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

% **Reserved on : 24th March 2022**
Pronounced on: 13th June, 2022

\+ W.P.(CRL) 1147/2020

SANTOSH KUMAR ..... Petitioner

Through: Mr. Vikas Pahwa, Mr. Syed Arham Masud, Mr. Vikhyat Oberoi, Mr. Rohan Wadhwa, Mr. Sudeep, Mr. Shadman Siddiqui, Mr. Sumair Boparai, Mr. Raavi Sharma and Ms. Nimisha Jain, Advocates

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr. Kritagya Kumar Kait, Advocate for UOI/R-1
Mr. Anupam S. Sharma, SPP for CBI with Mr. Prakarsh Airan, Ms. Harpreet Kalsi and Mr. Anurag Andley, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant Criminal Writ Petition has been preferred by the petitioner under Article 226 read with Article 227 of the Constitution of India, seeking a writ of Mandamus or any other appropriate writ or order

or direction in the nature for quashing of the order no. 14/3/97-CBI dated 30th January, 2018, issued by Ministry of Home Affairs (hereinafter "MHA") which permitted interception of telephonic calls of the petitioner, in the exercise of the powers conferred under Section 5(2) of the Indian Telegraph Act, 1885 and Rule 419 (A) of the Indian Telegraph Rules 2007. The Petitioner further seeks that the interception messages/calls obtained/recorded thereunder shall be destroyed and not to be used for any purposes.

FACTUAL MATRIX

2. Brief facts of the case are as laid down under:

a. Permission for interception of telephonic calls of the petitioner was granted by the MHA under Section 5(2) of the Indian Telegraph Act, 1885 and as per the procedure laid down under Rule 419A of the Telegraph Rules by order dated 30th January, 2018. In pursuant to the Order, FIR No. RC 01 (A)/2018/AC-111/CBI/New Delhi was registered under Sections 7/8/12/13(2) read with 13(1) of the Prevention of Corruption Act, 1988 (hereinafter "PC Act") and under Section 120B of Indian Penal Code, 1860 (hereinafter "IPC") at PS SPE/CBI/ACU-VIII/AC-III on 7th February, 2018. A raid was conducted on the same day and 4 persons including the petitioner were taken into custody. Bail was granted to the petitioner by learned Special Judge- CBI (PC Act)- 06 Tis Hazari Court, India.

b. Thereafter, Chargesheet was filed before the learned Special Judge on 23rd December, 2019. The perusal of the Chargesheet

and FIR demonstrates that the case made by respondent no. 1 (CBI) was based on the interception of the telephonic conversation amongst the accused persons by the Special Unit CBI, New Delhi upon taking permission from the MHA vide the Impugned Order.

c. The learned Special Judge took cognizance of the offences punishable under Sections 7/8/12/13(1) read with 13(2) of the PC Act and substantive offences thereof. Hence, the instant petition filed by the petitioner.

SUBMISSIONS

3. Mr. Vikas Pahwa, learned senior counsel appearing on behalf of the petitioner submitted that reasons for "public emergency" or "public safety" were neither recorded in the Impugned Order nor attracted in the instant case. The substantive as well as procedural safeguards enumerated under Section 5(2) of Telegraph Act and Rule 419A of Telegraph Rules have been violated which has resulted in violation of fundamental right to privacy of the petitioner.

4. Learned senior counsel for the petitioner referred to the judgment of ***People's Union of Civil Liberties (PUCL) vs. Union of India (UOI) and Ors.,* (1997) 1 SCC 301**. The Hon'ble Supreme Court stated that to pass an Order for interception, in exercise of powers under Section 5(2) and Rule 419-A, the occurrence of a public emergency or existence of public interest are the *sine qua non*. The judgment defined "public emergency" as a sudden condition or state of affairs affecting the people

at large calling for immediate action. The Hon'ble Supreme Court further defined "public safety" as a state or condition of freedom from danger or risk for people at large. If either of the two conditions were not in existence, the authorized officer could not resort to telephone tapping even though there was satisfaction that it was necessary to do so in the interest of sovereignty and integrity of the country. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. The same was affirmed by a 9 Judge bench of the Hon'ble supreme Court in ***K.S. Puttaswamy v. Union of India,*** **(2017) 10 SCC 1**.

5. It is submitted that the Impugned Order stated that the said judgments were being passed for reasons of "public safety", "in the interest of public order" and "for preventing incitement to the commission of an offence", however, in the instant case, no specific reason was stated as to what was the danger or risk for the people at large, nor the same was apparent in the instant case, as to what satisfied the concerned authorities that the Impugned Order needed to be passed for the reasons of public safety.

6. The learned senior counsel further referred to the judgment of ***K.L.D Nagsree v. Govt of India, Ministry of Home Affairs,*** **(2007) 1 AP LJ 1,** in which the Andhra Pradesh High Court quashed the impugned order and held that merely repeating and reproducing the conditions of the provisions verbatim would not amount to recording satisfactory existence of such conditions, and that specific reasons had to be provided as to why the concerned authority believed that such conditions existed.

7. It is submitted that the Impugned Order was silent on the satisfaction or reasons to be recorded before granting approval for the interception of the mobile data. Furthermore, the Impugned Order is mechanical as it is a verbatim reproduction of Section 5(2) of the Indian Telegraph Act. No reason has been given by the concerned authorities with regard to why the interception was being permitted. This clearly shows that the Impugned Orders were passed mechanically without application of mind to the facts and circumstances of the case in hand as no specification was provided for tapping of telephonic conversations for "public safety", "public order" or "preventing incitement to commission of an offence.

8. It is submitted that the Impugned Order was made in contravention of the procedure established by law, i.e., Rule 419A of the Indian Telegraph Rules. The aforementioned Rule mandates that any order issued under sub rule (1) of 419 shall accord reasons for such direction. However, as stated above, no such reasons were accorded in the Impugned Order. Furthermore, Rule 419A(2) also places mandatory requirement on the competent authority to forward any such order to be passed by them to the Review Committee within a period of 7 days. There was no document filed by the Respondents to show compliance with this mandatory procedure established by the law. Thus, the Impugned Order was violative of Rule 419A(2) of the Indian Telegraph Rules. Reliance was placed by the Petitioner on the judgment passed by the Gujrat High Court in ***Dilip Mulani vs. Central Bureau of***

Investigation and Ors., **2017 SCC OnLine Guj 2478,** wherein the impugned order before the Court was quashed on this ground alone. The same was reiterated by the Bombay High Court in ***Vinit Kumar vs. Central Bureau of Investigation and Ors.*** **(2019) SCC OnLine Bom 3155**.

9. It is further submitted that the Impugned Order is violative of Rule 419 A (3) which mandates that the concerned officer, before passing any order under Sub -Rule (1) of the Rule 419 A, shall consider the possibility of acquiring the necessary information by other means and the directions under Sub Rule (2) would be issued only when it is not possible to acquire the information by any other reasonable means. Therefore, the Impugned Order is bad in law since there is no examination of the Impugned Order on the touchstone of the principles of proportionality and legitimacy.

10. It is submitted that the Impugned Order is also violative of Rule 419 A (8) and (17). Under Rule 419 A (8), it is mandatory for the authorized officer to create a comprehensive record of the data that has been intercepted. Furthermore, under Sub Rule 17 of Rule 419 A it is categorically stated that the Review Committee shall meet at least once in two months to check the veracity of directions issues under Sub Rule (1) by the competent authority on the touchstone of sub-rule (2). In the event the Review Committee is of the opinion that the directions are not in accordance with provisions under Rule 419 A, it may set aside the order for destruction of the copies of the intercepted calls or messages. In

regard to this, there was no evidence on record filed by the Respondents which attested to the fact that the Impugned Order was according to the provisions of Rule 419 A. There was no evidence that the Review Committee recorded positive findings on the Impugned Order.

11. Learned senior counsel for the petitioner submitted that under Sub Rule (18) of Rule 419 A, the destruction of intercepted messages shall be carried out by the relevant competent authority every six months unless the records are required for functional requirements. As per the Affidavit filed by the Respondents dated 13th October, 2020, it was said that "*the records pertaining to lawful interception including the Minutes of the Review Committee, for the period from 01.01.2018 to 21.12.2018 have been destroyed on 22.07.19, whereas the CBI registered complaint on 07.02.18 after review of lawful interception order of the periods by the Review Committee.*" This is violative of Rule 419 A (18) which states that destruction of records pursuant to an order shall be done *"unless there, or likely to be required for functional requirements"*.

12. It is submitted that the record of the intercepted data would have been utilized at the time of the trial for either corroboration or contradiction. The destruction of records, hence, is bad in law as there was no reason why the record was destroyed even when the FIR was already registered and investigation was pending. Furthermore, since the Minutes of the Meeting is destroyed, the veracity of fact that the Impugned Order was referred to the Review Committee can never be tested which amounts to grave prejudice to the petitioner.

13. It is further submitted that due to illegal order of interception, grave prejudice had been caused to the petitioner as the same is ultra vires to Section 5(2) of Indian Telegraph Act and the Rules. The Hon'ble Supreme Court in ***PUCL*** *(supra)* held that:-

> "*In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Telegraph Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.*"

Furthermore, in ***Maneka Gandhi vs. Union of India,*** **(1978) 1 SCC 248,** the Hon'ble Supreme Court held as under:-

> "*Procedure which deals with modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substance right itself. A valuable constitutional right can be canalized only by civilized process. Therefore, not only a procedure established by law has to be mandatorily followed by the authorities but also at the same time have to be fair, just and reasonable.*"

It is submitted that the respondents have, therefore, caused grave prejudice to the petitioner by not following proper procedure laid down by the law. They have exercised their power in an arbitrary way which has resulted in violation of right to privacy of the petitioner as enshrined under Article 21 of the Constitution. The benefit of fair, just and reasonable procedural safeguards have been taken away from the petitioner.

14. It is submitted that the since the call recordings were procured illegally, such call recordings are bound to be destroyed and should not be used for any purpose, including for the purpose of the trial in the instant case. In this regard, a legal principle called "*Sublato Fundamento Cadit Opus*" i.e., if the foundation is removed the structure shall fall is to be followed. Therefore, the respondents are liable to destroy the records of the telephonic conversations obtained by the Impugned Order. Reliance was placed on the following cases to back aforesaid argument:

a. ***Sanjay Singh Ramrao Chavan v. Dattatray Gulabrao Phalke* (2015) 3 SCC 123.**

b. ***State of Punjab vs. Davinder Pal Singh Bhullar,* (2011) 14 SCC 770.**

c. ***Kavita Mannikikar vs. Central Bureau of Investigation,* 2018 SCC OnLine Bom 1095.**

15. It is finally submitted that the petitioner is an employee who has worked throughout his life in the private sector, and as a corollary, the petitioner's privacy concerns are sensitive and critical. In light of the aforesaid submissions, it is submitted that the Impugned Order is liable to be set aside.

16. *Per Contra,* Mr. Anupam S. Sharma, learned SPP appearing on behalf of respondent 2/CBI submits that the interception was conducted subsequent to a valid interception order under Section 5(2) of the Indian Telegraph Act, 1885 and as per rules laid down under Rule 419 A of the

Telegraph Rules. The interception was as per procedure established by law and as such, does not infringe the right to privacy of the petitioner.

17. It is submitted that the Petitioner urged that the Impugned Order was issued by Respondent 1 without specifying grounds necessary for "public emergency" or "public safety". Relevant portion of the Impugned Order is reproduced herein as under:

> "2. *Now, therefore, I, Home Secretory, being satisfied that, for reasons of public safety, it is necessary and expedient so to do in interest of public order and for preventing incitement to the commission of an offence hereby direct that any telephone message relating to clandestine contact/movement/activity etc to and from 9811061064 shall be intercepted and disclosed to Director, CBI.*
>
> *3. I am further satisfied that it is necessary to monitor this telephone as the information cannot be acquired through any other reasonable means"*

Evidently the order specifically stipulated the reason for interception in the present matter which is public safety and expedient in the interest of public order and for preventing incitement to commission of an offence.

18. It is submitted that, from the facts of the case, as narrated in the FIR as well as the Chargesheet and reply on behalf of respondent-CBI, it is apparent that the present matter pertains to corruption, which endangers public safety since economic crimes ultimately affect the economic stability and safety of the country and its citizens. Reliance is placed upon

Sanjay Bhandhari vs. The Secretary of Govt. of India, **Writ Petition No. 5466/2020** dated 23rd November, 2020.

19. It is further submitted that the reliance placed by the Petitioner in the case of ***K.L.D Nagsree*** (*supra*) is wholly misplaced insofar as apparently in the said decision there was no application of mind since the interception order in the said case did not mention either the occurrence of "public safety" or "public emergency" and all the situations proscribed under Section 5(2) of the Act were reproduced verbatim.

20. It is submitted that even if it is presumed that the provision required for the disclosure of reasons in writing had not been followed, in that case as well the disclosure of elaborate reasons as to why the interception was ordered would be against the modified disclosure requirements of procedural fairness which have been universally deemed acceptable for the protection of other facets of public including the sources of information leading to the detection of crime or other wrong doing, sensitive intelligence information and other information supplied in confidence for the purposes of government or the discharge of certain public functions. Furthermore, even Rule 419 A of the Telegraph Rules provides for extreme secrecy, utmost care and precaution in the matter of interception as it affects privacy, as also for the destruction thereof within a stipulated period, if not required for functional purpose. For the aforesaid reasons, the communications made by the respondent/CBI to the competent authority regarding surveillance of telephonic conversations are considered to be privileged communication under Sections 123 and 124 of the Indian Evidence Act, 1972.

21. It is further submitted by the learned SPP that an order of interception under Section 5(2) of the Telegraph Act issued by the competent authority is different from an order made under Section 144 of the Cr. P.C, although in effect, both orders have the effect of 'infringing' the fundamental right of privacy of a person. Under Section 144 of the Cr.P.C, the order passed requires that it must be in writing and must necessarily state the material facts of the case. Further, the said order has to be passed in accordance with the procedure laid down under Section 134 of the Cr.P.C. The person aggrieved by order passed under Section 144 of the Cr.P.C. may also challenge the said order before the Magistrate or the State Government and shall be afforded the opportunity to be heard. Under Section 5(2) of the Telegraph act and Rule 419A of Telegraph Rules, however, the legislature in its wisdom did not incorporate any such procedure. In contrast to Section 144 of the Cr.P.C., Section 5(2) and Rule 419A do not provide for material facts to be mentioned in the order for interception. The only requirement under Sub Rule (2) of 419A is that an order for interception should contain the reason for such direction which was already mentioned n the Impugned Order.

22. It is submitted that the sole restriction for order of interception is that the officer seeking the order, shall consider the possibility of acquiring the necessary information by other means and the directions under Sub Rule (1) of Rule 419A shall be issued only when it is not possible to acquire information from other reasonable means. Report under Section 173 of the Cr.P.C., clearly reflected that the initial

telephone conversation of the petitioner was intercepted which revealed the role of petitioner in incitement of offence of corruption and bribery and it was thought to be prudent and obtain the Impugned Order to verify the involvement of other persons, including petitioner, if any. There were no other reasonable means to acquire such information. It is submitted that neither Section 5(2) nor Rule 419A provides that the reasons are to be disclosed or communicated with the person against whom the interception has been issued.

23. It is submitted that an order for interception under Section 5(2) of the Telegraph Act is not amenable to judicial review unlike in the case of other provisions such as Section 144 of the Cr.P.C. the Magistrate is barred from exercising any jurisdiction in cases of interception of telephonic calls and even as a necessary safeguard to the rights of the citizen, it is only the Review Committee which has been empowered to review the interception order. Moreover, Affidavit dated 23rd September, 2020, filed by respondent no. 1 clearly reflects that the order was forwarded to the Review Committee and decision was taken by the Committee.

24. Learned SPP for CBI submitted that it is clear that the Legislature in its wisdom has in plain and unambiguous language vested the power of interception with the concerned competent authority only, subject to his/her satisfaction, procedurally safeguarded by the Review Committee under Rule 419A of the Telegraph Rules. Any other interpretation would run contrary to the legislative intent which is not to let the actual facts and reasons for interception to come into public domain as any interference

by Court/Magistrate at any stage could lead to disclosure of entire information.

25. The learned SPP for CBI submitted that a perusal of Affidavits dated 23rd September, 2020 and 9th October, 2020 filed by respondent no. 1 clearly reflects that the order was forwarded to the Review Committee and no adverse direction was passed by them. The Affidavits were filed by Senior Executives of the Union of India in their official capacity. The mere filing of Affidavits herein is sufficient compliance of the Telegraph Rules.

26. It is submitted that the destruction of Minutes of the Review Committee was as per the procedure under Sub Rule (18) of Rule 419A. It is to be noted that the petitioner did not challenge the vires of Rule 419 A of the Telegraph Rules. Moreover, Respondent- CBI had retained the hard disk and the other records for functional purpose. The order of interception was also passed before the registration of the FIR and the Review Committee was said to review the order as per the current circumstances that prevailed and not on the basis of subsequent events i.e. registration of the FIR, conduct of the investigation and filing of report under Section 173 of the Cr.P.C. It is further submitted that the procedural safeguards proscribed by the ***PUCL*** judgment were given effect till the time the Central Government laid down the procedure under Section 7 (2)(b) of the Telegraph Act. In ***PUCL*** judgment it is stated that during investigation by the Committee, if there is contravention of Section 5(2) Of the Telegraph Act, the Committee shall set aside the order and shall direct destruction of copies of the intercepted material.

27. The Petitioner has placed reliance on ***Jatinder Pal Singh v. CBI,* CRL. M.C. 3118/2012**, wherein there was no evidence to establish that the order of interception was ever forwarded to Review Committee or there was any decision by the said Committee. Furthermore, in the said case, the Learned Judge had not ascertained this fact during the course of trial (while framing charge) whereas the present case is still at infancy.

28. It is submitted that the present petition is premature insofar as Writ jurisdiction of this Court under Article 226 of Constitution of India cannot be invoked when a full-fledged trial is in progress, particularly, since the trail court is sized of the disputed questions of fact, which this Court, in exercise of its writ jurisdiction would not go into.

29. It is submitted that the petitioner is involved in the commission of grave offences and the interception of telephonic calls of the petitioner was done after it was revealed that he was in conversation with the complainant/accused and discussing corruption and bribery. Therefore, keeping in view the public interest the order of interception was just and fair.

30. The learned SPP further submits that, in the present case there was due compliance of procedure laid down by the law under Section 5(2) of the Telegraph Act and Rule 419 A of the Telegraph Rules. However, if it is presumed for arguments sake, there was noncompliance or partial compliance of the said provisions, even in that case the evidence so obtained will be admissible in trial against the petitioner and the accused. Section 5(2) of the Telegraph Act or Rule 419 A of the Telegraph Rules

do not deal with any rule of evidence. The non-compliance or partial compliance of the Telegraph Act and Rules does not per se affect the admissibility. The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained no longer integra in the view of the decision of the Hon'ble Supreme Court in ***R.M Malkani*** (*supra*). In the said case, the Apex Court held that even illegally obtained evidence would be admissible. The said issue has been reiterated by various Constitutional Courts in a catena of judgments and even the decisions in ***Puttaswamy - I*** and ***Puttaswamy- II*** did not hold to be the contrary. Moreover, in the ***R.M Malkani***, Hon'ble Court held that the protection under Article 21 of privacy is not available to a guilty citizen. Evidently the decision in ***Malkani*** *(supra)* has not been overruled by ***Puttaswamy-I*** (supra) and on the contrary, the same was re-affirmed in ***Puttaswamy- I*** & ***Puttaswamy – II***.

31. It is submitted that even if the call recordings in the present case are illegal, even then if any evidence is procured, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained. The same has been most recently re-affirmed by the Hon'ble Supreme Court in ***Yashwant Sinha vs. CBI Through Director,*** **AIR 2019 SC 1802,** and ***Pooran Mal v. Director of Inspection, Income-Tax, New Delhi and Ors,.*** **AIR 1974 SC 34**. It followed that since there was no dispute as to the authenticity, content or effect of the taped conversations, the quality of evidence was not affected by any unlawfulness in the conduct of the police and hence there is no basis for excluding the evidence.

Furthermore, even ***Puttaswamy - I*** *(supra)* has not imposed any embargo on the admissibility of illegally obtained evidence nor does the said judgment rule on the principles of evidence.

32. It was further contended by the learned SPP that the Rule making power under section 7 of the Telegraph Act does not deal with any Rule of Evidence. To substantiate the said contention, it was submitted by the Ld SPP that it is trite law that a Rule framed within the confines of an Act, cannot override the Act itself. It is submitted that the procedural safeguards in ***PUCL*** (supra) were given effect till the time the Central Government laid down the procedure under Section 7(2)(b) of the said Act. Subsequently, Rule 419-A of the Telegraph Rules was enacted by the Central Government under its rule making power provided for under Section 7 of the said Act. It is submitted, though, that section 7(2)(b) of the said Act does not deal with any Rule of Evidence nor does it introduce or refer to any exclusionary rule of evidence. In this regard, the Ld SPP has placed reliance upon the Judgment of the Hon'ble Apex Court in ***Additional District Magistrate (Rev.) Delhi Admn. &Ors. v Sri Ram &Ors,*** **AIR 2000 SC 2143.**

33. It is submitted that the process carried out by the respondent has been in consonance with the law laid down and therefore, the instant petition is liable to be dismissed for the reason of there being no reason to invoke the extraordinary jurisdiction of this Court.

ANALYSIS AND FINDINGS

34. This Court has heard the learned counsels for parties at length, given thoughtful consideration to the submissions made and has also perused the material on record.

35. Under the provisions of Article 226 read with Article 227 of the Constitution of India, the High Court exercises its Writ Jurisdiction in furtherance of proceedings initiated against the order no. 14/3/97-CBI dated 30th January, 2018 issued by MHA which permitted interception of telephonic calls of the Petitioner, in the exercise of powers conferred under:

(i) Section 5(2) of The Indian Telegraph Act, 1885 read as under:

"Power for Government to take possession of licensed telegraphs and to order interception of messages. —

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

A bare reading of the above provision shows that for the purpose of making an order for interception of message in exercise of powers under Sub-section (2) of Section 5 of the Telegraph Act, the occurrence of any public emergency or the existence of a public safety interest are the sine qua non.

(ii) Rule 419-A of the Telegraph Rules.

"419-A. (1) Directions for interception of any message or class of messages under sub-section (2) of Section 5 of the Indian Telegraph Act, 1885 (hereinafter referred to as the said (Act) shall not be issued except by an order made by the Secretary to the Government of India in the Ministry of Home Affairs in the case of Government of India and by the Secretary to the State Government in-charge of the Home Department in the case of a State Government. In unavoidable circumstances, such order may be made by an officer, not below the rank of a Joint Secretary to the Government of India, who has been duly authorized by the Union Home Secretary or the State Home Secretary, as the case may be:

Provided that in emergent cases—

(i) in remote areas, where obtaining of prior directions for interception of messages or class of messages is not feasible; or

(ii) for operational reasons, where obtaining of prior directions for interception of message or class of messages is not feasible;

The required interception of any message or class of messages shall be carried out with the prior approval of the Head or the

second senior most officer of the authorized security i.e. Law Enforcement Agency at the Central Level and the officers authorised in this behalf, not below the rank of Inspector General of Police at the state level but the concerned competent authority shall be informed of such interceptions by the approving authority within three working days and that such interceptions shall be got confirmed by the concerned competent authority within a period of seven working days. If the confirmation from the competent authority is not received within the stipulated seven days, such interception shall cease and the same message or class of messages shall not be intercepted thereafter without the prior approval of the Union Home Secretary or the State Home Secretary, as the case may be.

(2) Any order issued by the competent authority under sub-rule

(1) shall contain reasons for such direction and a copy of such order shall be forwarded to the concerned Review Committee within a period of seven working days.

(3) While issuing directions under sub-rule (1) the officer shall consider possibility of acquiring the necessary information by other means and the directions under sub-rule (1) shall be issued only when it is not possible to acquire the information by any other reasonable means.

(4) The interception directed shall be the interception of any message or class of messages as are sent to or from any person or class of persons or relating to any particular subject whether such message or class of messages are received with one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications from or to one particular person specified or described in the order or one particular set of premises specified or described in the order.

(5) The directions shall specify the name and designation of the officer or the authority to whom the intercepted message or class of messages is to be disclosed and also specify that the use

of intercepted message or class of messages shall be subject to the provisions of sub-section (2) of Section 5 of the said Act.

(6) The directions for interception shall remain in force, unless revoked earlier, for a period not exceeding sixty days from the date of issue and may be renewed but the same shall not remain in force beyond a total period of one hundred and eighty days.

(7) The directions for interception issued under sub-rule (1) shall be conveyed to the designated officers of the licensee(s) who have been granted licenses under Section 4 of the said Act, in writing by an officer not below the rank of Superintendent of Police or Additional Superintendent of Police or the officer of the equivalent rank.

(8) The officer authorized to intercept any message or class of message shall maintain proper records mentioning therein, the intercepted message or class of messages, the particulars of persons whose message has been intercepted, the name and other particulars of the officer or the authority to whom the intercepted message or class of messages has been disclosed, the number of copies of the intercepted message or class of messages made and the mode or the method by which such copies are made, the date of destruction of the copies and the duration within which the directions remain in force.

(9) All the requisitioning security agencies shall designate one or more nodal officers not below the rank of Superintendent of Police or Additional Superintendent of Police or the officer of the equivalent rank to authenticate and send the requisitions for interception to the designated officers of the concerned service providers to be delivered by an officer not below the rank of Sub-lnspector of Police.

(10) The service providers shall designate two senior executives of the company in every licensed service area/State/Union Territory as the nodal officers to receive and handle such requisitions for interception.

(11) The designated nodal officers of the service providers shall issue acknowledgment letters to the concerned security and Law Enforcement Agency within two hours on receipt of intimations for interception.

(12) The system of designated nodal officers for communicating and receiving the requisitions for interceptions shall also be followed in emergent cases/unavoidable cases where prior approval of the competent authority has not been obtained.

(13) The designated nodal officers of the service providers shall forward every fifteen days a list of interception authorizations received by them during the preceding fortnight to the nodal officers of the security and Law Enforcement Agencies for confirmation of the authenticity of such authorizations. The list should include details such as the reference and date of orders of the Union Home Secretary or State Home Secretary, date and time of receipt of such orders and the date and time of Implementation of such orders.

(14) The service providers shall put in place adequate and effective internal checks to ensure that unauthorized interception of messages does not take place and extreme secrecy is maintained and utmost care and precaution is taken in the matter of interception of messages as it affects privacy of citizens and also that this matter is handled only by the designated nodal officers of the company.

(15) The service providers are responsible for actions for their employees also. In case of established violation of license conditions pertaining to maintenance of secrecy and confidentiality of information and unauthorized interception of communication, action shall be taken against the service providers as per Sections 20, 20-A, 23 & 24 of the said Act, and this shall include not only fine but also suspension or revocation of their licenses.

(16) The Central Government and the State Government, as the case may be, shall constitute a Review Committee. The Review

Committee to be constituted by the Central Government shall consist of the following, namely:

> *(a) Cabinet Secretary— Chairman*
>
> *(b) Secretary to the Government of India Incharge, Legal Affairs — Member*
>
> *(c) Secretary to the Government of India, Department of Telecommunications — Member*
>
> *The Review Committee to be constituted by a State Government shall consist of the following, namely:*
>
> *(a) Chief Secretary— Chairman*
>
> *(b) Secretary Law/Legal Remembrancer Incharge, Legal Affairs— Member*
>
> *(c) Secretary to the State Government (other than the Home Secretary) — Member*

(17) The Review Committee shall meet at least once in two months and record its findings whether the directions issued under sub-rule (1) are in accordance with the provisions of sub-section (2) of Section 5 of the said Act. When the Review Committee is of the opinion that the directions are not in accordance with the provisions referred to above it may set aside the directions and orders for destruction of the copies of the intercepted message or class of messages.

(18) Records pertaining to such directions for interception and of intercepted messages shall be destroyed by the relevant competent authority and the authorized security and Law Enforcement Agencies every six months unless these are, or likely to be, required for functional requirements.

(19) The service providers shall destroy records pertaining to directions for interception of message within two months of discontinuance of the interception of such messages and in doing so they shall maintain extreme secrecy.

36. It is also pertinent to refer to the provisions of the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860 under which the petitioner is implicated in the instant case. The provisions are reproduced hereunder:

(i) Section 7 dealing with gratification other than legal remuneration read as under:

> *"**7. Influencing Public Servants** - Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification also be liable to fine."*

(ii) Section 8 that deals with gratification, for exercise of personal influence with public servant, read as under:

> ***"8. Offences relating to bribing of a Public servant**- "Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than 1[three years] but which may extend to 2[seven years] and shall also be liable to fine."*

(iii) Section 12 Punishment for abetment of offences, read as under:

> ***"12. Punishment for abetment of offences*** *- "Whoever abets any offence punishable under this Act, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years, but which may extend to seven years and shall also be liable to fine."*

37. The word abetment has not been defined in the PC Act but by virtue of Section 28 of the PC Act, it is permissible to look into the definition of abetment as appearing under Section 107 of the IPC. Section 107 of IPC reads as under:

> *"**107. Abetment of a thing** – A person abets the doing of a thing, who –*
>
> *First. – Instigates any person to do that thing; or*
>
> *Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> *Thirdly.- Intentionally aids, by an act or illegal omission, the doing of that thing."*

Thus, as per Section 107 of the IPC, an offence of abetment takes place in one of the three ways namely: (i) by instigation, (ii) by engaging in conspiracy for doing that thing and if an act or illegal omission takes place pursuant of that conspiracy; and (iii) by intentional aiding.

38. A person is said to "instigate" another to an act when he actively suggests or stimulates him to act by any means or language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement. The word "instigate" means to goad or

urge forward or to provoke, incite, encourage or urge to do an act. A mere intention or preparation to instigate is neither instigation nor abetment. The offence is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not or whether, having consented, he commits the crime or not. It depends upon the intention of the person who abets and not upon the act which is actually done by the person whom he abets.

39. The offence of abetment is also committed by "engaging in a conspiracy for doing of a thing" and only if act or illegal omission takes place pursuant to such a conspiracy. In order to constitute an offence of abetment by conspiracy, there must be a combination of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy and in order to doing of that thing.

40. Lastly, the offence of abetment may also be committed by intentional aid. A person abets by aiding when by act done either prior to, or at the time of the commission of an act he intends to facilitate and does in fact facilitate the commission thereof. In order to constitute abetment by aiding within the meaning of Section 107 of the IPC, the abettor must be shown to have intentionally aided the commission of crime. Further, the aid given must be with the intention to facilitate the commission of the crime. However, mere giving of aid will not make the act of abetment an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of crime.

41. It is also pertinent to refer to Section 120B of the IPC. The provision reads as under:

> ***"120B. Punishment of criminal conspiracy***
>
> *(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.*
>
> *(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."*

42. A prime consideration that has been raised in the instant matter before this Court through writ of mandamus is quashing of the order no. 14/3/97-CBI dated 30th January, 2018 issued by the MHA which permitted the interception of telephonic calls of petitioner in the exercise of powers conferred under 5(2) of the Indian Telegraph Act, 1885 and Rule 419-A of the Telegraph Rules which contended to be violative of Right to Privacy enshrined under fundamental right to life and personal liberty and thus further seeks an order directing destruction of call recording so obtained and not to use the same for any purpose.

43. The relevant portion of the Impugned order are reproduced herein as under:

> *"Now, therefore, I, Home Secretary, being satisfied that, for reasons of public safety, it is necessary and expedient so to do*

so in interest of public order and for preventing incitement to the commission of an offence hereby direct that any telephonic message relating to clandestine contact/movement/activity etc to and from 9811061064 shall be intercepted and disclosed to Director, CBI.

I am further satisfied that it is necessary to monitor this telephone as the information cannot be acquired through any other reasonable means."

44. The disclosure of elaborate reasons for interception orders would be against the modified disclosure requirements of procedural fairness which have been universally deemed acceptable for the protection of other facets of public including the source of information leading to the detection of crime or other wrong doing, sensitive intelligence information and other information supplied in confidence for the purpose of government or discharge of certain public functions. Furthermore, the Rule 419 A of the Telegraph Rules provide for extreme secrecy, utmost care and precaution in the matter of interception as it affects privacy.

45. The affidavits dated 23rd September, 2020 and 9th October, 2020 filed by Senior Executives of the Union of India reflects that the order was forwarded to the Review Committee and no adverse direction was passed by them. Furthermore, the destruction of Minutes of the Review Committee was as per the procedure under Sub Rule (18) of Rule 491A and hard disk and other records were retained for functional purpose.

46. The ratio ***Jatinder Pal Singh v. CBI, Crl MC 3118/2012***, is not applicable in the instant case as in the said judgment the Tape records of the calls intercepted were not admissible since the due procedure for such

interception as mandated by the Telegraph Act and the Rules framed there under had not been followed. However, in the instant case, for the purpose of interception the calls all procedures under the Telegraph Act as well as the Telegraph Rules were duly followed by the respondent/CBI.

47. In the case of ***Maneka Gandhi v. Union of India,*** **(1978) 1 SCC 248,** the Hon'ble Supreme Court opined that:

> *"**133.** The fundamental rights under Article 19(1) of the Constitution are subject to the restrictions that may be placed under Article 19(2) to (6) of the Constitution. The fundamental rights are not absolute but are subject to reasonable restrictions provided for in the Constitution itself. The restrictions imposed are to be by operation of any existing law or making of a law by the legislature imposing reasonable restrictions. The scheme of the article, thus while conferring fundamental rights on the citizens is to see that such exercise does not affect the rights of other persons or affect the society in general. The law made under Article 19(2) to (6), imposes restrictions on the exercise of right of freedom of speech and expression, to assemble peaceably without arms etc. The restrictions thus imposed, normally would apply only within the territory of India unless the legislation expressly or by necessary implication provides for extra-territorial operation. In the Penal Code, under Sections 3 and 4, the Act is made specifically applicable to crimes that are committed outside India by citizens of India. Neither in Article 19 of the Constitution nor in any of the enactments restricting the rights under Article 19(2) is there any provision expressly or by necessary implication providing for extra-territorial application. A citizen cannot enforce his fundamental rights outside the territory of India even if it is taken that such rights are available outside the country."*

48. In the case of ***A.K. Gopalan vs. State of Madras,*** **AIR 1950 SC 27,** Hon'ble Justice Mukherjee observed as under:

> *"**194.** Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restrictions that may be placed upon them by law, so that they may not conflict with the public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other law under which personal safety or liberty of persons could be taken away in the interest of the society and they set down the limits within which the State control should be exercised ...."*

49. The Hon'ble Supreme Court in the ***Justice K.S. Puttaswamy vs. Union of India,*** **(2017) 10 SCC 1** held that:

> *"**526.** But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind."*

> ***"558.*** *One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilised society governed by rule of law always recognises in every human being and is under obligation to recognise such rights in order to maintain and preserve the dignity of an individual regardless of gender, race, religion, caste and creed. It is, of course, subject to imposing certain reasonable restrictions keeping in view the social, moral and compelling public interest, which the State is entitled to impose by law."*

50. It is pertinent to point that the present matter pertains to corruption and through the order of ***Sanjay Bhandhari*** *(Supra)* the same was held to be a matter which endangers public safety since economic crimes ultimately affect the economic stability and safety of the country and its citizens.

51. The judicial pronouncements in the case of ***Yashwant Sinha vs. CBI*, (2019) 6 SCC 1** makes observations on admissibility of evidence irrespective of the way it has been obtained. The same read as:

> *"9. An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before the Court. In this regard, as already noticed, the documents have been published in The Hindu newspaper on different dates. That apart, even assuming that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court?* **In Pooran Mal v. Director of Inspection (1974) 1 SCC 345***, this Court has taken the view that the "test of admissibility of evidence lies in its relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out".*

CONCLUSION

52. Keeping in view the submissions, discussions and observations made in the foregoing paragraphs it is found that the order of interception as well as interception carried out subsequently were fair, reasonable and in accordance with law. The law of the land weighs in the favour of the public interest over certain individual interest. In the instant matter as well, the conflict of interest seems to be between the interest of the public and the individual before this Court. However, the material on record as well as the precedents reflect the fact that the interception carried out by the respondent was in accordance with the provisions Section 5(2) of the Indian Telegraph Act, 1885 and Rule 419-A of the Indian Telegraph Rules, 2007.

53. Therefore, in light of the facts of the case along with the material on record, the instant writ petition seeking quashing of order No. 14/3/97-CBI dated 30th January, 2018 issued by MHA stands dismissed as the said order was passed in light of the compelling reasons of public security protected under the clause of reasonable restrictions upon exercise of Fundamental Rights. Accordingly, the instant petition is dismissed.

54. Pending applications, if any, also stand disposed of.

55. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JUNE 13, 2022
dy/ms