

ORDER ON EXH.1 IN SPECIAL CASE (ATS) No.1/2018 AND CRI,
M.A. NO.39/2020
(CNR NO. MHPU01-015235-2018 & MHPU01-001724-2020)

1] This is an application for transfer of case records and seized property to Special Court, Mumbai, moved by National Investigating Agency (for short 'NIA') in view of Section 11 r/w 13 of NIA Act, 2008.

Backdrop facts :

2] After lodging of FIR dated 08/01/2018, present case was investigated by Anti-terrorist Squad (Hereinafter referred as 'ATS' for the sake of brevity), Pune. It is a State Investigating Agency. There are 11 accused in the case. Out of them, 8 accused were arrested. Charge-sheet has been filed against 8 accused by the State Investigating Agency under Sections 121, 121A, 124A, 153A, 505(1) (b), 117, 120B read with 34 of the Indian Penal Code, 1872 (hereinafter referred to as 'I.P.C.') and under Sections 13, 16, 17, 18, 18B, 20, 38, 39, 40 of the Unlawful Activities (Prevention) Act, 1967, as amended in 2008 and 2012 (hereinafter referred to as 'UAPA'). Remaining 3 accused are yet to be arrested and investigation in reference to those accused is thus not completed. The matter is at the stage of hearing on framing of the charge.

3] Invoking the powers under Section 6(5) of the NIA Act, the Central Government passed an order on 24/1/2020 thereby directing NIA to take up investigation of the case. In view of the said order, present application has been moved by NIA for transfer

of case records and seized property to the Special (NIA) Court, Mumbai.

4] Learned Special Prosecutor for NIA, Mr. Taralgatti has submitted that in view of the powers conferred under Section 11 of NIA Act, the Central Government has constituted Special Court under NIA Act for Maharashtra and it is situated at Mumbai, that in view of Section 13 of NIA Act when the investigation is being carried out by NIA, the matter can only be tried by Special (NIA) Court at Mumbai and therefore this Court has left with no jurisdiction to try and decide this case. He has, therefore, prayed for sending of the record and proceeding alongwith seized property to the Special Court.

5] All the accused have resisted the application by filing written say. Learned Advocate Mr. S.D. Patil, accused Surendra Gadling, learned Advocate Mr. R.T. Deshmukh, Adv. Akhtar Shahid and learned Advocate Mr. R.V. Nahar have argued and raised objection for transfer of case or for sending of record and proceeding, on the following amongst other grounds :

- i) *Investigation of the case has been completed and charge-sheet is filed, therefore there is nothing to be done by NIA.*
- ii) *This Court has no jurisdiction to transfer the case and the powers are vested only with Hon'ble High Court.*
- iii) *In fact, the State Investing Agency has not transferred investigation, NIA has done nothing in the matter and therefore the application cannot be entertained. On this point, accused Surendra*

Gadling has relied upon the judgment in the case of Naser Bin Abu Bakr Yafai Vs. The State of Maharashtra and others, (W.P.No.5022/2017 decided on 5/7/2017 (D.B.), Bombay High Court).

- iv) No permission of the Court is sought for re-investigation of the case.
- v) As per NIA Act also, the case has to be tried by the Court of Local Jurisdiction which means the Court at Pune and not at Mumbai.

6] Learned DGP Mrs. Ujwalla Pawar has submitted that the investigation has been taken up by NIA and only the Special Court under NIA Act can try and decide the matter. However, according to her, there is Special Court constituted by State Government under Section 22 of NIA Act at Pune which has jurisdiction to try and decide this case.

7] From the facts, following points arise for determination. I record my findings against them for the reasons discussed below :

Sr.No.	Points	Reasons
1	Whether this Court has jurisdiction to try and decide the case ?	No
2	What order ?	Application is allowed as per final order.

REASONS

AS TO POINT NO.1 :-

8] In the charge-sheet, it is specifically alleged that the accused in the present case were involved in unlawful activities,

which were the acts of terrorism within the meaning of Section 2 (k) of the UAPA. There are specific allegations that the accused were raising funds for the terrorist activities, they were recruiting different persons from different States to give training of the terrorist activities, they were hatching conspiracy for committing terrorist acts and they are the members of banned terrorist organisation. All these are the offences punishable under Section 10, 11, 13, 15 r/w 16, 17, 18, 18-B and Section 20 of UAPA. It is alleged that the accused hatched conspiracy to form a parallel government in the Country by overthrowing the government established by democratic set-up. While dealing with the bail applications of the accused persons, this Court has specifically observed that there is strong *prima facie* case against all the accused, having regard to the material collected by prosecution during investigation. Similar are the findings of Hon'ble Apex Court and Hon'ble High Court.

9] The object and purpose of NIA Act is to constitute an investigating agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of our India and also for the sake of security of the State.

10] Having regard to the aim and object of NIA Act, the order of investigation through NIA cannot be said to be illegal or improper. That apart, the order of transfer of investigation to NIA has not been challenged nor it has been set-aside. Therefore, this Court has to abide by the provisions of NIA Act.

11] At this stage, it is necessary to take into account the relevant provisions from Section 6 of the NIA Act which are as follows :

"6. Investigation of Scheduled Offences. – (1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation."

12] Form bare perusal of the above provisions, what can be gathered is that once NIA takes up the investigation of the case, the State Agency cannot proceed with the investigation and it is mandatory on its part to transmit the relevant documents and records of the NIA. It has been made clear in Sub-clause (7) of Section 6 of NIA Act that till the Agency takes up the investigation of the case, the State Agency or the officer-in-charge of the concerned police station has to continue with the investigation.

13] According to accused Surendra Gadling, uptill now the investigation of the present case has not been taken up by the NIA as it has done nothing in the case, except making prayer of transmission of record to the Special Court. Referring the judgment in the case of Naser Bin Abu Bakr Yafai (*Cited supra*), it is vehemently argued that the investigation has not been handed over to the NIA uptill now and therefore the application of NIA cannot be considered by the Court.

14] I have carefully gone through the judgment in the case of Naser Bin Abu Bakr Yafai (*Cited supra*). It is on different facts. In the said case, FIR came to be registered on 14/07/2016 and the investigation was taken up by ATS, Nanded. The Central Government passed order under Section 6(4) of NIA Act on

08/09/2016 directing NIA to take up further investigation of the said case. On 14/09/2016 NIA renumbered the crime by filing a copy of FIR before Special (NIA) Court. However, till 23/11/2016 NIA did not request the State Agency to handover papers of investigation. Before that, i.e. on 07/10/2016, the State Agency i.e. ATS Nanded filed charge-sheet against the accused and learned C.J.M. committed the case to the Court of Sessions on 18/10/2016. On requisition of NIA, the investigation papers were handed over by the State Agency on 8/12/2016. In the meanwhile, bail application was filed by the accused on 14/09/2016 challenging the jurisdiction of the Court to C.J.M. and ATS Special Court. The question to be determined in the above cited case was whether the Court of learned C.J.M. and the Special ATS Court was having jurisdiction in view of the order of investigation by NIA dated 08/09/2016.

15] Hon'ble Bench of High Court has observed that the jurisdiction of Criminal Court stand excluded only when the order under Section 6(4) of NIA Act is passed and the investigation is entrusted to NIA. The observations of the Hon'ble Bench from para No.28 are as follows :

"28. Considering the provisions of both the enactments, as well as the principles enunciated by the Full Bench of Patna High Court in the aforesaid decision, we are of a considered view that in the absence of any decision and direction of the Central Government to the NIA to investigate the scheduled offence, the State Investigation Agency was competent to investigate the said offence in accordance with the procedure prescribed under the Criminal Procedure Code. Furthermore, in the absence of entrustment of investigation to the NIA, the criminal Court had jurisdiction to try the offences in accordance with the

procedure prescribed under the Criminal Procedure Code."

16] Relying on the above observations, it is argued by the accused that there is no entrustment of the investigation to NIA and therefore the jurisdiction of this Court has not been ousted.

17] It is necessary to note that in the above cited case although order under Section 6(4) of the NIA Act was passed by the Central Government, the NIA did not make requisition for handing over papers of investigation till 23/11/2016. Till such requisition was made, there was no occasion for the State Agency to handover the investigation. It can be said that despite of the order of taking up investigation, the NIA did nothing till 23/11/2016. At this juncture, it is necessary to have careful reading of sub-clause (6) of Section 6 of NIA Act. It prohibits State Investigating Agency to carry on investigation only when any direction has been given about taking up investigation by NIA under Section 6(4) or Section 6(5) of the NIA Act. Therefore, it is not the date of order but the directions issued or steps taken by NIA are relevant to determine whether the NIA has taken up the investigation or not. In the absence of any direction from NIA, the State Agency was expected to carry on investigation in view of Section 6(6) of NIA Act, as quoted above.

18] The facts of the present case are different. In this case, the NIA has already issued requisition letter to the State Agency which is sufficient to make it clear that the investigation has been taken up by NIA in this case and therefore in view of Section 6(6) of NIA Act, the State Investigating Agency stands prohibited from

proceeding further.

19] It is already observed that although the charge-sheet is filed in the case some of accused are absconding or have not been arrested. The investigation has to be continued till they are arrested, interrogated and charge-sheeted. Therefore, it cannot be said that the investigation in the case has been completed and nothing is remained to be done by NIA. Even otherwise Section 173(8) of Cr.P.C. empowers NIA to make further investigation, even after filing of charge-sheet. It cannot be termed as re-investigation as argued on behalf of the accused.

20] In view of Section 11 of NIA Act, the Central Government has constituted Special Court for the cases investigated or to be investigated under the said Act. The relevant part of Section 11 is quoted hereinunder :

"11. Power of Central Government to constitute Special Courts –(1) The Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final....."

21] The Special Court for State of Maharashtra is situated at Mumbai. Having regards to the provisions of NIA Act, this case can exclusively be tried by the Special Court at Mumbai. Section 13 of

NIA Act makes the situation more clear. It runs as follows :-

13. *Jurisdiction of Special Courts* -(1)
Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

(2) If, having regard to the exigencies of the situation prevailing in a State if, --

(a) it is not possible to have a fair, impartial or speedy trial; or

(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or

(c) it is not otherwise in the interests of justice, the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the high Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation.

22] The net result of above discussion and purport of the above provisions is that the jurisdiction of this Court stands ousted. It would be useful to refer to the observations of Hon'ble Apex Court in the case of *The Central Bureau of Investigation Vs. Prakashan*

C. and Ors. reported in MANU/SC/1218/2017 (Cri. Appeal No.519/2017), which are as follows :

"9. In view of above provisions, it is clear that every scheduled offence covered by the NIA Act is not investigated by the NIA. Decision in this regard is taken by Central Government as per prescribed statutory procedure. If investigation is by NIA, Special Court Under Section 11 tries the offence. If investigation is by State agency, trial is by regular Court or Special Court Under Section 22. Though NIA Act is silent for cases investigated by CBI, the notification issued by Kerala State provides for such a situation".

23] Learned D.G.P. Mrs. Ujwalla Pawar has argued that the State Government has also established Special Courts as per Section 22 of the NIA Act at Pune and therefore it is not necessary to transmit record and proceedings to the Court at Mumbai, and the case can be tried by the Special Court at Pune.

24] No doubt, the State Government is empowered to constitute Special Courts under NIA Act and such Special Courts have been constituted at Pune. However, these courts are empowered to deal with the cases investigated by Agency of State Government. For proper appraisal, the relevant part of Section 22 is quoted herein under :

"22. Power of State Government to constitute Special Courts – (1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State Government under subsection (1) and shall have effect subject to the following

modifications, namely

(i) References to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government""

25] On bare perusal of the above provisions, it is clear that the agency referred in Section 22 is Investigating Agency of State Government and not NIA. In other words when investigation is carried out by NIA, only the Special Court established as per Section 11 of the NIA Act has jurisdiction to try the said case. Therefore, the arguments advanced by learned D.G.P. cannot be accepted.

26] So far as the issue of local jurisdiction is concerned, it is made clear by the applicants that the Special (NIA) Court at Mumbai has jurisdiction over entire State of Maharashtra and also State of Gujrat. Therefore, it can be said that the Special Court at Mumbai is the Court of local jurisdiction for this case. As such, it becomes clear that this Court has left with no jurisdiction to deal with the case and it falls in the jurisdiction of Special (NIA) Court, Mumbai. Hence, I answer point No.1 in the negative.

AS TO POINT NO.2 :-

27] Once it has become clear that this Court has left with no jurisdiction to entertain the case, it has to be transferred to the Court having jurisdiction i.e. Special (NIA) Court, Mumbai. According to accused, this Court, at its own, is not empowered to

transfer the case as there is no enabling provision in the Cr.P.C. They have referred Section 407 of Cr.P.C. and it is argued that the power to transfer the case is vested exclusively with the High Court. Section 407 of Cr.P.C. is quoted hereinafter :

"407. *Power of High Court to transfer cases and appeals – (1) Whenever it is made to appear to the High Court –*

(a) *that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or*

(b) *that some question of law of unusual difficulty is likely to arise; or*

(c) *that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, it may order –*

(i) *that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;*

(ii) *that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction.*

(iii) *that any particular case be committed for trial to a Court of Session; or*

(iv) *that any particular case or appeal be transferred to and tried before itself.*

(2) *The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative :*

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless

an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

28] On careful reading of Section 407 of Cr.P.C. what can be gathered is that the procedure laid down therein can be adopted or availed when the Court where the matter is pending, has jurisdiction to try and decide the same. The Hon'ble High Court is empowered to transfer any such case for the reasons as mentioned in Sub Section 1(a),(b),(c) as per Section 407 of Cr.P.C. It does not deal with the situation which has arisen in the case at hand. In the present case, this Court was having jurisdiction till the order under Section 6(5) of NIA Act was passed and NIA took up the investigation. As soon as NIA stepped up, the jurisdiction of this Court stands ousted. In such situation, the case has to be made over to the Court which has jurisdiction i.e. Special (NIA) Court, Mumbai. In the eyes of law it is not a transfer of case, but sending of the same to proper Court due to lack of jurisdiction. Hence, Section 407 of Cr.P.C. has no application here.

29] The Code of Criminal Procedure does not provide for such situation. There is analogous provision under Section 201 of Cr.P.C. for returning of complaint when the Court of Magistrate finds that it has no jurisdiction to entertain the same. It runs as follows :

"201. Procedure by Magistrate not competent to take cognizance of the case – If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall--

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court."

30] The situation in the present case is similar. The difference is that this is a police case and charge-sheet has been filed, alongwith seized property. The procedure prescribed for complaint cases under Section 201 of Cr.P.C. cannot be followed in the case. The record and proceeding and the seized property cannot be given in the hands of any agency, for obvious reasons. Therefore, it would be proper to send or transmit the record and proceedings alongwith seized property to the right Court i.e. the Special Court.

31] During the course of inquiry or trial before a Magistrate, when it appears to him that the case is one which ought to be tried by Court of Sessions, he has to commit the same to that Court, as per Section 323 of Cr.P.C. For that purpose, it is not necessary to move the Hon'ble High Court. It is because the Court of Magistrate lacks jurisdiction to try and decide the case and it has to be made over or committed to the Court of Sessions. The same analogy has to be applied in the present case also. When this Court has left with no jurisdiction to try the case, it has to be made over to the Court having jurisdiction i.e. Special (NIA) Court, Mumbai.

32] It would not be out of place to mention here that the above course of sending of record and proceedings to the Special (NIA) Court, Mumbai was adopted by this Court on earlier occasion, when investigation of Crime No.13/2018, Police Station ATS Pune

was transferred to NIA and it was not questioned by any Authority. That apart the procedure being adopted for sending or transmitting the case as such is not forbidden by Law. Therefore, it is expedient to send the record and proceedings of the case alongwith seized property to the Special (NIA) Court, Mumbai without seeking any direction from Hon'ble High Court.

33] At this juncture, the Investigating Officer of State Agency has produced an order of State Government dated 12/02/2020 thereby directing handing over of investigation of the case to NIA. Thus, it becomes clear that the State Investigating Agency is handing over investigation to NIA and therefore there remained no question of entrustment of investigation to the NIA, which was raised by accused. In the result, I proceed to pass the following order :

ORDER

1. Record and proceeding of Special Case (ATS) No.1/2018 be send to Special (NIA) Court, Mumbai, alongwith the entire muddemal property in properly sealed condition.
2. Special Case (ATS) No.1/2018 stands disposed off.
3. Original roznama and this order be retained and copies thereof be forwarded to Special (NIA) Court, Mumbai.
4. Copy of application for transfer of case Cri.M.A. No.39/2020 be also forwarded to the Special (NIA) Court, Mumbai.
5. Necessary information be send to Hon'ble Principal District and Sessions Judge, Pune.

6. All the arrested accused be produced before Special (NIA) Court, Mumbai on or before 28/02/2020.
7. The agency is directed to arrange for transportation of the record and proceeding, alongwith muddemal (in sealed condition).
8. For sending of the case proceedings and muddemal a Bailiff of District Court, Pune be deputed.
9. State Investigating Agency i.e. A.T.S., Pune to handover all the papers of investigation in relation to present case to NIA.

Pune.
Date : 14.02.2020

Sd/-x xx
(S. R. Navander)
Additional Sessions Judge, Pune.