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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 887/2011

J S BHATIA

..... Petitioner

Through: Mr. K.T.S Tulsi, Sr. Advocate with
Mr. Raj Kamal, Advocate.

versus

CBI

..... Respondent

Through: Mr. Harish Gulati and Mr. Hemant
Chaudhary, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

% **18.03.2011**

Crl. M.A. No. 3313/2011 (Exemption)

Allowed, subject to all just exceptions.

Crl. M.C. 887/2011 & Crl. M.A. 3312/2010 (Stay)

1. By the present petition the Petitioner seeks quashing of non-bailable warrants dated 8th March, 2011 passed by the learned Special Judge, CBI against the Petitioner in case FIR No. RC AC1 2011 A0001 under Sections 7/8/13(2) read with 13 (1) (d) of Prevention of Corruption Act, 1988 (in short PC Act) and 120B IPC.

2. Briefly the facts of the case are that the Petitioner is the Director (Marketing) of M/s Bhatia International Limited. The said Company is

engaged in the business of trading of imported and indigenous coal since 1979. In the year 2009 NALCO floated a tender for supply of 1,00,000 Mt of indigenous coal wherein M/s Bhatia International Limited was one of the bidders and was found to be L1. Similarly, in the year 2010 various tenders were floated by NALCO for supply of indigenous coal wherein M/s Bhatia International Limited was always a bidder and always cleared the tender in varying ratios. On 25th February 2011 on the basis of source information, abovementioned FIR was registered for causing undue favour to a private party by public servants through middleman against Shri Abhay Kumar Shrivastava, CMD, NALCO, Shri Bhushan Lal Bajaj, Smt. Anita Bajaj, Smt. Chandani Shrivastava, Mr. G.S. Bhatia, CMD, Bhatia Group of Industries and others. On 26th February, 2011 the accused nos. 1 to 4 in the FIR were arrested and produced before the Special Judge, CBI, New Delhi and were remanded to police custody till 3rd March, 2011. During the course of investigation the police searched the office of M/s Bhatia International Limited, Indore and seized tender documents and purchase orders concerning supply of coal to NALCO. The Petitioner was summoned twice vide notices dated 5th March, 2011 and 7th March, 2011 by the CBI under Section 160 Cr.P.C. to appear on the 6th March, 2011 and 8th March, 2011

respectively before Mr. Ram Singh, DSP, CBI. The Petitioner, however, did not join the investigation. Thereafter, on 8th March, 2011 the CBI filed an application for issuance of non-bailable warrants in the said FIR against the Petitioner herein. This application was allowed by the learned Special Judge, CBI vide order dated 8th March, 2011. This order of the learned Special Judge, CBI is impugned in the present petition.

3. Learned counsel for the Petitioner contends that the process of tender and the supplies to NALCO by M/s Bhatia International Limited through purchase orders was done in accordance with law and after following all conditions as stipulated in the tender documents no favour, whatsoever has been shown by NALCO to M/s Bhatia International Limited. Moreover the Petitioner is only an employee of M/s Bhatia International Ltd and has no role to play in the decision making process. It is further contended that the non-bailable warrants issued by the learned Special Judge, CBI against the Petitioner is without application of mind. Reliance is placed on *Inder Mohan Goswami vs. State of Uttaranchal, 2007 (12) SCC 1* to contend that the Courts have to be extremely careful before issuing the non-bailable warrants as the same involves interference with personal liberty. The only ground on the basis of which the impugned order is passed is that the name

of the Petitioner has figured in the transcript placed on record before the learned Special Judge, when even the validity and genuineness of the said transcripts and its decoding is itself in doubt. It is further contended that the tapping of the telephonic conversation on the basis of which the non-bailable warrants have been issued against the Petitioner is itself illegal and bad in law. Reliance is placed on *PUCL vs. Union of India, 1997 (1) SCC 301* and *State of Maharashtra vs. Bharat Shantilal Shah and others, 2008 (13) SCC 5* to contend that telephone tapping is a serious invasion of an individual's privacy and can be resorted to under 'occurrence of any public emergency' or 'in the interest of public safety'. Only violent crimes relate to public safety. Present case is an economic offence and though it may be a serious offence, it is not a heinous offence. Relying on *Siddharam Satlingappa Mhetre vs. State of Maharashtra, 2011 (1) SCC 694* it is contended that the principles for issuance of non-bailable warrants have not been invoked by the learned Special Judge and it should have examined the entire record before allowing the application of the Respondent. The Courts are the bastion of individual liberty and an order curtailing an individual's liberty cannot be passed lightly. Hence the order issuing the non-bailable warrants

against the Petitioner be quashed. The learned Senior Counsel for the Petitioner states that he does not press the second prayer in the petition regarding stay of arrest.

4. Per contra learned counsel for the CBI contends that the impugned order suffers from no illegality as sufficient efforts were made to seek the presence of the Petitioner and sufficient opportunity was granted to him. The Petitioner was served notices under Section 160 Cr.P.C. twice but he did not appear. Sufficient evidence had been placed on record that the Petitioner was avoiding the joining of investigation and is available neither at his residence nor the office. Contradicting the contention of the learned counsel for the Petitioner, it is stated that the permission to intercept the telephonic conversation on the basis of which non-bailable warrants were sought against the Petitioner by the learned Special Judge was taken from the Home Secretary, Union of India on 28th January, 2011. Hence there is no illegality in the said process of recording the conversation and due procedure has been followed. The learned counsel further submitted that the non-bailable warrants are in operation till 18th March, 2011 and as the Petitioner is not available despite non-bailable warrants issued, the Respondent would move

the learned Special Judge for proceedings under Sections 82 and 83 Cr.P.C. for declaring the Petitioner a proclaimed offender. The present petition be dismissed being devoid of any merit.

5. I have heard learned counsel for the parties and perused the records. Chapter VI of the Criminal Procedure Code, 1973 captioned as 'processes to compel appearance' consists of four parts: part A relates to Summons; part B to warrant of arrest; part C to proclamation and attachment and part D to other rules regarding processes. Part B, has in its fold Section 70 to 81. Section 73, which is required to be dealt with in the present petition reads as:

“73(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.”

Section 82 empowers the Court to issue proclamation; and so far as it is relevant for the present case, it reads as:

“82(1) *If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.*”

6. Whether a court can issue warrants to apprehend a person during investigation for his production before police in aid of investigation has been answered in *State through CBI vs. Dawood Ibrahim Kaskar and others*, 2000 (10) SCC 438. Their Lordships held:

21. That Section 73 confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also, can be best understood with reference to Section 155 of the Code. As already noticed under this Section a police officer can investigate into a non cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police starts investigation into a non- cognizable and non-bailable offence, (like Sections 466 or 467 (Part I) of the Indian Penal Code) and if during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evade the arrest, the only course left open to the Investigating Officer to ensure his presence would be to ask the Magistrate to invoke his powers under Section 73 and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his power under Section 73, for the person to be apprehended is 'accused of a non-bailable offence and is evading arrest.'

22. Another factor which clearly indicates that Section 73 of the Code gives a power to the Magistrate to issue warrant of arrest and that too during investigation is evident from the provisions of part 'C' of Chapter VI of the Code, which we have earlier adverted to. Needless to say the provisions of proclamation and attachment as envisaged therein is to

compel the appearance of a person who is evading arrest. Now, the power of issuing a proclamation under Section 82 (quoted earlier) can be exercised by a Court only in respect of a person 'against whom a warrant has been issued by it'. In other words, unless the Court issues a warrant the provisions of Section 82, and the other Sections that follow in that part, cannot be invoked in a situation where in spite of its best effects the police cannot arrest a person under Section 41. Resultantly, if it has to take the coercive measures for the apprehension of such a person it has to approach the Court to issue warrant of arrest under Section 73; and if need be to invoke the provisions of part 'C' of Chapter VI. [Section 8 (3) in case the person is accused of an offence under TADA]

23. Lastly, we may refer to Section 90, which appears in part 'D' of Chapter VI of the Code and expressly states that the provisions contained in the Chapter relating to a summon and warrant, and their issue, service and execution shall, so far as may be, apply to every summon and every warrants of arrest issued under the Code. Therefore, when a Court issues a warrant of arrest, say under Section 155 of the Code, any steps that it may have to subsequently take relating to that warrant of arrest can only be under Chapter VI.

24. Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest, we need answer the related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen

handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in accordance with Section 167(3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, Mr. Desai was not absolutely right in his submission that warrant of arrest under Section 73 of the Code could be issued by the Courts solely for the production of the accused before the police in aid of investigation.”

7. The Division Bench of this Court in *Ottavio Quattrocchi v. Central Bureau of Investigation* 75 (1998) DLT 97 (DB) following *State through CBI vs. Dawood Ibrahim Kaskar and others* held:

“44. The Supreme Court considered the question that whether a court can issue a warrant to apprehend a person during investigation for his production before Police in aid of investigation agency. The question was answered by the Supreme Court holding that Section 73 of the Code confers a power upon a Magistrate to issue a warrant and that it can be

exercised by him during investigation also. It was further held that Section 73 of the Code is a general application and that in course of investigation a court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest. On the question whether such issuance of warrant can be for his production before the police in aid of investigation, it was observed by the Supreme Court that a Magistrate plays, not frequently a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc.

45. In nutshell the Supreme Court held that when an application is moved by the Investigating Agency for arrest or apprehension of a person, who is accused of non-bailable offence, such prayer can be allowed by issuing a warrant for appearance before the Court only and not before the police.”

Thus, non- bailable warrants can be issued for procuring attendance of a person before the Court and on police remand being granted investigation can be carried out from such accused. The Petitioner herein has been avoiding the process of the investigating agency and the Court despite opportunities being given to him. Thus, the Court can proceed to issue proclamation under Section 82 of Cr.P.C. Non-bailable warrants being sine qua non for the issuance of action under Section 82, it is thus essential to issue non-bailable warrants.

8. The contention of the learned Sr. Counsel for the Petitioner that the learned Magistrate did not apply the law laid-down by the Hon'ble Supreme Court in the *Siddharam Satlingappa Mhetre*(supra) is misconceived. Learned Counsel relies on paras 85, 86 and 113 of the Report. Their lordships have brought forth the plight of large number of under-trials who are languishing in jail for a long time even for allegedly committing very minor offences and that Section 438 Cr.P.C has not been allowed in its full play. There is no denial to the fact that the liberty of an individual is precious and so is the society's interest in maintaining peace, law & order. It was thus held that arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case. The Court must carefully examine the entire available record and the allegations directly attributed to the accused and that these allegations should be corroborated by other material and circumstances on record. Applying the law laid down by their lordships, it may be noted that the learned Trial Court was conscious of the fact that the notices were given to the Petitioner to join the investigation however he did not join. He was not available either at his residence or at his office. The learned Judge

on consideration of the material placed, came to the conclusion that the Petitioner was evading the investigation and thus issuance of non-bailable warrants was essential. Learned Special Judge was conscious of the fact that the investigation involved illegal gratification of enormous magnitude and repeatedly Bhatia Group of Industries were getting the tenders and Petitioner was the Director (Marketing) of the said company. There is no gainsaying that Director (Marketing) though may be an employee is responsible for the day to day functioning of the Company. His involvement is evident from the interception carried out. At this stage, the Court is not required to test the veracity of the prosecution allegations as is being sought by the Petitioner by laying a challenge to the intercepted conversation.

9. I find no merit in the contention of the learned counsel for the Petitioner that since the present case involves an economic offence thus does not relate to any public emergency or interest of public safety and no interception could have been permitted. It is contended that an interception permitted contrary to these provisions was an illegal interception and thus the Court could not have become a party to support the evidence collected illegally. Public safety is a term of wide amplitude. Economic crimes ultimately effect the economic stability and safety of the country and its

citizens. An economic offence drains out the economic circulatory system of the country thus de-stabilizing it and endangering its very existence. It is not only the bodily offences of terrorism which effect the public safety but the economic offences as well which are the roots of most heinous anti social and anti national activities endangering public safety. Thus, I find no merit in the contention that it is a serious offence but not a heinous offence.

10. At this stage, it would be relevant to note the observations in *State of Maharashtra vs. Bharat Shanti Lal Shah & Ors.*(supra) wherein it was held:

“60. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance with procedure validly established by law. Thus, what the court is required to see is that the procedure itself must be fair, just and reasonable and non-arbitrary, fanciful or oppressive”.

In the present case, the interceptions have been taken after following the due process and thus prima-facie it cannot be said that there is infraction of Article 21 of the Constitution.

11. It is reported in *Inder Mohan Goswami & Anr.*(supra):

“The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged

with the commission of any offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.”

12. From the aforesaid facts it is clear that the investigating agency have sufficient prima facie evidence against the Petitioner to take further action against him. Therefore, I am of the opinion that the production of Petitioner in the present case before the Court is essential and thus, I find no illegality in the order passed by the learned Special Judge. The petition and the application are dismissed.

MUKTA GUPTA, J.

MARCH 18, 2011/vn