

(2012) 11 DEL CK 0209

In the Delhi High Court

Case No : Writ Petition (Criminal) 1582 of 2007

Dharambir Khattar

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 21-11-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(a), 19(2), 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 395, 395(1), 395(2)
Evidence Act, 1872 — Section 7
Income Tax Act, 1961 — Section 132, 256, 256(1), 256(2), 260A
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 50, 54
Telegraph Act, 1885 — Section 25, 5, 5(1), 5(2), 7

Citation : (2013) CriLJ 2011

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : R. Venkatramani, with Dr. Rekha Dhaka, Mr. Prashant Singh and Dr. Sushil Gupta, for the Appellant; S.K. Dubey and Mr. Nitin Kumar Sharma for the UOI and Mr. Dayan Krishnan with Mr. Gautam Narayan for the CBI, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This writ petition seeks to raise questions with regard to seven interception orders purportedly passed u/s 5(2) of the Indian Telegraph Act, 1885 (hereinafter referred to as "the Telegraph Act") read with Rule 419-A of the Indian Telegraph Rules, 1951 (hereinafter referred to as "the Telegraph Rules"). In the backdrop of these seven interception orders, the petitioner has prayed that:-

a) The case Bearing C.C. No. 12/2004 (RC No. AC 0001/2003) pending before the Special Judge, CBI, Patiala House Courts, New Delhi should be withdrawn by this court by invoking Article 228 of the Constitution of India inasmuch as, according to the petitioner, inter alia, a substantial question of law is involved therein;

b) Section 5(2) of the said Telegraph Act be declared as unconstitutional and, consequently, the interception orders be declared as void;

c) The seven interception orders be declared as being in violation of the fundamental and statutory rights of the petitioner and to prohibit the trial court from using the materials collected pursuant to the seven orders which pertain to 15 telephone/mobile numbers;

d) The order dated 02.11.2007 passed by the learned Special Judge, CBI, Patiala House Courts, New Delhi dismissing the petitioner's application u/s 395 of the Criminal Procedure Code, 1973 seeking a reference to the High Court, be quashed.

Before we proceed further, one of the seven orders of interception is set out here in below by way of sample:-

TOP SECRET

No. 14/3/97-CBI

MINISTRY OF HOME AFFAIRS

(Government of India)

WHEREAS as per provision in Sub-rule (1) of Rule 419-A of the Indian Telegraph Rules, 1951 notified on 16.02.1999 as Indian Telegraph (First Amendment) Rules, 1999 framed in exercise of the 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 the powers of 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 it is necessary/ expedient so to do in the Interest of sovereignty and integrity of India/Security of the State/Friendly relations with foreign states/public order/preventing incitement to the commission of an offence hereby direct that any telephone message relating to clandestine contact/movement/activity etc. to and from 98-102-58734, brought for transmission by or transmitted 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 90 days from the date of issue.

Sd/-

(N. Gopalswami)

Secretary to the Govt. of India

Ministry of Home Affairs,

New Delhi.

New Delhi

Dated 20.12.2002

2. The facts are few. It is apparent that there is a trial going on in CC No. 12/2004 (RC No. AC 0001/2003) before the Special Judge, CBI, Patiala House Courts, New Delhi. In that case, the petitioner is an accused. The prosecution is seeking to use as evidence the material collected pursuant to the seven interception orders mentioned above. According to the petitioner, the interception orders were passed purportedly u/s 5(2) of the said Telegraph Act, which provision itself is unconstitutional and, as a consequence thereof, the interception orders are void. It is further the case of the petitioner that the seven interception orders are, in any event, in violation of Section 5(2) of the said Telegraph Act and, therefore, the same should be declared as null and void. The petitioner also prays that this court should exercise the powers under Article 227 of the Constitution of India to set aside and/or quash the order dated 02.11.2007 passed by the learned Special Judge, CBI, whereby the petitioner's application u/s 395 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") was dismissed. According to the petitioner, the case involved the question as to the validity of Section 5(2) of the said Telegraph Act and, therefore, the application for reference to the High Court u/s 395, CrPC ought to have been allowed. It is furthermore the case of the petitioner that the case pending before the said Special Judge involves a substantial question of law as to the interpretation of the Constitution and the determination of which is necessary for the disposal of the case and, therefore, this court ought to exercise the powers conferred upon it under Article 228 of the Constitution of India by withdrawing that case from the Special Judge and thereafter either dispose the case itself or determine the question of law and return the case to the Special Judge for disposal in conformity with the decision of this court.

3. Prior to considering the submissions of the learned counsel for the petitioner with regard to Section 5(2) of the said Telegraph Act, it would be appropriate to set out the provisions thereof. Section 5 of the said Telegraph Act reads as under:-

5. 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 other 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 such 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 by transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

4. After reading through the above provision, Mr. R. Venkatramani, the learned senior counsel, appearing on behalf of the petitioner, submitted that the powers u/s 5(1) could be invoked only on the occurrence of any "public emergency" or in the interest of "public safety". According to the learned counsel for the petitioner, there was no "public emergency" nor was there any issue of "public safety" in the present case. He further contended that Section 5(2) also relates to "such occurrence of any public emergency" and also to a situation involving "public safety". Therefore, interception of messages transmitted or received by any telegraph could be ordered u/s 5(2) only if there existed a situation of "public emergency" or it was in the interest of "public safety". Thus, according to the learned counsel for the petitioner, if these two conditions did not exist, there could not be any order for interception with regard to telephone. It was further contended that the power u/s 5(2) was very drastic and was absolutely arbitrary. Consequently, it could be used by the Government in an arbitrary fashion. As such, Section 5(2) was violative of the fundamental rights guaranteed under Articles 14, 19(1)(a) and 21 of the Constitution of India. A reference was made to the decision of the Supreme Court in the case of *Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others*, as also to the Supreme Court decision in *People's Union of Civil Liberties (PUCL) v. Union of India: 1971 (1) SCC 301*.

5. The learned counsel for the petitioner submitted that it has been recognized in *PUCL (supra)* that telephone tapping amounted to an infraction of the fundamental right guaranteed under Article 21 of the Constitution. The very same decision of the Supreme Court also recognized the fact that telephone tapping amounted to an infraction of Article 19(1)(a) of the Constitution unless it was saved by Article 19(2). The learned counsel also submitted that the expression "public emergency" and "public safety" were explained in *Hukam Chand (supra)* and reiterated in *PUCL (supra)*.

6. The learned counsel for the petitioner made a two-fold submission in the backdrop of the aforesaid decisions of the Supreme Court. His first submission was that Section 5(2) was clearly unconstitutional inasmuch as it was amenable to arbitrary exercise of power. Secondly, he submitted that, in any event, the interception/phone tapping orders could only be issued in a situation which entailed "public emergency" or "public safety". According to him, a state of emergency did not exist in the present case prior to the issuance of the seven interception orders and the said orders were not in the interest of "public safety" as explained in *Hukam Chand* (supra). Therefore, a declaration was sought by the petitioner that the seven interception orders were in violation of the petitioner's fundamental and statutory rights. On this foundation, it was urged on behalf of the petitioner that the trial court be prohibited from using the materials collected pursuant to the said seven orders in the course of the trial pending before it.

7. It was also contended that this court should exercise its powers under Article 227 of the Constitution to set aside the order dated 02.11.2007 by which the learned Special Judge had dismissed the petitioner's application u/s 395, CrPC for a reference to the High Court. It was contended that the learned Special Judge had failed to realize that the case pending before the said Special Judge involved a question as to the validity of Section 5(2) of the said Telegraph Act and that the determination of this question was necessary for the disposal of the case. Consequently, the learned Special Judge, in view of Section 395 (1), was duty bound to state a case and refer the same for the decision of the High Court. It was further contended that, in any event, the learned Special Judge could have acted u/s 395 (2) by exercising her discretion inasmuch as, even if the provisions of sub-Section (1) did not apply, the case at least involved a question of law. Since the learned Special Judge did not make any reference u/s 395, CrPC, this court, according to the learned counsel for the petitioner, ought to exercise its jurisdiction of superintendence under Article 227 of the Constitution to set aside and quash the said order.

8. In response to these arguments, Mr. Dayan Krishnan, appearing on behalf of the CBI, submitted that, first of all, Article 228 of the Constitution would have no application in the present case and, therefore, the prayer for withdrawing of the case pending before the learned Special Judge to this court ought to be rejected outright. In this context, he submitted that Article 228 of the Constitution could only be invoked where the High Court was satisfied that a case pending before a court subordinate to it involved a "substantial question of law" as to the interpretation of the Constitution and the determination of which was necessary for the disposal of the case pending before the subordinate court. He submitted that a question already decided by the Supreme Court can never be regarded as a substantial question of law. According to Mr. Krishnan, the validity of Section 5(2) of the said Telegraph Act was to be considered as beyond reproach in view of the decision of the Supreme Court in *Hukam Chand* (supra) and *PUCL* (supra). In both these decisions, Section 5(2) of the said Telegraph Act had been

considered and the Supreme Court had not regarded it as invalid. It was contended that in PUCL (supra), Section 5(2) was directly under challenge, but in the course of the said decision, the Supreme Court noted that the vires of Section 5(2) of the said Telegraph Act were not seriously challenged and that the Supreme Court went on to prescribe the interim safeguards till the rules were framed u/s 7 of the said Telegraph Act providing for safeguards. It was contended by Mr. Krishnan that these decisions and, in particular, the decision of the Supreme Court in PUCL (supra) clearly indicates that the Supreme Court had given its imprimatur insofar as the Constitutional validity of Section 5(2) of the said Telegraph Act was concerned. Therefore, according to him, the same was not open to challenge and, consequently, no question of law with regard to the validity of that provision could at all arise as the same had been settled by the Supreme Court.

9. In this very context, it was also submitted that even if this court were to hold that the seven interception orders were in violation of law, the evidence that was collected pursuant to the said seven orders, would still be admissible as they were relevant. According to Mr. Krishnan, even illegally obtained evidence is admissible. This, according to him, was a common law principle which is well recognized in India and this issue also has been decided by several decisions of the Supreme Court and other courts. Some of the decisions referred to by him were as under:-

- 1) Barindra Kumar Ghose v. Emperor: 1910 ILR 37 Cal 467;
- 2) R.M. Malkani Vs. State of Maharashtra, ;
- 3) Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, ;
- 4) State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, .

10. We may also point out, at this juncture, that the learned counsel for the petitioner had referred to State of Punjab v. Baldev Singh: 1999 (6) SCC 172, wherein the decision of the Supreme Court in Pooran Mal (supra) was distinguished. However, Mr. Krishnan submitted that the decision of the Supreme Court in Baldev Singh (supra) was purely in the context of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"), which was a special case and, therefore, cannot be regarded as having taken away anything from the Supreme Court decision in Pooran Mal (supra). It was, therefore, contended by Mr. Krishnan that Article 228 of the Constitution could not be invoked at all in the present case as there was no substantial question of law which involved the interpretation of the Constitution. Even if the seven interception orders were, for the sake of argument, to be regarded as illegal, the material collected pursuant thereto would yet be admissible in view of the clear position of law as prevailing in India.

11. The second point urged by Mr. Dayan Krishnan was that the matter was

proceeding in trial before the learned Special Judge and that this court is not at all required to go into the question of validity of the seven interception orders or into the question of exercise of the powers u/s 5(2) of the said Telegraph Act. That, according to the learned counsel, is a matter to be gone into by the trial court. He placed reliance on the Supreme Court decision in the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, and, in particular, on para 31 thereof (per Kuldeep Singh, J) which is to the following effect:-

31. Finally, we are at a loss to understand as to why and on what reasoning the High Court assumed extraordinary jurisdiction under Article 226/227 of the Constitution of India at a stage when the Special Judge was seized of the matter. He had heard the arguments on the question of cognisance and had reserved the orders. The High Court did not even permit the Special Judge to pronounce the orders.

12. Thirdly, Mr. Krishnan submitted that the High Court generally does not entertain petitions under Article 226 of the Constitution when a full-fledged trial is in progress, particularly, as the trial court is seized of the disputed questions of fact, which, this court in exercise of its writ jurisdiction would not go into.

13. Fourthly, with regard to the order dated 02.11.2007 passed by the Special Judge, whereby the petitioner's application u/s 395, CrPC was rejected, Mr. Krishnan submitted that Article 227 of the Constitution is not by way of an appellate jurisdiction. As such, it should not be used as an appeal in disguise. He placed reliance on paragraph 28 of the Supreme Court decision in the case of State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, . The said paragraph 28 reads as under:-

28. Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate Tribunal's within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However, the power under Article 227 is a discretionary power and it is a difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate Courts and Tribunal's within the bounds of their authority and not to correct mere errors. Further where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised "as the cloak of an appeal in disguise".

14. For all these reasons, Mr. Krishnan submitted that the writ petition ought to be dismissed.

15. Mr. Dubey, appearing for the Union of India, submitted that the main challenge of the petitioner is to Section 5(2) of the said Telegraph Act. He submitted that the legislative competence has not been doubted or challenged. The challenge is in the context of Articles 14, 19 and 21 of the Constitution. He referred to the Supreme Court decision in the case of State of Maharashtra Vs. Bharat Shanti Lal Shah and Others, , wherein the decisions of the Supreme Court in the case of R.M. Malkani (supra) and PUCL (supra) were considered. Mr. Dubey submitted that the Supreme Court in Bharat Shanti Lal Shah (supra) clearly held that interception of conversation, although it constitutes an invasion of an individual right to privacy, can be curtailed in accordance with the procedure validly established by law. Consequently, what the court has to see is whether the procedure itself is fair, just and reasonable and not arbitrary, fanciful or oppressive. According to Mr. Dubey, when the PUCL (supra) case was heard by the Supreme Court, there was no procedure prescribed u/s 7 of the said Telegraph Act. Yet, the Supreme Court directed a series of steps to be taken before passing an order of interception u/s 5(2), till such time as the rules u/s 7 of the said Telegraph Act were framed. Mr. Dubey submitted that thereafter, Rule 419-A has been introduced in the said Telegraph Rules which are virtually the same as the directions given by the Supreme Court. Therefore, it would be well nigh impossible to say that the safeguards prescribed in Rule 419-A are not fair, just and reasonable inasmuch as they are virtually the same as the ones which find place in the PUCL (supra) decision. That being the position, the validity of Section 5(2) of the said Telegraph Act cannot be questioned. Mr. Dubey submitted that the PUCL (supra) case has already decided all the issues and now that Rule 419-A has been introduced with effect from 16.02.1999, the safeguards are also in place and there is no scope for challenging the validity of the said Section 5(2) of the said Telegraph Act.

16. In rejoinder, the learned counsel for the petitioner submitted that the understanding of the Government is contrary to the spirit of Section 5(2) and the Supreme Court decision in PUCL (supra), therefore, according to him, the validity of Section 5(2) is alive and is not a dead letter inasmuch as, according to him, it continues to give room for abuse of power. He sought to distinguish Navjot Sandhu's case as also the other decisions which were cited against him. The learned counsel reiterated that the prayers sought in this petition be allowed.

17. Let us, first of all, examine the prayer with regard to quashing/setting aside of the order dated 02.11.2007 passed by the learned Special Judge, whereby the application u/s 395, CrPC for reference to the High Court was rejected. Section 395, CrPC reads as under:-

395. Reference to High Court.--(1) Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the

determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefore, and refer the same for the decision of the High Court. Explanation.-- In this section, "Regulation" means any Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.

(2) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any Court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon.

18. A plain reading of Section 395(1) indicates that the court is required to make a reference only if it is satisfied that a case pending before it involves a question as to the validity of any Act etc, the determination of which is necessary for the disposal of the case. It is further necessary that the court must also be of the opinion that such Act is invalid or inoperative, but has not been so declared by the concerned High Court or by the Supreme Court. It is, therefore, clear that, first of all, the court must itself be satisfied that a case involves the question as to the validity of an act and that the declaration of which is necessary for the disposal of the case. There is the further requirement that the court itself must be of the opinion that the Act is invalid, but has not so been declared by the High Court or the Supreme Court. In the present case, the learned Special Judge was not of the opinion that Section 5(2) of the said Telegraph Act was invalid. She was also not satisfied that the case pending before her involved the question of validity of Section 5(2) of the said Act. In other words, the learned Special Judge did not feel that the ingredients of Section 395, CrPC had been satisfied. She also did not feel that any question of law arose which required her to make a reference u/s 395, CrPC. After a detailed examination of several cases, including the PUCL (supra) and the R.M. Malkani (supra) cases and other cases, the learned Special Judge rejected the application u/s 395, CrPC.

19. The petitioner has called upon us to exercise jurisdiction under Article 227 of the Constitution to set aside and quash the order dated 02.11.2007. First of all, we are in agreement with Mr. Krishnan in view of the observations made by the Supreme Court in *State v. Navjot Sandhu*: 2003 (6) SCC 461, which we have already referred to above, that this is not a case for exercise of power under Article 227 of the Constitution and the same cannot be used as a disguise for an appeal which is not provided by the statute. Secondly, assuming that we agree with the request of the petitioner and quash the impugned order dated 02.11.2007, where does it take the petitioner. The fact remains that by quashing

the order dated 02.11.2007, a reference to this court does not automatically ensue. All that it means is the order rejecting the reference is set aside.

20. At this juncture, it would be pertinent to refer to the provisions of Section 256 of the income tax Act, 1961 which provided for a reference to the High Court. That was the avenue of proceeding from the income tax Appellate Tribunal to the High Court prior to the introduction of Section 260-A which provided for appeals to the High Court. u/s 256(1) of the income tax Act, 1961, an application could be made requiring the Appellate Tribunal to refer a question of law to the High Court. Sub-Section (2) of Section 256 was specific, which entitled an aggrieved party to apply to the High Court in case the Tribunal refused a reference u/s 256(1). If the High Court was not satisfied with the correctness of the decision of the Appellate Tribunal, it could require the Appellate Tribunal to state the case and to refer it to the High Court. There is no provision similar to Section 256(2) of the income tax Act, 1961 in the CrPC and, particularly, in Section 395 thereof. In the absence of such a provision, we cannot assume such a power. And, Article 227 cannot, in our view, be used for this purpose. Therefore, the prayer for quashing the order dated 02.11.2007 is, apart from being untenable, of no consequence.

21. We shall now deal with the prayer under Article 228 for withdrawal of the case in conjunction with the prayer that Section 5(2) of the said Telegraph Act be declared as being unconstitutional and the prayer that the seven interception orders were in violation of the fundamental and statutory rights of the petitioner. The object of all these prayers, insofar as the petitioner is concerned, is that the material collected pursuant to the seven interception orders should not be used against the petitioner in the pending trial. Mr. Dayan Krishnan has raised a very important issue and that is that, even if the said interception orders are held to be illegal, the material collected pursuant thereto would still be admissible and, therefore, there is no question of invoking the jurisdiction under Article 228 of withdrawing the case to the High Court or of this court going into the issue of validity of seven interception orders.

22. However, before we examine that aspect of the matter, it would be appropriate for us to first examine the Supreme Court decision in *Hukam Chand* (supra) and *PUCL* (supra). In the context of Section 5(2) of the said Telegraph Act and Articles 19(1)(a) and 21 of the Constitution, in *Hukam Chand* (supra), the Supreme Court observed as under:-

13. Section 5(1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/specially authorised officer to take possession of any telegraphs. 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. It is in the context of these matters that the appropriate authority has to form an opinion with regard to the occurrence of a public emergency with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere "economic emergency"--as the High Court calls it--may not necessarily amount to a "public emergency" and justify action under this section unless it raises problems relating to the matters indicated in the section.

23. From the above extract, it is apparent that the existence of a "public emergency" is a pre-condition for the exercise of power u/s 5 of the said Telegraph Act. The Supreme Court observed that though the expression "public emergency" has not been defined in the said Act, the contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. The Supreme Court further observed that the two phrases "occurrence of any public emergency" and "in the interest of public safety" appear to take colour from each other and this makes it clear that a "public emergency" within the contemplation of the said provision 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 foreign States or public order or the prevention of incitement to the commission of an offence. The Supreme Court also observed that it is for the appropriate authority to form an opinion with regard to the occurrence of a public emergency with a view to take a further action under this provision.

24. In PUCL (supra), the Supreme Court was considering a Public Interest Litigation (PIL) under Article 32 of the Constitution in which the incidents of phone tapping had been highlighted. In that petition, there was a challenge to the Constitutional validity of Section 5(2) of the said Telegraph Act and, in the alternative, it was contended that the said provisions be suitably read down to include procedural safeguards, to rule out arbitrariness and to prevent indiscriminate telephone tapping. In this backdrop, the Supreme Court held that a telephone conversation is an important facet of a man's private life and the right to privacy would certainly include a telephone conversation in the privacy of one's home or in the office. The Supreme Court was of the view that telephone

tapping would thus infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. The exact words used by the Supreme Court are as under:-

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.

25. The Supreme Court then, in PUCL (supra), examined the issue as to whether telephone tapping, in any way, impinged upon the right to freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution. In this context, the Supreme Court held as under:-

19. Right to freedom of speech and expression is guaranteed under Article 19(1) (a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1) (a) of the Constitution.

26. It is apparent from the above extracts from the PUCL (supra) decision that the Supreme Court had taken a clear view that telephone tapping would infract Article 19(1)(a) of the Constitution unless it came within the grounds of restrictions under Article 19(2). The Supreme Court was also of the view that telephone tapping would violate Article 21 of the Constitution unless it was permitted under a procedure established by law.

27. The Supreme Court in PUCL (supra), in this backdrop, noticed that the Constitutional vires of Section 5(2) of the said Telegraph Act was not seriously challenged. It is obvious that once the Supreme Court was of the view that telephone tapping was violative of the fundamental rights guaranteed under Article 19(1)(a) and Article 21 of the Constitution, unless it came within the grounds of restrictions under Article 19 (2) or was permitted under a procedure established by law, the question of Section 5(2) of the said Telegraph Act being per se unconstitutional no longer survived. This is so because what remained to be seen was whether the telephone tapping was permitted under a procedure

established by law and or whether it came within the grounds of restriction under Article 19(2) of the Constitution.

28. With regard to Section 5(2) of the said Telegraph Act, the Supreme Court in PUCL (supra) observed 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 u/s 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority u/s 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 *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, 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.

29. The Supreme Court, as is apparent from the above extracts, was of the view that Section 5(2) itself lays down the parameters of the power of intercepting messages/conversation and that this power must have procedural backing so that the exercise of such power is fair and reasonable. The Supreme Court, therefore, agreed with the submission that no procedure had been prescribed for the exercise of the power u/s 5(2) of the said Telegraph Act as it was not disputed that Rules had not been framed, by then, u/s 7(2)(b) of that Act for providing the precautions to be taken for preventing the improper interception and disclosure of messages. In this context, the Supreme Court observed that in the absence of any such provision in the statute, it was not proper for prior judicial scrutiny as a procedural safeguard and that it was for the Central Government to make rules u/s 7 of the said Telegraph Act. The Supreme Court observed that it was entirely for the Central Government to make such rules on the subject, but till the time that was done, the right to privacy of an individual had to be safeguarded and in order to rule out arbitrariness in exercise of the power u/s 5(2) of the said Telegraph Act, it was necessary to lay down procedural safeguards for the exercise of power under the said Section 5(2) so that the right of privacy of a person is protected. The Supreme Court, in this context, observed as under:-

30. We are of the view that there is considerable force in the contention of Mr. Rajinder Sachar, Mr. Kapil Sibal and Dr. Rajeev Dhavan that no procedure has been prescribed for the exercise of the power u/s 5(2) of the Act. It is not disputed that no rules have been framed u/s 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power u/s 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed u/s 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

34. We agree with Mr. Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules u/s 7 of the Act. Section 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules u/s 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 u/s 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 u/s 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure u/s 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power u/s 5(2) of the Act so that the right to privacy of a person is protected.

35. We, therefore, order and direct as under:

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary u/s 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required u/s 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order u/s 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two-month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed,

(d) the extent to which the material is copied, and

(e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

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 u/s 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.

30. We may point out, at this juncture, that subsequent to the decision in PUCL (supra), the Central Government has, in fact, amended the said Telegraph Rules and introduced Rule 419-A, which is a virtual reproduction of the Supreme Court directions in para 35 of the PUCL (supra) case. The said Rule 419-A was brought into force with effect from 16.02.1999 and prior to that, but after the PUCL (supra) decision, the directions as given by the Supreme Court were in vogue.

31. From the above, it is apparent that the issue of the Constitutional validity of Section 5(2) of the said Telegraph Act is no longer open for the High Court inasmuch as the Supreme Court in PUCL (supra) took the alternative route of reading down the provision to include procedural safeguards so as to rule out arbitrariness and to prevent indiscriminate telephone tapping. From the manner in which the Supreme Court gave the directions in PUCL (supra), it is apparent that if those directions were to supplement Section 5(2), it would amount to a reasonable and fair procedure and the power of interception u/s 5(2) of the said Act would then not be such an arbitrary or unguided or unfair power as would amount to a violation of Article 19(1)(a) or Article 21 of the Constitution. We are, therefore, of the view that the submission of the learned counsel for the petitioner that Section 5(2) of the said Telegraph Act is unconstitutional is not

tenable in the light of the observations and conclusions of the Supreme Court in *Hukam Chand (supra)* and *PUCL (supra)*.

32. We shall now consider Article 228 of the Constitution. The same reads as under:-

228. Transfer of certain cases to High Court.-- If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may-

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

33. In order to invoke Article 228 of the Constitution, the High Court must be satisfied that the case pending before a subordinate court involves a "substantial question of law" as to the interpretation of the Constitution and the determination of which is necessary for the disposal of the case. As was pointed out earlier, Mr. Krishnan, appearing on behalf of the CBI, had contended that a question which has been settled by the Supreme Court can never be regarded as a substantial question of law. He had placed reliance on the Supreme Court decision in *Panjak Bhargava and another Vs. Mohinder Nath and another*, . In that case, the Supreme Court has observed as under:-

10. What is a substantial question of law would certainly depend upon facts and circumstances of every case and if a question of law had been settled by the highest court of the country that question however important and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as substantial question of law. In AIR 1927 110 (Privy Council) the Judicial Committee observed that a question of law to be considered a "substantial question of law" need not be one of general importance and it could be a substantial question "as between the parties". This Court had occasion to consider the views expressed on the point by the High Courts of Bombay, Nagpur and Madras in *Kaikhushroo Pirojsha Ghiara Vs. C.P. Syndicate, Ltd.*, , AIR 1949 300 (Nagpur) and *Rimmalapudi Subba Rao Vs. Noony Veeraju and Others*, respectively placing differing emphasis on what was a "substantial" question of law between the parties. It was held by this Court that while the view taken by the Bombay High Court was too narrow, the one taken by the Nagpur High Court was too broadly stated. Approving the view taken by the Madras High Court it was observed: (SCR pp. 557-58)

...The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so

whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

(Emphasis supplied)

34. It is obvious that Mr. Krishnan is right in contending that a question of law, which has been settled by the Supreme Court, however, important or difficult it may have been regarded in the past and whatever be the magnitude of its effect on any of the parties, cannot be regarded as a substantial question of law. It is obvious that the questions with regard to Section 5(2) of the said Telegraph Act already stand settled by the Supreme Court in PUCL (supra) and the parameters for its functioning are already clearly laid out. It is for the courts to examine the facts of each case and to arrive at a conclusion as to whether the parameters have been transgressed in each individual case or not. The question would be one of fact and not of law and certainly not a substantial question of law. Therefore, we agree with the submission of Mr. Krishnan that this is not a case in which we can invoke Article 228 of the Constitution and withdraw the case pending before the learned Special Judge.

35. The submission of Mr. Krishnan that, in any event, no question of law as such arises for consideration because even if the evidence is gathered illegally, the same would still be admissible, needs to be considered. The submission was that even if, on the facts of the present case, the trial court came to the conclusion that the seven interception orders in question were illegal in the sense that there was some contravention of the provisions of Section 5(2) of the said Telegraph Act or of Rule 419-A of the said Telegraph Rules, the same would not, in any event, enable the trial court to detract from the position that the material collected pursuant to the said orders would be admissible, as long as they were relevant. Several decisions had been referred to by Mr. Dayan Krishnan which we have noted earlier.

36. In Barindra Kumar Ghose (supra), Lawrence H. Jenkins, CJ, observed as under:-

61. Next, Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded.

As Jimutavahana with his shrewd common sense observes--"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks: "If a Brahmana be slain, the precept "slay not a Brahmana" does not annul the murder." But the absence of the precautions designed by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized. In this case there do seem to have been some irregularities, In the case of some searches there were not the two witnesses directed by the Code, while in the case of others it is at least problematical whether the witnesses called in comply with the statutory test of being "respectable inhabitants of the locality.

37. In R.M. Malkani (supra), the Supreme Court, inter alia, observed that "there is warrant for the proposition that even if evidence is illegally obtained, it is admissible". The Supreme Court observed as under:-

24. It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of Section 25 of the Telegraph Act in the facts and circumstances of the present case. There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See *Jones v. Owen* [(1870) 34 JP 759]. The Judicial Committee in *Kuruma, Son of Kanju v. R.* [1955 AC 197] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

30. It was said that the admissibility of the tape recorded evidence offended Articles 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape-recorded conversation was not procedure established by law and the appellant was incriminated. The appellant's conversation was voluntary. There was no compulsion. The attaching of the tape-recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant's conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In *R. v. Leatham* [(1961) 8 Cox CC 498] it was said "it matters not how you get it if you steal it even, it would be admissible in evidence". As long as it is not tainted by an inadmissible confession

of guilt evidence even if it is illegally obtained is admissible.

31. 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 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 Courts will tolerate safeguards for the protection of the citizen to be imperiled 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.

38. While the Supreme Court in *R.M. Malkani* (supra) held that a telephone conversation of an innocent citizen will be protected by the court against wrongful and 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. The Supreme Court referred to the decision in *Kuruma, Son of Kanju v. R.*: 1955 AC 197 and observed that in that case, the Judicial Committee held that the evidence was rightly admitted and the reason given was that evidence was admissible, it mattered not how it was obtained. The Supreme Court also observed and noted that there is, of course, always a word of caution and that is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused and that caution is the golden rule in criminal jurisprudence.

39. In *Pooran Mal* (supra), which is a Constitution Bench decision of the Supreme Court, it has been held that so far as India is concerned, its law of evidence is modelled on the rules of evidence which prevailed in English law and the courts in India and in England have constantly refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. The Supreme Court referred to the Calcutta High Court decision in *Barindra Kumar Ghose* (supra) which we have already mentioned above. The Supreme Court then examined the decision of the Allahabad High Court in *Emperor v. Allahdad Khan*: ILR 35 All 358, *Kuruma v. Queen*: 1955 AC 197, *Herman King v. Queen*: 1969 1 AC 304. The Supreme Court noticed that in *Herman King* (supra), the Privy Council, following *Kuruma v. R.* (supra), held that it was open to the court not to admit the evidence against the accused if the court was of the view that the evidence had been obtained by conduct of which the prosecution ought not to take advantage. But the Supreme Court further noted that that was not a rule of evidence, but a rule of prudence and fair play. In this backdrop, the Supreme Court observed as under:-

... It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.

40. Consequently, in the context of the factual matrix of the case before it, the Supreme Court held as under:-

25. In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of Section 132 of the Income Tax Act, still the material seized was liable to be used subject to law before the Income tax authorities against the person from whose custody it was seized and, therefore, no Writ of Prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs.

It is obvious that the Constitution Bench of the Supreme Court gave its imprimatur to the proposition that any evidence, if relevant, even if it was illegally obtained, would be admissible.

41. Insofar as the Supreme Court decision in Baldev Singh (supra) is concerned, which distinguishes the decision in Pooran Mal (supra), we agree with Mr. Krishnan that the said decision was a special case under the NDPS Act. Because, under the NDPS Act, possession of contraband itself is an offence and, therefore, the legality of search and seizure would be directly in issue. On the other hand, a conversation over the telephone per se is not an illegal event. Therefore, the decision in Baldev Singh (supra), which specifically dealt with the NDPS Act, does not, in any way, detract from the general principles set down in Pooran Mal (supra). That the decision in Baldev Singh (supra) was a special case, would be evident from the following observations in that decision itself:-

43. The judgment in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, has to be considered in the context in which it was rendered. It is a well-settled proposition of law that a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered.

45. The judgment in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, therefore, cannot be understood to have laid down that an illicit article seized during the search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act can be used as evidence of unlawful possession of the illicit article on the person from whom that contraband had been seized during an illegal search. Apart from the position that in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, on facts, it was found that the search and seizure conducted in the cases under consideration in that case were not vitiated by any illegality, the import of

that judgment, in the present context, can only be to the effect that material seized during search and seizure, conducted in contravention of the provisions of Section 132 of the Income Tax Act cannot be restrained from being used, subject to law, before the Income Tax Authorities in other legal proceedings against the persons, from whose custody that material was seized by issuance of a writ of prohibition. It was not the seized material, in *Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others*, which by itself could attract any penal action against the assessee. What is implicit from the judgment in *Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others*, is that the seized material could be used in other legal proceedings against an assessee, before the Income Tax Authorities under the Income Tax Act, dealing with escaped income. It is, therefore, not possible to hold that the judgment in *Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others*, can be said to have laid down that the "recovered illicit article" can be used as proof of unlawful possession of the contraband seized from the suspect as a result of illegal search and seizure. If *Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others*, judgment is read in the manner in which it has been construed in *State of Himachal Pradesh Vs. Shri Pirthi Chand and another*, (though that issue did not strictly speaking arise for consideration in that case), then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted "after" following the provisions of Section 50 of the NDPS Act and a seizure made during a search conducted "in breach of" the provisions of Section 50 of the NDPS Act. Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. In *R. v. Collins* [(1987) 1 SCR 265 (Canada)] the Supreme Court of Canada speaking through Lamer, J. (as his Lordship, Chief Justice of the Supreme Court of Canada then was) opined that the use of evidence collected in violation of the Charter rights of an accused would render a trial unfair and the evidence inadmissible. In the words of the Supreme Court of Canada:

The situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial

unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial.

(Emphasis ours)

46. The opinion in Collins case [(1987) 1 SCR 265 (Canada)] has been relied upon by the majority of the Supreme Court of Canada in R. v. Stillman [(1997) 1 RCS 607] also.

47. The question of admissibility of evidence, which may be relevant to the question in issue, has thus to be decided in the context and the manner in which the evidence was collected and is sought to be used.

54. Thus, even if it be assumed for the sake of argument that all the material seized during an illegal search may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption u/s 54 of the Act because presumption is an inference of fact drawn from the facts which are known as proved. A presumption u/s 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50.

55. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

56. Thus, considered we are of the opinion that the judgment in Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, correctly interprets and distinguishes the judgment in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, and the broad observations made in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, and State of Punjab Vs. Jasbir Singh and Others, are not in tune with the correct exposition of law, as laid down in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, .

42. In State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, , the Supreme Court was, inter alia, considering the question of interception of messages u/s 5(2) of the said Telegraph Act read with Rule 419-A of the said Telegraph Rules. The Supreme Court observed that the substantive power of interception by the Government or the authorized officer was conferred by Section 5 and the modalities and procedure for interception were governed by the said Rules. In that case, it had been contended that even Rule 419-A had not been complied

with and, therefore, the tape recorded conversation obtained through such interception could not be utilized by the prosecution to incriminate the accused. The learned counsel appearing for the State gave a two-fold response. In the first instance, it was submitted that there was substantial compliance with Rule 419-A. Secondly, it was contended that even if the interception had not taken place strictly in conformity with the said Rules, that did not affect the admissibility of the communication so recorded. It was contended that the illegality or the irregularity in the interception did not affect its admissibility in evidence inasmuch as there was no specific embargo against the admissibility in the said Act or the Rules. The Supreme Court held that irrespective of the merit with regard to the first contention, there was force in the alternative contention. Clearly, the Supreme Court accepted the contention that even if the interception had not taken place in strict conformity with Rule 419-A, that did not affect the admissibility of the communications so recorded. The Supreme Court clearly observed as under:-

153. The legality and admissibility of intercepted telephone calls arises in the context of telephone conversation between Shaukat and his wife Afsan Guru on 14th December at 2009 hrs and the conversation between Gilani and his brother Shah Faizal on the same day at 1222 hrs. Interception of communication is provided for by the provisions contained in Chapter V of POTO/POTA which contains Sections 36 to 48. The proviso to Section 45 lays down the pre-requisite conditions for admitting the evidence collected against the accused through the interception of wire, electronic or oral communication. Chapter V governing the procedure for interception and admission of the intercepted communications presupposes that there is an investigation of a terrorist act under POTA which has been set in motion. It is not in dispute that the procedural requirements of Chapter V have not been complied with when such interceptions took place on 14-12-2001. But, as already noticed, on the crucial date on which interception took place (i.e. 14th December), no offence under POTA was included whether in the FIR or in any other contemporaneous documents. We have already held that the non-inclusion of the POTO offences even at the threshold of investigation cannot be legally faulted and that such non-inclusion was not deliberate. The admissibility or the evidentiary status of the two intercepted conversations should, therefore, be judged de hors the provisions of POTO/POTA. On the relevant day, the interception of messages was governed by Section 5(2) of the Telegraph Act, 1885 read with Rule 419-A of the Telegraph Rules, 1951. The substantive power of interception by the Government or the authorised officer is conferred by Section 5. The modalities and procedure for interception is governed by the said Rules. It is contended by the learned Senior Counsel appearing for the two accused Shaukat and Gilani, that even Rule 419-A, has not been complied with in the instant case, and, therefore, the tape-recorded conversation obtained by such interception cannot be utilised by the prosecution to incriminate the said accused. It is the contention of the learned counsel for the State Mr. Gopal Subramaniam, that there was substantial compliance with Rule

419-A and, in any case, even if the interception did not take place in strict conformity with the Rule, that does not affect the admissibility of the communications so recorded. In other words, his submission is that the illegality or irregularity in the interception does not affect its admissibility in evidence there being no specific embargo against the admissibility in the Telegraph Act or in the Rules. Irrespective of the merit in the first contention of Mr. Gopal Subramaniam, we find force in the alternative contention advanced by him.

154. In regard to the first aspect, two infirmities are pointed out in the relevant orders authorising and confirming the interception in respect of specified telephone numbers. It is not shown by the prosecution that the Joint Director, Intelligence Bureau who authorised the interception, holds the rank of Joint Secretary to the Government of India. Secondly, the confirmation orders passed by the Home Secretary (contained in Vol. 7 of the lower court record, p. 447, etc.) would indicate that the confirmation was prospective. We are distressed to note that the confirmation orders should be passed by a senior officer of the Government of India in such a careless manner, that too, in an important case of this nature. However, these deficiencies or inadequacies do not, in our view, preclude the admission of intercepted telephonic communication in evidence. It is to be noted that unlike the proviso to Section 45 of POTA, Section 5(2) of the Telegraph Act or Rule 419-A does not deal with any rule of evidence. The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility. The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained is no longer res integra in view of the decision of this Court in R.M. Malkani Vs. State of Maharashtra, . In that case, the Court clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae u/s 7 of the Evidence Act. ...

43. It is apparent that the Supreme Court categorically held that the question of admissibility of a tape recorded conversation illegally collected or obtained was no longer in issue in view of the decision in R.M. Malkani (supra), where the Supreme Court held that a contemporaneous tape record of a relevant conversation was a relevant fact and was admissible. The Supreme Court clearly held that the non-compliance or inadequate compliance with the provisions of the said Telegraph Act did not per se affect the admissibility.

44. 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. In view of the foregoing discussion, there is no merit in the present petition and the same is dismissed with costs. We make it clear that any observations made by us in this decision with regard to the merits of the matter shall not be taken into account by the learned Special Judge while conducting the trial in CC No.

12/2004 arising out of RC No. AC 0001/2003.