

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

+ **CrI. M.C. No. 2136/2011 & CrI.M.As. 7766-7767/2011**

% Reserved on: 27<sup>th</sup> July, 2011

Decided on: 2<sup>nd</sup> August, 2011

ANIL KUMAR MADAN & ANR. .... Petitioners

Through: Mr. N. Hari Haran with Mr. L.R.  
Luthra, Advs.

versus

C.B.I. .... Respondents

Through: Mr. Dayan Krishnan with Mr. Gautam  
Narayan, Advs.

**Coram:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

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|------------------------------------------------------------------------------|---------------|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not?                                        | Yes           |
| 3. Whether the judgment should be reported in the Digest?                    | Yes           |

**MUKTA GUPTA, J.**

1. By this petition the Petitioners who are qualified engineers and partners of firm M/s. Gem International experienced in dealing with various types of high technology sports equipment including Timing/ Scoring/ Result Systems

(for short TSR System) seek setting aside of the order dated 23<sup>rd</sup> May, 2011 and quashing of initiation of proceedings under Section 82 Cr.P.C. in R.C. No. DAI-2010-A-0044 dated 29<sup>th</sup> November, 2010 under Section 420/467/468/471 IPC read with 120-B IPC and 13 (1) (d) read with 13 (2) of Prevention of Corruption Act (in short 'PC Act').

2. The grievance of the Petitioners is that a case was registered on 29<sup>th</sup> November, 2010 and on the basis of a source information inter-alia alleging therein that two officials of the Organizing Committee, Common Wealth Games, Delhi 2010 abused their official position and entered into criminal conspiracy with M/s Swiss Timings Ltd (SLT) Switzerland and other unknown persons to cheat the Government of India in the matter of awarding contract for TSR system to be acquired for the CWG Delhi 2010. After conclusion of investigation CBI filed charge-sheet against 11 accused persons on which the Learned Trial Court vide the impugned order dated 23<sup>rd</sup> May, 2011 took cognizance and issued proclamation under Section 82 Cr.P.C. against the Petitioners on the ground that the Petitioners were intentionally absconding and avoiding the judicial process.

3. Petitioners claim that the allegations against the Petitioners are false and against the material on record. They are not connected with the alleged offences in any manner. They contend that during January to February, 2011

Petitioner No.2 and the Investigating Officer of the CBI were in constant touch with each other on phone and the Petitioner No.2 was answering the queries which were being raised by the I.O. from time to time. Petitioners were interrogated at the office of CBI on 12<sup>th</sup> and 21<sup>st</sup> of February, 2011 from morning till evening. As desired by the Investigating Officer after the interrogation on 21<sup>st</sup> February, the Petitioners sent documents through courier on 21<sup>st</sup> February, 2011 which were received in the office of the Respondent on 25<sup>th</sup> February, 2011. Thereafter there was no notice from the CBI until 21<sup>st</sup> March, 2011. As the Petitioner No.1 has lost his vision on account of retinal detachment, he was advised to go abroad for immediate surgery. Thus, the Petitioner No.2 accompanied the Petitioner No.1 as his attendant and the Petitioner No.1 was operated on the 10<sup>th</sup> March, 2011 at a world renowned retinal treatment hospital. After 21<sup>st</sup> February, 2011 only on 29<sup>th</sup> March, 2011 CBI issued notices for appearance on 4<sup>th</sup> April, 2011 while the Petitioners were still abroad. The Petitioners sent a fax message to the CBI on 2<sup>nd</sup> April, 2011 informing about the surgery and that they planned to return and appear before them on 11<sup>th</sup> April, 2011 on which date CBI was requested for fixing the date for their appearance after 14<sup>th</sup> April, 2011, but no reply was received. Petitioners realizing the urgency cancelled the appointment with the Doctor scheduled for 6<sup>th</sup> April, 2011 and rushed back to India on 4<sup>th</sup> April, 2011

hoping that they may be able to appear before the CBI as per the notice. However, on the way the operated eye deteriorated and the vision was substantially reduced. Thus, the Petitioner No.1 was advised immediate rest. As per the Petitioners they had already sent a fax, as they thought to appear on 11<sup>th</sup> April, 2011, however on this date also the things did not improve and the Petitioners sent a fax message for fixing a date after 14<sup>th</sup> April, 2011. In the meantime the manager of the Petitioner's firm was called by the CBI on the 12<sup>th</sup> and 13<sup>th</sup> April, 2011 where he was badly tortured and threatened. The Petitioners got terrified and stressed. The Petitioner No.1 telephoned the CBI several times for fixing the date for appearance for both of them. On 26<sup>th</sup> April, 2011 a notice for appearance of Petitioners was received on 27<sup>th</sup> April, 2011. Since the Petitioners were not in Delhi on the night of 26<sup>th</sup> April, 2011 their office sent a fax message in the morning to the Respondent for fixing a date for appearance after two-three days.

4. Thus, in nutshell the contention is that though the Petitioners filed a writ petition on 27<sup>th</sup> April, 2011 seeking quashing of FIR being W.P. (Crl.) No. 596/2011 despite that on 29<sup>th</sup> April, 2011 the CBI obtained non-bailable warrants against the Petitioners during investigation without informing the Hon'ble Court that the Petitioners were appearing before the Court through their lawyer and were not absconding. During hearing of the writ petition it

was never informed to the Court or to the Petitioner's counsel about the non-bailable warrants having been obtained on 29<sup>th</sup> April, 2011. Petitioners moved an application before the learned Trial Court for recalling of the impugned order issuing initiating proceedings under Section 82 Cr.P.C. However, the application was dismissed vide order dated 6<sup>th</sup> June, 2011. It is, thus, prayed that the impugned order be quashed.

5. Learned counsel for the CBI contends that the whole boggy of operation of the Petitioner No.1 being urgent due to retinal detachment is falsified by the document filed by the Petitioner along with the bail application in the form of a reply of Wolfene Berger Thomas dated 19<sup>th</sup> April, 2011 the treating Doctor in Switzerland, wherein it has been stated that "the surgery is not urgent and can be planned according to professional agenda". It is contended that despite ailments the Petitioner No.1 was physically able to travel to Switzerland and to Ranchi. The excuse of Petitioner No.2 is further unwarranted as he has stated that he could not attend the office of CBI as he had to travel to Switzerland along with Petitioner No.1 as his attendant.

6. According to the learned Prosecutor after appearance on 12<sup>th</sup> February, 2011 the Petitioners absconded. Though the Petitioners sent a fax dated 4<sup>th</sup> April, 2011 stating that Petitioner No.1 has gone for treatment to Switzerland and PW2 had accompanied him, however in the objection of the Petitioners to

the order of proclamation it has been admitted that they had returned on the 4<sup>th</sup> April, 2011. Further the Petitioners had sent a fax dated 27<sup>th</sup> April, 2011 claiming that they were out of station on the said date. However, they have sworn affidavits dated 27<sup>th</sup> April, 2011 in support of the writ petition filed before this Hon'ble Court. Even the learned Trial Court has noted in the order dated 6<sup>th</sup> June, 2011 that although the said accused were present in Patiala House Court to swear affidavits but they did not appear before the Court. Reliance is placed on *Directorate of Enforcement Vs. A.K. Jain* 1988 2 SCC 105 and *Sanjeev Kumar Gupta Vs. Commissioner of Customs* 2001 90 DLT 643.

7. I have heard learned counsel for the parties. In the present case a perusal of the e-mail dated 19<sup>th</sup> April, 2011 from the treating Doctor in Switzerland shows that the second surgery was not urgent and could be planned according to professional agenda. Further with regard to non-appearance on 27<sup>th</sup> April, 2011 it is evident that the Petitioners were very much in Delhi in view of the affidavits sworn by them at Delhi. However they failed to appear before the Investigating Officer. The power of the Court under Section 73 Cr.P.C. to issue non-bailable warrants against the persons who are accused of non-bailable offence and are evading arrest is clearly defined. Despite notices by the CBI the Petitioners refrained to appear before

them. The Petitioners are accused persons in this case and because of their absence the Court was justified in issuing of warrants. The Learned Trial Court examined the reasons given by the Petitioners for their non-appearance before the Investigating Officer after the 21<sup>st</sup> February, 2011 and came to the conclusion that the same were not justified and there was no sufficient explanation. Though the Petitioners had sent a fax message on 2<sup>nd</sup> April, 2011 stating that they would appear before the Investigating Officer on 11<sup>th</sup> April, 2011, however they did not appear on the 11<sup>th</sup> April, 2011. On their own they changed the date of appearance after 14<sup>th</sup> April, 2011. CBI asked for their appearance on 22<sup>nd</sup> April, 2011 which was also changed to 26<sup>th</sup> April, 2011 and later to 27<sup>th</sup> April, 2011. On 27<sup>th</sup> April, 2011 a fax message was sent to CBI by the office of the Petitioners stating that both of them were out of stations. The said fax message was totally false and misleading as the Petitioners have sworn affidavits before the Oath Commissioner on the 27<sup>th</sup> April, 2011 in W.P. (CrI.) No. 596/2011 showing that they were in Delhi on that date. Non-bailable warrants were issued on the 25<sup>th</sup> May, 2011. The Learned Trial Court also took into consideration that prima facie there was material on record against the Petitioners to be involved in the conspiracy. 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. The learned

Trial Court was further cautious that the investigation involved unearthing of conspiracy in awarding the tender and the money trail thereafter.

8. In *Jayant Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104, the Hon'ble Supreme Court laid down the conditions precedent for recording of the evidence in absence of an absconding accused. In the said case, the accused was absconding after he was arrested. In the present case, it is at the stage where the Petitioner is avoiding investigation/arrest and even non-bailable warrants are also not being executed against them, thus, the process of the Court has been issued. The Court is within its right to declare him as a proclaimed offender. Section 73 Cr.P.C. permits the Magistrate to issue a warrant even against a person, who is accused of a non-bailable offence and is avoiding arrest. After issuance of this process if Petitioner still does not submit to the Court, the Court would be within its jurisdiction to proclaim him as an absconder under Section 82 Cr.P.C.

9. In *Siddharam Satlingappa Mhetre v. State of Maharashtra*, 2011 (1) SCC 694, 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 held 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. The learned Special Judge was further cautious that the investigation involved unearthing of conspiracy in awarding the tender and the money trail thereafter.

10. In *Inder Mohan Goswami & Anr.v. State of Uttaranchal*, 2007 (12) SCC 1, it has been held as under:-

“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.”

10. 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 Trial Court. The petition and application are dismissed being devoid of merit.

**(MUKTA GUPTA)**  
**JUDGE**

**AUGUST 02, 2011**  
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