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

% *Date of Decision : 28th April, 2016*

\+ W.P.(CRL) 1036/2015

MUSHTAQ AHMAD LONE ..... Petitioner

Through: Mr.Ramesh K.Mishra and Mr.Rajnish K.Sinha, Advocates.

versus

NATIONAL INVESTIGATION AGENCY AND ANOTHER ..... Respondents

Through: Mr.Sanjay Jain, ASG, with Mr.Shilpa Singh, Spl.PP, Mr.Abhishek Bagana, PP and Ms.R. Jain, Advocates for R-1.
Mr.Sanjeev Uniyal, Advocate for R-2/UOI.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

1. The writ petitioner before this Court is facing trial in case RC No.11/2011/NIA/DLI before the Special Court established under The National Investigation Agency Act, 2008 (hereinafter referred to as NIA Act) at Patiala House Court, New Delhi.

2. The prayer made in the writ petition is for issuance of directions prohibiting/restraining the Special Court constituted at Delhi under NIA Act from conducting trial of the petitioner in case RC No.11/2011/NIA/DLI as the offences have been allegedly committed in Jammu & Kashmir.

3. Mr.Ramesh K.Mishra, Advocate for the petitioner has raised the issue of territorial jurisdiction of the Special Court constituted under NIA Act at Delhi to try the petitioner. Learned counsel for the petitioner has referred to the provision of Section 13 of NIA Act which provides as under:-

> *'**13. Jurisdiction of Special Courts** – (1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.*
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> *(2) If, having regard to the exigencies of the situation prevailing in a State if, -*
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> > *(a) it is not possible to have a fair, impartial or speedy trial; or*
> > *(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or*
> > *(c) It is not otherwise in the interests of justice,*
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> *the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State of in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.*
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> *(3) The Supreme Court or the High Court, as the case may be, may act under this Section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation.'*

4. Learned counsel for the petitioner has submitted that in view of Section 13(1) of NIA Act, the petitioner/accused could have been tried only

in Jammu & Kashmir for the reason that the offence has been allegedly committed in Jammu & Kashmir only. He has submitted that when all the witnesses to be examined by the prosecution are from Jammu & Kashmir, the offence has been allegedly committed in Jammu & Kashmir, the petitioner can be tried at Jammu & Kashmir only.

5. Learned counsel for the petitioner has referred to paras 16.3, 16.4 and 17.2 of the chargesheet which have been extracted in the petition to show that the prosecuting agency has tried to bring the case artificially within the territorial jurisdiction of Delhi to deny the petitioner his right to have fair trial. Paras 16.3, 16.4 and 17.2 of the chargesheet as extracted in the writ petition, read as under:-

> *'16.3. The said outfit HM is allegedly involved in funding approximately ₹80 crores for terrorist activities in the past eight years to India. In pursuance of the said criminal conspiracy, funding continues by Hizb-Ul-Mujahiddeen (HM) from Pakistan through different mediums to different places including but not limited in J&K, Delhi and so on.*
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> *16.4. In the garb of one Jammu Kashmir Affectees Relief Trust (JKART), the said terrorist outfit is actively involved in furthering the terrorist activities in India. The head office of JKART, a frontal organisatiion of HM, is in Rawalpindi and branch offices are in Islamabad and Muzaffrabad. Once the money reaches India it is distributed through various conduits at several places including but not limited to J&K, Delhi and so on to the active terrorists and families of killed HM terrorists.*
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> *17.2. Investigation has revealed that funds received from HM in Pakistan are distributed to the active terrorists and to the next kin of the killed terrorists in J&K of the said outfit. Funds received by Hizbul-Mujahideen (HM) from across the border are transferred through Hawala channel to J&K, Delhi and other places in India in the garb of Jammu Kashmir Affectees*

Relief Trust (JKART), a frontal organization of Hizbul-Mujahideen (HM). The head office of JKART is in Rawalpiindi and branch noffices are in Islamabad and Muzaffrabad. Once, the money reaches India, it is distributed through various conduits at several places in J&K and Delhi.'

6. Mr.Ramesh K.Mishra, Advocate for the petitioner has submitted that the petitioner was earlier arrested in two cases i.e. case FIR No.72/20111 under Section 13 of Unlawful Activities Act, PS Sopore, J & K and case FIR no.73/2011 under Section 7/25 of I.A. Act & under Section 13 of Unlawful Activities Act, PS Sher Gadhi and both the times he was released on bail. It was due to this reason that he is now being tried in Delhi which is causing serious prejudice to him and has the effect of denial of right to have fair trial in violation of the fundamental rights guaranteed under Articles 14 & 21 of the Constitution of India. Trial at Delhi has also resulted in depriving the petitioner to meet his family and engage a defence lawyer of his choice and have financial support from his family. Even otherwise, there should have been a joint trial of all the cases arising out of the same transaction. The trial of petitioner in Delhi has the effect of delaying his trial in other cases in Jammu & Kashmir which has arisen out of the same transaction.

7. Learned counsel for the petitioner has submitted that when the cognizance of the offence was taken by the Special Court constituted under NIA Act, the petitioner was not before the Court to raise the objections on the issue of territorial jurisdiction. He has further submitted that in a petition filed by the co-accused Mohammad Shafi Shah before High Court of Jammu & Kashmir it was observed that the remedy could be availed before the concerned Court at Delhi or before the High Court of Delhi, hence this writ petition has been filed in Delhi to raise the issue of territorial jurisdiction.

8. Learned counsel for the petitioner has submitted that the transfer petition filed by the co-accused Muzaffar Ahmad Dar has been dealt with by the Supreme Court which was filed under Section 406 Cr.P.C. whereas in this case, the petitioner is challenging the territorial jurisdiction of the Special Court constituted at Delhi in view of provision of Section 13(1) of NIA Act. He has further submitted that unlike other enactments, NIA Act is applicable to the State of Jammu & Kashmir and trial can take place where the offence has been allegedly committed. Thus, the prayer made in the writ petition may be allowed and petitioner may be directed to try at the Special Court in Jammu & Kashmir.

9. Mr.Sanjay Jain, learned Additional Solicitor General appearing on behalf of National Investigation Agency has submitted that the petitioner is an active member of terrorist organisation '*Hizb-Ul-Mujahideen'*. Case RC No.11/2011/NIA/DLI has been registered by National Investigation Agency in compliance of the order No.11011/43/2011-IS-IV dated 07.09.2011 issued under Section 6 (5) of NIA Act, 2008 by the Ministry of Home Affairs regarding larger conspiracy towards terror funding by the active terrorist organisation '*Hizb-Ul-Mujahideen'* at different places in India. The original chargesheet was filed against ten accused persons before the Special Court on 20.11.2013 of which cognizance was taken. Since the investigation was related to larger conspiracy by the active terrorist organisation, further investigation continued in accordance with provisions of Section 173(8) Cr.P.C. At that time, some more names surfaced who were suspected to be involved in the said offence and against them, supplementary chargesheets have been filed. First supplementary chargesheet was filed on 01.11.2014 against accused No.11 and second supplementary chargesheet was filed on

15.12.2014 against accused No.12 who is the petitioner before this Court. In the above chargesheets, the trial is at the stage of consideration of charge.

10. Learned ASG for NIA/respondent has submitted that if the petitioner is aggrieved by any order of the Special Court, remedy is available under Section 21 of NIA Act. The attention of this Court has also been drawn to the orders passed by the Supreme Court in Transfer Petition (Criminal) No.220/2015 which was filed by Muzaffar Ahmad Dar – co-accused in this case. It has been submitted by learned ASG that the said transfer petition was not pressed, hence was dismissed as withdrawn with the direction to the respondent to examine 23 protected witnesses at the first instance after the charge is framed. Thus, the prayer of the petitioner that the matter needs to be tried at Jammu & Kashmir has already been considered by the Supreme Court with the limited relief to the petitioner in the Transfer Petition (Criminal) No.220/2015 that 23 protected witnesses have to be examined at the first instance after the charge is framed.

11. Learned ASG for NIA/respondent has also drawn the attention of this Court to the order dated 06.08.2015 passed by the High Court of Jammu & Kashmir in *Mohammad Shafi Shah vs. Commissioner Secretary to Govt. & Ors.* in 561-A 61/2013 c/w B.A. 24/2013 wherein the prayer made was for issuance of directions to the respondents to release Mohammad Shafi Shah S/o Abdul Gani R/o Papchan from custody forthwith. On the directions of the Court, NIA was impleaded as respondent No.5.

12. Learned Additional Solicitor General for NIA has referred to the contents of the chargesheet which disclose that the offences have been allegedly committed not only in Jammu & Kashmir but in Delhi and other parts of India. The learned ASG has referred to the submissions made by

Mr.Anil Bhan, Advocate representing NIA before High Court of Jammu & Kashmir and the order passed in that petition, which are extracted hereunder:-

> *'Mr.Anil bhan, learned counsel for respondent no.5, invited the attention of the Court to para 4 of the affidavit. In the said para it is stated that the arrested person is involved in heinous crime registered as RC-11/2011/NIA/DLI under section 120B, 121A of IPC, Section 17, 18, 39 and 40 of UA(P) Act, 1967 at Police Station NIA, New Delhi. It is also pleaded that the charge sheet has been submitted before the Special Court of NIA, New Delhi on 30.11.2013 and the next date was fixed as July 09, 2015. It is also pleaded that the Special Court of NIA, New Delhi is having jurisdiction to entertain the case of the aforesaid nature. It is also pleaded that the issue regarding jurisdiction of the Special Court of NIA, New Delhi can be raised before the same Court and thereafter the remedy against any order passed by the Special Court of NIA, New Delhi would lie with High Court of New Delhi.*
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> *Mr.Bhan, learned counsel further submitted that the arrested person is lodged in Tihar Jail, New Delhi. He is facing trial before the NIA and is admittedly represented by a lawyer.*
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> *Since the Special Court, NIA is in seisin of the matter, the arrested person, if he has any grievance about the competence of Court at New Delhi to try him, that objection can be raised before the said Court or can be raised before the High Court at Delhi.*
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> *This Court, in the aforesaid fact situation, cannot deal with the matter.*
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> *For the above stated reasons the respondent No.5 is deleted from the array of respondents. The petition against the said party shall stand closed. Petitioner would be at liberty to approach the Court at New Delhi, if he has any grievance about the competence of the Court of Delhi to try him.*

Registry to list this petition after four weeks.'

13. I have considered the rival submissions. Perusal of the record shows that the Transfer Petition (Crl.) No.220/2015 was filed by co-accused Muzaffar Ahmad Dar wherein all most similar averments have been made. The copy of the Transfer Petition (Crl.) No.220/2015 filed before the Supreme Court alongwith synopsis & list of dates has also been placed on record. The synopsis filed alongwith the Transfer Petition (Crl.) No.220/2015 before the Supreme Court are extracted hereunder:-

> *'The instant transfer petition is being filed under Section 406 of the Code of Criminal Procedure read with Section 13(3) of the National Investigation Agency Act, 2008 read with Order XXXIX, Rule I of the Supreme Court Rule 2013 for transfer of case FIR No.RC-11/2011/NIA/DLI currently pending before the Ld. Special Court, National Investigation Agency, Patiala House Courts, New Delhi to the Ld.Special Court, National Investigation Agency at Srinagar on the grounds that since the vast majority of the witnesses (307 out of 420 witnesses in the three chargesheets) are from Jammu and Kashmir the trial should happen in Srinagar and would be hopelessly delayed if it were to take place in Delhi. A copy of the third chargesheet is not available with the petitioner and the figures are based on an inspection. A copy of the same will be filed as soon as it is made available to the petitioner. There are, in the first two chargesheets filed, a total of 286 witnesses. The ones who are not from Jammu & Kashmir are officials of the NIA, a very few are formal witnesses regarding personal search of the accused when they were brought from Srinagar to Delhi. This leaves around 23 witnesses whom the NIA has claimed as 'protected witnesses'. Since their identity is not known it cannot be said where they live but it is pertinent to point out that as per as under Section 17(3)(a) of the National Investigation Agency Act, 2008, the Special Court has the power to hold proceedings at*

any place for the protection of the protected witnesses. As such, even if such protected witnesses cannot be produced in Srinagar, their examination can be held at any place as per the judgment of the Ld. Special Court itself. The petitioner is Accused No.11, although in effect he is accused no.3 since 8 of the accused mentioned in the first chargesheet are proclaimed offenders. He was chargesheeted through the second chargesheet under Ss.120-B r/w S.121-A, IPC and Sections 18,38,39,40 of the UAPA. He was formally arrested in the instant case as he was already in custody in Srinagar since 2009. The accusation against him, and other accused, is that while in custody in Srinagar central jail, they had smuggled in mobile phones which were used to stay in touch with operatives of the Hizb-Ul-Mujahideen. Jurisdiction is claimed in Delhi as allegedly some funds were transferred to persons in Delhi for illegal purposes.

The case of the petitioner is that as almost all the allegations, including conspiracy and overt activities have taken place in Srinagar, the trial should take place in Srinagar as a matter of law. Even if Delhi is considered to have jurisdiction, it is extremely pertinent to point out that out of the 285 witnesses cited by the prosecution 203 are residents of Jammu and Kashmir. The trial, if it takes place in Delhi, would be drawn out, unwieldy and would amount to process as punishment.'

14. The submissions made by learned counsel for the petitioner that the co-accused availed his remedy to seek transfer under Section 406 CrPC is factually incorrect as the grounds raised by the petitioner before this Court were also raised by the co-accused Muzaffar Ahmad Dar before the Supreme Court in the transfer petition. Thus, it is not open to the petitioner to agitate the same grounds before this Court which have been considered by the Supreme Court while granting the limited relief to the extent that 23 protected witnesses are examined at the first instance, the transfer petition

was dismissed as not pressed.

15. The cognizance of the offence was taken by the Special Court constituted at New Delhi under NIA Act on the basis of chargesheet which was filed against ten accused persons. It is well settled that cognizance is taken of the offence and not of the offender. The order taking cognizance of the offence has not been challenged. The petitioner has been made an accused by way of second supplementary chargesheet filed on 15.12.2014. The chargesheet contains specific averments about the offences being committed by the petitioner at different places including but not limited in J&K, Delhi and so on. In view of the accusations made in the chargesheet and supplementary chargesheet it cannot be said that the alleged offences have been committed within the State of Jammu & Kashmir only so as to exclude the jurisdiction of Special Court at Delhi.

16. It is also necessary to record here that the writ petition can be filed only when there is no alternative effective and efficacious remedy available under the law. Since remedy is available to the petitioner under the provisions of NIA Act, the writ petition is liable to be dismissed on this score as well.

17. The writ petition is dismissed.

As prayed copy of the order be given dasti to learned counsel for the petitioner.

PRATIBHA RANI, J.

APRIL 28, 2016

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HIGH COURT OF DELHI
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