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

Judgment reserved on:02.07.2024

Judgment pronounced on:16.10.2024

+ **CRL.M.C. 1331/2023 & CRL.M.A. 5078/2023**

CENTRAL BUREAU OF INVESTIGATION.....Petitioner

Through: Mr Anupam S Sharrma,
SPP with Mr Prakarsh Airan, Adv.

versus

MAHESH AGARWALLARespondent No. 1
AKSHAYA MOHAPATRARespondent No. 2

Through: Mr Shrish Kohli, Adv.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. The present petition has been filed under section 482 of Code of Criminal Procedure (“**CrPC**”) seeking to set aside the impugned orders dated 20.12.2022 and 16.01.2023 passed by the Ld. Special Judge (P.C. Act), CBI-08, Rouse Avenue Courts, New Delhi arising out of the RC 04(A)2017/AC-III/CBI/New Delhi titled as “**CBI vs. Paritosh Kumar Praveen & Others**” to the extent that the Ld. Special Judge ordered to supply copies of request letters/communication sent by the petitioner to Ministry of Home Affairs (“**MHA**”) for call



interception.

BREIF FACTS GIVING RISE TO THE PRESENT PETITION

2. On 05.04.2017, the petitioner/Central Bureau of Investigation (“**CBI**”) registered a case bearing No. RC-04(A)2017/AC-III/CBI/New Delhi for commission of offences punishable under Section 120-B of Indian Penal Code, 1860 (“**IPC**”) r/w section 7,12,13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 (“**PC Act, 1988**”) against the respondents and other accused.
3. After completion of investigation, CBI filed the chargesheet against the respondents and other co-accused on 26.02.2021 before the concerned Court for commission of offences punishable under section 120-B of IPC r/w Section 7, 12 and 13(2) r/w 13(1)(a) and 13(1)(d) of PC Act, 1988. On 11.03.2022, cognizance of the above mentioned offences were taken by the Ld. Special Judge and accordingly all the accused including respondents were summoned.
4. On 02.05.2022 in compliance of provisions of section 207 CrPC, copies of all the relied upon documents/statements of witnesses were supplied to the accused including respondents herein.
5. Thereafter on 24.05.2022, respondents herein filed two separate applications under Section 91 of CrPC seeking the same directions:-

“It is, therefore, most humbly prayed before this Hon’ble Court to give direction to the CBI to supply the above-mentioned applications/request letters to the applicant; or pass any other order(s) deems fit in the present facts and circumstances.”
6. The request letters mentioned above are the letters/communications



sent by the CBI to MHA for interception of calls.

7. Reply to the said applications were filed by the CBI wherein it was stated that the application/request letter to the MHA for seeking permission to put the phone on surveillance is not a relied upon documents, so its copy cannot be provided. Further, the orders (24.10.2016, 20.12.2016 and 13.02.2017) of the Union Home Secretary allowing the surveillance of the mobile phone were already supplied.
8. It was further stated that the copies of intercepted calls were also supplied to the accused/respondents. The interception of calls were as per provisions of Indian Telegraph Act, 1885 (“*Act of 1885*”) and rules made thereunder, hence there is no violation of any right to privacy of the respondents. The request letter contains details of other numbers for surveillance which is unconnected with the present matter, hence the copy of the same cannot be provided to the respondents. Lastly, the maintainability of these applications at pre-charge stage was also raised on the ground that such an application can be moved only at defence evidence stage.
9. Ld. Special Judge after considering the submissions, *vide* impugned order dated 20.12.2022 directed the CBI to supply the copies of request letters/communications sent by it to MHA upon which the MHA had passed the orders dated 24.10.2016, 20.12.2016 and 13.02.2017. The operative paras of the impugned order reads as under:-

“9) In order to support first application bearing no. M-67/22 for giving directions to CBI to supply copy of letter



sent by it to MHA, counsel for the accused relied upon the judgment of Hon'ble Delhi High Court in case CBI vs. Dharambir Khattar, 2015 SCC online Del 13213.....

In the present case in hand, CBI has not claimed any privilege qua the documents through which request was made to MHA to intercept the phone calls of the accused. It is also not denied by CBI that the documents as demanded by the accused are still in possession and control of the CBI and have not been destroyed so far. In reply to this application, when CBI has not claimed any privilege under Section 123 or 124 of Indian Evidence Act, then no question arises to ask it to produce the documents in court for perusal. Only objection of CBI is relating to the existence of details of other numbers of different cases kept for surveillance in that communications sent to MHA. PP on behalf of CBI referred to the order passed in Crl. M. C. 4939/2022 dated 27-9-2022 in case CBI vs. Rakesh Tiwari in which the Hon'ble High Court stayed the order of one Special Judge who had allowed the supply of the copy of request letter sent by the CBI to MHA for permission to keep the mobile phones of the accused on surveillance. However, it is not informed what ultimate order was passed in this case because it was only a stay order passed exparte on first date of hearing.

Accused has a right to question the legality and validity of the interception and recording of his phone calls, which



also comes within the purview of right to privacy. Such right can be violated by the State or by investigating agency only after following due procedure established under law in Telegraph Act and Rules. The base for obtaining MHA orders were the communications sent by CBI containing request for interception of the phone calls and SMS of accused. It is not justified on the part of the CBI to withheld those communications addressed to MHA especially when no privilege is claimed qua those. The apprehension of the CBI that if copies of such communications are supplied to accused then he may come to know various other details unconnected with this case, can be removed by applying the technique suggested by the High Court in above mentioned CBI vs. Dharambir Khattar's case. CBI is hereby directed to supply the copies of request letters/communications sent by it to MHA upon which MHA had passed the orders on 24-10-2016, 20-12-2016 and 13-2-2017. CBI while supplying the photocopies of original communications shall conceal the source of information, data, phone number, particulars of other persons unconnected with the present accused and other objectionable information etc. by applying permanent marker/white fluid. However, if the court deem it proper, then at the trial stage, can itself see the original if required. With these observations, the first application of the accused bearing no. M-67 /22 is allowed.

10. On the next date of hearing, vide impugned order dated 16.01.2023,



the Ld. Special Judge directed the CBI to either comply with the above directions contained in the order dated 20.12.2022 or challenge the said order. The operative paragraphs of the said order reads as under:-

“Now first time in the affidavit of the Director- CBI, the privilege u/s 123 & 124 of the Indian Evidence Act is claimed qua those communications which were ordered to be supplied to the accused as per order dated 20.12.2022. No explanation is given in the affidavit why such objection was not taken earlier in the reply filed to the application of the accused. Even otherwise also, the said communications have not been placed on record in the sealed cover for the perusal of the court before giving to the accused persons. The counsel for the accused strongly relied upon para no. 12 of the judgment of Delhi High Court in case CBI Vs Dharambir Khattar (2015) 224 DLT 521 and stated that raising of such objection of claiming privilege at this stage is not maintainable when the court has already passed the order and even the original is not shown to the court. Counsel for the accused also stated that no appeal has been filed against the said order by the CBI till date as per his knowledge.

PP wants to take instructions from his office whether such documents as ordered can be supplied to the accused or not and if still the objections have to be taken, then whether the said order is to be challenged or not in the High Court.



One more chance is given to the CBI to comply with the said order dated 20.12.2022 by next date of hearing in case no stay is received from the Hon'ble High Court.

Put up this matter on 06.02.2023 for further proceedings. ”

11. Aggrieved with the directions in the impugned order dated 20.12.2022 and observations made by the Ld. Special Judge in subsequent impugned order dated 16.01.2023, the present petition has been filed.
12. This Court on 28.02.2023, issued notice to the respondents and stayed the operation of the impugned orders dated 20.12.2022 and 16.01.2023. Also CBI was directed to take instructions as to whether the CBI is ready to put the inter department communication between CBI and MHA in a sealed cover before the Ld. Special Judge.
13. On 03.03.2023, CBI stated that they are unable to put the inter department communication between CBI and MHA in a sealed cover before the Ld. Special Judge.
14. Thereafter, the matter was taken up for hearing on 20.03.2023 wherein some arguments were advanced by Mr. Raju, learned ASG appearing on behalf of the CBI.
15. Arguments were heard on 12.04.2023 and on 27.04.2023, learned counsel for the respondents concluded his arguments and was directed to file written submissions. Thereafter the matter was listed on numerous dates but could not be taken up for hearing. This Court on 23.04.2024, listed the matter for arguments on 15.05.2024.
16. On 15.05.2024, request was made for adjournment on behalf of the CBI. Last and final opportunity was given to the CBI to argue the matter.



17. Since request was made on behalf of the CBI for adjournment, this Court *vide* order dated 02.07.2024 reserved the judgment and granted liberty to the parties to file their written submissions.

SUBMISSIONS ON BEHALF OF THE CBI

18. Mr Raju, learned ASG appearing on behalf of the CBI argues, amongst various other grounds, that the Ld. Special Judge failed in entertaining the applications preferred by respondents under section 91 of CrPC whereby request letters sent by CBI to MHA seeking permission to put phone of accused on surveillance prior to framing of charges.
19. He submits that the entitlement of an accused to seek order under section 91 of CrPC would not come till the stage of defence. The law laid down in *State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568* has been reiterated by the Hon'ble Supreme Court in *State of Rajasthan vs. Swarn Singh @ Baba Crl A. 856 of 2024* and more particularly in paragraphs 6 and 7. Reliance is also placed on *Nitya Dharmananda v. Gopal Sheelum Reddy, (2018) 2 SCC 93*.
20. He further argues that the Hon'ble Supreme Court in *P. Ponnusamy v. State of Tamil Nadu AIR Online 2022 SC 875* held that application for production of documents or list of documents shall apply at the trial stage i.e. after the charges are framed.
21. At the stage of framing of charge, the Court has to proceed on the basis of documents which are filed alongwith chargesheet under section 173(2) of CrPC. Hence the Ld. Special Judge could not have granted the prayer as the request letters/communications sent by the CBI to MHA was neither relied nor proposed to be relied upon by the



petitioner.

22. With regard to the request letters/communications sent by CBI to MHA, learned ASG submits that the Ld. Special Judge erred in directing the CBI to supply the request letters sent by it to the MHA holding that the said communications could not be withheld by CBI since no privilege was claimed over such request letters.
23. He argues that when the Review Committee did not give any adverse finding against the orders passed by the MHA, the issue was put to rest. An order for interception under Section 5(2) of the Act of 1885 is not amenable to judicial review and it is only the Review Committee which has been empowered to review the interception orders. The Ld. Special Judge has himself held that the interception order had been reviewed by the Review Committee and nothing adverse had been found.
24. The Ld. Special Judge failed to consider that the request letters/communications are privileged communications being barred under section 123 and 124 of the Indian Evidence Act, 1872 (*"Act of 1872"*). A duly sworn affidavit of Director, CBI was filed wherein it was mentioned that the process adopted for obtaining the orders of interception of mobile number of Paritosh Kumar Praveen was completely internal and top-secret matter of the Department. Only the orders of the Competent Authority received by CBI in connection with interception of the above noted mobile number were considered relevant and taken on record for the purpose of investigation of the present case and that the proposals of CBI were privileged communications and of confidential nature.



25. Admittedly, neither Section 5(2) of Act of 1885 nor Rule 419-A of the Telegraph Rules made under Act of 1885 provide that the reasons are to be disclosed or communicated to the person against whom the interception is issued. Reliance is placed on ***Director General of Income Tax (Investigation) Pune and Ors. v. Spacewood Furnishers Pvt. Ltd. MANU/SC/0605/2015.***
26. The Ld. Special Judge in the present case did not go into the aspect of deciding whether the documents were privileged or not and on the contrary, merely because initially no privilege was claimed, the applications were allowed. As settled in ***CBI v Om Arora Crl. M.C. 787/2014*** by this Hon'ble Court and referred in Santosh Kumar (supra), the documents of communication by CBI to MHA for interception are considered to be privileged documents.
27. With regard to privacy, Learned ASG argues that the interception was sanctioned by the Competent Authority *vide* orders dated 24.10.2016, 20.12.2016 and 13.02.2017 as per the provision of Section 5(2) of Act of 1885 and subsequently reaffirmed by the Review Committee. The right to privacy is not an absolute right but is subject to reasonable restrictions in accordance with law as held in ***K.S. Puttaswamy vs. Union of India, (2017) 10 SCC 1.***

SUBMISSIONS ON BEHALF OF THE ACCUSED PERSONS

28. *Per contra*, Mr Singh, learned Counsel for the respondent No. 1 argues that after the Ld. Special Judge passed the order dated 20.12.2022, the CBI instead of supplying the copy of the document, filed a compliance report and an affidavit of Director, CBI dated 13/01/2023 claiming privilege under section 123 and 124 of Act of 1872. The Ld. Special

Judge after perusing the compliance report and affidavit, passed an order dated 16.01.2023 directing the CBI to file the communication in a sealed cover for perusal of the Court.

29. He further submits that the provision of section 91 CrPC is clear and the Ld. Special judge can call for any document for its perusal and at any point of time, of the proceeding or even before that. Reliance is placed on the judgment of Division bench of Hon'ble High Court of Madhya Pradesh of *Special Police Establishment vs Umesh Tiwari and another*, 2022 SCC OnLine MP 100.
30. It is further argued that in the present petition, there is no ground to challenge to the powers of the Ld. Special Judge exercising powers under section 162 of Act of 1872 to decide the issue of immunity under section 123 and 124 of Act of 1872. Even the affidavit filed by the Director, CBI does not state anything about the provisions of section 162 of Act of 1872. Therefore, the Ld. Special Judge under section 91 of CrPC was absolutely within his powers to call for the said document in a sealed cover for its perusal before giving it to the respondents.
31. Further, it has been held in number of judgments that in order to decide whether immunity claimed by CBI under section 123 of Act of 1872 is justified or not, the Court will have to peruse the documents. The judgments are as follows: -
 - a) *S.P. Gupta vs Union of India*. (AIR 1982 SC 149).
 - b) *Debasis Sahu vs Nabeen Chandra Sahu and another*. [(2002) SCC Online Ori 43].
 - c) *State of U.P. vs Raj Narain&Ors*. [(1975) 4 SCC 428]



d) Public Service Commission U.P. Versus State of UP., (2019 SCC Online All 4576).

32. Relying on the above judgments, it is prayed that the present petition needs to be dismissed as there are no grounds made out to interfere in the impugned orders.

ANALYSIS

33. I have heard learned Counsel for the parties and perused the material available on record.

34. It is apposite to refer to section 91 of CrPC which reads as under:-

“91. Summons to produce document or other thing.—(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—



(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or
(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

35. On a bare reading of the section, it is clear that the Court is entitled to issue summons to produce documents if the Court is satisfied that such document is necessary and desirable for the purposes of investigation, inquiry, trial and any other proceedings under the CrPC. The said entitlement is also available to the Officer in Charge of the Police Station.
36. Section 91 of CrPC comes into rescue when any such document is withheld by any person then the Court can *suo moto* summon such document if it is satisfied that it is necessary and desirable for the said purposes (i.e. Investigation, inquiry, trial and any other proceedings under the CrPC). By passing such orders, amongst other facets, the Court or the police officer preserves the document or materials before it gets destroyed or misplaced as it helps in conducting fair trial. Additionally, it secures the rights of the parties therein before such document is suppressed.
37. In the present case, as noted above, the cognizance has been taken, the documents have been supplied to the respondents and the charges are yet to be framed.
38. The Hon'ble Supreme Court in ***Debendra Nath Padhi (supra)*** has dealt with the maintainability of application under section 91 of CrPC



filed by the accused. The relevant paragraphs are extracted below:-

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code”. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced



in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

.....

27. Insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by the High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the

material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at the stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28. We are of the view that jurisdiction under Section 91 of the Code when invoked by the accused, the necessity and desirability would have to be seen by the court in the context of the purpose — investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.”

- 39.** These observations were further relied upon by the Hon’ble Supreme Court in ***V.L.S. Finance Ltd. v. S.P. Gupta, (2016) 3 SCC 736*** wherein the Hon’ble Supreme Court set aside the direction of the High Court whereby it was directed to file application under section 91 of CrPC by the accused at the appropriate stage/stage of framing of charge. Further, the above observations of ***Debendra Nath Padhi (supra)*** were also relied in ***Nitya Dharmananda (supra)*** wherein the Hon’ble Supreme Court reversed the decision of the High Court allowing the application filed by the accused under section 91 of CrPC



at the stage of framing of charge.

40. Recently, the Hon'ble Supreme Court *vide* Order dated 12.02.2024 passed in ***State of Rajasthan v. Swarn Singh @ Baba*** relying upon ***Debendra Nath Padhi (supra)*** has categorically observed that the accused has no locus to file an application under section 91 of CrPC at the stage of framing of charge. The relevant para is extracted below:-

*“7. The learned counsel for the respondent has relied upon the decision in the case of Nitya Dharmananda v. Gopal Sheelum Reddy, (2018) 2 SCC 93, to submit that the court being under the obligation to impart justice, is not debarred from exercising its power under Section 91 Cr. P.C., if the interest of justice in a given case so requires. However the said decision is not helpful to the respondent. In the said decision also, it has been observed that the accused cannot invoke and would not have right to invoke Section 91 Cr. P.C. at the stage of framing of charge. In view of the law laid down by the Three Judge Bench in *State of Orissa v. Debendra Nath Padhi, (supra)*, we are inclined to accept the present appeal.”*

(Emphasis added)

41. Relying on the above judicial precedents, a co-ordinate bench has also endorsed the same view in ***Kuldeep Singh v. State (NCT of Delhi), 2024 SCC OnLine Del 2587.***
42. As per the order dated 02.05.2022 passed by the Ld. Special Judge, the documents were supplied to the respondents and the matter was listed for ‘scrutiny of documents’ on 24.05.2022. On that date, the

respondents herein, being accused, moved an applications under section 91 of CrPC seeking request letters/communications sent by CBI to MHA. The arguments on charge were yet to commence. The Hon'ble Supreme Court has time and again held that at the stage of framing of charges, the defence of the accused is not relevant [Ref: ***Debendra Nath Padhi (supra)***].

43. In addition, the documents forming part of the chargesheet can only be looked into at the stage of framing of charge. The accused has no right to produce any material or document at that stage. Reliance is placed on ***State of Gujarat v. Dilipsinh Kishorsinh Rao, 2023 SCC OnLine SC 1294*** wherein it was observed as under:-

“8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the charge-sheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the accused of making



submissions as envisaged under Section 227 of the Cr. P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.”

(Emphasis added)

44. When the impugned orders were passed, the observations of the Hon'ble Supreme Court made in ***Swarn Singh @ Baba (supra)*** was not available. This Court is bound by the observations of the Hon'ble Supreme Court wherein it is categorically stated that the accused cannot invoke section 91 of CrPC at the stage of framing of charge. In view of the categorical findings and keeping in mind the stage of proceedings i.e. charges are yet to be framed, the present petition is allowed and the impugned orders passed by the Ld. Special Judge are set aside.
45. All other grounds/objections are not relevant to be dealt with as the present petition succeeds on the ground of non-maintainability of applications filed under section 91 of CrPC at this stage. All other issues raised by the learned counsel for the parties are left open which shall be adjudicated in the appropriate proceedings.
46. Having allowed the present petition, the respondents are at liberty to file such applications under section 91 of CrPC at appropriate stage which shall be decided by the Ld. Special Judge in accordance with law without being influenced by the observations made herein above.
47. In the meantime till such application is filed, the CBI is directed to



preserve the request letters/communications sent by CBI to MHA.

- 48.** With these observations, the petition is allowed and disposed of alongwith pending applications, if any.

OCTOBER 16th, 2024/(MSQ)

JASMEET SINGH, J