
(1997) 06 CAL CK 0023
In the Calcutta High Court
Case No : Writ Petition No. 6167 (W) of 1997

Naina Jain

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-06-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 166, 22, 226
Foreign Exchange Regulation Act, 1973 — Section 40

Citation : (1998) 59 ECC 293

Hon'ble Judges : Vidya Nand, J; Bhagabati Prosad Banerjee, J

Bench : Division Bench

Judgement

Bhagabati Prosad Banerjee, J.—This is a writ application praying for a writ in the nature of Habeas Corpus, challenging the order of detention of Sri Nisit Jain, alias Bapi Jain, dated November 1, 1995, passed by Mr. K.L. Verma, Joint Secretary to the Government of India, in exercise of the powers conferred u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter referred to as "the said Act"), with a view to prevent him in future from acting in any manner prejudicial to the augmentation of foreign exchange, and on the strength of the said order, he was kept in custody in the Presidency Jail, Alipore, Calcutta.

2. The facts relevant for the purpose of this case are as follows:

The detainee was detained on March 26, 1997. The allegation on the basis of which the order of detention was passed and was detained was that information was received that Banwarilal Soni and Murarilal Soni, of 15, Hariram Goenka Street, Calcutta, were receiving and making payments in Indian currency at Calcutta under instruction of a person, resident of Bangladesh. Besides, they were also receiving gold biscuits at Calcutta and after selling the same, they used to send the sale proceeds of the gold biscuits to Bangladesh.

3. The said Sri Banwarilal Soni made a statement on 15th December, 1995, recorded u/s 40 of the Foreign Exchange Regulation Act, 1973, wherein it was stated that he and his brother's actual job was to receive Indian currency from one Bapi Jain of Ganesh Talkies, and also to make payments to various persons under instructions of Shahjahan of Motijhil, Dacca, Bangladesh.

4. The order of detention was passed against the detainee, Nisit Jain, alleging that he was known as Bapi Jain of Ganesh Talkies area and he made payments to various persons under instructions from Shahjahan of Motijhil, Dacca, Bangladesh.

5. In a statement made by Banwarilal Soni, u/s 40 of the Foreign Exchange Regulation Act, 1973, he stated that, his job was to receive Indian currency from one Bapi Jain of Ganesh Talkies. One of the points raised in the writ application was that the detainee was not known as Bapi Jain, and that there was no evidence and/or material in possession of the detaining authority to hold that the detainee was Bapi Jain and/or was also known as Bapi Jain of Ganesh Talkies area.

6. In this connection, it was alleged that the detainee has been detained wrongfully on the alleged basis that he was also known as Bapi Jain whereas he has never been called as Bapi Jain. The sponsoring authorities were carrying investigation against one Bapi Jain, with whom the detainee does not have any connection whatsoever. It was also alleged that in this connection a search and seizure was caused at the premises of one Mr. Banwarilal Soni and Mr. Murarilal Soni, 15, Hariram Goenka Street, Calcutta, on 14.12.1994, and after search, it was alleged that incriminating documents were seized from the premises of Mr. Banwarilal Soni and Mr. Murarilal Soni. After search, the Soni brothers were taken to the office of the Enforcement Directorate and where, it was alleged that, due to employment of third degree methods and torture, they were made to write that they received Indian currency of Rs. 2 crores from one Bapi Jain and distributed the same on the instruction of Sri Shahjahan of Bangladesh. The Soni brothers stated that they did not know the address and telephone number of Sri Bapi Jain. They also stated that they did not know the telephone number and address of Sri Bapi Jain. However, they described Bapi Jain as a person of fair complexion, aged about 35-36 years and heights of 5? ft. On March 28, 1995, few officers of the Enforcement Directorate came to the detainee's residence at Salt Lake and caused a search. No document was seized from his residence and a nil seizure memo was issued to him. However, the officers of Enforcement Directorate asked the detainee to accompany to their office and there he was kept confined and there the officers of the FERA it is alleged, forced him to write a statement as per their dictates. It is stated that the detainee refused to do so. But upon his refusal, they perpetrated third degree treatment upon him and subsequently started beating him mercilessly. It is stated that someone slapped and another kicked him and someone beat him with cane sticks: and as a consequence of this, the detainee's merciless beating, it is stated that the detainee became unconscious and fainted. After gaining consciousness, he was

not even allowed to meet his lawyers who came to the office. It is stated that because of the use of third degree treatment and brutality on him by the officers of FERA, he was mentally and physically shattered and could not stand on his own feet because of the pain on his body. It is also alleged that the detainee was prevented from using toilets and was not allowed to take even a glass of water after the merciless beating. It was further alleged that the officers kept him confined in the same room and locked it from outside. There, he was kept confined for half an hour and then one officer entered the room and kicked him on his forehead. It is stated that the detainee was already under severe pain and consequently he lost all the resistance, and in order to get rid of this inhuman torture, he was forced to make the statement as dictated by the officers of the FERA, in which it is stated that he received Rs. 2 crores from a certain person named Shahjahan of Bangladesh and thereafter handed over the said to Banwarilal Soni. It is stated that the detainee was forced to write that he got a remuneration of Rs. 50,000/- and he put signature on the two statements which were written in Hindi, and it was specifically alleged that the statements made by the detainee were non-voluntary and obtained after severe torture, by causing threat and he had no other option but do so in order to save him. Thereafter, the detainee made retraction petition, in other words, retracting the statement which he already made. Similarly, it is stated that the Soni brothers also retracted the statements made earlier in this connection.

It was also alleged in the writ petition that the telephone number which is stated to be belonging to the detainee, who was alleged to be known as Bapi Jain, was 239-6262, and it is stated that from the Telephone Directory it is clear that the telephone number is in the name of Rikhab Chand Jain, having his office at 2, Kali Krishna Tagore Street, Calcutta.

In paragraph 20 of the writ application, it was alleged that in arriving at a conclusion by the detaining authority that the detainee was Bapi Jain, the detaining authority has merely acted as a rubber stamp, and that the sponsoring authority and the Deputy Director of the Enforcement Directorate, FERA, Delhi, have prepared all the documents and the detaining authority simply rubber-stamped on the opinion form and the material placed before him, without application of mind. It was alleged that the detaining authority had just put his signature and did not do anything more. It was further alleged in paragraph 20(a) that the sponsoring authority had not only formed an opinion that the detainee should be detained, but a list of relied on documents was also prepared by them. It was stated that the preparation of the grounds of detention was not within the domain of the sponsoring authority, and from the letters dated September 22, 1995, and October 16, 1995, it became apparently clear that the alleged grounds of detention and list of relied upon documents were prepared by the sponsoring authority only and the detaining authority had just put his signature, even stamps were put by the sponsoring authority.

7. In this particular case, the counter-affidavit and/or the affidavit- in-opposition

was not affirmed by the detaining authority himself, but by one Mr. Somnath Pal, who was subsequently holding the post of Joint Secretary, (COFEPOSA), Ministry of Finance, Department of Revenue.

8. On this question, Mr. Pradip Kumar Ghosh, learned Counsel appearing on behalf of the appellant, referred to the decision of the Supreme Court in the case of *Ranjit Dam Vs. State of West Bengal*, . In that case the question of non-filing of affidavit by the detaining authority was considered by the Supreme Court. In that case, an order of detention was passed under the West Bengal (Prevention of Violent Activities) Act, 1970 and no affidavit was filed by the District Magistrate who passed the order of detention on the ground that at that time he was not available as he had since been appointed as the Secretary of the State Electricity Board. The Supreme Court, in this case, held that the reason given in the counter-affidavit for the District Magistrate not making the affidavit, does not appear to be satisfactory.

9. In *Shaik Hanif and Others Vs. State of W.B.*, , the Supreme Court held that where an order of detention u/s 3 of the Maintenance of Internal Security Act, 1971, is challenged by a habeas corpus petition, it is incumbent on the State to satisfy the court that the detention of the petitioner was legal and in conformity not only with the mandatory provisions of the Act but also in accordance with Article 22(5) of the Constitution. In response to the rule nisi, the counter-affidavit on behalf of the State should be sworn to by the District Magistrate or by the authority on whose subjective satisfaction the detention order u/s 3 was passed. If for sufficient reason shown to the satisfaction of the court, the affidavit of the person who passed the order of detention u/s 3 cannot be furnished, the counter-affidavit should be sworn by some responsible officer who personally dealt with or processed the case in the Government secretariat or submitted it to the Minister or other officer duly authorised under the rules of business framed by the Governor under Article 166 of the Constitution to pass orders on behalf of the Government in such matters. The failure to furnish the counter- affidavit of the Magistrate who passed the order of detention, is an impropriety. In most cases, it may not be of much consequence, but in a few cases, for instance, where mala fides or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of a serious infirmity, leading the court to declare the detention illegal.

10. In that case, the counter-affidavit was not filed by the District Magistrate who passed the detention order but instead the Deputy Secretary who had never personally dealt with the case had filed a defective affidavit on basis of facts gathered from official records and all material particulars of the ground of detention which were necessary to enable the detainee to make an effective representation were not communicated to him although no privilege was claimed by the State under Article 22(6) in respect of those particulars and the order of detention was held to be violative of Article 22(5) and was liable to be quashed.

11. With regard to the principle of interpretation which the court must adhere to, the Supreme Court in this case observed that since the Act restricts the citizen's fundamental right to personal liberty under the Constitution, it has to be construed strictly and as far as possible in favour of the citizen and in a manner that does not restrict that right to an extent greater than is necessary to effectuate that object. The provisions of the Act have, therefore, to be applied with watchful care and circumspection. It is the duty of the court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application.

12. Similar view was taken by the Supreme Court in the case of Bhut Nath Mete Vs. The State of West Bengal, ; Jagdish Prasad Vs. The State of Bihar and Another, ; Mohd. Alam Vs. State of West Bengal, ; Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, . In State of Gujarat Vs. Sunil Fulchand Shah and Another, , it was held that the detaining authority in habeas corpus case is required to affirm affidavit personally on oath stand taken on his behalf but it cannot be suggested as an inflexible rule applicable to all detention cases irrespective of the circumstances.

13. With regard to non-filing of affidavit by the detaining authority, Mr. B.R. Ghosal, learned Senior Counsel appearing on behalf of the Union of India, submitted that as the detaining authority was not made a party by name and he was posted in a different department after the order of detention was passed, it was not possible to file an affidavit on his behalf, and non-filing of an affidavit by the detaining authority, in the facts and circumstances of the case, had not resulted in any substantial failure of justice and/or infirmity, as alleged by Mr. Ghosh.

14. We are of the view that in view of the statement on affidavit on behalf of the petitioner that the detaining authority had no occasion to apply his mind and it was alleged that when an allegation is made that the detaining authority has merely acted as a post office by putting his seal and signature on the opinion formed by the sponsoring authority and that when the detaining authority was charged with the duty to form an opinion as required under the law and when the allegation has been made that such detaining authority had not formed opinion on the basis of his own satisfaction, but he had mechanically signed the order of detention prepared by the sponsoring authority, in such a case, an affidavit by the detaining authority denying and disputing this allegation, is a must, and that we have to bear in mind that it is a well-settled principle that when the authority is charged with the duty to form an opinion, it is he who has to form an opinion and that there is no scope for delegation of power for the purpose of forming opinion and that when a challenge has been made that the detaining authority had not applied his mind and did not form his personal and independent opinion on such a vital question, and that the detaining authority who has passed the order, does not come forward and deny the allegations made

therein, in that event, that would render the order of detention bad. Even in case of the words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or the "opinion" is altogether a subjective process not lending itself even to a limited scrutiny that such "reason to believe" or the "opinion" was not formed on relevant facts or within the limits or within the restraints of a statute as an alternative safeguard to the rules of natural justice where the function is administrative, and that when the order passed in such a situation is passed under a statute cannot be challenged on the ground of propriety or sufficiency and liable to be quashed on the ground of mala fide, dishonesty and corrupt purpose; even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power since the authority has to act in accordance with and within the limits of the legislation, its order can also be challenged if it is beyond those limits and passed on those grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any of these situations, it can well be said that the authority did not honestly form his opinion or that in forming it, he did not apply mind to relevant facts. This has been upheld in the case of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, which was affirmed by subsequent decision of the Supreme Court, and which is now a well settled principle of law.

15. In this case, the intensity of judicial review is much more than any other cases as it pertains to the life and liberty of a citizen and that a citizen is deprived of his liberty on the basis of an opinion formed by the detaining authority on the basis of the materials germane to the issue and that the main safeguard is that the authority concerned has to apply its mind to all relevant facts and has to come to an independent decision and has to form an opinion on the issue. When it is alleged that the detaining authority has merely acted as a post office and has put a rubber stamp on the material prepared and produced by the sponsoring authority, in the absence of a counter-affidavit by the detaining authority, the order of detention cannot be sustained and the principle laid down by the Supreme Court mentioned above applies in full force and this point is concluded by the decisions of the Supreme Court mentioned above, as explanation for not filing affidavit by the detaining authority is far from satisfactory and cannot be accepted.

16. Mr. Ghosh next relied upon a letter written by Mr. M.L. Acharya, Assistant Director, to Sri M.K. Kabirpanthi, Deputy Director, Enforcement Directorate (FERA), dated October 20, 1995, in which it was, inter alia, stated that:

Immediately after receipt of your FAX Message date 19.10.95 today Shri Roop Chand, Under Secretary, Ministry of Finance, was contacted over phone to ascertain as to whether the documents which were sent vide this office letter dated 25.9.95 as advised by H.O. , was actually received by the Ministry and he confirmed to have received all the documents. In fact he pointed out that the

legible copies of the documents (total 6 pages) mentioned at para-6 of our letter dated 25.9.95 were not thereafter received by the Ministry.

Shri Roop Chand, Under Secretary was informed of the fact that the legible copies of those documents have not yet been received from Nisit Jain although Nisit Jain was reminded for the same.

It appears that Shri Jain may not co-operate in furnishing the legible copies of those documents which constituted as some of the enclosures of his representation dated 25.4.95 made before the Director of Enforcement. Since the original documents are with Shri Jain, I would recommend that a decision on the subject matter may be taken by the Competent Authority on the basis of materials available on records and developments till now.

In view of the above, it is proposed that this development may be incorporated in the grounds and the letters dated 22.9.95 and 16.10.95 written to Shri Nisit Jain for the legible copies may be included in the list of relied upon documents, if considered necessary and a decision may be taken as already substantial time has passed since the forwarding of the original proposal.

17. Relying upon the statements made in the said letter, Mr. Ghosh submitted that this document reveals that the FERA authorities were deciding amongst themselves as to which document should be relied upon and which should not be relied upon. It was submitted that in other words the FERA authorities were the de facto detaining authorities and that the allegation in this behalf made in the writ application has not also been controverted and/or denied.

18. In this connection, reliance was placed to the case of Khudiram Das Vs. The State of West Bengal and Others, ; as well as In the matter of Madhu Limaye, reported in AIR 1969 SC 1014, wherein the Supreme Court has held that if the allegations had not been, traversed in the counter-affidavit, the same should have been deemed to have been admitted.

19. Accordingly, the allegation of non-application of mind by the detaining authority and/or that he had no occasion to independently apply the mind and that the allegation that the FERA authorities were the de facto detaining authorities who are deciding which document would be relevant for the purpose of detention and which would not be, is every vital as the allegation made in this behalf remains uncontroverted; in view of the principles of non-traverse on this vital and important pleading is concerned, the order of detention cannot be held to be valid.

20. Next it was contended that in the order of detention it was stated that the source of information referred to in paragraphs 1 and 8 of the order of detention, namely that "information was received that Banwarilal Soni and Murarilal Soni of 15, Hariram Goenka Street, Calcutta, were receiving and making payments in Indian currency at Calcutta under instruction of a person resident of Bangladesh. Besides they were also receiving gold biscuits at Calcutta and after selling the

same they used to send the sale proceeds of the gold biscuits to Bangladesh," and "neither Soni brothers (i.e., Banwarilal Soni and Murarilal Soni) nor their employee Tekchand @ Pappu could furnish the address and identity of Bapi Jain. Subsequently, based on the telephone No. 2396262, appearing at page No. 13 of the document marked "D", seized from business premises of Banwarilal Soni on 14.12.1994, and the intelligence gathered through source revealed that you are also known as Bapi Jain and residing at CD-297, Salt Lake City, Calcutta-700064". It is stated that in paragraph 17 of the order of detention, it was stated that "I consider it to be against public interest to disclose the source of information referred to in paragraphs 1 and 8 above". In this connection, it was submitted by Mr. Ghosh that the source of information may not be disclosed in public interest, but the information gathered from such is a different thing and which could not be withheld on the ground of public interest. It is also well settled that if the source is disclosed and source is not protected in public interest, and that if the sources are made known to public, in that event the source will be silent and the said source will not pass any secret and important information. Accordingly, the source of information may be withheld in public interest, but the text of the information received from such source has to be disclosed, otherwise the valuable constitutional right of representation under Article 22(5) of the Constitution would become nugatory.

21. In the instant case, in paragraph 8 of the order of detention, it was alleged that from the source of information, it revealed that the detainee was also known as Bapi Jain, which had been denied and disputed by the detainee, and if the text of the source is not disclosed showing that the detainee was also known as Bapi Jain and in usual course if the source was disclosed, the source would have revealed what are the materials and/or the information on the basis of which the detainee could also be known as Bapi, could have been made known to the detainee, in that event he would have got an opportunity of making a representation under Article 22(5) of the Constitution.

22. Accordingly, in our view, the decision not to disclose the source of information in public interest, is valid, but the text of information on the basis of which such a vital issue had been decided, has to be disclosed.

23. In the instant case, it is alleged that the detainee was also known as Bapi Jain. There was no evidence whatsoever before the detaining authority excepting of course the source of information that he was also known as Bapi. There was no test identification parade made and that the Soni brothers also had no occasion to come forward and identify that the detainee was in fact and in reality also known as Bapi Jain. It is well settled that when the identity of a person is in dispute, in that event it is imperative on the part of the detaining authority to disclose to and satisfy the court that the detainee was in fact and in reality also known as Bapi Jain. When in the petition it was alleged that the detainee was not known as Bapi Jain and the order of detention had been passed against the wrong person and/ or on mistaken identity, the court has to be satisfied about

the identity of the person and/or keeping in view that the Act restricts citizens' liberty which is a fundamental right under the Constitution and the respondent should not proceed in the matter in a mechanical routine and dull casualness and chill indifference on their part as pointed out by the Supreme Court in Shaik Hanif's case (supra).

24. Further, unless the particulars of the information received from secret source are disclosed, the valuable constitutional right of representation under Article 22(5) of the Constitution would have been made ineffective.

25. The entire basis of the detention is the alleged satisfaction of the detaining authority that the detainee was in fact and in reality known as Bapi Jain and although the Soni brothers could not furnish the address and identity of the said Bapi Jain and the alleged telephone number of the said Bapi Jain was not that of the detainee. yet the detaining authority was purportedly satisfied that the detainee was Bapi Jain. Privilege can be claimed under Article 22(6) of the Constitution regarding the source of information, but not the resources obtained from the source, which cannot be said to be privilege.

26. It was contended by Mr. Ghosh that no reasonable man would have been satisfied on the basis of such materials as mentioned in paragraph 8 of the detention order that the detainee was also known as Bapi Jain. There was no test of identification of the detainee by the Soni brothers. No cogent material was shown that the detainee was also known as Bapi Jain. Therefore, the objective materials for subjective satisfaction were entirely lacking. Next, it was submitted that the satisfaction of the detaining authority was further vitiated because of non-consideration of relevant materials and those relevant materials were that the detaining authority relied upon the confessional statements made by Banwarilal Soni and Murarilal Soni, but did not consider the retraction of such confessional statements made by both of them.

27. But it is not necessary to go into this question as in view of the fact that the statements made in paragraph 20 of the writ application regarding the role played by the detaining authority which was nothing but as a post office, was not denied and disputed. Further the statement made in paragraph 28, wherein it was alleged that there was a gross non-application of mind on the part of the detaining authority will be apparent from the facts mentioned hereinafter, and wherein it was stated that "none of the documents except two or three has been dealt with in the grounds of detention. Signature of the detaining authority is not on each page. Pages 13 and 14 appear to have been insisted into it. Size of the aforesaid pages are different. Type writing is different. A perusal of the aforesaid paragraphs will show that those have insisted at the later stage. The detainee by his representation dated 4th April, 1997 demanded from the respondent No. 2 information contained therein. The detainee also demanded complete grounds of detention inasmuch as in the grounds of detention paragraph 13 is missing. But the respondent No. 2 did not give any reply to the detainee which prevented him from making an effective and purposeful representation. A copy of the

representation dated 5th April, 1997 is annexed hereto and marked Annexure "G".?

This has not been specifically denied excepting saying that the allegation contained in paragraph 28 was denied save what appears from records.

28. In the instant case, admittedly Mr. Somnath Pal, who, at present, is holding the post of Joint Secretary, had no occasion to deal with the matter and he had no role to play at the time when the matter was in process and/or that he. was dealing with the file, but he was completely a stranger who had no occasion to deal with the file at the time when this file was processed and that whatever he had said was said on the basis of records, and accordingly, in the absence of denial of this statement by the persons concerned against whom such personal allegations had been made, renders the order of detention invalid.

29. In this connection, in the affidavit-in-opposition, it was admitted that the earlier retraction statement made by the Sonis were considered, but the second set of retraction framed in the jail in Hindi, were not considered and that it was specifically alleged that such non-consideration by the detaining authority was because of the fact that the sponsoring authority did not forward those retractions before the detaining authority, and that is why the detaining authority had no occasion to consider the same.

30. In this connection, reference was made to the decisions of the Supreme Court in K. Satyanarayan Subudhi Vs. Union of India, and others, , where the Supreme Court held that non-placement of retraction of confessional statement by detainee before detaining authority and non-consideration of retraction by detaining authority while making the order, the detention order will be invalid. The role of the sponsoring authority is to collect materials and place the same before the detaining authority with their proposal. But they are not the authority to restrict the hands of the detaining authority and/or to process materials in such a manner so that the detaining authority had no option but to pass an order of detention inasmuch as all the materials had to be placed before the detaining authority who is charged with the duty to form an opinion on perusal of all materials and documents on record. But it appears that the detaining authority was prevented from exercising its power in accordance with law because of non-forwarding the same by the detaining authority.

31. Mr. B.R. Ghosal, learned Counsel appearing on behalf of the Respondents, submitted that non-filing of the affidavit by the detaining authority in all cases does not vitiate the order of detention. But we are of the view that the affidavit was formed by a person who does not aver that he had personally dealt with the case of the detainee. He has sworn the affidavit merely on the basis of a paper information gathered from the official records. A stereotyped explanation could not be affirmed by the detaining authority, could not be accepted.

32. In Mohd. Alam Vs. State of West Bengal, the Supreme Court also held that withholding of information which was not claimed to be privileged under Clause

(6) of Article 22 of the Constitution, renders the order of detention invalid.

In the instant case the information obtained from the source had admittedly not been disclosed which resulted in rendering the order of detention illegal.

33. Mr. Ghosal reminded us that the power of the High Court under Article 226 on the Habeas Corpus petition is very much limited. Yes, the power is very much limited. But, in view of the principles laid down by the Supreme Court in various cases mentioned above, if it appears to us that the detaining authority had not come forward to file an affidavit, when there was an allegation on them that the detaining authority had acted mechanically and without application of mind on the basis of the material prepared by the sponsoring authority and/ or the said authority had acted as a post office, the same is a very fatal infirmity as that goes to the root of the order of detention. If it is alleged that the order of detention was not passed by the detaining authority after applying his mind to the relevant materials and/or he had not formed the requisite opinion and/or satisfaction required by the law, the court is bound to hold that there was no formation of opinion and/ or satisfaction by the concerned authority in accordance with law, which charged him with the duty to form an opinion independently on perusal of relevant materials and documents, and in the instant case that apart, the information received from the confidential source was not disclosed, which has resulted in depriving the petitioner's right of representation.

34. Further, the information derived from confidential source was very vital in the instant case to form the identity of the detainee. How the detaining authority could come to the conclusion that the detainee was also known as Bapi Jain, is a matter that should appear from records and/ or materials obtained from confidential source or otherwise. Withholding of these materials, in our view, had rendered the order of detention invalid, inoperative and accordingly we are clearly of the view that the order of detention is vitiated due to the fact that the same has been passed without application of mind which has not been denied and disputed by the detaining authority by filing an affidavit and that the detaining authority by withholding the materials of vital importance obtained from confidential source, has deprived the detainee of his right of representation and that non-placement of retraction of confessional statement which was withheld by the sponsoring authority is also a serious infirmity.

35. In view of this, it is not necessary to decide the other question raised in the writ application that there was delay in executing the order of detention and/or some of the documents which were supplied were illegible and mainly because of the fact that non-filing of the affidavit by the detaining authority cannot be accepted as not satisfactory. The detaining authority was available, but when serious allegation has been made in the affidavit pertaining to the formation of the opinion acting as a mere post office by the detaining authority and unless this is denied by the detaining authority, the court has no option but to grant relief to the detainee by declaring that the order of detention was invalid and inoperative.

36. We, therefore, allow the writ application by holding that the order of detention is illegal and the detenue should be released forthwith. The respondent No. 3, Superintendent of the Presidency Jail, is hereby directed to release the detenue, Nisit Jain, detained under the order of detention, dated November 1, 1995.

37. There will be no order as to costs.

The operative part of the judgment be communicated to the respondent No. 3 by special messenger.

38. The Superintendent, Criminal Section is directed to receive the file and do the needful at once.

Vidya Nand, J.

39. I agree.