



REPORTABLE

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Criminal Writ Petition No. 565/2022

Shashikant Joshi S/o Late Shri Sukhdev Prasad, Aged About 38
Years, Resident Of E-249, Shastri Nagar Vistar, Ajmer, Rajasthan.

----Petitioner

Versus

1. State Of Rajasthan, Through Its Chief Secretary, Jaipur.
2. Secretary, Department Of Home, Government Of Rajasthan, Jaipur.
3. Director General Anti Corruption Bureau, Jaipur., Rajasthan.
4. Rajesh Kumar Rao Inspector, Anti Corruption Bureau, Jaipur Rajasthan.
5. Nodal Officer, Airtel, Rajasthan, Bharti Hexacom Limited K-21 Sunny House, Malviya Marg, C-Scheme, Jaipur 302001, Rajasthan
6. Nodal Officer, Reliance Jio, Rajasthan Jaipur.

----Respondents

For Petitioner(s) : Mr. Swadeep Singh Hora, Mr. Mohit Khandelwal, Mr. T.C. Sharma, Mr. Vishivas Saini

For Respondent(s) : Mr. Atul Sharma, Dy.G.A.

HON'BLE MR. JUSTICE BIRENDRA KUMAR

Judgment Reserved on : 18/05/2023

Judgment Pronounced on : 04/07/2023

1. The petitioner has sought for quashment of order dated 28.10.2020, dated 28.12.2020 and 17.3.2021 passed by the Secretary (Home), Government of Rajasthan permitting interception of Mobile Phones of the petitioner and others in purported exercise of power under Section 5(2) of the Indian Telegraph Act 1885.



By order dated 28.10.2020 Mobile No. 9829172463 of co-accused Sunil Sharma was ordered to be intercepted by the Anti Corruption Bureau on suspicion that the said mobile was possibly being used for illegal activity relating to incitement to the commission of an offence affecting public safety. The interception was permitted for a period of 60 days and the said order was extended for another 60 days by order dated 28.12.2020.

On the same reasons by two separate orders dated 17.3.2021, Mobile phones of the petitioner bearing No. 9587921137 and 9950830107 were ordered to be intercepted.

2. The challenge is on the ground that right to privacy has been infringed by putting the mobile phones of the petitioner and others on surveillance/spying by the State machinery. The orders are violative of Article 19 and 21 of the Constitution of India unless the same is consistent with the procedure established by law. In the case on hand, no reason for making of such orders is disclosed, rather are on teeth of the procedural requirement.

3. It is worth to notice that on the basis of information gathered on interception of mobile calls, FIR No. 20 of 2021 was registered on 12.4.2021 under Section 7 and 8 of the Prevention of Corruption Act as well as under Section 201 and 120B of the IPC with the Anti Corruption Bureau Police Station, Jaipur. After investigation of the case, charge-sheet No. 140/2021 dated 4.5.2021 has already been filed. On bare perusal of the call details disclosed in the FIR, it is evident that there is no direct evidence against the petitioner of being indulged in bribing any public servant rather in the purported trap proceeding, no graft



money was recovered from possession of any of the accused persons including the petitioner.

4. Before considering the rival contentions of the parties, it would be apt to go through the provisions of Section 5(2) of the Indian Telegraphy Act and nature of the orders passed by the Secretary (Home):

“Section 5 (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 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.]

4(a) The order dated 28.10.2020 at Annexure-3 reads as follows:

**“Government of Rajasthan
Home (Group-9) Department**

22(1)Home-9/2019

Jaipur, Dated: **28.10.2020**

ORDER

1. Whereas it has been brought to the notice of Director General, Anti Corruption Bureau, Rajasthan, Jaipur that



Mobile/LL/IMEI No.(s) 98291-72463 is possibly being used for illegal activities relating to **incitement to the commission of an offence affecting public safety** and whereas it is necessary and expedient to prevent such a situation by keeping the above mentioned Mobile Number under observation, for a period of **60** days.

2. Now therefore, I, **Secretary, Home, Rajasthan** being satisfied that in the interest of public safety and preventing incitement to the commission of an offence, it is necessary and expedient to keep the above Mobile/LL/IMEI No.(s) **98291-72463** under observation and I, hereby direct that any telephone message relating to clandestine contact/movement/ activity etc. to and from telephone number brought for transmission by or transmitted shall be intercepted and disclosed to the officer as intimated by the **Director General, Anti Corruption Bureau, Rajasthan, Jaipur.**
3. I am further satisfied that it is necessary to monitor the above mentioned telephone as the information cannot be acquired through any other reasonable means.
4. This order shall remain in force for a period of **60** days from the date when the observation starts unless revoked earlier or extended further by subsequent order of the undersigned and the use of intercepted message or class of messages shall be subject to the provision of sub-section (2) of section 5 of the Indian Telegraph Act, 1885 and section 69 of IT Act, 2000.
5. **The conditions and requirements prescribed in Home Department Circular No. F.22(2)Home-9/87 Part dated 09/06/2016 shall be followed strictly for ensuring confidentiality and privacy of Intercepted information/messages/communications.**

Sd/-
(N.L. Meena)
Secretary, Home

Copy for necessary action to Director General Anti Corruption Bureau, Rajasthan, Jaipur.

4(b) The order dated 28.12.2020 at Annex. 7 reads as follows:



"OFFICE OF THE DIRECTOR GENERAL

ANTI CORRUPTION BUREAU, RAJASTHAN, JAIPUR.

No. ACB/DG/20/363

Dated: **28.12.2020**

The Nodal Officer
Airtel
Rajasthan, Jaipur.

Subject: -Observation of Suspect mobile number 98291-72463.

Sir,

Please Find enclosed herewith order of Secretary, Home Department No. **F.22(1) Home-9/2019 Jaipur** dated **28.12.2020** authorizing the monitoring of the mobile number **98291-72463**.

It is requested that the suspect and mobile number **98291-72463** may be kept under observation for a period of **60** days and hereby directed that voice, video, GPRS and data calls of home circle as well as PAN India circles while roaming and call related data provided to the undersigned Direction may be issued kindly to divert the calls received/made by the above mentioned number to no. (1) 0141-2712234 (2) 94135-02710 for interception.

Encls.-1

Yours faithfully

(Bhagwan Lal Soni)
Director General
Anti Corruption Bureau
Rajasthan Jaipur

4(c) Order dated 17.3.2021 Annexure-9 reads as follows:

**"Government of Rajasthan
Home (Group-9) Department**

22(1) Home-9/2019

Jaipur, Dated : **17.03.2021**

ORDER

1. Whereas it has been brought to the notice of Director General, Anti Corruption Bureau Rajasthan, Jaipur that Mobile/LL/IMEI No.(s) **99508-30107** is possibly being used for illegal activities **relating to incitement to the**



commission of an offence affecting public safety and whereas it is necessary and expedient to prevent such situation by keeping the above mentioned Mobile Number under observation, for a period of 60 days.

2. Therefore, **I, Secretary Home, Rajasthan**, being satisfied that in the interest of public safety and preventing incitement to the commission of an offence, it is necessary and expedient to keep the above Mobile/LL/IMEI No.(s) **99508-30107** under observation and 1. hereby direct that any telephone message relating to clandestine contact/movement/ activity etc. to and from telephone number brought for transmission by or transmitted shall be intercepted and disclosed to the officer as intimated by the **Director General, Anti Corruption Bureau, Rajasthan, Jaipur.**
3. I am further satisfied that it is necessary to monitor the above mentioned telephone as the information cannot be acquired through any other reasonable means.
4. This order shall remain in force for a period of 60 days from the date when the observation starts unless revoked earlier or extended further by subsequent order of the undersigned and the use of intercepted message or class of messages shall be subject to the provision of sub-section (2) of section 5 of the Indian Telegraph Act, 1885 and section 69 of IT Act, 2000.
5. **The conditions and requirements prescribed in Home Department Circular No. F22/2) Home-9/87 Part dated 09/06/2016 shall be followed strictly for ensuring confidentiality and privacy of Intercepted Information/messages/communications.**

Sd/-
(N.L. Meena)
Secretary, Home

5. Mr. S.S. Hora, learned counsel for the petitioner contends that in **People's Union for Civil Liberties (PULC) Vs. Union of India & Anr, reported in (1997) 1 SCC 301**, the Hon'ble Supreme Court considered the aforesaid provisions of Section 5(2) of the Indian Telegraph Act and held that the conditions/situations of "public emergency" or "the interest of public safety" are not secretive conditions. The situations would be apparent to a



reasonable person. In the case on hand, none of the impugned orders depict that what were the situations which persuaded the authority to record that public safety requires such an order. Only bald statement of "public safety involved" would not suffice the compliance of law. Moreover, the authority has to record reasons in writing before permitting interception of call details.

6. Learned counsel for the respondent contends that there is no need for verbatim compliance of the mandate of law. If substantial compliance has already been done, it would be taken as compliance of the mandate of law. The authorities have placed before the Secretary (Home) written request for permission stating therein that the user of the referred mobiles is suspected to be involved in corrupt practices under Prevention of Corruption Act.

7. A bare perusal of the impugned orders is indicative enough that no circumstance has been disclosed ventilating the objective satisfaction that the impugned orders were necessary for public safety. In absence of disclosure of such material, no prudent person can reach to a conclusion that in fact, it was a case of "in the interest of public safety." Moreover, no reason has been recorded in writing as required by Section 5(2) of the Indian Telegraph Act.

8. In PUCL (supra), the Hon'ble Supreme Court sated the law as follows:

"28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua



non. for the application of the provisions of Section 5(2) of the Apt. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

29. The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency of the existence of a public-safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

30. The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays-down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is



fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi v. Union of India , that "procedure which deals with the 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 substantive right itself". Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

9. The proposition that illegal tapping of phone conversation violates right to privacy is already accepted by a 9 Judges Constitution Bench decision in case of K.S. Puttaswamy Vs. Union of India, **(2017) 10 SCC 1**. Moreover, the view taken in PUCL (supra) was affirmed in K.S. Puttaswamy case with following observations:

" ... Telephone conversations were construed to be an important ingredient of privacy and the tapping of such conversations was held to infringe Article 21, unless permitted by `procedure established by law."

10. In pursuance of certain directions in PUCL (supra) rules were suitably amended to provide for procedure safeguards for protection of the right to privacy. Accordingly, Rule 419A was enacted by Telegraph Amendment Rules, 2007 in the Indian Telegraph Rules 1951 which would be discussed later on. Evidently, the impugned orders disclose that the authority concerned has not disclosed the material for its conclusion that it was in the interest of public safety to pass such orders. The authorities have failed to record any reason in writing consisted with the requirement of sub-section (2) of Section 5 above. Therefore, impugned orders suffer from arbitrariness and violate constitutional right of the petitioner.



11 Learned counsel for the petitioner next contends that respondent authorities have acted in utter violation of requirement of procedural safeguards under Rule 419A supra; Mr. N.L. Meena, the Secretary (Home) was not a competent person to pass order under the Act rather Mr. Abhay Kumar, Principal Secretary, Home was competent authority. In fact, Mr. N.L Meena and two other Secretaries were working under the Principal Secretary, Home. Learned counsel next contends that as required by the said Rules, the order should have been transmitted to the duly constituted Review Committee for its approval which has not been done in this case. It is not the case of the respondents that they had opted for invoking suspension clause in unavoidable circumstance as mentioned in the said rules.

12. The relevant portion of Rule 419A of the Indian Telegraph Amendment Rules, 2007 reads as follows:

"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.

(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."

13. As per Rule (1), only the Secretary to the State Government in charge of the Home Department was competent to pass the impugned orders. The petitioner has stated on oath that at the relevant time, Mr. Abhay Kumar was Secretary in charge of the Home Department and other Secretaries including Mr. N.L. Meena who had passed the impugned orders were not the in-charge of the Home Department, as such not competent to pass the impugned orders. Learned counsel for the respondent has relied upon order dated 10.1.2019 whereby work of the Home Department was allocated to different officers. Even in that order, the nature of the work involved herein was assigned to the Home Secretary. Moreover, the executive instructions cannot supercede the statutory rules. Therefore, the only competent person to pass the impugned orders was incharge of the Home Department of the State who is known as Principal Secretary, Home. As such ,



the impugned orders are not sustainable for being authored by an incompetent person.

14. I find force in the submission of learned counsel for the petitioner that impugned orders were never sent to the Review Committee which ought to have been sent within statutory period and the Review Committee was also expected to take decision on the validity of the impugned orders within a specified period. The statutory provisions are for some purpose and not for fun. The aforesaid provision ought to have been strictly followed but has not been followed at all. The respondents have not controverted that the impugned orders were not sent to the Review Committee nor any material suggest that the impugned orders were sent to the Review Committee.

15. The impugned orders do not contain any reason whereas the statutory provisions require reason to be recorded in writing for coming to the conclusion that the interest of public safety has persuaded the authority to pass the impugned orders.

16. Sub-rule (3) of Rule 419A (supra) requires that the authority passing any order under Section 5 (2) of the Telegraph Act shall consider possibility of acquiring the information by other means and the direction under sub-rule (1) shall be issued only when it is not possible to acquire the information by any other reasonable means. The provisions are explicit enough that authority is bound to disclose in the impugned orders that other means of acquiring necessary information was resorted to but was not possible. In the case on hand, merely a bald statement has been recorded that acquisition of information is not possible by any other means.



Therefore, the statutory provisions of sub-rule (3) has also not been complied in this case.

17. When the statute provides procedural safeguards to prevent arbitrary infringement of the rights to privacy, it must be strictly followed. In other words, required mandates could not have been ignored or superceded by the State or its machinery leading to offend the right under Article 19 and 21 of the Constitution of India. If the directions of the Hon'ble Supreme Court in PUCL' case (supra) which has been reinforced and approved by the Hon'ble Apex Court in Puttaswamy's case (supra) as well as mandates of Acts and Rules are allowed to be flouted to affect illegal interception of messages it would lead to breeding contempt and arbitrariness.

18. Learned counsel for the respondents have relied on the judgment in **Santosh Kumar Vs. Union of India & Anr., Writ Petition (Crl) No. 1147/2020** of the Hon'ble Delhi High Court. The case of Santosh Kumar (supra) is distinguishable since in that case impugned orders were passed by the competent authority and the orders were sent to the Review Committee whereas the present case suffers from non adherence on both the counts aforesaid.

19. In view of the discussions made above, it would be evident that the impugned orders suffer from manifest arbitrariness and if allowed to stand would amount to permit violation of the fundamental rights of the citizens and the law laid down by the Supreme Court. Therefore, all the three interception orders challenged herein and referred above stand hereby quashed. The



respondent authorities are directed to destroy the intercepted messages/recordings and its copies. Such messages shall not be considered in the pending criminal proceedings at any stage of the proceeding. The petitioner would be at liberty to adopt available legal remedy, for other reliefs sought for, in the writ petition.

20. With the aforesaid observations, the writ petition stands hereby allowed. However, with no order on costs in the facts and circumstances of the case.

(BIRENDRA KUMAR),J

BRIJ MOHAN GANDHI /77/54

