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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL. REV. P.753/2007 to 761/2007

Reserved on: 22.01.2008

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Date of decision:
31.01.2008

ENFORCEMENT DIRECTORATE

... PETITIONER

Through: P.P. Malhotra, ASG, A.K. Vali, N.K. Matta,
Mr.Anand Jha and Mr.Tuhin Kumar, Advs.

- V E R S U S -

NEMI CHAND JAIN @ CHANDRASWAMI

... ..RESPONDENT

Through: P.N. Lekhi, Sr. Adv. with Mr.K.K. Manan,
Aman Vachher, Mr.Santosh Chaurihaa,
Ranjan Chourasia, Mr.Ashutosh Dubey
Mr.V.K.Gupta, Advs.

and

AND

CRL.REV.P.772/2007

C.B.I.

... PETITIONER

Through: P.P. Malhotra, ASG, A.K. Vali, N.K. Matta,
Mr.Anand Jha and Mr.Tuhin Kumar, Advs.

- V E R S U S -

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and

CORAM: HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. The petitioners being the Central Bureau of Investigation (CBI) in Crl. R. P. No. 772/2007 and Enforcement Directorate in Crl. R.P. Nos. 753/2007 to 761/2007(hereinafter referred to as the said petitioners) are aggrieved by the Orders dated 06-12-2007 & 13-12-2007 passed by the Ld. CMM and Ld. ACMM respectively allowing the applications of the respondent seeking permission to go abroad for a period of 30 days from 20-12-2007 to 20-01-2008 in different complaint cases pending before the Ld. CMM and Ld. ACMM pertaining to the violations of Foreign Exchange Regulation Act, 1973 (in short FERA) and Foreign Contribution Regulation Act, 1976 (in short FCRA).

To appreciate the merits of the case, it would be pertinent to pen down a brief background of the cases.

Facts:

2. It is the case of the petitioners that with the adjudication proceedings pending against the respondent in a number of cases for such violations as mentioned aforesaid, a penalty of Rs. 9.65 crores was imposed on the respondent, to which not even a single penny has been deposited by the respondent till date. An SLP to the same effect is also pending. Apart from this, there have been separate criminal complaints filed by the petitioners for such

violations. While the respondent has been enlarged on conditional bail in these pending cases against him, one of the conditions imposed on him is that the respondent shall not leave the country without prior permission of the court and if he even desires to go out of Delhi, he shall give prior intimation to the said petitioner department about his programme and intimate the addresses and places where he could be contacted.

3. It is stated that similar requests like the present one to go abroad have been made by the respondent in the past where sometimes the respondent has been allowed while the other times declined. Such request was last made before the Ld. ACMM in 2004, when the CBI intervened and opposed the said application along with the Enforcement Department. One of the grounds for rejecting the said application was the apprehension of the said petitioners that the respondent may flee from the country and may not return back to face the trial in the enforcement cases and investigation in respect of conspiracy in Rajiv Gandhi Assassination case. The Ld. ACMM observed that the allegations made against the respondent were serious in nature and the possibility of his not returning back could not be ruled out. It was also observed that the respondent had failed to adduce any material to authenticate or substantiate his need to go abroad. In consequence to this, the respondent filed a writ petition being WP (Crl.) No. 723/2005 before this court. On 06-11-2007, this Court

directed the Ld. ACMM to consider the matter only on the merits of each complaint so filed. Accordingly, the two courts were moved by the respondent and after hearing the matter, the Ld. CMM and Ld. ACMM permitted the respondent to go abroad subject to certain conditions. It is these orders to which the petitioners have filed the present revision petitions.

Maintainability

4. The preliminary submission made by the respondent is on the maintainability of such revision petitions. It is the case of the respondent that the orders permitting the respondent to go abroad are interlocutory orders and therefore, no revision lies against such an order. Whereas, the petitioners plead that such orders are not interlocutory orders but final orders.
5. The noteworthy submissions by the learned Additional Solicitor General (ASG for short) in this behalf are that the said orders finally determine the assertion of the respondent that he is entitled to go abroad for a fixed period which makes the nature of such order as final one and not an interlocutory order. It cannot be said by any stretch of imagination that claim of right to travel abroad is not an important right or liability. The order permitting to travel abroad cannot be said to affect the particular aspect of the trial, i.e. whether the respondent can be absent from the trial and leave the jurisdiction of this Court. The learned ASG to substantiate his case has relied on the judgment of Amar Nath &

Ors. v. State of Haryana & Anr., (1977) 4 SCC 137 which has been followed in Madhu Limaya v. State of Maharashtra (1977) 4 SCC 551, where the term interlocutory order came up for consideration. It was held that orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court. In Madhu Limaya's case (*Supra*), it was laid down that where the High Court would have no revisional power u/s 397(2), the High Court could in accordance with one of the other principle exercise its inherent powers as there is no other provision in the Code for the redress of the grievance of an aggrieved party. The real intention of the Legislature is not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final yet it may not be an interlocutory order-pure-or simple. Some kinds of order may fall in between the two which may be taken to be orders of the type falling in the middle course.

6. In Rajendra Kumar Sitaram Pande v. Uttam, (1999) 3 SCC 134, the Apex Court while upholding the test of intermediate or quasi final order held that the revisional jurisdiction could be exercised in the cases of intermediate or quasi final order. In K. K. Patel v. State of Gujarat (2000) 6 SCC 195, the decisions of Amarnath's case

(supra), Madhu Limaye's case (supra) and Rajendra Kumar's case (supra) were considered and upheld and the feasible test evolved was whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not merely be interlocutory in nature as envisaged in section 397(2) of the Code. Hence, it is the case of the petitioners that the proceedings in relation to the petitioners' claim of the respondent's right to travel abroad were culminated by the impugned order and thus, the High Court would have the power to exercise its power of revision.

7. Alternatively, it is stated that this petition may be treated as a petition under section 482. In relation to the same, the learned ASG for the petitioners referred to the judgments of Col. Anil Kak v. Municipal Corporation, (2005) 12 SCC 734 and Madhu Limaye's case (supra) wherein it was held that the label of the petition is immaterial and irrelevant. The High Court has a power, right and duty to do substantial justice to the party. In Puran v. Rambilas, (2001) 6 SCC 338 it was held that High Court's inherent jurisdiction under S. 482 remains unaffected by provisions of S. 397(3).

8. Placing reliance on section 397 (2) of Code of Criminal Procedure (in short the said Code) which expressly bars the exercise of power of revision against any interlocutory order passed in any appeal, inquiry, trial or other proceedings, the learned senior

counsel for respondent stated that there have been precedents laid down to the effect that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect and that the language used in section 397(2) is in the restrictive sense. While distinguishing between what orders can be interlocutory orders and what cannot be, the learned senior counsel for the respondent stated that the scheme of laws in criminal and civil jurisdiction are different in respect to interlocutory orders and that the orders made under the provisions of Indian Penal Code are never interlocutory orders, they are substantive orders. A reference to section 4 and 5 of the Code was made to the effect that in criminal matters, interlocutory orders can be made only under the Code.

9. The learned senior counsel elucidating the meaning of the said term referred to the judgment of Poonam Chand Jain v. Fazru 2005 CrLJ 100 wherein it was held that if the term interlocutory order has to be defined in its natural and logical sense without resorting to the Code or any other statute, then it can be understood as an order which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all. Therefore, it was submitted that if the impugned order is comprehended in these proceedings, the order has to be regarded as an interlocutory order because leave of absence for

30 days from the Court would not finally dispose off the rights of the parties to litigation.

10. Further, reliance was placed on the judgment of In re Robin Kristo Mookerjee 10 Cal 268, to submit that the power of revision could be exercised under section 397 only under two conditions, i.e. where the findings were illegal or improper and where the proceedings were irregular. It was pointed out that the revisional power of the High Court merely conserved the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that its subordinate courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of process of inferior criminal courts or to prevent miscarriage of justice.

11. In addition to this, the argument advanced by the learned senior counsel in support of his case was that every order of every court is discretionary in nature. The attention of this court was brought to the sections 205/273/317 CrPC and it was stated that the condition for prior permission of the trial court can be understood only with regard to the necessity of ensuring the presence of the respondent in court during the hearing. Otherwise, the Courts are to be very liberal and generous in granting exemption from personal appearance and such presence should not be insisted upon unless the presence of the accused is absolutely necessary in the proceedings. In this behalf, the judgments of Gopal Ram &

Ors. v. State of Rajasthan & Anr., 1994 (3) Crimes 559 (Raj),
Ramesh Chandra Lath v. State of Orissa, 1992 Cri.L.J. 2263 and
Feroze Khatoon v. State of Jharkhand, 2004 Cri.L.J. 1457 (Jhar)
were relied on by the learned senior counsel. It was submitted
that dispensing with the presence of the accused cannot be
considered as modification of the order of bail or affecting the
order of the bail but it is only a discretion exercised within the bail
order itself. Such discretion exercised by the learned magistrate
cannot be considered as an order resulting in culmination of any
part of the proceedings.

12.It is also stated that the right to travel abroad can only be
curtailed under the Passports Act, 1967 (in short the said Act)
under section 6(2) (f) read with sections 10 & 11 of the said Act
and that these provisions are the complete Code to restrict
travels abroad and no separate action has been taken in this
behalf against the respondent.

13.To counter the line of reasoning forwarded by the learned ASG
for the petitioners in respect of the petitions being treated as
ones under section 482 of the Code, the learned senior counsel
for the respondent has put forth the rulings of the Apex Court in
Hira Lal Hari Lal Bhagwati v. CBI, 2003 (5) SCC 257 wherein the
decision of G. Sagar Suri and Anr. v. State of U.P. and Ors.,
(2000) 2 SCC 636 was followed and the relevant portion of the
same has been reproduced below:

"Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused, it is a serious matter. The Supreme Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code (State v. Bhajan Lal, 1992 Supp (1) SCC 335). Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice. Merely because the accused persons had already filed an application in the Court of Additional Judicial Magistrate for the discharge, it cannot be urged that the High Court cannot exercise its jurisdiction under Section 482 of the Code. Though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against them when no offence has been out against them and still why must they undergo the agony of a criminal trial."

14. On consideration of the submissions advanced by learned counsel for the parties, it is obvious that there is no separate action taken to prevent the travel of the respondent under the said Act nor is the passport seized. Thus the right of the respondent to travel abroad is preserved within the meaning of

Article 21 of the Constitution of India as observed in Maneka Gandhi v. UOI 1975 (1) SCC 248 . It, however, cannot be simultaneously lost sight of that at the stage of grant of bail, one of the conditions of the said bail order was that the respondent would surrender his passport and would not leave the country without prior permission of the trial court and, even if, he desires to go out of Delhi, he shall give prior intimation to the Department about his programme and intimate the addresses and places where he should be contacted.

15.It is once again not disputed that the bail order would be revisable as it is in the nature of a final order. The restriction to travel abroad has been placed as a condition of the bail order. Thus once the respondent is permitted to travel abroad subject to certain terms and conditions, it is the relaxation of the said order and hence, I am of the considered view that the revision would be maintainable.

16.The judgment cited by the ASG appearing for the petitioners, in fact, shows that there are orders in the nature which can be categorized as 'intermediate' or 'quasi final' orders and which do not strictly fall within the expression 'interlocutory order' as opposed to 'final order'. The restriction in filing a revision is only in case of orders which are interlocutory in nature as per Section 392(2) of the said Code.

17.I am unable to accept the plea of the learned counsel for the respondent that the impugned decision should be construed as one which permits the respondent not to remain present in court since there is no other restriction under the said Act for the respondent to travel outside the country. This is so since it is not a simplicitor permission not to remain present in Court, but the permission to travel abroad varying the initial condition imposed in the bail order.

18.The aforesaid being the position, the revision petition is held to be maintainable.

Merits of the Case

19.The reasons as disclosed in the application by the respondent for permission to go abroad are stated to be an invitation from one of his disciples to visit his place and perform some yagna and to deliver some lecture on religious matter. It is further stated that the respondent had been granted permission to go abroad on earlier occasions and every time he had returned to the country after such visit.

20.Such request made by respondent has been opposed to by the petitioners on various grounds that the reasons given for his visit are inadequate and do not indicate any compelling/compulsive or pressing need to go abroad. It is the case of the petitioners that where on one hand the respondent has not met the requirements of the penalty imposed on him and got a stay on the same on the

ground that he has no money, on the other hand, the respondent has sought permission to go abroad, which are self-contradictory statements in its own. Further, it is averred that the allegations made against the respondent in ten different cases pending are very serious in nature and the petitioners thus apprehend that there is every likelihood of the respondent not returning back to India and managing his stay abroad. The petitioners also apprehend that the respondent being an influential person, may tamper with the evidence in pending prosecutions.

21.It is submitted that the right to abroad as being part of personal liberty under Article 21 of the Constitution of India would not come into play in the case of the respondent since such a right is not an unfettered right and reasonable restrictions can always be imposed on a person in the interest of justice and the respondent is a person who has contravened the laws of the country and thus cannot in the garb of such a right subvert the process of law.

22.It has also been averred that the Ld. Trial court has failed to appreciate the decision of the Hon'ble Supreme Court in Chandraswami v. CBI (1998) 9 SCC 380 where a similar request of the respondent was rejected by the court.

23.The respondent in this behalf has brought the attention of this court to para 7 of the judgment Nemi Chand Jain @ Chandraswami v. UOI of this court dated 06-11-2007 which has been reproduced below:

“7. I consider that if any investigating agency investigating a crime considers that presence of any suspect was necessary within India and he should not be allowed to leave the country, the investigating agency should request the State/Central Government for passing an appropriate order under the Appropriate provisions of law, for putting restrictions on the movement of the person. If investigation of a case continues for years together, without an iota of evidences having been collected, the personal liberty of a person cannot be jeopardized only on the ground of investigation being continued. Had there been any additional evidence collected by MDMA or CBI in last 9 years, CBI would have filed additional charge sheet before the Court concerned.”

24.It is submitted that the respondent has been proceeded against under section 8(1) read with section 56 of the FERA and the punishment prescribed for such an offence if proved is a minimum of 6 months extended up to 7 years. Relying on the judgments of Gopal Ram's case (supra) and Feroze Khatoon's case (supra), the learned counsel for the respondent states that the liberal rule of granting permission to remain absent from court at the time of hearing would apply since the respondent's case would fall not within the purview of “long imprisonment”.

25.As already stated that the right to travel abroad can only be curtailed under the Passports Act, 1967 (in short the said Act) under section 6(2) (f) read with sections 10 & 11 of the said Act.

26.It is the case of the respondent that the respondent has been granted permission to abroad on earlier occasions during (1987 to

1995) the pendency of investigations of more serious offences and had ultimately got acquitted in those matters and that the FERA matters have been pending in the Department since 1982 when he was given such permission. In so far as the respondent being not allowed to go abroad in 1998 is concerned, the learned senior counsel pleaded that at that time criminal proceedings were pending against the respondent in Lakhu Bhai Pathak's case instituted by the CBI but the respondent has been acquitted in the said case and hence, the decision of the Supreme Court has become otiose.

27.The learned senior counsel has also stressed upon the personal liberty of the respondent and his right to go abroad to fall within the purview of Article 21 of the Constitution by referring to the case of Maneka Gandhi v. UOI's case (supra) where the Supreme Court has observed that personal liberty makes worth human/person and travel makes liberty worthwhile. However, the personal liberty and the fundamental rights granted to the citizens by Constitution are not absolute and reasonable restrictions, as envisaged under Constitution of India as well as warranted by the Security of State and circumstances, can be imposed by the State.

28.A perusal of the impugned orders show that the learned trial courts have considered the application of the respondent on merits and have taken into consideration the pleas raised by the

respondent. Such pleas have been opposed to by the petitioners on the similar grounds as raised in the present revision petitions. The learned trial courts while taking note of all the facts and circumstances prevalent in this case have opined that the respondent is allowed to go abroad since no reasonable ground has been made out to harbour the apprehension of the petitioners regarding tampering of evidence. It was found that the trial was proceeding and at this stage there could not be a question of tampering with the evidence. In addition to this, necessary conditions were also imposed on the respondent to ensure his return.

29. The appreciation of the aforesaid factual and legal position shows that the cases pending against the respondent in respect of the Rajiv Gandhi Assassination case and Lakhu Bhai Pathak's case do not stand in the way of the respondent as those issues are dead qua the respondent. The respondent, in fact, stands acquitted in the Lakhu Bhai Pathak's case and there is nothing else pending in that behalf. In so far as the investigation pending in Rajiv Gandhi Assassination case is concerned, I am in full agreement with the observations made in the judgment of Nemi. Chand Jain @ Chandraswami v. UOI of this court dated 06-11-2007 that the liberty of the respondent cannot be curtailed on the ground of investigation which has been pending for the last 9 years.

30.The only pending cases against the respondent are the present ones which relate to violation of FERA and FCRA. Thus the earlier observations of the Supreme Court in Chandraswami and Anr.v. CBI (Supra) would not apply now to the case of the respondent.

31.The respondent prior to the restrictions imposed on account of the Rajiv Gandhi Assassination case and Lakhu Bhai Pathak's case had visited abroad a number of times and come back without ever violating the conditions of the bail. There is thus no reason why the respondent should not be permitted to travel abroad and merely general averments by the petitioners against the respondent would not suffice. It is this fact which has weighed with the Trial Court which has granted permission to the respondent to travel abroad subject to following conditions:

In respect of Crl. Rev. Petition Nos.753-761/2007:

“a) That he shall furnish FDR in the sum of Rs.2,00,000/- as security for his return back with an undertaking to report back in the court after the expiry of 30 days from the date of his departure failing which the said amount shall stand forfeited without giving any further notice and he shall furnish the date of departure in the undertaking;

b) That he shall furnish his address during his stay abroad;

c) That he shall not seek extension of his stay abroad on any other ground including medical ground;

- d) That he shall authorize his counsel to receive notice on his behalf during his stay abroad;
- e) That he shall produce his surety in the court to give statement that he has no objection in case he is allowed to go abroad;
- f) That he shall file the itinerary before going abroad;
- g) That he shall appear in the court on the next date of hearing; and
- i) That he shall surrender back his passport on his return from abroad.”

In respect of Crl.Rev.Petition No.772/2007

- “i) Applicant/accused shall furnish an additional personal bonds of Rs.20 lakh with one surety of the like amount;
- ii) Applicant/accused shall furnish a FDR for an amount of Rs. 10 lakh for surety of his return to India in time;
- iii) Applicant/accused shall not seek extension of his stay in abroad in any contingency;
- iv) During his absence, he will be represented by Sh.K.K.Manan, Advocate and in no case due to the absence of accused, the proceedings shall be hampered with.
- v) That applicant/accused shall file a detailed affidavit disclosing his detailed programme including his stay at various station at abroad, telephone numbers and residential address; and

vi)Applicant/accused shall furnish the details of the authorized persons to receive any process from the court during his stay in abroad on his behalf.”

32.The aforesaid terms and conditions are identical in nine cases except Criminal Revision Petition No. 772/2007 where the respondent was asked by the Trial Court to furnish additional personal bonds of Rs.20 lakh with one surety of the like amount and was further asked to furnish an FDR for an amount of Rs.10 lakh for surety of his return to India.

33.Learned ASG in the alternative had contended that in case this Court was inclined to grant permission, then the respondent should be directed to deposit the full amount of the amount claimed from the respondent in view of the prosecution.

34.However, considering the facts and circumstances of the case, I am not inclined to accept this plea. It may be noticed that during the course of hearing, the counsel for the respondent was asked to give an itinerary and as per the said itinerary it is now stated that the respondent seeks to travel abroad only to UK, UAE and Mauritius.

35.In the impugned order, the respondent has already been asked to file a detailed affidavit disclosing his detailed programme including his stay at various stations at abroad, telephone numbers and residential address.

36.I am thus of the considered view that the respondent should be permitted to travel abroad but subject to certain further conditions/modified terms:

- 1.The first such additional term is that the condition no.(v) of the impugned order in Criminal Revision Petition No.772/2007 would uniformly apply to all the other nine cases.
- 2.Insofar as the furnishing of the FDRs to secure the return of the respondent to India is concerned, the amount in each of the nine cases where an FDR is to be furnished by the respondent in the sum of Rs.2 lakh stands modified to an FDR in the sum of Rs.10 lakh each.
- 3.In Criminal Revision Petition No.772/2007, the FDR to be furnished by the respondent as security for his return to India would be for Rs.20 lakh instead of Rs.10 lakh, as directed by the impugned order. Since the respondent is stated to be going abroad at the request of his disciples, it would not be difficult for the respondent to make

appropriate arrangements for furnishing
such security as directed in this Order.

4. The permission for the respondent to travel
abroad is restricted to 30 days in terms of
the impugned order but the period would
commence from the date of his departure.

37. The petitions are disposed of in the aforesaid terms.

38. The trial court record be sent back expeditiously.

January 31, 2008
J
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SANJAY KISHAN KAUL,