

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

Case Number and Parties Name	M.Cr.C. No.60404 of 2021 <i>Special Police Establishment</i> vs. <i>Umesh Tiwari and another</i>
Date of Order	21/01/2022
Bench Constituted	<u>Division Bench:</u> Justice Sheel Nagu Justice Sunita Yadav
Order delivered by	Justice Sheel Nagu
Whether approved for reporting	Yes
Name of counsels for parties	Shri Abhijeet Awasthy, learned counsel for the petitioner. Shri Sankalp Kochar, learned counsel for the respondent.
Law laid down	1. An accused cannot invoke Section 91 Cr.P.C. during pendency of investigation. 3. However, an accused can invoke Section 91 on and after the filing of charge-sheet. 3. Section 91 can also be invoked by the other stakeholders i.e. victim and also prosecution. 4. Court can also invoke Section 91 Cr.P.C. <i>suo moto</i> . 5. All the above invocation by any stakeholder is subject to satisfaction of the Court about desirability and necessity of the document sought to be produced.
Significant paragraph numbers	4.5, 4.6 & 7.

ORDER
21.01.2022

Per: Sheel Nagu, J.

Inherent powers of this Court u/S 482 Cr.P.C. are invoked by the

prosecution challenging the legality and validity of the order dated 07.10.2021 vide Annexure P/4 whereby an application u/S 91 Cr.P.C., for production of call details of conversation which took place through the mobile of the complainant Ankit Mishra, Rajesh Khede, R.K. Nagaich and Anand Kumar during certain period, was allowed by the Trial Court.

2. Learned counsel for the rival parties are heard on the question of admission as well as final disposal.

CONTENTIONS

3. The first and foremost ground raised by the petitioner-prosecution is that the accused who had successfully invoked Section 91 before the trial Court had no right to do so for the reason that Section 91 is not meant for the benefit of the accused and also that the said cannot be invoked during pendency of investigation. In support, learned counsel for the prosecution had relied upon the decision of the Apex Court in ***State of Orissa v. Debendra Nath Padhi, 2005 (1) SCC 568 (Para 25)*** and in the case of ***Nitya Dharmananda v. Gopal Sheelum Reddy, 2018 (2) SCC 93 (Para 8)***.

3.1 On the other hand, learned counsel for the respondent accused supporting the impugned order submits that if the call details are not requisitioned and preserved then the same would be lost forever. It is submitted that it was the duty of the prosecution to collect the said material evidence in shape of call details but the prosecution failed to perform its duty and therefore the accused respondent was compelled to step in by invoking Section 91.

3.2 Learned counsel for the petitioner has relied upon Section 91(3)(b) of Cr.P.C. and the order dated 27.02.2013 passed in M.Cr.C. No.9274/2012 (***Ajaz Khan and others vs. State of M.P.***), the order dated 21.08.2020 passed in M.Cr.C. No.16227/2020 (***Suryakant Patil vs. State of M.P.***) as well as the decision reported in **2015 (2) MPWN Note 66 (*Himmat Singh vs. CBN*), 2017 (3) MPWN Note 71 (*Renu Sharma vs Atul Bhargav*), 2015 SCC Online Delhi 9639 (*Suresh Kalmadi vs. CBI*).**

3.3 Shri Kapil Duggal, learned counsel for the complainant relying upon the decisions in *K.S. Puttaswamy vs. Union of India*, 2017(10) SCC 1 (Para 257 & 406), *Mazdoor Kisan Shakti Sangathan v. Union of India*, 2018 (17) SCC 324 (Para 61) and *Arnab Ranjan Goswami v. Union of India*, 2020 (14) SCC 12 (Para 47), contends that since the prosecution is still at the stage of investigation and charge-sheets has not been filed, the question of invoking Section 91 by the accused does not arise since investigation is a unilateral process where the accused has no role to play. More so, it is submitted by the complainant that he was not heard before passing the impugned order which was passed posthaste. The complainant lastly submits that by summoning the call records of the conversation *inter alia* of the complainant, the right to privacy of the complainant stand breached and since right to privacy is a concomitant of right to life, the complainant cannot be deprived of the said right without following the due process of law.

FINDINGS

4. The first question which cropped up before this Court is as to whether Section 91 can be invoked by the accused respondent or not ?

4.1 In a different context where the Apex Court was considering the right of an accused to invoke Section 91 for obtaining documents in support of his defence at the stage of framing of charge, the Apex Court had an occasion to deal with the scope and ambit of Section 91 which is evident from Para 25 and Para 8 of the judgments in the cases of *Debendra Nath Padhi*(supra) and *Nitya Dharmananda*(supra), respectively. Para 25 and Para 8 are reproduced herein 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.

8. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC de hors the satisfaction of the court, at the stage of charge.”

4.2 Before this Court proceeds ahead, it would also be apt to reproduce Section 91 of Cr.P.C. as follows :-

"9.1 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.”

4.3 Language employed in Section 91 reveals following foundational ingredients and characteristics :-

- (i) Section 91 is meant to be invoked for producing documents/other things by way of summon.
- (ii) Section 91 can be invoked at any stage of investigation, inquiry, trial or even other proceedings under the Cr.P.C.
- (iii) Section 91 does not expressly provide as to who can invoke this provision.
- (iv) However, the language of Section 91 implies that it can be invoked by the Court or the Officer in-charge of the Police Station concerned.
- (v) And this invocation can be done when the Court or the Police is of the view that production is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under Cr.P.C.
- (vi) The satisfaction regarding necessity or desirability of the Court or the Police is *sine qua non* for invoking this provision.
- (vii) The production of document or other thing is to be made before the Court if directed by the Court or before the officer if directed by Police Officer.

4.4 The aforesaid reveals that production of any document or thing can be directed by the Court after being satisfied that such production is necessary and desirable for the purpose of proper and lawful conduction of investigation, inquiry, trial or other proceeding.

The ultimate object behind Section 91 is to confer power in the hands of the Court in case of pending investigation, inquiry, trial or other proceedings to produce document or other thing which the Court deems relevant and cogent to the conduction of investigation, inquiry, trial or other proceedings and which are not already on record. Thus, Section 91 is a supplementary power available *inter alia* to the Court to do complete justice in investigation/inquiry/trial or other proceedings as the case may be and to prevent failure of justice.

4.5 From the aforesaid analysis, it is vivid that it would not be proper to restrict the right to invoke Section 91 to only the Court and the Police Officer. The window of Section 91 will have to remain open for all the stakeholders in an investigation, inquiry, trial and other proceedings, be it

the victim, accused, police, Court or any other stakeholders involved.

4.6 However, since the process of investigation is unilateral in nature where the accused has no role to play during pendency of investigation, the accused cannot as of right invoke Section 91. However, the invocation of Section 91 during investigation remains open for the Court, the Police or the victim whereas the accused can invoke Section 91 on and after filing the charge-sheet from which stage the proceedings become multilateral bringing to the fore the other stakeholders i.e. the victim and the accused also, besides the prosecution.

4.7 The paramount object behind Section 91 is to ensure that no cogent material connected to the offence/issue is left undiscovered and unconsidered in the pursuit of truth during investigation, inquiry, trial or other proceedings.

5. Reverting to the factual matrix attending the instant case, it is seen that production has been directed of the cell phone call records of the complainant and some other persons who are said to be somehow connected with the offence in question. The objection taken by the victim is of violation of his right to privacy while the objection taken by the prosecution is that the accused has no right to invoke Section 91.

True it is that the right to privacy of the victim may be breached but if the production of the said call details can assist the Court in discovering truth and rendering justice in the matter then the Court has to adopt the due process before invoking Section 91, by affording opportunity to the person whose right to privacy is likely to be breached. This shall not only take care of the apprehension expressed by the complainant about the alleged breach of privacy but shall also ensure furtherance of the investigation/inquiry/trial/other proceedings in a free and fair manner thereby rendering justice and avoiding failure of justice. Thus, in the considered opinion of this Court, the trial Court ought to have heard the victim/complainant before passing the impugned order.

6. As regards objection of the prosecution, this Court is of the firm view that except during the pendency of the process of investigation, the accused cannot be denied his right to invoke Section 91. Section 91 admittedly does not in express terms identifies the stakeholder in justice dispensation system who can invoke the said provision, but the content and context of Section 91 implies that the said provision can be invoked by the Court at any stage of investigation, inquiry, trial and other proceedings.

7. The Court can invoke Section 91 either *suo moto* or on behest of some stakeholder in the process of investigation, inquiry, trial or other proceedings. The cause for invoking Section 91 can arise from any source, be it victim, accused (except during pendency of investigation) and Police. Denying any of the stakeholder, the right to invoke Section 91 may defeat the ultimate object behind Section 91 which is to ensure discovery of truth, rendering of justice and preventing failure of justice. However, any such invocation by any stakeholder at any point of time would be subject to satisfaction of necessity and desirability of that document to the process of investigation, inquiry, trial or other proceedings.

8. In view of above discussion, what comes out loud and clear is that by the impugned order the trial Court permitted the respondent accused to invoke Section 91 during pendency of investigation which as per the discussion above is impermissible since the process of investigation is unilateral and out of bounds for the accused.

9. Accordingly, the impugned order challenged herein cannot be sustained in the eyes of law. However, looking to the ultimate object behind Section 91 which is to discover the truth, render justice and prevent failure of justice, if the trial Court feels that the call details as directed to be requisitioned by way of summon by the impugned order are necessary and desirable for the purpose of investigation which is presently pending then the trial Court is free to direct the investigating agency to take the said material into consideration so that the

investigation is conducted and concluded in a free and fair manner without any element of prejudice for or again any stakeholder involved.

10. The impugned order accordingly is set aside with the aforesaid liberty to the trial Court.

11. Petition stands **allowed** in above terms. No cost.

(SHEEL NAGU)
JUDGE

(SUNITA YADAV)
JUDGE

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