

ROMILA THAPAR AND ORS.

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v.

UNION OF INDIA AND ORS.

(Writ Petition (Criminal) No. 260 of 2018)

SEPTEMBER 28, 2018

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**[DIPAK MISRA, CJI, A. M. KHANWILKAR AND  
DR. D. Y. CHANDRACHUD, JJ.]**

*Constitution of India – Art.32 – Writ petition filed by five persons, as next best friend of five activists-accused who were arrested purportedly in connection with FIR No.4/18 – Said FIR registered in Pune in relation to communal violence that took place in Bhima Koregaon as outcome of an event organized by organization called Elgar Parishad – Plea of petitioners that neither of the five accused persons were present in the said event nor any allegation against them is found in the FIR and that the said FIR was fabricated by Pune Police after FIR No.2/18 was filed against some Hindutva right wing leaders based on an eye-witness account that they incited violence against Dalit congregation in Bhima Koregaon – Petitioners inter alia prayed for appointing Special Investigation Team (SIT) and Court monitored investigation – Held: (Majority view) Per A.M. Khanwilkar, J. (for himself and Dipak Misra, CJI) Accused persons cannot choose as to which Investigating Agency must investigate the offence committed by them – Present is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organization, Communist Party of India (Maoist) and its activities – Crime under investigation in FIR No.4/2018, inter alia is to investigate the allegations that a banned organization, Communist Party of India (Maoist), organises events as referred to in FIR No.2/2018 to propagate ill-will in different classes and turn them into violent activities – Incidents such as at Bhima Koregaon is the outcome of such conspiracy – Reliefs claimed not granted – (Minority view) Per Dr. D.Y. Chandrachud, J. (Dissenting) In the present case, the initiation of the proceedings u/ Art. 32 is not motivated by extraneous reasons – Conduct of the Pune police in utilising the agency of the electronic media to cast*

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- A *aspersions on persons whose conduct is still under investigation, fortifies the need for an investigation which is fair – Sufficient material has been placed before the Court bearing on the need to have an independent investigation – Dissent is a symbol of vibrant democracy – Voices in opposition cannot be muzzled by persecuting those who take up unpopular causes – Present is a proper case for*
- B *the appointment of SIT –SIT to be appointed – Investigation shall be monitored by Supreme Court – Unlawful Activities (Prevention) Act, 1967 – Constitution of India – Arts.21 and 22(1).*

- Constitution of India – Art.32 – Public Interest Litigation – Locus for – Held: **Per A.M. Khanwilkar, J. (for himself and Dipak Misra, CJI)** Prayer for changing the Investigating Agency cannot be dealt with lightly and the Court must exercise that power with circumspection – Writ petition at the instance of the next friend of the accused for transfer of investigation to independent Investigating Agency or for Court monitored investigation cannot be*
- D *countenanced, much less as public interest litigation – **Per Dr. D.Y. Chandrachud, J. (Dissenting)** When a group of citizens has moved Supreme Court with an impassioned plea about the violation of human rights the Court must look beyond locus into the heart of the matter.*

- Constitution of India – Art.32 – Writ petition under –*
- E *Maintainability of, in criminal matters – Held: **Per Dr. D.Y. Chandrachud, J.** Ordinarily, when an investigation into a criminal offence is in progress, recourse must be taken to the provisions of the Code – However, in the present case the petitioners have not sought recourse to the jurisdiction of Supreme Court for espousing a remedy which is available before the competent court under the*
- F *Code of Criminal Procedure – Present proceedings have been moved with a specific grievance that the arrest of the five individuals is an attempt by the State to muzzle dissent – Supreme Court, as a constitutional adjudicator, has been entrusted with the jurisdiction u/Art. 32 to secure the fundamental freedoms guaranteed by the*
- G *Constitution – Protection of fundamental liberties is a subject so integral to democratic constitutional values that technicalities should not be allowed to override the cause of substantive justice.*

- Constitution of India – Art.32 – Public Interest Litigation – Constitution of Special Investigation Team (SIT) – Jurisdiction of Supreme Court – Held: **Per Dr. D.Y. Chandrachud, J.** Instances*
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*indicate the diversity of settings in which Supreme Court has ordered the constitution of SITs – While the Court does not determine the course of the investigation, it acts as a watchdog to ensure that a fair and impartial investigation takes place.* A

***Criminal Trial – Investigation pending – Use of electronic media by Police – Practice of – Held: Per Dr. D. Y. Chandrachud, J. Use of the electronic media by the investigating arm of the State to influence public opinion during the pendency of an investigation subverts the fairness of the investigation – Police are not adjudicators nor do they pronounce upon guilt.*** B

**Disposing of the Writ petition, the Court** C

**HELD: Per A.M. Khanwilkar, J. (for himself and Dipak Misra, CJI)**

**1.1 The accused persons do not have a say in the matter of appointment of Investigating Agency. Further, the accused persons cannot choose as to which Investigating Agency must investigate the offence committed by them. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about *mala fide* exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. Rather, averment in the petition as filed was to buttress the reliefs initially prayed- regarding the manner in which arrest was made. Upon perusal of the material already gathered during the ongoing investigation, it is clear that the present is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of Communist Party of India (Maoist), a banned organization and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor it is possible to enquire into whether the same is genuine or fabricated. [Paras 14, 21 and 26] [985-D-F]** D  
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**1.2 The consistent view of Supreme Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored** H

A investigation. In the present case, the original writ petition was  
filed by the persons claiming to be the next friends of the  
concerned accused (A16 to A20). Amongst them, (A19), (A16),  
(A18) and (A17) have filed signed statements praying that the  
reliefs claimed in the subject writ petition be treated as their writ  
petition. That application deserves to be allowed as the accused  
B themselves have chosen to approach Supreme Court and also in  
the backdrop of the preliminary objection raised by the State that  
the writ petitioners were completely strangers to the offence under  
investigation and the writ petition at their instance was not  
maintainable. It is, therefore, assumed that the writ petition is  
C now pursued by the accused themselves and once they have  
become petitioners themselves, the question of next friend  
pursuing the remedy to espouse their cause cannot be  
countenanced. The next friend can continue to espouse the cause  
of the affected accused as long as the concerned accused is not  
D in a position or incapacitated to take recourse to legal remedy  
and not otherwise. [Para 27] [986-A-C]

1.3 Prayer clauses (i) and (ii) also make reference to FIR  
No.2/2018 registered at Pimpri (Urban) Police Station on 2<sup>nd</sup>  
January, 2018. However, that is an independent FIR registered  
at a different police station against the Hindutva right wing  
E leaders. It is, at best, in the nature of a cross FIR in respect of  
the same incident against the alleged aggressors filed by an eye-  
witness. Neither the writ petitioners nor the named accused in  
FIR No.4/2018 in that sense, can pursue relief in respect of FIR  
No.2/2018. Admittedly, Criminal Writ Petition has already been  
F filed in the Bombay High Court by the complainant in FIR No.2/  
2018 herself for issuing directions to the Investigating Agency  
in that crime. There is force in the argument of the State that the  
crime under investigation in FIR No.4/2018, *inter alia* is to  
investigate the allegations that a banned organization,  
CPI(Maoist), organises events such as referred to in FIR No.2/  
G 2018 to propagate ill-will in different classes and turn them into  
unconstitutional and violent activities. Further, such activities  
were purportedly carried out by Kabir Kala Manch and others in  
different areas in the State of Maharashtra by delivering  
vituperative speeches and to spread false history, disputable

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statements and incite objectionable slogans, sing songs and road  
dramas and distribution of objectionable and provocative  
pamphlets and books also. The incidents such as at Bhima  
Koregaon and nearby places of stone throwing, castes clashes  
and arson incidents is the outcome of such conspiracy. Taking  
any view of the matter, the reliefs claimed in the modified prayer  
clauses (i) and (ii) for investigation in respect of FIR No.2/2018,  
cannot be taken forward at the instance of the named five accused  
persons in FIR No.4/2018 registered at Vishram Bagh Police  
Station (Pune City) on 8<sup>th</sup> January, 2018 or for that matter their  
next friends. A fortiori, it must follow that the writ petitioners,  
who are strangers to the offence under investigation (in FIR No.4/  
2018); and since they are merely espousing the cause of the  
arrested five accused as their next friends, cannot be heard to  
ask for the reliefs which otherwise cannot be granted to the  
accused themselves. What cannot be done directly, cannot be  
allowed to be done indirectly even in the guise of public interest  
litigation. [Paras 28, 29] [986-E-H; 987-A-D]

1.4 The prayer for changing the Investigating Agency cannot  
be dealt with lightly and the Court must exercise that power with  
circumspection. As a result, the writ petition at the instance of  
the next friend of the accused for transfer of investigation to  
independent Investigating Agency or for Court monitored  
investigation cannot be countenanced, much less as public  
interest litigation. The investigation of the offence in question is  
at a nascent stage and, therefore, it is not desirable to elaborate  
further as the modified reliefs (i) and (ii) as prayed cannot be  
granted. [Paras 30, 31] [986-E-H; 987-A-D]

1.5 The third modified relief claimed in the writ petition to  
issue directions that all electronic devices, records and materials,  
allegedly seized from the detinuee/accused, be examined by  
Forensic Science Laboratory outside the State of Maharashtra to  
ensure fair play and in the interest of justice. Even this prayer  
cannot be taken forward. If any one of the twenty two named  
accused have any grievance or apprehension about the same, he  
is free to make that request before the jurisdictional Court, which  
can be considered at the appropriate stage in accordance with  
law. [Para 32] [988-A-B]

A       **1.6 The fourth modified relief is to direct release of the arrested activists from custody as per law. The accused persons must pursue this relief before the appropriate court, which can be considered by the concerned court on its own merits in accordance with law. The concerned accused persons have already taken recourse to remedy before the jurisdictional High Courts.**  
 B       **Hence, they are free to pursue all legal remedies available to them as per law. All questions will have to be considered by the concerned Court in accordance with law. Accordingly, even the fourth modified relief cannot be considered in the present writ petition.[Para 33] [988-C-E]**

C       **1.7 Accordingly, this writ petition is disposed of with liberty to the concerned accused to take recourse to appropriate remedy as may be permissible in law. The interim order passed by this Court on 29<sup>th</sup> August, 2018 (directing that the five arrested persons be placed under house arrest) shall continue for a period of four**  
 D       **weeks to enable the accused to move the concerned court. The said proceedings shall be decided on its own merits uninfluenced by any observation made in this judgment, which is limited to the reliefs claimed in the writ petition to transfer the investigation to an independent Investigating Agency and/or Court monitored investigation. The Investigating Officer is free to proceed against**  
 E       **the concerned accused as per law. [Para 37] [989-B-C]**

*State of West Bengal and Ors. vs. Committee for Protection of Democratic Rights, West Bengal and Ors. (2010) 3 SCC 571; [2010] 2 SCR 979 – followed.*

F       *Narmada Bai vs. State of Gujarat and Ors. (2011) 5 SCC 79; [2011] 5 SCR 729; Sanjiv Rajendra Bhatt vs. Union of India and Ors. (2016) 1 SCC 1; [2015] 12 SCR 498 – relied on.*

G       *E. Sivakumar vs. Union of India and Ors. (2018) 7 SCC 365; Divine Retreat Centre vs. State of Kerala and Ors. (2008) 3 SCC 542; [2008] 4 SCR 701 – referred to.*

**Per Dr. D.Y. Chandrachud, J.: (Dissenting)**

**HELD: 1.1 The jurisdiction under Article 32 is wide enough to reach out to injustice in any form and originating in any source.**  
 H       **Securing human liberty and dignity must occupy an important**

space in the judicial docket. Liberty and freedom are defining values of the Constitution. The institutional role of Supreme Court as a constitutional adjudicator should brook no technicalities which obstruct the cause of justice. When a group of citizens has moved this Court with an impassioned plea about the violation of human rights- in the present case no less than five distinguished citizens with a track record of service to the nation have done so- the Court must look beyond locus into the heart of the matter. Whether the grievance has any substance is indeed a distinct matter which must be determined objectively. The Court will not interfere in every case merely because it has the jurisdiction. But its duty to scrutinise, perceive and remedy violations of human rights is non-negotiable. However, the issue of locus, even in a technical sense, has receded into the background. During the course of the hearing, the Court has been apprised that each of the five individuals who were arrested has subscribed to the averments in the petition and would stand by what is urged before this Court in protection of their rights. The objection to maintainability lacks substance, in either view of the matter. [Para 5] [993-A-D]

1.2 While entertaining these proceedings, this Court is conscious of the fact that ordinarily, when an investigation into a criminal offence is in progress, rights and remedies are provided by the Code of Criminal Procedure. Hence, it is but trite law that in matters pertaining to or arising during the course of investigation such as remand, bail (including anticipatory bail) and quashing of proceedings, recourse must be taken to the provisions of the Code. During the course of investigation, it is to the competent court that an accused must ordinarily turn for the remedies that are available under substantive or procedural provisions of the criminal law. But in the present case, it is necessary for the Court to bear in mind that recourse to its constitutional jurisdiction under Article 32 has been invoked not only by the petitioners but by the five individuals who were arrested on 28 August 2018. The petition was moved before this Court on 29 August 2018 when an interim order was passed directing that the five arrested persons be placed under house arrest. At the earliest possible point in time, these five individuals have moved this Court indicating that they abide by the averments

A and reliefs sought in the petition and seek that they should be  
transposed as petitioners under Article 32. The petitioners have  
not in their submissions sought recourse to the jurisdiction of  
this Court for espousing a remedy which is available before the  
competent court under the Code of Criminal Procedure. These  
proceedings have been moved with a specific grievance that the  
B arrest of the five individuals is an attempt by the State to muzzle  
dissent and that each of them is being persecuted for being a  
defender of persons subjected to human rights' violations. [Paras  
14, 15] [1001-D-E; 1002-C-G]

C 1.3 Supreme Court, as a constitutional adjudicator, has been  
entrusted with the jurisdiction under Article 32 to secure the  
fundamental freedoms guaranteed by Part III of the Constitution.  
While the discipline of the law of criminal procedure must at all  
times be kept in view, it cannot be gainsaid that the protection of  
fundamental liberties is a subject so integral to democratic  
D constitutional values that technicalities should not be allowed to  
override the cause of substantive justice. The court must  
undoubtedly tread with circumspection for in the guise of seeking  
access to its wide jurisdiction under Article 32, the normal  
remedies under the criminal law should not be displaced. Again,  
E as the court has repeatedly emphasised, public interest litigation  
should not become a weapon for settling political scores or of  
pursuing extraneous ends. In the present case, the initiation of  
the proceedings under Article 32 is not motivated by extraneous  
reasons. The law is not a respecter of social, economic or political  
status and every litigant who seeks access to justice has to be  
F treated evenly. Here five citizens have invoked the jurisdiction  
of this Court in extraordinary circumstances where they claim  
that a group of human rights activists has been targeted by the  
State police. Each of those five individuals has joined in these  
proceedings. Over the course of the last decade, the jurisdiction  
G of this Court has evolved under Article 32 to order the  
constitution of a SIT. Such instances indicate the diversity of  
settings in which this Court has ordered the constitution of SITs.  
Decisional flexibility in the exercise of this jurisdiction meets  
exigencies which arise in unforeseen situations, warranting the  
intervention of this Court under Article 142. While the Court  
H does not determine the course of the investigation, it acts as a



watchdog to ensure that a fair and impartial investigation takes place. A fair and independent investigation is crucial to the preservation of the rule of law and, in the ultimate analysis to liberty itself. Besides the jurisdiction to order the constitution of a SIT, the proceedings of this Court are replete with instances where an investigation has been monitored under the authority of this Court. With the body of precedents on the subject, the maintainability of a prayer for relief, seeking that the investigation should be either monitored by this Court or should be entrusted to an independent SIT under the directions of this Court cannot be in doubt. [Paras 17, 18, 20 and 21] [1003-H; 1004-A-E; 1005-A-B; 1006-D-E]

1.4 On 29 August 2018, this Court issued notices to the State of Maharashtra and to the others impleaded as respondents to the proceedings. Within a few hours of the conclusion of the court hearing, a press conference was held in Pune by the Joint Commissioner of Police proclaiming that the Pune police had more than sufficient evidence against the five individuals whose transit remand was stayed by this Court while ordering them to be placed under house arrest. This is disconcerting behaviour – the Joint Commissioner sought in this oblique manner to respond to the interim order of this Court by recourse to the electronic media. On 31 August 2018, a press conference was addressed by a team of senior police officers headed by ADG (Law and Order), Maharashtra. During the course of the press conference letters (many of which should form part of the case diary) were selectively flashed and read out. According to the petitioners they were also leaked to the media. [Para 22] [1006-G-H; 1007-A-C]

1.5 The first round of arrests in the present case took place on 6 June 2018. On 8 June 2018 an alleged letter was released by the police to the media a little before the proceedings for remand before the competent court (in the June arrests), alleging that the arrested persons were plotting to attack the Prime Minister. On 4 July 2018 when the arrested persons were to be produced before the Court in Pune, a letter attributed to one ‘SB’ was sensationally telecast on a television channel linking her with the unlawful activities of certain groups. A serious grievance has been made about the fact that these letters have

A neither been placed before the Court of law nor did they find mention in the transit remand applications moved before the CJM, Faridabad by the Pune police. [Para 22] [1007-E-F]

1.6 This facet of the case is of serious concern. The manner in which the Joint Commissioner of Police and the Additional  
B Director General of Police (Law and Order), Maharashtra have selectively disclosed purported details of the investigation to the media and on television channels casts a cloud on the impartiality of the investigative process. The use of the electronic media by the investigating arm of the State to influence public opinion during the pendency of an investigation subverts the fairness of  
C the investigation. The police are not adjudicators nor do they pronounce upon guilt. In the present case, police briefings to the media have become a source of manipulating public opinion by besmirching the reputations of individuals involved in the process of investigation. What follows is unfortunately a trial by the media.  
D That the police should lend themselves to this process is a matter of grave concern. The investigation commenced as an enquiry into the Bhima-Koregaon violence. The course of the investigation was sought to be deflected by alleging (in the course of the press briefings of the police) that there was a plot against the Prime Minister. Such an allegation is indeed of a serious order.  
E Such allegations require responsible attention and cannot be bandied about by police officers in media briefings. But during the course of the present hearing, no effort was made by the ASG to submit that any such investigation is being conducted in regard to the five individuals. On the contrary, he fairly stated that there  
F was no basis to link the five arrested individuals to any such alleged plot against the Prime Minister. Nor does the counter affidavit makes any averment to that effect. All this has certainly a bearing on the basic question as to whether the Maharashtra police can now be trusted to carry out an independent and impartial investigation. [Para 24] [1008-D-H; 1009-A-B]

G 1.7 The counter affidavit, which has been filed by the State of Maharashtra makes it abundantly clear that the arrest of the five individuals (on 28 August 2018) was based on “material gathered from others”. This adverts to the material alleged to have been gathered in the course of the raids conducted against  
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those individuals who were arrested in the months of June and July 2018. Paragraph 26 of the counter states that this material “clearly shows that they were involved” in (i) selecting and incorporating cadres to go underground in the ‘struggle area; (ii) mobilising and distributing money; (iii) facilitating selection and purchase of arms; (iv) deciding the rates of such arms; and (v) suggesting the routes and ways of smuggling such arms into India for its onward distribution amongst the cadres. Upon perusing the material, it is clear that the allegation that each of the five individuals arrested on 28 August 2018 is found to be engaged in activities of the nature set out in paragraph 26 of the counter affidavit is taking liberties with the truth. General allegations against the philosophy of a banned organisation, its policies and the modalities followed in the execution of its unlawful activities constitute one thing. Linking this to specific activities of named individuals is a distinct matter. [Paras 25, 26] [1009-C-E, G-H; 1010-A]

1.8 One of the circumstances which must certainly bear upon the fairness and impartiality of the process which has been followed by the investigating agency is in regard to the importation of two panch witnesses from Pune, when the arrests were carried out. Section 41B of Code of Criminal Procedure emphasises the importance of an independent witness while making an arrest. The two panch witnesses in the present case are employees of the Pune Municipal Corporation. It is not disputed that they travelled as part of the police team which made the arrest. [Para 27] [1010-D, H]

*D K Basu v State of West Bengal* (1997) 1 SCC 416 : [1996] 10 Suppl. SCR 284 – relied on.

1.9 There is a serious allegation that the arrests have been motivated by an attempt to quell dissent and to persecute five individuals who have pursued the cause of persons who have suffered discrimination and human rights violations. In approaching the present case, the Court must be mindful of the need not to thwart a criminal investigation leading to the detection of unlawful acts. Equally, the Court has to be vigilant in the exercise of its jurisdiction under Article 32 to ensure that liberty is not sacrificed at the altar of conjectures. Individuals who assert

A causes which may be unpopular to the echelons of power are yet entitled to the freedoms which are guaranteed by the Constitution. Dissent is a symbol of a vibrant democracy. Voices in opposition cannot be muzzled by persecuting those who take up unpopular causes. Where, however, the expression of dissent enters upon the prohibited field of an incitement to violence or the subversion of a democratically elected government by recourse to unlawful means, the dissent ceases to be a mere expression of opinion. Unlawful activities which violate the law have to be dealt with in accordance with it. The conduct of the Pune police in utilising the agency of the electronic media to cast aspersions on those under investigation fortifies the need for an investigation which is fair. When the Joint Commissioner of Police and the Additional Director General of Police cast aspersions in the public media against persons whose conduct is still under investigation, and in disregard of proceedings pending before a judicial forum, it is the duty and obligation of this Court to ensure that the administration of criminal justice is not derailed. However, it is made clear that nothing in this order shall be construed as any observation on the merits of the investigation which is to take place. [Para 29] [1011-D-H; 1012-A-B]

E 1.10 Supreme Court has a constitutional obligation, where its attention has been drawn, in a case such as the present, to a real likelihood of the derailment of a fair investigative process to issue appropriate directions under Article 142 of the Constitution. Hence, while the investigation should not be thwarted, this is a proper case for the appointment of a Special Investigating Team. F The Special Investigating Team shall submit periodical status reports to this Court, initially on a monthly basis. The interim order passed by this Court on 29 August 2018 shall continue to hold the field for a further period of three weeks within which it would be open to the said five individuals or any one or more of them to apply for bail before the Court of competent jurisdiction. G [Paras 39-41] [1017-F-G; 1018-B]

*Sanjiv Rajendra Bhatt v Union of India* (2016) 1 SCC 1 : [2015] 12 SCR 498 – distinguished.

H *National Human Rights Commission v State of Gujarat* (2009) 6 SCC 342; *SIT (NHRC v State of Gujarat)* (2009)

- 6 SCC 767 : [2009] 7 SCR 236; *Ram Jethmalani v Union of India* (2011) 8 SCC 1; [2011] 8 SCR 725; *Common Cause v Union of India* (2017) 3 SCC 501; [2017] 1 SCR 556; *Sunita Devi v Union of India* (2018) 3 SCC 664; *Vineet Narain v Union of India* (1996) 2 SCC 199 : [1996] 1 SCR 1053; *Babubhai Jamnadas Patel v State of Gujarat* (2009) 9 SCC 610; *Centre for Public Interest Litigation v Union of India* (2011) 1 SCC 560; *Bharati Tamang v Union of India* (2013) 15 SCC 578 : [2013] 14 SCR 525; *Rajendran Chingaravelu v. RK Mishra* (2010) 1 SCC 457 : [2009] 15 SCR 1113; *Narmada Bai v State of Gujarat* (2011) 5 SCC 79 : [2011] 5 SCR 729; *E Sivakumar v Union of India* (2018) 7 SCC 365; *S. Nambi Narayanan v Siby Mathews* (2018) 11 SCALE 171 – **relied on.****
- Rajiv Ranjan Singh ‘Lalan’ (VIII) v Union of India*, (2006) 6 SCC 613: [2006] 4 Suppl. SCR 742; *Gulzar Ahmed Azmi v Union of India*, (2012) 10 SCC 731: [2012] 9 SCR 287; *Simranjit Singh Mann v Union of India* (1992) 4 SCC 653; *Ashok Kumar Pandey v State of West Bengal* (2004) 3 SCC 349 : [2003] 5 Suppl. SCR 716; *Pratibha Ramesh Patel v Union of India* (2016) 12 SCC 375: [2016] SCR 896; *Udyami Evam Khadi Garmodyog Welfare Sanstha v State of UP* (2008) 1 SCC 560; *State of Maharashtra v Tansen Rizwan Siddiquee* (2018) 10 SCALE 711; *Divine Retreat Centre v State of Kerala* (2008) 3 SCC 542 : [2008] 4 SCR 701; *Kiran Bedi v Committee of Inquiry* (1989) 1 SCC 494: [1989] 1 SCR 20; *Delhi Judicial Service Association v State of Gujarat* (1991) 4 SCC 406 : [1991] 3 SCR 936; *Joginder Kumar v State of UP* (1994) 4 SCC 260– **referred to.****

**Case Law Reference**

**In the judgment of A.M. Khanwilkar, J. (for himself and Dipak Misra, CJI)**

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| [2011] 5 SCR 729 | relied on | Para 21 |
| 2015 12 SCR 498  | relied on | Para 22 |

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A	(2018) 7 SCC 365	referred to	Para 23
	[2008] 4 SCR 701	referred to	Para 24
	[2010] 2 SCR 979	followed	Para 25
<b><u>In the judgment of Dr. D. Y. Chandrachud, J. (Dissenting)</u></b>			
B	[2006] 4 Suppl. SCR 742	referred to	Para 13
	[2012] 9 SCR 287	referred to	Para 13
	(1992) 4 SCC 653	referred to	Para 13
	[2003] 5 Suppl. SCR 716	referred to	Para 13
C	[2016] SCR 896	referred to	Para 13
	(2008) 1 SCC 560	referred to	Para 13
	(2018) 10 SCALE 711	referred to	Para 13
	(2009) 6 SCC 342	referred to	Para 13
D	[2009] 7 SCR 236	relied on	Para 18
	[2011] 8 SCR 725	relied on	Para 18
	[2017] 1 SCR 556	relied on	Para 18
	(2018) 3 SCC 664	relied on	Para 18
E	[1996] 1 SCR 1053	relied on	Para 20
	(2009) 9 SCC 610	relied on	Para 20
	(2011) 1 SCC 560	relied on	Para 20
	[2013] 14 SCR 525	relied on	Para 20
F	[2009] 15 SCR 1113	relied on	Para 23
	[1996] 10 Suppl. SCR 284	relied on	Para 28
	[2011] 5 SCR 729	relied on	Para 30
	[2015] 12 SCR 498	distinguished	Para 33
G	(2018) 7 SCC 365	relied on	Para 34
	[2008] 4 SCR 701	referred to	Para 35
	(2018) 11 SCALE 171	relied on	Para 37
	[1989] 1 SCR 20	referred to	Para 38

<b>[1991] 3 SCR 936</b>	<b>referred to</b>	<b>Para 38</b>	<b>A</b>
<b>(1994) 4 SCC 260</b>	<b>referred to</b>	<b>Para 38</b>	
<b>[1996] 10 Suppl. SCR 284</b>	<b>relied on</b>	<b>Para 38</b>	

CRIMINAL ORIGINAL JURISDICTION : Writ Petition  
(Criminal) No. 260 OF 2018 **B**

Under Article 32 of the Constitution of India.

Tushar Mehta and Maninder Singh, ASG, Dr. Abhishek Singhvi, Dr. Rajeev Dhawan, Amarendra Sharan, Harish N. Salve, Anand Grover, Sr. Advs., Prashant Bhushan, Ms. Vrinda Grover, Amit Bhandari, Avishkar Singhvi, Susan Abraham, D. Suresh, Soutik Banerjee, Ms. Ratna Appnender, Ms. Cheryl D' Souza, Ms. Madhur Bhartiya, Ankit Grewal, Ms. Nidhi Ram, Harinder Neel, Omman Kuttan, Nishant Ramakantrao Katneshwarkar, Kanu Agrawal, Manan Popli, Ranvijay Singh, Shantanu Sharma, Rajeev Ranjan, R. Bala, Rajat Nair, Prabhas Bajaj, Swati Ghildiyal, Sachin Sharma, Ms. Devanshi Singh, Ms. Diksha Rai, Ms. Palak Mahajan, Ms. Diksha Rai, Nihal Sing Rathod, Ms. Tripti Tandon, Ms. Nehmat Kaur, Jagdish Meshram, Paras Nath Singh, Ms. Sangita Madan, Jitendra Ashok, Aakarsh Kamra, Abhishek Kumar, Shiv Sagar Tiwari, Advs. for the appearing parties. **C**

The Judgments of the Court were delivered by **E**

**A. M. KHANWILKAR, J.** 1. Five illustrious persons in their own field have filed this petition on 29<sup>th</sup> August, 2018 complaining about the high-handed action of the Maharashtra Police in raiding the homes and arresting five well known human rights activists, journalists, advocates and political worker, with a view to kill independent voices differing in ideology from the party in power and to stifle the honest voice of dissent. They complain that the five activists, namely, Gautam Navalakha, Sudha Bharadwaj, Varavara Rao, Arun Ferreira and Vernon Gonsalves were arrested on 28<sup>th</sup> August, 2018 from their homes at New Delhi, Faridabad, Mumbai, Thane and Hyderabad, respectively, without any credible material and evidence against them justifying their arrest, purportedly in connection with FIR No.0004/2018 dated 8<sup>th</sup> January, 2018 registered with Police Station Vishram Bagh, Pune City. This action was to silence the dissent, stop people from helping the poor and downtrodden and to instill fear in the minds of people and was a motivated action to deflect people's attention from real issues. The petitioners have made it clear in **F**

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A their petition that they were seriously concerned about the erosion of democratic values and were approaching this Court “not to stop investigation into allegations” “but” to ensure independent and credible “investigation into the arrest of stated five human rights activists.” They claim that anything short of that relief will damage the fabric of the nation irreparably.

B 2. The FIR in connection with which the said five persons came to be arrested has been appended and marked as Annexure P-2. It was registered on the basis of the statement given by one Tushar Ramesh Damgule, which reads thus:

C **“Translation: FIR COPY**

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

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Taka Peshwai Re Garjana Sidnakache, Aalee Nvyane Peshwai re Garaj Tila Thokyachee, Re Saimka Garaj Tila Thokyachee...” as well as, the same had presented in the form of Pathnatya (Raadaramaj) and Dance Event with malice and enmity intentions. After in Second session, said Sudhir Dhawade while expressing role, he made the malice and disputable statement that “Jab Julm Ho to, Bagawat Honi Chahiye shahar mein, Jab Julm Ho to bagawat honi chahiye shahar mein aur agar bagawat na ho to, behatar hai kee, rat dhalane se phle ye shahar jalke rakh ho jaye, ye shahar jalke rakh ho jaye....” Then he said some other malice statement that “ye jo satrahai, ye satra hia, tayat hi apane aap mein ladai ka ellanhai, ye nave peswai ko haemin Samshan Ghat mein, kabrastan meindajana hai..” Afterwards, other speakers also expressed themselves in grudge words in the same Programme, some objectionable and provocable books kept for selling. After ending the program, I left from the there. On the date of 1<sup>st</sup> January, 2018 as usual year, huge crowd gathered to salute and honour the victory stambh/monument at Bheema Koregaon. But because of the Elgar Parishad which was held at Shaniwar Wada on 31<sup>st</sup> December, 2017, Kabir Kala Manch’s Sudhir Dhawale, Sagar Gorakhe, Harshali Potdar, Jyoti Jagtap, Ramesh Gaichor and other six seven persons tried to express malice statement and tried to incite disputable words, sentences between two society groups, raise some provocable slogans, songs and road drama imposed wrong and false History above mentioned Sudhir Dhawale, Harshali Potdar and other Kabir Kala Manch’s Activists been interrogated by legal inspection and sources. **Therefore, I state that, banned Maoist Organisation (CPI) have organized role is to boast and implicate the strong Maoist thoughts in depressed class and misdirect or misguide them and turn them towards unconstitutional violence activities, carrying the same thoughts, Kabir Kala Manch’s Sudhir Dhawale and his other activist had presented different areas in Maharashtra, malice speeches, had spread false History, disputable statements and incite objectionable slogans, sung songs and road-dramas. They distributed some objectionable and provocable pamphlets, books too. So remarkably it reflected at Bheema Koregaon**

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A **and nearer places by stone throwing, castes clashes and arson incidents.**

Therefore, an organization –Elgar Parishad, on the day of 31<sup>st</sup> December, 2017 at 2.00 p.m. to 10.00 p.m. at Shaniwar Wada, Pule, role defines Kabir Kala Manch’s Sudhir Dhawale, programme conductor Sagar Gorakhe, and other artists HarshaliPotdar, Jyoti Jagtap, Ramesh Gaichor and others had presented objectionable songs as well as “Jab Julm ho to, Bagawat Honi Chahiye shahar mein, Jab Julm Ho to bagawat honi chahiye shahar mein aur agar bagawat na ho to, behatar hai kee, rat dhalane se phle ye shahar jalke rakh ho jaye, ye shahar jalke rakh ho jaye...” such type of disputable, objectionable passing statements, tried to incite disputable words, sentences between two society groups, raised some provokable slogans, songs and road drama, imposed wrong and false History misguided the society. The same had been disputable and stone-throwing and arson incidents converted into disputable and cast clashes in society’s specific groups, with human injuries, violence, severe damages etc.

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

F This statement given, Date: 08/01/2018  
In front of:  
(M.B. Talware)  
Police - Sub-Inspector  
Vishram Baug, Police Station, Pune.”

(emphasis supplied)

G 3. According to the petitioners, none of the five persons arrested in connection with the stated FIR was present during the event organized on 31<sup>st</sup> December, 2017 at Pune by “Elgar Parishad” (with which they have no concern) nor any allegation is found against them in the FIR. Nevertheless, the Pune Police swiftly moved against them, for reasons best known on fabricated charges under various provisions of the

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Unlawful Activities (Prevention) Act, 1967 (“UAPA”) and under the Indian Penal Code. A

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

5. It is further stated in the writ petition that the Pune Police investigating the Bhima Koregaon violence was systematically leaking documents to selective media with a view to spread false propaganda against the activists and to prejudice the public opinion against those arrested. The leaked documents allegedly found from the computer recovered during the search of the house of Rona Wilson, were addressed to Comrade Prakash and signed by ‘R’, which apparently mentions about senior comrades proposing concrete steps to end the Modi-era by planning a Rajiv Gandhi style incident to assassinate the Prime Minister. The police had deployed systematic strategy to put out highly provocative but completely unsubstantiated, unverified and unproven allegations through select media channels to prejudice the public opinion against those already arrested. Further, the organizers of Elgar Parishad had immediately refuted the tall claim of the Pune Police and went on record that the event referred to in the FIR under investigation was organized by them (Elgar Parishad) and no other organization was concerned therewith, much less any banned organization had any role in that regard. E F G H

- A This statement was issued by a former Judge of this Court and another former Judge of the Bombay High Court who are the organizers of Elgar Parishad, emphatically condemning the letters leaked to the media by the Police as the same were never produced in evidence before the Court and that it was a ploy of the Government as it had felt threatened because of the mobilization of people by Elgar Parishad to raise their voice against the establishment and resist communal forces. The organization of Elgar Parishad had also denied of having received funds from any of the accused persons named in the FIR.

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6. According to the petitioners, similar arbitrary arrests by the Pune City Police were caused across the country, particularly of those who spoke for the poor and marginalized and to malign human rights defenders, lawyers, activists and the progressive ideas and human rights ideology that they espouse, so as to have a chilling effect in the minds of the activists and dissuade them from criticizing the policies and programmes of the Government.

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- D 7. The petitioners then state that without providing any evidentiary link between the persons arrested and raided *inter alia* Gautam Navlakha and Sudha Bhardwaj with FIR No.4 of 2018, they were served with the arrest memos signed by the persons who were brought as part of the entourage of the Pune Police as so-called “independent and respectable persons” to authenticate the arrest memos. The seizure memos were prepared in Marathi and signed by the Panchas who were brought by the Pune Police as part of the entourage. No translated copy of the FIR or the seizure memo was made over to Gautam Navlakha or Sudha Bhardwaj even though they were not conversant with Marathi. In this backdrop, Gautam Navlakha filed habeas corpus petition before the Delhi High Court, being Writ Petition No.2559 of 2018 challenging the transit remand order passed by the Chief Metropolitan Magistrate on 28<sup>th</sup> August, 2018. Similar petition was filed in the Punjab and Haryana High Court to direct the jurisdictional Court which had allowed the prayer to grant transit remand, to keep Sudha Bhardwaj at her residence under supervision of the local police. Even the petition filed in the Punjab and Haryana High Court is still pending. Nevertheless, the petitioners rushed to this Court by way of the present writ petition filed as a public interest litigation, to espouse the cause of the five persons arrested by the Pune Police, praying for an independent and comprehensive enquiry into the stated arrest as follows:

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**“PRAYERS**

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

i) Issue an appropriate writ, order or direction, directing an independent and comprehensive enquiry into arrest of these human rights activists in June and August 2018 in connection with the Bhima Koregaon violence.

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ii) Issue an appropriate writ, order or direction, calling for an explanation from the State of Maharashtra for this sweeping round of arrests;

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iii) Issue an appropriate writ, order or direction, directing the immediate release from custody of all activists arrested in connection with the Bhima Koregaon violence and staying any arrests until the matter fully investigated and decided by this court.

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iv) Pass any such other order as may be deemed appropriate.”

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

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“Taken on Board.

Issue notice.

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

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

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A We order accordingly. The house arrest of Mr. Gautam Navalakha and Ms. Sudha Bharadwaj may be extended in terms of our orders.

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

B Let the matter be listed on 6.9.2018.”

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

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

G 10. It is then stated that one Tushar Ramesh Damgule had lodged an FIR on 8<sup>th</sup> January, 2018, naming six persons as accused for the offence registered thereunder by the Vishram Bagh Police Station. Out of the six named accused, only one person came to be arrested on 6<sup>th</sup> June, 2018, namely, Sudhir Dhawale in connection with the registered offence. As the investigation progressed and material was gathered during the ongoing investigation, Section 120-B was added on 6<sup>th</sup> March, 2018

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and two more persons were found to be suspected accused namely, Surendra Gadling, R/o Nagpur and Rona Wilson, R/o Delhi. On 17<sup>th</sup> April, 2018 the Investigating Agency conducted searches at the residence of eight persons, namely: A

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

Further, the entire search procedure was videographed right from the time the Investigating Agency knocked at the doors of the respective individuals till the material recovered were seized, sealed, and punchnamas were drawn in the presence of independent punchas. During the said search, documents were recovered from their respective computers/ laptops/pen drives/ memory cards. Different documents were found to have been copied on different dates. The seized items were immediately sent for investigation to Forensic Science Laboratory, which in turn gave “clone copies/mirror images” to the investigating agency so as to ensure that pendency of FSL Report does not hamper the investigation. It is then stated that documents recovered from the seized items unraveled the information implicating the accused not only as active members of CPI (Maoist) but being involved in an ongoing sinister design of having committed and in the process of committing criminal offences having the potential of destabilizing the society. The documents clearly reflect the preparation, planning and coordination not only amongst the stated accused persons but with others subsequently arrested, to carry out violence including planned ambush/rebellion against the enemy (which is our country and security forces). D E F

11. He has further stated that all the documents recovered during the search from the custody and possession of the respective accused will be produced before the Court, perusal of which would reveal that the accused persons are not merely political dissenters but involved in sinister design, planning, preparation and commission of criminal offences to destabilize the society. After the incriminatory material came to light, G

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A further offences under Sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of the UAPA are added on 17<sup>th</sup> May, 2018 against the following individuals:

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

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

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

E Further, two more persons were arrested and also searched on 6<sup>th</sup> June, 2018, namely, Shoma Sen, R/o Nagpur and Mahesh Raut, R/o Nagpur and Gadchiroli. It is then stated that the searches carried out against these persons were also videographed from the beginning to the end as was done on the earlier occasion in respect of the searches carried of other accused. Even during this search, it is alleged that the material seized was in the form of computers, laptops, pen-drives and memory cards which have been forwarded to Forensic Science Laboratory, which in turn provided clone copies to the Investigating Agency for facilitating further investigation.

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12. It is then stated in the affidavit that the further investigation G unraveled that the five persons who came to be arrested on 28<sup>th</sup> August, 2018 were also involved in the criminal conspiracy and their role was not merely peripheral in nature. Based upon the incriminating material, they were arrested from the residential or work places under similar fashion in the presence of independent panchas who were Government

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Officers. It is also stated that one of them, namely, Vernon Gonsalves has been convicted by the Special Court, Nagpur for offences under the UAPA. A

13. The sum and substance of the reply affidavit is that sufficient material has become available during the investigation, which is still in progress, to indicate the complicity of the concerned accused who have been arrested including the five named persons in respect of whom the present writ petition has been filed by third parties. They are arrested not because of their political activities but for their involvement in the planning and execution of offences to destabilize the society and their association with the banned organization. Their involvement is noticed in selecting and encouraging cadres in the banned organizations to go underground in 'struggle area', mobilizing and distributing money, facilitating selection and purchase of arms, deciding the rates of such arms and suggesting the routes and ways of smuggling such arms into India for its onward distribution amongst the cadres. Some of them have suggested training and laying booby traps and directional mines. Their involvement is also for providing strategic inputs in furtherance of the objective of armed rebellion, on lines of strategic documents of the banned terrorist organization. It is stated that all the material collected during the investigation will be eventually placed on record of the jurisdictional Court along with the police report to be filed in due course. Further, the question of showing that material to anyone muchless accused, would defeat the investigation in progress and that is not the requirement of law. The affidavit also emphasizes that house arrest of the concerned accused merely restricts physical movement but there is no way of ensuring that these persons would not indulge in destruction of evidence and alert other potential accused while sitting at home. As a matter of fact, their custodial interrogation may become necessary during further investigation and for which reason the Investigating Agency be granted liberty to take them in police custody in accordance with law. B C D E F

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

A for permitting them to amend the prayer clause of the writ petition and permit the petitioners to seek following modified prayers:

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

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

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

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

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

H 15. During the arguments, Dr. Abhishek Manu Singhvi, Dr. Rajeev Dhawan, Dr. Ashwani Kumar learned senior counsel and Mr. Prashant Bhushan, learned counsel appearing for the writ petitioners and Mr. Anand Grover, learned senior counsel appearing for the arrested persons, have argued that the stated five persons have not been named in the FIR nor

were they present during the event referred to in the FIR. Registration of two FIRs in respect of the same incident, first on 2<sup>nd</sup> January, 2018 at Pimpri (Urban) Police Station and the second, at Visharam Bagh Police Station, Pune City, was impermissible and was a ploy to deflect the inaction of the Pune Urban Police for the reasons best known to them. Moreover, the offences under the draconian law (UAPA) have been added without due authorization of the competent authority. It is contended that liberty of individual and dignity of the accused are the facets of core constitutional values. They submit that this case is not about ordinary criminal jurisprudence but of actualization of constitutional values and to expose the unjustified incarceration of innocents who happen to be human rights activists. They submit that the liberty and dignity of the accused persons must be preserved. According to them, the Investigating Agency was not discharging its statutory obligation of fairness in investigation but was indulging in selective leaks of documents which contain unsubstantiated insinuations against the accused persons solely with a view to malign their reputation and create public opinion against them. The Pune Police had the audacity to rush to the Press for divulging the documents which they claim to have recovered during the seizure from one of the accused and not the five persons arrested on 28<sup>th</sup> August, 2018. They submit that the clarificatory statement issued by the two former Judges cannot be discarded. However, no effort has been made by the Investigating Agency to ascertain the factual position from those two Judges. According to them, it is a case of persecution of the five persons named in the writ petition as multiple cases have been registered against them since 2005 and each of them have been acquitted in the concerned case. 25 criminal cases were registered against Varavara Rao, 11 cases have been registered against Arun Ferreira and 18 cases against Varnon Gonsalves. They have been acquitted in all the cases except one against Gonsalves, which matter is pending in appeal. They have relied upon the report prepared by the Committee headed by the Deputy Mayor which clearly points towards the complicity of Sambhaji Rao Bhide and Milind Ekbote in particular, for having caused incitement and violence on 1<sup>st</sup> January, 2018. However, no action has been taken by the Pune Police against the persons who were responsible for causing riots and violence. It is submitted that it is unfathomable that two FIRs are registered in respect of the same incident and two different investigating agencies are going ahead with the investigation. More so, the basis of arrest of five persons on 28<sup>th</sup> August, 2018 was their

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- A involvement in planning the assassination of the current Prime Minister but there is no allegation to that effect in the FIR nor has any fresh FIR been registered by the Police, although the same is a serious matter warranting investigation by an Investigating Agency no less than National Investigating Agency or at least the CBI. The persons arrested, however,
- B are well-known for their track record of human rights activism and have been unjustly put behind bars on the basis of unsubstantiated allegations and without any evidence against them. The entire sub-text of creating a real threat is a figment of imagination of the Investigating Agency and that has been done for reasons best known to them. Obviously, it is politically motivated. The transit remand applications preferred by the
- C Investigating Agency also do not mention the letters indicative of involvement of the persons concerned in planning and execution of Maoist plot nor have those letters been produced before the Court thus far. The letters which were flashed to the media are obviously fabricated. Further, no plausible explanation is forthcoming as to why the Investigating Agency had taken panchas along with them for conducting search outside
- D the State of Maharashtra. The role of the investigating team in FIR No.4 of 2018 in the manner in which they caused arrest of five persons named in the writ petition, has been seriously questioned and it is earnestly prayed by the learned counsel that the modified reliefs as claimed ought to be granted. The counsel have filed exhaustive written submissions to
- E buttress the plea for entrusting the investigation of the case to an independent Investigating Agency.

16. Mr. Tushar Mehta, learned Additional Solicitor General appearing for the State of Maharashtra on the other hand, submitted that the Court should be loath to entertain the writ petition of this nature
- F when the investigation of a serious crime is in progress as per the statutory provisions and the material gathered during the investigation justifies the arrest of the concerned accused. He submitted that the investigation is being conducted responsibly and impartially and strictly in accordance with the provisions of Cr.P.C. by an officer of the rank of Assistant Commissioner of Police under the supervision of Deputy Commissioner
- G of Police and further monitored by Joint Commissioner and finally by the Commissioner of Police who is of the rank of Additional Director General of Police. There is no allegations against the investigating officer of working under dictation or that he had any personal malice against the named accused. Further, there is active involvement and monitoring of
- H senior police officials and pre-existing safeguards have been put in place

by the State in order to ensure a fair investigation and in order to maintain independent and impartiality of all sorts, coupled with the fact that the action of the Investigating Agency would be monitored by the jurisdictional Courts at different stages, the question of appointing Special Investigation Team or to allow investigation by independent Investigating Agency under the monitoring of the Court, should be eschewed. He submitted that the Court may look at the documents already gathered during the investigation to satisfy its conscience as to whether the arrest of concerned accused was justified or otherwise. In any case, there is robust mechanism of overseeing the actions of the Investigating Agency by the jurisdictional Courts while considering not only the application for police remand or judicial remand and bail application but also the remedy of discharge and quashing of the prosecution. In other words, the issues raised by the petitioners may be germane for pursuing relief of bail or discharge/quashing, but not relevant to consider prayer for change of investigating agency, that too at the instance of accused themselves. He has handed over a compilation of documents or incriminatory material collected during the investigation allegedly showing the involvement of the concerned accused, for our perusal. He has also handed over the Case Diary and two Registers of documents recovered during the search from the accused persons. He further states that the subject FIR in respect of which action is being taken against the accused was registered on 8<sup>th</sup> January, 2018 for offences punishable under Section 153-A, 505 (1B), 17, 34 IPC. After the investigation progressed, further offences were added including the offences under Sections 13,16,17,18, 18B, 20,38,39 & 40 of UAPA on 16<sup>th</sup> May, 2018, on the basis of the material collected during the ongoing investigation. Initially, the offence was registered only against 6 accused and as the investigation progressed, as of now there are 22 accused named, including the 5 accused referred to in this petition who were added as accused on 22<sup>nd</sup> August, 2018 for the reasons stated in the Case Diary, and only thereafter the investigating team proceeded to arrest them on 28<sup>th</sup> August, 2018. He submits that the Investigating Agency had to proceed against the named accused after the revelation of their involvement with the banned organization, as was noticed from the documents and material recovered during the searches conducted in respect of the premises of co-accused. The named accused (A16 to A20) cannot be heard to question that part of the investigation regarding the manner of search, which the concerned co-accused alone may do at the appropriate stage before the jurisdictional court.

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- A 17. He submits that even though the Court may have jurisdiction to examine all aspects of the matter, considering the fact that the investigation is at a nascent stage and is being done by senior police officials under the supervision of their superior officers up to the level of Commissioner of Police, it is not a case for grant of reliefs as prayed.
- B The accused persons must take recourse to the remedy prescribed by law instead of directly approaching this Court under Article 32 of the Constitution and can get complete justice from the jurisdictional Court. He submits that in criminal matters, interference in the garb of public interest litigation at the instance of strangers has always been discouraged and rejected by this Court. Further, the present petition is nothing but
- C abuse of the process and as the named accused Varavara Rao, Sudha Bharadwaj and Gautam Navalakha have filed their respective petitions before the jurisdictional High Courts, which proceedings are pending for adjudication, the same persons have now filed affidavits before this Court for transposing them as petitioners and allowing them to adopt the prayer of the writ petitioners. They ought to elect their remedy to be pursued
- D and in particular, before the jurisdictional Courts. Therefore, this petition must be discouraged. He submits that the modified relief claimed in the writ petition to release the accused persons is in the nature of habeas corpus which is not maintainable in respect of the arrest made during the ongoing investigation. He submits that no right can enure in favour
- E of the accused to seek relief of investigation of the crime through an independent agency and for the same reason, even strangers to the offence under investigation or next friends of the accused, cannot be permitted to pursue such a relief in the guise of PIL. He submits that the foundation of the present writ petition is the perception of the writ petitioners (next
- F friends) that the accused are innocent persons. He submits that that basis is tenuous. For, there are enough examples of persons having split personality. In a criminal case, the action is based on hard facts collected during the course of investigation and not on individual perception. He contends that the argument of the writ petitioners that liberty of the five
- G named accused cannot be compromised on the basis of surmises and conjectures is wholly misplaced and can be repelled on the basis of the material gathered during the ongoing investigation indicating the complicity of each of them. He relies on Section 41 of Cr.P.C. which enables the police to arrest any person against whom a “reasonable suspicion” exists that he has committed a cognizable offence. Therefore, the integrity of the Investigating Agency cannot be doubted as there is enough material
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against each of the accused. He further submits that the argument of the writ petitioners based on the circumstances pressed into service for a direction to change the Investigating Agency is completely against the cardinal criminal jurisprudence and such a relief is not available to persons already named as accused in a crime under investigation. A

18. Mr. Harish Salve, learned senior counsel appearing for the complainant at whose instance FIR No.4/2018 came to be registered at Vishram Bagh Police Station (Pune City), submits that there is no absolute right, much less a fundamental right, to market ideas which transcend the line of unlawful activity. The Court must enquire into the fact as to whether the investigation is regarding such unlawful activity or merely to stifle dissenting political voice. If it is the former, the investigation must be allowed to proceed unhindered. In any case, the affected persons, namely, the named accused must take recourse to remedy prescribed by law before the jurisdictional Court as it is not a case of unlawful detention or action taken by an unauthorized Investigating Agency. According to him, the Court must lean in favour of appointing a SIT or an independent Investigating Agency or Court monitored investigation only when the grievance made is one about the investigation being derailed or being influenced by some authority. In the present case, the grievance is limited to improper arrest of individuals without any legal evidence to indicate their complicity in the commission of any crime or the one registered in the form of FIR No.4/2018. The allegation of motivated investigation is without any basis. No assertion is made by the writ petitioners or the named accused that the investigation by the Pune City Police is mala fide in law. If the allegation is about mala fide in fact, then the material facts to substantiate such allegation, including naming of the person at whose instance it is being so done, ought to have been revealed. That is conspicuously absent in this case. According to the learned counsel, the reliefs claimed in the writ petition do not warrant any indulgence of this Court. B C D E F

19. After the high-pitched and at times emotional arguments concluded, each side presenting his case with equal vehemence, we as Judges have had to sit back and ponder over as to who is right or whether there is a third side to the case. The petitioners have raised the issue of credibility of Pune Police investigating the crime and for attempting to stifle the dissenting voice of the human rights activists. The other side with equal vehemence argued that the action taken by Pune Police was G H

A in discharge of their statutory duty and was completely objective and independent. It was based on hard facts unraveled during the investigation of the crime in question, pointing towards the sinister ploy to destabilize the State and was not because of difference in ideologies, as is claimed by the so called human rights activists.

B 20. After having given our anxious consideration to the rival submission and upon perusing the pleadings and documents produced by both the sides, coupled with the fact that now four named accused have approached this Court and have asked for being transposed as writ petitioners, the following broad points may arise for our consideration:-

- C (i) Should the Investigating Agency be changed at the behest of the named five accused?
- (ii) If the answer to point (i) is in the negative, can a prayer of the same nature be entertained at the behest of the next friend of the accused or in the garb of PIL?
- D (iii) If the answer to question Nos.(i) and/or (ii) above, is in the affirmative, have the petitioners made out a case for the relief of appointing Special Investigating Team or directing the Court monitored investigation by an independent Investigating Agency?
- E (iv) Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law abiding person?

21. Turning to the first point, we are of the considered opinion that the issue is no more *res integra*. In ***Narmada Bai Vs. State of Gujarat and Ors.***<sup>1</sup>, in paragraph 64, this Court restated that it is trite law that the accused persons do not have a say in the matter of appointment of Investigating Agency. Further, the accused persons cannot choose as to which Investigating Agency must investigate the offence committed by them. Paragraph 64 of this decision reads thus:-

G “64. .... **It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.**”

(emphasis supplied)

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H (2011) 5 SCC 79



22. Again in *Sanjiv Rajendra Bhatt Vs. Union of India and Ors.*<sup>2</sup>, the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Paragraph 68 of this judgment reads thus:

“68. **The accused has no right with reference to the manner of investigation or mode of prosecution.** Similar is the law laid down by this Court in *Union of India v. W.N. Chadha*<sup>3</sup>, *Mayawati v. Union of India*<sup>4</sup>, *Dinubhai Boghabhai Solanki v. State of Gujarat*<sup>5</sup>, *CBI v. Rajesh Gandhi*<sup>6</sup>, *Competition Commission of India v. SAIL*<sup>7</sup> and *Janta Dal v. H.S. Choudhary*.<sup>8</sup>”

(emphasis supplied)

23. Recently, a three-Judge Bench of this Court in *E. Sivakumar Vs. Union of India and Ors.*<sup>9</sup>, while dealing with the appeal preferred by the “accused” challenging the order of the High Court directing investigation by CBI, in paragraph 10 observed:

“10. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment. In paragraph 129 of the impugned judgment, reliance has been placed on *Dinubhai Boghabhai Solanki Vs. State of Gujarat*<sup>10</sup>, wherein it has been held that in a writ petition seeking impartial investigation, the accused was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed in *Narender G. Goel Vs. State of Maharashtra*<sup>11</sup>, in particular, paragraph 11 of the reported decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the

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<sup>2</sup> (2016) 1 SCC 1

<sup>3</sup> 1993 Supp. (4) SCC 260

<sup>4</sup> (2012) 8 SCC 106

<sup>5</sup> (2014) 4 SCC 626

<sup>6</sup> (1996) 11 SCC 253

<sup>7</sup> (2010) 10 SCC 344

<sup>8</sup> (1991) 3 SCC 756

<sup>9</sup> (2018) 7 SCC 365

<sup>10</sup> *Supra* @ Footnote 5

<sup>11</sup> (2009) 6 SCC 65

A           peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not heard, in our opinion, will be of no avail. That per se cannot be the basis to label the impugned judgment as a nullity.”

24. This Court in the case of *Divine Retreat Centre Vs. State of Kerala and Ors.*<sup>12</sup>, has enunciated that the High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint an investigating officer of its own choice to investigate into a crime on whatsoever basis. The Court made it amply clear that neither the accused nor the complainant or informant are entitled to choose their own Investigating Agency to investigate the crime in which they are interested. The Court then went on to clarify that the High Court in exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of the aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer *mala fide*.

D           25. Be that as it may, it will be useful to advert to the exposition in *State of West Bengal and Ors. Vs. Committee for Protection of Democratic Rights, West Bengal and Ors.*<sup>13</sup> In paragraph 70 of the said decision, the Constitution Bench observed thus:

E           “70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and

<sup>12</sup> (2008) 3 SCC 542

<sup>13</sup> (2010) 3 SCC 571

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international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.”

26. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about *mala fide* exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. Rather, averment in the petition as filed was to buttress the reliefs initially prayed (mentioned in para 7 above) – regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A16 to A20) has been seriously disputed by the Investigating Agency and have commended us to the material already gathered during the ongoing investigation which according to them indicates complicity of the said accused in the commission of crime. Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organisation and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor it is possible to enquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court. Admittedly, the named accused have already resorted to legal remedies before the jurisdictional Court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the Court for obtaining remand by the Police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.

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A        27. In view of the above, it is clear that the consistent view of this  
Court is that the accused cannot ask for changing the Investigating  
Agency or to do investigation in a particular manner including for Court  
monitored investigation. The first two modified reliefs claimed in the  
writ petition, if they were to be made by the accused themselves, the  
same would end up in being rejected. In the present case, the original  
B        writ petition was filed by the persons claiming to be the next friends of  
the concerned accused (A16 to A20). Amongst them, Sudha Bhardwaj  
(A19), Varvara Rao (A16), Arun Ferreira (A18) and Vernon Gonsalves  
(A17) have filed signed statements praying that the reliefs claimed in  
the subject writ petition be treated as their writ petition. That application  
C        deserves to be allowed as the accused themselves have chosen to  
approach this Court and also in the backdrop of the preliminary objection  
raised by the State that the writ petitioners were completely strangers to  
the offence under investigation and the writ petition at their instance  
was not maintainable. We would, therefore, assume that the writ petition  
is now pursued by the accused themselves and once they have become  
D        petitioners themselves, the question of next friend pursuing the remedy  
to espouse their cause cannot be countenanced. The next friend can  
continue to espouse the cause of the affected accused as long as the  
concerned accused is not in a position or incapacitated to take recourse  
to legal remedy and not otherwise.

E        28. Be that as it may, we are conscious of the fact that prayer  
clause (i) and (ii) also make reference to FIR No.2/2018 registered at  
Pimpri (Urban) Police Station on 2<sup>nd</sup> January, 2018. However, that is an  
independent FIR registered at a different police station against the  
Hindutva right wing leaders Milind Ekbote and Sambhaji Rao Bhide. It  
F        is, at best, in the nature of a cross FIR in respect of the same incident  
against the alleged aggressors filed by an eye-witness. Neither the writ  
petitioners nor the named accused in FIR No.4/2018 in that sense, can  
pursue relief in respect of FIR No.2/2018 registered at Pimpri (Urban)  
Police Station. Admittedly, Criminal Writ Petition No.1875 of 2018 has  
G        already been filed in the Bombay High Court by Anita R. Sawale (the  
complainant in FIR No.2/2018) herself for issuing directions to the  
Investigating Agency in that crime. As presently advised, we find force  
in the argument of the State that the crime under investigation in FIR  
No.4/2018, inter alia is to investigate the allegations that a banned  
organization, CPI(M), organises events such as referred to in FIR No.2/  
H        2018 to propagate ill-will in different classes and turn them into

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

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

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

31. As the answer to point Nos. (i) and (ii) are in the negative and F  
against the writ petitioners and named accused, we do not wish to dilate  
on the circumstances pointed out to us by the accused regarding the  
manner of their arrest. For, any observation in that regard by this Court  
may prejudice the said accused including the co-accused who are not  
before this Court or the prosecution, which must be eschewed. We are G  
of the considered opinion that the investigation of the offence in question  
is at a nascent stage and, therefore, it is not desirable to elaborate further  
as the modified reliefs (i) and (ii) as prayed cannot be granted for the  
reasons noted hereinbefore.

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- A        32. That takes us to the third modified relief claimed in the writ petition to issue directions that all electronic devices, records and materials, allegedly seized from the detainee/accused, be examined by Forensic Science Laboratory outside the State of Maharashtra to ensure fair play and in the interest of justice. Even this prayer cannot be taken forward.
- B        If any one of the twenty two named accused have any grievance or apprehension about the same, he is free to make that request before the jurisdictional Court, which can be considered at the appropriate stage in accordance with law. We are not expressing any opinion either way in the present writ petition in that regard.
- C        33. The fourth modified relief is to direct release of the arrested activists from custody as per law. The accused persons must pursue this relief before the appropriate court, which can be considered by the concerned court on its own merits in accordance with law. As noted earlier, the concerned accused persons have already taken recourse to remedy before the jurisdictional High Courts. Hence, they are free to
- D        pursue all legal remedies available to them as per law. We are not expressing any opinion either on the issue of maintainability thereof or on merits of the reliefs that may be claimed therein. All questions will have to be considered by the concerned Court in accordance with law. Accordingly, even the fourth modified relief cannot be considered in the present writ petition.
- E        34. In view of the above, we have advisedly refrained from dealing with the factual issues raised by the parties and including the named accused represented by their counsel before us, as any observation made by this Court may cause serious prejudice to them or the co-accused who are not before this Court or, for that matter, the prosecution case,
- F        resulting in serious miscarriage of justice. Similarly, we do not wish to burden the judgment with the other reported judgments relied upon by the counsel for the parties and dealing with legal propositions canvassed by them, which are not necessary to be answered in the present writ petition.
- G        35. We may hasten to mention that we have perused the Registers containing relevant documents and the Case Diary produced by the State of Maharashtra. But we have avoided to dilate on the factual position emerging therefrom, lest any prejudice is caused to any accused or the prosecution, in any manner.
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36. The record/files/documents and the Case Diary handed over to the Court in a sealed cover by the State be returned to the counsel for the State in a sealed cover. A

37. Accordingly, this writ petition is disposed of with liberty to the concerned accused to take recourse to appropriate remedy as may be permissible in law. The interim order passed by this Court on 29<sup>th</sup> August, 2018 shall continue for a period of four weeks to enable the accused to move the concerned court. The said proceedings shall be decided on its own merits uninfluenced by any observation made in this judgment, which is limited to the reliefs claimed in the writ petition to transfer the investigation to an independent Investigating Agency and/or Court monitored investigation. The Investigating Officer is free to proceed against the concerned accused as per law. All the accompanying applications are also disposed of in terms of this judgment. B C

**DR. D. Y. CHANDRACHUD, J.** 1. The intersection between criminal law and constitutional rights has led to the evolution of judicial precedent which originates in this Court. Our recent decisions reiterate the value of individual dignity as essential to a democratic way of life. But lofty edicts in judicial pronouncements can have no meaning to a citizen unless the constitutional quest for human liberty translates into securing justice for individuals whose freedom is under threat in specific cases. The role of the Court involves particularly sensitive balances when the state seeks to curb freedom to investigate perceived breaches involving offences against the state. Custodial interrogation involves the balancing of diverse and often conflicting values: the effective administration of criminal justice, an impartial process of investigation and the liberty and reputation of the individual. The invocation of our jurisdiction under Article 32 in this case is founded on the grievance that a group of five human rights activists is sought to be persecuted for espousing the cause of the marginalised which is considered to be ‘unpopular’. Conscious as the Court is of the public interest in the effective administration of criminal justice, it cannot be oblivious to the overriding constitutional concern to secure the dignity of the individual. The key to the balance between the two lies in a fair, independent and impartial investigation of crime. As a matter of principle, I am unable to agree with the views expressed by the learned Chief Justice and my learned brother Justice AM Khanwilkar. D E F G

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- A        2. On 29 August 2018, the jurisdiction of this Court under Article  
32 was invoked by five distinguished academics to seek an “independent  
and comprehensive inquiry” in the circumstances relating to the arrest  
of five human rights activists on 28 August 2018. The arrests by the  
Pune police took place following the raids which were conducted at  
their homes and offices. The arrests took place simultaneously in Delhi,  
B        Faridabad, Mumbai, Thane and Hyderabad. The petitioners assert that  
our jurisdiction has been invoked not to impede the investigation but to  
ensure that an independent and credible investigation is made by persons  
nominated by and subject to the supervision of this Court. The petitioners  
urge that the invocation of the draconian provisions of the Unlawful  
C        Activities (Prevention) Act, 1967 (UAPA) in the present case is an attempt  
to silence dissent by targeting human rights activists who have been  
working to protect the rights of the poor and the marginalised, particularly  
Dalits. This is set forth in the prefatory averments of the writ petition,  
extracted here:
- D        “The charges against them on the face of it appear indiscriminate,  
unwarranted, part of a malicious campaign to threaten human  
rights defenders, independent journalists, writers and thinkers in  
this country, from critiquing the government and its policies and  
an attempt to muzzle dissent. The activists who have been  
arrested are pro democracy workers who have been leading  
E        peaceful peoples rights based movements especially among the  
poor and marginalised communities, Dalits and adivasis, for  
several years, in different parts of the country. The use of the  
UAPA meant for exceptional and violent activity, against such  
persons, when there has been absolutely no evidence of any  
F        acts of violence by these activists is deeply disconcerting and  
calls for an urgent intervention by this Hon’ble Court.”

The grievance is that those five persons are being persecuted for their  
views and their voices are sought to be chilled into silence by a criminal  
prosecution.

- G        3. First, as to the locus of the petitioners:
- (i) The first petitioner - Romila Thapar is an eminent historian and  
Professor Emeritus at Jawaharlal Nehru University. She was selected  
on two occasions for the conferment of the Padma Bhushan award by  
the Union Government, which she declined. Romila Thapar has been  
H        elected to the British Academy and the American Academy of Arts and



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Sciences and has been conferred with honorary doctoral degrees by the Universities of Oxford and Chicago, among others. Her writings include a book titled, ‘A History of India’;

(ii) The second petitioner, Devaki Jain is a pioneer feminist economist and has been associated with national bodies, including the Planning Commission and the National Commission for Women and, international organisations, including UNDP and the South Commission. She is the founding member of two organisations engaged in women’s studies. She is a recipient of the Padma Bhushan in 2006, the third highest civilian award from the Government of India, for her contribution to social justice and the empowerment of women;

(iii) The third petitioner, Prabhat Pattnaik, was a Rhodes Scholar and is an eminent economist who taught at JNU for over three decades. He was vice-chairperson of the Kerala Planning Board and a member of a high-powered UN Task Force on the global financial system;

(iv) The fourth petitioner Satish Deshpande, is a sociologist at the University of Delhi. He is a recipient of the Malcolm Adiseshiah award for distinguished contributions to development studies. He was a member of the Union government’s expert committee on the proposed Equal Opportunity Commission. He has held visiting appointments at the University of Chicago and in Paris; and

(v) The fifth petitioner, Maja Daruwala, is a member of the Board and a senior advisor to the Commonwealth Human Rights Initiative. In that capacity she has been associated with significant research on the implementation of human rights norms in the country. She has been working in the field of advocacy for rights and social justice for over forty years.

4. The persons who were arrested on 28 August 2018 and on whose behalf these proceedings were initiated have been described thus in the petition:

“i. Gautam Navalakha (Human Rights activist and journalist New Delhi). He was the President of the People’s Union for Democratic Rights and has been associated with the Economic and Political Weekly. He is a known commentator on current affairs. The state relied upon him to negotiate the safe return of persons abducted by left wing extremists in Chhattisgarh.

- A ii. Sudha Bharadwaj (Advocate, Chhattisgarh High Court, currently residing in Faridabad) Prominent cause lawyer of Bilaspur High Court who has represented workers, poor and marginal farmers and others in Chhattisgarh. She is the national green secretary of PUCL and since 2017 been teaching at the National Law University, Delhi. As a member of the Indian Association of People's lawyers, advocated Sudha Bharadwaj was vocal against the arrest of lawyers like Surendra Gadling in recent times. Sudha Bharadwaj has been a member of committees and provided legal aid and is a recognised human rights defender.
- B
- C iii. Varavara Rao (Age 79, based in Hyderabad, political worker, commentator and renowned poet). He was a professor of English and Telugu literature.
- iv. Arun Ferreira, (Mumbai) Practising as a lawyer since 2015 and a Human Rights activist.
- D v. Vernon Gonsalves (Mumbai), Gold medallist from Bombay University in Commerce, accounts officer at Siemens, then lecturer of accounts in Maharashtra College, writer and columnist. His translation of Annabhau Sathe's "Gold from the Grave" from Marathi to English published in David Davidar's "A Clutch of Indian masterpieces".
- E Three of the above individuals were prosecuted in the past for offences primarily under the Indian Penal Code, 1860, the Arms Act, 1959 and the UAPA. Arun Ferreria is stated to have been acquitted in all eleven cases instituted against him. Vernon Gonsalves was acquitted in seventeen out of the nineteen cases instituted against him (an appeal is pending in
- F one case where he stands convicted while an application for discharge is pending before the Gujarat High Court in one case). Vara Vara Rao was acquitted in all twenty cases where he was prosecuted<sup>1</sup>.

5. During the course of the hearing, a preliminary objection was raised by Mr. Tushar Mehta, the learned ASG to the maintainability of these proceedings. He urged that the petitioners have no locus to question the circumstances relating to the arrest of the five individuals named above. I would not have been inclined to accept a technical argument of this nature in view of the constitutional imperatives for this Court to

<sup>1</sup> Details of these cases have been submitted in charts A, B and C annexed to the written submissions filed by Dr AM Singhvi, learned senior counsel.

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intervene when human freedoms and liberties are alleged to be imperilled. A  
 The jurisdiction under Article 32 is wide enough to reach out to injustice  
 in any form and originating in any source. Securing human liberty and  
 dignity must occupy an important space in the judicial docket. Liberty  
 and freedom are defining values of our Constitution. The institutional  
 role of this Court as a constitutional adjudicator should brook no  
 technicalities which obstruct the cause of justice. When a group of citizens B  
 has moved this Court with an impassioned plea about the violation of  
 human rights - in the present case no less than five distinguished citizens  
 with a track record of service to the nation have done so - the Court  
 must look beyond locus into the heart of the matter. Whether the  
 grievance has any substance is indeed a distinct matter which must be C  
 determined objectively. The Court will not interfere in every case merely  
 because it has the jurisdiction. But its duty to scrutinise, perceive and  
 remedy violations of human rights is non-negotiable. However, the issue  
 of locus, even in a technical sense, has receded into the background.  
 During the course of the hearing, the Court has been apprised that each D  
 of the five individuals who were arrested has subscribed to the averments  
 in the petition and would stand by what is urged before this Court in  
 protection of their rights. The objection to maintainability lacks substance,  
 in either view of the matter.

6. A brief historical background is necessary. On 1 January 1818, E  
 a few hundred soldiers of the East India Company comprising of Dalits,  
 tribals, Muslims, Christians and backward communities defeated the  
 Peshwa army led by Bajirao II at Koregaon, on the banks of the Bhima  
 river near Pune. Like many of its genre, the battle has assumed a  
 legendary status primarily because of the victory of the Dalits. Honouring  
 the then martyrs, the colonial government raised a victory pillar, the 'Vijay F  
 Stambh'. The pillar is a symbolic rallying ground for an annual event to  
 mark the victory. The event represents the aspirations of those who  
 have been subject to discrimination and prejudice in the caste-ridden  
 structure of our society.

7. In keeping with tradition, a public meeting was scheduled to G  
 commemorate the 200th anniversary of the Bhima-Koregaon victory on  
 31 December 2017. Among those who were associated with the event  
 were two judges: one of them, Justice PB Sawant is a former judge of  
 this Court. Justice BG Kolse Patil is a former judge of the Bombay High  
 Court. The event was planned at Shaniwar wada in Pune. An organisation H

A known as the Kabir Kala Manch was to supervise a cultural programme. Besides the two judges who addressed the Elgar Parishad, the speakers included Shri Prakash Ambedkar, President of the Bharatiya Republican Party. The event was titled: “Bhima-Koregaon Shourya Din - Elgar Parishad”. The petitioners claim that ‘Elgar’ is a clarion call. The state reads into it a sinister symbolism of an attack. On 1 January 2018, a communal disturbance took place at Bhima-Koregaon when, as the allegation goes, a group of Dalits was attacked in the process of offering a salutation to the victory pillar. News of the incident spread across the state of Maharashtra, resulting in a violent agitation in the state.

B 8. Following these incidents, a First Information Report in regard to the incident was lodged on 8 January 2018 by one Tushar Damgude. The FIR specifically names the following individuals:

- i Sudhir Dhawale;
- ii Sagar Gorakhe;
- D iii Harshali Potdar;
- iv Dipak Dhengale;
- v Jyoti Jagtap; and
- vi Ramesh Gaychore.

E Sudhir Dhawale was arrested on 6 June 2018. As the investigation progressed, Section 120B of the Penal Code was added on 6 March 2018 and two more persons - Surendra Gadling and Rona Wilson - were suspected to be involved. On 17 April 2018, the Pune police conducted searches at the residences and offices of the following persons:

- F 1 Rona Wilson, a resident of Delhi;
- 2 Surendra Gadling, a resident of Nagpur;
- 3 Sudhir Dhawale and Harshali Potdar, residents of Mumbai;
- 4 Sagar Gorakhe, a resident of Pune;
- G 5 Dipak Dhengale, a resident of Pune; and
- 6 Ramesh Gaychore and Jyoti Jagtap, residents of Pune

In the counter affidavit which has been filed by the Assistant Commissioner of Police, Pune city, it has been stated that the material retrieved from the computers, laptops, pen drives and memory cards of

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the above accused persons implicated them as active members of the Communist Party of India (Maoist), a banned organisation, and reflected a design of being involved in the commission of offences having the potential to destabilise the country. Based on the investigation, the provisions of Sections 13, 16, 17, 18, 18B, 20, 38, 39 and 40 of the UAPA were invoked on 17 May 2018 against the following individuals:

- (i) Surendra Gadling;
- (ii) Rona Wilson;
- (iii) Shoma Sen;
- (iv) Mahesh Raut;
- (v) Comrade M. alias Milind Teltumbade (underground);
- (vi) Comrade Prakash alias Navin alias Rituparn Goswami (underground);
- (vii) Comrade Manglu (underground); and
- (viii) Comrade Dipu and other underground members.

On 6 June 2018 five persons were arrested namely:

- (i) Surendra Gadling;
- (ii) Rona Wilson;
- (iii) Sudhir Dhawale;
- (iv) Shoma Sen; and
- (v) Mahesh Raut.

The counter affidavit filed by the Assistant Commissioner of Police states that it is on the basis of the material recovered during the course of the search of the above persons that the five individuals on whose behalf the present proceedings have been instituted were found to be a part of the criminal conspiracy. The averment in the counter reads as follows:

“I state and submit that based upon the aforesaid material recovered from the searches of the aforesaid persons [which is a part of the case diary and which would be placed for consideration and perusal of this Hon’ble Court in a sealed cover], the following persons were also clearly found to be a part of the criminal conspiracy and their role was not merely peripheral role

A but they were found to be playing a very vital role in the criminal offences committed and/or planned by others. Based upon the said incriminating material, the following persons came to be arrested on 28.8.2018 and searches were conducted at their residential/work places in a similar fashion, under videography in presence of individual Punchas who were Government officers.

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1 Vara Vara Rao R/o Hyderabad

2 Arun Ferreira R/o Thane

3 Vernon Gonsalves R/o Mumbai

C

4 Sudha Bhardwaj R/o Faridabad

5 Gautam Navlakha R/o Delhi”

The counter alleges that each of the five individuals is found to be working for and to be an active member of a “banned terrorist organisation” - the Communist Party of India (Maoist). Paragraph 26 of the counter affidavit states that each of them has been found, from the material gathered from others during investigation, to be involved in unlawful activities which are described thus:

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“The material gathered from others based upon which the five accused persons named hereinabove are arrested, clearly show that they were involved in selecting and encouraging cadres to go underground in ‘struggle area’, mobilizing and distributing money, facilitating selection and purchase of arms, deciding the rates of such arms into India for its onward distribution amongst the cadres. Some of them have suggested training and laying of booby traps and directional mines. They are also found to be providing strategic inputs in furtherance of the objective of armed rebellion as per the strategic document of the banned terrorist organisation namely Communist Party of India (Maoist).”

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The petition was initially taken up for hearing on 29 August 2018. Interim directions to place the five individuals under house arrest were issued, in terms of the request made by their counsel:

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“We have considered the prayer for interim relief. It is submitted by Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the petitioners that in pursuance of the order of the High Court, Mr. Gautam Navalakha and Ms. Sudha Bharadwaj have

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been kept under house arrest. It is suggested by him that as an interim measure, he has no objection if this Court orders that Mr. Varavara Rao, Mr. Arun Ferreira and Mr. Vernon Gonsalves, if arrested, they are kept under house arrest at their own homes. We order accordingly. The house arrest of Mr. Gautam Navalakha and Ms. Sudha Bharadwaj may be extended in terms of our orders.”

Since the case was being heard, the house arrest has since been extended by the interim directions of this Court of 6 September 2018 and 17 September 2018. During the course of the hearing, permission has been sought to formally amend the writ petition to seek the constitution of a Special Investigating Team under the directions of this Court, so as to ensure an independent investigation.

9. Unfolding his submissions, Dr Abhishek Manu Singhvi, learned senior counsel stated that a First Information Report in respect of the violence which took place on 1 January 2018 (FIR 2/2018) was lodged by Anita R Sawale at PS Pimpri on 2 January 2018. The FIR alleges that violence was unleashed against Dalits by a mob armed with swords, rods and other weapons. The FIR specifically names Sambhaji Bhide, head of an organisation known as Shivajinagar Pratishthan and Milind Ekbote, Chief of Hindu Janjagaran Samiti as perpetrators and conspirators. Sambhaji Bhide has not been arrested while Milind Ekbote is stated to have secured bail within a month of his arrest. The FIR relates to offences under the Penal Code, Arms Act and the SC/ST Act<sup>2</sup>. No provision of the UAPA has been invoked. Since the police were allegedly not investigating the FIR, a writ petition has been filed before the Bombay High Court<sup>3</sup>. FIR 4/2018 was lodged on 8 January 2018 at PS Vishrambagh by Tushar Damgude who is alleged to be a self-professed follower of Sambhaji Bhide. The FIR adverts to a speech delivered by Sudhir Dhawale at the Elgar Parishad on 31 December 2017 in which allegedly an incendiary speech was made, with the following lines:

“Jab Julm ho to Bagawat Honi Chahiye shahar mein, Jab Julm Ho to bagawat honi chahiye shahar mein, aur agar bagawat na ho to behatar he ke, ye raat dhalane se pehle ye shahar jalkar rakh ho jaye, yesatra hein, ye satra ki title hi, apne aap mein,

<sup>2</sup> The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989

<sup>3</sup> Criminal Writ Petition 1875/2018

- A           ladhai k ailan hein, ye nayi peshwai ko hamko shamshan ghat  
              mein, Kabrastaan mein dafnana hein.””

Dr. Singhvi submits that these lines are but a translation of Bertolt Brecht’s play, “The Good Person of Szechwan”, (1942). Notably, according to the submission, FIR 4/2018 does not allude to any conspiracy to attack

- B           the Prime Minister. It has been submitted that it is undisputed that none  
              of the activists under house arrest were named in the FIR. They are not  
              alleged to be present at the Elgar Parishad on 31 December 2017 or at  
              Bhima-Koregaon on 1 January 2018. Moreover, according to the  
              submission, the State of Maharashtra opposed the anticipatory bail of  
C           Milind Ekbote on the ground that the violence was committed as a part  
              of a pre-planned conspiracy by him and by others. The arrests of the  
              five persons were affected nearly nine months thereafter.

10. The next limb of the submission of Dr Singhvi is that certain  
              letters which are alleged to have been authored by the arrested activists  
              are ex-facie fabricated. These letters are alleged to have been recovered  
D           by the police from the electronic devices of one of the accused who was  
              raided in the month of April 2018 and was arrested in June 2018. Shri  
              Parambir Singh, Additional Director General of Police (Law and Order),  
              State of Maharashtra appeared in a television programme called “Truth  
              v Hype” on NDTV on 1 September 2018 and stated that the letters  
E           which were placed before the media by senior police functionaries were  
              yet to be verified. According to the petitioners, thirteen such alleged  
              letters were leaked to the media by the police during the course of press  
              briefings. They are now available in the public domain. These letters, it  
              has been submitted, do not find mention even in the transit applications  
              filed by the Pune police before the concerned court. The letters are  
F           unsigned and do not bear any identifiable particulars including e-mail  
              addresses or headers. Curiously, the recovery is stated to have been  
              made from the electronic devices of a third person who is neither the  
              author nor the addressee of the letters. Hence, it has been urged that:

- G           (i) While it was alleged that a plot against the Prime Minister has been  
              uncovered in an alleged letter, it is noteworthy that no new FIR has been  
              registered by the police and investigation continues by the Pune police  
              under FIR 4/2018, pertaining to the Bhima-Koregaon violence;

- (ii) The state is not taking the conspiracy theory seriously as is evident  
              from the fact that no fresh FIR has been registered and the investigation  
H           continues to remain with the Pune police; and



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(iii) Seven out of the thirteen alleged letters which were leaked to the media by the police have been authored by or addressed to one “Comrade Prakash”. The Sessions Court at Gadchiroli in its judgment dated 7 March 2017 convicting GN Saibaba in Sessions Case 13/2014 held that he had used the pseudonym ‘Prakash’ in letters scribed by him. It is a matter of record that Saibaba has been lodged in Nagpur Central Jail since 7 March 2017 and hence the alleged letters attributed to him after that date are ex-facie fabricated.

Dr. Singhvi has drawn the attention of the court to the consistent pattern and history of the police targeting human rights activists and incarcerating them by foisting false criminal cases. This is buttressed by adverting to the prosecutions launched against three of the August 2018 detainees. Vara Vara Rao was implicated in 25 cases out of which 13 ended in acquittal, 3 in discharge and 9 in the withdrawal of the prosecution. He has not been convicted in any case and is 79 years of age. Arun Ferreira has been acquitted in all the 11 cases in which he was implicated. Vernon Gonsalves has been acquitted in 17 out of the 19 cases in which he was accused; a discharge application is pending in one case while an appeal against conviction in another case is pending before the Nagpur bench of the High Court, where he has already served his sentence.

11. During the course of his submissions, Dr. Singhvi urged that there was a gross violation of law rendering the arrest, search and seizure unlawful. The panch witnesses were ‘imported’ from Pune and are employees of the Pune Municipal Corporation. The two panch witnesses travelled together with the Pune police and are stock witnesses. Hence it has been submitted that there has been a clear violation of the safeguards introduced in Section 41B of the Code of Criminal Procedure, 1973. In the transit remand application of Sudha Bhardwaj, the Pune police submitted before the Court of the CJM, Faridabad on 28 August 2018 that her remand was necessary since other individuals who were arrested in June 2018 had made disclosure statements in regard to incitement of the riots in Koregaon. Significantly, no such disclosure has been made by the arrested persons nor is there a mention of a Maoist conspiracy in the alleged letters or in the remand application.

12. In summation, Dr. Singhvi urged that each of the persons who were arrested on 28 August 2018 is an active defender of human rights. They have taken a position on human rights violations. The submission is that this targeted persecution is meant to strike fear amongst human

- A rights' lawyers, activists and writers to deter them from speaking against or critiquing governmental policies and police actions. Persecution of this nature would, it has been urged, shake the foundation of the rule of law and render the freedoms guaranteed by the Constitution illusory. Learned counsel submitted that the purpose of these proceedings is not to thwart an investigation but to ensure that the investigation is fair and impartial.
- B It was urged that in a long line of precedent, this Court has ordered the constitution of Special Investigation Teams (SIT) or a court monitored investigation under Article 32 of the Constitution. In the present case, it was urged, that the facts which have been adverted to before the Court indicate that the investigation has been anything but fair and impartial.
- C The targeting of human rights activists for their opposition to the governing regime implicates a serious violation of democratic values and necessitates either the setting up of a SIT or the monitoring of the investigation by this Court.

- D 13. On the other hand, Mr Tushar Mehta, learned ASG has urged the following submissions:

- (i) No interference by the Court is permissible in a criminal case in the garb of a public interest litigation. A PIL is not maintainable at the behest of a third person for seeking reliefs which can be granted only under Sections 438 or 439 and Section 482 of the Criminal Procedure Code
- E **(Rajiv Ranjan Singh 'Lalan' (VIII) v Union of India,<sup>4</sup> Gulzar Ahmed Azmi v Union of India,<sup>5</sup> Simranjit Singh Mann v Union of India<sup>6</sup> and Ashok Kumar Pandey v State of West Bengal<sup>7</sup>;**
- (ii) There is an abuse of process in the present case since three of the arrested persons - Vara Vara Rao, Sudha Bhardwaj and Gautam Navlakha
- F have filed petitions before the jurisdictional High Courts which are pending adjudication. Hence it would be impermissible to allow their prayer for transposing them or adopting the averments in the petition **(Pratibha Ramesh Patel v Union of India<sup>8</sup>, Udyami Evam Khadi Garmodyog Welfare Sanstha v State of UP<sup>9</sup>);**

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<sup>4</sup> (2006) 6 SCC 613

<sup>5</sup> (2012) 10 SCC 731

<sup>6</sup> (1992) 4 SCC 653

<sup>7</sup> (2004) 3 SCC 349

<sup>8</sup> (2016) 12 SCC 375

- H <sup>9</sup> (2008) 1 SCC 560

(iii) A PIL under Article 32 would not be maintainable for the purpose of seeking relief under Sections 438 and 439 of the Criminal Procedure Code; A

(iv) Reliefs in the nature of a writ of Habeas Corpus, which have been sought in the present proceedings under Article 32 are not maintainable (**State of Maharashtra v Tansen Rizwan Siddiquee<sup>10</sup>**); B

(v) The accused does not have a vested right to seek an investigation monitored by the court or to have a particular agency as the investigator; and

(vi) The investigation in the present case is being conducted responsibly and impartially by an officer of the rank of an Assistant Commissioner of Police. The investigation is being carried out under the supervision of a Deputy Commissioner of Police and is being monitored by the Joint Commissioner of Police who is of the rank of an Additional Director General. C

14. While entertaining these proceedings, this Court is conscious of the fact that ordinarily, when an investigation into a criminal offence is in progress, rights and remedies are provided by the Code of Criminal Procedure. Hence, it is but trite law that in matters pertaining to or arising during the course of investigation such as remand, bail (including anticipatory bail) and quashing of proceedings, recourse must be taken to the provisions of the Code. These principles have been highlighted in the decisions to which a reference has been made by the ASG. In *Rajiv Ranjan Singh* (supra) the trial had commenced in a criminal case involving a charge of amassing wealth disproportionate to the known source of income of a public servant. This Court held that a PIL is not meant to advance a political agenda and would be alien to pending criminal proceedings. The petitioners were not de facto complainants and if at all they had a grievance regarding the removal of a public prosecutor, they should have moved the Special Judge or the High Court at the earliest point of time. The Court emphasised that any interference at the behest of a third party was liable to affect the course of justice and may even prejudice the accused by denying a fair trial. In *Gulzar Ahmed Azmi* (supra) a petition under Article 32 sought an investigation of all bomb blast cases since 2002 with a direction for the release of the detainees on bail. In that context, this Court held that sufficient safeguards were D  
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<sup>10</sup> (2018) 10 SCALE 711

- A available under the criminal law and it was for the individual against whom a criminal proceeding is lodged to work out his or her remedy. In *Simranjit Singh Mann* (supra) the Court declined to exercise its jurisdiction under Article 32 where the petitioner did not seek to enforce his own fundamental rights but the fundamental rights of two “condemned convicts” who had not themselves complained of a violation. This Court
- B noted that it was not open to “any and every person” to challenge a conviction and unless the aggrieved individual suffers from a disability recognised by law, it would be unsafe and hazardous to allow a third party or stranger to question the correctness of a conviction and sentence imposed after trial. These principles were also adverted to in the earlier
- C decision in *Ashok Kumar Pandey* (supra). They are well settled. As a court which is governed by precedent, we are bound by them and by a consistent line of authority which requires that during the course of investigation, it is to the competent court that an accused must ordinarily turn for the remedies that are available under substantive or procedural provisions of the criminal law.
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15. But in the present case, it is necessary for the Court to bear in mind that recourse to its constitutional jurisdiction under Article 32 has been invoked not only by the petitioners but by the five individuals who were arrested on 28 August 2018. The petition was moved before this Court on 29 August 2018 when, as already noted, an interim order was
- E passed directing that the five arrested persons be placed under house arrest. At the earliest possible point in time, these five individuals have moved this Court indicating that they abide by the averments and reliefs sought in the petition and seek that they should be transposed as petitioners under Article 32. The petitioners have not in their submissions sought
- F recourse to the jurisdiction of this Court for espousing a remedy which is available before the competent court under the Code of Criminal Procedure. These proceedings have been moved with a specific grievance that the arrest of the five individuals is an attempt by the state to muzzle dissent and that each of them is being persecuted for being a defender of persons subjected to human rights’ violations. When the petition was
- G initially filed, the relief which was sought was in regard to the circumstances relating to the arrest of the human rights activists. By an application for amendment, the reliefs have been sought to be amended to inter alia seek the constitution of a Special Investigating Team (to be monitored by this Court). For clarity, the above reliefs are extracted
- H below:

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“i) Issue an appropriate writ, order or direction for setting up of a Special Investigating Team (SIT) comprising of senior police officers with impeccable career records of professionalism, integrity and independence, reporting directly to this Hon’ble Court, for conducting a fair and independent investigation and inquiry into the offences stated in the zero FIR lodged at Pimpri police station on 02.01.2018 (now Cr.Case No 2/2018), and the FIR 4/2018 lodged at Vishrambagh police station on 08.01.2018 by Tushar Damgude, and all other related matters and allegations; or

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

16. Though the prayer seeking the appointment of a Special Investigating Team is sought to be introduced by way of an application for amendment, it is necessary to note that in the petition as it was originally filed, it has been stated that the object of the petition is not to stop an investigation but to ensure an independent and credible investigation. The relevant averment in that regard reads as follows:

“Petitioners are seriously concerned about the erosion of democratic values and are moving this Hon’ble Court not to stop investigation into allegations but to ensure independent and credible investigation by such persons as may be deemed fit under supervision of this Hon’ble Court. Anything short of this will damage the fabric of nation irreparably.” (emphasis supplied)

The application for amendment, does not, in other words, set up a new case but is intended to introduce a formal prayer on the basis of averments which have already been made in the petition as it was originally filed.

17. This Court, as a constitutional adjudicator, has been entrusted with the jurisdiction under Article 32 to secure the fundamental freedoms guaranteed by Part III of the Constitution. While the discipline of the

- A law of criminal procedure must at all times be kept in view, it cannot be gainsaid that the protection of fundamental liberties is a subject so integral to democratic constitutional values that technicalities should not be allowed to override the cause of substantive justice. The court must undoubtedly tread with circumspection for in the guise of seeking access to its wide jurisdiction under Article 32, the normal remedies under the criminal law should not be displaced. Again, as the court has repeatedly emphasised, public interest litigation should not become a weapon for settling political scores or of pursuing extraneous ends. In the present case, we have no manner of doubt that the initiation of the proceedings under Article 32 is not motivated by extraneous reasons. The law is not a respecter of social, economic or political status and every litigant who seeks access to justice has to be treated evenly. Here we have five citizens who have invoked the jurisdiction of this Court in extraordinary circumstances where they claim that a group of human rights activists has been targeted by the state police. Each of those five individuals has joined in these proceedings.

- D 18. Over the course of the last decade, the jurisdiction of this Court has evolved under Article 32 to order the constitution of a SIT. In **National Human Rights Commission v State of Gujarat**,<sup>11</sup> a SIT was constituted in a matter involving a serious element of communal disharmony. Further directions were issued by this Court for regular status reports to be filed by the SIT (**NHRC v State of Gujarat**<sup>12</sup>). In **Ram Jethmalani v Union of India**,<sup>13</sup> this Court observed that in several instances in the past, when the issues were of a complex nature, yet requiring the intervention of the Court, SITs were ordered to be constituted to enable the Court, the Union government and other organs of the state to fulfil their constitutional obligations. In **Common Cause v Union of India**,<sup>14</sup> the test for the constitution of a SIT was a prima facie abuse of power and authority by the Director of the Central Bureau of Investigation to scuttle an investigation and enquiries into coal block allocations. In **Sunita Devi v Union of India**,<sup>15</sup> an independent and impartial SIT was constituted where it was found that the investigation into the murder of a family was lackadaisical and the real culprits had not been put to trial.

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<sup>11</sup> (2009) 6 SCC 342

<sup>12</sup> (2009) 6 SCC 767

<sup>13</sup> (2011) 8 SCC 1

<sup>14</sup> (2017) 3 SCC 501

H <sup>15</sup> (2018) 3 SCC 664

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These instances indicate the diversity of settings in which this Court has ordered the constitution of SITs. Decisional flexibility in the exercise of this jurisdiction meets exigencies which arise in unforeseen situations, warranting the intervention of this Court under Article 142. While the Court does not determine the course of the investigation, it acts as a watchdog to ensure that a fair and impartial investigation takes place. A fair and independent investigation is crucial to the preservation of the rule of law and, in the ultimate analysis to liberty itself.

19. Mr Harish Salve, learned senior counsel appearing on behalf of the complainant, has sought to urge that a SIT has been constituted in cases where there is an allegation against the political class in power, so that the investigation is not derailed by those who are capable of intercepting it. Such a construction, in my view, would restrict the width and ambit of the jurisdiction which has advisedly been entrusted to this Court by the framers of the Constitution. The fact that in a particular case, a SIT was ordered to be constituted in a situation where there was an allegation of interference with the investigation by the political establishment is not a reason to confine the exercise of the jurisdiction only to such cases. In the rights discourse, violations of law and transgressions of human rights arise in myriad situations which it may be difficult to anticipate exhaustively. Prudently therefore, the jurisdiction under Article 32 is not hedged in by technicalities nor would it be wise to confine it to stated categories. The ultimate touchstone for the exercise of the jurisdiction is that a violation of the fundamental human freedoms relatable to the cardinal values of liberty, dignity and equality under Part III of the Constitution is in issue.

20. Besides the jurisdiction to order the constitution of a SIT, the proceedings of this Court are replete with instances where an investigation has been monitored under the authority of this Court. In **Vineet Narain v Union of India**,<sup>16</sup> this Court in the context of the widely publicised Jain Hawala transactions case ordered a court monitored investigation to ensure that government agencies discharged their duties and functions bearing in mind the tenets of equality and the rule of law. In doing so, this Court emphasised the need to retain public confidence in the process of investigation. In **Babubhai Jamnadas Patel v State of Gujarat**,<sup>17</sup> a two judge Bench, while noting that investigation

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<sup>16</sup> (1996) 2 SCC 199

<sup>17</sup> (2009) 9 SCC 610

A of offences is normally the function of the investigating agency emphasised that where extraordinary facts or situations are involved, it is the duty of the High Courts and of this Court to intervene to ensure that the rights of citizens are duly protected:

B “The courts, and in particular the High Courts and the Supreme Court, are the sentinels of justice and have been vested with extraordinary powers of judicial review and supervision to ensure that the rights of the citizens are duly protected.”

In **Centre for Public Interest Litigation v Union of India**,<sup>18</sup> a court monitored investigation was ordered in a public interest litigation which focused on the need for a thorough and impartial investigation into the 2G Spectrum scam. In **Bharati Tamang v Union of India**,<sup>19</sup> this Court held that in an appropriate case, or when exceptional circumstances have been made out, the jurisdiction under Article 32 can be exercised to constitute a SIT or to transfer the investigation to a Central Agency and monitor it, or even to order a de novo investigation into criminal cases.

21. With this body of precedent on the subject, the maintainability of a prayer for relief, seeking that the investigation should be either monitored by this Court or should be entrusted to an independent SIT under the directions of this Court cannot be in doubt. Though wide-ranging submissions have been urged before this Court on merits, it is necessary that the court must eschew a detailed or meticulous examination of the material produced by the ASG together with the case diary, particularly when the investigation is in progress. The expression of a finding by this Court would affect the administration of criminal justice or perhaps in a given case, even the rights of the accused. The observations of this Court must, therefore, be confined to assessing whether a case has been made out for the constitution of a SIT and matters having a bearing on that decision.

22. I must, at the outset, dwell on the fairness of the manner in which the police have approached this investigation. On 29 August 2018, this Court issued notices to the State of Maharashtra and to the others impleaded as respondents to the proceedings. Within a few hours of the conclusion of the court hearing, a press conference was held in Pune by

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<sup>18</sup> (2011) 1 SCC 560

H <sup>19</sup> (2013) 15 SCC 578



Shivarjirao Bodhke, the Joint Commissioner of Police proclaiming that the Pune police had more than sufficient evidence against the five individuals whose transit remand was stayed by this Court while ordering them to be placed under house arrest. This is disconcerting behaviour - the Joint Commissioner sought in this oblique manner to respond to the interim order of this Court by recourse to the electronic media. On 31 August 2018, a press conference was addressed by a team of senior police officers headed by Shri Parambir Singh, ADG (Law and Order), Maharashtra. During the course of the press conference letters (many of which should form part of the case diary) were selectively flashed and read out. According to the petitioners they were also leaked to the media. A video of the press conference is annexed in the form of a CD at Annexure R-2 of the rejoinder and has been uploaded on <https://www.youtube.com/watch?v=PCVKfstx2Qc>. On 1 September 2018 the ADG (Law and Order) appeared on a television programme titled "Truth v Hype" on NDTV, during the course of which he is stated to have agreed that the letters which had been read out by him were still undergoing forensic analysis together with the electronic devices. The CD of the programme is annexed as Annexure R-3 to the rejoinder. Besides this, the attention of the Court has been drawn to the fact that the first round of arrests in the present case took place on 6 June 2018. On 8 June 2018 an alleged letter was released by the police to the media a little before the proceedings for remand before the competent court (in the June arrests), alleging that the arrested persons were plotting to attack the Prime Minister. On 4 July 2018 when the arrested persons were to be produced before the Court in Pune, a letter attributed to Sudha Bhardwaj was sensationally telecast on a television channel linking her with the unlawful activities of certain groups. A serious grievance has been made about the fact that these letters have neither been placed before the Court of law nor did they find mention in the transit remand applications moved before the CJM, Faridabad by the Pune police.

23. In **Rajendran Chingaravelu v RK Mishra**,<sup>20</sup> this Court deprecated the tendency of the police to reveal details of an investigation to the media even before the completion of the investigation. This Court observed:

"21. But the appellant's grievance in regard to media being informed about the incident even before completion of

<sup>20</sup> (2010) 1 SCC 457

A investigation, is justified. There is growing tendency among  
investigating officers (either police or other departments) to  
inform the media, even before the completion of investigation,  
that they have caught a criminal or an offender. Such crude  
attempts to claim credit for imaginary investigational  
breakthroughs should be curbed. Even where a suspect  
B surrenders or a person required for questioning voluntarily  
appears, it is not uncommon for the Investigation Officers to  
represent to the media that the person was arrested with much  
effort after considerable investigation or a case. Similarly, when  
someone voluntarily declares the money he is carrying, media is  
C informed that huge cash which was not declared was discovered  
by their vigilant investigations and thorough checking. Premature  
disclosures or 'leakage' to the media in a pending investigation  
will not only jeopardise and impede further investigation, but many  
a time, allow the real culprit to escape from law..."  
(emphasis supplied)

D 24. This facet of the case of serious concern. The manner in  
which the Joint Commissioner of Police and the Additional Director  
General of Police (Law and Order), Maharashtra have selectively  
disclosed purported details of the investigation to the media and on  
television channels casts a cloud on the impartiality of the investigative  
E process. In its 2010 decision in **Rajendran** (supra) this Court was  
constrained to take note of this growing tendency on the part of  
investigating agencies. The use of the electronic media by the investigating  
arm of the State to influence public opinion during the pendency of an  
investigation subverts the fairness of the investigation. The police are  
F not adjudicators nor do they pronounce upon guilt. In the present case,  
police briefings to the media have become a source of manipulating  
public opinion by besmirching the reputations of individuals involved in  
the process of investigation. What follows is unfortunately a trial by the  
media. That the police should lend themselves to this process is a matter  
of grave concern. The investigation commenced as an enquiry into the  
G Bhima-Koregaon violence. The course of the investigation was sought  
to be deflected by alleging (in the course of the press briefings of the  
police) that there was a plot against the Prime Minister. Such an  
allegation is indeed of a serious order. Such allegations require responsible  
attention and cannot be bandied about by police officers in media briefings.  
H But during the course of the present hearing, no effort has been made

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by the ASG to submit that any such investigation is being conducted in regard to the five individuals. On the contrary, he fairly stated that there was no basis to link the five arrested individuals to any such alleged plot against the Prime Minister. Nor does the counter affidavit makes any averment to that effect. All this has certainly a bearing on the basic question as to whether the Maharashtra police can now be trusted to carry out an independent and impartial investigation.

25. During the course of the hearing, the learned ASG has assisted the Court by tendering the case diary and a compilation of documentary material. As a matter of prudence, the court must desist from advertng to the details contained in the compilation or in the case diary save and except for indicating broad reasons in the course of evaluating the reliefs which have been claimed. The counter affidavit, which has been filed by the State of Maharashtra makes it abundantly clear that the arrest of the five individuals (on 28 August 2018) was based on **“material gathered from others”**. This adverts to the material alleged to have been gathered in the course of the raids conducted against those individuals who were arrested in the months of June and July 2018. Paragraph 26 of the counter (which has been extracted earlier) states that this material **“clearly shows that they were involved”** in (i) selecting and incorporating cadres to go underground in the ‘struggle area; (ii) mobilising and distributing money; (iii) facilitating selection and purchase of arms; (iv) deciding the rates of such arms; and (v) suggesting the routes and ways of smuggling such arms into India for its onward distribution amongst the cadres.

26. Next, it is alleged that “some of them” (i) “have suggested training and laying of booby traps and directional mines”; and (ii) “are found to be providing strategic inputs in furtherance of the objective of armed rebellion” in pursuance of a strategic document of a banned terrorist organisation namely, the Communist Party of India (Maoist). With the assistance of the ASG I have carefully perused the compilation produced before the Court. Upon perusing the material, I find that the allegation that each of the five individuals arrested on 28 August 2018 is found to be engaged in activities of the nature set out in paragraph 26 of the counter affidavit (extracted above) is taking liberties with the truth. General allegations against the philosophy of a banned organisation, its policies and the modalities followed in the execution of its unlawful activities constitute one thing. Linking this to specific activities of named

- A individuals is a distinct matter. At this stage, it is necessary to note the submission which has been urged in regard to an undated letter of Sudha Bhardwaj to Comrade Prakash which was also allegedly distributed to the media. There is a serious bone of contention in regard to the authenticity of the letter which, besides being undated, does not contain any details including the e-mail header. A statement has been handed over the court in support of the submission that the letter is an obvious fabrication made by a Marathi speaking person because in as many as 17 places, it contains references to words scribed in Devanagari, using forms peculiar to Marathi. It has been urged that Sudha Bhardwaj who does not belong to Maharashtra and is not Marathi speaking, could not possibly have written a letter in Devanagari utilising essentially Marathi forms of grammar or address. We need not delve into these aspects at this stage, since they are matters for a fair investigation.

27. One of the circumstances which must certainly bear upon the fairness and impartiality of the process which has been followed by the investigating agency is in regard to the importation of two panch witnesses from Pune, when the arrests were carried out. Section 41B of Code of Criminal Procedure emphasises the importance of an independent witness while making an arrest. Section 41B of the Code provides as follows:

**“Every police officer while making an arrest shall-**

- E (a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;
- (b) prepare a memorandum of arrest which shall be-**
- F **(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;**
- (ii) countersigned by the person arrested; and
- (c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.”
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(emphasis supplied)

The two panch witnesses in the present case are employees of the Pune Municipal Corporation. It is not disputed before this Court that they travelled as part of the police team which made the arrest.

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28. It was in **DK Basu v State of West Bengal**,<sup>21</sup> that this Court A  
laid down requirements to be followed in all cases of arrest, which  
included the following:

“(2) That the police officer carrying out the arrest of the arrestee  
shall prepare a memo of arrest at the time of arrest and such  
memo shall be attested by at least one witness, who may either B  
be a member of the family of the arrestee of a respectable person  
of the locality from where the arrest is made. It shall also be  
countersigned by the arrestee and shall contain the time and  
date of arrest.”

This Court observed that the requirements it had enunciated emanated C  
from Articles 21 and 22(1) of the Constitution and “need to be strictly  
followed” failing which action for contempt of court would be initiated.

29. There is a serious allegation that the arrests have been  
motivated by an attempt to quell dissent and to persecute five individuals  
who have pursued the cause of persons who have suffered discrimination D  
and human rights violations. In approaching the present case, the Court  
must be mindful of the need not to thwart a criminal investigation leading  
to the detection of unlawful acts. Equally, the Court has to be vigilant in  
the exercise of its jurisdiction under Article 32 to ensure that liberty is  
not sacrificed at the altar of conjectures. Individuals who assert causes E  
which may be unpopular to the echelons of power are yet entitled to the  
freedoms which are guaranteed by the Constitution. Dissent is a symbol  
of a vibrant democracy. Voices in opposition cannot be muzzled by  
persecuting those who take up unpopular causes. Where, however, the  
expression of dissent enters upon the prohibited field of an incitement to  
violence or the subversion of a democratically elected government by F  
recourse to unlawful means, the dissent ceases to be a mere expression  
of opinion. Unlawful activities which violate the law have to be dealt  
with in accordance with it. In the background which has been adverted  
to earlier, it would be blasé to accept the submission that the investigation  
by the police should be allowed to proceed without a safeguard for G  
ensuring the impartiality and independence of the investigative agency.  
The conduct of the Pune police in utilising the agency of the electronic  
media to cast aspersions on those under investigation fortifies the need  
for an investigation which is fair. When the Joint Commissioner of Police

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<sup>21</sup> (1997) 1 SCC 416

- A and the Additional Director General of Police cast aspersions in the public media against persons whose conduct is still under investigation, and in disregard of proceedings pending before a judicial forum, it is the duty and obligation of this Court to ensure that the administration of criminal justice is not derailed. I make it absolutely clear that nothing in this order shall be construed as any observation on the merits of the investigation which is to take place. The purpose of the direction which I propose to give is to ensure that the basic entitlement of every citizen who is faced with allegations of criminal wrongdoing, is that the investigative process should be fair. This is an integral component of the guarantee against arbitrariness under Article 14 and of the right to life and personal liberty under Article 21. If this Court were not to stand by the principles which we have formulated, we may witness a soulful requiem to liberty.
- B
- C

30. The judgment of the majority has relied on certain decisions to hold that such a petition as in the present case is not maintainable and the prayer for the constitution of SIT at the behest of the five individuals under investigation cannot be entertained. In **Narmada Bai v State of Gujarat**,<sup>22</sup> the petitioner filed a writ petition under Article 32 for issuance of a writ directing the CBI to register a FIR in a case pertaining to an alleged fake encounter in which her son was killed. The key issue was whether after filing of the charge-sheet by the state investigative agency, this Court was precluded from appointing an independent specialised agency like the CBI to go into the same issues, if the earlier investigation was not done in accordance with the established procedure. The factual determination to be carried out was whether the petitioner had made out a case for entrusting the investigation to the CBI.
- D
- E

- F 31. While this Court observed that “It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency” and that “the accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them”, the Court also observed that there were “large and various discrepancies” in the reports and the investigation conducted by the police authorities of the State of Gujarat and that the charge-sheet filed by the state investigating agency could not be “said to have run in a proper direction.” A two judge Bench of this Court concluded that even though
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<sup>22</sup> (2011) 5 SCC 79

the charge-sheet had been filed, in view of the circumstances brought to the notice of the Court, the involvement of the police officials of the State of Gujarat in the investigation was “undesirable”. Thus, “to meet the ends of justice and in the public interest”, the CBI was directed to take charge of the investigation. A

32. This case supports my view that in the interest of justice, and particularly when there are serious doubts regarding the investigation being carried out, it is not only permissible, but our constitutional duty to ensure that the investigation is carried out by a special investigation team or a special investigative agency so that justice is not compromised. B

33. In **Sanjiv Rajendra Bhatt v Union of India**,<sup>23</sup> the petitioner, who was an IPS officer filed a plea before this Court seeking the appointment of a SIT, to probe into two FIRs filed against him by the Gujarat Police. On the facts of the case, it was held that the nature of the case relating to an allegedly false affidavit and the alleged hacking of an email account were not of such wide amplitude so as to warrant the constitution of a SIT. The Court also observed that the petitioner had not come to the Court with clean hands and that no relief could be granted to an individual who came to the Court with “unclean hands.” These facts were the distinguishing feature. I have previously discussed the established precedents of this Court which indicate the circumstances in which this Court can constitute a SIT. C D E

34. In **E Sivakumar v Union of India**,<sup>24</sup> the petitioner was named in an FIR which was being investigated in regard to the illegal manufacture and sale of pan masala and gutkha containing tobacco and/or nicotine. The petitioner challenged the decision of the High Court to transfer the investigation of the criminal case to the Central Bureau of Investigation. One of us (Khanwilkar, J.) who authored the judgment on behalf of this Bench held: F

“The High Court has cogitated over all the issues exhaustively and being fully satisfied about the necessity to ensure fair investigation of the crime in question, justly issued a writ of mandamus to transfer the investigation to the CBI.”<sup>25</sup> G

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<sup>23</sup> (2016) 1 SCC 1

<sup>24</sup> (2018) 7 SCC 365

<sup>25</sup> Ibid, at para 5

A The judgment of the High Court was upheld on the following ground:

“... the question regarding the necessity to ensure a fair and impartial investigation of the crime, whose tentacles were not limited to the State of Tamil Nadu but transcended beyond to other States and may be overseas besides involving high ranking officials of the State as well as the Central Government, has now been directly answered. For instilling confidence in the minds of the victims as well as the public at large, the High Court predicated that it was but necessary to entrust the investigation of such a crime to CBI. Viewed thus, there is no infirmity in the conclusion reached by the High Court in the impugned judgment, for having entrusted the investigation to CBI.”<sup>26</sup>

Drawing attention to the duty of this Court as adjudicator, it was also observed:

D “It is the bounden duty of a court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative... If a grave suspicion arises with regard to the investigation, should a constitutional court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it?... ”<sup>27</sup>

(emphasis supplied).

The above observations are a significant reminder of the function of this Court, as the protector of the fundamental rights of citizens. These rights must be safeguarded particularly when there is a possibility that failure to take a position may lead to a denial of justice.

G 35. The case of **Divine Retreat Centre v State of Kerala**<sup>28</sup> concerned with the maintainability of an anonymous petition to a judge of the High Court seeking a direction for an investigation. The anonymous petition was taken up suo motu by the High Court under Section 482 of the Code of Criminal Procedure and the investigation of the criminal case was directed to be taken away from the investigating officer and

<sup>26</sup> Ibid, at para 9

<sup>27</sup> Ibid, at para 13

H <sup>28</sup> (2008) 3 SCC 542



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entrusted to a SIT. The central question in this case was the scope of the inherent power conferred on the High Court under Section 482 of the Code of Criminal Procedure. It was held that:

“The High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint any agency of its own choice to investigate a crime on whatsoever basis and more particularly on the basis of anonymous petitions addressed to a named Judge. Such communications cannot be converted into suo motu proceedings for setting the law in motion. Neither the accused nor the complainant or informant is entitled to choose its own investigating agency to investigate a crime in which it may be interested.” (emphasis supplied)

The Court in the context of Article 226 commented on the maintainability of public interest litigation as follows:

“It is well settled that a public interest litigation can be entertained by the constitutional courts only at the instance of a bona fide litigant. The Supreme Court has uniformly and consistently held that the individual who moves the Court for judicial redress in cases of public interest litigation must be acting bona fide with a view to vindicating the cause of justice and not for any personal gain or private profit or of the political motivation or other oblique consideration...”<sup>29</sup>

It was also observed that:

“the High Court in exercise of its whatsoever jurisdiction cannot direct investigation by constituting a special investigation team on the strength of anonymous petitions.”<sup>30</sup>

36. These observations indicate that what found disfavour with this Court was the High Court having entertained an anonymous petition to constitute a SIT. The facts of the above case are distinct from the case at hand. The observations made on the maintainability of public interest litigation only lend support to the present case. The petitioners in the present case are not anonymous. There has been no argument that the petitioners have been motivated by personal gain or political considerations.

<sup>29</sup> Ibid, at para 59

<sup>30</sup> Ibid, at para 50

A 37. Recently on 14 September 2018, the learned Chief Justice, speaking for the present bench of three Judges handed down a verdict<sup>31</sup> granting compensation of Rs 50 lakhs to a space scientist who was found upon further investigation by the CBI to have been wrongfully implicated and subjected to custodial interrogation. This was on an allegation that he had leaked out official secrets of the Indian Space Research Organisation. The learned Chief Justice held:

B “...there can be no scintilla of doubt that the appellant, a successful scientist having national reputation, has been compelled to undergo immense humiliation. The lackadaisical attitude of the State police to arrest anyone and put him in police custody has made the appellant to suffer the ignominy. The dignity of a person gets shocked when psycho-pathological treatment is meted out to him. A human being cries for justice when he feels that the insensible act has crucified his self-respect. That warrants grant of compensation under the public law remedy. We are absolutely conscious that a civil suit has been filed for grant of compensation. That will not debar the constitutional court to grant compensation taking recourse to public law. The Court cannot lose sight of the wrongful imprisonment, malicious prosecution, the humiliation and the defamation faced by the appellant.”

D The fact that the payment of compensation was ordered nearly 24 years after the wrongful arrest is a grim reminder about how tenuous liberty can be and of the difficulty in correcting wrongs occasioned by unlawful arrest.

E 38. There can be no manner of doubt that the deprivation of human rights seriously impinges upon the dignity of the individual for which even compensation may not constitute an adequate recompense. This theme echoes recurrently in the judgments of this Court in **Kiran Bedi v Committee of Inquiry**,<sup>32</sup> **Delhi Judicial Service Association v State of Gujarat**,<sup>33</sup> **Joginder Kumar v State of UP**<sup>34</sup> and **DK Basu v State of West Bengal**<sup>35</sup>. In **DK Basu**, this Court elucidated on the importance of personal liberty in the constitutional scheme:

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<sup>31</sup> S Nambi Narayanan v Siby Mathews, (2018) 11 SCALE 171

<sup>32</sup> (1989) 1 SCC 494

<sup>33</sup> (1991) 4 SCC 406

<sup>34</sup> (1994) 4 SCC 260

H <sup>35</sup> (1997) 1 SCC 416

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“17. Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides “no person shall be deprived of his life or personal liberty except according to procedure established by law”. Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression “life or personal liberty” has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries.”

The Court also emphasized that no arrest can be made without reasonable satisfaction after investigation about the genuineness and bona fides of a complaint:

“20. This Court in *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined:

“No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. ... No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.””

39. This Court has a constitutional obligation, where its attention has been drawn, in a case such as the present, to a real likelihood of the derailment of a fair investigative process to issue appropriate directions under Article 142 of the Constitution.

40. Hence, I am of the view that while the investigation should not be thwarted, this is a proper case for the appointment of a Special Investigating Team. Circumstances have been drawn to our notice to cast a cloud on whether the Maharashtra police has in the present case acted as fair and impartial investigating agency. Sufficient material has been placed before the Court bearing on the need to have an independent investigation.

41. Hence, following the line of precedent of this Court which has been discussed earlier, I am firmly of the view that a Special Investigating

- A Team must be appointed. The investigation shall be monitored by this Court. The Special Investigating Team shall submit periodical status reports to this Court, initially on a monthly basis.<sup>36</sup> The interim order passed by this Court on 29 August 2018 shall continue to hold the field for a further period of three weeks within which it would be open to the said five individuals or any one or more of them to apply for bail before the Court of competent jurisdiction. I would direct that the petition be listed after three days for orders on the constitution of the Special Investigating Team. There shall be an order in these terms.
- B

Divya Pandey

Petition disposed of.

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<sup>36</sup> Speaking as I do for the minority, I have not indicated the names of the personnel who would constitute the SIT. Should that occasion arise, liberty is granted to seek an appropriate direction from this Court.