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**(1976) 12 OHC CK 0004**  
**In the Orissa High Court**  
**Case No : O.J.C. No. 749 of 1974**

N.K. Panda

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 16-12-1976

**Acts Referred:**

Evidence Act, 1872 — Section 123, 124

**Citation :** (1977) 44 CLT 229

**Hon'ble Judges :** S.K. Ray, Acting C.J.; P.K. Mohanti, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

P.K. Mohanti, J.—Petitioner was originally appointed as an Invigilator in the National Sample Survey Organisation. Government of India, Ministry of Finance with effect from 14-11-1950. He was promoted to the post of Inspector with effect from 19-10-1953. He was further promoted on 22-7-1958 to the post of Scrutiny Inspector which was subsequently re-designated as Assistant Superintendent with effect from 20-11-1962. He was appointed substantively as Assistant Superintendent with effect from 31-7-1967. The next promotional post above that of Assistant Superintendent is the post of Superintendent, the appointment to which is made by selection. As per the Recruitment Rules (Annexure B) ten per cent of the vacancies are filled by direct recruitment and the balance of ninety per cent by promotion from the posts of Assistant Superintendents. A seniority list of Assistant Superintendents was, published on 22-1-1964 in which the Petitioner's name finds place at serial No. 86 and opposite parties 3 to 28 are shown below the Petitioner. In supersession of the claim of the Petitioner, opposite parties 3 and 4 were promoted to the rank of Superintendent with effect from 11-12-1973. A representation made by the Petitioner was rejected on 7-2-1974. Opposite parties 5 to 7 were promoted as Superintendents on 6-7-1974. Opposite parties 8 to 28 were promoted to the said rank on 9-7-1974.

The Petitioner's contention is that his case for promotion to the rank of Superintendent was not considered at all although he was at the time the vacancies arose eligible for the same. In this writ petition the Petitioner prays for issuance of a writ of mandamus or certiorari quashing the promotions of opposite parties 7 to 28 and directing the opposite parties 1 and 2 to consider the Petitioner's case for promotion with effect from the date when his juniors were promoted. It has also been prayed that opposite parties 1 and 2 be directed to communicate to the Petitioner the adverse remarks, if any recorded in his confidential character roll and to give him an opportunity to submit a representation for expunging the same.

2. Opposite parties 1 and 2 are the Union of India represented by the Secretary, Planning Department, Government of India and the Director of National Sample Survey Organisation respectively. They filed a joint counter contending that the case of the Petitioner was duly considered by the Departmental Promotion Committee when opposite parties 3 to 23 were promoted. On all the occasions as officers with better record of service were available the Petitioner's name could not be included in the panel for promotion to the post of Superintendent. It is admitted by them that opposite parties 3 to 23 were juniors to the Petitioner and that there was no adverse remark or adverse circumstance against the Petitioner.

3. On 22-12-1975 the Petitioner asked for a direction to the opposite parties 1 and 2 to produce the records of the Departmental Promotion Committee in which decisions were taken to promote opposite parties 3 to 28 on 11-12-1973, 6-7-1974 and 9-7-1974.

4. An affidavit sworn by Shri S.C. Chaudhuri, Additional Secretary, Department of Statistics, Ministry of Planning was filed in reply to the Petitioner's prayer for production of documents. It is stated therein that the records of the Departmental Promotion Committee are in the nature of unpublished official records relating to the affairs of the State and that their disclosure would materially affect freedom and candour of expression in determination of public policy. It is also stated that maintenance of secrecy of these documents is essential for ensuring the proper functioning of public services. On these grounds, privilege u/s 123 of the Evidence Act was claimed on behalf of opposite parties 1 and 2. The Bench hearing the writ petition at that time disallowed the claim of privilege by a short order dated 7-4-1976 and directed production of the records. In our opinion, the claim of privilege was rightly disallowed.

5. Section 123 of the Evidence Act provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of the 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.

6. The scope and ambit of Section 123 of the Indian Evidence Act have been considered by their Lordships of the Supreme Court in *The State of Punjab Vs.*

Sodhi Sukhdev Singh, , Amar Chand Butail Vs. Union of India (UOI) and Others, and The State of U.P. Vs. Raj Narain and Others, and clear guiding principles have been laid down. In the case of Sodhi Sukhdev Singh<sup>1</sup>, their Lordships indicated that there are two categories of documents which can be said to relate to affairs of the State. Documents whose contents, if disclosed would affect national defence or public security or good neighbourly relations of the country belong to one category. The other category comprises of such documents, disclosure of whose contents would materially affect the freedom and candour of expression of opinion in the determination and examination of public policies. Admittedly, the records of the Departmental Promotion Committee do not come within the first category of documents. The only question for determination is whether these records can come within the second category of documents.

7. Mr. Chaudhuri in his affidavit has not chosen to furnish a clue as to the jeopardy to which the Government might be exposed if the contents of the records in question are disclosed. It is not shown in what way would such a disclosure be detrimental to the public interest. The objection taken in the affidavit is too vague. Mr. Chaudhuri has merely followed the letters of Sections 123 and 124 of the Evidence Act and has not said anything more than this that he claims privilege. In our opinion, the records in question have come into existence in course of common routine business and public interest will not be injuriously affected by their disclosure. We are not satisfied that disclosure of the contents of the records will affect the freedom and candour of expression of opinion in the determination and execution of any public policy. We are fortified in this view by decided cases in which the stand of the type taken by Mr. Chaudhuri in this case has been deprecated.

8. In Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another, , a Division Bench held as follows:

If, therefore, having considered the document he tells the Court that the document is one relating to affairs of State and that its disclosure will be injurious to public safety, the Court ordinarily would accept his statement if made on oath. But the statement must not be of a vague or indefinite character. He must not only indicate the nature of the document, but he must also state what injury to public interests he contemplates would result from the disclosure of the document.

In para 17 of the judgment Chagla C. J. made the following observations:

The scales are always weighed against the subject who fights against Government, and Government should be loath to throw against him more weight in the scales by refusing disclosure of documents which are relevant to the issues in the suit. Government should always bear in mind that it is incumbent upon it to see that there is a fair trial between itself and the subject who is fighting the Government. It should also realise that refusal to disclose material documents makes it difficult or impossible for the subject to make good his allegations

against the Government. Government should aim bear in mind that the loyalty of its officers to the cause of Government should not prevail to the extent of injustice being done to the subject.

9. In *State of Orissa and Ors. v. Jagannath Jena* 1975 (2) S.L.R. 413, this Court held:

Mere expression of opinion of various hierarchy of officers on the file as to the suitability or unsuitability of a particular candidate for a post and the results obtained by such candidate in any examination held for appointment to that post are normally not matters which would affect the efficient administration of public affairs.

10. In *D.C. Chakravarty v. Union of India* O.J.C. No. 262 of 1973 D/20-12-1974, this Court by order dated 6-11-1974 disallowed the claim of privilege in respect of the report of the Departmental Promotion Committee observing as follows:

There can be no dispute that these documents have come into existence in course of normal governmental activities and were not confidential communications. The purpose of Section 123 or Section 124 of the Evidence Act would not be defeated in any manner if these documents are made a part of the record and inspection thereof is granted.

11. In *Ram Gopal v. Union of India* 1912 S.L.R. 158, the Petitioner alleged that the Departmental Promotion Committee had not considered the case of the Superintendents for appointment and" sought for a direction that the Government be asked to produce the proceedings of the Departmental Promotion Committee. The Government of India claimed privilege u/s 123 of the Evidence Act. A Division Bench of the Delhi High Court relying on an earlier Division Bench decision of that High Court disallowed the claim of privilege observing as follows:

We fail to see how such record could in any manner be said to relate to that class of documents the disclosure of which will cause injury to public interest. On the other hand, we feel that by making available to the Court, the actual proceedings of the D.P.C. the department would be helpful to show its bona fide and to dispel any misapprehension of the Petitioner, however, mis-placed.

The Court further said:

It is unfortunate that the Government should in many cases claim privilege u/s 123, Evidence Act and thus unnecessarily invite suspicion when on the other hand disclosure will be to its benefit. This tendency of secretiveness in matters which concern vast number of employees is hardly consistent with the open and democratic society that our Constitution is committed to build. It is time that it is recognised that the public matters should be made open to public scrutiny and it is only in cases which involve any danger to the security of the State that any documents should be withheld from the Court. In the present case after going through the proceedings of the D. P. C. we feel that the case of the government has only improved; many of the unfounded suggestions made by the Petitioner

have been proved to be wrong. This example shows how sometimes undue regard for secrecy results in even the best evidence being withheld on the untenable-and weak plea of public interest.

12. In *N.P. Mathur v. State of Bihar* 1971 (1) S.L.R. 335, the Petitioners contended that their cases had not been considered while making the appointment to the post of Chief Secretary. They called for production of the relevant files which dealt with the appointment to the post of Chief Secretary and privilege was claimed by the State u/s 123 of the Evidence Act. A Full Bench of the Patna High Court disallowed the claim of privilege and in para 44 of the judgment Hon"ble Mr. Justice Untwalia (as he then was) made the following observations:

If a citizen makes a grievance that such, an equality of opportunity has been denied to him, it would be a travesty of justice ordinarily and generally to uphold the claim of privilege. Except in very exceptional circumstances which would clearly bring about injury to public interest, such a claim is not to be upheld.

13. In *The State of U.P. Vs. Raj Narain and Others*, , the Court while reiterating the views taken in the earlier decisions remarked as follows:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security, see *New York Times Co. v. United States* (1971) 29 Law Ed. 822 : 403 U.S. 713. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routsne. The responsibility of official to explain and to justify their acts is the chief safeguard against oppression and corruption.

14. Applying the aforesaid principles to the present case we are left with no doubt that there was no justification whatsoever for claiming privilege.

15. In pursuance of the order dated 7-4-1976, the minutes of the Departmental Promotion Committee held on 7-12-1973, 6-6-1974 and 21-6-1974 were produced and the learned Counsel for the Petitioner was allowed to inspect the same. On a perusal of the records, it appears that the Petitioner was one of the forty officers whose cases were considered by the Departmental Promotion Committee held on 7-12-1973. The Committee classified the eligible officers on the basis of merit, as determined by their respective records of service, and then prepared the select list. Names of only those officers who were classified as "Very good" were placed on the select list for promotion to the posts of

Superintendents Assessment of the Petitioner by the Committee was "good". The officers whose assessment was "very good" were included in the panel for promotion. Mr. Murty, the learned Counsel for the Petitioner pointed out some corrections made in columns 9 and 11 of the seniority list attached to the minutes dated 7-12-1973 and contended that the Petitioner was assessed by the Committee as "V. G," (very good), but by subsequent manipulation a cross mark was put on the letter "V" and the assessment shown as "good". He filed a petition for production of the original Character Rolls of the Petitioner for verification. The prayer was vehemently opposed by Mr. H. G. Panda, the learned Counsel for the opposite parties. It is not possible to accede to the contention of Mr. Murty. On a careful scrutiny, we are satisfied that the corrections were made by the Committee at the time of assessment and that there was no subsequent manipulation as alleged. If actually the Petitioner had been classified as "very good" his name would not have been omitted from the list of selected candidates mentioned in the minutes of the meeting recorded by the Committee on 7-12-1973. We do not think that for the disposal of this writ petition it is necessary to have the Character Rolls of the Petitioner.

16. It appears that the Petitioner's case was also considered by the Departmental Promotion Committee held on 6-6-1974 and 21-6-1974 and he was classified as "Good" whereas the officers whose names were recommended for promotion were classified as "Very good."

It was for the Departmental Promotion Committee to make assessment regarding the merits of each eligible officer by considering the service records. This Court cannot sit in judgment over the assessment made by the Departmental Promotion Committee.

17. The post of Superintendent having been classified as a selection post, the selection had to be made on the basis of merit and not on seniority. In *Sant Ram Sharma Vs. State of Rajasthan and Another*, it was clearly pointed out that promotion to selection posts is to be based primarily on merit and not on seniority alone. The Petitioner was not selected because on consideration of his records of service he could not be classified as "Very good" while the opposite parties who got that classification were selected. He can have no legal grievance against these selections.

18. There is no merit in this writ application and it is accordingly dismissed. Parties to bear their own costs.

S.K. Ray, A.C.J.

I agree.

Application dismissed.