

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 16th November, 2010
Date of Order: 22nd December, 2010

+CRL.M.C. 2866/2007
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22.12.2010

CDR.(RETD.) JARNAIL SINGH KALRA
THR. PEROKAR/HIS WIFE JASVINDER KALRA Petitioner
Through: Mr A .K. S. Mishra & Mr. Mahinder
Singh, Advocates

versus

C.B.I. Respondent
Through: Mr. Dayan Krishnan, Advocate &
Mr. Gautam Narayan, Advocate

AND

+CRL.REV.P. 521/2007

SALAM SINGH RATHORE Petitioner
Through: Mr A.K.S. Mishra & Mr. Mahinder Singh,
Advocates.

versus

C.B.I. Respondent
Through: Mr. Dayan Krishnan, Advocate &
Mr. Gautam Narayan, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the reporter or not? | Yes. |
| 3. Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. By present petition, the petitioners assailed order dated 10th July, 2007 of learned CMM allowing an application under Section 173 (5) (a) read with Section 207

of Cr. P.C. moved by CBI with a prayer that official secret documents recovered from the accused (enlisted in the application) relating to Ministry of Defence and Defence Forces containing classified information be not supplied to the accused since the disclosure of the information contained in the document would be prejudicial to the security, safety and interest of the Nation.

2. The accused was facing trial under Official Secrets Act and the case was at initial stage of supply of documents when this application was made and allowed by the learned CMM on the ground that the documents contained sensitive information, disclosure of which could adversely affect the security of Nation and copies of these documents should not be handed over to the applicant. The order of learned CMM is assailed on the ground that the learned trial court wrongly considered that the subject matter of documents was not required to be proved and only the facts that documents contained sensitive information and the documents were unauthorisedly possessed by the accused, was required to be proved by evidence. It was submitted that trial court mis-interpreted the right of the accused under Section 207 Cr. P.C. to get the entire material collected during investigation and did not appreciate the law laid down in *Supdt. and Remembrancer of Legal Affairs Vs. Satyen Bhowmick* case (AIR 1981 SC 917). It is submitted that petitioner would not be in a position to defend himself in view of serious allegations levelled against him for the violation of Official Secrets Act and order of the trial court should be set aside and directions should be given to furnish the copies of documents seized and recovered from the accused.

3. Reliance is placed by the accused persons on Section 207 (v) of Cr. P.C. and it is argued that any document or relevant extract thereof forwarded to the Magistrate

with the police report under sub-section (5) of Section 173 of Cr. P.C. has to be supplied to the accused.

4. It is not the case of the accused person that the documents form a part of court record but has not been supplied to the accused person. Section 173 (5) of Cr. P.C. deals with the final report to be filed by the police before the Court and Section 173 (5) Cr. P.C. provides that when such a report is forwarded, the police, along with report has to forward all relevant documents or extract thereof on which prosecution propose to rely, other than those already sent to Magistrate during investigation, and the statements recorded under Section 161 Cr. P.C. of all persons whom prosecution proposes to examine. Thus, what is to be handed over to the accused are those documents or extract thereof which are forwarded by the police to the Magistrate during investigation or along with the report under Section 173 Cr. P.C. If the same has not been forwarded to the Magistrate by the police, the accused does not have a right to get a copy of those documents under Section 207 Cr. P.C. and that is why a Magistrate under Section 207 (v) Cr. P.C. has been directed to furnish to the accused free of cost a copy of such documents or relevant extract thereof forwarded to him with the police report under Section 173 (5) Cr. P.C.

5. Under Section 3 of Official Secrets Act mere possession of Secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy, or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India or security of State has been made offence. In the present case copies of certain official notings and documents were recovered from the accused which related to classified information regarding defence of the Nation. The prosecution had prepared a memo of documents and the

nature thereof and the same has been handed over to accused. The contention of the accused is that the copies of those documents which were recovered from him be handed over to him under Section 207 Cr. P.C. If the documents had been declassified and the stand of the state had been that these documents were no more classified or secret, there was no difficulty in handing over these documents to the accused. However, so long as the documents remain classified and secret handing over of copies of those documents, to accused and possession of such documents by anyone would amount to an offence under Section 3 of Official Secrets Act.

6. The purpose of legislature in providing Section 173 and 207 of Cr. P.C. was to see that accused gets a fair trial. The purpose was not to see that the offence is again repeated. It is not that fair trial cannot take place without giving the secret documents recovered from the accused back in the hands of accused during trial. It would be sufficient if recovery of these documents is proved during trial by producing the recovered documents at the time of evidence before the court concerned for perusal that these documents were confidential and secret document and then again retaining them by prosecution. A secret disclosed to more number of persons does not remain a secret. There is every likelihood, that once the documents are given in the custody of accused or his counsel for the purpose of conducting trial, they would not remain secret nor there is a guarantee that the documents when placed on court records would not fall in the hands of scrupulous elements and misused. Therefore, State's insistence that copies of these documents should not be supplied to the accused is justified. It need not be emphasized by this Court that neither the court records are preserved or guarded in such a manner that they do not fall in the hands of unscrupulous elements neither the accused or counsel for accused can give a guarantee about the documents given to them would not fall in the hands of unwanted person.

7. If the State has chosen not to give copies of these documents for the reasons of the security of Nation, no fault can be found with the State. Ultimately the guilt of the accused has to be decided at the end of the trial and not before trial and if the Court comes to a conclusion that non supply of these documents caused a prejudice to the accused and the accused was not able to prepare his defense adequately, the court can always acquit the accused. The prosecution has a right of choice, to insist that it would not hand over these documents even at the cost of ultimate acquittal of the accused, and the court cannot force the prosecution to hand over the secret documents to accused at the cost of security of Nation.

8. I also consider that it is not the law that every incriminating material which is recovered from an accused has to be produced in the court in the same shape and order, in order to prove that the incriminating material was recovered from the accused nor it is necessary that a copy of every incriminating document should be furnished to the accused in order to ensure fair trial to the accused. Say, in a case under Arms and explosive Act when a time bomb or other explosive substance is recovered at the instance of accused which is necessarily required to be defused, it would not be necessary for prosecution to produce the time bomb or other explosive substance in the same condition in which it was recovered. It is sufficient if the time bomb is defused and a memo of its recovery showing what were the constituents of time bomb is prepared and a copy of memo is handed over to the accused during trial and the defused time bomb is produced at the time of trial. Similarly, if highly radioactive material is recovered from any person, it is not necessary that such radioactive material should be even brought to the court. It would be sufficient if a memo of material is prepared about the recovery of radioactive material and a report of expert regarding the nature of radioactive material is produced in court and copy thereof is given to the accused. In such circumstances, it cannot be said that a

prejudice was caused to the accused. Similarly, in case of perishable things, an order can be obtained from the court about the disposal of such things and still the recovery can be proved from the accused on the basis of order so obtained. Similarly, in the cases of offences under Narcotics drugs it is not necessary for the accused to insist that he should be given a sample of the drug recovered from him. It is sufficient if a memo of recovery of Narcotics substance is prepared and at the time of trial, it is proved that Narcotics substance was recovered and it was tested in laboratory and found to be a prohibited substance under NDPS Act.

9. I consider that where handing over sample of a substance or a copy of recovered document in the hands of accused itself amounts to an offence, the accused cannot insist, during trial that the same should be supplied to him and without that his right to fair trial stands prejudiced.

10. A fair trial has to be fair to the State and to the accused. If the State considers that official secrets found in the possession of accused were such sensitive that handing over the copies of those secrets documents to the accused, counsel or to the Court would prejudice the security of the State or shall affect the security of the State or Nation or would put some person's life in danger (like a list of undercover agents) the State will have a right to withhold those documents. The court cannot compel that those disclosure should be given to the accused at any cost because right of accused involved in that offence shall be prejudiced. I, therefore, consider that the court cannot compel the State to give those documents which the State considers to be sensitive and confidential and disclosure of which was prejudicial to the interest of the State. The accused at the end of trial can argue how the non disclosure of documents resulted into miscarriage of justice, if any, and convince the

Trial Court about his stand but cannot insist that the copies of secret documents must be supplied to him.

I find no infirmity in the order of the trial court. The petitions are hereby dismissed.

DECEMBER 22 , 2010
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SHIV NARAYAN DHINGRA, J.