In the High Court of Judicature at Madras

Reserved on : 20.6.2025	**Delivered on : 02.7.2025**

Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Writ Petition No.143 of 2018
& WMP.Nos.206 & 207 of 2018

P.Kishore ...Petitioner

Vs

1.The Secretary to Government of India, Ministry of Home Affairs, North Block, Central Secretariat, New Delhi. 110001.

2.The Director, CBI, Plot No.5B, 6th Floor, CGO Complex, Lodhi Road, New Delhi. 110003.

3.The Additional Superintendent of Police, SPE : CBI : ACB : Chennai. (RC MA1 2011 A 0033)

(R2 & R3 are impleaded in WMP.No.5360 of 2020 vide separate order dated 02.7.2025 by NAVJ) ...Respondents

PETITIONS under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the respondent in No.14/3/97-CBI dated 12.8.2011, quash the same and consequently declare the intercepted telegraphic messages/conversations to and from 98410-77377 as invalid ***(prayer amended as per order of court dated 10.1.2018 vide WMP.No. 844 of 2018 by KRCBJ)***.

For Petitioner : Mr.Sharath Chandran for
Mr.Rajagopal Vasudevan

For Respondents : Mr.AR.L.Sundaresan, ASG
assisted by
Mr.T.V.Krishnamachari, SPC for R1
and
assisted by
Mr.K.Srinivasan, SPC for R2 & R3

ORDER

This is a petition filed by the petitioner under Article 226 of The Constitution of India challenging an order dated 12.8.2011 passed by the first respondent under Section 5(2) of the Telegraph Act, 1885 (hereinafter called the Act) and Rule 419-A of the Telegraph Rules, 1951 (hereinafter called the Rules) authorizing tapping of the mobile

phone of the petitioner by the second respondent.

2. This case raises seminal constitutional questions touching the scope of the right to privacy and the power of the Law Enforcement Agencies to resort to covert surveillance by tapping the mobile phones to obtain information regarding the commission of an alleged crime.

3. The circumstances giving rise to this challenge are as under:

(i) The petitioner - one Mr.P.Kishore was the Managing Director of one M/s.Everonn Education Limited, Perungudi, Chennai. On 12.8.2011, the first respondent passed an order under Section 5(2) of the Act and Rule 419-A(1) of the Rules authorizing the interception of messages from the phone of the petitioner. The impugned order alleged that interception should be made and disclosed to the CBI for reasons of public safety and in the interest of public order and for preventing incitement to the commission of an offence.

(ii) In the meantime, pursuant to the aforesaid order, on 29.8.2011, the third respondent registered a first information report (FIR) in R.C.MA1 2011 A 0033 of 2011 against one Mr.Andasu Ravinder, IRS, Additional Commissioner of Income Tax, Company

Range, Chennai (A1), the petitioner (A2) and one Mr.Uttam Bohra (A3) for offences under Section 120-B of the Indian Penal Code (IPC) and Section 7 of the Prevention of Corruption Act, 1988. The FIR alleged that A1 had conducted a search in the business premises of the said M/s.Everonn Education Limited, which was found to have concealed certain taxable income. A1 was alleged to have demanded a bribe of Rs.50 lakhs from A2 to help the said company evade taxes. Pursuant to this conspiracy, A2 was to hand over the said sum of money to A1 later that night and A3, who was a friend of A1, was to take the money thereafter to an unknown place.

(iii) On the basis of the above information, the officials of the CBI proceeded to Aayakar Bhavan Campus around 8:55 pm and took positions when they saw a Maruti Alto Car bearing registration number TN-04-AD-9747 driven by A3 proceeding towards the residence of A1. A3 alighted from the car and proceeded towards the stairs leading to the residence of A1. A1 was seen coming down from the stairs with a carton box in a polythene bag and getting into the car of A3 to take away the money to an unknown place. At that time, the CBI officials intercepted and apprehended A1 and A3. The carton box was seized and was later opened wherein it was found to have contained Rs.50

lakh. Neither A1 nor A3 could give satisfactory explanation for the money seized. It should be noted that it is not the case of the CBI that the petitioner (A2) was present on the spot at that time or that the money was seized from him.

(iv) The CBI completed the investigation and filed a final report before the 9th Additional District Court-cum-Special Court for CBI Cases, Chennai. The same has been taken on file as C.C.No.3 of 2013 and was stated to be pending.

(v) The petitioner (A2) had initially challenged the said order dated 12.8.2011 passed under Section 5(2) of the Act before this Court by filing Crl.O.P.No.12404 of 2014. This Court had, by an order dated 06.6.2014, granted an interim order of stay, which continued to be extended from time to time. Later, Crl.O.P.No.12404 of 2014 was dismissed on 27.10.2017 granting liberty to the petitioner to challenge the said order dated 12.8.2011 before the appropriate forum. It appears that this course was resorted to since the impugned order has been passed by the first respondent under Section 5(2) of the Act. Since the first respondent is obviously not a Criminal Court under the Criminal Procedure Code (Cr.P.C), the challenge to such an order could have only been made under Article 226 and not by way of a petition

under Section 482 of the Cr.P.C. This petition under Article 226 has been filed pursuant to the liberty granted by this Court in the order dated 27.10.2017 in Cr.O.P 12404 of 2014.

4. The 1st respondent has filed its counter affidavit opposing the writ petition on the following grounds:

(i) The impugned order has been passed in strict compliance with Section 5(2) of the Act and Rule 419-A of the Rules. Since the petitioner was having a conversation to commit an offence, it was intercepted in the interest of public safety preventing further incitement to the commission of an offence.

(ii) Tapping of phones in the instant case has been done in consonance with the law laid down by the Hon'ble Supreme Court in the case of ***Hukam Chand Shyam Lal Vs. Union of India [reported in 1976 (2) SCC 128]***.

(iii) The decision of the Hon'ble Supreme Court in the case of ***R.M.Malkani Vs. State of Maharashtra [reported in 1973 (1) SCC 471]*** has categorically stated that the argument based on right to privacy is not available to a guilty citizen against the efforts of the police to vindicate the law. Hence, the prayer of the petitioner is not

maintainable and ought to be dismissed.

5. The third respondent filed a counter affidavit for himself and on behalf of the second respondent contending, inter alia, as follows:

(i) Based on source information, the CBI had registered a regular FIR on 29.8.2011. A team of the CBI officials was thereafter deputed to carry out the search under Section 165 of the Cr.P.C. at the residential premises of the said Mr.Andasu Ravinder (A1) at No.121, IT Colony, Uthamar Gandhi Road, Nungambakkam, Chennai-34. After reaching the residential premises of the said Mr.Andasu Ravinder (A1), the CBI officials saw the car of the said Mr.Uttam Bohra (A3) reaching the said residence. A1 came down from his residence on the 1st floor and proceeded towards the car. He was seen to be carrying a carton box with a polythene bag. A1 met A3 and both boarded the car. When they were about to depart, the CBI team intercepted the car and recovered the polythene bag from A1. The bag was found to have contained Rs.50 lakhs and neither A1 nor A3 was able to account for possession of the said sum of money. The CBI completed the investigation and filed a final report before the 9th Additional Court for

CBI Cases, Chennai in C.C.No.3 of 2013 against three accused persons, of which, the petitioner has been arrayed as A2.

(ii) The bribe of Rs.50 lakhs was handed over to A1 by A2 and A1 was later intercepted while attempting to secret this money with the help of A3. The interception orders were necessary since they were issued for the purpose of detecting, preventing, investigating and prosecuting the corrupt activities. The order dated 12.8.2011 was passed in consonance with Section 5(2) of the Act and reflected complete application of mind.

(iii) The order dated 12.8.2011 was passed after following the procedure established by law. Such procedures are just and reasonable and pass the test of proportionality and legitimacy. Since the order dated 12.8.2021 has been passed by the Home Secretary, there is a presumption of constitutionality attached to the order of interception.

(iv) The guidelines issued in the judgment of the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties Vs. Union of India [reported in AIR 1997 SC 568]*** have been strictly complied with. In any event, in view of the judgment of the Hon'ble Apex Court in the case of ***R.M.Malkani***, it is not open to the petitioner to claim any right to privacy either under Article 21 or under Article 19

of The Constitution of India since the protections given therein are not for the guilty citizens.

(v) According to the CBI, the order of the first respondent under Section 5(2) of the Act has been passed on account of a ***"public emergency"***. As regards the expression ***"public safety"*** occurring in Section 5(2), the CBI stated that this aspect cannot be confined to events or situations, which would be apparent to any reasonable person. Since the offence, in the instant case, is one of corruption, the same would impact public safety since it undermined the reputation of the Income Tax Department.

(vi) There was no violation of the safeguards provided under Rule 419-A of the Rules since there was no direction from the first respondent to place the samples before any Review Committee.

(vii) The power to take voice samples has been recognized by the Hon'ble Apex Court in the case of ***Ritesh Sinha Vs. State of U.P. [reported in AIR 2019 SC 3592]*** and the use of intercepted voice conversations was upheld by a learned Single Judge of this Court in the case of ***Sanjay Bhandari Vs. Secretary to Government of India, Ministry of Home Affairs & another [W.P.Nos.5466***

& 5470 of 2020 dated 23.11.2020]. Hence, the impugned order did not suffer from any infirmity whatsoever.

6. A reply affidavit has been filed by the petitioner contending as follows:

(i) The impugned order mechanically repeats the expressions used in Section 5(2) of the Act. The other orders passed in respect of some of the other accused have been placed on record to show that they are basically cyclostyled orders, which reflect no independent application of mind.

(ii) The expression ***"public order"*** has been explained by the Hon'ble Supreme Court in the case of ***Hukam Chand Shyam Lal*** and in the subsequent decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties***. These decisions make it clear that unless there is a a public emergency or public safety, the power under Section 5(2) of the Act cannot be resorted to. The decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** has been upheld by the Supreme Court in the case of ***K.S.Puttaswamy Vs. Union of India [reported in 2017 (10) SCC 1]*** while recognizing the right to privacy as an integral element of Article 21 of

The Constitution of India. Several High Courts have quashed similar orders under Section 5(2) of the Act following the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties.*** Consequently, the impugned order is also vitiated and must be set aside as one without jurisdiction.

7. Heard the respective learned counsel appearing for either parties.

8. Mr.Sharath Chandran, learned counsel appearing on behalf of the petitioner contended as follows :

(a) The law as regards the right to privacy has evolved over the past 75 years. In the decision of the Hon'ble Supreme Court in the case of ***M.P.Sharma Vs. Satish Chandra [reported in 1954 (1) SCC 385 : 1954 SCR 1077],*** a Bench consisted of 8 learned Judges had initially taken the view that there was no right to privacy under The Constitution of India.

(b) This view was reiterated by the majority in the Constitution Bench in the case of ***Kharak Singh Vs. State of U.P. [reported in 1964 (1) SCR 332 : AIR 1963 SC 1295]*** barring ***K.Subba Rao,J,***

who dissented. However, in the decisions of the Hon'ble Supreme Court in ***Gobind Vs. State of M.P. [reported in 1975 (2) SCC 148]*** and in ***R.Rajagopal Vs State of Tamil Nadu [reported in 1994 (6) SCC 632]***, echoes of the existence of a right to privacy were heard. These echoes grew louder in the decision of the Hon'ble Apex Court in ***People's Union for Civil Liberties,*** which was concerned with the phone tapping. In the said decision it was conclusively held that the unauthorized phone tapping violated the right to privacy under Article 21 of The Constitution.

(c) Once Article 21 was triggered, the impairment of a fundamental right would have to be sustained only on the anvil of a procedure established by law. The statutory backing to tap phones is traceable to Section 5(2) of the Act. Unless the jurisdictional conditions in that provision are satisfied, phone tapping would be illegal.

(d) In view of the decision of the Hon'ble Apex Court in ***People's Union for Civil Liberties***, Section 5(2) of the Act will not stand attracted unless and until there existed a public emergency or was done in the interest of public safety. The Supreme Court held that neither the occurrence of public emergency nor the interest of public safety is a secretive condition or situation. Either of the situations

would be apparent to a reasonable person. Covert surveillance of the type conducted in this case definitely cannot fall within the aforesaid two situations contemplated under Section 5(2) of the Act.

(e) On 25.4.2011, the Government of India reiterated the legal position that phone tapping could be carried out only in strict compliance with Section 5(2) of the Act and in accordance with law and the guidelines laid down by the Hon'ble Apex Court in the case of ***People's Union for Civil Liberties***. This press note was issued four months prior to the impugned order. That apart, even as per the counter affidavit of the CBI, the intercepted conversations were not placed before the Review Committee in terms of Rule 419-A of the Rules, which is mandated by the decision of the Hon'ble Apex Court in the case of ***People's Union for Civil Liberties***. Thus, the Government cannot feign ignorance of the law, when it purportedly issued the impugned order.

(f) Since the impugned order has been issued without jurisdiction, the same must necessarily be set aside. The evidence so obtained must also stand wiped out since the action is no longer in the realm of a mere irregularity, but is founded on unconstitutionality.

(g) The common law doctrine of fruit of a poisonous tree was held to be inapplicable in India in view of the judgments of the Hon'ble Apex Court in the case of ***Pooran Mal Vs. Director of Inspection (Investigation) of Income Tax, Mayur [reported in AIR 1974 SC 348]*** and in the case of ***R.M.Malkani***. But, these decisions were rendered at a time when right to privacy was not recognized under Article 21. Previously, the evidence obtained as a result of an illegal search may be admissible provided it is relevant.

(h) The First Bench of this Court in the case of ***SNJ Breweries Vs. Principal Director of Income Tax (Investigation) [reported in (2024) 2 CWC 727]*** has considered the issue and held that the decisions of the Hon'ble Supreme Court in ***Pooran Mal*** and ***R.M. Malkani*** require a re-look in the light of the law laid down by the 9 Judges' Bench of the Hon'ble Apex Court in the case of ***K.S.Puttaswamy.***

9. These submissions were countered by Mr.AR.L.Sundaresan, learned ASG appearing on behalf of the respondents and he submitted as follows:

(a) The provisions of Section 5(2) of the Act ought to be expanded so as to accommodate newer contingencies such as the case on hand. Adverting to paragraph 16 of the counter affidavit of the CBI, it was submitted that since the matter involved corruption in high places, the issue involved a risk to public safety. Since the reputation of the Income Tax Department was at stake, there was a resultant threat to public safety.

(b) Restricting the concept of public safety to situations that would be evident to a reasonable person would exclude situations like detection of crimes carried on by secretive means since most of the threat is from hidden actors. Such information is sensitive in nature and cannot be placed in the public domain. Therefore, the scope of Section 5(2) of the Act must be expanded beyond its literal words to accommodate newer situations such as the one on hand.

(c) There was a complete application of mind while passing the impugned order, which is evident from the order itself. Referring to paragraph 10 of the counter affidavit of the CBI, it was submitted that such interception was necessary to prevent the offence of corruption and for detection of corrupt activities, which was permissible under the rubric of public safety under Section 5(2) of the Act.

(d) Adverting to the decision of the Hon'ble Apex Court in ***R.M. Malkani***, it was submitted that the said decision was clearly applicable to the case on hand. Even if the impugned order is set aside, the evidence so collected cannot be eschewed. It is a settled principle of law that it is not the source, but the relevancy of the evidence that matters.

(e) The decision of the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties*** has been subsequently translated into the Enactment of Rule 419-A of the Rules. The Government has scrupulously adhered to these Rules while passing the impugned order.

(f) Lastly, the present case involved a serious crime of bribery and corruption and the intercepted conversation led to the registration of the FIR. Thus, this material should not be kept aside on technicalities.

10. From the rival submissions and the materials on record, the following are the questions that arise for the consideration of this Court:

(1) What is the scope of the right to privacy guaranteed under Article 21 of The Constitution in the context of private conversations over the telephone/mobile phone? Does the unauthorized phone tapping violate Article 21 of The Constitution?

(2) Does the impugned order meet the requirements of Section 5(2) of the Act ?

(3) Have the respondents complied with the procedural safeguards as set out in Rule 419-A of the Rules ?

(4) If the answer to questions (2) & (3) is in the negative, what is the effect of evidence collected pursuant to an unconstitutional act of phone tapping ?

The Right to Privacy and Phone Tapping :

11. The right to privacy has, for long, been regarded as one of the most sacred liberties of the subject. Long before, it took its roots in this country, its existence was recognized and upheld by the Courts

under the common law for several centuries in the context of privacy of one's property and possessions.

12. Way back in 1604, in ***Seymane Vs. Richard Gresham [reported in 1604 All ER Rep.62],*** it was famously declared that **"*the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose*."** The sanctity of a man's home was regarded as so sacred that it was declared in ***Huckle Vs. Money [reported in 95 ER 768]*** as under:

> *"… To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour…."*

13. In the landmark case *of* ***Entick Vs. Carrington [reported in (1765) 19 Howells' State Trials 1029 : (1765) 95 ER 807 : 2 Wils KB 275]***, ***Lord Camden*** observed:

> *"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the*

> *whole…. By the laws of England, every invasion of private property, be it even so minute, is a trespass. No man can set foot upon my ground without my licence but he is liable to an action though the damage be nothing."*

14. These developments led ***William Pitt***, the Elder, to famously declare in 1781 as follows :

> *"The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dare not cross the threshold of the ruined tenement."*

15. In the United States, Lord Camden's opinion in ***Entick*** was extensively quoted by the U.S. Supreme Court in the case of ***Boyd Vs. United States [reported in 116 US 616 (1886)]*** wherein it was declared that a compulsory production of a man's papers violated the 4th and 5th Amendments of the U.S. Constitution. The Supreme Court observed as follows :

> *"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the*

> *essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty. and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.*

16. But, the right to privacy, as we now know it, gained impetus after two Boston lawyers viz. Samuel Warren and Louis Brandeis wrote a famous article titled ***"The Right to Privacy"*** in the 1894 issue of the Harvard Law Review. They argued that the concept of privacy was no longer restricted to an invasion of property, but also extended to the protection of the personal rights of an individual as well. It was observed thus:

> *" 'Recent inventions and business methods call attention to the next step which must be taken*

> *for the protection of the person, and for securing to the individual what Judge Cooley calls the right " to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life ; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons ; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer."*

17. The seeds of the right to privacy or the right to be let alone, which were sown in this seminal article germinated into a full blossom in the case of ***Olmstead Vs. United States [reported in 1928 SCC OnLine US SC 131 : 277 US 438 (1928)]***. The issue before the U.S. Supreme Court was as to whether the use of evidence of private telephone conversations between the defendants and others, which were intercepted by means of wiretapping, amounted to a violation of the Fourth and the Fifth Amendments of the U.S. Constitution. The Fourth Amendment of the U.S. Constitution declared thus:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

18. The Fifth Amendment guaranteed to a citizen thus:

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

It should be mentioned that while wiretapping could violate the 4th Amendment, the use of such evidence in a criminal case could violate the 5th Amendment as well.

19. As noted earlier, the decision in the case of ***Boyd*** had recognized privacy as an aspect of a property right. The question in the case of ***Olmstead*** was as to whether this could be extended to telephone wire tapping. The majority decision delivered by the Chief Justice William Howard Taft held that wiretapping did not amount to a search and seizure within the meaning of the Fourth Amendment. Justice Brandeis dissented. He echoed the very same lines of reasoning seen in his 1894 article, which he had co-written as a lawyer in the Harvard Law Review when he observed :

> *"Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.*
>
> *The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of*

every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?"

20. In two seminal paragraphs, Justice Brandeis declared wiretapping to be a violation of the Fourth Amendment and set out his now infamous prophecy:

"The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are

> *naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."*

21. As experience has now shown, the dissent of Justice Brandeis was truly, to borrow the words of Chief Justice Hughes, ***"an appeal to the brooding spirit of the law, to the intelligence of a future day, with the hope that a later decision may possibly correct the error which the dissenting Judge believes the court to have been betrayed."*** The majority view in the case of ***Olmstead*** that the 4th Amendment protected persons and not places gave room for a very serious criticism in the case of ***Lopez Vs. United States [reported in 1963 SCC OnLine US SC 117 : 373 US 427 (1963)]*** wherein it was observed thus:

> *"63. But even without empirical studies, it must be plain that electronic surveillance imports a peculiarly severe danger to the liberties of the person. To be secure against police officers' breaking and entering to search for physical objects is worth very little if there is no security against the officers' using secret recording devices to purloin words spoken in confidence within the*

> *four walls of home or office. Our possessions are of little value compared to our personalities."*

22. The wheel turned a full circle when the dissenting opinion of Justice Brandeis was declared as the law in the case of ***Katz Vs. United States [reported in 389 US 347 (1967)]*** wherein the question was as to whether a public telephone booth was a constitutionally protected area so that the evidence obtained by attaching an electronic listening recording device to the top of such a booth would violate the right to privacy of the user of the booth. Overruling the majority view in the case of ***Olmstead***, it was held thus:

> *"The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, [Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.] in a*

friend's apartment, [Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697.] or in a taxicab, [Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

….The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve

> *that end did not happen to penetrate the wall of the booth can have no constitutional significance*
>
> *These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."*

Thus, it was concluded that the unauthorized surveillance by way of wiretapping would violate the 4th Amendment by constituting an unlawful search and seizure.

Development of Right to Privacy in India :

23. It is well known that in India, the Supreme Court had initially taken the view that there existed no right to privacy akin to the 4th Amendment to the U.S. Constitution. In the United States, privacy was located in the 4thAmendment as an aspect of the guarantee against unreasonable searches and seizures. In the case of ***M.P. Sharma,*** a Bench of 8 learned Judges of the Hon'ble Supreme Court declared that there existed no fundamental right to privacy in The Constitution. The focus of the Court was entirely on Article 20(3) and it was held thus:

> *"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."*

24. We must give due allowance for this approach since this decision was delivered in the heydays of ***the A.K Gopalan doctrine [A.K.Gopalan Vs. State of Madras (reported in AIR 1950 SC 27)],*** which viewed the fundamental rights as isolated silos. It was not until 1970 in ***R.C.Cooper's*** case ***[R.C.Cooper Vs. Union of India (reported in AIR 1970 SC 564)]*** that the fluidity of the various parts within the context of fundamental rights and the constitutional law were explicitly recognized.

25. In the decision of the Hon'ble Supreme Court in ***Kharak Singh,*** the question before the 6 Judges' Constitution Bench

was as to whether Chapter 22 of the U.P.Police Regulations violated Articles 19(1)(d) and 21 of The Constitution. The majority view of ***N.Rajagopala Ayyangar,J*** struck down Regulation 236(b) of the said Regulations, which authorized "***domiciliary visits***" i.e., the policeman or chaukidar enters the house and knocks at the door at night and after awakening the suspect makes sure of his presence at his home as being violative of Article 21 of The Constitution. However, the Majority still refused to recognize the right to privacy as an aspect of personal liberty under Article 21. ***N.Rajagopala Ayyangar,J*** observed thus:

> *"Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."*

Subba Rao,J took a slightly different path. The learned Judge viewed privacy as an integral part of personal liberty under Article 21. The learned Judge held thus:

"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado [[1949] 238 US 25] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. It so understood, all the acts of surveillance under

> *Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."*

26. Despite these observations, a Division Bench of this Court, in the case of ***RamkishanSrikishan Jhaver Vs. Commissioner of Commercial Taxes [reported in (1965) 57 ITR 664],*** found themselves bound by the majority view of the Hon'ble Supreme Court in the case of ***Kharak Singh*** and was not prepared to go so far as to recognize the right to privacy on par with the protection guaranteed under the Fourth Amendment in the United States was concerned.

27. In the decision of the Hon'ble Supreme Court in ***Gobind***, Regulations 855 & 856 of the Madhya Pradesh Police Regulations authorizing domiciliary visits were questioned as being violative of Articles 19(1)(d) and 21 of The Constitution. Justice Mathew, who delivered the opinion of a unanimous Three Judges' Bench, began by observing thus:

> *"The question whether right to privacy is itself a fundamental right flowing from the other fundamental rights guaranteed to a citizen under Part III is not easy of solution."*

As regards the competing claims of privacy and State interest, it was observed:

> *"There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State."*

28. In the decision of the Hon'ble Supreme Court in ***Gobind,*** though the relevant Regulations were ultimately saved by reading it

down narrowly, it appears that the Hon'ble Supreme Court did, however, proceed on the basis that a right to privacy did exist, which is evident from the following observation:

> *"The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."*

29. By the 1990's, it had become clear that the Majority view in the decision of the Hon'ble Supreme Court in ***Kharak Singh*** had been severely watered down almost to the point of it being denuded of its status as a precedent. In the decision of the Hon'ble Supreme Court in ***R.Rajagopal,*** a Two Judges' Bench declared that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It characterized the right as a ***"right to be let alone".***

30. The next decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** is a watershed in the development of the Constitutional Right to privacy in India. This was a petition under Article 32 of The Constitution challenging the validity of Section 5(2) of the Act and seeking issuance of guidelines in the wake of indiscriminate tapping of telephones of members of the opposition. The Court pointed out the problem as under :

> *"Telephone-tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day."*

It then proceeded to declare:

> *"We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of The Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted.*

> *The said right cannot be curtailed "except according to procedure established by law"."*

The Court proceeded to hold that in the context of phone tapping, an invasion into the right to privacy was through a procedure established by law ie., Section 5(2) of the Act. It also laid down certain procedural safeguards by way of directions under Article 142 of The Constitution, which will be referred to and dealt with in another part of this order.

31. At this juncture, it should be observed that the decision of the Hon'ble Supreme Court in ***M.P.Sharma*** was by a Bench of 8 Judges and the decision of the Hon'ble Supreme Court in ***Kharak Singh*** was by a Bench of 6 Judges. Although the decisions of the Hon'ble Supreme Court in ***Gobind, R.Rajagopal*** and ***People's Union for Civil Liberties*** had declared the right to privacy to be a part of Article 21, this view could not be definitively proclaimed since the shadow in the decision of ***M.P.Sharma*** still hung over these decisions. Matters eventually came to head when the matter was referred to a Nine Judges' Bench of the Hon'ble Supreme Court by a Constitution Bench in ***K.S.Puttaswamy (Privacy-9J) Vs. Union of India [reported in 2017 (10) SCC 1].***

32. It is not necessary to burden this order with the various scholarly opinions in the Nine Judges Bench judgment of the Hon'ble Supreme Court in the case of in ***K.S.Puttaswamy (Privacy-9J)*** except to state that it was unanimously declared that the decision of the Hon'ble Supreme Court in ***M.P.Sharma*** to the extent that it held that the right to privacy is not protected by The Constitution stood overruled. Approving the decisions of the Hon'ble Supreme Court in ***Gobind*** and ***People's Union for Civil Liberties,*** it was unanimously declared that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of The Constitution, as ***Justice S.K Kaul***, in his concurring judgment, poignantly remarks:

> *"Let the right to privacy, an inherent right, be unequivocally a fundamental right embedded in Part III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today. The old order changeth yielding place to new."*

33. Thus, there is no doubt that the right to privacy is an integral facet of the right to life and personal liberty under Article 21 of The

Constitution. We may, therefore take as settled that where the State seeks to place any restriction on an individual's right to privacy, it must be protected unless it is shown that such restriction is authorized under a procedure established by law.

34. The next question is as to whether phone tapping constitutes a violation of the right to privacy under Article 21. The answer to this question is no longer res integra. In the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties***, it was held thus:

> *"18. The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments*

> *in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."*

From a reading of the above, there can be no doubt that telephone tapping would infringe Article 21 unless such infringement has the sanction of a procedure established by law.

Does the impugned order meet the requirements of Section 5(2) of the Act :

35. The "law", which is referred to in the context of phone tapping in the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties***, is the Act namely the Telegraph Act, 1885. It is, therefore, necessary to first set out the relevant provisions of this Act as they stood at different points in time. When the Act was originally enacted, Section 5 read as follows:

> *"5. (1) On the occurrence of any public emergency, or in the interest of the public safety, the Governor General in Council or a Local Government, or any officer specially authorised in*

this behalf by , the Governor General in Council, may

(a) take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act ; or

(b) order 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 or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under Sub-Section (1) was in the interest of the public safety, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive proof on the point."

36. The Act, 1885, being a pre-constitutional legislation, several doubts arose as to the constitutionality of its provisions particularly in the light of the unbridled power it conferred contrary to the freedoms guaranteed under Article 19 of The Constitution. In its 38th Report on the Indian Post Office Act, 1898, the Law Commission of India dealt

with the in pari materia provisions in Section 26 of the said Act, which permitted interception of postal articles on the ground of public emergency or public safety. Section 26 of the Indian Post Office Act, 1898 was modelled on the lines of Section 5 of the Act. The Law Commission recommended that both Section 5 of the Act, 1885 and Section 26 of the Indian Post Office Act, 1898 be amended so as to bring it in line with the permissible restrictions set out in Article 19(2)-(6) of The Constitution.

37. Pursuant to these recommendations, Section 5 of the Act, 1885 was substituted by Central Act 38 of 1972 to read as follows :

> *"Power for Government to take possession of licensed telegraphs and to order interception of messages.—*
>
> *(1) 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, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of*

any telegraph established, maintained or worked by any person licensed under this Act.

(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."

It would be evident that the effect of the amendment was to bring Section 5(1) & (2) of the Act, 1885 in line with the permissible heads of restrictions under Article 19 of the Constitution.

38. The scope of Section 5(1) of the Act came up for consideration before the Hon'ble Supreme Court in ***Hukam Chand Shyam Lal*** wherein it was observed thus:

> *".....Firstly, the occurrence of a "public emergency" is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a pre-requisite for the exercise of power under this section, must be a "public emergency" and not any other kind of emergency. The expression public emergency has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. In Sub-Section (1) the phrase 'occurrence of any public emergency' is connected with and is immediately followed by the phrase "or in the interests of the public safety".*

These two phrases appear to take colour from each other. In the first part of Sub-Section (2), those two phrases again occur in association with each other and the context further clarifies with amplification that a ***"public emergency"*** within the contemplation of this Section is one, which raises problems concerning ***the interest of the public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence.***

39. The provisions of Section 5(2) of the Act were elaborately considered by the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties*** wherein it was observed in paragraphs 28 to 30 as under:

> *"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 Act. 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".*

40. From a reading of the decisions of the Hon'ble Apex Court in ***Hukam Chand Shyam Lal*** and ***People's Union for Civil Liberties,*** it is clear that to invoke Section 5(2) of the Act, the following conditions must be cumulatively satisfied:

> • *The first step under Section 5(2) is the occurrence of a public emergency or where interest of public safety so demands. 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. Neither the occurrence of public emergency nor the interest of public safety is a secretive condition or situation. Either of the situations would be apparent to a reasonable person.*

> • *It is only when the above two situations exist that the Authority may then pass an order directing interception of messages after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) the 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.*
>
> • *In other words, unless and until there is a public emergency or it is necessary in the interests of public safety, 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.*

41. Keeping these principles in mind, it is seen that in the instant case, a perusal of the impugned order would show that it has been passed purportedly in exercise of powers under Section 5(2) of the Act and Rule 419-A of the Rules. The order reads as follows:

"TOP SECRET
No 14/3/97-CBI
MINISTRY OF HOME AFFAIRS
(Government of India)
ORDER

1. Whereas as per provision in Sub-Rule (1) of Rule 419-A of the Indian Telegraph Rules, 1951 notified on 01.03.2007 as Indian Telegraph Amendment Rules, 2007 framed in exercise of powers conferred by Section 7 of the Indian Telegraph Act, 1885 (13 of 1885), the Secretary, Ministry of Home Affairs, Government of India has been authorized to exercise powers of the Central Government under Sub-Section (2) of Section 5 of the Indian Telegraph Act, 1885 (13 of 1885).

*2. Now, therefore, I, Union Home Secretary, being satisfied that, for reasons of public safety, it is necessary and expedient to do in the interests of public order and for preventing the incitement to the commission of an offence hereby direct that any telephone message relating to clandestine contact/movement/activity to and from ******** shall be intercepted and disclosed to the 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.

4. This order shall remain in force for a period not exceeding 60 days from the date ie.,

04.07.2011 and in 'total' it is not exceeding the 180 days limit of the Sub-Rule 419A(6) of the Indian Telegraph Act, 1885.

(R.KSingh)
Secretary to the Govt of India
Ministry of Home Affairs
New Delhi

New Delhi
Dated : 12.08.2011"

42. A reading of the impugned order shows that the Secretary to Government has mechanically repeated the wordings of Section 5(2) of the Act without adverting to any factual basis. When an Authority is required to set out its satisfaction while passing an order, the order must disclose that there has been application of mind to the facts of the case. This is all the more important since the order passed under Section 5(2) of the Act by the Secretary is subject to a review under Rule 419-A(17) of the Rules before the Review Committee.

43. There appears to be no serious application of mind by the first respondent since the order recites that it is passed for "***reasons of public safety***", which the Court is required to presume is "***in the interests of public safety***" as provided under Section 5(2) of the Act.

But, the invocation of this ground in this case is clearly unsustainable since the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties*** clearly held as follows:

> *"The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. 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."*

44. Admittedly, the entire operation in this case involves covert surveillance of the mobile phone of the petitioner and consequent interception of conversations between the accused persons. This was clearly a covert operation. The term '***interests of public safety***' as explained in the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** contemplates a situation, which is not secretive and is apparent to a reasonable person. By no stretch of imagination, can the facts of this case be characterised to meet the aforesaid requirements so as to bring it within the rubric of '***interests of public safety***' as explained by the Supreme Court.

45. In similar circumstances, a learned Single Judge of the Karnataka High Court, in the case of ***Dr.S.M.Mannan Vs. CBI [reported in 2024 SCC OnLine Kar 80]***, refused to hold that covert surveillance in a case of illegal gratification would come within the scope of Section 5(2) of the Act. It was observed as follows:

> *"The order is dated 18-09-2019. It is this that has to be placed before the Review Committee. The order is passed invoking subsection (2) of Section 5 of the Telegraph Act. The order reads that Union Home Secretary is satisfied that it was necessary and expedient in public safety to order interception. What public safety was involved in the case at hand is not known, and is not discernible anywhere either in the order or in the requisition. I fail to understand what public safety or public emergency was involved in the case at hand. The allegation is with regard to acceptance of illegal gratification. If that be so, a drastic measure of wiretapping could not have been permitted against the petitioner, as admittedly he did not involve any of the trait necessary under sub-section (2) of Section 5 of the Act and its interpretation by the Apex Court. Therefore, wiretapping is loosely permitted against the petitioner. This finding that the act of wiretapping is illegal would cut at the root of the*

> *matter and obliterate all the acts or steps taken by the prosecution in its aftermath. I deem it appropriate to notice if there is any semblance of merit in the allegation as well."*

46. Realizing this perhaps, the first respondent appears to have taken an alternative stand before this Court. In the counter affidavit filed before this Court, the 1st respondent has contended as under:

> *"4. I deny the contention raised in paragraph 5 of the affidavit. It humbly submit that the respondent has acted strictly in accordance with the Indian Telegraph Act, 1885 read with Indian Telegraph Rules, 1951 (amended vide Indian Telegraphic (Amended Rules, 1999) and Rules made pursuant to the Indian Telegraphic (Amended Rules). I submit that the impugned order dated 12.08.2011 passed by the Respondent in the Proceedings No 14/3/97-CBI is valid since the Petitioner's telephonic conversation is unlawful to commit an offence, hence it was intercepted in the interest of public safety and preventing further incitement by the Petitioner to the commission of an Offence. ……"*

The first respondent has thereafter made a reference to the decision of the Hon'ble Supreme Court in ***Hukam Chand Shyam Lal*** and stated as follows:

> *"6……..That it is respectfully submitted that the Respondent herein has used the mechanism of telephone tapping only on the occurrence of the aforesaid circumstances mentioned in Hukum Chand Shyam Lal's case namely on the occurrence of any "public emergency" or in the "interest of public safety"*

47. He would further submit that the terms ***'public emergency'*** and ***'public safety'*** have been interpreted by the Hon'ble Supreme Court to mean problems concerning the interests of the public safety, the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States or public Order or for preventing the incitement to the commission of an offence and hence, the allegation questioning the validity of the order passed by the first respondent is irrational.

48. The counter affidavit, instead of lending clarity, unfortunately exposes the flawed understanding of the first respondent. While the impugned order invokes the ground of '***interests of public safety***', the counter affidavit of the first respondent seeks to invoke '***public emergency***' as a ground to validate the exercise of powers under

Section 5(2) of the Act. It is too well settled that the grounds for passing a statutory order cannot be improved upon in a counter affidavit (See ***M.S.Gill Vs. Chief Election Commissioner [reported in AIR 1978 SC 851]***.

49. That apart, even if one were to accept the contention at face value, it cannot carry the case of the first respondent any further since the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties*** termed a public emergency to mean ***"the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action."*** Admittedly, that is not the case here. The facts of this case do not disclose any emergency at all let alone a public emergency. This is a case of covert surveillance in a case involving alleged receipt of illegal gratification. If the arguments were to be accepted, then every case under the Prevention of Corruption Act, 1988 could be termed as being opposed to the interests of public safety. By its very nature of things, the facts in this case cannot come within rubric of public emergency or interests of public safety as expounded by the Hon'ble Supreme Court.

50. It was also sought to be contended that phone tapping was essential to preserve public order by preventing and detecting crime. The expression "***public order***" is well known. In the decision of the Hon'ble Supreme Court in ***Commissioner of Police Vs. C.Anita [reported in 2004 (7) SCC 467]***, it was held thus:

> *"public order" has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of "law and order" and "public order" is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of the public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting "public order" from that concerning "law and order"*

51. Thus, the effect of breach of public order would involve a wide spectrum of the public and does not involve a covert operation hatched and carried out in secrecy such as the case on hand. In fact, the use of Section 5(2) of the Act to detect the commission of ordinary crimes *de-hors* the requirement of public emergency or in the interests of public safety appears to be clearly misconceived. Where phone tapping has been found necessary to tackle crimes, such a power has been expressly conferred as for example in certain special statutes like the Maharashtra Control of Organized Crime Act, 1999. Section 14 of the said Act authorizes interception of wire, electronic or oral communication for the purposes of investigating into organized crime. The words of Section 5(2) of the Act cannot be strained to include detection of ordinary crime.

52. Realizing this legal position, the CBI, in its counter affidavit, would seek to attack the very basis of the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties,*** by contending, inter alia, in paragraph 10 as hereunder:

> *"Restricting the concept of public safety to the mere "situations that would be apparent to the reasonable person" will exclude most of the actual*

> *threats which present the most grave circumstances to the public safety like terrorist attacks, corruption at high places, economic and organized crimes, most of which are hatched in the most secretive of manners."*

53. As stated above, the Hon'ble Supreme Court, in the case of ***People's Union for Civil Liberties***, unequivocally set out the following in paragraph 28:

> *"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."*

54. It should be pointed out that paragraph 28 of the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** has been approved by the Constitution Bench of the Supreme Court in the case of ***K.S.Puttaswamy (Aadhaar-5J) Vs. Union of India [reported in 2019 (1) SCC 1]*** in the context of Section 33(2) of the Aadhar Act, 2016, which permits disclosure of identity information and authentication records in the interest of national security. Therefore, the contention of the CBI that the observations in the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** require

change is not an argument that can be countenanced before this Court.

55. As pointed out by the learned counsel for the petitioner, the contention of the CBI is clearly a ruse as the Government was very much aware of the existing state of the law when it passed the impugned order on 12.8.2011.

56. The attention of this Court was invited to a Press Note dated 25.4.2011, which was passed barely 4 months before the impugned order. It would read as follows:

"Press Information Bureau
Government of India
Cabinet Secretariat
25-April-2011 19:24 IST

Clarifications on the Report on Tapping of Telephones

There have been a number of articles on the Cabinet Secretary's report regarding tapping of telephones which appeared in some section of the media. It is important that the correct factual position is presented to the media.

The provisions for authorization of interception are contained in Section 5(2) of Indian

Telegraph Act, 1885 read with Rule 419(A) of the Indian Telegraph Rules, 1951 as well as Section 69 of the Information Technology Act, 2000 read with Information Technology (Directions for Interception or Monitoring or Decryption of Information) Rules, 2009.

The Hon'ble Supreme Court has upheld the constitutional validity of interceptions and monitoring under Section 5(2) of the Act through its order dated 18.12.1996 in Writ Petition (C) No.256/1991 by People's Union for Civil Liberties (PUCL) Vs. Union of India. It has also observed that the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "Right to Privacy", and accordingly, held that telephone tapping would infringe the Right to Life and Right to Freedom of Speech & Expression enshrined in Articles 21 and 19(1)(a) respectively of the Constitution of India, unless it is permitted under the procedure established by law. The Hon'ble Court further observed that Section 5(2) of the Act clearly provides that 'occurrence of any public emergency' or 'interest of public safety' is a sine qua non for the application of these provisions. ***Neither of these are secretive conditions or situations. Either of the***

situations would be apparent to a reasonable person.

In this regard, the Hon'ble Court has recalled its observations in the case of Hukum Chand Shyamlal Vs. Union of India and others, 1976 stating that 'economic emergency' is not one of those matters expressly mentioned in the statute, and further that mere 'economic emergency' may not necessarily amount to a 'public emergency' and justify action under Section 5(2) of the Act, unless it raises problems relating to the matters indicated in the section. 'Public emergency' would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. It is one which raises problems concerning the interest of public safety, the sovereignty and integrity of India, the security of the State, friendly relations with sovereign States or public order or the prevention of incitement to the commission of an offence. 'Public Safety' means the state of condition of freedom from danger or risk for the people at large. ***It has been stated further that when either of these two conditions are not in existence, authorities cannot resort to telephone tapping, even though there is satisfaction that it is necessary or expedient to do so in the interests of sovereignty and***

integrity of India, security of the State, friendly relations with sovereign States, public order or for preventing incitement to the commission of an offence.

In the light of the above, the Hon'ble Supreme Court gave directions covering the issue of institutional safeguards to be put in place in respect of interception under Section 5(2) of the Indian Telegraph Act, which was incorporated in terms of Rule 419(A) of the Indian Telegraph Rule, 1951.

In the light of recent controversies on account of interception of certain telephone numbers by a designated authorized agency, which were extensively reported by media, the Hon'ble Prime Minister directed the Cabinet Secretary to look into the Rules, Procedures and Mechanism to avoid their misuse. After examining all the relevant issues, Cabinet Secretary recommended further comprehensive refinement of Rules and Procedures, in addition to providing for stronger penal provisions for violations by amending the law. It was also recommended to either remove the CBDT from the list of authorized agencies in respect of telephone interception as the income tax laws fall within civil jurisdiction and do not always impinge on the public safety or to specify stipulations regarding the extent of surveillance

> *allowed to the agency, including the level at which requests are to be made for authorization by the Home Secretary.* ***It is clarified that the law does not permit use of telephone tapping and monitoring of conversations to merely detect tax evasion.*** *There are specific laws and rules that contain provisions for detection of unaccounted wealth and evasion of taxes, and interception of telephones without 'public emergency' or 'public safety' being at stake is not in accordance with the law, as exhaustively interpreted by the Hon'ble Supreme Court. The recommendations made by the Cabinet Secretary reiterate this established legal position, which should not be seen in terms of conflicts between individuals or interest groups."*

57. The aforesaid Press Note is self-explanatory and correctly sums up the Government's own understanding of the position of law laid down in the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties***, which states that no phone tapping can be authorized in the absence of a public emergency or in the interests of public safety even though there is satisfaction that it is necessary or expedient to do so in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with sovereign States, public order or for preventing incitement to the commission of

an offence. It has also understood the legal position that neither of the above conditions viz., '***public emergency***' or in the '***interests of public safety***' is a secretive condition or situation. Though a press note is not a legal instrument, it is well settled that such documents reflect the understanding of the legal provisions by the Executive.

58. In the decision of the Hon'ble Supreme Court in ***R & B Falcon (A) Pty Ltd. Vs. CIT [reported in 2008 (12) SCC 466]***, it was pointed out as follows :

> *"34. Rules of executive construction in a situation of this nature may also be applied. Where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight."*

59. It is, therefore, not open to the CBI to say that the requirement of public emergency and the interests of public safety should be confined to situations, which are secretive when the Government themselves have understood the scope of Section 5(2) of the Act only in that manner.

60. The CBI has also gone on record to state in paragraph 16 of its counter affidavit that interception was necessary since it was required to prevent the offence of corruption.

61. However noble and well-intended the objective may be, tapping of phones *de-hors* a ***'public emergency'*** or in the '***interests of public safety***' as stipulated in Section 5(2) of the Act cannot be legally justified as the law presently stands.

62. The learned Additional Solicitor General of India would, however, request this Court to expand the scope of Section 5(2) of the Act to accommodate cases of this nature.

63. This Court is unable to accept this submission since the boundaries for invasion of a fundamental right through the medium of enacted law is a function of the Legislature and not the Court. Section 5(2) of the Act has set out the ***Lakshman Rekha*** and the role of the Court is confined to seeing as to whether the threshold is not crossed. As sentinels on the qui vive, the Courts are gatekeepers of

Fundamental Rights. Gate keepers cannot become gate makers to reposition the gates as and when the Executive requires without the intervention of the Legislature as pointed out by ***H.R.Khanna,J*** in the case of ***Godavari Sugar Mills Ltd. Vs. S.B.Kamble [reported in 1975 (1) SCC 696],*** which reads thus :

> *"Any provision which has the effect of making an inroad into the guarantee of fundamental rights in the very nature of things should be construed very strictly and it would not, in our opinion, be permissible to widen the scope of such a provision or to extend the frontiers of the protected zone beyond what is warranted by the language of the provision."*

64. That apart, the above contention cannot be accepted since this Court is bound by the interpretation put upon Section 5(2) of the Act in paragraph 28 of the decision of the Hon'ble Apex Court in ***People's Union for Civil Liberties***, which has also been approved by the Constitution Bench decision of the Hon'ble Supreme Court in ***K.S. Puttaswamy (Aadhaar-5J) Vs. Union of India [reported in 2019 (1) SCC 1]***.

65. The decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** has been cited with approval in the decision of the Hon'ble Apex Court in ***Anuradha Bhasin Vs. Union of India [reported in 2020 (3) SCC 637]***. This case is concerned with the validity of the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 framed under Section 7 of the Act. These Rules permit the restriction of telecom services including access to the Internet. Rule 2(2) the said Suspension Rules contains safeguards, which are akin to Rule 419-A of the Rules. One of the safeguards is the forwarding of the reasoned order of the Competent Authority to a Review Committee, which has been set up under the said Suspension Rules within one working day. Rule 2(6) requires the Review Committee concerned to meet within five working days of issuance of the order suspending the telecom services and record its findings as to whether the order issued under the said Suspension Rules is in accordance with the provisions of the main Statute viz. Section 5(2) of the Act.

66. In the above context, the Hon'ble Supreme Court was called upon to examine the circumstances, under which, an order could be

justified under Section 5(2) of the Act. After referring to the decisions of the Hon'ble Supreme Court in ***Hukam Chand Shyam Lal*** and ***People's Union for Civil Liberties,*** it was observed in the decision of the Hon'ble Supreme Court in ***Anuradha Bhasin*** as hereunder:

> *"100. Keeping in mind the wordings of the section, and the above two pronouncements of this Court, what emerges is that the prerequisite for an order to be passed under this sub-section, and therefore the Suspension Rules, is the occurrence of a "public emergency" or for it to be "in the interest of public safety". Although the phrase "public emergency" has not been defined under the Telegraph Act, it has been clarified that the meaning of the phrase can be inferred from its usage in conjunction with the phrase "in the interest of public safety" following it. Hukam Chand Shyam Lal case [Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128] further clarifies that the scope of "public emergency" relates to the situations contemplated under the sub-section pertaining to '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'.*

101. The word "emergency" has various connotations. Everyday emergency, needs to be distinguished from the type of emergency wherein events which involve, or might involve, serious and sometimes widespread risk of injury or harm to members of the public or the destruction of, or serious damage to, property. Article 4 of the International Covenant on Civil and Political Rights, notes that '[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…'. Comparable language has also been used in Article 15 of the European Convention on Human Rights which says "In time of war or other public emergency threatening the life of the nation". We may only point out that the "public emergency" is required to be of serious nature, and needs to be determined on a case-to-case basis.

102. The second requirement of Section 5(2) of the Telegraph Act is for the authority to be satisfied that it is necessary or expedient to pass the orders in the interest 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, and must record reasons thereupon. ***The terms "necessity" and "expediency" bring along the stages an emergency is going to***

> ***pass through usually. A public emergency usually would involve different stages and the authorities are required to have regard to the stage, before the power can be utilised under the aforesaid Rules.*** *The appropriate balancing of the factors differs, when considering the stages of emergency and accordingly, the authorities are required to triangulate the necessity of imposition of such restriction after satisfying the proportionality requirement."*

67. In view of the above discussions and having regard to the meaning ascribed to the expressions '***public emergency***' and '***interests of public safety***' in paragraph 28 of the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** as affirmed by the Constitution Bench of the Hon'ble Supreme Court in ***K.S.Puttaswamy (Aadhaar-5J) Vs. Union of India [reported in 2019 (1) SCC 1]***, it is clear that in the facts on hand, the impugned order does not pass muster under any of the two condition precedents i.e., '***public emergency***' and '***interests of public safety***' required for exercise of jurisdiction under Section 5(2) of the Act. Consequently, the impugned order is, on the face of it, without jurisdiction and is liable to be quashed on this short ground.

Have the respondents complied with the procedural safeguards set out in Rule 419-A of the Rules :

68. In the decision in ***People's Union for Civil Liberties,*** the Hon'ble Supreme Court had issued various directions/procedural safeguards under Article 142, which were required to be mandatorily followed in all cases of phone tapping. These directions were incorporated into the Rules as Rule 419-A by virtue of the Indian Telegraph (Amendment) Rules, 2007.

69. Adverting to these Rules, it was submitted by Mr.Sharath Chandran, learned counsel appearing on behalf of the petitioner that Rule 419-A of the Rules required the intercepted material to be placed before a Review Committee to examine as to whether the interception was carried out in accordance with Section 5(2) of the Act. The attention of this Court was drawn to Rule 419-A(17) to (19), which reads as follows:

> *"(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."

70. The attention of this Court was also drawn to the decision of the Hon'ble Supreme Court in ***Anuradha Bhasin*** wherein similar procedural requirements as contained in the said Suspension Rules, 2017 framed under the Act were held to be mandatory.

71. In response, the learned Additional Solicitor General adverted to paragraph 13 of the counter affidavit of the CBI, which reads as follows:

> *"It is pertinent to mention here that in the present case, no further direction from the Competent Authority communicating any direction from the Review Committee, was conveyed, which, inter alia, means that in addition to the order for lawful interception received from the Union Home Secretary ie., Competent Authority, no other order was received by the CBI in this matter."*

In view of the above stand, it is clear that in the facts of this case, the intercepted material was not placed before the Review Committee at all.

72. In the decision of the Hon'ble Supreme Court in ***Anuradha Bhasin*****,** the Supreme Court considered a similar review mechanism contemplated under Rule 2(2) of the said Suspension Rules, 2017. It was held thus:

> *"96. The second requirement under Rule 2(2) is the forwarding of the reasoned order of the competent authority to a Review Committee which has been set up under the Suspension Rules, within one working day. The composition of the Review Committee is provided under Rule 2(5), with two distinct Review Committees contemplated for the Union and the State, depending on the competent authority which issued the order under*

> *Rule 2(1). Rule 2(6) is the final internal check under the Suspension Rules with respect to the orders issued thereunder. Rule 2(6) requires the Review Committee concerned to meet within five working days of issuance of the order suspending telecom services, and record its findings about whether the order issued under the Suspension Rules is in accordance with the provisions of the main statute viz. Section 5(2) of the Telegraph Act."*

73. Emphasizing on the mandatory nature of the procedural safeguards, in the case of ***Anuradha Bhasin,*** the Supreme Court held thus:

> *"106. We also direct that all the above procedural safeguards, as elucidated by us, need to be mandatorily followed. In this context, this Court in Hukam Chand Shyam Lal case [Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128] , observed as follows : (SCC p. 133, para 18)*
>
> *'18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other amodes (sic) of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature.…'*

(emphasis supplied)

This applies with even more force considering the large public impact on the right to freedom of speech and expression that such a broad-based restriction would have."

74. In view of the above, it is clear that the exercise of power under Section 5(2) of the Act was coupled with a duty to forward the same under Rule 419-A(17) of the Rules to examine as to whether the jurisdictional requirements under Section 5(2) had been satisfied. Admittedly, in the instant case, the intercepted material has not been placed before the Review Committee at all. Thus, there has been a complete go by of the compliance of the mandatory provisions of law.

75. The attention of this Court was drawn to a decision of a learned Single Judge of the Andhra Pradesh High Court in the case of ***K.L.D.Nagasree Vs. Government of India, Ministry of Home Affairs [reported in 2006 SCC OnLine AP 1085 : (2007) 1 AP L.J. 1]*** wherein considering the violation of Rule 419-A of the Rules, it was observed thus:

"35. Keeping in view the object and purpose of the said Rules as declared in People's Union For

> *Civil Liberties's case (2 supra) and particularly since the violation of the said provisions would result in infraction of right to privacy of an individual which is a part of the right guaranteed under Article 21 of the Constitution of India, I am of the opinion that Rule 419-A though procedural in nature is mandatory and the non-compliance of the same would vitiate the entire proceedings.*

76. It is also relevant to note that under Sub-Rule (9), if the Review Committee is of the opinion that the directions are not in accordance with the provisions of Rule 419-A of the Rules, it is empowered to set aside the directions and order for destruction of the copies of the intercepted message. The fact that the consequences of non-compliance of the procedure prescribed under Rule 419-A are also provided under the same Rule, which further reinforces the intention of the Legislature to make the said procedure mandatory. Hence, the non-compliance of the procedure under Rule 419-A is undoubtedly fatal.

77. At any rate, since the impugned order is also in contravention of the substantive law as laid down in Sub-Section (2) of

Section 5 of the Act and is declared illegal, the consequential action of respondents 2 and 3 in intercepting the mobile telephone of the petitioner is automatically rendered unauthorised. Hence, whatever information is obtained pursuant to the order dated 17.11.2003 cannot be taken into consideration for any purpose whatsoever.

78. It should be mentioned here that the judgment of the learned Single Judge of the Andhra Pradesh High Court in ***K.L.D.Nagasree*** has been affirmed by a Division Bench of the Andhra Pradesh High Court in ***Government of India Vs. K.L.D.Nagasree [reported in 2023 SCC Online AP 1834]*** and the special leave petition filed by the CBI in ***S.L.P.(Criminal) No.5584 of 2025*** was also dismissed on ***15.4.2025***.

79. The decision of the Andhra Pradesh High Court was followed by a Division Bench of the Bombay High Court in the case of ***Vinit Kumar Vs. CBI [reported in 2019 SCC Online Bombay 3155]*** wherein it was held as under :

> *"30. The Respondents also claim that three interception orders dated 29.10.2009, 18.12.2009 and 24.2.2010 are 3 different orders and are not*

continuation of the earlier order. This action of issuing successive orders or repeated orders under sub-rule (1) of Rule 419(A) by the competent authority without making a reference to the review committee within 7 working days and/or there being scrutiny by the review committee under sub-rule (17) of Rule 419(A) is in clear breach of the statute, Rules and the Constitution of India. All three impugned orders in the instant case bear the same number and ex-facie appears to have been issued in the similar manner before the expiry of period of earlier order. The 1st order dated 29th October 2009 is valid for 60 days. Before the expiry thereof, order dated 18th December 2009 is issued for further period of 60 days. And before the expiry of this second order, third order dated 24th February 2010 is issued for further period of 60 days. There is no record produced to show that the compliance of Rules. This is wholly impermissible and in violation of the directions issued by the supreme Court in PUCL's case (supra), which stand affirmed by the constitution bench judgment in K.T. Puttaswamy (supra)."

80. In the instant case, now there is an admission by the respondents that the records have been destroyed purportedly under

Sub-Rule (18) of Rule 419-A of the Rules. The word "***such***" in Sub-Rule (18), therefore, refers to the direction and/or to the intercepted message referred to in the previous Sub-Rule namely Sub-Rule (17), which is not in accordance with the provisions of Sub-Section (2) of Section 5.

81. The findings of the Review Committee would be either directions being in accordance with the provisions or not. If the findings are in favour of the directions, i.e., if the directions conform to the requirements of the provisions, no further step is contemplated. However, if the findings are such that the directions are not in accordance with the provisions, then Rule 419-A(17) of the Rules further provides for setting aside the directions and ordering for destruction of the copies of intercepted messages or class of messages. Thus, the orders for destruction are contemplated in Rule 419-A(17) only if the directions so issued under Rule 419-A(1) for interception are ultra vires Section 5(2) of the Act. Significantly, the destruction of record (i.e., copies of the intercepted messages and/or class of messages) is mandatorily coupled with setting aside the directions for interceptions.

82. This Court may also add here that if the directions of the Honb'le Apex Court in the case of ***People's Union for Civil Liberties,*** which are now re-enforced and approved by the Hon'ble Apex Court in the case of ***K.T.Puttaswamy (Aadhaar-5J) Vs. Union of India reported in 2019 (1) SCC 1]*** as also the mandatory Rules in regard to the illegally intercepted messages pursuant to an order having no sanction of law, are permitted to be flouted, we may be breeding contempt for law, that too in matters involving infraction of fundamental right to privacy under Article 21 of The Constitution of India. To declare that *de-hors* the fundamental rights, in the administration of Criminal Law, it would amount to declaring the Government Authorities to violate any directions of the Hon'ble Supreme Court or mandatory Statutory Rules in order to secure evidence against the citizens. It would also lead to manifest arbitrariness and would promote the scant regard to the procedure and fundamental rights of the citizens and the law laid down by the Apex Court.

83. It was brought to the notice of the Court that this judgment is now pending consideration before the Hon'ble Supreme Court.

However, the same view has been taken by the Rajasthan High Court in the case of ***Shashikant Joshi Vs. State of Rajasthan [reported in 2023 SCC OnLine Rajasthan 1108 : (2023) 3 RLW 2333]*** and recently in the case of ***Rakesh Kumar Meena Vs. State of Rajasthan [reported in 2025 SCC Online Rajasthan 448]***.

84. The CBI had pointed out that a learned Single Judge of this Court had, in the case of ***Sanjay Bhandari,*** taken a different view.

85. But, a close look at the said decision would show that in paragraph 11, the learned Single Judge of this Court has reproduced the contentions in the counter affidavit of the CBI, which have been once again repeated before this Court in the instant case. It is also seen that the attention of the learned Single Judge was not drawn to the fact that paragraph 28 of of the decision of the Hon'ble Supreme Court in ***People's Union for Civil Liberties*** has been affirmed by the Constitution Bench of the Hon'ble Apex Court in ***K.S.Puttaswamy (Aadhaar-5J) Vs. Union of India [reported in 2019 (1) SCC 1].*** Therefore, unless and until the requirements of

Section 5(2) of the Act are met, the order put to challenge would be unconstitutional.

86. In view of the fact that the intercepted material was not placed before the Review Committee in a manner contemplated under Rule 419-A(17) of the Rules for scrutinizing as to whether the requirements of Section 5(2) of the Act were satisfied or not, it must necessarily follow that the impugned order is also vitiated by non-compliance with the mandatory requirements of the aforesaid provisions.

What is the effect of evidence collected in violation of Section 5(2) of the Act ?

87. Mr.AR.L.Sundaresan, learned Additional Solicitor General of India appearing on behalf of the respondents would submit that even assuming that the order under Section 5(2) of the Act was without jurisdiction, the evidence so collected is admissible since it is a well settled proposition of law that even illegally collected evidence is admissible provided it is relevant. He placed strong reliance on the decision of the Hon'ble Supreme Court in ***R.M.Malkani.***

88. The aforesaid contention is based on the common law rule laid down in ***R V. Leatham [reported in (1861) 8 Cox CC]***, wherein ***Crompton,J*** said : ***"It matters not how you get it; if you steal it even, it would be admissible".*** This principle was reiterated in ***R.M.Malkani*** and in ***Pooran Mal***. Both these decisions were rendered when the decision of the Hon'ble Apex Court in ***M.P.Sharma*** was still good law and there was no right to privacy guaranteed under Article 21.

89. In ***R.M.Malkani***, the Hon'ble Supreme Court dealt with an appeal against conviction. Considering an argument of the violation of the right to privacy, it was held thus:

> *"There is no scope for holding that the appellant was made to incriminate himself. At the time of the conversation there was no case against the appellant. He was not compelled to speak or confess. Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by*

> *tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or even irregular method in obtaining the tape-recording of the conversation."*

90. This decision may not aid the case of the respondents for more than one reason. In the first place, the decision of the Hon'ble Supreme Court in ***R.M.Malkani*** was a case of an appeal against conviction where the presumption of innocence did not apply. It is in this context that the Hon'ble Supreme Court had observed that the protection against phone tapping is not available to a guilty citizen. Here, the petitioner is only accused of an offence. The presumption of innocence still applies in his favour.

91. Secondly, as pointed out above, the decision was rendered during the time when the judgment of the Hon'ble Apex Court in ***M.P.Sharma*** was holding the field. It has been pointed out by

D.Y.Chandrachud,J in paragraph 51 of the decision in ***K.S.Puttaswamy (Privacy-9J) Vs. Union of India [reported in 2017 (10) SCC 1]*** held that the decision in ***R.M.Malkani*** had rejected the argument based on privacy under Article 21 by placing reliance on the decision of the Majority in ***Kharak Singh***. As already seen, the decision in ***K.S.Puttaswamy (Privacy-9J) Vs. Union of India [reported in 2017 (10) SCC 1]*** was significant because it (a) overruled the majority view in the decision in ***Kharak Singh*** and (b) affirmed the existence of a right to privacy under Article 21.

92. Thus, the jurisprudential basis of the decision of the Hon'ble Apex Court in ***R.M.Malkani*** having been altered, it remains to be seen as to what is the effect of the decision in ***K.S.Puttaswamy*** on the evidence that is collected by unconstitutional methods. The question was considered by the First Bench of this Court in ***SNJ Breweries*** wherein it was observed there as follows:

> *"Thus, it needs to be examined if the recent judgment of 9 Judge Bench in Puttaswamy's case recognizing right to privacy to be part of Article 21 of the Constitution of India necessitates a revisit of Pooran Mal, to see the impact of the judgment in* ***Puttaswamy*** *with regard to the view that*

> *illegally obtained evidence can be used. We say so, since violation of the safeguards relating to search would now render the search not just illegal but unconstitutional. The sequitur of an unconstitutional action is that it is rendered void."*

Having observed as above, the First Bench of this Court remitted the matter to the learned Single Judge for consideration of the said issue. Where the tapping of phones is found to have been done in violation of Section 5(2) of the Act, the order would be clearly unconstitutional. An unconstitutional order is void under Article 13 and no rights or liabilities can flow from it.

93. In the context of eschewing evidence, which have been obtained through unconstitutional means, it is necessary to reproduce the following observations of ***Holmes,J*** in ***Olmstead*** as hereunder **:**

> *"49. ……. I am aware of the often-repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and the cases that have followed it. I have said*

> *that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."*

94. Leaving aside the broader question of the general admissibility of evidence obtained by unconstitutional means, this case can be decided on a narrower basis i.e., on the basis of Rule 419-A of the Rules. As has been pointed out earlier, one of the guidelines issued by the Hon'ble Supreme Court in ***People's Union for Civil Liberties***, dealt with this issue and it reads as follows:

> *"35.*
> *(9)…..*
> *(a)….*
> *(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material."*

95. Rule 419-A(17) of the Rules also authorizes the destruction of intercepted messages/calls if it is found that the action is not in

accordance with Section 5(2) of the Act. Noticing these provisions, the learned Single Judge of the Andhra Pradesh High Court, in ***K.L.D.Nagasree,*** had declared that the material obtained in violation of Section 5(2) of the Act and Rule 419-A of the Rules cannot be used for any purpose whatsoever. As noticed earlier, this decision has been affirmed right up to the Supreme Court. Similarly in the Division Bench decision of the Bombay High Court in ***Vinit Kumar*** and the two decisions of the Rajasthan High Court in the cases of ***Shashikant Joshi*** and ***Rakesh Kumar Meena***, directions were issued for destruction of records.

96. The very fact that the intercepted material was not even placed before the Review Committee for its scrutiny would show that the respondents have clearly acted in brazen violation of the law. In view of the above discussions and as was done in the decision of the Hon'ble Andhra Pradesh High Court in ***K.L.D.Nagasree,*** it would suffice for this Court to declare that the intercepted material collected pursuant to the impugned order in violation of Section 5(2) of the Act and Rule 419-A(17) of the Rules shall not be used for any purposes whatsoever.

CONCLUSIONS :

97. The result of the above discussions can be summed up as follows:

> "**i.** The right to privacy is now an integral part of the right to life and personal liberty guaranteed under Article 21 of The Constitution of India.
>
> **ii.** Telephone tapping constitutes a violation of the right to privacy unless justified by a procedure established by law. Section 5(2) of the Act authorizes interception of telephones on the occurrence of a ***public emergency*** or ***in the interests of public safety***. Both these contingencies are not secretive conditions or situations. Either of the situations would be apparent to a reasonable person. As laid down in paragraph 28 of the decision of the Hon'ble Apex Court in ***People's Union for Civil Liberties,*** it is only when the

above two situations exist that the Authority may pass an order directing interception of messages after recording its satisfaction that it is necessary or expedient so to do in the interest of (1) the sovereignty and integrity of India, (2) the security of the State, (3) friendly relations with foreign States, (4) public order or (5) for preventing incitement to the commission of an offence.

iii. In the instant case, the impugned order dated 12.8.2011 does not fall either within the rubric of "***public emergency***" or "***in the interests of public safety***" as explained by the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties***. The facts disclose that it was a covert operation/secretive situation for detection of crime, which would not be apparent to any reasonable person. As the law presently stands, a situation of this nature does not fall

within the four corners of Section 5(2) of the Act as expounded by the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties,*** which has been approved by the Constitution Bench of the Hon'ble Supreme Court in ***K.S.Puttaswamy (Aadhaar-5J) Vs. Union of India [reported in 2019 (1) SCC 1].***

iv. The respondents have also contravened Rule 419-A(17) of the Rules by failing to place the intercepted material before the Review Committee within the stipulated time to examine as to whether the interception was made in compliance with Section 5(2) of the Act.

v. As a consequence of (iii) and (iv) above, the impugned order dated 12.8.2011 must necessarily be set aside as unconstitutional and one without jurisdiction. Besides violating Article 21, it is also ultra

vires Section 5(2) of the Act besides being in violation of the mandatory provisions of Rule 419-A of the Rules.

vi. It follows that the intercepted conversations collected pursuant to the impugned order dated 12.8.2011 in violation of Section 5(2) of the Act and Rule 419-A(17) of the Rules shall not be used for any purposes whatsoever.

vii. It is, however, made clear that the above direction shall have no bearing on the other material that have been collected by the CBI subsequent to and independent of the intercepted call records, which shall be considered by the Trial Court on its own merits without being influenced by any of the observations made in this order."

98. In the result, the writ petition is allowed. The order dated 12.8.2011 bearing No.14/3/97-CBI passed by the first respondent

is quashed with the above directions. No costs. Consequently, the connected WMPs are closed.

02.7.2025

Index : Yes
Neutral Citation : Yes
To
1.The Secretary to Government
of India, Ministry of Home
Affairs, North Block, Central
Secretariat, New Delhi.
110001.

2.The Director, CBI, Plot No.5B,
6th Floor, CGO Complex,
Lodhi Road, New Delhi.
110003.

3.The Additional Superintendent
of Police, SPE : CBI : ACB :
Chennai. (RC MA1 2011 A 0033)

RS

N.ANAND VENKATESH,J

RS

WP.No.143 of 2018 &
WMP.Nos.206 & 207 of 2018

02.7.2025