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

+ **Date of Decision: 02.11.2017**

% **CRL.A. 966/2017**

WASIM AKRAM MALIK ..... Appellant  
Through: Mr. Mehmood Pracha, RHA  
Sikander, Prateek Gupta, Mohd.  
Danish, Advocates

versus

NATIONAL INVESTIGATION AGENCY (NIA) ..... Respondent  
Through: Mr. Amit Sharma, SPP with Mr. Som  
Prakash, Adv.

**CORAM:**  
**HON'BLE MR. JUSTICE VIPIN SANGHI**  
**HON'BLE MR. JUSTICE P.S.TEJI**

**VIPIN SANGHI, J. (ORAL)**

1. When the appeal was listed before this Court on 23.10.2017, the Court had recorded the preliminary objection raised by Mr. Amit Sharma, learned SPP appearing for the respondent NIA regarding maintainability of the appeal in view of Section 21 of the National Investigation Agency Act (NIA Act). He has placed reliance on the decision of this Court in ***Bachraj Bengani @ B.R. Jain v. State***, 110 (2004) DLT 233 – a decision in the context of Section 34 of the Prevention of Terrorism Act, 2002 (POTA), which is *para materia* with Section 21 of NIA Act, and the order dated 18.04.2012 passed in Crl A No.416/2012, ***Ghulam Mohammed Bhat v.***

**National Investigation Agency.** Reliance was also placed on the decision of the Supreme Court in *State v. Navjot Sandhu*, (2003) 6 SCC 641.

2. We have heard Mr. Pracha, learned counsel for the appellant, and Mr. Amit Sharma, learned SPP on the aspect of maintainability.

3. The appellant has preferred the present appeal to assail the order dated 22.09.2017 passed by the learned Special Judge (NIA) hearing NIA Case No.RC-09/NIA/DLI arising out of FIR No.49/2011 dated 07.09.2011, titled NIA v. Wasim Akram Malik & Ors., whereby the learned Special Judge declined the request of the defence counsel that he be allowed to go through the entire file brought by the Tehsildar, Chanakyapuri, on the ground that the same is not a relied upon document by prosecution.

4. According to Mr. Pracha, the defence has been deprived of the opportunity of leading on record the evidence that it desired to lead in the matter on the aspect of grant of sanction under the Explosive Substance Act, 1908. He states that the appellant has been denied the right of effective cross examination of the prosecution witness PW-29.

5. Section 21 of the NIA Act, which provides for appeals, reads as follows:

*“21 Appeals. -*

*(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.*

(2) *Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.*

(3) *Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.*

(4) *Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.*

(5) *Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:*

*Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:*

*Provided further that no appeal shall be entertained after the expiry of period of ninety days.”*

6. From the above, it would be seen that an appeal under the said Act lies only from a judgment, sentence or order, which is not an interlocutory order passed by the Special Court to the High Court – both on facts and on law. Sub section (3) of Section 21 expressly bars an appeal or revision to any court from any judgment, sentence or order including an interlocutory order of a Special Court, except as provided under sub section (1). At the same time, sub section (4) carves out an exception by providing that, notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special

Court granting or refusing bail.

7. In view of the aforesaid, unless the appellant is able to satisfy us that the order sought to be assailed in the present appeal is not an interlocutory order, and amounts to judgment, sentence or order otherwise, the present appeal would not be maintainable.

8. Mr. Pracha has sought to advance submissions to claim that the order passed by the learned Special Judge declining the request of the defence to go through the entire file brought by the Tehsildar, Chanakyapuri on the aspect of grant of sanction under Section 7 of the Explosive Substance Act, is unjust and contrary to the earlier order passed by the learned Special Judge dated 26.08.2015.

9. Mr. Pracha has also submitted that in *Navjot Sandhu* (supra), the Supreme Court took notice of *Bipin Shantilal Panchal v. State of Gujarat*, (2001) 3 SCC 1, wherein the Supreme Court laid down the manner in which the Trial Court should record the evidence whenever an objection is raised with regard to leading of certain evidence. Mr. Pracha submits that the Trial Court should follow the same procedure. He submits that since the Trial Court has not adopted the procedure laid down in *Bipin Shantilal Panchal* (supra), the present appeal would be maintainable and the order impugned cannot be termed as an interlocutory order, and that it is a final order on the issue raised.

10. The expression “interlocutory order” is used in the Code in Section 397(2) – which provides that the power of revision conferred by sub-Section (1) shall not be exercised in relation to any interlocutory order passed in any

appeal, inquiry, trial or other proceedings.

11. In *Amar Nath and Others Vs. State of Haryana & Another*, (1977) 4 SCC 137, the Supreme Court considered the meaning of the said expression. In that context, the Supreme Court held that Section 397(2) has been incorporated with the paramount object of safeguarding the interests of the accused, by cutting short the delays resulting from challenge to all and sundry orders passed by the Trial Court during the trial proceedings. The Supreme Court observed:

*“The term “interlocutory order” is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary “interlocutory” has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the term “interlocutory order” in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code. But orders which are*

*matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.”* (emphasis supplied)

12. The Supreme Court referred to its earlier decision in ***Central Bank of India Vs. Gokal Chand***, AIR 1967 SC 799, wherein it was held that:

*“... .. interlocutory orders, are merely procedural and do not affect the rights or liabilities of the parties. ... .. orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding they regulate the procedure only and do not affect any right or liability of the parties.”* (emphasis supplied)

13. Pertinently, Section 21(4) of the said Act expressly makes an order passed by the Special Judge granting or refusing bail appealable, precisely for the reason that such an order is, otherwise, considered as an interlocutory order and would not have been appealable on account of the bar contained in Section 21(3) unless specifically so provided for. The reason why the expression “interlocutory order” is understood in a restricted sense for the purpose of maintainability of a revision petition holds good for the purpose of construing the width of the said expression for the purpose of maintainability of an appeal under Section 21 of the Act as well. It would be detrimental to the early conclusion of the trial under the Act, if the said expression is widely construed in the context of Section 21 of the Act.

14. We may also notice the decision of the Supreme Court in ***Madhu Limaye Vs. State of Maharashtra***, AIR 1978 SC 47, wherein the Supreme Court, inter alia, observed:

*“12. Ordinarily and generally the expression “interlocutory order” has been understood and taken to mean as a converse of the term “final order”. In volume 22 of the third edition of Halsbury's Laws of England at p. 742, however, it has been stated in para 1606:*

*“... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required.”*

*In para 1607 it is said:*

*“In general a judgment or order which determines the principal matter in question is termed ‘final’.”*

*In para 1608 at pp. 744 and 745 we find the words:*

***“An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of right already given in the final judgment, are to be worked out, is termed ‘interlocutory’. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.”***

13. In *S. Kuppuswami Rao v. King* [AIR 1949 FC 1 : 1947 FCR 180] Kania, C.J. delivering the judgment of the Court has

*referred to some English decisions at pp. 185 and 186. Lord Esher, M.R. said in Salaman v. Warner [(1891) 1 QB 734] :*

***“If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”***

*To the same effect are the observations quoted from the judgments of Fry, L.J. and Lopes, L.J.” (emphasis supplied)*

15. The order sought to be assailed by the appellant in the present appeal does not finally decide any issue. It is not an order which decides any matter of moment and does not adjudicate any right of the accused on a particular aspect of the trial. It does not substantially affect the rights of the accused. The impugned order is a procedural order and a step taken towards the final adjudication, for assisting the parties in the prosecution of their case in the pending proceeding. It is not a final decision on the matters in dispute but is a merely matter of procedure. If the appellant/ accused is aggrieved by the procedure adopted by the learned Special Judge, it shall be open to the appellant to raise all his pleas at the final stage before the learned Special Judge and, in the eventuality of the appellant being convicted, at the appellate stage if, and when, such conviction is assailed. To interfere with the impugned order at this stage would be counter-productive and not conducive to early conclusion of the trial in the case.

16. In this regard, we may also refer to the decision in *Navjot Sandhu* (supra). The order which was sought to be assailed by the accused in the



said case – in an appeal preferred under section 34 of POTA, was an order passed on an application of the accused wherein he had sought a direction from the Special Judge that some intercepted conversation should not be used as evidence in the trial for proving the charges under POTA. The Trial Court had disallowed the said application vide an order dated 11.07.2002. The High Court had interfered with the said order in appeal. On further appeal before the Supreme Court, the Supreme Court did not find favour with the decision of the High Court. In paras 30 and 31 of the said decision, the Supreme Court held as follows:

*“30. This being the law, let us now see whether the High Court was right in interfering at this stage. As has been set out hereinabove, by the time the High Court delivered the impugned judgment the evidence, objected to, had already been recorded. **The order dated 11-7-2002 was clearly an interlocutory order. Section 34 POTA clearly provides that no appeal or revision would lie to any court from an order which was an interlocutory order. As stated above, the impugned order is a common order in all applications/petitions.** Respondent Geelani had filed an appeal under Section 34 POTA. Merely because he chose to invoke Section 482 of the Criminal Procedure Code did not mean that his application was not an appeal. **Clearly the High Court could not have interfered at this stage.** The High Court has not indicated that it was exercising power of superintendence under Article 227. Such a power being a discretionary power, it is difficult to attribute to the order of the High Court such a source of power. Even otherwise, in respect of respondent Geelani power under Article 227 could not have been invoked or exercised.*

*31. On facts of this case we find that the effect of the impugned order is that the statutory provision of Section 34 POTA has been circumvented. The impugned order has also led to the very peculiar situation set out hereinabove. To repeat,*

*under Section 34 POTA the appeal is to be heard by a Bench of two Judges of the High Court. We are informed that the appeal is being heard by a Bench of two Judges of the High Court. An appeal under Section 34 POTA is both on facts and on law. **The correctness of the interlocutory order could, by virtue of Section 34 POTA, have been challenged only in the appeal filed against the final judgment. The respondents by filing the applications/petitions and the learned Judge having chosen to entertain them, has resulted in a party being deprived of an opportunity of canvassing an important point of law in the statutory appeal before the Division Bench.** The peculiar situation is that the Division Bench, hearing a statutory appeal (both on law and facts) is bound/constrained by an order of a Single Judge. The order of the Special Judge is based on an interpretation of the various provisions of POTA. The Special Judge undoubtedly had authority and jurisdiction to interpret the various provisions of POTA and other laws. The Special Judge had jurisdiction to decide whether the evidence collected by interception could be used for proving a charge under POTA. The Special Judge was acting within the limits of his authority in passing the impugned order. We are told that before the Single Judge of the High Court the arguments, by both sides, went on for approximately two weeks. Even before us considerable time was taken. This is being mentioned only to indicate that the question is not so clear. It requires interpretation of various provisions of POTA. **Neither the power under Article 227 nor the power under Section 482 enabled the High Court to correct an error in interpretation even if the High Court felt that the order dated 11-7-2002 was erroneous. Even if the High Court did not agree with the correctness of that order, the High Court should have refused to interfere as the order could be corrected in the appeal under Section 34 POTA.** To be remembered that by the time the impugned order was passed the evidence had already been recorded. Thus there was no abuse of process of court which could now be prevented. Even the ends of justice did not require interference at this stage. In fact **the ends of justice required that the statutory intent of Section 34 POTA be given effect to.***

*The High Court should have directed the respondents to raise all such points in the statutory appeal, if any, required to be filed under Section 34 POTA. If in the appeal the Division Bench felt that the order was not correct or that it was erroneous it would set aside the order, eschew the evidence and not take the same into consideration. Thus no prejudice was being caused or would be caused to the respondents. Their rights were fully protected as per the provisions of POTA. At this stage there was no miscarriage of justice or palpable illegality which required immediate interference. We are therefore of the opinion that even if powers under Article 227 or under Section 482 could have been exercised this was a case where the High Court should not have exercised those powers. (emphasis supplied)*

17. In our view, the above observations of the Supreme Court are squarely attracted in the facts of the present case, since Section 34 POTA is *pari materia* with Section 21 of the NIA Act.

18. Mr. Sharma has also placed reliance on **Ghulam Mohammed Bhat** (supra), which in turn placed reliance on **Bachraj Bengani** (supra). In **Bachraj Bengani** (supra), a Division Bench of this court held that an order framing charge is an interlocutory order and, therefore, an appeal could not be preferred under Section 34 of POTA.

19. We do not find any merit in the submission of Mr. Pracha premised on **Bipin Shantilal Panchal** (supra) either. The trial is in progress and it shall be open to the appellant to raise all his defences before the Trial Court, which we have no doubt, shall be duly considered at the appropriate stage.

20. In our view, the order passed by the learned Special Judge, which is assailed in the present proceedings, is an order passed in the course of trial.

The same is clearly an interlocutory order.

21. Since the order in question is an interlocutory order, the present appeal is not maintainable and is, accordingly, dismissed.

**VIPIN SANGHI, J**

**P.S.TEJI, J**

**NOVEMBER 02, 2017**

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