HIGH COURT OF MADHYA PRADESH: JABALPUR

(DIVISION BENCH)

MCRC No. 26749/2017

S.N. Vijaywargiya ..…… Petitioner

Versus

Central Bureau of Investigation .....…. Respondent

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Coram:

DB: Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, J.

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Shri Shekhar Naphade, Senior Advocate with Shri Amalpushp Shroti, Advocate for the petitioner.

Shri J.K. Jain, Assistant Solicitor General for the respondent - Central Bureau of Investigation.

Shri P.K. Kaurav, Advocate General with Shri Amit Seth, Advocate for the State.

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Whether Approved for Reporting: **Yes**

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Law Laid Down:

✎ In terms of Section 170(1) of the CrPC, the Investigating Agency is mandated to produce an accused in custody for the non-bailable offence. The argument that the Court should have issued summons in respect of such offence stands rejected. An order dated 20.10.2016 of a Single Bench of this Court in **MCRC No.17501/2016 (Rajendra Kori vs. State of Madhya Pradesh) - is overruled.**

✎ Accused has no right to insist upon investigation by a particular agency – whether State police or CBI. It is the culpability of an offender which has to be tested on the basis of the investigations conducted by the prosecution agency before the Court of Law – Supreme Court judgment in **2011(5) SCC 79 (Narmada Bai vs. State of Gujarat & others)** – relied.

✎ The argument that CBI could not have investigated the process of admission in private medical colleges in view of the fact that only the examination process conducted by VYAPAM was entrusted to CBI is found to be not tenable. VYAPAM Scam starts from the examination process and ends with the admissions, therefore, admissions in the private medical colleges are part of the VYAPAM Scam. Thus, CBI is competent to investigate the offence.

✎ Even if the process of admission in the private medical colleges is not treated to be part of the VYAPAM Scam, the State conveyed its "No objection" for the investigations including in the process of admission in the private medical colleges. Thus, it cannot be said that CBI has no jurisdiction to investigate and/or to submit report or special Court has no jurisdiction to take cognizance of the offence.

Significant Paragraph Nos.: **7, 8, 10, 12, 13, 15, 17 to 23**

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Reserved on: 18/12/2017

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O R D E R

{ 21/12/2017 }

Per: Hemant Gupta, Chief Justice:

Challenge in the present petition preferred by the petitioner under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code") is to an order dated 23.11.2017 (Annexure A-1) passed by the learned 15th Additional Sessions Judge & Special Judge (CBI), Bhopal in Case No.ST/9500317/2014 wherein cognizance of the offence registered as Crime No.RC2172015A0025 has been taken and warrant of arrest has been issued against the petitioner. The petitioner has further challenged an order dated 06.12.2017 (Annexure A-2) whereby application for cancellation of warrant of arrest was declined.

2. The facts, in brief, are that on 30.10.2013, an offence punishable under Sections 419, 420, 467, 468, 471 read with 120-B of the Indian Penal Code; Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988; Sections 65 and 66 of the Information Technology Act, 2000; and Sections 3-D (1) and (2) and 4 of the M.P. Recognised Examination Act, 1937 was

registered as Crime No.12/2013 by the Special Task Force, Bhopal constituted by the State of Madhya Pradesh in respect of irregularities committed in Pre-Medical Test-2012 (for short "PMT-2012") conducted by M.P. Professional Examination Board (for short "the VYAPAM").

3. Later, the investigations were taken over by the Central Bureau of Investigation (for short "CBI"). The petitioner was informed vide letter dated 11.11.2017 (Annexure A-3) received by him on 21.11.2017 that a charge-sheet shall be filed on 23.11.2017 in the Court of Special Judge, Bhopal. The charge-sheet for an offence punishable under Sections 420, 467, 468, 471, 201 read with 120-B of IPC; Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988; Sections 43 read with 66 of the Information Technology Act, 2000; and Sections 3-D (1) and (2) and 4 of the M.P. Recognised Examination Act, 1937 was filed on 23.11.2017, but, since the petitioner did not appear on the said date, the learned Special Judge, issued non-bailable warrants. It is at that stage, the petitioner moved an application for recall of the non-bailable warrant, which stood declined. The petitioner also applied for anticipatory bail under Section 438 of the Code, which also stands declined vide order passed on 23.11.2017 (Annexure A-19) in Bail Application No.4002/2017 (Dr. S.N. Vijaywargiya and another vs. State of M.P. Through CBI, Bhopal). Thereafter, the petitioner preferred second application for grant of anticipatory bail, which also stood dismissed vide order dated 30.11.2017 (Annexure A-20) passed in Bail Application No.9604139/2017 (S.N. Vijaywargiya vs. CBI, Bhopal).

4. As per the orders passed by the learned Special Judge, the petitioner is Chairman of People's Medical College, Bhopal. The allegation against the petitioner is that the People's Medical College, Bhopal has given wrong information in respect of vacant seats relating to PMT-2102 admission process to the Director, Medical Education, Bhopal with the dishonest intention and illegally admitted Anugrah Verma, Mohd. Sajid, Brijesh Kumar Mishra, Mukesh Kumar Patel, whose real name is Sandeep Kumar and Virendra Kumar. After giving wrong information, the College admitted ineligible candidates, namely, Shweta Jadav, Deepesh Dubey, Neha Batra and Karishma Singhai. The learned Special Judge held that the petitioner has been charged for an offence under Section 467 of the IPC for which the punishment is life imprisonment or a punishment for a period of 10 years. Since the allegations are serious and that it is not a case of "no evidence", therefore, the petitioner is not entitled to grant of concession of anticipatory bail. It may be stated that the applications for grant of anticipatory bail by the office bearers of People's Medical College were declined vide orders dated 14.12.2017 in MCRC No.25107/2017 (Dr. Vijay Kumar Pandya vs. Union of India through CBI) and MCRC No.25158/2017 (Dr. Vijay Kumar Ramnani vs. Union of India through CBI).

5. The argument of the learned counsel for the petitioner is that the petitioner was not arrested during the investigation by the Special Task Force or by the Central Bureau of Investigation; therefore, non-bailable warrant could not have been issued against the petitioner. Learned counsel

relies upon the judgment of the Supreme Court reported as **2007 (12) SCC 1 (Inder Mohan Goswami and another vs. State of Uttaranchal and others**) wherein the Supreme Court has delineated as to when the non-bailable warrants can be issued. It is argued that the Inspector, CBI sent a communication dated 11.11.2017, which was received by the petitioner on 21.11.2017. The communication is that a charge-sheet is being filed by the CBI on 23.11.2017 in which the petitioner is an accused person but there was no direction to appear before the Court on 23.11.2017. The relevant excerpt from the said letter dated 11.11.2017 is reproduced as under:-

> "It is intimated that in CBI Case No.RC2172015A0025 (STF Crime No.12/2013) chargesheet is being filed by CBI against you, as an accused person, in the Ld. Court of Shri Dinesh Prasad Mishra, 15th Additional Sessions Judge, VYAPAM notified cases, Bhopal at District Court building, Bhopal on 23.11.2017."

5.1 It is argued that there was no direction to appear before the Court nor the CBI could issue any direction for appearance of the accused before the Court. Once the matter was before the Court, the Court should have issued summons for securing the presence of the accused rather than to issue non-bailable warrants in the first instance itself. Learned counsel for the petitioner also relied upon a Single Bench order of this Court passed on 20.10.2016 in **MCRC No.17501/2016 (Rajendra Kori vs. State of Madhya Pradesh)** wherein the learned Single Bench considering an application under Section 438 of the Code in connection with a crime registered at Police Station, CBI, ACB, Jabalpur for an offence punishable

under Sections 420 read with 120-B of the IPC and Sections 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 observed as under:-

> "**6**. There is no provision in the Code of Criminal Procedure for the issuance of a notice by the investigating agency requiring the prospective accused person to appear before the Trial Court on the date on which the charge sheet is filed. The Investigating Agency in the course of investigation has the authority under section 160 Cr.P.C to issue notice to such persons who have knowledge about the commission of the offence to appear before the police and join investigation. Under the said provision, a notice can also be issued to an accused person to appear before the investigating agency as the said section does not proscribe the issuance of such a notice to a person accused of an offence. However, once the investigation is complete and the charge sheet is to be filed under section 173(2) Cr.P.C, there vests no further right or authority with the investigating agency to summon the accused persons, save as is provided under section 173(8), to carry out further investigation. The Trial Court also cannot and must not expect the accused persons who are named in the charge sheet to be present before it on the date on which the charge sheet is filed by the investigating agency, as there is no presumption that the trial court will take cognizance of the offences against the prospective accused person(s) named in the charge sheet, by exercising jurisdiction under section 190(1) (b) Cr.P.C."

5.2 It is also argued that the Special Court, CBI has no jurisdiction to entertain the charge-sheet as the CBI is authorized only to investigate the VYAPAM cases and not the cases relating to admission in Private Medical Colleges unrelated to conduct of examination by the Professional Examination Board. Learned counsel relies upon the Supreme Court judgment reported as **2012 (8) SCC 106 (Ms. Mayawati vs. Union of**

India and others) to contend that CBI cannot investigate into the matter, which is not entrusted to it.

5.3 Learned counsel for the petitioner referred to an order of this Court reported as **ILR 2014 (MP) 2884 (Awadhesh Prasad Shukla vs. State of M.P. and others**) wherein the question raised was regarding transfer of investigation of criminal cases registered in connection with irregularities in the examinations conducted by M.P. Professional Examination Board to the Central Bureau of Investigation. This Court declined to refer the matter to the Central Bureau of Investigation.

5.4 In fact, in Writ Petition No.21251/2013 (PIL) (Shri K.K. Mishra vs. State of M.P. and others) (Annexure A-14), prayer 11(iv) was to direct the respondents including the CBI to inquire into the matter regarding the number of students said to be more than 20 in every private medical colleges whereby students have taken admission to block the seats and thereafter, on the last date cancelled their admission. The relevant prayer read as under:-

> "**(iv)**. To issue a appropriate writ directing the respondents to enquire into the matter regarding the number of students which is more than 20 in numbers in every private medical colleges that why take admissions, block seats and only on the last date cancelled their admissions and whether the same students are doing it in the previous years also and are their studying in any medical colleges. (*sic.*)"

5.5 While considering the said prayer, this Court in **Awadhesh Prasad Shukla (supra**) declined such relief by observing as under:-

> "**78.** As a result, we now proceed to examine the reliefs claimed in the respective petitions:
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> *** *** ***
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> **(IV)** (a) In W.P. No.21251/2013.....
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> **(c)** In prayer clause (iv) direction is sought against the respondents to inquire into the episode of cancellation of admission of students enblock whereas allowing other students of the previous year to continue their medical course. In the first place, no argument was advanced before us in connection with this relief. Moreover, the incidental issues have already been dealt with in our recent decision in Writ Petition No.20342/2013 and other companion matters, decided on 11th April, 2014. Accordingly, this relief cannot be taken forward."

5.6 It is contended that an appeal being Special Leave to Appeal (Civil) No.16456/2014 (Ajay Dubey vs. State of M.P. and others) arising out of a common order passed by a Division Bench of this Court in **Awadhesh Prasad Shukla (supra)** which had also disposed of connected Writ Petition No.21251/2013 (K.K. Mishra vs. State of M.P. and others), was dismissed by the Supreme Court vide order dated 28.11.2014. However, in Writ Petition (Civil) No.417/2015 (Digvijaya Singh vs. State of M.P. and others), the State Government during the course of hearing before the Court on 09.07.2015 stated that it has no objection whatsoever for transferring the investigation of criminal cases relating to VYAPAM Scam to the Central Bureau of Investigation (CBI). The relevant extract of the order dated 09.07.2015, read as under:-

> "The learned Attorney General for India, on instructions, states that the State of Madhya Pradesh has no objection whatsoever for transferring the investigation of criminal cases related to VYAPAM Scam to the Central Bureau of Investigation (C.B.I.) and also the cases related to deaths of persons that are allegedly linked with the VYAPAM Scam, for a fair and impartial enquiry.
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> We appreciate the stand of the learned Attorney General for India.
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> In view of the above, we now transfer the investigation of criminal cases related to VYAPAM Scam and also the cases related to deaths which are allegedly linked with VYAPAM Scam to the C.B.I. from Monday, the 13th July, 2015 onwards."

5.7 It is, thus, contended that the scope of investigation by the Central Bureau of Investigation was in respect of the irregularities in the examination conducted by VYAPAM whereas admissions in the private medical colleges were not referred to CBI by the Supreme Court though sought in one of the petitions, therefore, the entire investigation carried out by the Central Bureau of Investigation and the filing of the charge-sheet in respect of admissions granted in the medical colleges is illegal and so is the cognizance taken by the Special Court, CBI.

5.8 Relying upon the judgment of Supreme Court rendered in **Ms. Mayawati (supra)** it was argued that the investigations into the admission made in the private medical colleges was beyond the scope of investigations entrusted to CBI, therefore, the learned Special Judge could not entertain the charge sheet filed. Learned counsel for the petitioner referred to para-30 of the judgment, which read as under:-

> "**30**. As rightly pointed out that in the absence of any direction by this Court to lodge an FIR into the matter of alleged disproportionate assets against the petitioner, the Investigating Officer could not take resort to Section 157 of the Code of Criminal Procedure, 1973 (in short 'the Code') wherein the Officer-in-charge of a Police Station is empowered under Section 156 of the Code to investigate on information received or otherwise. Section 6 of the DSPE Act prohibits CBI from exercising its powers and jurisdiction without the consent of the Government of the State. It is pointed out on the side of the petitioner that, in the present case, no such consent was obtained by CBI and submitted that the second FIR against the petitioner is contrary to Section 157 of the Code and Section 6 of the DSPE Act. It is not in dispute that the consent was declined by the Governor of the State and in such circumstance also the second FIR No. RC 0062003A0019 dated 5-10-2003 is not sustainable."

6. We have heard learned counsel for the parties. To examine the first argument that the learned Special Judge could not have issued non-bailable warrant to appear in the first instance; certain provisions of the Code require to be extracted, which are as under:-

> "**2**. **Definitions**. - In this Code, unless the context otherwise requires,-
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> "**(x)** 'warrant-case' means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;
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> *** *** ***
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> **170. Cases to be sent to Magistrate when evidence is sufficient**.—(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the

offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day-to-day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report."

(emphasis supplied)

190. Cognizance of offences by Magistrates, - (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

6.1 It would also be relevant to quote certain provisions of the Prevention of Corruption Act, 1988, which are extracted as under:-

> "**4. Cases triable by special Judges**— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.
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> (2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.
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> (3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.
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> (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.
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> **5. Procedure and powers of special Judge** – (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by the Magistrates.
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> *** *** ***"

7. The First Schedule relating to the classification of the offences show the offence under Sections 467 and 468 of the IPC as non-bailable offence whereas Section 468 of the IPC is a cognizable offence whereas an offence under Section 467 of the IPC, which leads to imprisonment for life is

cognizable whereas, the offence which leads to imprisonment for 10 years is non-cognizable. Thus, the petitioner is an accused of a non-bailable and cognizable offence. The petitioner is to be tried as in a warrant case, since the punishment for the offences charged, is for a term exceeding two years. In respect of an offence, which is to be tried as a warrant case, the process to compel appearance is contained in Chapter V and Part-B of the Chapter VI of the Code, whereas, Chapter XII relates to the power of the police to investigate.

8. The police officer was bound to produce an accused in custody to the Court in terms of Sub Section (1) of Section 170 of the Code. The accused are charged for an offence under Sections 467, 468 and 471 of the IPC. There is no assertion that the petitioner was granted pre-arrest bail during investigations. Therefore, there was mandate to the CBI to produce the accused for the non-bailable offences in custody alone. Since the CBI did not produce the accused in custody, the Court was within its jurisdiction to take the accused in custody. The petitioner was informed that the charge-sheet shall be filed before the Court of Special Judge on 23.11.2017. Therefore, it was incumbent for the petitioner to make himself available to the Court.

9. In **Inder Mohan Goswami**'s **case (supra),** an appeal was directed against an order passed by the High Court refusing to set aside non-bailable warrants issued against the appellant on the basis of first information report

for the offence under Sections 420 and 467 of IPC. While considering the issue of personal liberty of citizen and interest of the State, the Court held as under:-

> "***Personal liberty and the interest of the State***
>
> **50.** Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.
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> **51**. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.
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> **52**. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.
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> ***When non-bailable warrants should be issued***
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> **53.** Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:
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> - it is reasonable to believe that the person will not voluntarily appear in court; or
> - the police authorities are unable to find the person to serve him with a summon; or
> - it is considered that the person could harm someone if not placed into custody immediately.

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> **56**. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided."

10. The judgment in **Inder Mohan Goswami's case (supra**) was considered in a later judgment reported as **(2012) 9 SCC 791 (Raghuvansh Dewanchand Bhasin vs. State of Maharashtra and another**) wherein the Court held that the guidelines issued in **Inder Mohan Goswami's case (supra**) are broad guidelines and not the rigid rules of universal application when facts and behavioural patterns are bound to differ from case to case. Since discretion in this respect is entrusted with the court, it is not advisable to lay down immutable formulae on the basis whereof discretion could be exercised. The relevant extract from the said judgment read as under:-

> "**13**. We deferentially concur with these directions, and emphasize that since these directions flow from the right to life and personal liberty, enshrined in Articles 21 and 22(1) of our Constitution, they need to be strictly complied with. However, we may hasten to add that these are only broad guidelines and not rigid rules of universal application when facts and behavioral patterns are bound to differ from case to case. Since discretion in this behalf is entrusted with the court, it is not advisable to lay down immutable formulae on the basis whereof discretion could be exercised. As aforesaid, it is for the court concerned to assess the situation and

> exercise discretion judiciously, dispassionately and without prejudice. Viewed in this perspective, we regret to note that in the present case, having regard to nature of the complaint against the appellant and his stature in the community and the fact that admittedly the appellant was regularly attending the court proceedings, it was not a fit case where non-bailable warrant should have been issued by the Additional Chief Metropolitan Magistrate. In our opinion, the attendance of the appellant could have been secured by issuing summons or at best by a bailable warrant. We are, therefore, in complete agreement with the High Court that in the facts and circumstances of the case, issuance of non-bailable warrant was manifestly unjustified."

11. In **Rajendra Kori's case (supra)**, the attention of the learned Single Bench has not been drawn to Section 170 of the Code, which directs an police officer, in case of non-bailable offence, after completion of the investigations that there is sufficient evidence or reasonable ground to forward an accused to a Magistrate (in the present case Special Judge) for trial. Therefore, the said judgment is not the correct enunciation of law and is thus overruled. Thus, learned Special Judge was within its jurisdiction to issue non-bailable warrant in the first instance in view of the judgment of the Supreme Court in **Raghuvansh Dewanchand Bhasin (supra**).

12. The role of the Management of the People's Medical College has been examined in detail in **MCRC No.25107/2017 (Dr. Vijay Kumar Pandya vs. UOI through CBI)** and **MCRC No.25158/2017 (Dr. Vijay Kumar Ramnani vs. UOI through CBI)** as well, wherein it has been held as under:-

> "**5**. The allegations are that the People's Medical College was allotted 63 seats of State quota by Director, Medical Education. The college informed the Director, Medical Education that 54 students have taken admission in the first counseling in the college by 20.09.2012 i.e. before the second round of counselling. Thereafter, the college informed that two more candidates have applied for upgradation to Government Medical Colleges. Therefore, the second round of counselling was held only for 11 vacancies by the Director, Medical Education. In the report it is stated that five of accused engine candidates were already students of MBBS course in the medical colleges of Uttar Pradesh but the college has shown that they have taken admission in the college. Thus, the said five seats were declared vacant and filled on 30.09.2012 without following any due process in an arbitrary manner. In fact, it was pointed out that one of the candidate, namely, Neha Batra has prepared a demand draft of Rs.3,81,200/- from a Bank in New Delhi on 28.09.2012 though her name was not appearing in any of the list of the Director, Medical Education. She was admitted on 30.09.2012 and is linked with middleman Sonu Pachori."

13. The Supreme Court examined the role of the Investigating Officer and the duty of the Court in a judgment reported as **(2007) 1 SCC 110** (**M.C. Mehta (Taj Corridor Scam) v. Union of India and others)**. It was held that when a cognizable offence is reported to the police, they may, after investigation take action under Section 169 or Section 170 of the Code. If the police thinks that there is not sufficient evidence against the accused, it may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, it may, under Section 170 of the Code, forward the accused to a competent Magistrate. In either case, the police has to submit a report of the action taken, under Section 173 of the

Code, to the competent Magistrate who considers it judicially under Section 190 of the Code and that it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)*(b)* of the Code or decline to take cognizance. The relevant extract from the judgment read as under:-

> **"21.** In *Abhinandan Jha* v. *Dinesh Mishra, AIR 1968 SC 117; (1967) 3 SCR 668,* this Court held that when a cognizable offence is reported to the police they may after investigation take action under Section 169 or Section 170 CrPC. If the police thinks that there is not sufficient evidence against the accused, it may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, it may, under Section 170, forward the accused to a competent Magistrate. In either case the police has to submit a report of the action taken, under Section 173, to the competent Magistrate who considers it judicially under Section 190 and takes the following action:
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> (*a*) If the report is a charge-sheet under Section 170 it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)(*b*); or decline to take cognizance. But he cannot call upon the police to submit a report that the accused need not be proceeded against on the ground that there was not sufficient evidence. (SCR p. 668)
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> (*b*) If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report he can give directions to the police under Section 156(3) to make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed; but if the police is still of the opinion that there was not sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take

> cognizance under Section 190(1)(*c*). But the Magistrate cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1)(*a*) or (*c*), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to such opinion. (SCR pp. 668-69)
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> This judgment shows the importance of the opinion to be formed by the officer in charge of the police station. The opinion of the officer in charge of the police station is the basis of the report. Even a competent Magistrate cannot compel the police officer concerned to form a particular opinion. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer in charge of the police station. There is no provision in the Code empowering a Magistrate to compel the police to form a particular opinion. This Court observed that, although the Magistrate may have certain supervisory powers under the Code, it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. The formation of the said opinion, by the officer in charge of the police station, has been held to be a final step in the investigation, and that final step has to be taken only by the officer in charge of the police station and by no other authority."

14. While considering the anticipatory bail application of the officials of the Management of Chirayu Medical College i.e. **MCRC No.24983/2017 (Dr. Ajay Goenka vs. CBI)** and bail applications of the officials of the Management of L.N. Medical College i.e. **MCRC No.24605/2017 (Jai Narayan Chouksey vs. CBI)** and **MCRC No.24600/2017 (Dr. Divya**

Kishore Satpathi vs. CBI) vide order dated 14.12.2017, this Court has returned the following findings:-

> **"24**. Thus, there are grave and serious allegations of wrongful admission of students in the Medical Colleges being run and managed by the petitioners. As per the charge-sheet, in Chirayu Medical College, out of quota of 63 students, 55 students were granted wrongful admission. In L.N. Medical College, out of 63 seats, 41 students have been granted wrongful admission. Meaning thereby, that such large number of students have been admitted otherwise than on merit for financial considerations. Such action of the petitioners, if proved, during trial would show the deep-rooted malice in the admission process whereby the merit is given a go-bye and the students, who are not meritorious, were admitted at the cost of more meritorious candidates for monetary consideration. Thus, the action or inaction of the petitioners, who were running the medical colleges has denied admission to the large number of more meritorious candidates, who were, in fact, entitled to admission and thus, leading to their frustration. The entire process would be antithesis of the rule that the students should be admitted only on merit. Thus, the gravity of the accusation against the petitioners is glaring. In fact, the petitioners may not be an accused of taking life of a person but if the allegations are proved, the petitioners cannot commit more heinous crime than of playing with the life of young students. It would be a case of mass killing of the career of numerous students."

15. Therefore, we do not find any merit in the argument raised by the learned counsel for the petitioner that the process of summon was mandatorily required to be resorted to as the petitioner is an accused of non-bailable and cognizable offence. The Court has issued non-bailable warrant against the petitioner keeping in view the role of the petitioner to furnish

wrong information to the Director, Medical Education and to give admission to ineligible candidates.

16. In respect of an argument of the learned counsel for the petitioner that CBI was not entrusted with the investigations into the admission process by the Private Medical Colleges, learned Advocate General, who was present in the Court submitted that admission by a private medical college is a part of the chain of events whereby the middlemen and racketeers used the examination process to engage students, who were already admitted in other medical colleges in an earlier year to appear as engine candidates and to attach bogie candidates to facilitate copying of the answers. Such engine-bogie process was not restricted to the officials of VYAPAM but also to the officials of the Director, Medical Education, Bhopal and the Private Medical Colleges. In fact, one of the candidate, namely, Neha Batra prepared a demand draft of Rs.3,81,200/- from a Bank in New Delhi on 28.09.2012 for admission in People's Medical College though her name was not appearing in any of the list of the Director, Medical Education. She was admitted on 30.09.2012 and was linked with middleman Sonu Pachori. The illegalities in the process of examination of VYAPAM were for admission only, therefore, the VYAPAM scam starts from examination process and ends with the admissions. Therefore, the CBI is competent to investigate the offences relating to admissions of the candidates by the private medical colleges.

17. Learned Advocate General further stated that the State has no objection in conduct of investigations into all aspects of examination and admissions in the Pre-Medical Test/Examination for the year 2008, 2009, 2010, 2011, 2012 and 2013.

18. It may be pointed out that in **Ms. Mayawati** (**supra**), the consent for investigations by CBI was declined by the Governor of the State, therefore, without the consent of the State Government, CBI could not take over the investigations whereas in the present case, the admissions by the private Medical Colleges complete the chain of events, which started with tainted examination process by the Professional Examination Board. But even if the admission in private medical colleges is not part of the chain, the State having no objections in relation to conduct of investigation by CBI, the petitioner cannot make a grievance of the investigations by CBI.

19. A Constitution Bench of the Supreme Court in a judgment reported as **(2010) 3 SCC 571 (State of West Bengal and others vs. Committee For Protection of Democratic Rights, West Bengal and others)** was examining the question; as to whether the Court can issue direction to investigate into a cognizable offence, which has taken place within the territorial jurisdiction of the State without the consent of the State Government. The Court held the power of judicial review of Supreme Court under Article 32 or for that matter the power of the High Court under Article 226, the power of judicial review is an integral part of the basic structure of

the Constitution, therefore, no Act of the Parliament can exclude or curtail the power of the Supreme Court and/or High Court with regard to enforcement of the fundamental right, therefore, the Constitutional Courts can order entrustment of investigations to CBI. The CBI can investigate any offence provided the State consents to it under Delhi Police Establishment Act, 1946. Since the State has no objection to conduct investigation relating to VYAPAM scam including admission in the private medical colleges by CBI, therefore, it cannot be said that CBI has no jurisdiction or the Special Court has no jurisdiction to conduct investigation of the matter.

20. It may be further noticed that an accused has no right to insist upon investigations by a particular agency - whether offence is investigated by the State police or the CBI. The culpability of an offender has to be tested on the basis of the investigations conducted by the prosecution agency before the Court of Law. The Supreme Court in a judgment reported as **2011 (5) SCC 79 (Narmada Bai vs. State of Gujarat and others)** held that accused persons do not have a say in the matter of appointment of an investigating agency. The accused persons cannot choose as to which investigating agency must investigate the alleged offence committed by them. Relevant extract from the said decision is reproduced as under:-

> **"64.** The above decisions and the principles stated therein have been referred to and followed by this Court in *Rubabbuddin Sheikh vs. State of Gujarat, (2010) 2 SCC 200,* where also it was held that considering the fact that the allegations have been levelled against high-level police

> officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by CBI. Without entering into the allegations levelled by either of the parties, we are of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that the accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them."

21. The Supreme Court in a judgment reported as **AIR 1955 SC 196** (**H.N. Rishbud and another vs. State of Delhi)** held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. It is also held that it does not follow that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. The relevant extract read as under:-

> **"9.** The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of

a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., Sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (*a*), (*b*) and (*c*) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (*a*) or (*b*) of Section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, Cr.P.C. which is in the following terms is attracted:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error,

omission or irregularity, has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in - '*Prabhu* v. *Emperor', AIR 1944 PC 73(C)* and - *Lumbhardar Zutshi* v. *King', AIR 1950 PC 26(D)*.

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent

> powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case.....”

22. In a judgment reported as **1992 Supp (1) SCC 335** (**State of Haryana and others vs. Bhajan Lal and others**), the Supreme Court considering Section 5-A of the Prevention of Corruption Act held that the investigation conducted in violation thereof bears the stamp of illegality but that illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the court for trial and where the cognizance of the case has in fact been taken and the case is proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused. The relevant extract read as under:-

> **“119.** It has been ruled by this Court in several decisions that Section 5-A of the Act is mandatory and not directory and the investigation conducted in violation thereof bears the stamp of illegality but that illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the court for trial and where the cognizance of the case has in fact been taken and the case is proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. See (*1*) *H.N. Rishbud and Inder Singh* v. *State of Delhi (AIR 1955 SC 196)*, (*2*) *Major E.G. Barsay* v. *State of Bombay ((1962) 2 SCR 195)*, (*3*) *Munnalal* v. *State of Uttar Pradesh ((1964) 3 SCR 88)*, (*4*) *S.N. Bose* v. *State of Bihar ((1968) 3 SCR 563),* (*5*) *Muni Lal* v. *Delhi Administration ((1971) 2 SCC 48)* and (*6*) *Khandu Sonu Dhobi* v. *State of Maharashtra ((1972) 3 SCC 786).* However, in *Rishbud's case* and *Muni Lal's case*, it has been ruled that if any breach of the

> said mandatory proviso relating to investigation is brought to the notice of the court at an early stage of the trial, the court will have to consider the nature and extent of the violation and pass appropriate orders as may be called for to rectify the illegality and cure the defects in the investigation."

23. Even before this Court a similar question arose for consideration, which was decided by a Full Bench recently in **Criminal Revision No. 544/2016 (Arvind Jain vs. State of Madhya Pradesh)** along with other connected revision petitions on 26.10.2017 wherein, it was held that a defect or illegality in the investigations has no direct bearing on the competence or the procedure relating to cognizance or trial.

24. Therefore, the investigation by one or the other investigating agency cannot be said to have vitiated the report filed and cognizance of the offence taken by the Court, more so, when the State has no objection to the conduct of the investigations by the Central Bureau of Investigation.

25. In view of the foregoing discussion, we do not find that any case is made out for interference. Consequently, the present petition is hereby **dismissed**.

(HEMANT GUPTA)
Chief Justice

(VIJAY KUMAR SHUKLA)
Judge

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