory bail and obtained an interim protection from arrest. In September, 2020 Suresh Kumar moved the Division Bench Bombay High Court to have the FIR against him quashed. In the course of hearing, NEL appeared before the High Court through counsel and sought two weeks time to file an affidavit in reply with additional documents. The High Court proceeded to pass the following order:

"3. Considering these facts, following order is passed:

a. Liberty is granted to Respondent No. 2 to file an affidavit-in-reply with additional compilation of documents in the Registry on or before 12th October, 2020 with copy to other side.

b. Liberty is granted to the Petitioners, if they so desire to file rejoinder, if any, on or before 19th October, 2020.

c. Matter to appear on board on 28th October, 2020.

d. In the meanwhile, no coercive measures shall be adopted against the Petitioners in respect of the FIR No. 367/2019 dated 19.09.2019, registered at Worli Police Station, Mumbai, Maharashtra (subsequently transferred to Economic Offence Wing, Unit IX, Mumbai and has been numbered as C.R. No. 82/2019).

e. At this stage, the learned Counsel Mr. Shyam Dewan for Respondent No. 2 submits that anticipatory bail application filed by the Petitioners before the Sessions Court is pending for

hearing and the Sessions Court may get influenced by this order. We clarify that the Sessions Court shall decide the anticipatory bail application of the Petitioners' on its own merits.

f. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order."

After having appeared before the High Court and requested it to grant two weeks time, NEL hit

upon a brainwave, and decided to take the matter on appeal to the Supreme Court. By an order

dated 12.10.2020 (which was incidentally the last day for NEL to file a reply before the High Court) the Supreme Court [D.Y CHANDRACHUD, INDU MALHOTRA and INDIRA BANERJEE, JJ] stayed the operation of paragraph 3 (d) of the High Court, *inter alia*, observing as under:

"It has been submitted that since the second, third and fourth respondents were protected by an interim stay of arrest by the Sessions Court, there was no occasion to seek a blanket direction of the High Court restraining the investigating officer from taking coercive measures and such an application is an abuse of the process. It has been urged that the High Court passed [*P. Suresh Kumar v. State of Maharashtra*, 2020 SCC OnLine Bom 1711] an order directing that no coercive measures would be adopted without any reasons being indicated.

The effect of the aforesaid order was that the proceedings before the High Court were completely stalled. The matter before the Supreme Court was adjourned from time to time, and six months later, *i.e.*, on 13.04.2021, M.R SHAH, J (for himself and D.Y CHANDRACHUD and SANJIV

KHANNA, JJ) delivered judgment setting aside paragraph 3(d) of the order of the High Court.

The Supreme Court reasoned that the power under Section 482 Cr.P.C was to be exercised in the "*rarest of rare*" cases, and that while the High Court was, in an exceptional case, certainly entitled to interfere with an investigation in exercise of powers under Section 482 Cr.P.C or under Article 226 of the Constitution, it was always required to assign brief reasons while granting an interim stay of investigation in order to "*demonstrate application of mind by the Court*"

The Court further concluded :

"Para 80 - xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."

III

While investigating a crime in exercise of powers under Chapter XII of the Cr.P.C the investigation agencies may arrest an accused in exercise of powers under Chapter V of the Cr.P.C. The power to effect arrest is an essential concomitant of the general power of investigation statutorily conferred on the police. With the introduction of Section 41-A Cr.P.C, there may be cases [4]where the requirement of arrest may be totally unnecessary if the accused cooperates with the inquiry. Under Section 160 Cr.P.C the police may issue a summon to any person as a witness to attend an inquiry in connection with the facts of the case. Disobedience of such summons may, in certain cases, furnish a good ground to effect arrest and also expose the defaulter to a prosecution under Section 176 IPC.

The word "*coerce*" or "*coercion*" does not find a place in the Cr.P.C. The dictionary meaning of the word "*coercive*" is "*relating to the use of force or threats*[5]". While the Cr.P.C sanctions the use of force by the police in certain circumstances, the use of threats by the police during the course of investigation is without any legal sanction. Yet, anyone with even a flirting acquaintance with the methods of our police would know that quite often the police display a fair amount of propensity to resort to third degree. The Supreme Court has also taken judicial notice of this fact[6].

In this backdrop, it becomes all the more necessary for the High Courts to check a possible case of abuse of the coercive powers of the police by stepping in to exercise its wholesome powers under Section 482 Cr.P.C. After all, it cannot be forgotten that the High Court is the first point of

[4] See Section 41 (1)(b) Cr.P.C
[5] Oxford English Dictionary, Second Edition, OUP
[6] See for instance the observations of the Supreme Court in Arnesh Kumar v. State of Bihar, 2014 8 SCC 273

contact for a citizen as the Magistrates do not possess any inherent power to interdict an unlawful investigation. While the power of the police under Chapter XII is theoretically unfettered, it is axiomatic that in a country wedded to the rule of law, there is no public power, statutory or otherwise, that is absolutely immune from scrutiny by the superior Courts. The power vested in the High Courts under Section 482 Cr.P.C and Article 226 of the Constitution requires them to perform an onerous balancing act of protecting the personal liberty of a citizen from the jurisdictional excesses of the police while allowing the police to exercise their powers of investigation in a manner consistent with the law.

As indicated, *supra*, the jurisprudence of "*no coercive steps*" is largely homegrown in the Supreme Court. The following statistics make good this claim: a random search on the website of the Supreme Court revealed that 22 orders directing "*no coercive steps*" were passed in various criminal matters by 13 different benches of the Supreme Court in 2019 alone[7]. Interestingly, M.R SHAH, J, who authored the judgment in *Neeharika Enterprises*, was a part of two such benches. An order passed by one of those benches to which SHAH, J was a party reads as follows[8]

"Issue notice returnable in three weeks.

In the meanwhile, no coercive steps shall be taken against the

petitioner."

Juxtapose this with paragraph 3(d) of the order passed by the Bombay High Court (extracted *supra*) in *Neeharika Enterprises*, and it would be evident that if cryptic orders were the winning criteria, the Supreme Court would win hands down.

To make matters worse, in 2020, there were 41 matters where orders issuing notice and "*no coercive steps*" were passed by the Supreme Court in criminal matters[9].Notwithstanding this, the Supreme Court holds that a direction to the effect that no coercive steps be adopted is too

[7] See the orders passed in SLP Criminal Nos 6771, 7174, 5187,11114, 8330, 10907,9914,8985,1476, 7208,1930,4557,11479,5200, 10754, 8408, 8982, 9793, 5889, 5191 of 2019, SLP Diary No 42962 of 2019 and W.P Cri 254 of 2018

[8] Manoj v. State of U.P, SLP Criminal 9793 of 2019, dated 25.10.2019

[9] S.L.P Criminal Nos 559, 5250, 4297, 2001, 366, 6172, 2553, 1669 of 2020, W.P 5, 60 of 2020, W.P 90, 208, 344 of 2020, SLP Cri 5456 4829, 5865, 3746, 5234, 4971, 4318, 5150, 2269, 6570, 5324, 4197, 2350, 5725, 4265, 1800, 5386, 79, 6384, 4456, 1811, 6159, 6831, 1885, 2415, 1043, 4147 of 2020, and SLP Diary No 19000 of 2020,

vague and is capable of being misunderstood and/or misapplied. If the orders of the same kind were being regularly passed by the Supreme Court, it would be strange to hold that the earlier orders of a cognate variety passed by several eminent judges, many of whom continue to serve on the Supreme Court, were apt to be characterized as "*too vague and/or broad*" which can be "*misunderstood and/or misapplied*". Taking the aforesaid conclusion to its logical end, it would follow that that "*no coercive steps"* orders when passed by the Supreme Court are perfectly comprehensible and valid but the same would be "*too vague and/or broad*" which can be "*misunderstood and/or misapplied*" if it is passed by a High Court. The law is no respecter of persons, and I would venture to think that it is legitimate to assume that it is no respecter of institutions either. It would be a startling proposition that the comprehensibility of an order should be judged on the basis of the forum that has passed it. With all due respect, such conclusions appear wholly illogical and have presumptuousness written all over it.

IV

The Court then turns its attention to the powers of the High Court under Section 482 of the

Cr.P.C and proceeds to chronologically trace the powers of the High Court from the decision of the Privy Council in *Emperor v. Khwaja Nazir Ahmad* to the decision *Bhajan Lal*. Conspicuously absent, in an otherwise perfect chronology, is the decision of a three-judge bench in *State of West Bengal v. Swapan Kumar Guha*[10] .It has become necessary to briefly notice this decision as its importance has been unfortunately missed.

In *Swapan Kumar Guha*, the Calcutta High Court quashed an FIR in exercise of its powers under Article 226 of the Constitution. The State of West Bengal came up on appeal. It was contended that the High Court had no power to interdict an investigation. Support for this proposition was garnered from the very same passage which the Supreme Court in *Neeharika Enterprises* has extracted from the speech of Lord Porter in the Privy Council decision of *Khawaja Nazir Ahmad.*

In holding that the investigative powers of the police were not to be ordinarily interfered with the Privy Council added a rider, which is quite often missed, when it observed:

[10] AIR 1982 SC 949

"No doubt, if no cognizable offence is disclosed, and still more, if no offence of any kind is disclosed, the police would have no authority to undertake an investigation."

In SWAPAN KUMAR GUHA, CHANDRACHUD, C.J noticed the aforesaid passage and observed as under:

"If anything, therefore, the judgment shows that an investigation can be quashed if no cognizable offence is disclosed by the F.I.R. It shall also have been noticed, which is sometimes overlooked, that the Privy Council took care to qualify its statement of the law by saying that the judiciary should not interfere with the police in matters which are within their province. It is surely not within the province of the police to investigate into a Report which does not disclose the commission of a cognizable offence and the Code does not impose upon them the duty of inquiry in such cases."

The decision in *Swapan Kumar Guha,* is important for the simple reason that the Supreme Court legitimized the High Court's interference into the investigative powers of the police by deploying the *ultra vires* test. This becomes clearer when CHANDRACHUD, C.J observes *"The power to investigate into cognizable offences must, therefore, be exercised strictly on the condition on which it is granted by the Code."* The aforesaid observation neatly captures the relevant enquiry: whether the impugned investigation is in respect of facts which do not disclose a cognizable offence and is, thus, without jurisdiction or do the facts disclose that the police are abusing its statutory powers (*cases of mala fides etc*) rendering its acts in excess of jurisdiction.

The Court in *Neeharika Enterprises*, concludes that the power of quashing should be exercised "sparingly with circumspection, in the 'rarest of rare cases'", adding that this standard is not to be confused with the test formulated for the death penalty. However, while pointing out what 'rarest of rare' does not mean, the Supreme Court, unfortunately, does not point out what the expression does mean in the context of powers under Section 482 Cr.P.C. The final result is complete confusion, as is evident from paragraph 10 of the judgment, where the following expressions are found :"the power should be exercised sparingly with circumspection" "in the rarest of rare cases[11]" ; "inherent powers do not confer an arbitrary jurisdiction[12]"; Court cannot

[11] Paragraph 10.iv

[12] Paragraph 10.xi

act "according to its whims or caprice"[13]; "conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the Court[14]"

These are rather severe outbursts, but they still do not tell us what "*rarest of the rare*" in the context of Section 482 Cr.P.C mean.

Yet another facet of the judgment in *Neeharika Enterprises*, is the requirement of assigning reasons for passing interim orders staying an investigation. The Court was at pains to observe:

"Even in such a case the High Court has to give/assign brief reasons why at this stage the further investigation is required to be stayed. The High Court must appreciate that speedy investigation is the requirement in the criminal administration of justice."

Reading and re-reading the aforesaid observations, I could not help notice that there was something seriously amiss in the second sentence. The expression "*criminal administration of justice*" deployed by the Court had me wondering whether there was anything criminal about the administration of justice in the first place. As human minds are prone to occasional flights of fancy, the inclusion of the adjective "*criminal*" prior to the words "*administration of justice*" and that too in the context of "*speedy justice*" had me wondering whether the learned judges of the Supreme Court were drawing inspiration from the Star Chamber of the by-gone era of Charles I. The Star Chamber, as is well known, deployed methods of speedy trial which, with reasoned justification, may well be regarded as criminal today.

Having convinced myself that this was perhaps not the case, I am persuaded to believe that what was really meant was "*the administration of criminal justice*" when the Court rather unwittingly observed that speedy justice is the requirement of "*criminal administration of justice*."

As regards, the requirement of assigning reasons, it is one thing to say that it would be desirable for the High Court to assign reasons, and is quite another thing to say that an order without reasons would be, *ipso facto*, rendered bad on account of lack of reasons. It would be an undesirable proposition that lack of reasons must lead to only one inference that the High Court

[13] Paragraph 10.xi
[14] Paragraph 10.xiii

has not applied its mind to the facts of the case. Such a proposition would be contrary to the presumption contained in Section 114 of the Evidence Act.

What cannot also be lost sight of is the fact that it is the High Court, which is the highest Court in the State, that is the vested with the powers to interfere with a police investigation, in an appropriate case. There can be no presumption, statutory or otherwise, that a constitutional authority is prone to abusing its powers by not giving reasons. Moreover, the Supreme Court has repeatedly held that the High Court is a coordinate constitutional authority and that the Supreme Court's role is akin to that of an elder brother[15]. By the same token it is necessary, in the constitutional scheme of things, that the elder brother does not turn into the proverbial bully.

V

The Supreme Court recently reaffirmed that granting stay on investigation or any other interim relief by the High Court while exercising its powers under Section 482 of the Code of Criminal Procedure (CrPC), should be done only in the rarest of rare cases[16]

A Division Bench of Justices **MR Shah** and **BV Nagarathna** said that this position been settled in *M/s. Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra*.

"What is emphasized by this Court in the case of M/s. Neeharika Infrastructure Pvt. Ltd. is that grant of any stay of investigation and/or any interim relief while exercising powers under Section 482 CrPC would be only in the rarest of rare cases. This Court has also emphasized the right of the Investigating Officer to investigate the criminal proceedings," the top court stated.

The Court was hearing an appeal assailing a February 14 decision of the Gujarat High Court which, while admitting the Section 482 plea, had granted interim relief and stayed the criminal proceedings against the respondents.

The respondent-accused had, in 2019, approached the High Court seeking quashing of the criminal proceedings. Before any further investigation could begin, the High Court had on

[15] AIR 2004 SC 2351
[16] ***[Siddharth Mukesh Bhandari v. State of Gujarat and Another]***

October 10, 2019 granted interim relief and directed that there shall be no coercive steps against the respondents.

However, on December 9, 2019, the Supreme Court had stayed the October 10 order of the High Court and later on December 17, 2021 set aside the High Court's interim order.

Subsequently, the High Court while again admitting the application of the respondent-accused, granted interim relief by staying the criminal proceedings.

The Supreme Court noted that the High Court while passing the order had seriously erred in the teeth of the earlier decision of the apex court in the case of ***M/s Neeharika Infrastructure Private Limited*** wherein it was ruled that even in a case where the High Court is prima facie of opinion that an exceptional case is made out for grant of interim stay of further investigation, it has to give brief reasons why such an interim order is warranted.

"The High Court has not properly appreciated the principles and the law laid down by this Court in the case of M/s. Neeharika Infrastructure Pvt. Ltd. (supra). What is emphasized by this Court in the case of M/s. Neeharika Infrastructure Pvt. Ltd. (supra) is that grant of any stay of investigation and/or any interim relief while exercising powers under Section 482 Cr.P.C. would be only in the rarest of rare cases," the Court observed.

While allowing the appeal, the Court observed that:

"Despite the earlier judgment and order passed by this Court in the very criminal proceedings quashing and setting aside the earlier interim orders passed by the High Court, which came to be set aside by this Court, again, the learned Single Judge has granted the very same interim relief, which as observed hereinabove, can be said to be in teeth of and contrary to our earlier judgment and order in the case of M/s. Neeharika Infrastructure Pvt. Ltd. (supra)."

Therefore, the Apex Court has set aside the February 14, 2022 order of the High Court.

VI

CONCLUSION

Coming back to *Neeharika Enterprises*, the order passed by the High Court shows that the respondent had appeared and taken time to file a counter. It is quite possible that given the nature of the submissions made before it the High Court did not find it necessary to pass a

detailed order at that stage. The Supreme Court however, justifies its interference on the ground that orders directing "*no coercive steps*" without assigning reasons would hamper "*speedy investigation*" and "*the rule of law*".

It will be recalled that the Bombay High Court, while passing the impugned order had directed that the matter would be heard on 28.10.2020. The Supreme Court, whose jurisprudence usually balks at a petition for special leave under Article 136 of the Constitution against an interim order, not only entertained the SLP against the interim order but also stayed direction contained in paragraph 3(d). Had the High Court heard the matter, the quash petition may have finally seen its end one way or the other in 2020.

By staying the order of the High Court nothing was achieved, as the accused was already protected by an order of anticipatory bail by the Sessions Court. Instead, the battle over an inconsequential paragraph 3(d) raged on for nearly six months. Finally, on 13.04.2021 the Supreme Court set aside paragraph 3(d) of the order alone and directed the quash petition to be heard out by the High Court. In the legal skirmish over paragraph 3(d), which lasted over six months, the quash petition lingered on before the High Court without moving an inch. So much for speedy justice and the rule of law. For the all of the aforesaid reasons, *Neeharika Enterprises* is a judgment that is better forgotten.