

IN THE SUPREME COURT OF INDIA  
ORIGINAL CRIMINAL JURISDICTION  
**CRL.M.P. NO. 19816 OF 2009**  
IN  
WRIT PETITION (CRL) NO.37-52/2002

IN THE MATTER OF:

DEVENDRA BHAI PATHAK AND ORS.

PETITIONERS

VERSUS

STATE OF GUJARAT AND ORS.

RESPONDENTS

**PAPER BOOK**

**WITH**

**CRL.M.P. NO. 19816 OF 2009: AN APPLICATION FOR DIRECTIONS**

**(FOR DETAILED INDEX: KINDLY SEE INSIDE)**

**ADVOCATE FOR THE PETITIONERS/APPLICANTS: APARNA BHAT**

**INDEX**

<b>Sl.No.</b>	<b>Particulars</b>	<b>Page No.</b>
1.	An application for directions along with Affidavit	1- 26
2.	<b>Annexure A</b> Letter dated 24.11.2008 letter to SIT Chairperson urging that 164 statements of witnesses be recorded	27-32

<b>3.</b>	<b>Annexure B</b> Letter from S Sattar Juzara dated June 30, 2009 and defence advocate A Hassan dated August 15, 2009 stating facts about SP Mothaliya's conduct related to the Godhra trial	<b>33-37</b>
<b>4.</b>	<b>Annexure C</b> Order dated Sept 7, 2009 passed by the Special Judge in Gulberg Trial	<b>38-45</b>
<b>5.</b>	<b>Annexure D</b> True copy of statement under section 161 Cr.P.C. and Evidence of Police Witnesses (Gulberg society) who turned hostile	<b>46-60</b>
<b>6.</b>	<b>Annexure E</b> True copy of the newspaper report in relation to Witnesses in the British nationals case turning hostile	<b>61-67</b>
<b>7.</b>	<b>Annexure F</b> Communication between CJP and SIT on detailed witness protection programme for key eyewitnesses dated May 2009 and thereafter (reminder) on September 2009 and SIT's response	<b>68-96</b>
<b>8.</b>	<b>Annexure G</b> Order in the Naroda Gam trial dated October 7, 2009 case refusing victims representation	<b>97-107</b>

IN THE SUPREME COURT OF INDIA  
ORIGINAL CRIMINAL JURISDICTION  
**CRL.M.P. NO. 19816 OF 2009**  
IN  
WRIT PETITION (CRL) NO.37-52/2002

IN THE MATTER OF:

DEVENDRA BHAI PATHAK AND ORS.

PETITIONERS

VERSUS

STATE OF GUJARAT AND ORS.

RESPONDENTS

AN APPLICATION FOR DIRECTIONS.

TO

THE HON'BLE CHIEF JUSTICE OF  
INDIA AND HIS LORDSHIP'S COMPANION  
JUSTICES OF THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF  
THE PETITIONER ABOVENAMED:

MOST RESPECTFULLY SHOWETH:

1. That the aforesaid petition was filed before this Hon'ble court under article 32 of the Constitution of India following the communal violence in the State of Gujarat. The petition primarily expressed dis-satisfaction about the manner of investigation in a few critical cases and sought transfer of the investigation. In a separate set of Petitions which are led by the Petition filed by the National Human Rights Commission, transfer of the trials were sought as it was found that the Gujarat State was not conducive to conduct these critical trials where serious allegations of State complicity was brought out.
2. That this petition is being heard alongwith the petitions filed by the National Human Rights Commission (Writ Petition (Crl) No.109 of 2003 and Transfer Petition (Crl) No. 194-202 of 2003 & 326-329 of 2003.
3. That on March 26, 2008 this Hon'ble Court was pleased to appoint a Special Investigation Team to look into the cases in which extremely serious violations had taken place. The team (SIT) comprises of a retired police officer and other serving officers. Three of these retired officers are from outside the state and three others from within the Gujarat police and all the names were suggested by the respondent state government. This team is assisted by local officers of the Gujarat Police.
4. That at the time of appointment of the SIT, this Hon'ble Court had held that

*“After having heard learned counsel for the parties, we feel that considering the sensitive nature of the cases involved, appointment of a Special Investigation Team (in short 'SIT') is warranted. Communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by rule of law. The Constitution of India, in its preamble refers to secularism. Religious fanatics really do not belong to any religion. They are no better than terrorists who kill innocent people for no rhyme or*

*reason in a society which as noted above is governed by rule of law.*

*These are cases where there is an element of communal disharmony, which is not to be countenanced. The State of Gujarat has stated that it has no objection if further investigation is done so that peoples' faith on the transparency of action taken by the State is fortified.*

*Mr. Mukul Rohtagi, learned senior counsel appearing for the State stated that the State's approach is fair and it is not interested in shielding any culprit or a guilty person, but on the other hand, would like all those who are guilty, to be punished. This statement of Mr. Rohtagi is not accepted by some of the learned counsel appearing for the alleged victims. We need not go into that aspect, in view of the fact that there is an agreement that there is need for a Special Investigation Team. We, therefore, direct that an appropriate notification shall be issued by the State Government regarding the creation of SIT, the constitution of which shall be as follows.:-*

- 1. Shri R.K. Raghavan, retd. Director of the CBI.*
- 2. Shri C.B. Satpathy, retd. DG, Director, Uttar Pradesh,  
Police College, Moradabad*
- 3. Ms. Geeta Johri*
- 4. Shri Shivanand Jha*
- 5. Shri Ashish Bhatia*

*The notification by the State be issued as early as practicable, preferably within ten days.*

*Officers at SI Nos. 3 to 5 are IG rank officers. Shri Raghavan will be the chairman of the committee and Ms. Geeta Johri shall be the convener. The committee shall in its first meeting work out the modalities to be adopted for the purpose of enquiry/investigation. If any person wants to make statement before the SIT for giving his*

*or her version of the alleged incidents, the SIT shall record it. Those who want to give their version shall in writing intimate the convenor of the committee so that the SIT can call him or her for the purpose of recording his/her statement. It is needless to say that the SIT shall not confine the investigation by recording statement of those who come forward to give his or her version and shall be free to make such inquiries/investigation as felt necessary by it. The State Government shall provide necessary infrastructure and provide resources for effective working of the SIT. The report of the SIT shall be furnished to this Court in a sealed cover after completion of the inquiry/investigation for which three months time is granted. After the report is submitted, the further action required to be taken shall be dealt with by this Court. The SIT shall conduct inquiries/investigations including further investigation in the following cases:-*

*I. GODHRA*

*FIR NO.09/2002 DATED 27.2.2002:*

- i) CR NOS.1-6/2002 titled Mohd Rafudan Ansari & Ors.*
- ii) CR NOS.09/2002 titled State Vs. Junia Farooq Hassaan & Ors. pending in Juvenile court*

*II. SARDARURA, MEHSANA*

*CR Nos. 275/2002 arising out of FIR No.46/2002 dated 28.2.2002 of police station Bijapur, Mehsana*

*III. GULBERG SOCIETY, MEGHANINAGAR AHMEDABAD*

*CR Nos.67/2002 at Meghaninagar Police Station*

- i) Sessions Case No.152/2002 titled State V/s. Kailash Lalchand Dhobhi & Ors.*
- ii) Criminal Case No.1720/2002 titled State V/s. Shankarji Hakaji Mali pending Metro Magistrate court, Ahmedabad*
- iii) Criminal Case No.296/2003 titled State V. Sandeep pending in the Metropolitan Magistrate court, Ahmedabad*

*iv) Criminal Case No.524/2002 titled State V. Vishal Badrilal  
Nayee & Ors. pending in the Junenile court, Ahmedabad*

#### *IV. NARODA PATIYA*

*Arising out of FIR No.100/2002 dated 28.2.2002 of PS  
Naroda, Ahmedabad*

- i) CR No.982/2002 titled State v. Naresh Chahra pending in  
MM Court, Ahmedabad*
- ii) CR No.1662/2002 titled State V. Padmendra Singh & Ors.*

#### *V. ODE ANAND DISTRICT*

*Cr.Nos.23/2002 and 27/2002 (Ode Massacre). Leave was  
granted to petitioners, CJP, to amend petition to include  
these Session Trials. Trials were stayed.*

#### *VI. NARODA GAON*

*Inadvertently left out. CJP filed a TP(Crl.)No.233/2004  
and trial was stayed on 23.8.2004.*

*VII. W.P.No.284/2003 TP(Crl.)No.43/2004 Imran Dawood Vs.  
Union of India.*

*So far as SLP (Crl.)No.4409/2003 and Writ Petition (Crl.) 216/2003 are  
concerned, though it is pointed out by learned counsel by the State of  
Gujarat that the trial is at concluding stage, in view of the orders passed in  
the other cases, we feel it would be appropriate if the inquiry/investigation  
including further investigation is done, in this case also. The relevant case  
No. is FIR 60/02 commonly known as 'Deepda Darwaza'. So far as Writ  
Petition(Crl.)No.284/03 and T.P.(Crl.)43/2004 are concerned, the case is  
commonly known as 'British Nationals Case' and relates to Himmat Nagar,  
Prantij P.S district Sabarkantha and relates to FIR 1/26/2002.*

*We make it clear that SIT shall be free to work out the modalities and  
the norms required to be followed for the purpose of inquiry/investigation  
including further investigation. Needless to say the sole object of the*

*Criminal Justice System is to ensure that a person who is guilty of an offence is punished.*

*Mr. K.T.S. Tulsi, learned senior counsel had submitted that in some cases the alleged victims themselves say that wrong persons have been included by the police officials as accused and the real culprits are sheltered. He, therefore, suggested that trial should go on, notwithstanding the inquiry/investigation including further investigation as directed by us. We find that the course would not be appropriate because if the trial continues and fresh evidence/materials surface, it would require almost a de novo trial which would be not desirable.*

*These matters shall be listed for further directions in the last week of August, 2008.*

*The pleadings in all these matters be completed within a period of three months.”*

5. In an independent petition filed by one of the victims, Smt.Zakia Jafri and Citizens for Justice and Peace (SLP (CrI.) No. 1088/2008), this Hon'ble Court on April 27, 2009 was pleased to direct the same SIT to investigate into a serious complaint of mass murder and criminal conspiracy against the chief minister of the state and 61 others including cabinet ministers, administrators and policemen. It was after the ruling of this Hon'ble Court that SIT got two officers from outside inducted into the team.
6. That at present, seven of the eight trials could be said to be underway (the eighth about to begin) and certain developments therein need to be expressly put on record as there are serious concerns about the manner in which these trials are proceeding despite the presence and supervision of the SIT.
7. Despite the functioning of the SIT, some disturbing events have taken place which has necessitated the filing of the present application. These are:
  - a. The SIT refusing to look into key aspects related to further investigation especially aspects dealing with malafide intentions and complicity of state actors which were finally

directed by the sessions Court conducting the trial on the application filed by the victims;

b. Police witnesses, directly working with the SIT, turning hostile to the shock of the trial court which had observations about their conduct after they were declared hostile;

c. Witnesses turning hostile, the SIT not ensuring adequate insulation and safety and not taking any action against the same.

8. It is submitted that the Petitioners, another Citizens' group, Citizens for Justice and Peace and the victims have co-operated fully with the SIT, appeared before them and also have been in regular correspondence with the SIT bringing to the notice of the SIT all the facts which are relevant to the trials including previous incidents and the role played by the State officials. On many occasions requests have also been made to investigate into certain issues that are critical for the trials. The SIT initially was co-operative. However, in the past few months, they have become surprisingly tardy and not responsive to any request made which has forced the victims to approach the Court directly.

9. The problems that are being brought to the notice of this Hon'ble Court are in the following categories.

- a. Problems with investigation;
- b. Problems with the SIT members and the roles that are being played by them;
- c. Problems with the prosecutors and the Courts in some cases.

10. That it is submitted at the outset that within days of the Special Investigation Team (SIT) being constituted by this Hon'ble Court, on May 9, 2008, after being summoned by the SIT, the Petitioner no. 6 herein appeared before the Team on behalf of the victims of the riots, submitted a detailed statement, that contained issues and pointers on re-investigation related to:

- a) each of the specific cases;
- b) elements of wider conspiracy and pre-planning by powerful actors in the state administration.



In addition to that, all documents comprising of pleadings before the various courts relating to the trials were also submitted. Electronic versions of the same were also supplied at the request of the SIT. The Chairperson of the SIT also requested the said Petitioner to tabulate in detail the issues for re-investigation vis a vis each case and each and every allegation being made. This was also done and duly submitted to SIT on May 29, 2008. A true copy of the statements both on May 9, 2008 and again in detail on May 29, 2008, submitted to the SIT is being filed in a separate volume. However, despite this support and regular statements given by the victims to the SIT, the re-investigation/further investigation conducted by SIT set up by this Hon'ble Court with a historic mandate has been superficial and peripheral with no substantial improvements being made on earlier charge-sheets filed by the Gujarat police. A detailed analysis on each case indicating the status prior to SIT and status after the appointment of SIT are being filed as Volume 2.

11. It is submitted that in addition to the above, as early as November 24, 2008, the Petitioner no. 6 herein, through a Citizens' organization, Citizens for Justice and Peace had written to the Chairman of the SIT that keeping in mind the manner in which the trials have gone ahead in the past and the witnesses have conducted themselves due to pressure and other factors, it was important to get the statements of the witnesses recorded under Section 164 of the Code of Criminal Procedure so as to strengthen the cases. However, this was not done. Annexed hereto and marked **Annexure A** is a true copy of the said communication.
  
13. The Petitioners will deal with the manner in which investigation is not being conducted properly while substantiating each assertion with support of documents.

#### **i. The Godhra Trial**

In the Godhra Train Burning Case, SIT has fully endorsed the theory put forward through the earlier investigations by the Gujarat police and has not probed at all into the revelations made through *Tehelka magazine's Operation Kalank*. In this sting operation witnesses have stated on camera that they have been bribed by the Gujarat police to speak in favour of the "conspiracy" theory of the Gujarat police. Whatever the facts of the matter, given the sensitivities involved in the case, the SIT ought to have investigated it thoroughly and not leave it unexplored. Initially Shri Noel Parmar, a police officer accused of complicity was given several extensions even after retirement from the Gujarat police and was continued by SIT and removed only after an uproar in the media. The special PP

in this matter has been defending the state of Gujarat's conspiracy theory as Special PP since almost the start of the trial and SIT has not seen fit to replace him even in the interests of transparency.

On June 30, 2009 and then again on August 15, 2009 the role of SP Panchmahals, Shri.Mothaliya was brought to the applicants' attention, first through a letter by the son of one of the accused Shoeb Sattar Juzara and thereafter through senior Defence Counsel Advocate A Hassan appearing before the Hon'ble Trial Court. Both communications annexed hereto and marked as **Annexure B** suggest that SP Panchnamhas Motahliya was in fact keeping witnesses to ransom hostage and thereby trying to influence testimonies. In fact advocate Hasan had objected to his presence in the court during trial because as an investigating officer, he cannot remain present in the court room when evidence is being recorded.

#### **ii. Gulberg Trial:**

- a) failure to investigate, interrogate and produce before the court critical documentary evidence such as print outs of mobile phones of police officers, message books and wireless message books of Meghaninagar police station and the city control room, log books and inward telephone register;
- b) failure to interrogate senior police officers higher than the PI Erda, for example joint commissioner MK Tandon, and even CP PC Pandey (arraigned as accused on serious allegations of destruction of evidence (burning bodies to an unrecognizable state, thereby abetting the criminals);
- c) failure to investigate the failure of the Fire Brigade that did not arrive at the scene of crime, in the heart of Ahmedabad city for three days after the incident;
- d) Failure to complete investigations related to the sting operation by witness 481, Ashish Khaitan of *Tehelka* that includes a failure to check the mobile phone records of accused named in the sting operation and reluctance to obtain original equipment to prove the evidence;
- e) Failure of SIT to produce the video-graph of the scene of crime until the witnesses made an application for the same before the Trial Court; (after which it has been produced in a sealed cover)
- f) deliberate lapse in investigating the circumstance behind the vanishing phone record of former parliamentarian Ahsan Jafri who is reported to have made close to 200 distress phone calls for help;
- g) failure to prepare an effective site map of the scene of attack;

h) failure to investigate or produce the log books of individual police officers assigned on duty, the Meghaninagar station diary among other lapses.

The victims made an application to the Hon'ble Court and the Hon'ble Court found merit in the application of the victims and ordered further investigation in the matter as per the request of the victims. Annexed hereto and marked **Annexure- C** is a true copy of the order passed on the applications for re-investigation under 173(8) submitted by victims' advocates before the trial courts. This order was passed on September 7, 2009 and the Judge hearing the case ordered re-investigation on key points argued by victims' advocates including obvious lacuna by SIT in investigating documentary evidence like station diary and inward registry entries of the local and city police stations, fire brigade records as also telephones of key accused in the massacre.

On October 5, 2009, a police witness in the Gulberg society case, Babubhai Pandor was declared hostile retracting from his earlier statements under section 161 Cr.P.C. made in 2002 and then before SIT. The Judge while declaring him hostile stated "that it was pointed out that here is a policeman, a government employee and public servant turning hostile and this fact has been noted." A true copy of the evidence recorded that contains this observation by the Judge is annexed hereto and marked **Annexure D**.

### **iii. Sardarpura Trial**

- a) Key witnesses appear to have deliberately not been examined by SIT. These include Head Constable Devjibhai (P.S.O. Vijapur) at the time of incident (At the most critical time while the incident was taking place in Sardarpura village, from 8 p.m. of the night of 1.3.2002 till the morning of 2.3.2002) PSO HC Devjibhai's presence required that his statement be recorded which has not been done; (2) V.H.F. Operator Babubhai (Wireless operator from the police who would be aware of all wireless calls and records has not been examined by SIT); (3) Jamaben Harchandji Thakor (Munsafkhan Khan stated in his statement before SIT that this Jamaben, resident of Sardarpura that a meeting of Patels had taken place in the village and hence big trouble and violence will happen); (4) Mansuri Nisar Ahmed Gulamnabi (Munsafkhan stated in his SIT statement that he had contacted Mansuri resident of Nisarg society Ahmedabad when the attacks started that night after 9.30 p.m. who had repeatedly contacted DGP Control Gandhinagar and Mehsana too for help from his mobile phone and yet his statement has not been not recorded by SIT);
- b) SIT has been tardy and superficial in obtaining key documentary evidence related to the crime at the time. For instance, SIT has not obtained the mobile call records or details of calls of PSI Rathod and PSI Parmar between 28.2.2002 and 2.3.2002;
- c) Police witnesses according to the chargesheet are PSI ML Rathod, Nayab Police officer, Visnagar division Bachuba Vesalji, DSP Mehsana, Anupamsingh Gahlot, PI

Vijapur, KR Vaghela PSI Vijapur, GK Parmar and PSI BD Gohil. From the witness statements it appears that these officers roaming around in the police wireless vans were constantly in touch with each other on the wireless. However there are no corresponding message books in the charge-sheets nor has SIT thought it fit during its investigations to inquire into whether their presence and movements is borne out in the records;

d ) It is apparent from the chargesheet filed by SIT and statements of witnesses MunsafkhanYasinkhan Pathan and police witness GK Parmar that witness Munsafkhan made innumerable phone calls from his own landline number 32328 and the mobile numbers of Nisar Ahmed Gulamnabi appealing for help from the police for the attacks on Muslims, for increased police protection and timely action. These phone calls were made from 8 p.m. of 1.3.2002 until 4 a.m. of 2.3.2002 to both the Vijapur police station and state Control room. Yet in the re-investigation, SIT has simply not bothered to investigate these distress calls, not recorded any statements in connection with these innumerable calls, not collected investigated or produced any telephone call records of the relevant time period, not produced the telephone *vardi* book or telephone incoming register. No statements have been recorded in this connection;

e) It appears clearly from the investigation papers that without panchnamas being carried out and recorded, bodies of the dead victims were removed from the spot. SIT has simply not bothered to investigate this major procedural lapse. Key documentary evidence is also absent from the SIT investigation papers;

f) The case papers in this case and the witness statement of Firojabano Bachumiya suggest that iron rods with an electric current were forced and suspended into the home of Mehmoodmiya where women, old men and children had fled to take shelter. These statements say that the electric connection was taken from an electric pole near the home of Nathubhai Karsanbhai but nothing in the SIT investigation has explored this aspect of the crime.

#### **iv. Naroda Patia Trial & Naroda Gam Trials**

a) Fifteen witnesses in their statements both before SIT and made earlier, at the minimum have named accused number one Babu Bajrangji Patel as not just accused but leader of the mob, mastermind etc. He is a key person behind the massacre that let to 95 (non official figures state 110) persons being slaughtered. Despite this evidence against him SIT has not sought to move the courts for cancellation of his bail and he is free, enjoys the special patronage of the Gujarat chief minister and is in every position to tamper with investigations and intimidate witnesses and victims;

b) Suresh Langda Richard Chara, another accused named by as many as 53 witnesses as also an accused figuring on a self-confession of heinous crimes in *Tehelka's*

*Operation Kalank* for murder rape and ghastly crimes similarly has not sought to be re-arrested by SIT;

c) Similarly while SIT has arraigned second PI from the Naroda police station as accused, despite crucial criminal lapse being attributed by half a dozen witnesses to first PI KK Mysorewala (after 2002 promoted to rank of SP) no moves have been made to charge him until recently when some witnesses who were attacked allegedly at the behest of Smt. Maya Kodnani complained of this lapse to SIT;

d) Similarly names of other powerful and influential accused from among the state apparatus have been ignored by SIT;

e) the entire procedure for arrest of minister Maya Kodnani after "notice" was served on her allowing her time to go underground while attending official duties and failure of SIT to investigate any further during her and Dr Jaideep Patel's remand period has also raised questions about SIT's investigations.

There are three other key trials which are being supervised by the SIT. The Petitioners in this case have been assisting victims in one of those trials that is arising out of the Odh incident. The Petitioners are not able to analyse its status as the Sessions Court has rejected their application to get a copy of the report/charge sheet filed by the SIT.

17. The sensitivity of the re-investigation and further investigation that SIT was mandated to go into involved *inter alia* looking into whether or not serious allegation of malafide and bias in the investigations by the Gujarat police could be substantiated. For this to happen, officers with unimpeachable independence and integrity would need to scrutinize the evidence and thereafter gather further evidence. Before the Special Investigation Team was constituted the intervenors/petitioners by way of an application in the Transfer Petition filed by the National Human Rights Commission had raised their doubts about the officers suggested on 25.3.2008 by the State of Gujarat and agreed to by the Learned Amicus Curiae. The issues before some of the officers who were chosen from the state cadre were and are:

- a) Can the officers chosen by SIT investigate the highest political functionary at whose behest the entire massacre was orchestrated or whose role in containing the violence is suspected?
- b) Can the officers investigate against their own then DGP (P.C. Pande), whose role is under a cloud and who would be writing their ACRs?
- c) Can the officers keep the progress of investigations a secret from the DGP? Will the confidentiality of investigations be compromised?
- d) How would the integrity of investigations be ensured?

18. The role and background of all the SIT members needs to be looked into at this stage. The Special Investigation Team (SIT) appointed in this case enjoys a historic mandate. Nearly eighteen months after its appointment in 2008 and after a scrutiny of the investigations revealed through the charge-sheets filed in the trial there are certain anxieties about the time spent by senior officers on this onerous assignment. The Chairperson of the SIT, perhaps due to exigencies of his other commitments is not present in Gandhinagar permanently and on many occasions is away for rather long periods of time. This basically results in the Gujarat cadre officers conducting the investigation without any supervision. To the knowledge of the Petitioners, the Chairperson spends an average of two to three days a month in Gujarat despite an entire infrastructure and regular facilities and emoluments provided. This SIT is overseeing not only these eight trials but now, after the April 27, 2009 order in the SLP (CrI.) 1088/2008 also investigating the complaint into the chief minister and 61 others, a sensitive affair.
19. Three of the Gujarat level officers who are part and parcel of SIT appointed by this Hon'ble Court are Smt Geeta Johri, Shri Ashish Bhatia and Shivanand Jha. It is submitted that while Smt Johri was expressly put in charge of the Sardarpura, Deepda Darwaza and British Nationals re-investigations and further investigations, Shri Bhatia had the charge of Naroda Gam and Patia and Gulberg Society investigations and Shri Jha the Odh investigation. It is under their supervision, the lapses mentioned hereinabove have taken place. These lapses alone mandate their removal from the SIT. The Petitioners are also detailing other concerns they have about these officers.
20. In the investigation arising out of the SLP (CrI) 1088 of 2008, one of the SIT members, Shri. Shivanand Jha is also ought to be investigated as his name is mentioned in the list of alleged accused. Ideally, the said member, a senior police officer should have recused himself. However, he continues to remain an important member of the SIT. The second factor which renders the ability of independent judgement and discretion of this officer questionable is the fact that he had deposed on behalf of the State before the Justice Nanavati Commission wherein he supported the State. He was also the Joint Commissioner of the Police, Ahmedabad during the violence of 2002. The Police Control Room was under his charge during the mass violence. Thereafter when investigations into critical incidents within Ahmedabad city were afoot from mid-2002, though transferred to Rajkot he remained in Ahmedabad. In addition to the same, he has also served as the Home Secretary of the Gujarat government for nearly three years after 2002 when this matter was pending before the Hon'ble Supreme Court. He consistently took the approach that the investigations of these cases should not be handed over to the

CBI or transferred out of the State and that the ongoing process of investigation was appropriate.

21. The second SIT member from Gujarat, Smt Geeta Johri did perform diligently in the initial stages of an investigation related to another case known as the "Sohrabuddin Encounter case.". Infact, it was this fact which had impressed this Hon'ble Court to appoint her as a member of the team. However, as has been argued before this Hon'ble Court in the said encounter case, she has been seriously indicted for her inactivity and complacency in the matter after the three IPS Officers were arrested by Shri Rajnish Kumar Rai in the Sohrabuddin matter. It also appears that this officer, was favoured by the State soon after she was assigned the responsibility of the investigation into the Sohrabuddin encounter, on July 1, 2006, just a week after she started preliminary inquiry into the case, by acceding to an old request made by her for an alternate plot. The government gave her an alternate plot of land as requested by her measuring 330 sq metres in the same sector in Gandhinagar by waiving off the premium amount that has to be mandatorily paid which, according to the rules, should have been 50 per cent of market value if the allottee wishes to change the plot. Given this fact and the corruption charges against her husband which could put her in an awkward position, does render her independent judgement and zeal to further inquire into the matter as is required questionable.
  
22. The third and last member from Gujarat Shri Ashish Bhatia, in charge of Ahmedabad's Crime Branch, was specifically put in charge of the Gulberg and Naroda investigations and has failed in performing his duties in the trials that he is put in charge of which are Gulberg and Naroda. He has failed to ensure
  - a. Proper charge sheets were filed;
  - b. Refused to conduct further investigation despite glaring leads provided by many victims;
  - c. Critical phone records have gone missing and no investigation about the manner in which they went missing are addressed or investigated;
  - d. Police witnesses have turned hostile in the trials he is supervising;
  - e. Failed to arraign key policemen accused of gross complicity as accused despite statements made in 2002 and then again by SIT.
  
23. While it is undoubtedly true that new and in some cases influential accused have been arraigned as accused in the fresh chargesheets filed by SIT, even this aspect has been a trifle superficial and unsatisfactory. For example, in the Naroda Patia case, one Suresh Richard Chara who figures prominently in many witness statements (as many as 59) and also figured in Tehelka's *Operation Kalank*, continues to be out on bail intimidating

witnesses even while the trial has commenced. Another accused against whom several witnesses have deposed to the gruesome slitting open of a pregnant woman's womb also roams free in the area on bail. While it is true that Dr Maya Kodnani a Minister and VHP leader Dr Jaideep Patel have been arraigned as accused, it is clear that there are gaps and anomalies in the investigations related to them and the manner of their arrests. In a public drama, SIT actually issued formal notice to Dr Maya Kodnani before she was arrested allowing her time to go underground guarded by the Gujarat police and she continued to attend the Assembly while absconding. During her remand period little or no interrogations or investigations have been conducted and given the fact that she is on bail it is evident that she could do much to influence the trial. It is critical to place on record the fact that unlike the privilege accorded to any other accused, SIT, had evidence through witness statements against Dr Maya Kodnani (Gujarat minister for child welfare) and Dr Jaideep Patel (general secretary of the Vishwa Hindu Parishad) since October 2008 but yet, in the first SIT chargesheet in the Naroda Patia case (dated December 2008) these two powerful politicians were not arraigned as accused. Worse still, twice in January 2009, SIT chairperson DR RK Raghavan actually summoned Dr Kodnani and Dr Patel to the SIT office at Gandhinagar effectively issuing a warning to them of their impending arrest. Then Dr Kodnani and Mr. Patel, fully armed with Gujarat state police security personnel "absconded" and "went underground", none from the SIT team including the senior Gujarat cadres could track them down and while underground they obtained anticipatory bail from the sessions court at Ahmedabad. During the hearing of the anticipatory bail, the sessions judge, despite knowing he was adjudicating on a matter of a ghastly and heinous crime, demanded of the IO (from SIT) whether in his opinion the two accused were needed by SIT for further investigations. Gujarat state Deputy Superintendent of Police Pravinsinh Maal (who continues to be involved in the cases with the SIT) had actually replied in the negative. This questionable slip by an officer who is an integral part of the SIT team rendered the whole move to arrest Kodnani and Patel a farce. Currently these accused are out on regular bail. Both enjoy positions of influence and at any stage influence the evidence and course of the trial. The fact that witnesses have been attacked by goons claiming to be "Mayabehn's men" is indicative of this malevolent influence that they enjoy.

25. Similarly some of the absconding accused in the Gulberg cases attended official duties as Corporators while ostensibly SIT was on the look out for them before arrest. In the Naroda cases while the second PI Gohil has been arraigned as accused, despite several statements by witnesses (more than six) against first PI KK Mysorewala and other SRO officers, they have not been included as an accused.



26. Significantly, Dildar Umrao Saiyed, and his family living at Naroda Patia were attacked in September 2009 and last year in November 2008 after it became known that he had deposed before SIT. On September 25, 2009, media carried reports and photographs of this witness and his family being roughed up by attackers claiming to be supporters of "Mayabehn and Jaideepbhai." Two other key witnesses Imtiyaz Saeed Khan Pathan and his brother, eyewitnesses from the Gulberg massacre case have also been threatened on the telephone. Complaints have been registered by both before SIT. This clearly shows that the lives of those witnesses who have stood by the truth continue to be endangered in Gujarat.
27. On October 7, 2009, newspapers reported three key witnesses in the trial known as British Nationals case, that who had named three accused Mitha Patel, Chandu Patel, Praveen Patel, Manoj Patel, Ramesh Patel and Kala Patel in 2002 before Inspector D K Vankar retracted their statements while the trial was afoot, ostensibly under SIT supervision before the designated judge HP Patel at Himmatnagar. Ironically, in 2005, DySPs J R Prajapati and H L Chaudhary recorded the statements of the three witnesses again, who endorsed their earlier statements recorded by Vankar. But during their examination by the prosecution before the special judge earlier this month, they retracted their earlier statements and stated on oath that they were not present on the spot at the time of the incident. Since statements under section 164, Cr.P.C. are not recorded, it is not known how the SIT can salvage this case. A true copy of the newspaper reports are annexed hereto and is marked as **Annexure E**.
28. It is critical and pertinent that this Hon'ble Court interrogates SIT about the steps and measures taken by it to ensure the insulation and protection of witnesses given the onerous responsibility placed on SIT by this Court. Despite the directions for witness protection, it is not clear whether SIT in any way ensured that these three witnesses, Kalusinh Makwana, Badarsinh Makwana and Dalpat were protected from threats and inducements, the trial insulated from the influence of the local rich and powerful Patel community etc.
29. There are serious problems with some of the prosecutors appointed by the SIT. Some of the prosecutors appointed as special public prosecutors by SIT had earlier appeared for accused policemen or for accused either for remand, bail or for discharge etc in the course of the past seven years. This raises a serious and ethical question of conflict of interest. SIT had been approached with all this material through a number of communications in June 2009.

Special Public prosecutor Nigam Shukla appointed by SIT has appeared as special counsel for the state of Gujarat before the Nanavaty-Shah Commission that is probing among other things the role of the state government, chief minister and state cabinet. He has on occasion appeared for the CBI as standing counsel in the Gujarat carnage cases in the Gujarat high court and does not have much trial court experience. He is assisted by Vimal Solanki and Kalpen Goswami who appear as assistant public prosecutors.

## ii **Sardarpura Case** **SC Shah**

Suresh Shah assisted by Vishal Patel has been appointed by SIT as special public prosecutor. He has been PP in this case since 2004.

## iii. **British National Case**

Special Public prosecutors appointed in this case is lawyer Ajay Choksi will appear as special public prosecutor in the case, while Vaibhav Vyas, who has been practising along with Choksi, will appear as the assistant public prosecutor. Choksi has appeared for none less than suspended Director Inspector General of Police (DIG) DG Vanzara in the Sohrabuddin Sheikh fake encounter case and in the famous Chetan Battery murder case with Vyas as his junior in both cases.

30. It may also be mentioned here that the applicants have played the responsible role of supporting victims and witnesses and, after the May 1, 2009 order they were asked by Chairman SIT to present a witness protection programme for key witnesses. This has been complied with by the petitioners which included providing a list of witnesses from the Gulberg, Sardarpura, Odh, Naroda Gam and Patia trials who need special paramilitary protection. These communications and the response from SIT chairperson are also annexed hereto as **Annexure- F (Colly)**. The applicants have ensured that the key eyewitnesses in these trials are not summoned until arrangements for protection to passage way to and from the court is made through the central paramilitary. The applicants have even made formal applications to the court to this effect. It is then surprising how, in the other trials also being conducted by SIT, eye witnesses have been allowed to appear without insulation or protection. The sorry conclusions that can be drawn is that, even today the sway of the local police and administration of the state executive on the justice process is strong and even SIT, headed by three officers of seniority from outside of Gujarat has been able to insulate itself completely from this influence.
31. The last factor which is of concern is the manner in which some of the courts trying these cases are not appreciating the need for independent victim representation. It is also

submitted that victims and witness rights, sought to be ensured by this Hon'ble Court through its order of May 1, 2009 are seriously sought to be compromised during the trials afoot currently in Gujarat. While in two cases afoot, basic rights of the victims and witnesses to be heard has been granted by the court through lawyers for the victims assisting the prosecution, on October 7, 2009, Judge SH Vohra in the Naroda Gam case passed an order refusing victims lawyers the rights to assist the prosecution. The order is annexed hereto as **Annexure G**. It is pertinent to note here that the special public prosecutor during the hearing of the application did not either support nor oppose the application by victims. Given the peculiar nature of the case, it was only fair and just that victim' lawyers are allowed to assist the prosecution. However, this order coupled with the current role of the SIT only reinforces the requirement of the transfer of these trials to a State outside Gujarat which was the original prayer made by the National Human Rights Commission to this Hon'ble Court.

32. The unfortunate attitude of another court appointed to try the Odh massacre case can be seen through its reaction to applicant, victim and witness Rafiq Mohammed Abdul Karim Khaliq v/s Dinubhai Bhikhabhai & Others ( CR No. I 23 of 2002 with Khambolaj Police Station). This application was made on 21.08.2009 before the Hon'ble Sessions Court appointed following the May 1, 2009 order of the Hon'ble Supreme Court and the prayer was simply requesting a copy of the chargesheet from the court. While dismissing the application the Court observed that,

“ The applicant is a witness. The SIT has completed its investigation and has submitted its report i.e., the chargesheet. The applicant needs copy of all the papers of the investigation including the copies of the statements of the witnesses so as to seek appropriate legal advice. The applicant therefore prays for the certified or uncertified copies of the above documents ”

Date: 21.08.2009- Order:

“ The application is filed by the applicant in his individual capacity to obtain the copies of the documents. Necessary stages are yet to be concluded. The session's case has yet not been notified on the board. The special public prosecutor has been appointed. The applicant is not entitled to obtain the copies of the documents so demanded, hence this application is dismissed.”

When the applicant victim witness filed an application on 29.08.2009 requesting for a certified copy of the application and order dtd 21.08.2009 to enable legal redressal the Court revealed its antipathy to the victims by ordering, on the same day that is on 29.08.2009 that “ It is not necessary to give the copies, hence, rejected”.

Again, the SIT that is meant to act as a just arbiter protecting the interests of the victims and ensure justice was a mute spectator to this entirely unjust process.

33. That lastly, it is important and relevant to recall the history of this present litigation and especially the circumstances in which the State Government has agreed for reinvestigation and proposed the names of three senior officers to be part of the SIT.
- i) The State Government had consistently opposed/resisted the reinvestigation of cases by an independent agency, and transfer of these cases outside the State.
  - ii) In 2004, the state of Gujarat misled this Hon'ble Court on the issue of Bail being granted to influential accused by filing only partial bail orders deliberately concealing the granting of bail by the high court. This was not appreciated by this Hon'ble Court.
  - iii) In early 2008, the Central Government expressed its willingness to get the cases investigated by CBI.
  - iv) The State Government vehemently opposed the investigation of these cases by the CBI and agreed for investigation by a SIT provided that the officers constituting the team are not from outside the State.
  - v) The State Government came to court prepared with a list of officers and immediately proposes the name of three senior officers which were accepted by the Court on the recommendations of the amicus curiae.

In retrospect it appears that this was actually a pre-emptive move of the State Government to prevent the transfer of cases to CBI, and forestall an independent investigation and man the SIT with pliable officers who would toe its line.

34. In view of the aforementioned facts and circumstances the present application is being filed seeking appropriate directions from this Hon'ble Court.
35. That the application is bonafide and made in the interests of justice.

#### PRAYER

In the facts and circumstances stated hereinabove, it is Most Respectfully prayed that this Hon'ble Court be pleased to:

- a. Re-constitute the SIT and appoint members suggested by the Petitioners namely Rajnish Kumar Rai (1992, IPS); Dr. Neerja Gotru Rao (1993, IPS); A.K. Singh (1985, IPS); Vinod Mall (IPS) to the SIT;
- b. Direct all the SIT members to spend at least 15-20 days in a month in Gujarat while the investigation and trials are on-going;
- c. Order transfer of the trials out of the state of Gujarat and

d. pass such other order or orders as this Hon'ble Court may deem fit in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE APPLICANTS/PETITIONERS HEREIN PRAYS

Filed by:

(Aparna Bhat)  
Advocate for the Petitioners/Applicants

**New Delhi**  
**Dated: 23<sup>rd</sup> October 2009**