

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

Date of decision: May 26, 2014

+1. CRL.REV.P. 683/2012

ANIRUDDHA BAHAL

..... Petitioner

Through: Mr. Pramod Kumar Dubey with
Mr. Shiv Pande, Mr. Shiv Chopra, Mr. Nishank
Mattoo & Mr. Hemant Shah, Advocates

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Mr. P.K.Sharma, St. Counsel with
Mr. Rakesh Sharma, Ms. Somi Mehra, Ms. Renu
Malik & Mr.Pulkit Mishra, Advocates

+2. CRL.REV.P. 707/2012

NIRAJ KUMAR

..... Petitioner

Through: Mr. Shri Singh with Mr.Dheeraj Kumar
& Ms. Aakanksha Singh, Advocates

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Mr. P.K.Sharma, St. Counsel with
Mr. Rakesh Sharma, Ms. Somi Mehra & Ms. Renu
Malik, Advocates

+3. CRL.REV.P. 34/2013

THOMAS MATHEW

..... Petitioner

Through: Dr. M.P. Raju with Mr. J.P. Thomas,
Advocates

versus

**CENTRAL BUREAU OF INVESTIGATION THR. THE DY
SUPERINTENDENT OF POLICE**

..... Respondent

Through: Mr. P.K.Sharma, St. Counsel with
Mr. Rakesh Sharma, Ms. Somi Mehra & Ms. Renu
Malik, Advocates

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. The present three revision petitions are filed by the petitioners against the order dated 16th October, 2012 passed by the Id.Additional Sessions Judge-FTC(Central) Delhi.
2. These revision petitions arise out of FIR i.e., Crime No.RC No.1(S)/2001/SIC.IV New Delhi dated 30.3.2001 registered by the Central Bureau of Investigation (in short referred to as C.B.I.) under Section 3 and 5 of Official Secrets Act, 1923 (hereinafter referred to as “the Act”) and Section 120-B of IPC on the complaint of Mr. S.P.Shokhanda, Under Secretary, Ministry of Home Affairs, New Delhi dated 21.3.2001 vide OM No.-1202/184/2000-VC dated 29.3.2000. It was alleged in the OM that a meeting was held on 29.9.1999 under the Chairmanship of Shri G.K.Pillai, Joint Secretary, to discuss the activities of Dutch NGOs in India appeared on the website of Tehelka.com, a news portal, on 9.10.2000. It was alleged that the minutes were classified in nature and were marked ‘secret’ and leakage of these classified documents constitutes an offence under the Act. It was further alleged that the portal had deleted the website pages subsequently. It was alleged that there was reason to believe that Niraj Kumar/petitioner, Section Officer in the Ministry of Home Affairs, NE Division who was the

custodian of the file at the relevant time, leaked the information along with some other sensitive information in collusion with another officer of the MHA.

3. In pursuance to the FIR, CBI through its Dy.Suptd. of Police, Sh.N.S. Kharayat, filed a complaint dated 4.6.2003 u/s 13 of the Official Secrets Act, 1923 (hereinafter referred to as 'the Act') for the offences u/s 3(1)(c), 5(1)(2)(4) of the Act read with section 120-B IPC before the learned C.M.M., Delhi.

4. In the complaint, the reference is made to aforesaid FIR registered with the CBI. It is alleged that during the investigation it came to light that accused Niraj Kumar while working as Section Officer in NE-IV Section of MHA submitted a note dated 5.9.1999 titled "Dutch interest in India's fringe politics" to Sh. G.K. Pillai, the then Joint Secretary. The file bearing No.11011/40/99 NE-IV was opened and marked "secret" as it was observed that the activities of Dutch NGOs could bring long term implications. It is alleged that a meeting was held on 29.9.1999 on the subject under the Chairmanship of Sh. G.K. Pillai, Joint Secretary, MHA in which officers from the Ministry of Home Affairs, Ministry of External Affairs, RAW and Intelligence Bureau had attended. The minutes of meeting were drawn and after it was approved by the Joint Secretary, the copy of same was forwarded to the concerned Officers vide letter dated 7/8.10.2000 marked "Secret".

5. It was alleged that the investigation had revealed that on 9.10.2000 the minutes of meeting dated 29.9.1999 almost verbatim appeared on the portal of tehelka.com besides a report containing secret matters of the said file No. 11011/40/99/NE-IV under the title "Dutch Support Revealed For

Rebels In Bihar and North East” was also displayed. On 10.10.2000, another report under the title “unravelling : The Dutch role in aiding and abetting Indian Insurgents” containing information from the said Secret file of the Ministry of Home Affairs was also displayed by tehelka.com. It is alleged that after the minutes were displayed, Joint Secretary (EW), Ministry of External Affairs vide DO letter dated 24.10.2000 addressed to Sh. G.K. Pillai, JS (NE) MHA, New Delhi conveyed that Dutch ambassador Mr. Peter Coch had brought to the MEA’s attention about the information available on the website of tehelka.com. Consequently, Shri G.K.Pillai, Joint Secretary (NE) requested for an enquiry by Intelligence Bureau. In the report the IB pointed out that Shri Niraj Kumar could be involved in leakage of the secret information.

6. As per allegations in complaint, accused Niraj Kumar considered accused Thomas Mathew, the then Director, MHA, as his god father. Accused Thomas Mathew knew accused Mathew Samuel from tehelka.com. It is alleged that accused Mathew Samuel also visited the office of accused Thomas Mathew before and after the story had appeared on tehelka.com website. It is alleged that as per investigation, the article appeared on tehelka.com on 9.10.2000 and 10.10.2000 was extracted from secret file no.11011/40/99 NE-IV of MHA. It is alleged that accused persons i.e. Niraj Kumar, Thomas Mathew, Mathew Samuel and Aniruddha Bahal were close to each other and had been visiting each other. They were also in touch with each other on phone.

7. As per allegations it was accused Niraj Kumar who handed over the relevant document on the assurance of Thomas Mathew to Mathew Samuel that the same would not be published.

8. It is alleged that investigation had revealed that UD & MD Agencies Pvt. Ltd was registered with Registrar of Companies Mumbai on 2.9.96 where Tarunjeet Tejpal and Aniruddha Bahal were appointed as Directors on 20.3.2000. On 1.5.2000, Tarunjeet Tejpal was appointed as MD. On 6.8.2000, UD & MD Agencies entered into an agreement with 4C Plus (Internet).com Pvt.Ltd for operating tehelka.com. Buffalo Networks was incorporated as a company on 23.6.2000 and Tarunjeet Tejpal, Kunwarjeet Tejpal and Aniruddha Bahal were Directors of the company. Later on i.e., from 1.7.2000 Tarunjeet Tejpal was appointed as MD of said company. On 20.7.2000 Buffalo Network entered into an agreement with UD & MD Agencies to take over the operations of tehelka.com which was signed by Aniruddha Bahal on behalf of UD & MD Agencies and Tarunjeet Tejpal on behalf of Buffalo Networks.

9. It is alleged that as per investigations, accused persons i.e. Niraj Kumar, Aniruddha Bahal, Thomas Mathew, Mathew Samuel, Tarunjeet Tejpal entered into a criminal conspiracy in furtherance whereof they obtained the said secret file and displayed its contents on tehelka.com.

10. On the same allegations, subsequently charge sheet was filed before learned C.M.M. on 12.4.2005.

11. Vide order dated 15.6.2005, the ld.CMM took cognizance of the offence punishable u/s 3 and 5 of the Act read with section 25/27/54/59 Arms Act and issued process against all the accused persons including the petitioners in these revision petitions. By order dated 7.7.2005, the ld.CMM amended the order dated 15.6.2005 and reference to offence u/s 25/27/57/59 of the Arms Act was removed by stating that it was a clerical mistake and cognizance was clarified to be taken u/s 3 and 5 of the Official Secrets Act,

1923 read with section 120B IPC.

12. On 13.12.2006, the case was transferred from the court of Id.CMM, Tis Hazari Courts, Delhi to the court of the Id. Special Judge, Tis Hazari.

13. Vide the impugned order dated 16.10.2012, the Id.Additional Sessions Judge concluded that the material on record discloses prima facie commission of offence under section 3(1)(c) and 5(1)(2) and (4) of the Act read with section 120B IPC by all the accused persons, namely, Niraj Kumar, Thomas Mathew, Mathew Samuel, Aniruddha Bahal and M/s Buffalo Net Works Pvt. Ltd and further framed a charge u/s 5(1)(a) punishable u/s 5(4) of the Act against accused Niraj and u/s 5(2) punishable u/s 5(4) of the Act against the accused Mathew Samuel and Thomas Mathew.

14. Aggrieved by the order dated 16.10.2012, the present revision petitions have been filed by accused persons, namely, Niraj Kumar, Aniruddha Bahal and Thomas Mathew.

15. At this stage, it would be useful to reproduce section 3(1)(c) and 5(1)(2) and (4) of the Act which read as under:-

“Section 3 - Penalties for spying

(1) If any person for any purpose prejudicial to the safety or interests of the State—

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(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or

information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States,

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air-force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

Section 5 - Wrongful communication, etc., of information

(1) If any person having in his possession or control any secret official code or pass-word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access Owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a

person who is or has been employed under a person who holds or has held such an office or contract-

(a) wilfully communicates the code or pass-word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass-word or information,

he shall be guilty of an offence under this Section.

(2) If any person voluntarily receives any secret official code or pass-word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass-word, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this Section.

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(4) A person guilty of an offence under this Section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.”

16. Section 3(1)(c) stipulates that offence as defined under section 3(1)(c) if relates to “work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Govt., in or relation to any secret official code”, is punishable with imprisonment which may extend to 14 years and in other cases to three years. In the impugned order dated 16.10.2012, the Id. Additional Sessions Judge has proceeded on the premise that allegations in the complaint/charge-sheet are not covered within the ambit of above words of Section 3(1)(c) and the offence is punishable by imprisonment which may extend to 3 years. Even before this court, it is not contended by CBI that the present case would be covered by the ambit of above words of section 3(1)(c) of the Act and would be punishable by imprisonment, which would be anything more than 3 years. Section 5(1)(2) and (4) of the Act reproduced above show that all the accused persons in the present case have been charged for the offence which are punishable with imprisonment for a term which may extend to three years or with fine or with both.

17. Insofar as accused Niraj Kumar is concerned, it is contended on his behalf that the case of the prosecution is based on conjectures. It is contended that there is no direct or circumstantial evidence capable of being converted into legal evidence against this accused to show that he had passed on the copy of minutes dated 29.9.1999 to accused Aniruddha Behal

or any other person. It is submitted that material on record filed by prosecution itself shows that accused Niraj Kumar was transferred from the concerned seat from North Block to Sardar Patel Bhawan on 12.10.1999 and thereafter he handed over the custody of the file to one Ratti Ram, PW who has been made a prosecution witness in this case. Reference is made to the statement of Rati Ram, PW recorded under Section 161 Cr.P.C.

18. It is contended that after handing over the charge accused Niraj Kumar ceased to be the custodian of the relevant file. The alleged publication on the site took place about a year from the date of handing over the charge by the said accused. It is also contended that the case of the prosecution against the accused Niraj Kumar is entirely based on alleged confessional statement purportedly recorded u/s 164 Cr.P.C. It is submitted that the statement u/s 164 Cr.P.C. is hit by the provisions of section 24 of the Indian Evidence Act. It is also submitted that the said statement was withdrawn by this accused. In any event, it is submitted that the statement was never recorded as per provisions of section 164 Cr.P.C. There is no provision or procedure for taking on record the pre-recorded statement by way of statement u/s 164 Cr.P.C. Reference in this regard was made to the provisions of Chapter 13 Rule 4 of Delhi High Court Rules which stipulates that statement u/s 164 Cr.P.C must be reduced in writing either by the Magistrate. It is also contended that tenor of this document itself shows that the accused Niraj Kumar had made the alleged statement in the hope of being granted pardon and an application u/s 306 Cr.P.C was moved for being made an approver as is apparent from the order dated 17th March, 2011 of the Id.trial court which was never done.

19. Learned counsel for the petitioner-Niraj Kumar has submitted that in

the impugned order, the Id.trial court has referred to the statement of Ratti Ram, PW who in his statement u/s 161 Cr.P.C has stated that he was told by one Mohan that accused Niraj Kumar had made photocopies of the documents after his transfer from the seat but the statement of Mohan has not been recorded. Even the statement of Ratti Ram, PW against the accused Niraj Kumar, at best, is in the nature of hearsay evidence.

20. Learned counsel for the petitioner-Niraj Kumar has further contended that alleged statement recorded u/s 164 Cr.P.C was printed text supplied by the respondent-CBI that was incorrectly taken on record by the Id.trial court. It is contended that the alleged confessional statement was extracted by the respondent on the inducement of being declared as an approver which inducement had been offered fraudulently and with malafide intention. It is further contended that the alleged statement u/s 164 Cr.P.C was not recorded as per Delhi High Court Rules (Section 4 of Chapter 13 Vol.III of the Delhi High Court Rules). It is contended that the alleged statement u/s 164 Cr.P.C was not recorded by the Magistrate or under the dictation of the Magistrate. There is no provision to tender a typed copy under section 164 Cr.P.C as has been done in the present case.

21. The complaint is filed on the basis of alleged documents i.e., minutes of the meeting dated 29.9.1999 and report that is said to have been electronically published on the site, tehelka.com. However, the said documents are not supported by any certificate under Section 65B of the Evidence Act, 1862, to show that the document is a correct representation of an electronic document as alleged by the CBI.

22. Learned counsel for the petitioner-Aniruddha Bahal has submitted that prosecution has failed to prima facie establish that the alleged minutes

of the meeting dated 29.9.1999 were ever published on the website of Tehalka.com. In the alternate, it is contended that as per case of the prosecution the minutes were posted on the website on 9.10.2000 and were removed therefrom on 10.10.2000 i.e., very next day. It is submitted that it is not the case of prosecution that this petitioner was guided by any consideration except to place the matter before public domain in discharge of his obligations as a journalist. It is submitted that the document dated 29.9.1999 cannot be considered as a secret document and in any event, the present petitioner cannot be imputed with the knowledge of the fact that this document was a secret document. It is contended that this document nowhere bears any endorsement to the effect that it is a secret document. It is also argued that even if it is presumed that it was a part of file which was marked 'secret', there is nothing on record to show that petitioner was aware of the said fact.

23. It is further contended that the case of prosecution is solely based on the purported statement recorded u/s 164 of Cr.P.C. which is liable to be ignored for the reason as argued on behalf of Niraj Kumar. Moreover, at best, the statement under Section 164 Cr.P.C. is in the nature of confessional statement by the co-accused who is being tried along with other co-accused persons and thus has no significance against the present petitioner.

24. It is further contended that the Id. C.M.M. erred in taking cognizance of the offences on the basis of challan in view of the provisions of section 13(3) of the Act. It is contended that the Act is a complete code in itself. It would not be open to the Id.C.M.M. to take cognizance of the offence except on the basis of complaint and the material attached to the complaint. It is further contended that power to file complaint under section 13(3) of the Act

only vests with the appropriate government or some officer empowered by the appropriate government in his behalf. It is contended that the complaint dated 4.6.2003 filed by the Deputy Superintendent of Police Shri N.S.Kharayat, CBI was thus incompetent. It is also contended that the Secretary, Ministry of Home Affairs who himself was a delegate of the Central Government, could not have delegated the power under section 13(3) of the Act to file the complaint.

25. Insofar as the co-accused Thomas Mathew is concerned, it is contended that there is no material against him which gives rise to grave suspicion against the accused for commission of alleged offences. It is contended that the case against him is also based on the alleged confessional statement of co-accused Niraj Kumar purported to have been recorded u/s 164 Cr.P.C which is liable to be rejected for the reasons noted above. The charge sheet or the complaint does not mention anything about his involvement or that he had any knowledge of the publication of the alleged offending material.

26. In substance, the contention of learned counsel for the accused persons is that there is no sufficient material on record to justify framing of charge against them and for taking cognizance, as such, the order of framing charge is liable to be set aside.

27. Learned counsel for the respondent-CBI has argued to the contrary. It is submitted that there is sufficient material to justify the framing of charge against the accused persons. Attention of this court was drawn to the order dated 13.5.2010 passed by this court in CrI.M.C.1637/2010 wherein the revision petition filed by the accused -Niraj Kumar against the complaint/charge sheet was withdrawn reserving liberty to the petitioner/accused

Niraj Kumar to take all the pleas taken in the said revision petition before the Id.trial court at the time of hearing arguments on the point of charge. It is also submitted that evidential value of confessional statement recorded by the Id.M.M. can be better looked into after recording of evidence by the Id.trial court.

28. It is contended that so called “retraction” is belated and is an afterthought and of no value in the eyes of law. It is further contended that the so called “retraction” has not diluted prima facie evidence against the petitioner Niraj Kumar and other co-accused persons.

29. It is contended that the Id.C.M.M. has rightly taken the cognizance on the basis of complaint and charge sheet filed against the accused persons since both arise out of one FIR and there is no illegality in the order dated 15.6.2005.

30. It is submitted that the accused Aniruddha Bahal was not only the Director of accused company but also Editor of the Portal. It is further submitted that as per statement of co-accused Niraj Kumar recorded u/s 164 Cr.P.C, specific role has been attributed to the accused Aniruddha Bahal, as such, he cannot escape from the responsibility of publishing the material in question by claiming that he had no knowledge about the commission of offence under the Act. It is submitted that charge can be framed on the basis of strong suspicion. Reference is made to the judgment in Sajjan Kumar Vs. CBI 2011 CrI.L.J.1225SC and Nakul Kohli vs. State 2010 CrI.L.J.4536.

31. It is contended that there is sufficient evidence against the accused persons both oral and documentary, as such, charge has been rightly framed against them and the revision petitions are liable to be dismissed.

32. I have heard learned counsel for the parties and perused the material

on record.

33. I find that there is substantial force in the submissions made on behalf of accused persons that respondent-CBI could not have proceeded to file charge sheet in the present case.

34. The Official Secrets Act is a special Act and by virtue of section 4 and 5 of the Cr.P.C., any trial under the Official Secrets Act would be governed by the procedure as laid down by the Official Secrets Act.

Section 13(3) of the Official Secrets Act is as follows:-

“13. Restriction on trial of offences

.....
(3) No Court shall take cognizance of any offence under this Act, unless upon complaint made by order of, or under authority from, the appropriate Government or some officer empowered by the appropriate Government in this behalf.”

35. The term ‘complaint’ vide Section 2 (d) of Cr.P.C. means any allegation, made orally or in writing, to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

36. The term ‘police report’ is defined in Section 2 (r) of Cr.P.C. as follows:-

“2(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173”

37. Thus, the term ‘complaint’ and ‘police report’ have different meaning and connotation. In this case, the CBI initially filed the complaint under Section 13(3) of the Act, thereafter, proceeded to file a charge sheet under

Section 173 Cr.P.C. In the order dated 15.6.2005 the learned CMM has referred to challan and the complaint under Section 13(3) of the Act. Thus, it would appear that the learned CMM took cognizance of the offence based on the police complaint and the charge sheet. Moreover, the learned CMM vide order dated 7.7.2005 also ordered that the complaint filed under Section 13(3) of Act and the charge sheet be clubbed together as per law.

38. Learned CMM has not referred to the law by which complaint under Section 13(3) of Act and Section 173 of Cr.P.C. were liable to be clubbed together. However, it may be that the learned CMM had the provisions of Section 210 Cr.P.C. in her mind.

39. Section 210 of Cr.P.C. reads as follows:-

“210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.”-(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case

arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.”

40. Provisions of Section 210 Cr.P.C. would have no applicability to the trial of offences under the Act. Under Section 13(3) of the Act reproduced above, no court can take cognizance of an offence under the Act unless upon complaint made by order of, or under authority from appropriate Government or some officer empowered by the appropriate Government in this behalf.

41. The Official Secrets Act is a Special Act and a complete code in itself. As per the mandate of the Official Secrets Act, no Court shall take cognizance in the absence of a ‘complaint’ filed under authority of the Appropriate Government. Therefore a ‘complaint’ as defined under Section 2(d) of the Code, and the authority of the Appropriate Government for filing the complaint for the offence committed under the Official Secrets Act, if any, are the *sine qua non* for taking cognizance of any offence under the Act.

42. In this regard, reference can be made to Section 22 of the Transplantation of Human Organs Act, 1994 [“TOHO”]. The same is as under:-

“22. Cognizance of offence. –

- (1) No court shall take cognizance of an offence under this Act except on a complaint made by –
- (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government or, the case may be, the Appropriate Authority; or
 - (b) a person who has given notice of not less than sixty days, in such manner as may be prescribed, to the Appropriate Authority concerned, of the alleged offence and of his intention to make a complaint to the court.
- (2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
- (3) Where a complaint has been made under clause (b) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

43. The Supreme Court in the case of **Jeewan Kumar Raut vs CBI**; AIR 2009 SC 2763 while dealing with the provisions of Section 22 of TOHO held as follows:-

“12. *TOHO* is a special Act. It deals with the subjects mentioned therein, viz., offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative. *TOHO* provides for appointment of an appropriate authority to deal with the matters specified in Sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorized *inter alia* to

investigate any complaint of the breach of any of the provisions of *TOHO* or any of the rules made thereunder and take appropriate action.

13. The Appropriate Authority, subject to exceptions provided for in *TOHO*, thus, is only authorized to investigate cases of breach of any of the provisions thereof, whether penal or otherwise. Ordinarily, any person can set the criminal law in motion. The Parliament and the State Legislatures, however, keeping in view the sensitivity and/ or importance of the subject, have carved out specific areas where violations of any of the provisions of a special statute like *TOHO* can be dealt with only by the authorities specified therein.

14. The FIR lodged before the officer incharge of the Gurgaon Police Station was by way of information. It disclosed not only commission of an offence under *TOHO* but also under various provisions of the Indian Penal Code. The officer incharge of the Police Station, however, was not authorized by the appropriate government to deal with the matter in relation to *TOHO*; but, the respondent was. In that view of the matter, the investigation of the said complaint was handed over to it.

15. *TOHO* being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in

force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences. *TOHO* being a special Act and the matter relating with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code.

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19. Section 22 of *TOHO* prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it a laid down therein. Respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of *TOHO*. If by reason of the provisions of *TOHO*, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of Sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, Sub-section (2) of Section 167 of the Code was not attracted.

20. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorization under Section 13(3)(iv) of *TOHO*. While doing so, it could

exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO. To put it differently, upon completion of the investigation, an authorized officer could only file a complaint and not a police report, as a specific bar has been created by the Parliament. In that view of the matter, the police report being not a complaint and vice-versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would report the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.”

(emphasis added).

44. The position under the Official Secrets Act is also similar to the position under TOHO. Here also the law prohibits the filing of charge sheet by implication.

45. In these circumstances, taking cognizance of the offence and the

directions to club the charge sheet and the complaint by the learned CMM cannot be sustained.

46. I also find substance in the submission of accused persons that there was no sufficient material on record to frame the charge against the accused persons.

47. Accused Niraj Kumar is facing trial for handing over the copy of the minutes dated 29.9.1999 to other co-accused persons. As per respondent, accused Niraj Kumar was custodian of the relevant file till 12.10.1999 and thereafter was transferred to Sardar Patel Bhawan. After 12.10.1999, this accused ceased to be the custodian of the relevant file. The files were then in the custody of Ratti Ram, PW. Other than the statement of accused Niraj Kumar under Section 164 Cr.P.C., to which the reference shall be made later on, there is no statement of any other person on record to show that the accused Niraj Kumar had obtained copy of the minutes either before or thereafter. In his statement under Section 161 Cr.P.C., Ratti Ram, PW has referred to the statement of one Mohan but the statement of Mohan, if recorded, has not been filed. Mr.S.P.Shokhanda, PW Under Secretary (Vigilance), Ministry of Home Affairs, North Block, New Delhi in his statement under Section 161 Cr.P.C. was asked the reasons for assuming that the information could have been leaked by accused Niraj Kumar and the sole reason given by this witness for making this assumption is that the accused was dealing with the file containing the minutes of the meeting dated 29.9.1999 before his transfer on 12.10.1999. However, no reason is assigned by any of the witnesses as to why only this person is being doubted for allegedly having disclosed the minutes to other persons. Even the statement of Mr.G.K.Pillai, Joint Secretary (NE), MHA, PW and Harish

Chandra Prakash, PW recorded u/s 161 Cr.P.C are of no help to respondent.

48. The prosecution next relies on the confessional statement of Niraj Kumar recorded by the learned MM under Section 164 Cr.P.C. The counsel for all the accused persons has challenged the statement recorded under Section 164 Cr.P.C. as illegal and of no legal consequence. The statement referred to in the statement recorded by learned MM is a typed statement which runs into 9 pages. Section 164(4) Cr.P.C. lays down that any confession shall be recorded in the manner provided in Section 281 of that Code for the recording of examination of accused and shall be signed by the person making the confession.

Section 164(4) of Cr.P.C. is reproduced as under:-

“164. Recording of confessions and statements:-

...

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) AB Magistrate”

49. Section 281 Cr.P.C. provides as under:-“281. Record of examination of accused:-

(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or Presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.”

50. Thus, there is a clear indication in the section that the statement under Section 164 Cr.P.C. should be got recorded by the Magistrate either in his or her own handwriting or should be dictated to some person and pre-recorded statement would not normally suffice. Moreover, Section 4 of Chapter 13 Vol. III of Delhi High Court Rules also state that in recording a statement or confession under Section 164 Cr.P.C., the provisions of that section and provision of Section 281 Cr.P.C. should be strictly followed by the court concerned.

51. The material on record would also show that the statement in issue was made by accused Niraj Kumar in the hope of being made an approver in this case. There is an application on record moved by accused Niraj Kumar under Section 306 Cr.P.C. dated 9.1.2006 for grant of pardon and for making him approver of the case. There is another application dated 9.7.2006 under Section 306 Cr.P.C. by respondent for grant of pardon to Niraj Kumar. There are deletions and improvements made in the statement. The accused Niraj Kumar was ultimately not made an approver. Those applications remained pending for a long time. On 18.4.2011 Niraj Kumar had moved two applications, one seeking withdrawal of statement u/s 164 Cr.P.C and the other for withdrawal application of application u/s 306 Cr.P.C. The application seeking withdrawal of application u/s 306 Cr.P.C was not opposed by respondent. Accordingly, the said application was allowed by Id.trial court on 20.4.2012. In the application for withdrawal of

statement under Section 164 Cr.P.C. Niraj Kumar has stated that at the time of making the alleged statement he was in custody and not on bail. He was also under suspension from his job. Considering his situation, petitioner was given assurance that he would be made a witness in the said case and that all criminal charges against him would be dropped and he would be reinstated in his job and pressurised him to submit a printed text before the ld. M.M. In these circumstances, I find considerable force in the submission of the petitioner that the alleged statement was got signed and he was made to submit to Ld. M.M. In such circumstances, I concur with the counsel for accused persons that it would be unjust if prosecution is permitted to rely on the statement under Section 164 Cr.P.C. for framing the charge against all the accused persons.

52. There is no other prima facie evidence available against accused Niraj Kumar.

53. Insofar as Aniruddha Bahal is concerned, the prosecution was required to produce material that the minutes of meeting dated 29.9.1999 were published on the website tehelka.com and the same was with the knowledge of accused Aniruddha Bahal. There is no evidence that the minutes of meeting dated 29.9.1999 were displayed on the website. Section 65 B of the Evidence Act lays down the procedure for admissibility of electronic records. Though more than 13 years have passed, the prosecution has not filed any certificate under Section 65B. It is stated that Sh. Prakash Shokhanda, Under Secretary (Vigilance), MHA, stated that the information was downloaded by the then MHA website incharge but statement of website incharge was not got recorded nor any certificate obtained. In any event there is no material to show that accused Aniruddha Bahal had the

knowledge of the fact that minutes were secret document and there was no marking of secret on that document.

54. It has also been argued on behalf of accused Aniruddha Bahal that time and again it held by the Hon'ble Supreme Court that the vicarious liability cannot be attached upon the directors and managing directors of a company just by the virtue of them being directors or managing directors. The basic requirement of impleading a director is to show that the said director was responsible for the day to day affairs of the company. It has to be clearly stated what the role of the director was in the alleged commission of offence and secondly whether the said role was attributable to such criminal intent and intention. It is argued that the absence of specific averments in regard to the role and manner of involvement of the director cannot in any circumstance fasten any liability on the said director. However, but I need not go into all this in view of the fact that there is no sufficient evidence to frame charge against this accused.

55. Against Thomas Mathew again there is no evidence other than alleged confessional statement under Section 164 of accused Niraj Kumar to which reference has already been made.

56. Prima facie there is no material which shows grave suspicion against the accused Thomas Mathew also for commission of any of alleged offences.

57. In view of above discussion, the order on charge dated 16th October, 2012 passed by the Id.Addl. Sessions Judge, Fast Track Court (Central), Tis Hazari, Delhi and the charge framed vide aforesaid order in FIR i.e., RC No.1(S)/2001/SIC.IV New Delhi dated 30.3.2001 against the petitioners/accused persons are set aside. The petitioners stand discharged

in the present case.

Revision petitions stand disposed of accordingly.

Trial court record be sent back.

VEENA BIRBAL, J

May 26th, 2014
ssb/kks