

(2021) 12 BOM CK 0078

In the Bombay High Court

Case No : Criminal Writ Petition No. 1901 Of 2021

Rashmi Uday Shukla

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 15-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Information Technology Act, 2000 — Section 43, 43(b), 43B, 66, 77B
Indian Telegraph Act, 1885 — Section 30
Official Secrets Act, 1923 — Section 5, 5(1)(a)
Code Of Criminal Procedure, 1973 — Section 91, 160, 482
Indian Penal Code, 1860 — Section 24, 25, 77B, 120B
Prevention Of Corruption Act, 1988 — Section 7
Right To Information Act, 2005 — Section 2, 2(h), 3, 5, 5(2), 6, 7, 8, 8(1), 8(1)(a), 8(2), 8(3), 8(e), 8(h), 8(j), 9, 22, 24, 31

Citation : (2021) 12 BOM CK 0078

Hon'ble Judges : Nitin Jamdar, J;Sarang V. Kotwal J

Bench : Division Bench

Advocate : Mahesh Jethmalani, Gunjan Mangla, Darius J. Khambata, J.P. Yagnik, Pheroze Mehta, Tushar Hathiramani, Anil Singh, Aditya Thakkar, D.P. Singh, Smita Thakur, Pranav Thakur

Final Decision : Disposed Of

Judgement

Nitin Jamdar, J

1. Rule. Rule made returnable forthwith. Respondents waive service. Taken for disposal.

2. On 26 March 2021, the Respondent No.2-Assistant Commissioner of Police filed a First Information Report at the Cyber Crime Police Station, Mumbai, with the allegation that on 23 March 2021, Mr. Devendra Fadnavis, the Leader of the Opposition, in an interview on a television news channel produced a copy of the secret/confidential letter addressed by Ms. Rashmi Shukla, the Commissioner State Intelligence Department to the Director-General of Police. It was also

alleged that the Leader of the Opposition also showed a pen drive containing sensitive and confidential material concerning the police force in Maharashtra obtained by State Intelligence Department through interception. Crime C.R. No.02 of 2021 was registered with Cyber Cell, BKC, Bandra (East) against unknown persons on the allegation that confidential material received through legal interception was illegally obtained and supplied to an unauthorised person, thereby committing offences under the Indian Telegraph Act, 1885, Information Technology Act, 2000 and, the Official Secrets Act, 1923.

3. Ms. Rashmi Shukla, who was Commissioner of the State Intelligence Department at the relevant time, has filed this petition for quashing the C.R. No.02 of 2021. In the alternative, the Petitioner prays that the investigation pursuant C.R. No.02 of 2021 be transferred to the Central Bureau of Investigation.

4. We have heard Mr. Mahesh Jethmalani, the learned Senior Advocate, for the Petitioner and Mr. Darius Khambata, the learned Senior Advocate for the Respondent- State of Maharashtra and Mr. Anil Singh, the learned Senior Additional Solicitor General, for the Respondent - Central Bureau of Investigation.

5. The impugned FIR bearing No. 2 of 2021 does not name the Petitioner. Upon a query as regards the stand of the Respondent - State on this issue, the learned Senior Advocate for the Respondent State, on instructions, informed that there is material against the Petitioner and no statement can be made that the Petitioner will not be named as an accused. The learned Senior Advocate for the State sought to produce some material in that regard in a sealed envelope for the perusal of the Court alone. Since the material could be against the Petitioner and we may be required to render a finding based on the same, we did not the sealed envelope on record. In light of this position, the learned Counsel for the parties have proceeded to address us in the Petition.

6. The Petitioner is an officer of the Indian Police Service, appointed in the year 1988. The Petitioner worked at various places in the State of Maharashtra. On 11 October 2018, the Petitioner was appointed as the Commissioner of State Intelligence Department (SID). On 25 August 2020, the Petitioner addressed a communication to the Director-General of Police, State of Maharashtra. In this communication, the Petitioner stated that numerous complaints allege a network of brokers with political connections who are engaging in the desirous posting of police officers in the State in exchange for large sums of money. In order to ascertain the veracity of these reports, phone numbers of those involved in nefarious activities were placed under telephone surveillance upon taking necessary permissions. It was stated that there is merit in the complaints, and police officers ranging from inspectors to several high ranking IPS officers are in contact with undesirable individuals. The Petitioner annexed a factual report substantiating the findings and recommended a high-level enquiry to be undertaken and the matter be brought to the notice of the Chief Minister of Maharashtra. Upon receipt of this communication, Mr. S.K. Jaiswal, who was the

Director-General of Police of Maharashtra (DGP), wrote to Mr. Sitaram Kunte, who was the Additional Secretary (Home), the State of Maharashtra, on 26 August 2020, informing him that the report has been received from the Commissioner SID and forwarded the same to him with a recommendation for an enquiry. We are informed that Mr. Sitaram Kunte wrote to the Director-General to be cautious and proceed based on cogent material alone, resort to counselling, etc. According to the Petitioner, the Petitioner had also informed the Hon'ble Chief Minister on 11 August 2020 about the information received through the interception.

7. On 2 September 2020, the Petitioner was transferred from the post of Commissioner of State Intelligence Department to the post of Director General of Civil Defense, the State of Maharashtra.

8. On 23 March 2021, the Leader of Opposition Mr. Devendra Fadnavis during an interview, referred to the communications and the report of the Petitioner. After the Leader of Opposition held the press interview, the Chief Secretary (Mr. Sitaram Kunte) prepared a report regarding the allegations made by the Leader of Opposition referring to the report prepared by the Petitioner. The Chief Secretary sought to record the factual position regarding the transfer and the action taken. It was stated that except in some transactions in the year 2020, all transfers were made as per the recommendation of Police Establishment Boards, and all recommendations were unanimously made. This report was prepared on 25 March 2021.

9. On 26 March 2021, the impugned FIR came to be filed by Respondent No.2, Assistant Commissioner of Police, with the Cyber Crime Police Station, Mumbai. The gist of the FIR is as follows. On 23 March 2021, while Respondent No.2 was in the office, at about 11.00 hours in the morning, he watched the live interview of the Opposition Leader Mr. Devendra Fadnavis on the Marathi News Channel of ABP Majha. He saw that Mr. Devendra Fadnavis showed the copy of the secret/confidential letter sent to the then Director General of Police Mr. Subodh Jaiswal and read over the contents the same, in which there was secret information about transfers of Police Officers. Similarly, he showed one pen drive and with around 6.0 G.B. data in the same, which, according to him, contained the conversations between senior police officers and some private persons obtained by State Intelligence Department through interception. After the press conference, the said letter read over by Mr. Devendra Fadnavis was telecasted and circulated on different social media. The Informant stated that the letter concerned with the confidential information along with the technical data/information gathered by Informant and his colleagues from time to time as per the order of the then State Intelligence Department about the general transfers of the year 2020 through legal interception, which with a detailed report then Commissioner had given to the then Director General of Police. The Leader of Opposition read over secret/confidential letters and correspondence in a Press Conference, and the data of confidential interception obtained lawfully could also

be with the Leader of Opposition. Thus some unknown person illegally obtained the confidential letter written by Commissioner Smt. Rashmi Shukla to the then Director General of Police, and the document and the information received through legal interception were supplied to the Leader of Opposition. The FIR was filed under Section 43B and Section 66 of the Information Technology Act, 2000, Section 30 of the Indian Telegraph Act, 1885 and Section 5 of the Official Secrets Act, 1923.

10. After the FIR in the present case was filed, a summons was issued to the Petitioner on 26 April 2021 under Section 160 of Cr.P.C. summoning the Petitioner to remain present on 28 April 2021. The Petitioner replied on 27 April 2021 and informed Respondent No.1 about her inability to remain present due to the situation brought about by the Covid-19 pandemic. After that, Petitioner was called to attend as per her convenience from 29 April 2021 to 4 May 2021. On 5 May 2021, the Petitioner filed the present writ petition.

11. The Deputy Commissioner of Police, on behalf of the Respondent - State, has filed a reply denying the contentions of the Petitioner. It is stated that the information received pursuant to surveillance constitutes information contemplated under Section 5 of the Official Secret Act, and leakage of such information is an offence that must be investigated. It is contended that the only question before the Court is whether a cognisable offence is made out. The reply deals with the assertions in the petition parawise, and it is stated that the determination of the person who had control over the documents and who leaked the information is a matter of investigation.

12. The Petitioner has filed a rejoinder reiterating the contentions regarding malafides and that no offence is made out. It is stated that the surveillance and submission of the report were as per law.

13. Before we proceed further, a reference to other judicial proceedings will be necessary to keep the matter in perspective. On 20 March 2021, Mr. Param Bir Singh, the then Commissioner, Mumbai, wrote to the Hon'ble Chief Minister making allegations against Mr. Anil Deshmukh, the Home Minister, Maharashtra that Mr. Anil Deshmukh had abused his position for monetary gains. One Dr. Patil filed a complaint with Malabar Hill Police Station based on the letter of Mr. Param Bir Singh making allegations against Mr. Anil Deshmukh. Mr. Param Bir Singh filed a Writ Petition (Civil) No. 385 of 2021 in the Supreme Court for a direction to the CBI to conduct a fair and impartial investigation in the alleged malpractices of Mr. Anil Deshmukh. The Petition was disposed of as withdrawn. After that Mr. Param Bir Singh filed a Public Interest Litigation No. 6 of 2021 in this Court for investigation in the alleged malpractices committed by Mr. Anil Deshmukh. Dr. Patil filed Writ Petition No.1541 of 2021. Two more Public Interest Litigations were filed seeking independent investigation. The Division Bench of this Court (Chief Justice and G.S. Kulkarni, J.) disposed of the bunch of petitions by order dated 5 April 2021. The Division Bench directed the Director of CBI to carry out a preliminary enquiry and take further courses available in law. Mr. Anil

Deshmukh resigned from the post of Home Minister. The preliminary enquiry was conducted and FIR No. R.C. 2232021A003 of 2021 on 21 April 2021 at AC-B, CBI, New Delhi for offences punishable under Section 120-B of Indian Penal Code, 1960 and under Section 7 of the Prevention of Corruption Act, 1988 (as amended) by amendment Act of 2018 against Mr. Anil Deshmukh and others. The fifth unnumbered paragraph of the FIR concerned with the issue of transfer of Police Officers mentioned in the report of the Petitioner. The State of Maharashtra filed a Writ Petition No.1903 of 2021 seeking to challenge un-numbered paragraph 5 (also 4) that the investigation as regard this area in the FIR was beyond the scope of the order passed on 5 April 2021. The Division Bench (S.S. Shinde and N.J. Jamadar, JJ.) opined that the un-numbered paragraph 5 would fall within the ambit of the order dated 5 April 2021 it was linked with the allegation of official position by the then Home Minister. The Division Bench however clarified that the investigation in FIR filed on 21 April 2021 could not be regarding all transfers of police officers as per the report of the Petitioner but only regarding undue influence exercised by Mr. Anil Deshmukh, the ex-Home Minister of Maharashtra. Division Bench dismissed the writ petition 1903 of 2021 by order dated 22 July 2021. The Division Bench clarified that the present writ petition, which was then pending, will be decided on its own merits. The State of Maharashtra challenged the order dated 22 July 2021 in the Supreme Court by filing a Special Leave Petition, which was dismissed.

14. The Petitioner has sought the following prayers in the Petition:-

"(a) That this Hon'ble Court may be pleased to quash and set aside the FIR bearing C.R. No. 02 of 2021 registered with Respondent No.1; and

(b) That in the alternative this Hon'ble Court be pleased to transfer FIR bearing C.R. No 02 of 2021 and investigation pursuant thereto to Respondent No.3."

15. We will first consider the prayer for quashing of the FIR and, thereafter, the alternate prayer for transfer of investigation.

16. Though the Petitioner has made wide-ranging arguments, we have to keep in mind the scope of the matter before us. There are various stages in a criminal proceeding, and the degree of scrutiny by the court at different stages would be different. We are called upon to quash of the FIR when the investigation is at a preliminary stage. Our discussion and observations in this decision are in the context of this prayer made.

17. The Petitioner has invoked the provisions of Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure for grant of this relief. The law regarding the exercise of the powers under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure to consider these prayers has been settled by a series of decisions of the Supreme Court, including the leading decision in the case of State of Haryana v/s. Bhajan Lal AIR 1992 SC 604 and the latest decision of the Supreme Court in M/s. Neeharika Infrastructure Pvt. Ltd. v/s. State of Maharashtra AIR 2021 SC 1918

where review of the earlier case law on the subject was taken. In the case of Bhajan Lal, the Supreme Court identified and referred to certain contingencies where the FIR and complaint could be quashed. The law laid down in the case of Bhajan Lal was reiterated by the Supreme Court in various decisions and is applied in many cases by the High Courts. The common thread that runs through these decisions is that while the power of the High Court under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure to quash the FIR is available, its exercise should be in exceptional circumstances. The balance between the power of the High Court and the self-imposed restraint to be exercised is highlighted in the decision of Neeharika, where after a detailed review of the law on the subject, the Bench of three learned Judges have laid down the propositions of law. The principles affirmed in the decision of Neeharika, which are relevant to the case at hand, are as follows. The primary position is that the police have a statutory right and duty to investigate a cognisable offence. The courts would not ordinarily obstruct any investigation into the cognisable offences. The power of quashing should be exercised sparingly and with circumspection. The exercise of this power to be in the 'rarest of rare' cases, clarified as not to be confused with the term used in the death penalty context. Save in exceptional cases where non-interference would result in the miscarriage of justice; the court should not interfere at the stage of investigation of offences and scuttle the criminal proceedings at the initial stage. When a prayer is made to quash the FIR because the FIR does not disclose any cognisable offence, it must be borne in mind that an FIR is not an encyclopaedia that must disclose all the details. While considering the prayer for quashing the FIR, the court has only to examine whether the accusations in the FIR disclose the commission of a cognisable offence or not. If they are present, the court has to permit the investigating agency to investigate the allegations in the FIR.

18. Therefore, the question before us is whether the Petitioner has made out an exceptional case to quash the FIR in light of the legal position as above.

19. The first ground agitated by the petitioner to quash the FIR is that the allegations made in the first information report, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused.

20. The impugned FIR is lodged under section 43B and Section 66 of the Information Technology Act, 2000 (the IT Act); Section 30 of the Indian Telegraph Act, 1885 (the Telegraph Act); and Section 5 of the Official Secrets Act, 1923 (the Official Secrets Act). To refer again to the FIR, it states that on 23 March 2021, during the live interview on a Marathi news channel, the Leader of opposition, Mr. Devendra Fadnavis produced a copy of the confidential letter written by the Petitioner dated 25 August 2020 to the Director-General of Police. The Leader of the Opposition read out the contents. The Leader of the Opposition also showed a pen drive that contained around 6 G.B. of data of conversation between Senior Police Officer and private person which the State Intelligence

Department had obtained. The interview was given wide publicity. According to the FIR, that unknown persons have leaked the confidential letters and material sent by the Petitioner to the then Director General of Police by intercepting it and this being classified information, the offence under Section 30 of the Indian Telegraph Act read with Section 49(b), and 66 of the Information Technology Act and Section 5 of the Official Secrets Act are attracted.

21. Section 30 of the Indian Telegraph Act, which is referred in the FIR, reads thus:-

" Section 30. Retaining a message delivered by mistake.-

If any person fraudulently retains, or wilfully secretes, makes away with or detains a message which ought to have been delivered to some other person, or, being required by a telegraph officer to deliver up any such message, neglects or refuses to do so, he shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both."

Section 30 makes fraudulent retention of a message which is to be delivered to some other person an offence. The FIR has also applied Sections 43, 66 of the Information Technology Act. Section 43 reads thus:-

"Section 43 [Penalty and compensation] for damage to computer, computer system, etc. -

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network,-

(a) accesses or secures access to such computer, computer system or computer network [or computer resource];

(b) downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) damages or causes to be damaged any computer, computer system or computer network, data, computer database or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

(f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;

(j) steal, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

he shall be liable to pay damages by way of compensation to the person so affected. Explanation.-For the purposes of this section,-

(i) "computer contaminant" means any set of computer instructions that are designed-

(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or

(b) by any means to usurp the normal operation of the computer, computer system, or computer network;

(ii) "computer database" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;

(iii) "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;

(iv) "damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means;

(v) "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form."

Unauthorised downloading or copying, or extracting database or information data without the permission of the owner is an offence which is punishable under Section 66 of the Information Technology Act, which reads thus:-

"Section 66. Computer-related offences.

-If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation. -For the purposes of this section,-

(a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860);

(b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code (45 of 1860)."

Section 77-B makes the offences under this Act punishable with imprisonment of three years and cognisable.

22. The learned Counsel for the Petitioner contended that the offence under Section 43B and Section 66 of the IT Act and Section 30 of the Telegraph Act are not made out by the bare perusal of the FIR. It is contended that the Petitioner did not have access to the computer at all, and there is no allegation of downloading the information. The Petitioner contends that it is only an inference that the information was given. The Respondent - State contends that Section 43B of the IT Act, which deals with downloading and taking copies of the material unauthorisedly, by virtue of Section 77-B and Section 66 of the IT Act, is a cognisable offence. Even under Section 30 of the Telegraph Act retaining information without authority is an offence. The Respondent - State contends when the investigation is still going on as to how classified information was unauthorisedly leaked, it will be premature to hold that no offence under these sections is made out and the Court must permit the police to carry on the investigation.

23. As per the FIR, the pen drive shown by the Leader of the Opposition was not obtained with the owner's permission. Whether and how the confidential letter and the pen drive, which allegedly contained confidential information was dealt with without permission, is a matter of investigation. It will not be possible to render a finding that this FIR does not disclose the commission of any cognisable offence without going into the merits and demerits of the allegations. We will refrain from giving final findings on the merits of the case since the entire spectrum of facts is not before us and when the investigation is still ongoing. Therefore, at this stage, when Respondent Nos. 1 and 2 are in the process of investigation as to how the pen drive containing various confidential material was fraudulently retained, unauthorizedly downloaded and copied, it cannot be said that the facts stated in the FIR do not constitute any cognisable offence under Section 30 of the Indian Telegraph Act and Section 66 and 77-B of the Information Technology Act.

24. The learned Counsel for the parties advanced contentions at length regarding Section 5 of the Official Secrets Act. The primary contention of the Petitioner is that the Petitioner has nothing to do with the incident narrated in the FIR, and there is no material against the Petitioner at all in respect of the incident narrated therein. The alternate submission is that even assuming for the sake of

argument that the Petitioner supplied the pen drive and the material to the Leader of the Opposition, even then, no offence is made out under Section 5 of the Official Secrets Act.

25. Section 5 deals with wrongful communications of information and reads thus:-

"Section 5. Wrongful communication, etc., of information .

- (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, [or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act,] or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been, employed under a person who holds or has held such an office or contract-

(a) willfully communicates the code or password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a court of Justice or a person to whom it is, in the interest of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or password or information, he shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or password or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, password, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this section.

(3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, to any foreign power or in any other

manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.

(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

(emphasis supplied)

The provision states that if any person having in his possession or control any secret official information which has been entrusted in confidence by a person who has been obtained owing to his position as a person holding office under the Government, willfully communicates the information to any person other than the one to whom he is authorised to communicate, such person will be guilty of an offence which is punishable for a term which may extend to three years.

26. The Petition annexes the letter written by the Petitioner as a Commissioner of State Intelligence Department to the Director-General of Police. The letter is marked as Top Secret. The report annexed is also marked as Top Secret. The letter written by the Director-General of Police Mr. S.K. Jaiswal to Mr. Sitaram Kunte, Additional Chief Secretary (Home), is also marked as Top Secret. The FIR states that the Leader of Opposition in the live telecast interview showed and read out the Top Secret letter written by the Petitioner to the Director-General of Police and referred to the pen drive recording the conversation between the police officer and some private persons. Therefore, from the contents of the FIR and the annexures to the Petition, it is clear that what was shown and referred to is confidential and top-secret information. These documents attract the provisions of Section 5 of the Official Secrets Act. In that context, the provisions of the Official Secrets Act will have to be noted.

27. We have not been shown any statutory provision that the Leader of Opposition can be termed as the authority contemplated under Section 5 of the Official Secrets Act by virtue of the post. As per the FIR, the document which admittedly marked confidential falling within the purview of Section 5 of the Official Secrets Act was found with the person not contemplated under Section 5. Therefore it cannot be said at this stage that Section 5 of the Official Secrets Act is not attracted at all in the FIR.

28. The Petitioner contends that there is no evidence that the Petitioner was the source or did the Petitioner delivered any document to the Leader of Opposition. According to the Petitioner, the Petitioner communicated to the Director-General of Police through the official channel, who further communicated it to the Additional Chief Secretary (Home) through the official channel, and the Petitioner had supplied two pen drives. The Petitioner wrote the letter to the Director-General of Police on 25 August 2020. The Petitioner was transferred on 2 September 2020 and did not have any document or pen drive in possession. According to the Petitioner, when the Petitioner was questioned on 19 and 20 May 2021, nothing was put to the Petitioner in this regard. Petitioner was not

confronted with the queries of removing the pen drive or the data. The Petitioner left the Maharashtra for deputation to Central Reserved Police Force on 11 February 2021, and there is absolutely no evidence against the Petitioner. The Petitioner submits that thus there is no case made out against the Petitioner in respect of the offence under Section 5 of the Official Secrets Act.

29. To a specific query to the Respondent-State, it was informed to us that in the ongoing investigation, the Investigating Officer has found that the confidential information was copied on the three pen drives in the office of the State Investigation Department. The information was copied on the three pen drives as per the instructions of the Petitioner. After this secret information was copied on three pen drives, they were handed over to the Petitioner. Two of the pen drives were seized during the investigation. According to the Investigating Officer, the third pen drive and the official document is the one shown by the Leader of the Opposition during his interview. The State has also informed that the third pen drive and the document appear to have been handed over by the Leader of the opposition to the Ministry of Home Affairs, New Delhi. It is informed that the Investigating Officer has requested the Ministry of Home Affairs for the document and the pen drive on 3 May 2021, 12 May 2021, 7 June 2021, 23 September 2021 without any response from the Ministry of Home Affairs.

30. During the hearing, the learned Counsel for the State placed on record a copy of the Misc. Application No. 1856 of 2021 was filed in the Court of Additional Chief Metropolitan Magistrate,

37 Court, Esplanade, Mumbai. This application filed by the Investigation Officer of the Respondent - State prays for a direction to the Ministry of Home Affairs to provide the documents and the pen drive handed over by the Leader of Opposition for the investigation. The Petitioner's statement recorded under Section 160 of the Code of Criminal Procedure placed on record. The Petitioner was specifically asked by the Investigating Officer regarding the copies of the confidential report prepared in August 2020, wherein the Petitioner had replied that there were only two pen drives prepared. Therefore, the Investigating Agency is investigating how the pen drives, which were not two but three and the documents, went out of the official custody. Since the Investigating Agency is proceeding to investigate on these lines, we cannot hold at this stage reading the FIR no offence under Section 5 of the Official Secrets Act is made out, and no investigation is necessary.

31. As an alternative submission, the Petitioner submitted that even assuming that the Petitioner handed over a copy of the document and the pen drive to the Leader of the Opposition, no offence is made out under any of the provisions of the enactments referred to in the FIR. The Petitioner contends that the official document is secret only if its disclosure is prejudicial to the public interest. The Petitioner relies on Section 8(2) of the Right to Information Act, 2005 (RTI Act), which states that if the public interest in disclosure outweighs the harm to the protected interests, notwithstanding anything contained in the Official Secrets

Act, access to the same may be allowed. The Petitioner relies on the decision of the Delhi High Court in the case of Shankar Adawal v/s. Central Bureau of Investigation 2019 SCC Online Delhi 9434 to contend that merely because the document is marked secret, its disclosure does not amount to an offence if it is not prejudicial to the public interest. The Petitioner also relies on the decision of the Supreme Court in the case of Yashwant Sinha & Ors. v/s. Central Bureau of Investigation 2019(6) SCC 1 to contend that in the case such as the one at hand where the surveillance data showed a large amount of corruption, and it was in the public interest that it comes into the public domain, then the Official Secrets Act cannot be invoked against the Petitioner. It is contended that protecting the persons in official positions from corruption cannot be said to be in the public interest. It was also contended that the Supreme Court had taken a note of the report of the Petitioner and the fact that it was in the public domain. The gist of the Petitioner's argument is thus that in assuming the Petitioner handed over the confidential document to the Leader of the opposition, the Petitioner intended to expose the corruption in the Police Department of the State and that action being in the public interest it cannot be considered to be an offence under Official Secrets Act in the light of the provisions of the RTI Act and the decision of the Supreme Court in the case of Yashwant Sinha.

32. The Respondent-State has argued that Section 5 of the Official Secrets Act is squarely applicable and that the petitioner is misconstruing the provisions of the RTI Act. The Petitioner was head of State Intelligence. The pen drives were in Petitioners custody by virtue of Petitioner's post. Section 2(h) of RTI Act defines "public authority". Section 3 thereof generally states about Right to Information. Section 8(1) provides for exemptions where Section 8(3) only speaks about public authority and not about any person. Section 8(2) does not wipe out the Official Secrets Act. It is only for the public authority to give information out in the public domain that too after following the procedure, applications are made under the Right to Information Act. The decision on the existence of public interest is of the public authority and not any and everyone in the organisation. The decision in the case of Central Public Information Officer, SC of India vs Subhash Chandra Agarwal (2020) 5 SCC 481 of the Constitution Bench and of the Supreme Court in Chief Information Commissioner vs High Court of Gujarat & Anr. (2020) 4 SCC 702 clearly lay down that Right to Information Act does not override the Official Secrets Act. It is not the law that anyone can give away confidential information protected under Official Secrets Act. If it is so as it would lead to anarchy. On these grounds, the Respondent-State opposes the submissions of the Petitioner.

33. Since the Petitioner has advanced a contention that no offence is made out at all, we are called upon to decide this question of law. However, we have to be mindful that we are not considering a trial and only dealing with an absolute proposition that no offence can be considered to be made out by reading of the FIR.

34. The RTI Act was enacted in the year 2005 to set out a practical regime for the right to information for citizens to secure access to information under the control of public authorities. Public Authority is defined under Section 2 to mean any authority or body or institution of self-government established or constituted under the Constitution, by any other law made by Parliament or State Legislature or established by notification by the appropriate Government. It includes a body owned, controlled or substantially financed and non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government. The 'Public Authority' has to designate a Public Information Officers under Section 5 of the RTI Act. Section 5 states that every Public Authority shall, within the time stipulated, designate Public Information Officers to provide information to persons requesting the information under this Act. Section 5(2) contemplates setting up an appellate authority. The Public Information Officer is empowered to deal with requests from persons seeking information and render reasonable assistance to the persons seeking such information. Section 6 of the RTI Act Lays down the procedure for requesting information. As per this provision, a person who desires to obtain any information under this Act has to make a request in writing or through electronic means with accompanying such fee as may be prescribed to the concerned Public Information Officer. Under Section 7 of the Act, the concerned Public Information Officer either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9 as expeditiously as possible. Section 8 of the Act deals with exemption from disclosure of information, and it reads thus:-

8. Exemption from disclosure of information.- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with subsection (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of subsection (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

Section 8, therefore, lays down exemptions from disclosure of information. Section 8(e) is an exemption regarding the information available to a person in his fiduciary relationship unless the competent authority is satisfied that the larger public interest warrants the disclosure. Section 8(h) relates to information that would impede the investigation or apprehension, or prosecution of offenders. Section 8(j) relates to personal information which can be released to the authorities stipulated therein is satisfied that the public interest justifies the disclosure. Section 8(2) that notwithstanding anything in the Official Secrets Act

nor any of the exemptions permissible in accordance with 8(1) of RTI Act, a 'public authority' may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

35. The Petitioner has relied upon the decision of the Supreme Court in the case of Yashwant Sinha, which was rendered in a review petition. Three documents annexed to the review petition which, as per the preliminary objection raised by the Attorney General, were unauthorizedly removed from the office of the Ministry of Defence, Government of India. It was contended by the Attorney General that the review petitioner could not rely on the provisions of Section 8 of the RTI Act. The three documents which were the subject matter of the controversy were published in a newspaper, and one of the documents was published by an online media publication. The Supreme Court in that context referred to the competing rights and observed in paragraphs 10 and 11 thus:-

"10. Insofar as the Right to Information Act is concerned in Chief Information Commissioner vs. State of Manipur (2011) 15 SCC 1 this Court had occasion to observe the object and purpose behind the enactment of the Act in the following terms:

"The preamble (of the Right to Information Act, 2005) would obviously show that the Act is based on the concept of an open society. As its preamble shows, the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that the Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal."

11. Section 8(2) of the Right to Information Act (already extracted) contemplates that notwithstanding anything in the Official Secrets Act and the exemptions permissible under sub section (1) of Section 8, a public authority would be justified in allowing access to information, if on proper balancing, public interest in disclosure outweighs the harm sought to be protected. When the documents in question are already in the public domain, we do not see how the protection under Section 8(1)(a) of the Act would serve public interest."

In the concurring opinion rendered by K.M. Joseph J in paragraphs, 37 and 38 also referred to Section 22 and 24 of the RTI Act along with Section 8. Section 8(2) of the Act is described as a legal revolution wherein even Official Secrets Act would not stand in the way for access to information.

36. However, as rightly pointed out by the learned Counsel for the Respondent - State that the Supreme Court in Yashwant Sinha has not laid down an absolute proposition of law that the breach of Section 5 of Official Secrets of Act has

ceased to be an offence. The legal position emphasised in this decision is that Section 8(2) of the RTI Act will operate if it is in the public interest to do so. However, it is also emphasised that the information is not to be given for mere asking, and the applicant must establish that withholding such information will result in greater harm. In the case of Shankar Advawal, the Delhi High Court, as a finding of fact, found that the information therein was not protected under the Official Secrets Act. Therefore, the said decision is not relevant to the matter at hand.

37. In the case of the Chief Information Commissioner, the Bench of three learned Judges of the Supreme Court observed that Section 31 of the RTI Act repeals only the Freedom of Information Act, 2002 and not other laws. If the legislature intended to repeal any other Acts or laws that deal with disseminating information to an applicant, then the RTI Act would have specified so. In the absence of any provision to this effect, the provisions of the RTI Act cannot be interpreted to attribute a meaning to them which was not intended by the legislature. Thus the breach of Section 5 of the Official Secrets Act continues to be an offence.

38. The Constitution Bench, in the case of Central Public Information Officer, considered the provisions of RTI Act and the Official Secrets Act in a case that arose from release of information relating to the judiciary wherein the larger conspectus of independence of the judiciary was under consideration. For the matter at hand, the observation of the Constitution Bench in paragraph 35 are relevant:-

"35. Sub-section (2) to Section 8 states that notwithstanding anything contained in the Official Secrets Act, 1923 or any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests. The disclosure under Section 8(2) by the public authority is not a mandate or compulsion but is in the form of discretionary disclosure. Section 8(2) acknowledges and empowers the public authority to lawfully disclose information held by them despite the exemptions under sub-section (1) to Section 8 if the public authority is of the opinion that the larger public interest warrants disclosure. Such disclosure can be made notwithstanding the provisions of the Official Secrets Act. Section 8(2) does not create a vested or justiciable right that the citizens can enforce by an application before the PIO seeking information under the RIT Act. PIO is under no duty to disclose information covered by exemptions under Section 8(1) of the RTI Act. Once the PIO comes to the conclusion that any of the exemption clauses is applicable, the PIO cannot pass an order directing disclosure under Section 8(2) of the RTI Act as this discretionary power is exclusively vested with the public authority."

Thus, the Constitution Bench has referred to two essential ingredients of Section 8(2). Firstly, it is not a mandate but a form of voluntary disclosure. It permits the public authority to lawfully disclose confidential information if the authority is of

the opinion that larger public interest requires disclosure. However, Section 8(2) does not create a vested or justiciable right that citizens can enforce. Secondly, reference is to the "public authority", and not any person dehors the provisions of the Act. It is in this context that Section 8 needs to be seen. This Section provides for exemption from disclosure of information. It states that notwithstanding anything contained in the Act, there is be no obligation to give any citizen the information of the categories listed in the Section. Section 8(2) does not envisage that anyone and everyone can make confidential information protected under the Official Secrets Act available to the general public. Section 8(2) refers to a 'Public Authority' and the officers specifically designated by the Public Authority under the Act. The Petitioner admittedly is not the authority under RTI Act; neither information in question is routed through the provisions of the RTI Act.

39. Further under Section 8(2) of the RTI Act, the Public Authority is required to deliberate whether disclosure would outweigh the harm of protected interest. These two competing objectives will have to be balanced by the 'Public Authority'. Section 8(2) of the RTI Act also confers discretion on the 'Public Authority'. As defined under Section 2(h), each of these Public Authorities under the RTI Act have an infrastructure set up where the official information is made available to the public in a designed manner. The determination to make information protected under Section 5 of the Official Secrets Act available to the public has to be the decision within the scheme of the RTI Act wherein competing interests have to be evaluated on the criterion of the public interest. It is not permissible for any and all persons to nullify the official Secrets Act under the assumption that it would be in the public interest to do so. The notion of public interest may vary from individual to individual. That determination of existence public interest is left under section 8(2) of the RTI Act to the authorised officer of the Public Authority under the RTI Act. Giving a free charter to leak confidential material at will is not envisaged under Section 8(2) of the Act. The Petitioner, thus, cannot take any assistance from section 8(2) of the RTI and the argument of the Petitioner based on this provision is rejected.

40. As stated earlier, we have not been shown any provision of law that the Leader of Opposition would be covered under Section 5(1)(a) of the Official Secrets Act. The decisions of the Supreme Court relied upon by the Petitioner in the case of K. Anbazhagan v/s. Superintendent of Police and Ors. 2004(3) SCC 767 and E. Sivakumar v/s. Union of India and Ors. Spl. Leave Petition (Civ.) (Diary No. 17180/2019) dtd 18 May 2018 does not lay down this proposition. These decisions primarily underscore the importance of the opposition members as watchdogs in a functional democracy. This is an entirely different concept. These decisions do not lay down a proposition of law that leaking confidential information to a leader of opposition by anyone in official custody of the confidential information would be saved under RTI Act and will not infringe the Official Secrets Act. In any case, the Petitioner has not specifically contended that the Petitioner has given the official secret documents to the Leader of

Opposition, and it is only a hypothetical submission. There is no categorical stand before us that the Petitioner wanted to and acted in the public interest in handing over the official secret document and the pen drive containing the material from interceptions to the Leader of Opposition as the Petitioner believed that it was in public interest do so.

41. The learned Counsel for the Respondent - State submitted that even otherwise the assumption of the Petitioner that handing over letter and pen drive would be in the public interest is a fallacy. It is contended that the Petitioner's communication and the report involving transcript of information, at the stage at which the report was leaked, would alert those who are involved in the same and secondly, it will cause a stigma on all transfers and the functioning of the entire police machinery in the State and demoralise police force irrespective whether guilty or otherwise. This, according to the Respondent-State, is not in the public interest. It was also contended that the Petitioner would be then not acting as a crusader but as a politician.

42. To reiterate, the scope of the inquiry before us is only to consider whether the FIR can be quashed. Section 8(2) of the RTI Act has not obliterated Section 5 of the Official Secrets Act nor has made it inoperative. The FIR does not disclose that methodology under Section 8(2) of the RTI Act was followed. This alternate argument of the Petitioner that it was in the public interest to disclose confidential information is at the most a matter of defence. Suffice it to state for the present discussion that Section 8(2) of the RTI Act does not mean that Section 5 of the Official Secrets Act is removed from the statute book. The FIR does not state that it was the public authority which gave the confidential information under the purview of the Official Secrets Act upon deliberation.

43. The Petitioner contended that the Respondent - State is taking a contrary stand. A report submitted by Mr Kunte, the Additional Chief Secretary (Home), on 25 March 2021, stated that there is no substance in the Petitioner's report. Also, during the course of the hearing of Public Interest Litigation No. 6 of 2021 and Others before the Division Bench of this Court, the Advocate General informed that nothing of substance was found in the report of the Petitioner. The statement of the learned Advocate General is referred to in paragraph 40 of the Judgment of the Division Bench dated 5 April 2021. The Petitioner submitted that once the State takes a stand that there is no substance in this report, there should not be any prejudice in disclosing the documents as it will not be against the public interest. There would be no violation of Section 5 of the Official Secrets Act. It was contended that if Respondents Nos.1 states that the report of the Petitioner had no value, then there is no necessity to invoke the Official Secrets Act.

44. We find no merit in this submission. As rightly underscored by the Counsel for the Respondent - State the FIR and the present investigation is not about the contents of the Report but upon the action of releasing an official document unauthorizedly. As we have elaborated later, the FIR which is sought to be

investigated is regarding the action of releasing a document protected under the Official Secrets Act, and debate on the contents thereof would be a complete diversion. The statement of counsel regarding the Petitioner recorded in the order passed the Division Bench in Writ Petition No.1903 of 2021 is a general statement and cannot act as an estoppel against the Respondent-State in this regard.

45. Thus, we conclude that the Petitioner's contention that the impugned FIR should be quashed as it does not disclose any cognisable offence, and there is no need to investigate any further cannot be accepted and is accordingly rejected.

46. Second ground under which the Petitioner has sought to quash the FIR on the ground of vendetta and malafides. As held by the Supreme court in the case of Bhajan Lal, an FIR can be quashed where a criminal proceeding is manifestly attended with malafides and where the proceedings were maliciously instituted with an ulterior motive for wreaking vengeance on the accused to spite him due to private and personal grudge.

47. The learned Counsel for the Petitioner submitted that the FIR is that the Petitioner is falsely implicated. The invocations of the provisions referred to in the FIR are misconceived and disclose non-application of mind. Even though the FIR does not name the Petitioner, the Petitioner is kept hanging. In the other writ petitions, statements are being made that the present FIR is against the Petitioner. The Petitioner contends that since the Petitioner intercepted various messages showing the corruption, the Petitioner was transferred by subjecting the Petitioner in an entirely untenable investigation. The Petitioner was immediately transferred to a post that did not exist before and did not have any well-defined role and duties. The Petitioner was transferred on 2 September 2020 and released to the Central Government on deputation. One of the people, whom the Petitioner has named as a broker, was a member of the State Police Complaints Authority, subsequently removed, which clearly shows an attempt to suppress the corruption that the Petitioner sought to bring out. The FIR is filed to suppress the facts unearthed by the Petitioner in her report. The Petitioner had taken all the necessary permissions while collecting the information, and there is no question of any illegal connection and dissemination of information. The FIR is filed with vindictive motive since the report of the Police Officer, which has offended the powerful politicians. The report of the Petitioner is referred to by the Division Bench of this Court in the PIL and in the order passed by the Supreme Court. The Petitioner, in an official capacity with the permission of senior officers, including the Chief Secretary, the earlier Additional Chief Secretary, had collected the telephonic conversations. The Petitioner had vacated her office upon transfer that too to a truncated post, which was the result of the revelation of the Petitioner. The Petitioner had submitted a report to the Director-General as a duty mandated her to do so, and the secrecy was maintained. The investigation is a counterblast to intimidate a honest Police Officer who has sought to expose a nexus of corruption, and it is an act of vendetta. Such actions of the State

against the Police Officer who has exposed nexus between the Ministers and others of corruption would demoralise the police force. Such vindictive actions by the Respondent - State is nothing but the abuse of the judicial process. The Petitioner contends that, therefore, a fit case where the Court must step in and use its extraordinary powers to prevent the miscarriage of justice and harassment of the Petitioner against whom the FIR does not disclose any offence, and it should be quashed as against the Petitioner.

48. Respondent - State counters this ground of challenge contending as follows. It is not demonstrated as required in law as to how the investigation is a malafide investigation. On the contrary, the investigation is justified and needs to be conducted. No argument is made is that the leakage of secret information should not be investigated. The stand taken by the Petitioner is contradictory. Firstly, the Petitioner states that the Petitioner has done nothing and then contends that it is in the public interest. Since what is sought is quashing of FIR, the well-settled law regarding parameters of quashing will apply, i.e. whether the FIR as it read makes out a cognisable offence. The FIR should be read as it is, which is the legal requirement, and it shows all the necessary ingredients. On these grounds, the Respondent-State has opposed the contention of the Petitioner.

49. We have considered that rival contentions on this ground. First, the charge of malafides in a court of law needs to be established as per the requirements governing the standards of proof. The second aspect is the approach of the Court in respect of such allegations when the court prima facie finds that cognisable offence is made out and investigation is merited.

50. First, the aspect of legal standards of proof. As per the law laid by the Supreme Court in the case of Bhajan Lal, the Petitioner will have to show that FIR is "manifestly" attended with malafides and someone has maliciously filed the FIR with an out of private and personal grudge with an ulterior motive for vengeance against the Petitioner. The Petitioner has argued malice in fact and also shades of malice in law orally before us. Only the State of Maharashtra is made party respondent in this regard. The Assistant Commissioner of Police is joined by name only because he has lodged the FIR. No personal malafides have been attributed to Respondent No.2, who lodged the FIR. The third is the Central Bureau of Investigation. Who is wreaking vengeance against the petitioner or has a personal and private grudge is left in the realm of conjecture. The ground of malafides cannot be pleaded and argued with casualness as it reflects on the credibility and reputation of the investigating agency. That the Petitioner was transferred after submitting the report could be two unconnected events, and from that direct inference existence of malafides can not be drawn. After that, the Petitioner was further transferred, and these are matters in the realm of service law.

51. In the rejoinder arguments the Petitioner advanced a contention that the two sitting Ministers of the State released the contents of the Petitioner's report on

Minister on 24 March 2021, but they are not accused. It is argued that this shows malafides and also that the documents were in the public domain. There is no merit in this contention. Firstly this is done after the interview by the Leader of the Opposition, and the FIR itself states that once the material came into the public domain through the interview, it was widely circulated. Secondly, an investigation is going on as to how the material leaked. Whether the two Ministers released the report or that the Leader of the Opposition did not read the Petitioner's report are all matters of factual inquiry and investigation. It is not possible for us at this stage to draw any definite conclusion. The Petitioner's attempt is to call upon this Court to render factual findings at this stage when the investigation is ongoing, which is not possible to do.

52. In the case of *Sanapareday Maheedhar Seshagiri v. State of Andhra Pradesh* (2007)13 SCC 165 : AIR 2008 SC 787 , the Supreme Court observed that the High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges mala fides against the author of the FIR or the complainant. The High Court should also refrain from making an imaginary journey in the realm of conjectures to invent grounds to pass the orders which would interfere with the investigation. Therefore if the allegations in the FIR disclose that a material protected under the Official Secrets Act was unauthorizedly leaked, then it cannot be said that there are any malafides in investigating the cognisable offence. The Constitution Bench in the case of *Sheonandan Paswan v. the State of Bihar*, (1987) 1 SCC 288, 318 : [1987] SCC (Cri) 82 observed that FIR, which is justifiable and based upon adequate evidence, does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant. The Supreme Court in the case of *State of A.P. v. Golconda Linga Swamy*(2004) 6 SCC 522 : AIR 2004 SC 3967 held that when the information is lodged at the police station and offence is registered, then malafides of the informant would be of secondary importance.

The material collected during the investigation and evidence led in the court that decides the fate of the accused.

53. Once we find that the FIR discloses cognisable offence and merits investigation, then quashing the FIR against the Petitioner would directly interfere with the investigation. The Respondent - State has contended that statements have been recorded during the investigation, wherein it is stated that the Petitioner had created three pen drives. Two have been recovered, including the one sent to the Director-General of Police, but one pen drive is not traceable. The Leader of the Opposition had a pen drive with around 6.0 GB of data. According to Respondent - State, the third pen drive was handed over by the Leader of Opposition to the Ministry of Home Affairs. The State is trying to get the pen drive from the Ministry of Home affairs. If it matches, then it is apparent who has done the leak and, if it does not match, it will be by somebody else. In the application under Section 91 of Cr.P.C. Home Ministry is asked to give the pen drive, and since there is no response, an application is filed to

the Court of 37 Metropolitan Mag-istrate's Court, bearing No.1856/2021. It was contended that even though, as of today, the Petitioner is not a named accused, there is material against the Petitioner, and no statement can be made that the Petitioner will not be made accused. It was also contended that the Petitioner was at the very centre of the incident, and quashing the FIR qua the Petitioner would directly and materially affect the investigation. Having considered the arguments, we cannot hold that these submissions of the Respondent-State are meritless.

54. The position in law is that the High Court should be ex-tremely cautious about interfering with the investigation and should not stall the investigation unless it is convinced beyond any manner of doubt that FIR does not disclose any commission of an offence, and it is highly detrimental to the public interest. That is so because it is the duty of the police officer to investigate to collect evidence to prove the offence. Thus the Court should be circumspect in passing such orders that would entail delaying completion of the investiga- tion. In the case of *State of Bihar v. J.A.C. Saldanha* (1980) 1 SCC 554 , the Supreme Court observed that the executive is charged with a duty to keep vig-ilance over law and order situations is committed to its bounden duty to investigate the office.

55. Thus, regarding the first prayer, having examined the facts of the cases, the contention of the parties and dicta of the Supreme Court culled out above, we find no ground is made to quash the FIR in the extraordinary jurisdiction of this Court.

56. Now we come to the second prayer of the Petitioner that is for the transfer of investigation to the Central Bureau of Investigation.

57. Regarding the prayer for transfer of investigation is concerned, which is an alternate prayer, we have perused the grounds taken in the Petition. Grounds (F), (G) and (H) deal with the same. Ground (F) of the Petition stated that the CBI is investigating the offence regarding the transfer of police officers and the documents from the State Government including confidential and therefore, the investigation be handed over to the Respondent - CBI (wrongly referred to as Respondent No.4 instead of 3). In-ground (G), it is stated that there cannot be two FIRs on the same transaction. In-ground (H), it is stated that the Division Bench of this Court had disposed of the PIL directing the Respondent - CBI to consider the allegations in respect of undue influence regarding posting and transfer of police force. These is the pleading in respect of transfer of Investigation.

58. The Petitioner's oral contention for transfer of investigation is based on two counts. Firstly, the present investigation by the Respondent-State is malafide and out of political vendetta, and therefore, it needs to be handed over to the CBI. The learned Additional Solicitor General submitted that if the Petitioner is right in contending that the present FIR is a counterblast to the investigation by CBI, then it is a worrisome aspect. The learned ASG also contended that the

investigation should be fair, and if action is motivated and is a counterblast, then such investigation cannot be stated to be a fair investigation. The learned ASG contended that the CBI is ready and willing to take over the investigation if directed by this Court.

59. The Respondent - State has relied upon the decision of the Constitution Bench in the case of *State of West Bengal Ors. v/s. Committee for Protection of Democratic Rights, West Bengal & Ors.* 12010(3) SCC 571 to contend that though the High Court has the power to transfer the investigation to the Central Bureau of Investigation from the State government without the State government's consent, this power should not be in a routine manner and exceptional circumstances and no such circumstances exist in this case. Secondly, the transfer of investigation is not as per a person's choice. The transfer of investigation by taking it out of one agency to entrust it to another has serious implications, and the Court would not readily transfer the investigation from one agency to another.

60. The Supreme Court, in the case of *Committee for Protection of Democratic Rights*, while holding that the High Court has power under Article 226 of the Constitution of India to transfer investigation from the State machinery to the Central Bureau of Investigation, has underscored the need to keep in mind self-imposed restrictions. The observations of the Supreme Court in paragraph 70 of the Report are a caution against the ready exercise of the power by the High Court. The Supreme Court observed that despite wide powers conferred Article 226 of the Constitution, while passing any order, the High Court must bear in mind certain self-imposed limitations on exercising these Constitutional powers. The power under the said Article 226 requires great caution in its exercise. On the aspect of issuing a direction to the CBI to conduct an investigation, the Supreme court observed that it is time and again reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations.

61. Transfer of an investigation from one agency and entrust it to another on the ground of lack of fairness has to be directed with circumspection and not because there is some vague, unsupported suspicion. On the first ground for the request for transfer that the investigation is malafides and out of vendetta, we have already recorded our opinion that no such case is established by the Petitioner. The Petitioner has not made any case that the investigation pursuant to this FIR lacks credibility or does not inspire confidence. It cannot be said the FIR does not disclose a cognisable offence. That being the position the state police machinery is investigating as they are duty-bound to do. Thus this cannot be a ground for seeking transfer of investigation.

62. The second and main argument of the Petitioner that since CBI is already considering the broader set of events relating to FIR registered against Mr. Anil Deshmukh, (Ex-Home Minister of the State) and Others, based on the content of

the report of the Petitioner, the present investigation being directly connected with it should be transferred to the respondent CBI the Investigation. Secondly, the investigation in respect of the central incident that is interconnected with the present FIR is already under investigation of the CBI. The Petitioner contends that the Central Bureau of Investigation is already investigating the matter in respect of police transfers, which was approved in the order passed in Writ Petition No.1903 of 2021 by the Division Bench of this Court on 22 July 2021, and it will be appropriate if the CBI investigates the present FIR as well. The learned ASG contended that the Central Bureau of Investigation has already carried out a substantial investigation into the aspect of corruption regarding police transfers, and the CBI investigation should not be permitted to be affected. The ASG reiterated that if the Court concludes that the investigation is to be transferred to the Central Bureau of Investigation, the CBI is ready to take over the investigation.

63. The Respondent-State responds that the investigation by the CBI in the FIR registered against Mr. Deshmukh and others based on contents of the Petitioner's report is different from the investigation of the present FIR. The short question in this investigation is how the confidential information leaked. Therefore, there is no connection with the investigation carried out by the CBI regarding the investigation as to the transfers of police officers. Even if the transfers were ultimately found to be a product of corruption, the leak of sensitive information illegally would still continue to be an offence. On this ground, the Respondent-State opposes the prayer.

64. The Division Bench of this Court, while considering the Writ Petition No.1903 of 2021 filed by the State of Maharashtra to quash the unnumbered paragraph 5 of the FIR dated 21 April 2021, referred to the report of the Petitioner. The observations of the Division Bench relevant for the matter at hand are as under :

"82. Mr. Dada expressed an apprehension that a roving inquiry into the transfer and posting of all officers may have a demoralising effect on the police force. The apprehension on the part of the State apparently stems from the impression that all the transfers and postings may be put in the dock. In our view, the aspect of transfer and posting of police officers, referred to in 5th unnumbered paragraph of the FIR is essentially linked to the allegations of abuse of official position by the then Home Minister and his confederates.

83. The investigation agency can, in our view, legitimately inquire into the aspect of transfer and posting of police officers so also reinstatement of Shri Vaze after 15 years, to the extent those transfers and posting have the nexus with the offences alleged against the then Home Minister and his associates keeping in view the observations of the Division Bench in the order dated 5th April 2021. Conversely, the order of the Division Bench cannot be construed as giving unfettered authority to CBI to inquire into the transfer and posting of the police officers generally, which do not reflect upon the alleged acts and conduct expressly attributed to the then Home Minister and his alleged confederates and

the resultant offences.

84. ...

85. By way of abundant caution, we clarify that the observations hereinabove have been made for the limited purpose of adjudicating the challenge in the present Petition by the State and the same will have no bearing on the determination of Writ Petition No. 1902 of 2021 (Param Bir Singh s/o Hoshiyar Singh Vs. The State of Maharashtra & Ors .), Writ Petition No. 1843 of 2021 (Param Bir Singh s/o Hoshiyar Singh Vs. The State of Maharashtra & Ors.), Writ Petition No. 1901 of 2021 (Rashmi Uday Shukla Vs. The State of Maharashtra & Ors.) and Writ Petition No.1934 of 2021 (Rachana Ravindra Bhoir Vs. The State of Maharashtra) which are pending consideration before this Court and they shall be on their own merits."

(emphasis supplied)

Thus, the Division Bench held that the transfers and postings of the Police Officers referred to in unnumbered paragraph 5 are linked to the allegation of abuse of official position by the then Home Minister and others. The Bench clarified that its and the earlier orders of this Court are not to be construed as unfettered authority to CBI to inquire into transfers and postings of the Police Officers generally, which do not reflect upon the alleged act and conduct expressly attributed to the then Home Minister and others. After clarifying the same, the Division Bench reiterated that the present Writ Petition, which was pending, would be decided on its own merits.

65. We find merit in the contention of the Respondent - State that two investigations are two different. The complaint in the present FIR is of an unauthorised leak of the official secret documents. It may be that the investigation based on the truth or veracity of the contents of the documents will lead to a different result. However, it is a different investigation to ascertain how and whether official secret documents were leaked. Even if the contents of the documents are true and correct, the illegal leakage of the official document will still constitute an offence. Thus, the alleged offence concerning the illegal handling of the official confidential document is different from the investigation carried out by the CBI in respect of FIR dated 21 April 2021. It is separate from the present FIR, and the outcome of both the investigation need not depend on each other. The Division Bench of this Court has already made it clear that all aspects of police transfers are not handed over to the CBI to investigate. Therefore, no ground for transfer is made out to transfer the investigation, and the second prayer made in this petition is rejected.

66. The FIR was lodged on 25 March 2021. As of today, the petitioner is not named in the FIR. We are informed that the petitioner is currently serving in the State of Telangana and is holding an important post. In these facts and circumstances, we are of the opinion that the Petitioner is entitled to the protection of advance notice of seven working days in case the Respondent State

intends to take any coercive steps against the Petitioner.

67. To conclude, the impugned FIR prima facie discloses cognisable offences. Since the FIR discloses a cognisable offence, the police have a duty to investigate. No ground is made out to quash the FIR and to prevent any further investigation. The prayer for transfer of the Investigation to CBI on the ground that the CBI is investigating the postings of the Police Officers is without merit as both the investigations are different. Even if the contents of the Petitioners report are found to be correct, the alleged illegal leakage of official documents will nevertheless constitute an offence, and this will not depend on the result of the investigation conducted by the CBI. Thus, the prayers for quashing the FIR and for the transfer of investigation to the CBI are rejected. However, considering the facts and circumstances, if the Respondent - State proposes to take any coercive steps against the Petitioner, the Respondent - State will give advance notice of seven working days to the Petitioner.

68. As a result, both the prayers that is for quashing of the FIR and for the transfer of investigation are rejected. However, if the Respondent - State intends to take any coercive steps against the Petitioner, the Respondent - State will give advance notice of seven working days to the Petitioner.

69. The Writ Petition is accordingly disposed of. Rule discharged.