

(1990) 08 DEL CK 0019
In the Delhi High Court
Case No : C.W.P. No. 235/90

Illyas Ahmed

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 31-08-1990

Acts Referred:

Citation : (1992) CriLJ 6 : (1991) 2 RCR(Criminal) 643

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : Mr. Herjinder Singh, for the Appellant; Mr. Sunil Mehta, for the Respondent

Judgement

1. The Zonal office of the Enforcement Directorate Calcutta through their secret sources received the information that on 5-3-1990 at about 2 p.m., one Illyas Ahmad, the present petitioner will be visiting one Prasenjit Nag of M/s. Uptronics Service (P) Ltd. at his office situated at 18th floor, Chatterjee International Centre 30, J.L. Nehru Road, Calcutta, for selling US 10,000/- authorisedly. On the basis of this information, the officers maintained surveillance at the office of Prasenjit Nag and apprehended the petitioner at about 2.45 p.m. On his personal search, they recorded and seized Rs. 2 lakhs along with incriminating documents. On interrogation, the petitioner disclosed the names of number of persons connected with the illegal sale and purchase of foreign currency. As a follow-up action, searches were conducted at numerous places where from material documents and foreign currency were recovered.

2. The petitioner was arrested on 7-3-1990 and was produced before the C.M.M. Calcutta the next date who was pleased to remand him to judicial custody till 22-3-1990 in the first instance which are extended from time to time till 2-4-1990.

3. In the meantime, on 30-3-1990, Shri Mahinder Prasad, Joint Secretary to the Government of India, while exercising powers under S. 3(1) of the Conservation

of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act) directed the detention of the petitioner in Presidency Jail, Alipur, Calcutta, with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchanges. The order and the grounds of detention were duly served on the petitioner while he was in judicial custody. On 9-4-1990, the petitioner made a representation to the detaining authority through the Superintendent, Jail for revocation of his illegal and wrongful arrest and detention and further praying for his immunities release. According to the petitioner, this representation has not as yet been disposed of.

4. The petitioner has challenged the order of his detention dated 30-3-1990 by way of filing the present petition under Art. 226/227 of the Constitution of India read with Sec. 482 of the Code of Criminal Procedure for the issuance of a writ of habeas corpus or any other appropriate writ, order or direction and for his immediate release.

5. On 3-5-1990, while admitting the petition, the Division Bench of this Court directed the Rule returnable within 4 weeks. The respondents did not care to file the counter within the stipulated period and the petitioner then moved an application (Cr.M. 193/90) praying for making the Rule absolute and ordering immediate release of the petitioner. The respondents sought time to file the reply but it was not to be. Finally, on 1-8-1990, the following order was passed :-

"In spite of service of the notice of the criminal writ petition, respondents have not cared to file the counter. By this application, the petitioner prays that either the Rule be made absolute or the matter be fixed for actual hearing. Let the matter now be listed for actual hearing on 10-9-1990 within first five cases."

The matter has now been taken up but without any counter from the respondent.

6. The main contention of the learned counsel for the petitioner is that there is a long delay in considering the representation of the petitioner by the detaining authority. It has not been dealt with expeditiously and with promptitude by the functionaries of the respondent/State. Further more, in the said representation, the petitioner had requested for the supply of as many as 14 material and relevant documents which were referred to, relied upon and taken into consideration by the detaining authority while passing the impugned order of detention, but the same have not been supplied to him till date i.e. 1-5-1990, the date of filing of the petition. During the course of the arguments, learned counsel submitted that the petitioner was supplied the copies of the documents asked for by the respondents only on 21-5-1990 whereas by the time, the meeting of the Advisory Board had already taken place on 16-5-1990. This has prevented the petitioner from making an effective and purposeful representation resulting in the violation of petitioner's fundamental right guaranteed under Art. 22(5) of the Constitution of India.

7. As there is no reply from the side of the respondents, the facts mentioned in the petition are being taken on their face value.

8. It is not disputed that most of the documents which the petitioner asked for in his representation consist of copies of the search authorisations and search warrants and reports of the searches conducted at the residential and business premises of number of persons, the reference of which has been made in the grounds of detention.

9. In the present case, the detaining authority in the detention order relies upon certain searches conducted at various premises. It is quite clear that no valid search could have been conducted except in pursuance of the issuance of the search warrant. In other words, the search warrants are the basic documents on the basis of which the search could have been conducted and the result of which is relied upon by the detaining authority. A document of this type is of vital nature and though it may not have been specifically relied upon but its reference has certainly been made in the impugned order which makes the search warrants also as one of the material documents on which the detention is based.

10. How vital such a document can be is illustrated by the decision of this Court in CrI.W. 127/85 decided by a Division Bench of this Court on 5-9-1985. In that case, the detenu had asked the detaining authority to supply, inter alia, the search warrants issued by the Assistant Collector of Customs together with the reasons to believe recorded by him at the time of issue of search warrants and also the exact time and date when the reason to believe in the case was recorded. This request was rejected by the detaining authority. The court perused the search warrants and found that in the search warrants for the search of one of the properties, there was no mention that there was information that smuggled goods belonging to the detenu were lying in the property in question. The court was thus satisfied that by the non supply of search warrants, a prejudice has been caused to the detenu in making an effective representation.

11. It is true that in the aforesaid case, the Court examined the search warrants and found that a prejudice has been caused, but the question of prejudice is not really relevant at this stage. Vide *Mrs. Tsering Dolkar Vs. Administrator, Union Territory of Delhi and Others*, . The prejudice to the detenu really lies in his not having been supplied with the search warrants. Had he been supplied with then search warrant, he might have been able to show that a prejudice has been caused to him. In this view of the matter, I am of the firm opinion that the non-supply of search warrants asked for by the detenu vitiates the detention.

12. At this stage, we may note that the detaining authority has not altogether rejected the representation of the petitioner for the supply of documents. In fact, some of those documents have been supplied to him on 21-5-1990 but that too after the Advisory Board has met and given its given its opinion. A Bench of this court in *Hazi Sayeed Mohd. Masoom v. Union of India* (CrI.W. 126/85) has pointed out that, this is not proper compliance with the provisions of the Statute and the Constitution. In a case where the documents to which the petitioners are entitled in order to make an effective representation are supplied to them after the Advisory Board has met, then his right must be held to have been frustrated.

This has happened in the present case.

13. Learned counsel for the respondent on the basis of the Judgment reported as *Madan Lal Anand Vs. Union of India and others*, submitted that where the detaining authority has placed reliance on certain misc. applications in the main civil revision petition, the non-supply of the copies of the main civil revision will not vitiate the order of detention. The submission is that if the detaining authority has only made a casual or passing reference to any document in the course of narration of facts but has not relied upon the same while making the order of detention, it could not be said that the detenu was prevented from making an effective representation.

14. The Judgment has no relevance to the facts of the present case. In fact, the learned counsel for the respondent has missed the point in issue.

15. In petitions under the COFEPOSA Act, the settled proposition of law is that all the documents relied upon for the purpose of ordering detention ought to be supplied *pari passu* the grounds of detention to the detenu and the documents not relied upon but casually referred to for the purpose of narration of facts are also to be supplied to the detenu if he so demands. This is for the reason that what is relevant for the defense of the detenu is not for the detaining authority to decide but this is an area which entirely falls within the domain of the detenu.

16. If we apply the said principle to the facts of the present case, it can easily be said that in the impugned order of detention, the documents such as search authorisations, and search warrants were referred to and relied upon and were made the basis for ordering his detention but not supplied to him *pari passu* the grounds of detention. These were only supplied on 21-5-1990 after the Advisory Board had met on 16-5-90. The non supply of these material documents on demand in time even if not considered to be relevant by the detaining authority would also vitiate the order of detention. The law on the this subject is very clear. In the case of *Vinod Kumar Arora @ Vinod Kumar Vs. Administrator, Union Territory of Delhi and Others*, , settled the propositions once for all. In para No. 10 of the said Judgment, the Court relied upon another Judgment of the Bombay High Court in *Mohd. Hussain v. Secretary, Government of Maharashtra* 1982 Cri LJ 1884, wherein the entire case law was surveyed and the extracts of which read as under :-

"We may, Therefore, summarise the law laid down by the Supreme Court on the point as follows :-

(a) the copies of all the documents which are relied upon or which form the basis of the grounds of detention must be supplied to the detenu along with the grounds of detention;

(b) the documents which are not relied upon or do not form the basis of the detention order but which are merely referred to casually and incidentally as and by way of narration of facts in the grounds of detention need not be supplied to

the detenu;

(c) however, even such documents, if the detenu requests for the same, have to be supplied to him for whether they are relevant for his defense or not is for the detenu to decide and not for detaining authority to judge."

17. The fact of the matter is that the detenu did demand a set of documents in his representation, whether they were relied upon or not, which have only been supplied to him after the meeting of the Advisory Board. The non supply of search authorisations and search warrants in time to the detenu, in my opinion, in the circumstances of the case, vitiate the order of detention.

18. In the result, the petition is allowed and the Rule is made absolute. The order of detention impugned in this petition is quashed and it is directed that the petitioner shall be set at liberty unless required in some other case.

19. Petition allowed.