

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

Delivered on: 05th November, 2015

+ CRL.M.C. 2873/2015 & CrI.M.A. 10251/2015 (stay)

C B I

..... Petitioner

Represented by: Mr. Sanjay Jain, ASG
with Ms. Sonia Mathur & Mr. Sushil Kr.
Dubey, Advs.

Versus

DHARAMBIR KHATTAR

..... Respondent

Represented by: Mr. S.K.Rungta, Sr. Adv.
with Mr. Varun Gupta, Mr. Prashant Singh &
Mr. Jeewan Chandra, Advs.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. By way of the present petition, filed under Section 482 Cr.P.C. petitioner / CBI seeks setting aside of order dated 20.05.2011 thereby directing the CBI to produce the record containing the proposals sent to Ministry of Home Affairs seeking permission for interception of telephone calls.

2. Further seeks directions thereby setting aside of order dated 08.05.2015 read with order dated 15.05.2015 whereby the prayer made in the affidavit filed by the Director, CBI thereby seeking privilege under Section 123 and 124 of Indian Evidence Act, 1872 with regard to aforesaid documents has been dismissed by Id. Special Judge.

3. The present case was registered on 26.03.2003 against the accused persons and respondent herein under Section 120B IPC and Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act, 1988 on the basis of source information. Presently the case is pending trial in the Court of Id. Special Judge, CBI Rohini Courts, New Delhi and is at the stage of evidence of PWs.

4. Mr. Sanjay Jain, Id. ASG appearing on behalf of the petitioner, submitted that during the course of cross-examination of PW5 Mr. Navdeep Virk, respondent moved an application under Section 91 Cr.P.C. thereby seeking direction to CBI to produce certain documents / records submitted by the petitioner to the Ministry of Home Affairs in the form of seven proposals for obtaining orders / permission for interception of certain telephone calls of the accused persons. This was done after the above witness had deposed that “*the proposals were top secret*”. Accordingly, the petitioner filed a reply to the aforesaid application stating therein that those documents have not been relied by the prosecution and are not relevant to the facts and circumstances of the case. However, the said application was allowed in terms of the impugned order dated 20.05.2011 and CBI was directed accordingly.

5. Mr. Jain further submitted that the authorization in connection with the electronic surveillance were obtained from the competent authority vide seven Top Secret Orders, each of which was valid for 90 days. These seven orders have been filed along with the chargesheet and copy of which have been supplied to the accused persons. After

the impugned order dated 20.05.2011, Director, CBI filed an affidavit dated 23.07.2011, thereby claiming privilege under Sections 123 and 124 of Indian Evidence Act 1872 on the ground that due to disclosure of the records mentioned above, public interest would suffer adversely. The said affidavit was pending consideration before the Id. Trial Court and finally vide order dated 08.05.2015 read with Order dated 18.05.2015, the request of the CBI seeking privilege was disallowed by the Id. Trial Court and directed them to make the records available to the accused / respondent in compliance of order dated 20.05.2011.

6. Ld. ASG further submitted that the documents in issue are top secret in nature and relates to the affairs of the State viz. maintenance of law and order, economic / social stability and provide corruption free society for which the State is committed and their disclosure will lead to contrary effect on the functioning of surveillance on the persons suspected to be acting in contravention of law and public interest will suffer.

7. Mr. Jain further submitted that the process of interception of telephone calls is used to keep the activities of suspects under surveillance which may or may not result into the registration of regular cases depending on the nature of conversation and evidence appearing during interception of calls of the suspected persons. Adequate secrecy is maintained in obtaining the order of competent authority for interception of telephone calls of suspected persons and subsequent interception in public interest. Moreover, this disclosure

would definitely have an adverse effect on the functioning of the law enforcement / investigating agencies and ultimately would be detrimental to public interest. It will expose the “source” who furnishes such information.

8. To strengthen his arguments, Id. ASG has relied upon a case of ***Manjeet Singh Khara v. State of Maharashtra 2013 (9) SCC 276*** whereby the Hon’ble Supreme Court held as under:

“We state at the cost of repetition that the prosecution has categorically taken the stand that they do not propose to rely upon the information passed on to the Anti Corruption Bureau leading to an open inquiry against the accused persons. We fail to see how the accused persons are prejudiced by non-disclosure of the name of the person who sent the complaint as well as the original copy of the complaint received by the Anti Corruption Bureau. Situations are many where certain persons do not want to disclose the identity as well as the information/complaint passed on them to the Anti Corruption Bureau. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their life. This complaint only triggered an enquiry. Ultimately, the first information was lodged on the basis of an open inquiry bearing VER No. 31/1987 and it is based on that inquiry the first information report dated 13.10.1992 was registered.”

9. Mr. Jain further submitted that non-disclosure of these documents will not affect the administration of justice in the instant case as no content of these documents / records is being used as an evidence against the accused persons. The incriminating intercepted calls transcript has already been filed. It is a settled that State has a

prerogative of preventing evidence being given in the matter that would be contrary to public interest and are of top secret in nature and related to the affairs of the State.

10. Ld. Counsel has relied upon a case of ***People's Union for Civil Liberties and Anr. v. Union of India and Ors. 2004 2 SCC 476*** whereby held as under:

“Every right - legal or moral - carries with it a corresponding obligation. It is subject to several exemptions/exceptions indicated in broad terms. Generally, the exemptions/exceptions under those laws entitle the government to withhold information relating to the following matters:

- (i) International relations;*
- (ii) National Security (including defence) and public safety;*
- (iii) Investigation, detection and prevention of crime;*
- (iv) Internal deliberations of the government;*
- (v) Information received in confidence from a source outside the government;*
- (vi) Information, which, if disclosed, would violate the privacy of individual;*
- (vii) Information of an economic nature, (including Trade Secrets) which, if disclosed, would confer an unfair advance on some person or concern, or, subject some*

person or government to an unfair disadvantage;

(viii) Information which is subject to a claim of legal professional privilege, e.g., communication between a legal adviser and the client; between a physician and the patient;

(ix) Information about scientific discoveries.”

11. Mr. Jain further submitted that there is no period of limitation prescribed under the Limitation Act as well as under the Criminal Procedure Code within which a petition under Section 482 Cr.P.C. ought to be filed. The affidavit seeking privilege under Section 123 and 124 of Indian Evidence Act was filed immediately after the order dated 20.05.2011. The said affidavit was pending consideration. Therefore, there was no delay from the side of the petitioner.

12. He has relied upon a case of the ***State of U.P. v. Raj Narayan and Ors. 1975 (4) SCC 428*** and submitted that by the majority decision rendered in ***S.P. Gupta v. President of India and Ors. AIR 1982 SC 149*** Hon'ble Supreme Court reaffirmed the dictum of ***Raj Narayan*** (*supra*) in the following manner:

69. Now an objection against the disclosure of a document on the ground that it relates to affairs of State may be made before the court either because it would be against the interest of the State or the public service to disclose its contents or because it belongs to a class of document which in the public interest ought not to be disclosed, whether or not it would be harmful to disclose the contents of the particular document.....The claim put forward by

the Id.Solicitor General on behalf of the Union of India is that these documents are entitled to immunity from disclosure because they belonged to a class of documents which it would be against national interest or the interest of the judiciary to disclose. It is settled law, and it was so clearly recognised in Raj Narain's case : [1975]3SCR333 (supra) that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level interdepartmental communications and dispatches from ambassadors abroad (vide : Conway v. Rimmer 1968 AC 910 and Reg v. Lewes J.K. Ex parte Home Secy. 1973 AC 388). Papers brought into existence for the purpose of preparing a submission to cabinet (vide Commonwealth Lanyon Property Ltd. v. Commonwealth 129 LR 650) and indeed any documents which relate to the framing of government policy at a high level (vide: Re Grosyenor Hotel. London). It would seem that according to the decision in Sodhi Sukhdev Singh's case AIR 1961 SC 4931 (supra) this class may also extend to "notes and minute made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached" in the course of determination of questions of policy Lord Reid in Conway v. Rimmer (supra) at page 952 proceeded also to include in this class "all documents concerned with policy-making within

departments including, it may be minutes and the fire by quite junior officials and correspondence with outside bodies". It is not necessary for us for the purpose of this case to consider what documents legitimately belong to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But, it does appear that cabinet, papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or Concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure.
(emphasis supplied)

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76. We may also point out that we were invited to inspect for ourselves the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India for the purpose of deciding whether that correspondence was entitled to immunity against disclosure. Now the view taken in *Sodhi Sukhdev Singh's case*: [1961]2SCR371 was that where an objection is raised against the disclosure of a document under Section 123, the Court has no power to inspect the document under Section 162 for the purpose of deciding the objection. But with the greatest respect to the learned Judges who decided that case, we do not think this view is correct and in fact subsequent decisions of this Court seem to be against it. So far as English Law is concerned it is now well-settled as a result of the decision of the House of Lords in *Conway v. Rimmer* 1968 AC 910 (supra) that there is a residual power in the Court to inspect the document. If the Court finds it necessary to do so for the purpose of deciding whether on balance the disclosure of the document would cause greater injury to public Interest than its non-disclosure, vide *Conway v. Rimmer* (supra) at pages 953, 979, 981 and 993. This residual power of the Court to inspect the document has also be recognised in

Australian Law by the decision of the High Court of Australia in Sankey v, Whitlam 21 Aus. L.R. 505. We do not see any reason why under Indian Law the Court should be denied this residual power to inspect the document. It is true that under Section 162 the Court cannot inspect the document if it relates to affairs of State, but this bar comes into operation only if the document is established to be one relating to affairs of State. If, however, there is any doubt whether the document does relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest and the document is therefore one relating to affairs of State, is not excluded by Section 162. This Court in fact held in no uncertain terms in Raj Narain's case : [1975]3SCR333 (supra) where an objection against the disclosure of the Blue Book was taken on behalf of the State under Section 123, that if the Court was not satisfied with the affidavit objecting to the disclosure of the document, the Court may inspect the document. Ray, C.J, observed at two places while dealing with the objection against the disclosure of the Blue Book under Section 123 that "If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court," and "If the Court in spite of the affidavit wishes to inspect the document, the Court may do so." Mathew, J. also pointed out that in Amarchand Butail v. Union of India : AIR1964SC1658 this Court inspected the document in order to see whether it related to affairs of State. There can therefore, be no doubt that even where a claim for immunity against disclosure of a document is made under Section 123, the Court may in an appropriate case inspect the document in order to satisfy itself whether its disclosure would, in the particular case before it, be injurious to public interest and the claim for immunity must therefore be upheld...." (emphasis supplied)"

13. On the other hand, Mr. S.K. Rungta, Id. Senior Counsel appearing on behalf of the respondent submitted that during examination of Mr. Navdeep Virk, it came on record that the proposals for obtaining permission for recording conversation had been moved by him, which later reached to the Ministry of Home Affairs through the officers concerned. The said witness has admitted that the seven orders thereby granting permission had been issued by the Ministry of Home Affairs on the basis of information furnished in the proposal letters. Accordingly, respondent moved an application under Section 91 Cr.P.C. whereby submitted that non-filing of proposals, which are crucial for the just decision of the cases will cause great prejudice to the accused persons and therefore sought directions for calling the record pertaining to the proposals mentioned above.

14. Id. Sr. Counsel further submitted that impugned order was passed on 20.05.2011 after considering the reply filed by CBI to the application filed under Section 91 Cr.P.C. At that point of time, the CBI did not claim privilege on the seven proposals made. However, after the lapse of 4 years, the present petition has been filed.

15. He further submitted that the above proposals are very much necessary for the just and fair adjudication of the case and were sent somewhere in the year 2002. Thus, it has lost its relevancy in the year 2005. Therefore, there is no merit in the case of the petitioner and the same is liable to be dismissed.

16. I have heard Id. Counsel for the parties.

17. It is pertinent to mention here that the CBI had filed its reply to the application under Section 91 Cr.P.C. that the same was not maintainable in relation to any document as has not been relied upon by the prosecution. Therefore, the documents sought by the respondent are not relevant to the facts and circumstances of the case. However, the CBI had not claimed any privilege upon the documents sought to be filed by the respondent in the Court.

18. It is not in dispute that the documents / proposals in question are offered by CBI officials themselves. Thus, the said documents are very much in their custody and control. Moreover, seven proposals / orders were issued by the Secretary, Ministry of Home Affairs permitting the interception of 15 telephone calls.

19. PW5, Mr. Navdeep Virk, the then Superintendent of Police, CBI appeared before the Court on 13.03.2009 and 07.09.2009 for recording his examination in chief and part cross-examination respectively. During his cross-examination on 07.09.2009 the said PW testified as under:

“The proposals were prepared by me. As far as I recollect, the proposals were top secret. The proposals used to travel by hand for getting the signatures of the concerned officials. I do not remember if the proposals were entered in the movement register but the same were handled by Ins. M.C. Kashhap who used to take it by hand. Proposals are not in the form of letters but are basically files with notings and that the files have numbers. As Insp. M.C. Kashyp had handled the files, so he would be in a better position to tell about the numbering of the files. I

cannot say anything about it. The proposal in the file was prepared by me and then it was put up before the DIG and after his signature, it was put up before the Jt. Director and then the Director, CBI and thereafter the same file was put up before the Secretary, Home. As I recollect, there were seven proposals were prepared by me. Without looking at the record, I cannot tell if seven proposals were in different files or not.”

20. It cannot be disputed that the defence is entitled to ask for production of such documents which are relevant, necessary and desirable for effective cross-examination of the prosecution witnesses. It is also pertinent to mention here that a similar attempt had been made by the respondent at the stage of scrutiny of documents under Sections 207 Cr.P.C., same was rejected and even upheld by this Court. The application under Section 207 Cr.P.C. relates to pre-charge stage of the case and the observations of Id. Special Judge in its order dated 17.09.2005 were confined to pre-charge stage. Thus, Id. Special Judge held the request of the applicant to be pre-mature.

21. I note this Court vide order dated 11.03.2008 has only held that up to the pre-charge stage, the court cannot direct the prosecution to furnish copies of documents other than those which prosecution proposes to rely upon or which have been already sent to the Court during investigation. Thus, this Court nowhere held that the accused is not entitled to any further documents under Section 91 Cr.P.C. even at the subsequent stage of trial.

22. The language of Section 91 Cr.P.C. is very wide and can be

invoked by production of documents such as case diary of another case, which may be necessary or desirable for the purpose of using statements recorded in the other case diary for contradicting the witness. When the aforesaid documents appears to be connected with the subject matter of the case and are not in possession of the accused, then the court can always invoke Section 91 Cr.P.C with a view to advance the interest of justice.

23. In *S.Swaminathan v. State of Delhi*, 2008 CrL. L.J. 1957 this Court has differentiated the stage elaborated in *State of Orissa v. Debendera Nath Padhi*, AIR 2005 SC 359 and held as under:

“26. Needless to state, in view of the decision in Debendra Nath Padhi’s case (supra) since charges have been framed, it would be open to the petitioners to file an application before the ld. Trial Court under Section 91 of the Code of Criminal Procedure, 1973.”

24. It is pertinent to mention here that PW5, Mr. Navdeep Virk during his cross-examination has expressed his inability to make statement with regard to seven proposals without looking at the record. The said proposals were submitted by the CBI to the Ministry of Home Affairs seeking permission for interception of telephone calls. If the proposals which were directed to be produced vide order dated 20.05.2011 were top secret, what prevented the CBI to claim privilege under Section 123 and 124 of Cr.P.C. of the Evidence Act.

25. It is important to note that the CBI filed their reply to the aforesaid application on 18.12.2009, i.e., after three months and further

additional affidavit after more than 9 months, i.e., 24.09.2010. The respondent was making repeated requests for the decision on the said application, but due to the delay on the part of the CBI in filing the reply, same was decided by the Id. Trial Court on 20.05.2015 directing the CBI to produce the seven proposals. However, in none of the two replies, the CBI had claimed any privilege in respect of seven proposals and did not take any steps for claiming privilege in terms of Section 123 and 124 of Indian Evidence Act. Thus, the affidavit filed by the CBI is an after-thought. Moreover, said affidavit has not been filed by adopting prescribed procedure. The said affidavit had to be filed by the Secretary (Home). However, the affidavit, which was rejected by the Id. Trial Court was of Director, CBI who is not competent to claim privilege in terms of Section 123 and 124 of Indian Evidence Act.

26. Though, I find force in the submission of Mr. Sanjay Jain, Id. ASG that the proposals may disclose the names of the sources, which will go against the security of an individual and the State as well. Therefore, by producing the proposals on record, as directed by the Id. Trial Court vide order dated 20.05.2011, the petitioner may prepare a photocopy of the same and delete the name of the source or other objectionable information therein by applying white fluid / permanent marker or other material. However, Id. Trial Court is at liberty to see the original record in a sealed cover for its satisfaction.

27. In view of the above discussion, I am of the considered opinion

that there is no perversity or illegality in the orders dated 20.05.2011 and 08.05.2015 r/w order dated 15.05.2015 passed by the ld. Trial Court.

28. Accordingly, the petition is disposed of.

Crl.M.A. 10251/2015 (stay)

Dismissed as infructuous.

SURESH KAIT, J

NOVEMBER 05, 2015

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