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

Date of decision: 21st October, 2020

+ **BAIL APPLN. 1747/2020 & CRL.M.As. 9378-79/2020**

JAHIRUDDIN

..... Applicant

Through: Mr. Rahul Sharma and Ms. Abhilasha
Shrawat, Advocates (M:9540005499)

versus

STATE (GOVT OF NCT DELHI)

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel
with Mr. Raghuvinder Verma, APP
and SI Amit Kumar.

Mr. Kapil Sibal, Senior Advocate,
Mr. Sidharth Luthra, Senior
Advocate with Mr. Tejas Karia, Mr.
Pavit Singh Katoch, Mr. Koshy John,
Mr. Ravjyot Ghuman, Mr. Shashank
Mishra, Ms. Akshi Rastogi and Ms.
Shivika Singh, Advocates for
WhatsApp Inc.

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With

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BAIL APPLN. 1826/2020 & CRL.M.As. 9697-98/2020

JAVED

..... Applicant

Through: Mr. Rahul Sharma and Ms. Abhilasha
Shrawat, Advocates (M:9540005499)

versus

STATE (GOVT OF NCT DELHI)

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel
with Mr. Raghuvinder Verma, APP
and SI Amit Kumar.

Mr. Kapil Sibal, Senior Advocate,
Mr. Sidharth Luthra, Senior
Advocate with Mr. Tejas Karia, Mr.
Pavit Singh Katoch, Mr. Koshy John,

Mr. Ravjyot Ghuman, Mr. Shashank Mishra, Ms. Akshi Rastogi and Ms. Shivika Singh, Advocates for WhatsApp Inc.

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And

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BAIL APPLN. 3109/2020 & CRL.M.A. 14233/2020

SALMAN ANSARI

..... Petitioner

Through: Ms. Pooja Kohli and Mr. Vijay Tyagi,
Advocates. (M:9582349668)

versus

STATE OF NCT DELHI

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel
with Mr. Raghuvinder Verma, APP
and SI Amit Kumar.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been held through video conferencing.
2. These are three bail applications arising out of the same FIR No. 0325/2020 registered with the PS-New Usmanpur under Section 21 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act 1985. The matter was first listed on 16th July, 2020, on which date, status report and nominal roll was called for. On the next date i.e 7th August 2020, Mr. Varma, Id. APP, submitted that the CDR shows that there were a large number of calls between the three Petitioners herein. Taking into consideration the nature of the allegations and the status report filed, this Court had granted 30 days for completion of the investigation. A further status report along with the FSL report was called for.
3. Detailed submissions were then heard on 11th September, 2020. Mr. Varma, learned APP submitted that all the three accused in FIR No.

325/2020 are part of a drug syndicate and had a WhatsApp group to coordinate the illegal drug trade, the contents of which are unknown and cannot be ascertained unless a transcript of the WhatsApp conversation is obtained. On the other hand, Mr. Rahul Sharma, counsel for the Applicants had submitted that the number of calls cannot be a ground for rejection of bail, as the contents of those calls are unknown.

4. On 29th September 2020, this Court was informed by the Delhi Police that a notice, dated 25th July 2020, had been issued to WhatsApp Inc. seeking registrant details of the users of WhatsApp numbers, details of the WhatsApp groups, WhatsApp calls, chats and any other details exchanged between the various co-accused in FIR No. 325/2020, for the purposes of investigation and to ascertain as to whether the Applicants were involved in the supply and trade of the contraband recovered. However, no response was received to this notice. In view of the above circumstances, this Court had issued notice to WhatsApp Inc.

5. On the last date, i.e. 13th October, 2020, Mr. Kapil Sibal, on behalf of WhatsApp Inc. had submitted that the details which are available with WhatsApp Inc., to the extent possible, have already been given to the Delhi Police and that WhatsApp Inc. cannot access the details of messages and calls on its platform, as they are end-to-end encrypted. It was further submitted that similar issues are pending before the Hon'ble Supreme Court and had e-mailed a copy of orders indicating the same to the Court Master for this Court's perusal.

6. Today, Mr. Kapil Sibal, Id. Senior counsel, along with Mr. Siddharth Luthra, Id. Senior counsel, submit that in an application for bail, no notice may be issued to a third party.

7. The Delhi Police has also filed its status report along with the notice issued to WhatsApp Inc. and the reply thereto. Insofar as the information disclosed or not disclosed by WhatsApp Inc., the same is not the subject matter of these petitions as the police authorities have not sought any relief here. If the Delhi Police wishes to pursue any other remedies for seeking disclosure of information against WhatsApp Inc. they are permitted to avail of the same, in accordance with law.

8. This Court has perused the various orders placed on record on the last date including the order of the Supreme Court dated 24th September, 2019 in ***T.P. (Civil) No. 1943-1946/2019 in Facebook Inc. v. Union of India***. Some extracts of the said order read:

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The main issue arising in these petitions is how and in what manner the intermediaries should provide information including the names of the originators of any message/content/information shared on the platforms run by these intermediaries. There are various messages and content spread/shared on the social media, some of which are harmful. Some messages can incite violence. There may be messages which are against the sovereignty and integrity of the country. Social media has today become the source of large amount of pornography. Paedophiles use social media in a big way. Drugs, weapons and other contrabands can be sold through the use of platforms run by the intermediaries. In such circumstances, it is imperative that there is a properly framed regime to find out the persons/institutions/bodies who are the originators of such content/messages. It may be necessary to get such information from the intermediaries.

Under the IT Act and the rules framed thereunder,

the intermediaries are also required to furnish some information. Section 87 of the IT Act gives power to the Central Government to frame rules and in terms thereof, the Information Technology (Intermediaries Guidelines) Rules, 2011 have been notified. Sub-rule 4 and sub-rule 7 of Rule 3 of these Rules require the intermediaries to store certain information and that information has to be provided in accordance with the Rules.

Some of the intermediaries submit that they cannot provide information either with regard to the content or with regard to the originators because they have end to end encryption and therefore, even the intermediaries are not in a position to find out who is the originator or what is the content.

xxx

We find that the law in this regard is still at a nascent stage and technology keeps changing every day, if not every hour. There are various creases which need to be ironed out. Though, the guidelines provided that the intermediaries should furnish the information, it is not clear how the intermediaries who are based abroad and do not even have grievance officer posted in the country, would be compelled to reveal this information.

xxx”

9. Some of the connected issues are also being considered by the Supreme Court in ***SMW (Crl.) No(s). 3/2015***, titled ***In Re: Prajwala Letter Dated 18.2.2015, Videos of Sexual Violence and Recommendations.***

10. Thus, the question as to the extent of disclosure that can be directed against WhatsApp Inc./Facebook Inc. appears to be pending before the Supreme Court. In view of the above, the notice issued to WhatsApp stands discharged. This Court has not examined the objection raised by WhatsApp,

as to whether notice can be issued to it in bail matters or not. The said question is left open.

11. The petitions for bail were then heard for some time, on merits After some hearing, the Petitioners wish to withdraw the present bail applications. Accordingly, the applications are dismissed as withdrawn. The present withdrawal would not come in the way of the Petitioners, if they wish to seek bail from the concerned Court at an appropriate stage, after the filing of the Forensic Science Laboratory (FSL) report which is analysing their phones as also other evidence including the substance which was seized from one of the Petitioners.

PRATHIBA M. SINGH
JUDGE

OCTOBER 21, 2020

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