IN THE COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2367 OF 2019

Vinit Kumar
Age : 54 years, Occ : Business,
Residing at 35, Shreyas, 180,
Madam Cama Road,
Mumbai – 400 032. ..Petitioner.

Versus

1. Central Bureau of Investigation]
Economic Offences Division,]
Plot No. C-35A, “G” Block,]
Bandra Kurla Complex,]
Bandra (East), Mumbai,]
PIN – 400 051.]
]
2. Ministry of Home Affairs.]
Government of India]
Through]
Secretary, North Block,]
New Delhi – 110 001.]
]
3. State of Maharashtra.]
Through]
Addl. Public Prosecutor,]
PWD Building, High Court, Bombay,]
Dr. Kane Road, Fort, Mumbai]
PIN – 400032.]
]
4. Union of India.]
Through Ministry of Law & Justice.]
Aaykar Bhavan, Mumbai.]..Respondents.

Mr. Vikram Nankani, Senior Advocate with Dr. Sujay Kantawala i/b Ishan Srivastava for the Petitioner.
Ms. Rebeca Gonsalvez for Respondent No. 1.

Mrs. A. S. Pai, APP for the Respondent-State.
Mrs. P. H. Kantharia for Respondent Nos. 2 and 4.

Coram : RANJIT MORE & N. J. JAMADAR, JJ.

Arguments concluded on : August 22, 2019.
Judgment pronounced on : October 22, 2019.

Judgment [Per Ranjit More] :

1. The petitioner has impugned before us the orders dated 29th October, 2009, 18th December, 2009 and 24th February, 2010, which directed interception of telephone calls by respondent No.2 on the ground of being *ultra vires* of Section 5(2) of the Indian Telegraph Act, 1885 (for short "the Act"), non-compliance of Rules made thereunder, and for being in violation of the fundamental rights guaranteed under Part-III of the Constitution of India. The petitioner's case is that they ought to be quashed and intercepted messages obtained thereunder shall be destroyed as directed by the Hon'ble Supreme Court in *People's Union for Civil Liberties (for short "the PUCL") v. Union of India [(1997) 1 SCC 301]* and as provided in Rule 419A(17) introduced by G.S.R.193 of 1st March, 2007 (w.e.f. 12th March, 2007) The petitioner is also relying on a Nine Judge Constitution Bench judgment in *K.S. Puttaswamy v. Union of India [(2017) 10 SCC 1]* for seeking enforcement of his fundamental rights under

Articles 14 and 21 of the Constitution of India.

2. As per petitioner, the alleged illegally intercepted telephonic recordings contained in the charge-sheet and all material collected on the basis of such alleged illegally intercepted telephonic recordings ought to be set at naught. The petitioner submits that it is settled law that if the foundation is removed, the structure falls and that the legal maxim *"sublato fundamento cadit opus*" squarely applies in the instant case.

3. Section 5 of the 1885 Act deals with the power of the Government to take possession of licensed telegraphs and to order interception of messages. Sub-section (2) of Section 5, for our purpose is relevant, which reads as follows:

> "5.(1)
>
> *(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be*

> *intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:*
>
> *Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.]"*
>
> [Underlined emphasis supplied]

4. In *PUCL(supra)*, a two Judge Bench of the Apex Court has observed as follows :

> *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.*
>
> *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".*
>
> *34. .....The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule-out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.*
>
> *[Emphasis supplied]*

5. Pursuant to the above observations, the Hon'ble Supreme Court in PUCL (Supra) was pleased to order and direct inter alia the following as procedural safeguards :

> *"35- We therefore direct as under....*

> *9. There shall be a **Review Committee** consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.*
>
> *(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.*
>
> *(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.*
>
> *(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.*
>
> *[Emphasis supplied]*

6. The Hon'ble Supreme Court in ***PUCL (Supra)*** thus categorically held and directed that :-

I. Right to privacy would certainly include telephonic conversation in the privacy of one's house or office. Telephone tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the

procedure established by law.

II. “Occurrence of 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 1885 Act, and without them, the authorities have no jurisdiction to exercise the powers under the said Section to take resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interest of sovereignty and integrity of India etc.

III. The expression “public safety” means the State or Condition of freedom from danger or risk for the people at large.

IV. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situation would be apparent to a reasonable person.

V. The substantive law as laid down in Section 5(2) of the Act must have procedural safeguards for this valuable constitutional right as settled in Maneka Gandhi versus Union of India, that “procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 of the

Constitution of India has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself", and the 'procedure' must rule out any thing arbitrary, freakish and bizarre.

VI. To safeguard and protect the fundamental right to privacy, and in order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act, the Hon'ble Supreme Court laid down procedural safeguards for the exercise of power under Section 5(2) of the Act and inter alia directed that there shall be a Review Committee, which shall on its own, within two months of the passing of the order by the authority concerned, investigate, whether there has been any contravention of the provisions of Section 5(2) of the Act.

VII. Not only this, the Hon'ble Supreme Court further directed that 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, and shall further direct the destruction of the copies of the intercepted material.

VIII. The Hon'ble Supreme Court further directed that if on

investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

7. These directions not only forge procedural safeguards into the matters of infringement of right to privacy, but also provide for a just and reasonable procedure. These directions also provide procedural guarantee against the abuse of any illegal interference by the guaranteed destruction of the copies of the intercepted material, in a case where pre-requisite for invoking Section 5(2) i.e. ”occurrence of any public emergency” or “in the interest of public safety” is non- existent. Needless to say that the aforesaid directions are binding on us in view of Article 141 and enforceable through India under Article 142 of the Constitution of India.

8. The proposition that illegal tapping of telephone conversation violates right to privacy is now accepted and reinforced as guaranteed fundamental right under Article 21 of the Constitution of India, by a nine Judge Constitution Bench

decision in *K. S. Puttaswamy versus Union of India [(2017) 10 SCC 1]*, by overruling the earlier Constitution Bench judgments, which did not consider right to privacy as fundamental rights, analogues to the American Fourth Amendment, viz. *M. P. Sharma versus Satish Chandra [AIR 1954 SC 300]*, or held that invasion of privacy is not an infringement of fundamental right guaranteed by Part III of the Constitution viz. *Kharak Singh [AIR 1963 SC 1295]*. It has now been held by the Constitution Bench in *K. S. Puttaswamy (supra)* that the right to privacy is protected by the Constitution as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India and as a part of the freedom guaranteed by Part-III of the Constitution of India.

9. Moreover, the view taken in *PUCL's case (supra)* was affirmed by the said nine Judge Bench in *K. S. Puttaswamy (supra)* with following observations:

> *"68. In a decision of a Bench of two judges of this Court in PUCL, the Court dealt with telephone tapping. The petitioner challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 and urged in the alternative for adopting procedural safeguards to curb arbitrary acts of telephone tapping.*
>
> *69..... Telephone conversations were construed to be an*

important ingredient of privacy and the tapping of such conversations was held to infringe Article 21, unless permitted by 'procedure established by law' . .

The Court also held that telephone tapping infringes the guarantee of free speech and expression under Article 19(1)(a) unless authorized by Article 19(2). The judgment relied on the protection of privacy under Article 17 of the International Covenant on Civil and Political Rights (and a similar guarantee under Article 12 of the Universal Declaration of Human Rights) which, in its view, must be an interpretative tool for construing the provisions of the Constitution. Article 21, in the view of the Court, has to be interpreted in conformity with international law. In the absence of rules providing for the precautions to be adopted for preventing improper interception and/or disclosure of messages, the fundamental rights under Articles 19(1)(a) and 21 could not be safeguarded. But the Court was not inclined to require prior judicial scrutiny before intercepting telephone conversations. The Court ruled that it would be necessary to lay down procedural safeguards for the protection of the right to privacy of a person until Parliament intervened by framing rules under Section 7 of the Telegraph Act. The Court accordingly framed guidelines to be adopted in all cases envisaging telephone tapping.

70. The need to read the fundamental constitutional guarantees with a purpose illuminated by India's commitment to the international regime of human rights' protection also weighed in the decision. Section 5(2) of the Telegraph Act was to be regulated by rules framed by the Government to render the modalities of telephone tapping fair, just and reasonable under Article 21. The importance which the Court ascribes to privacy is evident from the fact that it did not await the eventual formulation of rules by Parliament and prescribed that in the meantime, certain procedural safeguards which it envisaged should be put into place.

.....
512. Similarly, in PUCL v. Union of India, (1997) 1 SCC 301, this Court dealt with telephone tapping as follows: .....

> *"17. 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".

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."

The Court then went on to apply Article 17 of the International Covenant on Civil and Political Rights, 1966 which recognizes the right to privacy and also referred to Article 12 of the Universal Declaration of Human Rights, 1948 which is in the same terms. It then imported these international law concepts to interpret Article 21 in accordance with these concepts."

10. Thus, now the judgment in PUCL (supra) has to be seen in the light of observations contained in the nine Judge Constitution Bench judgment. The nine judge judgment also noticed the earlier judgments in *R. M. Malkani v. State of Maharashtra (1973) 1 SCC 471* and observed as under :

"*51. Among the early decisions of this Court following Kharak Singh was R M Malkani v State of Maharashtra. In that case, this Court held that Section 25 of the Indian Telegraph Act, 1885 was not violated*

because :(R.M.Malkani Case, SCC p. 476, para 20)

> *"20. Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone."*

This Court followed the same line of reasoning as it had in Kharak Singh while rejecting a privacy based challenge under Article 21. Significantly, the Court observed that : (R.M.Malkani Case, SCC p. 479, para 31)

> *"31. 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 telephone conversation of an innocent citizen will be protected by Courts against wrongful or high handed 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 Court will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods."*

In other words, it was the targeted and specific nature of the interception which weighed with the Court, the telephone tapping being directed at a guilty person. Hence the Court ruled that the telephone conversation of an innocent citizen will be protected against wrongful interference by wiretapping.

[Emphasis supplied]

11. Evidently, the nine Judge Bench was of the view that the judgment in *R.M. Malkani (supra)* follows the same line of reasoning as it held in Kharak Singh (supra), as attaching tape recorder to the telephone was not considered as invasion of fundamental right to privacy under Article 21 of the Constitution

of India. Kharak Singh (supra) has now been overruled.

The 9 Judge Constitution Bench further held that :

> *"265. But the important point to note is that when a right is conferred with an entrenched constitutional status in Part III, it provides a touchstone on which the validity of executive decision making can be assessed and the validity of law can be determined by judicial review.*
>
> *313. Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.*
>
> *317. ..... The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, Kharak Singh's reliance upon the decision of the majority in Gopalan is not reflective of the correct position in view of the decisions in Cooper and in Maneka. Kharak Singh to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.*
>
> *325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law;*

(ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

...

428.2 The right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails.

428.3 Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

525. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

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

568. Similarly, I also hold that the "right to privacy" has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

578. It is not India alone, but the world that recognises the right of privacy as a basic human right. The Universal Declaration of Human Rights to which India is a signatory, recognises privacy as an international human right. The importance of this right to privacy cannot be diluted and the significance of this is that the legal conundrum was debated and is to be settled in the present reference by a nine-Judges Constitution Bench.

Test : Principle of proportionality and legitimacy

638. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

*" **(i) The action must be sanctioned by law;***

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference."

643. The aforesaid aspect has been referred to for purposes that the concerns about privacy have been left unattended for quite some time and thus an infringement of the right of privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognized as a fundamental right falling in part III of the Constitution of India.

650. Let the right of 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.

652. The reference is disposed of in the following terms:

652.1. The decision in M P Sharma which holds that the right to

privacy is not protected by the Constitution stands over-ruled;

652.2. The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;

653.3. 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.

653.4. Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law.

12. In view of the aforesaid clear and emphatic pronunciation of law on the subject by the Nine Judge Constitution Bench in ***K. S. Puttaswami (supra),*** it is no longer *res-integra* that :-

(a) The right to privacy is recognised by the Nine Judge Bench as inherent fundamental right having protection as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedom guaranteed by Part III of the Constitution which is subject to specified restrictions;

(b) Any infringement of the right to privacy by State Authorities will have to meet the following four tests based on the “Principle of proportionality and legitimacy” :

1. The action must be sanctioned by law;

2. The proposed action must be necessary in a democratic society for a legitimate aim;
3. The extent of such interference must be proportionate to the need for such interference;
4. There must be procedural guarantees against abuse of such interference.

(c) All earlier judgments suggesting to the contrary, are no longer binding precedents. The matters of infraction of the fundamental right to privacy would now have to necessarily satisfy the aforesaid tests, and cannot be dealt with on the basis of the overruled judgments in M.P.Sharma (supra) or Kharak Singh (supra) or based thereon or on the same line of reasoning like R. M. Malkani (supra).

13. It is at this stage, it is pertinent to note that directions contained in PUCL (supra) are in consonance with the aforesaid 4 tests.

14. After the judgment in PUCL (supra) and before the judgment in K.S.Puttaswamy (supra), Rules were also framed by the Central Government. Relevant Rules introduced by G.S.R.

193(4) dated 1st March, 2007 (w.e.f. 12th March, 2007) read as follows :

> “419. Interception or monitoring of telephone messages.- (1) It shall be lawful for the Telegraph Authority to monitor or intercept a message or messages transmitted through telephone, for the purpose of verification of any violation of these rule or for the maintenance of the equipment.
>
> 419-A. .....
>
> (2) Any order issued by the competent authority under sub-rule (1) shall contain reasons for such direction and a copy of such order shall be forwarded to the concerned Review Committee within a period of seven working days.
>
> (16) The Central Government and the State Government, as the case may be, shall constitute a Review Committee. The Review Committee to be constituted by the Central Government shall consist of the following, namely:
>
> (a) Cabinet Secretary — Chairman
>
> (b) Secretary to the Government of India Incharge, Legal Affairs - Member
>
> (c) Secretary to the Government of India, Department of Telecommunications — Member
>
> The Review Committee to be constituted by a State Government shall consist of the following, namely:
>
> (a) Chief Secretary — Chairman
>
> (b) Secretary Law/Legal Remembrancer Incharge, Legal Affairs — Member
>
> (c) Secretary to the State Government (other than the Home Secretary)— Member
>
> (17) The Review Committee shall meet at least once in two months and record its findings whether the directions issued under sub-rule (1) are in

> accordance with the provisions of sub-section (2) of Section 5 of the said Act. When the Review Committee is of the opinion that the directions are not in accordance with the provisions referred to above it may set aside the directions and orders for destruction of the copies of the intercepted message or class of messages.
>
> (18) Records pertaining to such directions for interception and of intercepted messages shall be destroyed by the relevant competent authority and the authorized security and Law Enforcement Agencies every six months unless these are, or likely to be, required for functional requirements."

15. The petitioner before us is a businessman and is accused No.2 in Special CBI Case No.99 of 2011 arising out of FIR No.RC. 0682010003 of 11th April, 2011, lodged by CBI. In brief, the case of CBI alleges that the petitioner is a bribe-giver, who gave a bribe of Rs.10,00,000/- to accused No.1(Public Servant-Bank Official) for getting certain credit related favour. We are not going into the merits or otherwise of the allegations levelled by CBI. The same can be assailed by the petitioner in his discharge application before the Trial Court.

16. We are of the view that as per Section 5(2) of the Act, an order for interception can be issued on either the occurrence of any public emergency or in the interest of the public safety.

The impugned three interception orders were issued allegedly for the reason of ‘public safety’. As held in PUCL (supra), 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. The expression “Public Safety” as held in PUCL (supra) means the state or condition of freedom from danger or risk for the people at large. When either of two conditions are not in existence, it was impermissible to take resort to telephone tapping.

17. The Hon’ble Supreme Court in *PUCL case (supra)* has observed that 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 the reasonable person.

18. Even at this stage, from the affidavits filed by the Respondents or the charge-sheet, the Respondents could not justify any ingredients of risk to the people at large or interest of the public safety, for having taken resort to the telephonic tapping by invading the right to privacy. Neither from the

impugned orders nor from the record any situation showing interest of public safety is borne out.

19. We are satisfied that in peculiar fact of the instant case, the impugned three interception orders neither have sanction of law nor issued for legitimate aim, as sought to be suggested. The impugned three interception orders could not satisfy the test of *"Principles of proportionality and legitimacy"* as laid down by the nine judges' constitution bench decision in *K. T. Puttaswamy* (supra). We, therefore, have no hesitation in holding that all three impugned orders are liable to be set aside. Accordingly, we quash and set aside the same.

20. Having held so, the next question arises is as to whether any directions for destroying the intercepted messages are warranted in a particular case or the instant case. The answer to the said issue would lie in ascertaining whether following directions contained in *PUCL case (supra)* which are now upheld by the constitution bench decision in *K. T. Puttaswamy* (supra) are mandatory :

> "35. We, therefore, order and direct as under :-
>
> 9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.
>
> (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."

21. We find that there is no scope to presume that aforesaid directions are not mandatory. It is an admitted position that Rule 419(A)(17) which provides for destruction of intercepted messages also adopt the said directions. We can neither permit the Respondents to continue to ignore the directions of the Hon'ble Apex Court nor can we ignore the same. Having held that the impugned interception orders have been issued in contravention of the provisions of section 5(2) of the Act, we have no option but to further direct the destruction of intercepted messages.

22. There is another aspect which has been argued. We were shown that CBI has taken diverse stands in various

proceedings before the trial Court from time to time on the issue of compliance of rules in response to the applications made by the Petitioner.

23. In reply dated 27th January 2016 filed by the CBI before the trial Court, it was contended as follows :

> *"3. That the Applicant accused Shri. Vinit Kumar has filed the Miscellaneous Applications before this Hon'ble Court for providing certified copy of the prior approval of the review committee under Rule 419(A) of Indian Telegraph Rule, 1951.*
> *4. That, the said approvals under Rule 419(A) of the Indian Telegraph Rule, 1951 has been filed along with the charge sheet filed before this Hon'ble Court vide Dd-4, D-5 and D-6 and the same has been supplied to all the accused persons along with the charge sheet."*

24. In its additional reply dated 29th August 2016, the CBI has further contended as under :

> *"5. It is humbly submitted that, the sanction issued by the Home Secretary Government of India under Telegraph Rule 1951 for intercepting the Call Data will be reviewed once in 2 months after the approval by the Review Committee of Telegraph Authority and the approval granted by the Home Secretary will be reviewed and if the said approval is in accordance and no discrepancies are found, Review Committee will not issue any orders. And if the approval is given by the Home Secretary and not in accordance and if any discrepancies are found, then the Review Committee shall issue the orders to the Home Secretary, Government of India.*

> *6. That, it is ascertained that, once the permission is granted by the Home Secretary, Government of India under Telegraph Rule 1951, the Review Committee will issue their approval only to the Home Secretary, Government of India and not to CBI or any other Agencies."*

25. Following observations are made In the order dated 18th November 2015 passed by the trial Court :

> *"22. .... SPP has submitted that CBI have obtain approval, it will be produce at the time of evidence."*

26. On behalf of CBI, one Ashok Prasad, Inspector of Police, CBI has filed an affidavit dated 10th July 2019 opposing this petition, wherein following averments are made :

> *"25. ..... I say that the CBI EOB was never, an is not at present in possession of any order of the Review Committee as aforesaid. The CBI EOB is not aware of whether any such order was ever passed by the Central Review Committee.*
>
> *27. ..... The CBI EOW never was, and is not, in possession of any "approval of the Review Committee".*
>
> *30. ..... As mentioned hereinabove, apart from the directions for interception dated 29/10/2009, 18/12/2009 and 24/2/2010, the records referred to in the aforesaid paragraphs are not in the possession of the CBI, EOW, and therefore the CBI EOB would not be able to produce the same. The records sought by the Petitioner / A-2 would be in the possession of the concerned Secretary who issued the directions for interception / the Review Committee....."*

27. On behalf of the Respondent – Union of India, one Mr. Rakesh Kumar, Secretary to Government of India, Ministry of Home Affairs has filed an affidavit dated 8th August 2019. While relying on Rule 419A(18), he has submitted thus in paragraphs 2 and 3 :

> *"2. ..... Thus, as per the provision of sub Rule 18 of Rule 419A of the Indian Telegraph Rules, 1951 all the interception order of mobile numbers for the above periods have been destroyed through shredding machine being more than six months old.*
>
> *3. ..... Only when the Review Committee is of the opinion that the directions are not in accordance with the provisions as per Section 5(2) of the Telegraph Act, may set aside the directions and orders for destruction of the copies of the intercepted message or class of messages. Otherwise no direction is issued by the Review Committee"*

28. We deprecate taking of such varying stands by the Respondents in the matter of alleged violation of fundamental rights.

29. 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).

30. In the instant case, now there is an admission by the Respondent that the record have been destroyed purportedly under sub-rule (18) of rule 419(A). The words "such" in sub-rule (18) therefore, refers to the direction and/or to the intercepted

message referred to in previous sub-rule (17) which are not in accordance with the provisions of sub-section (2) of section 5.

31. The findings of review committee would be either directions being in accordance with the provisions or not. If findings are in favour of the directions, i.e., if the directions conform to the requirements of provisions, no further step is contemplated. However, if the findings are that directions are not in accordance with the provisions, then Rule 419(A)(17) further provides for setting aside the directions and orders for destruction of the copies of intercepted messages or class of messages. Thus, orders for destruction are contemplated in Rule 419(A)(17) if and only if the directions so issued under rule 419(A)(1) for interception are *ultra vires* of section 5(2). 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.

. The stand of the Respondent, therefore, draws adverse inference against the Respondent and would not put them on a better footing to take advantage of their own wrong.

32. *In KLD Nagashree v. Government of India [AIR-2007 AP 102]* while considering the rules as existed before 12.7. 2007 and directing the destruction of intercepted messages pursuant to the illegal direction, it was observed in paragraphs 35 to 38 :

> "35. Keeping in view the object and purpose of the said Rules as declared in People's Union for Civil Liberties's case (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.
>
> 36. 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, 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 further makes clear 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.
>
> 37. 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 the 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.

> 38. For the reasons stated above, the Writ Petition is allowed declaring the impugned order dated 17-11-2003 as illegal and void and consequently directing that the copies of the intercepted messages pursuant to the said order shall be destroyed. No costs."

. We are in complete agreement with the view taken by the Andhra Pradesh High Court which considers the rules providing for consequences for non compliance, as well as the directions of the supreme Court in *PUCL's case (supra)* while deciding this issue.

33. The Respondents relied on the judgment in *Dharambir Khattar v.. Union of India [2012 SCC Online Delhi 5805]* which relies on *R. L. Malkhani v. State of Maharashtra [1973(1) SCC 471], State (NCT of Delhi) Navjot Sandhu [2005 (11) SCC 600]* and *Pooran Mal vs. Director of Inspection (Investigation) [1974(1) SCC 345]* to urge that even if there is some violation of the rules framed under the Act in collecting the material, such material can be relied upon as evidence during the trial. In particular, the following observations from *Dharambir (supra)* was stressed upon:

> "Therefore, without going into the issue of whether there was non-compliance of the provisions of

> Section 5(2) or of Rule 419-A, it is clear that even if there was, in fact, no compliance, the evidence gathered thereupon would still be admissible. This is the clear position settled by the Supreme Court and, therefore, no further question of law arises on this aspect of the matter."

34. In *Dharambir (supra)* the challenge before the Delhi High Court was to constitutional validity of section 5(2) of the Act and the intercepted messages were sought to be declared void on that basis. The compliance of final directions in *PULC's case (supra)* directing destruction of the intercepted messages on finding contravention of section 5(2) of the Act was not in consideration. The fact of complete lack of jurisdiction and mandatory rules itself providing for consequences of destruction in such event was not the issue involved and considered. Most importantly, while delivering the said judgment, Delhi High Court did not have the benefit of authoritative pronouncement of the the nine judges constitution bench judgment in *K. T. Puttaswamy* (supra). No examination on the touchstone of principles of proportionality and legitimacy, as laid down by the nine judges constitution bench judgment in *K. T. Puttaswamy* (supra) was involved. The facts before the Delhi High Court were materially different. The case of *Dharambir Khattar (supra)* is, thus,

distinguishable on the above peculiar facts and ground.

35. Similarly, *Navjot Sandhu (supra)* was a case of prevention of terrorist activities. It was serious case relating to the national security. It was nobody's case that ingredients of section 5(2) of the Act could not be satisfied or there was complete lack of jurisdiction under section 5(2) of the Act as in the instant case. Moreover, the said judgment is only prior to decision in *K. T. Puttaswamy* (supra). It in paragraph 154, it relies on *R. M. Malkhani (supra)* which as noticed in paragraph 51, *K. T. Puttaswamy* (supra) followed the same line of reasoning as in *Kharak Singh (supra)* while rejecting the privacy based challenge under Article 21 of the constitution of India, which now stands overruled.

36. *Poorn Mal (supra)* is a decision where the facts and issues were not similar to the instant case. Here the action of the executive is in breach of the fundamental rights under Article 21 of the Constitution of India as also directions of the Supreme Court in *PUCL's case (supra)*, in that case there was no direction or provision which could mandate the destruction of record in the

absence of valid order. No case of any infraction of Article 21 of the Constitution of India was raised. That apart, *Pooran Mal(supra)* inter alia follows *M. P. Sharma (supra)* and majority opinion in *A. K. Gopalan v. State of Madras [(1950) SCR 88]* which today stand overruled. The following paragraphs from *Pooran Mal (supra)* where reliance is placed on A. K. Gopalan (supra) and M. P. Sharma (supra) which are now overruled by the nine judges constitution bench decision in *K. T. Puttaswamy* (supra) :

> "23. As to the argument based on "the spirit of our Constitution", we can do no better than quote from the judgment of Kania, C. J. in A. K.Gopalan v. The State of Madras :
>
> "There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority."
>
> .....
> In M. P. Sharma v. Satish Chander, already referred to, a search and seizure made under the Criminal Procedure Code was challenged as illegal on the ground of violation of the fundamental right under Article 20(3), the argument being that the evidence was no better than illegally compelled evidence. In support of that contention reference was made to the Fourth and Fifth amendments of the American Constitution and also to some American cases which seemed to hold that the obtaining of incriminating evidence by illegal seizure and search tantamounts to the violation of the Fifth amendment. The Fourth amendment does not place any embargo on. reasonable searches and seizures. It. provides that the right of the people to be secure in

> their persons, papers and effects against unreasonable searches and seizures shall not be violated. .Thus the privacy of a citizen's home was specifically safeguarded under the- Constitution, although reasonable searches and seizures were not taboo. Repelling the submission, this Court observed at page 1096."
>
> A power of search and seizure is in any system of jurisprudence in 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. Nor is it legitimate to assume that the constitutional protection under article 20(3) would be defeated by the statutory provisions for searches.
>
> It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search."

37. Even the judgment of Hon'ble Supreme Court in *Umesh Kumar v. State of UP [(2013) 10 SCC 591]*, in paragraph 35 refers to and relies upon R. M. Malkhani, Pooran Mal and Navjot Sandhu (supra), which are already discussed hereinabove. Moreover, the said cases are distinguishable from the facts of the instant case. We are also bound by the judicial discipline which requires that we should follow the latter decision of greater strength bench in preference to the lesser strength bench decision.

38. Further in *Hussein Ghadially v. State of Gujarat*

[(2014) 8 SCC 425] for non compliance with the mandatory requirement of approval, in the light of Article 21 the Constitution of India, even the conviction under the TADA Act was set aside.

> "21.3 Thirdly, because if the statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited.
>
> .....
>
> 29. The upshot of the above discussion, therefore, is that the requirement of a mandatory statutory provision having been violated, the trial and conviction of the petitioners for offences under the TADA must be held to have been vitiated on that account."

39. We may also add here that if the directions of the Apex Court in *PUCL'case (supra)* which are now re-enforced and approved by the Apex Court in *K. T. Puttaswamy* (supra) 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 of privacy under Article 21 the Constitution of India. To declare that *dehorse* the fundamental rights, in the administration of criminal law, the ends would justify the means would amount to declaring the Government authorities may violate any directions of the

Supreme Court or mandatory statutory rules in order to secure evidence against the citizens. It would lead to manifest arbitrariness and would promote the scant regard to the procedure and fundamental rights of the citizens, and law laid down by the Apex Court.

40. We, therefore, quash and set aside three interception orders dated 29th October, 2009, 18th December, 2009 and 24th February, 2010 and consequently direct the destruction of copies of intercepted messages/ recordings. The intercepted messages/ recordings stand eschewed from the consideration of trial Court. The Petitioner is at liberty to adopt the remedy available in law for the other reliefs sought in the writ petition.

[N. J. JAMADAR, J.] **[RANJIT MORE, J.]**