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CrI.O.P.No.2872 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.10.2024

CORAM :

**THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM
AND
THE HONOURABLE MR. JUSTICE V.SIVAGNANAM**

CrI.O.P.No.2872 of 2024

Union of India represented by
its Additional Superintendent of Police,
National Investigation Agency,
Kochi. (R.C.No.06/2019/NIA/DLI)

... Petitioner

Vs.

1. Mohammed Asarudeen
S/o. Abdul Salam
2. Mohammed Riyas @ Mohamed Riyaz,
S/o. Haja Bakrudeen
3. S. Nijam Ali @ Nijam
S/o. K.Sardhar Khan
4. Mohamed Rishwan @ Rishwan
S/o. Mansoor Ali.
5. Mohamed Thoufik @ Mohammed Towfeeq
S/o. Kamal Batcha
6. Mohamed Farvees @ Mohammed Parvish @ Farvees
S/o. IsmathBatcha
7. Thowheeth Batcha @ Towheed Batcha
S/o. Thariq Batcha



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8. Mohammed Ibrahim @ Ibrahim
S/o. Abdul Kareem

9. Mohammed Hasan Kudhoos,
S/o. Asraf Ali

10. Rahman Sadiq
S/o. Mohamed Ismail

11. Mohammad Ali Jinna
S/o. Haji Mohamed

12. Abdul Majith
S/o. Mohammed Ibrahim

13. Bhurkhanudeen
S/o. Mohammed Farooq

14. Shahul Hameed
S/o. Tajudeen

15. Nafeel Hasan,
S/o. Rahim

16. Mohamed Faruk @ Faruk
S/o. late Kamaludeen

17. Myden Ahamed Shali @ Shali
S/o. Abdul Kader

... Respondents

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C. to modify the order passed in CrI.M.P.No.299 of 2019 in C.C.No.2 of 2019 now renumbered as Spl.S.C.No.20 of 2022 dated 21.08.2019 on the file of the learned Special Judge for NIA cases, Poonamallee by setting aside the direction in para 3 of the same to the extent that it directs the furnishing of copies of the



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un-redacted 161(3) statements of the protected witnesses to the accused after the chief examination such protected witnesses.

For Petitioner : Mr. A.R.L.Sundaresan,
Addl. Solicitor General of India,
Asst. by
Mr. R. Karthikeyan

For Respondents : Mr.I. Abdul Basith

ORDER

(Order of the Court was made by *S.M.SUBRAMANIAM, J.*)

Under assail is an interlocutory order passed by the Special Court for NIA cases, dated 21.08.2019 in CrI.M.P.No.299 of 2019 in C.C. No.2 of 2019.

2. The petitioner filed a petition under Section 44 of the Unlawful Activities (Prevention) Act 1967 (hereafter referred as UAP Act) r/w. Section 17 of the National Investigation Agency Act 2008 (Herein after referred as NIA Act) r/w. Section 173 (6) of Cr.P.C for passing necessary orders not to supply copies of the statement recorded under Section 161 of Cr.P.C in respect of protected witnesses to the accused persons or their advocates/Legal Counsels in view of the safety and security of the witnesses.



3. The Trial Court adjudicated the issues and passed orders granting permission to the prosecuting agency to hide the identity and address of the witnesses, namely, LW-10, LW-11, LW-12, LW-19, LW-20, LW-21, LW-22, LW-34, LW-35, LW-36, LW-37, LW-38, LW-39, LW-40 and LW-70 mentioned in Annexure "A" to the charge sheet and in the statements of said witnesses recorded under Section 161 of Cr.P.C. The second direction issued by the Trial Court is to submit one separate set of true copy of such hided copy of statements of those witnesses in Annexure-A to the charge sheet to the Court, along with the copies to be supplied to the accused persons, to keep with the case records. Upon such submission, the Trial Court directed its office to keep the original of Annexure-A to the charge sheet and the statements under Section 161 of Cr.P.C of the said witnesses in a sealed cover separately under the safe custody of the Court.

4. The objectionable third direction, which resulted in filing of the present original petition is that the original statements under Section 161 of Cr.P.C in respect of those witnesses will be opened from the sealed cover on the date of examination of the concerned witnesses and after examination in chief is over, the statement of such witnesses shall be supplied to the accused immediately.



5. The learned Additional Solicitor General of India, Mr.A.R.L.Sundaresan, appearing on behalf of the petitioner would submit that the prosecuting agency has no objection with reference to direction Nos. 1 and 2 issued by the Special Court for NIA cases. With reference to the third direction, if it is implemented, it would defeat the very purpose for protecting the witnesses under the Act. Thus, the third direction is to be set aside.

6. The learned Additional Solicitor General of India would further submit that the alleged charges against the respondents 1 to 17/accused persons are serious in nature. The threat perception has been elaborately stated by the prosecuting agency in the petition and having considered the same, the Trial Court issued a third direction with reference to the original statement under Section 161 Cr.P.C. to be opened from the sealed cover on the date of examination of the concerned witnesses and after examination in chief is over, the statement of such witnesses shall be supplied to the accused immediately. If the said procedure is allowed to be implemented, then the very purpose of witness protection will be defeated.

7. The learned Additional Solicitor General of India would further submit



that the name, addresses and identity of the witnesses need not be disclosed in the judgment itself and when the prosecuting agency has raised a genuine apprehension regarding threat perception for the protected witnesses, the Trial Court ought not to have issued such a direction to open the sealed cover after examination in chief is over.

8. Mr.Abdul Basith, appearing on behalf of the respondents would oppose by stating that right to cross examination is a basic right conferred. Such a right need not be taken away, which would defeat the very criminal law system. The Trial Court with caution issued the direction to open the sealed cover on the date of examination of the concerned witnesses and after examination, in chief is over. Therefore, the same would not cause any prejudice to the interest of the prosecution or to the protected witnesses.

9. In support of his contention, he relied on the full Bench Judgment of the Punjab and Hariyana High Court in the case of ***Bimal Kaur Khalsa /vs Union of India and others*** in ***Civil W.P.No.3761 of 1986 dated 20.10.1987***. The Full Bench of Punjab and Haryana High Court asserted the right of an accused for cross examination and accordingly, only on protection of Section 161 Cr.P.C. Statement, the accused will be in a position to defend his case and



thus, the direction issued by the Punjab and Haryana High Court is inconsonance with the principles. The said judgment was confirmed by the Hon'ble Supreme Court of India. Mr. Abdul Basith relied on paragraph 105 of the said judgment, which reads as under:-

"...105. Since, it has been left to the Court to decide upon as to how to keep the identity and address of any witness secret, so while doing so it would act in a manner as to ensure to the accused effective opportunity of cross-examining the witness by seeing to it that the name and address and identity of the witness are disclosed to him well before the start of the trial. "

10. Mr. Abdul Basith, would further contend that the present petition filed by the prosecuting agency is not maintainable under Section 21(5) of NIA Act since no appeal has been contemplated against the interlocutory order passed by the Special Court. In this regard, the Hon'ble Supreme Court of India in the case of ***Amar Nath and others /vs/ State of Haryana reported in Manu/ SC/0068/1987 dated 29.07.1977***, which was upheld by the Constitution Bench of the Hon'ble Supreme Court of India in the case of ***Kartar Singh /vs/ State***



of Punjab reported in 1994 (3) SCC 569.

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11. We have considered the arguments of the learned Additional Solicitor General of India and the learned counsel for the respondents to the lis on hand. Section 44 of UAP Act denotes protection of witnesses. Sub Section 2 and 3 of Section 44 reads as under:-

44. Protection of witnesses.—

..... (2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

..... (3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—

(a) the holding of the proceedings at a place to be decided by the court;

(b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;

(d) a decision that it is in the public interest to order that



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all or any of the proceedings pending before such a court shall not be published in any manner. "

12. Subsection 2 stipulates that on an application made by witness in any proceedings or by the Public Prosecutor in relation to such witnesses or the Court on its own motion, is satisfied that the life of such witness is in danger, it may, for the reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness in secret.

13. In continuation of Sub Section 2, Sub Section 3(b) contemplates that "avoiding of the mention of the name and address of witness in its orders or judgments or in any records of the case accessible to public". Therefore, the Trial Court is empowered to protect the name and address of the witnesses in its orders or judgments or in any records of the case accessible to public.

14. In the context of the language employed in Sub Section 3(b) "accessible to public" Mr.Abdul Basith would contend that the 161 Cr.P.C. statement now opened from the sealed cover would not be accessible to the public and therefore, no prejudice would be caused and thus, the petition is to be rejected.



15. We are of the considered opinion that the phrase in sub Section 3(b) that "accessible to public" indicates the orders or judgments or any records, which are all accessible to public. However, the said word cannot be linked with the protection of witness, which is otherwise to be provided, if any threat perception is made out by the prosecution or suo-motu by the Court under Sub Section 2 to Section 44 of UAP Act.

16. The phrase accessible to public is indicating the judgment or orders, which is always accessible to the public and it is unconnected with the examination or cross examination or opening of sealed cover, wherein 161 Cr.P.C statements are kept by the Courts. In this context, subsection 2 would be relevant , which would indicate that if the court is satisfied that the life of the witness is in danger it may for the reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness in secret. Thus, the scope of sub Section 2 to Section 44 and Sub Section 3(b) to Section 44 need not be compared with. Sub Section 3 is only inclusive and it cannot be exhaustive. Thus, the requirement under Section 44 would be that if the prosecution or the Court on its own motion or the witness concerned raised certain apprehension or threat perception in the event of disclosing their name and address, the application is entertainable and the Court on satisfaction is



empowered to protect the name, address and identity of those witnesses, not only during the trial but even at the time of delivering the judgments or passing orders. The protection to witnesses cannot be granted in piece meal and it must be provided in complete form. In the absence of such complete protection, the very purpose and object of giving protection under the Act will be defeated and therefore, the Courts are expected to adopt a pragmatic approach while implementing section 44 of UAP Act and Section 17 of NIA Act as the case may be.

17. In the present case, the case against the accused No.1 to 17 are serious in nature. The petitioner/prosecuting agency filed a petition to protect certain witnesses, who all are residing in the same place and the reasons stated for protecting the witnesses are enumerated in paragraph 14 and 15 of the petition filed before the Trial Court, which reads as under :-

" 14. It is further submitted that, it is highly essential to keep the identity and address of some of the witnesses in secrecy to ensure fair trial and also to ensure the protection of these witnesses. Those witnesses are residing either in the Scene of crime/Thirubhuvanam or in the surrounding of Thirubhuvanam. There is impending threat to the life of the witnesses, if their identity is revealed to the accused persons.



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A list of such witnesses to be protected along with the statements thereof is being filed along with the charge sheet. Another important fact is that main leaders involved in this case are still absconding.

15. It is further submitted that, in the event of sensitivity of the case, some of the important witness have been categorized as protected witness as per the provision of section 17 of the National Investigation Agency Act, 2008 and Section 44 of the Unlawful Activities (Prevention) Act, 1967. The statement of those protected witnesses recorded u/s.161 of Cr.P.C. namely, LW.10, LW-11, LW-12, LW-19, LW-20, LW-21, LW-22, LW-34, LW-35, LW-36, LW-37, LW-38, LW-39, LW-40 and LW-70 as mentioned in the " List of Witness (Annexure-A)" is to be kept secret, with a view to protect their indentities, in view of the safety & security of the witness. Therefore, the statements recorded u/s.161 of CrPC of the said protected witnesses' may be kept in the record of this Hon'ble Court in the instant case and the same may also be kept in sealed cover. The said statements and Annexure-A are not to be supplied to the accused persons of the case or their legal counsels/advocates at this stage under the provision of Section 17 of the NIA Act, 2008 and Section 44 of the UA(P) Act, 1967 r/w. Section 173(6) of CrPC, until such time as this Hon'ble Court deems fit, in view of the safety and security of those witnesses as the main leaders/accused involved in this case are



still absconding. Hence, there is high possibility of life threat to those witnesses as well as tamper the evidence. Copies of the statements recorded under Section 161 Cr.PC of the remaining witnesses, who are not categorized as protected witnesses, but cited in the final report, will be supplied to the accused persons, along with the relied upon documents other than protected document. "

18. A perusal of the order impugned reveals that the Court has taken cognizance of the threat perception as raised by the prosecuting agency. Having endorsed the threat perception raised by the prosecuting agency, the Trial Court has granted protection to the witnesses by issuing direction nos.1 and 2. While granting protection to the mentioned witnesses in paragraph 6(1)and (2) of the order impugned, the Trial Court by issuing a direction no.(3) diluted the scope of Section 44 of the UAP Act, which resulted in filing of the present petition.

19. As far as the petition filed by the prosecuting agency before this Court under Section 482 Cr.P.C is concerned, admittedly no appeal would lie against the Interlocutory orders of the Special Court under Section 21(1) of NIA Act. In the absence of any appeal and if there is any possibility of miscarriage of justice, the High Court is empowered to invoke its inherent powers conferred under



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Section 482 Cr.P.C. To meet the ends of justice, High Court is expected to

exercise the powers under Section 482 Cr.P.C and in the present case, when an appeal is not contemplated under NIA Act to the prosecuting agency, and the interest of the protected witnesses are concerned, we have no hesitation in forming an opinion that the present petition under Section 482 Cr. P.C would be entertainable. It is brought to the notice of this Court that the examination of witnesses in chief and cross have already been concluded and therefore, no prejudice would be caused to the accused persons at this stage.

20. The Trial Court though granted protection to the witnesses as prayed for by the petitioner/prosecuting agency issued a rider clause in direction No.3, which would in our opinion would dilute the very purpose and object of Section 44 in protecting the witnesses, which is a special provision, more specifically in respect of such serious offences.

21. Once the Court formed an opinion that the witnesses are to be protected, the said protection must be in complete form and it cannot be diluted at any circumstances. Once the statement under Section 161 Cr.P.C. in respect of those protected witnesses are kept in a sealed cover, it cannot be opened after examination of the concerned witnesses and after examination in chief is



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over. It cannot be opened for the purpose of handing over to the accused persons. It is to be opened only for the purpose of dealing with the case by the court and for disposal of the case. If it is opened for handing over the statement to the accused persons, then the protection becomes an empty formality, which is not otherwise intended under Section 44 of the UPA Act. For all these reasons, we upheld the direction issued by the Trial Court in paragraph 6(1) and 6(2) of the order impunged and we set-aside paragraph 6(3) of the order of the Special Court under NIA Act dated 21.08.2019 in M.P.No.299 of 2019 in CC No.2 of 2019.

22. Accordingly, the Criminal Original Petition stands allowed in part.

[S.M.S., J.]

[V.S.G., J.]

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Index: Yes/No

Speaking/Non-speaking order

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