

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 218 of 2010 & CM APPL 450/2010

Reserved on: 21st May 2010

Decision on: 02nd July 2010

BRIG. (RETD.) UJJAL DASGUPTA Petitioner
Through: Mr. Prashant Bhushan with
Mr. Rohit Kumar Singh and
Mr. Pranav Sachdeva, Advocates

versus

CABINET SECRETARIAT Respondent
Through: Mr. P.P. Malhotra, Additional Solicitor
General with Mr. Atul Nanda, Ms. Rameeza
Hakeem and Mr. Gaurav Gupta, Advocates

CORAM: JUSTICE S.MURALIDHAR

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT

1. This petition, which challenges a decision dated 25th August 2009 of the Central Information Commission ('CIC'), involves the interpretation of the first proviso to Section 24 (1) of the Right to Information Act, 2005 ('RTI Act').

2. The Petitioner is facing trial for offences under the Official Secrets Act, 1923 ('OSA') in FIR No. 42 of 2006 registered against him by the Special Cell of the Delhi Police. An application made by him before the trial court seeking supply of certain documents relied upon by the prosecution was dismissed by the learned Additional Sessions Judge ('ASJ') by an order dated 19th April 2008. This was challenged by the Petitioner in this Court

by way of Criminal Miscellaneous Case No. 1255 of 2008. By an order dated 25th April 2008 this Court disposed of the said petition with certain directions for supply of soft and hard copies of some of the documents. Although the said judgment was by an order dated 14th May 2008 stayed by the Supreme Court in Special Leave Petition (Criminal) No. 3718 of 2008 by a subsequent order dated 23rd February 2010 the Supreme Court dismissed the special leave petition.

3. The background facts are that during the relevant time when the events leading to the filing of the criminal case transpired, the Petitioner was posted as the Director (Computers) in the Research and Analysis Wing ('RAW') under the Cabinet Secretariat, Government of India. It is alleged that the Petitioner was in possession of classified data on his official laptop which he brought to his residence. The allegation was that he had worked on the data on his home PC and transferred the information on to pen drives. The case of the prosecution as contained in paras 11 and 12 of the complaint is as under:

"11. The recovered hard disk drives and pen drives recovered from accused Ujjal Dasgupta were analysed in Cyber Lab of Special Cell. During analysis the steganography software "Stegno_tesec version 1.0" developed by 'FCE, MCTE', Faculty of Communication Engineering, Military College of Telecommunication Engineering, TCPDUMP version 3.9<2005.05.24>, "C Cleaner" and "Eraser" along with many other files were recovered from one pen drive make CommunicAsia 2005. About 50 presentations relating to NSCS and "Special

Action Plan and Follow ups 29 Sept 2004 (3PPs) and “Project Anveshak” related 3PPs accessed from F Drive relating to R&AW were recovered from the hard disk of his home computer. 19 PPs relating to “Project Anveshak” were also recovered from the hard disk of his official laptop computer.

12. Documents/information relating to “Project Anveshak” recovered from the house computer and laptop computer of accused Ujjal Dasgupta were sent to Cabinet Secretariat (R&AW) for opinion on classification and authorization of possession. R&AW categorically opined that Project “Anveshak” is a classified project. Ujjal Dasgupta had access to the software developed under this project. Ujjal Dasgupta was not allowed to take the software or its populated contents outside the office. He was also not allowed to connect his official laptop computer of PC computer to an internet connection. The project is related to the security/defence matters of the country. If the project or its details were passed on to an unauthorised person or foreign agent, it could be prejudicial to the safety or interest of the State.”

4. This Court has by its order dated 25th April 2008, which has been affirmed by the Supreme Court, directed the prosecution to supply the copies of the paper print outs of the pen drives recovered from the Petitioner (Envelope ‘D’), copies of the paper print outs of the details concerning project Anveshak (Envelope ‘X’) and certified copies of hard copies of annexures A and B thereto. The disclosure of information was

directed subject to the condition that neither the Petitioner nor his counsel will further disseminate or in any manner transmit such document or allow it to be accessed, read, written or inspected by any person other than the Petitioner or the counsel for the Petitioner. As far as the home PC is concerned, if any of the documents contained in the hard disc thereof, were to be relied upon by the prosecution then the authenticated hard copies thereof were directed to be given to the Petitioner. It was further clarified that if the above directions were complied with, then the cloned copies of the pen drives and hard discs need not be provided. This was consequent upon the submission made on behalf of the prosecution that it would have no objection to running a software on the hard discs of the home and office PCs which would indicate the various changes the hard disc had been subject to and the file name, date of creation, date last accessed, file size and path of the contents of the hard disc.

5. On 29th October 2008 the Petitioner submitted an application under the RTI Act to the Central Public Information Officer ('CPIO') RTI Cell, Cabinet Secretariat referring to certain replies given by the RAW to the Special Cell to the queries raised by the Special Cell with regard to project Anveshak. It is the Petitioner's case that by way of the said replies RAW created a false impression that the Petitioner was guilty of committing the offences of which he was accused. He explained that the said replies given by the RAW to the Special Cell were "directly affecting the liberty of the applicant in the violation of his human rights." The Petitioner's case is that the said replies were the direct cause of the Petitioner being denied bail by the trial court as well as by the High Court. The Petitioner proceeded

therefore to raise the following questions:

“17. Q (ii) and Ans (ii) – Access to Anveshak Software

(a) Uninstalled Software – were the CDs/other magnetic media containing the uninstalled Anveshak Software handed over by C-DAC to Director (Computers)/ Computer Cell? If yes, please provide certified copies of the following:-

(i) Receipt given by Computer Cell of R&AW to C-DAC for the same/received copy of the issue voucher under which the software was handed over.

(ii) Extracts of ledger entry of relevant ledger showing the Anveshak software having been taken on charge by Computer Cell of R&AW – if No, please specify so.

(b) Installed Software

(i) Was any computer dedicated for independent use by Director (Computers) in any of the user branches where Anveshak was installed? If yes, was an exclusive user ID and password allotted to him to enable such independent access? If not, please specify so.

(ii) Was Director (Computers) allowed access to any user's computer in any branch where Anveshak was in use, independent of the actual user? If yes, was the ID and password of such computer used for accessing the Anveshak data base made available to him to permit such access independent of the actual user? If no, please specify so.

18. Q. (iii) and Ans (iii) – Taking the Anveshak software or its populated contents outside the office.

(a) As clarified in your Ans (iv), Anveshak relates to a database management system used for storage and

retrieval of data. The data base is an intrinsic part of the software, that being so, can any of the data populating the Anveshak database be accessed except through the Anveshak software?

(b) Was the Anveshak software present on the residence computer as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, was the software complete and functional? If no, please specify so.

(c) Was the Anveshak software present on the residence computer as per the recovery made from me and forwarded to you side Annexure A to D1? If yes, was the software complete and functional? If no, please specify.

(d) Were any populated contents of Anveshak database present on the office laptop as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, please list out these documents that was found. If no, please specify so.

(e) Were any populated contents of Anveshak data base present on the residence computer as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, please list out these documents that were found. If no, please specify so.

(f) If the answers to question at sub-paras (b) to (e) above are in the negative, then was the Answer (iii) given by you specific only to the Q (iii) asked by Special Cell and unrelated to the recoveries made from me and forwarded to you vide Annexure A to D1?

19. Q (iv) and Ans (iv) – Connection of Anveshak to Defence Matters

(a) Does the recovery made from me and forwarded to R&AW vide Annexure A to D1 substantiate that sensitive data pertaining to security or defence matters of the country was present on the office laptop? If yes, please provide a list of such documents. If no, please specify so.

(b) Does the recovery made from me and forwarded to R&AW vide Annexure A to D1 substantiate that sensitive data pertaining to security or defence matters of the country was present on my residence computer? If yes, please provide a list of such documents. If no, please specify so.

(c) If the answers to the questions at sub-paras (a) & (b) above are in the negative, then was Answer (iv) given by you specific only to the Question (ix) and unrelated to the recoveries made from me and forwarded to R&AW vide Annexure A to D1?

20. Q (vi) and Ans. (vi) – Connecting to the Internet Connection

(a) Does the recovery made from me and forwarded to R&AW vide Annexure A to D1 substantiate that the software or populated contents of Project Anveshak were sent out from the Desktop PC of the undersigned over an insecure internet connection? If yes, please provide details of what was sent out and when. In no, please specify so.

(b) Does the recovery made from me and forwarded to

R&AW vide Annexure A to D1 substantiate that the software or populated contents of Project Anveshak were sent out from the office laptop of the undersigned over an insecure internet connection? If yes, please provide details of what was sent out and when. If no, please specify so.”

6. By its letter dated 19th November 2008 the CPIO (RTI) & Director informed the Petitioner that RAW “being an intelligence wing of the Government is exempted from the provisions contained in the RTI Act.” Further it was stated that since the case was *sub judice* in the trial court, the Cabinet Secretariat was “not under any obligation to provide the information sought for under the RTI Act 2005.”

7. The Petitioner’s appeal was dismissed by the Appellate Authority (RTI) on 14th January 2009 holding that the CPIO had rightly rejected the application. Thereafter, the Petitioner appealed to the CIC.

8. Rejecting the appeal, the CIC held that detention under the orders of the Court and the trial in a competent court of law in which the accused gets a reasonable opportunity to defend himself cannot *per se* be termed as a violation of human rights. The CIC agreed with the Respondent that in terms of Sections 8 (1)(a) and 8 (1)(h) of the RTI Act disclosure of the information sought for “may prejudicially affect national security”.

9. The submissions of Mr. Prashant Bhushan, learned counsel appearing for the Petitioner and Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the Respondent have been heard.

10. Mr. Bhushan, learned counsel for the Petitioner submits that the proviso to Section 24 of the RTI Act clarifies that “information pertaining to allegations of corruption and human rights violations shall not be excluded.” According to him, since the replies given by the RAW were vague and misleading, they were the direct cause of the Petitioner being denied bail and that by itself was a violation of his personal liberty and thus his human rights. According to him, as long as the Petitioner makes “allegations” of human rights violations by RAW, exemption under Section 24 of the RTI Act from disclosure of information held by the RAW would not be available to it. He further submits that the exemption under Section 24 should be narrowly construed and an interpretation adopted which would advance the purpose and object of the RTI Act. He further points out that the information sought is innocuous and does not concern the contents of the so called secret documents.

11. On the other hand Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the RAW submits that as long as the Petitioner is in custody pursuant to the Court’s orders, it cannot be said that there is a violation of his human rights.

12. Pursuant to the submissions made by learned counsel for both the parties and in view of the subsequent developments in the form of the dismissal of the SLP by the Supreme Court against the order dated 25th April 2008 by this Court in Criminal Miscellaneous Case No. 1255 of 2008, Mr. Bhushan submitted that the Petitioner’s queries were narrowed as

follows:

“ (A) Were the CDs/other magnetic media containing the uninstalled Anveshak Software handed over by C-DAC to Director (Computers)/Computer Cell? If yes, please provide certified copies of the following:-

(i) Receipt given by Computer Cell of R&AW to C-DAC for the same/receipted copy of the issue voucher under which the software was handed over.

(ii) Extract of ledger entry of relevant ledger showing the Anveshak Software having been taken on charge of Computer Cell of R&AW.

(B) Was the Anveshak software present on the office laptop as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, was the software complete and functional? If no, please specify so.

(C) Was the Anveshak software present on the residence computer as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, was the software complete and functional? If no, please specify so.

(D) Were any populated contents of Anveshak database present on the office laptop as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, please list out these documents that were found. If no, please specify so.

(E) Were any populated contents of Anveshak database present on the residence computer as per the recovery made from me and forwarded to you vide Annexure A to D1? If yes, please list out these documents that were

found. If no, please specify so.”

13. In response to the above questions, the learned Additional Solicitor General on instructions stated that the above information could well be sought by the Petitioner in the course of the criminal trial in accordance with law and under the directions of the trial court. Since the Petitioner had already availed of that remedy during the course of the criminal trial, the indirect method of getting the information from the RAW under the RTI Act was both impermissible in law and uncalled for.

14. This Court has considered the above submissions.

15. The first question that requires to be considered is whether the case involves providing information pertaining to “allegations” of “human rights violations” by the organization holding the information i.e. RAW. It appears to this Court that the Petitioner has attempted to somehow bring his case within the scope of the proviso to Section 24 of the RTI Act, and has for that purpose alleged that his human rights were violated by RAW. However, a careful perusal of the documents placed on record shows that the Petitioner’s main grievance is not about human rights violations by RAW. He has been arrayed as an accused following due process of law. At the present stage of the criminal trial a charge sheet has not been filed and charges are yet to be framed. As explained by the Supreme Court in *State of Orissa v. Debendra Nath Padhi 2005 AIR 359*, the stage at which the accused can seek to produce documents by way of defence would be a stage of framing of charges and not earlier. Therefore, even at the criminal trial,

the stage for the Petitioner to produce documents in his defence has not been reached. In other words, he will not be able to rely upon documents/information in possession of the prosecution agency which are not already on record of the trial court and which are not relied upon by the prosecution.

16. It was urged by Mr. Bhushan that irrespective of whether the Petitioner is or is not able to access or produce information in his defence in the trial, as long as he has made allegations of human rights violations against the RAW, the information sought by him under the RTI Act cannot be denied. This Court is unable to accept the above submission. Whether in fact the replies given by the RAW were the only reason for the denial of the bail to the Petitioner by the Court or whether they amounted to human rights violations cannot be determined at the present stage. The prima facie tenability of the case of the prosecution is yet to be determined by the criminal court. The criminal court is obliged to do so at the stage of framing of charges. This Court cannot, therefore, preempt the answer to such a question in the present proceedings. In the considered view of this Court in a situation where the criminal trial against the Petitioner is pending at the stage of framing of charges, it would not be open for this Court to arrive at any conclusion, one way or the other, about the tenability of the “allegations” made by the Petitioner about “human rights violations” by the RAW.

17. This Court, accordingly, holds that at the present stage the proviso to Section 24 (1) under the RTI Act does not stand attracted and the exemption from disclosure of the information held by the RAW under the RTI Act

does not get lifted. It is however clarified that the present order will not preclude the Petitioner from being provided with the information held by the prosecution and intended to be used by it against him in the criminal trial.

18. For the aforementioned reasons, the petition is dismissed but in the circumstances with no order as to costs. The pending application also stands dismissed.

S. MURALIDHAR, J.

JULY 02, 2010
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