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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 11.07.2019
Judgment Pronounced On : 02.08.2019

CRL.A.1264/2018

GHULAM MOHD. BHAT Appellant

versus

NATIONAL INVESTIGATING AGENCY Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Manu Sharma and Ms. Ridhima Mandhar, Advocates

For the Respondent : Mr. Amit Sharma, Special Public Prosecutor, NIA with Mr. Ahmed Zaid, Advocate

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE BRIJESH SETHI

J U D G M E N T

SIDDHARTH MRIDUL, J

1. The present appeal under Section 21(4) of the National Investigating Agency Act, 2008 (hereinafter referred to as 'the NIA Act') read with Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.') assails the order dated 26.11.2018 passed by the District & Sessions Judge, Special Judge

(NIA), Patiala House Courts, New Delhi, in case arising out of RC-06/2011/NIA/DLI, registered by the NIA under Sections 13,17,18 and 20 of the Unlawful Activities (Prevention) Act, 1967, (hereinafter referred to as 'UA(P) Act'), whereby the third bail application instituted on behalf of the appellant came to be dismissed.

2. The facts as are relevant for the adjudication of the present appeal are briefly encapsulated as follows:-

- (a) It is the case of the prosecution that, in the month of December, 2010, the Delhi Police received an information that two cell phones bearing No.9560872567 and 923335000846 were being used for Hawala transactions.
- (b) It is further the case of the prosecution that, case bearing FIR No.4/2011 was registered at Police Station-Special Cell, Lodhi Colony on 16.01.2011 under Section 120-B of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC') read with Section 17 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the UA(P) Act'). Thereafter, the investigation was transferred to National Investigating Agency (hereinafter

referred to as 'NIA') and it registered the case on 24.04.2011.

- (c) The NIA submitted its charge sheet before the Special Court on 20.07.2011 indicting four persons, including the appellant herein.
- (d) It is alleged in the charge sheet that, on the aforementioned information, certain phone numbers were put under surveillance and on the basis of the information collected from the surveillance, it came to light that, one Maqbool Pandit, who was a member of a banned outfit, was sending huge amounts of funds to the secessionists and terrorists based in Jammu and Kashmir via Delhi.
- (e) It is further alleged that on 22.01.2011, on the basis of the reliable information, a joint team of the Delhi Police and Jammu and Kashmir Police, laid a trap at Bemina Bypass Chowk, Srinagar, to apprehend the accused persons with the illegal money.
- (f) It is further alleged that, at around 10.30 a.m. a white Maruti Car bearing No.JK 09 2942 came from the Bypass road and stopped near the water tank, adjacent to a park.

It is further alleged that two people namely, Ghulam Jeelani Liloo @ Salim @ Ghulam Jeelani Sofi (A-3) and Farooq Ahmed Dagga @ Rahi (A-4) stepped out of the car and waited.

- (g) It is further alleged that, in the meanwhile the appellant, Ghulam Mohd. Bhat (A-1), came from the same side and started talking to them. It is further alleged that at that time the informer identified the above said three persons.
- (h) It is further alleged that, the persons who had come in the car (A-3 and A-4) took out a red and yellow bag from the car, opened it and showed it to the person, who had come on foot i.e. Ghulam Mohd. Bhat, the appellant herein. The team members then approached the said three persons and apprehended them.
- (i) It is further alleged that, from A-1, Rs.20 lakhs, cell phones bearing No.88039112274 and 9797720964 and a slip containing certain phone numbers were recovered. It is also alleged that, from the remaining two accused persons also certain recoveries were made. It is further alleged that, the appellant herein, was produced before

the Court of learned Chief Judicial Magistrate, Srinagar and one day's transit remand was granted to the Delhi Police.

- (j) The case of the prosecution is that, the appellant while being apprehended, tried to flee from the spot and in the process, he received some injuries after which he was shifted to the hospital. That further, two seizure memos were allegedly prepared, with respect to the recoveries allegedly made from the appellant.
- (k) Thereafter, the NIA also filed a supplementary charge sheet on 22.12.2011 in the court, indicting Mohd. Maqbool Pandit and Aijaz Ahmed Bhat as accused No.5 and 6 respectively, wherein it was alleged that the aforementioned have illegally raised funds in Saudi Arabia and Pakistan and sent it to India through Hawala channels to Mohd. Sidiq Ganai @ Lala, to promote terrorist activities in Jammu and Kashmir, India.
- (l) The District & Sessions Judge, Special Judge (NIA) vide the order dated 03.03.2012 was pleased to frame charges against the appellant herein under Sections 13, 17, 18 and

20 of the UA(P) Act.

- (m) The first bail application instituted on behalf of the appellant was dismissed by the learned Special Judge (NIA) vide order dated 18.02.2012, observing therein that the prosecution has been able to show that there is *prima facie* evidence to substantiate the accusations against the appellant.
- (n) The appellant, after 25 witnesses had been examined, filed the second application for bail dated 08.05.2015, pleading therein that, he had been falsely implicated; false allegations of recovery of money had been leveled against him; no independent witness was joined; neither has any specific act of terrorism been alleged against him nor has any material been placed on record to connect him to any terrorist act; and that the testimony of the witnesses examined thus far shows that he has been falsely implicated. The second bail application was also predicated on the submission that although PW-1 testified that the appellant suffered injuries while trying to evade apprehension, but his testimony shows that the latter was

kept at the spot while his search was conducted.

- (o) The second bail application lastly mentioned that the appellant is 60 years old and suffering from various ailments like hypothyroidism, gout, arthritis, prostate enlargement, respiratory allergy/asthma, spinal problems and also diagnosed with T2 Hyperintense Lesions and Hemangioma etc.
- (p) The learned Special Judge (NIA), after considering the submissions made on behalf of the appellant, dismissed his second bail application vide order dated 05.11.2015.
- (q) The appellant assailed the aforesaid order dated 05.11.2015 by instituting Criminal Appeal No.1251/2015 before this Court.
- (r) The High Court vide its order dated 07.02.2018, disposed of the said Criminal Appeal No.1251/2015 with the following order:-

“This appeal is pending since 2015 against the order rejecting grant of bail. Since then the trial has progressed.

In our view, it would be appropriate that the appellant moves a fresh application before the Trial Court to seek bail, since the Trial Court is seized of the matter and would be able to better appreciate the contentions of the

parties in relation to grant of bail.

Learned counsel for the appellant, therefore, seeks leave to move a fresh application before the Trial Court. Liberty to move a fresh application to seek bail is granted. In case such an application is moved, the same shall be considered by the Trial Court on its own merits on an early date convenient to the court.

The appeal stands disposed of.”

- (s) Subsequent thereto, the appellant filed a third bail application, which has been dismissed by the learned Special Judge (NIA), vide order dated 26.11.2018, impugned in the present appeal.

3. Mr. Manu Sharma, learned counsel appearing on behalf of the appellant has reiterated the submissions made on behalf of the appellant before the learned Special Judge (NIA), as detailed hereinabove, before us as well. Mr. Manu Sharma, learned counsel has in this behalf, invited our attention to the testimony of PW-1 to urge that, same suffers from material contradictions and is bereft of any material to show that there are reasonable grounds for believing that the accusations against him are “*prima facie true*”.

4. It is contended on behalf of the appellant that, Section 43D(5) of UA(P) Act does not completely bar the grant of bail and the decision of the Hon’ble Supreme Court in **Ranjit Singh Brahmjeet**

Singh Sharma vs. State of Maharashtra & Anr. reported as (2005) 5 SCC 294 has been pressed into service, in order to buttress the contention of the appellant.

5. Per contra, Mr. Amit Sharma, learned counsel appearing on behalf of the NIA has invited our attention to the decision of the Hon'ble Supreme Court in **National Investigation Agency vs. Zahoor Ahmad Shah Watali** reported as (2019) 5 SCC 1 to urge that, the material/evidence collated by them in reference to the accusations against the appellant in the first information report, must prevail until contradicted and overcome or disproved by other evidence; and that the material against the appellant in the present case and on the face of it, shows his complicity in the commission of the stated offences and that a detailed examination by the court of the merits and demerits of the offence is not required to be done at this stage.

6. In ***Zahoor Ahmad Shah Watali (supra)***, the Supreme Court was pleased to held as follows:

“22. When it comes to offences punishable under special enactments, such as the 1967 Act, something more is required to be kept in mind in view of the special provisions contained in Section 43-D of the 1967 Act, inserted by Act 35 of 2008 w.e.f. 31-12-2008. Sub-sections (5), (6) and (7) thereof read thus:

“43-D. Modified application of certain provisions of the Code.—(1)-(4)***

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

23. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and

Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is “*prima facie*” true. By its very nature, the expression “*prima facie* true” would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is “*prima facie* true”, as compared to the opinion of the accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. Nevertheless, we may take guidance from the exposition in *Ranjitsing Brahmajeetsing Sharma* [*Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paras 36 to 38, the Court observed thus: (SCC pp. 316-17)

“36. Does this statute require that before a person is released on bail, the court, albeit *prima facie*, must come to the conclusion that he is not guilty of such

offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.

38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. ... What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea.”

And again in paras 44 to 48, the Court observed: (SCC pp. 318-20)

“44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed,

the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so

as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

47. In *Kalyan Chandra Sarkar v. Rajesh Ranjan* [*Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] this Court observed: (SCC pp. 537-38, para 18)

‘18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in *Puran v. Rambilas* [*Puran v. Rambilas*, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124] : (SCC p. 344, para 8)

“8. ... Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. ... That did not mean that whilst granting bail some reasons

for prima facie concluding why bail was being granted did not have to be indicated.”

We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail. Therefore, we are not in agreement with the argument addressed by the learned counsel for the accused that the High Court was not expected even to indicate a prima facie finding on all points urged before it while granting bail, more so in the background of the facts of this case where on facts it is established that a large number of witnesses who were examined after the respondent was enlarged on bail had turned hostile and there are complaints made to the court as to the threats administered by the respondent or his supporters to witnesses in the case. In such circumstances, the court was duty-bound to apply

its mind to the allegations put forth by the investigating agency and ought to have given at least a prima facie finding in regard to these allegations because they go to the very root of the right of the accused to seek bail. The non-consideration of these vital facts as to the allegations of threat or inducement made to the witnesses by the respondent during the period he was on bail has vitiated the conclusions arrived at by the High Court while granting bail to the respondent. The other ground apart from the ground of incarceration which appealed to the High Court to grant bail was the fact that a large number of witnesses are yet to be examined and there is no likelihood of the trial coming to an end in the near future. As stated hereinabove, this ground on the facts of this case is also not sufficient either individually or coupled with the period of incarceration to release the respondent on bail because of the serious allegations of tampering with the witnesses made against the respondent.'

48. In *Jayendra Saraswathi Swamigal v. State of T.N.* [*Jayendra Saraswathi Swamigal v. State of T.N.*, (2005) 2 SCC 13 : 2005 SCC (Cri) 481] this Court observed: (SCC pp. 21-22, para 16)

‘16. ... The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State v. Jagjit Singh* [*State v. Jagjit Singh*, (1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and *Gurcharan Singh v. State (UT of Delhi)* [*Gurcharan Singh v. State (UT of Delhi)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.’”

24. A priori, the exercise to be undertaken by the Court at this stage—of giving reasons for grant or non-grant of bail—is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done

at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.

25. From the analysis of the impugned judgment [*Zahoor Ahmad Shah Watali v. NIA*, 2018 SCC OnLine Del 11185] , it appears to us that the High Court has ventured into an area of examining the merits and demerits of the evidence. For, it noted that the evidence in the form of statements of witnesses under Section 161 are not admissible. Further, the documents pressed into service by the investigating agency were not admissible in evidence. It also noted that it was unlikely that the document had been recovered from the residence of Ghulam Mohammad Bhatt till 16-8-2017 (para 61 of the impugned judgment). Similarly, the approach of the High Court in completely discarding the statements of the protected witnesses recorded under Section 164 Cr.P.C., on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is, in our opinion, in complete disregard of the duty of the Court to record its opinion that the accusation made against the accused concerned is *prima facie* true or otherwise. That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 CrPC) and other material gathered by the investigating agency during investigation.

26. Be it noted that the special provision, Section 43-D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. To wit, soon after the arrest of the accused on the basis of the FIR registered against him, but before filing of the charge-sheet by the investigating agency; after filing of the first charge-sheet and before the filing of the supplementary or final charge-sheet consequent to further investigation under Section

173(8) CrPC, until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses, etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 CrPC), do not make out reasonable grounds for believing that the accusation against him is *prima facie* true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.

27. For that, the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is.”

7. In view of the foregoing observations, the determination to be made by this court at this stage is within a very narrow compass. What the court is required to examine is the issue, whether there are reasonable grounds for believing that the accusations made against the appellant are “*prima facie true*”.

8. In this behalf we must observe at the outset that, it is an admitted position that the co-accused, A-3 (Ghulam Jeelani Liloo) and A-4 (Farooq Ahmed Dagga), have since pleaded guilty to the charges framed against them and stand convicted vide judgment and order on sentence dated 20.05.2019 and 04.06.2018 respectively. Further a perusal of the order passed by the Special Court, NIA as well as the material on record, would *prima facie* show the following:-

- (i) That the appellant during the relevant period made and received calls to and from Farooq Ahmed Dagga (A-4) and Aijaz Ahmad Bhat (A-6) on the mobile phone No.9797720964 seized from him vide seizure memo D-10 (Ex.PW1/B) and CDR D-72 in relation thereto.
- (ii) That a perusal of CDR D-72//87 shows that, calls were received by the appellant on the aforementioned mobile number 966548948415 allegedly belonging to A-6 Aijaz Ahmad Bhat (absconder) on 20.01.2011.
- (iii) That CDR No.D72/104 also shows receipt of calls by the appellant from Mobile No.9622431733 seized from A-4 Farooq Ahmed Dagga vide seizure memo D-13. The

transcript (D44/4) of the aforesaid conversation between the appellant and A-6 alludes to '*Dukan Khula Rakho*', which has been testified by PW-27 in his deposition as a code word for an unlawful act.

- (iv) That vide forensic voice examination report (D-46) dated 28.06.2011, Ex.PW-11/B, which has been opined by the expert that the voice in the aforesaid conversation is that of the appellant.
- (v) That the NIA has alleged that the appellant is a habitual offender of terror financing cases and has been charged as an accused in case FIR No.252/07, under Sections 17,18,21,24,40 of UA(P) Act at Police Station-Udhampur, Jammu and Kashmir, India; and FIR No.95/2007, under Sections 10,17,18,20 & 21 of UA(P) Act and Section 120-B, 121-A RPC, Police Station-Ramban, Jammu and Kashmir.

9. In our considered view, the relevant provision of the UA(P) Act, in relation to the grant or release on bail to an accused person, is enunciated as a non-obstante clause, which clearly and unequivocally postulates that, if the court is of the opinion that, there are reasonable

grounds for believing that the accusations against such person are *prima facie* true, he shall not to be released on bail. (Ref: **Syed Mohd. Zishan Ali vs. The State (NCT of Delhi, CRL.A.923/2018**, decided by this Court on 29.04.2019)

10. Further, as eloquently observed by the Hon'ble Supreme Court in **Zahoor Ahmad Shah Watali (supra)** that, “*a priori, the exercise to be undertaken by the Court at this stage – of giving reasons for grant of non-grant of bail – is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise*”. It has also been enunciated that, “*once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge*”. (Ref: **Zahoor Ahmad Shah Watali (supra)**, paragraphs 24 and 26)

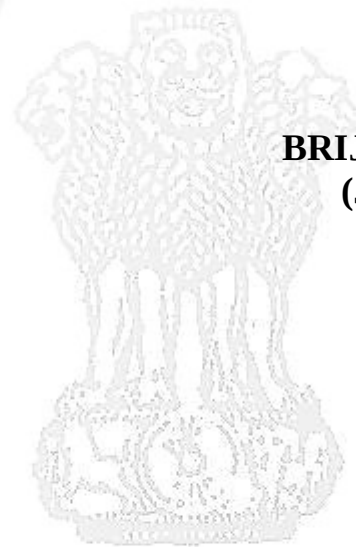
11. In view of the foregoing, we find no warrant to interfere with

the impugned order dated 26.11.2018 rendered by the District & Sessions Judge, Special Judge (NIA), Patiala House Courts, New Delhi. The appeal being devoid of merits, is consequently dismissed.

SIDDHARTH MRIDUL
(JUDGE)

BRIJESH SETHI
(JUDGE)

AUGUST 02, 2019
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