
(1943) 06 CAL CK 0031
In the Calcutta High Court

Ijjatali Talukdar and Another

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision : 23-06-1943

Acts Referred:

Bengal Excise Act, 1909 — Section 46(a)

Citation : AIR 1943 Cal 539

Hon'ble Judges : Lodge, J;Das, J

Bench : Full Bench

Judgement

Das, J.—The two petitioners before us are husband and wife. They were tried before the Subdivisional Magistrate of Serajganj on a charge u/s 46(a), Bengal Excise Act, for being in possession of illicit distilled spirit in contravention of Section 18 of that Act and also on a further charge u/s 16(f) of the same Act for using, keeping and having in their possession certain materials and apparatus for the purpose of manufacturing spirit in contravention of Section 13 of that Act. One of the defences of the petitioners was that the prosecution had been engineered at the instance and instigation of one Bazlur Rahaman (a nephew of the first petitioner) who had contrived to plant the offending materials and apparatus in the house of the petitioners out of old enmity towards them. It appears that on 12th May 1912 the petitioners applied to the Subdivisional Magistrate for issuing a summons on the Excise Commissioner, Bengal, for production of the petition alleged to have been made by Bazlur Rahaman against him to the Excise Commissioner and the Report thereon. The Sub-divisional Magistrate who was then trying the case and before whom this petition had been made having been transferred shortly thereafter, the trial was started de novo and no action appears to have been taken on this petition. On or about 14th July 1942, a fresh application was made on behalf of the petitioners for summons, amongst others, on the Excise Commissioner of Bengal, Calcutta for production of that petition of Bazlur Rahaman and the Report thereon which I have mentioned and also an anonymous letter relating to the enquiry in connexion with that petition. In this application the petitioners also prayed for summons on

the Excise Superintendent of Pabna for production of several telegrams said to have been sent by the Excise Sub-Inspector to the Excise Superintendent on certain dates therein mentioned and the several telegrams said to have been sent by the Excise Superintendent to the Excise Sub-Inspector on those dates and the two Dak books of the Serajganj Circle Sub-Inspector and the Sub-Inspector in charge of the depot. The Subdivisional Magistrate directed issue of summons as prayed and the summonses were duly served. Both the Superintendent of Excise, Pabna and the Commissioner of Excise, Bengal, sent the documents by their respective clerks but claimed privilege u/s 123, Evidence Act. The Commissioner of Excise claimed privilege in an unsworn memorandum which is in the following terms:

(a) I direct Maulvi K.A. Quddus to appear with the files mentioned in the summons and to claim privilege for them u/s 123, Evidence Act.

(b) I withhold permission to give any evidence derived from the files for which privilege is claimed under this order.

It should be represented to the Court that these files contain unpublished official records relating to affairs of State for the purpose of Section 123 and that in view of the provisions of Section 162, Evidence Act, the files are not open to the inspection of the Court.

Sd. Illegible, Head of Department.

Dated 25th July 1942.

2. The privilege claimed by the Superintendent of Excise, Pabna was on the same ground and on practically the same terms. His memorandum was dated 31st July 1942. Apart from a bare assertion that the documents relate to affairs of State, there is no indication as to whether and how their production would injure public interest. Nor was the claim made on affidavit. The documents summoned having been produced in sealed covers a petition was filed on 15th August 1942 on behalf of the petitioners contending that no privilege could be claimed for those documents and praying that the Court should decide whether any such privilege could be claimed and to enable it to do so the Court should open the covers and see the documents. The Sub-Divisional Magistrate took no action on this petition and simply endorsed thereon the following words "Pile with the record." Eventually, on 7th December 1942, both the petitioners were found guilty and convicted under both the charges. Petitioner 1 was sentenced to a fine of Rupees 250 and in default of payment to 3 months rigorous imprisonment and petitioner 2 was directed to execute a bond of Rs. 200 with one surety to appear and receive sentence when called upon within one year and in the meantime to keep the peace.

3. The petitioners appealed to the Sessions Judge of Pabna. One of the points urged on behalf of the petitioners in support of their appeal was that those documents which would have helped them in establishing the story of planting

were not admitted in evidence on the erroneous ground of privilege. This point, like the others also taken on their behalf did not find favour with the lower appellate Court and the appeal was dismissed and the sentences were confirmed. The petitioners thereupon moved this Court in revision and on 5th March last obtained the present rule calling upon the District Magistrate of Pabna to show why the order of conviction and sentence complained of in the petition filed in Court should not be set aside and the appeal re-heard on ground No. 1 mentioned in the said petition. Ground No. 1 on which this rule has been issued is as follows:

1. For that the judgments of the Courts below have been vitiated by exclusion of important documentary evidence on the erroneous ground of a privilege u/s 123, Evidence Act, without the Court even opening the cover and seeing for himself whether the privilege claimed was justifiable.

4. The rule came up for hearing before us in the presence of learned advocate for the petitioners and the learned Deputy Legal Remembrancer who appeared for the Crown to show cause. The only point for our consideration is whether the decision of the learned Sessions Judge upholding the exclusion of the documents by the trial Court on the ground of privilege claimed u/s 123, Evidence Act, can be sustained. The reasoning adopted by the learned Sessions Judge in coming to his decision on this point is as follows : Although Section 94, Criminal P.C., it authorises any Court to issue a summons for the production of any document necessary or desirable for the purposes of any trial yet by Sub-section (3) of that section the provisions of that section do not affect Sections 128 and 124, Evidence Act. Section 123 provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned who shall give or withhold such permission as he thinks fit. Then although para, 1 of Section 162 gives the Court the power to decide the validity of the objection to production of any document, para. 2 puts a limitation on such power in respect of documents referring to matters of State. The result of the two sections therefore is that where it is a question relating to matters of State, in respect of which privilege is claimed u/s 123 it is the officer at the head of the department concerned who decides whether privilege is to be claimed and also whether it is a matter of State or not and the Court has nothing to do regarding the question as to whether the document relates to matters of State or not. This is the conclusion of the learned Judge on a construction of the two sections I have mentioned. He concedes that the position is different u/s 124 and that when privilege is claimed under that section in respect of any communication made to a public officer in official confidence it is for the Court to decide the validity of such claim, because the limitation applicable to documents relating to affairs of State will not apply to such communication and the Court may see the communication to enable it to decide the matter. The learned Judge refers to the decision of the Judicial Committee in the well-known Australian case of *Henry Greer Robinson v. State of South Australia* AIR 1931 P.C. 254 and expresses the

view that that decision does not apply to this country where the law is different. He also refers to Ibrahim sheriff v. Secretary of State AIR 1936 Nag. 25 in which the Assistant Judicial Commissioner of Nagpur sitting singly held, relying on certain previous decisions including two decisions of this Court and the decision in AIR 1931 P.C. 254, that it was for the Court in the first instance to satisfy itself that the documents relate to any affair of State or that their production will be detrimental to public interest. The learned Sessions Judge did not follow the Nagpur case as detailed reasons had not been set out in the judgment and as the propositions there laid down were, in his opinion, repugnant to the express provisions of Sections 123,124 and 162, Evidence Act. As observed by Greer, Rowell v. Pratt (1936) 2 K.B. 226.

Privilege is governed by well-settled principles, and the Courts have always jealously safe-guarded their powers of compulsion against encroachments by claims of privilege. A recent example is to be found in the decision of the Privy Council in A.I.R. 1931 P.C. 254.

5. The observations of Lord Blanesburgh in the last mentioned case are indeed instructive and succinctly set out the well established principles on which such privilege can be claimed, the limit to such claim, the manner in which it has to be claimed and the powers of the Court in relation to such claim of privilege. For ready reference, the following passages may be quoted from that judgment as reported in AIR 1931 P.C. 254.:

And, first of all, it is, their Lordships think, now recognised that the privilege is a narrow one, most sparingly to be exercised. "The principle of the rule," Taylor points out in his work on Evidence, Section 939, "is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires.

Again:

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production.

At page 1126:

Particularly it must be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain over-riding principle of public interest" as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh

or unfair. But such an opposite view is without justification. In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production - one only to be overborne by the gravest considerations of State policy or security.

At pages 1126-1127:

The power of the Court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument. The result of the discussion has been, as their Lordships think, to confirm the view of Griffiths, C.J. in *Morconi's Wireless Telegraph Co. v. The Commonwealth* (1913) 16 C.L.R. 178 where in effect he concludes that the Court has in these cases always had in reserve the power to enquire into the nature of the document for which protection is sought and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege, provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against.

Again at pages 1127-1128:

Upon one further general question the result of the authorities is, their Lordships think, not doubtful. The Court is entitled to prescribe in any particular case the manner in which the claim or privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised, accept the unsworn statement of responsible Minister. It may, in another case where the circumstances seem so to require, call for an affidavit from him. The Court did so in *Kain v. Farrer* (1877) 37 L.T. 469, holding that it was not enough there to state in a mere formal affidavit that discovery was objected to on the ground of public policy, but that it ought to appear that the mind of a responsible Minister had been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for, and Lord Coleridge insisted on an affidavit being produced from the President of the Board of Trade himself. In the present case their Lordships are not required to make upon this subject any pronouncement as to the proper practice in cases in which the Crown is not a party litigant and bound to give discovery. In such a case, it seems to their Lordships clear that this particular privilege should normally like any other, be claimed under the sanction of an oath, the oath being that of a responsible Minister of State whose mind has been directed to the question. Their Lordships, in saying this, do not of course mean to suggest that this requirement has come to be called for as a protection against imposition. Nothing of the sort. But it is required as a guarantee that the statement and opinion of the Minister, which the Court is asked to accept is one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have

already been published.

At page 1130-31:

Their Lordships have already given reasons for their conclusion that the Court is possessed of such a power. In the case of the Supreme Court, under the South Australian Rules of Court Order 31, Rule 14, Sub-rule (2) the power is conferred in terms express. The order which is in the same form as Order 31, Rule 19A(2) of the Rules of the English Supreme Court is to the effect that where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim. Their Lordships see no reason why the particular privilege now in question should be excluded from the connotation of the word as there used. They see no reason why in South Australia any more than in England the word should be construed in a narrow sense - and as to England: see *Ehrmann v. Ehrmann* 8 D.M. & G. 182. Documents in respect of which such privilege was claimed were inspected by Scrutton J., in *Asiatic Petroleum Co. Ltd. v. Anglo Persian Oil Co* (1916) 1 K.B. 822. It has been suggested that the inspection was there made by consent, but their Lordships find no warrant in the report for that conclusion. There is a precedent for it in Queensland to which their Lordships will later refer, and with reference to the whole matter they are much impressed by the observations of Starke J. in his dissenting judgment in *Grifien's case* See 36 C.L.R. 378 in the course of which at p. 402, he says, speaking of the papers now again in question, "No one has suggested that the interest of the public are such that a Judge ought not to see the documents.

At page 1132:

Their Lordships need hardly add that the Judge in giving his decision as to any document will be careful to safeguard the interest of the State and will not in any case of doubt, resolve the doubt against the State without further inquiry from the Minister.

6. In the case before us the privilege was claimed u/s 123, Evidence Act. This section forbids the giving of any evidence derived from unpublished official records relating to any affair of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. The occasion for claiming privilege under this section only arises where it is sought to give any evidence derived from unpublished official records relating to any affairs of Q State. That is the condition precedent. When this condition precedent is fulfilled and the occasion for claim of privilege arises, it is then for the officer at the head of the department concerned to waive or claim the privilege. Likewise Section 124 of the Act provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosures. Here again the condition precedent to give rise to a claim of privilege

is that the communication had been made to the public officer in official confidence and he is asked to disclose the same, When this condition is fulfilled it is for the public officer to decide whether public interest would suffer by the disclosure. Both the sections are, however, silent as to who is to decide whether the condition precedent has been fulfilled, namely as regards Section 123 whether the document in question is of the nature or kind mentioned in that section and as regards Section 124 whether the communication in question was made to the public officer in official confidence. Is it to be left to the ipse dixit of the head of the department in one case or the public officer in the other or is it to be decided by the Court? Here the provisions of Section 162 of the Act come into play. The first paragraph of this section clearly empowers the Court to decide the validity of the objection.

7. The learned Sessions Judge, however, has proceeded on the assumption that the second paragraph of this section limits the power given to the Court in this behalf under the first paragraph in so far as documents relating to matters of State are concerned; for this second paragraph disentitles the Court from inspecting the documents in question. We are not of opinion that the reasoning of the learned Judge is sound. The first paragraph gives the Court power to decide the validity of the claim of privilege and the second paragraph only provides the method or means by which the Court will be able to decide the question, namely, (1) by inspecting the document or (2) by taking other evidence. It is only in case of documents relating to affairs of State that the Court cannot inspect the document. It only means that in cases of such documents one of the methods or means by which the Court is to decide the question is not available to it. The duty of deciding the question is still on the Court under the first paragraph of the section. In case of documents relating to affairs of State it may be difficult for the Court to decide the question, yet, it need not be necessarily impossible for the Court to do it. Ordinarily no difficulty will arise because heads of department or public officers are not expected to act capriciously and ordinarily the Court will accept their statement. If necessary, the Court will require the officer to claim the privilege in the manner indicated in the judgment of Lord Blanesburgh in AIR 1931 P.C. 254. If, however, the Court find that an over zealous officer is capriciously putting forward a claim of privilege the Court will decide, as best as it can, by the means available to it whether the claim is well founded. In many cases, the very nature of the documents may be enough to show that it cannot be an unpublished official record relating to any affair of State. Thus, it has been held by Holmwood and Sharfuddin JJ., in *Harabans Sahai v. Emperor* 15 I.C. 77 that statements made by witnesses in the course of a departmental enquiry into the conduct of Police officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under Sections 123, 124, or 125, Evidence Act.

8. In *Rokunali v. Emperor* AIR 1916 Cal. 138 Chitty and Smither JJ., it was held that an entry in the posting register showing that Preventive Officers were stationed, at a particular place at the time of the appellant's arrest was not privileged

under Sections 123, 124 and 162, Evidence Act. The case in *Harabans Sahai v. Emperor* 15 I.C. 77 was followed in *Rowell v. Pratt* (1936) 2 K.B. 226 which was cited before the learned Sessions Judge. Again, in *Kaliappa v. Emperor* AIR 1937 Mad. 492 it was held that statements of witnesses recorded by a Forest Officer in the course of an investigation were not privileged under Sections 123 or 124. These sections and the judicial decisions have also been discussed in *Bhaiya Saheb v. Pandit Ramnath Rampratap* AIR 1938 Nag. 358 where it has been J stated as follows:

When the State is a party, it is interested in the litigation and is bound by ordinary procedure and so before documents otherwise relevant can be excluded, the Court must be satisfied that the mind of a responsible officer of Government has been brought to bear upon the question whether it is expedient in the public interest to give or to withhold the information asked for; and also that he has made his decision solemnly and with a due sense of responsibility and not merely in order to avoid an inconvenient disclosure which may tell against his own side in the litigation or as a matter of mere departmental routine. When however, the State is not a party, the position is different. It is no longer interested. It is no longer bound by the rules of procedure which govern the parties to a suit and so it would then j ordinarily be enough for the Court to accept the unsworn statement of the head of the department, or when Section 124, Evidence Act, applies, of the public officer concerned. As to which of these two courses should be adopted in any particular case is a matter which is purely discretionary with the Court But the Court is to decide whether a document is one of State or not. (Rules applicable in India when the State is not a party stated) : AIR 1931 P.C. 254 relied on.

9. In *Mohon Singh v. Emperor* AIR 1940 Lah. 217 *Dalip Singh and Sale JJ.* held that the diary of a foot-constable who was shadowing the movements of a suspect could not possibly become an affair of State within the accepted meaning of the words. *Dalip Singh J.* at p. 225 observed as follows:

I would therefore like to draw the attention of the Inspector General of Police and other heads of departments to the matter should it arise again that the law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that the head of a department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but as pointed out by their Lordships of the Privy Council, it would be good to follow the practice of the English law, namely that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may

draw an adverse inference from the non-production of the document.

10. All the above cases indicate that the ultimate decision as to whether a claim of privilege is well founded or not rests with the Court and the Court jealously guards its powers. We need not refer to cases where privilege has been claimed u/s 12 because the learned Sessions Judge has not disputed that the power of decision as to the nature of the communication and the circumstances in which it was made is vested in the Court. The learned Deputy Legal Remembrancer has relied on the observations of Mukherjee W.S. Irwin v. D.J. Read AIR 1921 Cal. 282. The English cases therein referred to have been considered and explained by the Privy Council in AIR 1931 P.C. 254 which was decided in 1931. The case in Suppiah Mooppanar Vs. Mallappa Chetty and Others, merely follows W.S. Irwin v. D.J. Read AIR 1921 Cal. 282 and does not render much assistance. In the light of more recent cases we have discussed the observations of Mukherjee W.S. Irwin v. D.J. Read AIR 1921 Cal. 282 require modification. Before concluding, we need only mention that the learned Sessions Judge has brushed aside the Australian case AIR 1931 P.C. 254 on the assumption that the law in India is different. He has overlooked the fact that that case turned also on the construction and meaning of Order 31 Rule 14(2) of the South Australian Rules of Court. That rule was in the same terms as Order 31 Ruled 19A(2) of the Rules of the English Supreme Court which corresponds exactly to Order 11 Rule 19(2) of our Code of Civil Procedure. Therefore that Australian case AIR 1931 P.C. 254 is good law in this country and is certainly an authority for the purpose of construing Order 11 Rule 19(2) of our Civil Procedure Code. That rule provides as follows:

Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

11. It will be noticed that in this rule no limitation has been placed on the power of the Court to inspect documents. State documents are not excluded in this rule. Very interesting questions may arise whether and if so how far the provisions of Section 162, Evidence Act, 1872, has been by necessary implication abrogated or modified by Order 11, Rule 19(2), Civil P.C., 1908. Can it be said that the Legislature intended that in a civil suit the Court can, under Order 11, Rule 19(2) and inspite of Section 162, inspect a State document to decide the claim of privilege but in a criminal case the Court cannot inspect perhaps that very document" by reason of Section 162, Evidence Act?. In the view however we take of the documents in question it is not necessary for us to embark upon any further discussion on this point. We have no doubt whatever that the documents which the Excise Commissioner, Bengal was summoned to produce, namely the petition of Bazlur Rahaman and the anonymous letter and the report in so far as it contains the statements made by witnesses to the investigating officer do not come within the purview of Section 123 at all and therefore there can be no claim for privilege in respect thereof. There may be some doubt about

the telegrams that passed between the two officers and the Dak books. The learned Sessions Judge has made no distinction between the 2 sets of documents and this fact alone is, in our opinion, sufficient to dispose of this rule. We therefore make the rule absolute and set aside the judgment of the learned Judge and direct that the appeal be re-heard on ground No. 1 in the light of the observation made by us.

Lodge, J.

12. I agree.