
(1974) 03 AHC CK 0025
In the Allahabad High Court
Case No : Election Petition No. 5 of 1971

Raj Narain

APPELLANT

Vs

Smt. Indira Nehru Gandhi and Another

RESPONDENT

Date of Decision : 20-03-1974

Acts Referred:

Evidence Act, 1872 — Section 123, 162

Citation : AIR 1974 All 324

Hon'ble Judges : K.N. Srivastava, J

Bench : Single Bench

Advocate : Shanti Bhushan, R.C. Srivastava, G.D. Vidyarthi, Krishna Pal Singh, M.C. Gupta, B. Solomon, G.C. Dwivedi, Satish Trivedi, K.N. Tripathi, Suraja Prakash, H.N. Shukla, S.N. Chaturvedi, R. Dwivedi, T.N. Porwar and A.N. Singh, for the Appellant; S.C. Khare, J.N. Tiwari, S.N. Misra, V.N. Khare, S.K. Mukherji, P.C. Chaturvedi, K.L. Misra, A.P. Misra, Satya Mohan and N.N. Mukerji, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : The State of U.P. Vs. Raj Narain and Others, AIR 1975 SC 865 : (1975) 4 SCC 428 : (1975) 3 SCR 333

K.N. Srivastava, J.—In this election petition privilege has been claimed regarding three sets of documents. Sri S. S. Saxena is alleged to have claimed privilege regarding four papers, including copy of a blue book with the title as "Rules and Instructions for the Protection of Prime Minister when on Tour or in Travel". Privilege was claimed by the Superintendent of Police, Rae-Bareilly, regarding two papers which relate to the Tour Programme of Smt. Indira Nehru Gandhi at Rae-Bareilly during the election period. Sri K. P. Sood claimed privilege regarding two documents. Sri Sood is an officer of the Accountant General's Office, Central Revenue, New Delhi. Sri Saxena is alleged to have claimed privilege orally as an agent and representative of Sri R. K. Kaul, Home Secretary, Uttar Pradesh Government. This privilege was claimed by Sri Saxena on 10-9-1973, but an

affidavit was filed by Sri Kaul claiming that privilege on 20-9-1973. Much stress was laid by the parties' counsel in support of their respective contentions regarding the production of the blue book with the title "Rules and Instructions for the Protection of Prime Minister when on Tour or in Travel". It shall hereinafter be called as the "blue book".

2. According to the petitioner, firstly, privilege u/s 123 of the Evidence Act could not be claimed orally. Secondly, Sri Saxena did not claim privilege. The third contention of the petitioner's counsel was that after a lapse of ten days the affidavit of Sri Kaul should not be considered as Sri Kaul knew full well that Sri Saxena was bringing that book to Court for production and, as such, if he had to claim any privilege he should have armed Sri Saxena with the necessary affidavit. The fourth contention was that requisite conditions of Section 123, Evidence Act, were not fulfilled.

3. Section 123 of the Evidence Act reads as below:--

"Section 123. 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."

4. In this connection, reference to Section 162 will also be relevant because it lays down the procedure which should be adopted while deciding the question of privilege. Section 162 of the Evidence Act reads as below:

"Section 162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence u/s 166 of the Indian Penal Code."

5. A reading of bare Section 123 of the Evidence Act clearly indicates that in order to claim privilege there must be certain prerequisite conditions: (1) the document must be an unpublished official record, (2) it should relate to the affairs of State, and (3) it can be admitted in evidence with the permission of the head of the department concerned who shall give or withhold such a permission.

6. u/s 162 of the Evidence Act, the Court has power to inspect the document for the purpose of deciding the question of its admissibility or to get it translated if such a course be required. But, the words "Unless it refers to matters of State"

clearly indicate that documents relating to matters of State cannot even be inspected by the Court for determining the question of its admissibility.

7. Before taking up the question involved in this case, we have to see as to whether the evidence derived from the blue book is from unpublished official records and, secondly, if they relate to the affairs of State, and also as to whether the Court would suo motu refuse permission for the production of the documents or it can do so only when privilege is claimed by the head of the department concerned. No doubt, even if the document fulfills the first two conditions, the head of the department can permit its production if he so decides, but he has power to withhold it if the two conditions, mentioned above, are satisfied and it is not in public interest to disclose its contents.

8. The question, therefore, would arise as to what would be the stage for deciding this question and by whom. Learned Counsel for the respondent as well as the State Counsel and the Advocate-General contended that the Court shall refuse permission for production of document even if the head of the department did not withhold permission or permitted its production because according to them it was the primary duty of the Court to do so in view of the word "permitted" which has been used in this section. They contended that different languages have been used in different sections of the Evidence Act such as in Section 123 the word used is "permitted", in Sections 124 and 125 the words used are "shall be compelled", while in Section 126 the word used is "permitted". I shall therefore, examine all these four sections separately. It is no doubt correct that the witness must be competent to make the statement, and that his statement should be relevant. If these conditions are fulfilled, a statement would be admitted.

9. Sections 122 to 127 of the Evidence Act are exceptions to the general rule. These sections do not allow a certain evidence to be brought in unless the conditions laid down in these sections are fulfilled. u/s 124, no public officer can be compelled to disclose communications made to him in official confidence, when by that disclosure public interest is likely to suffer. Similarly, u/s 125, no Magistrate or Police Officer can be compelled to tell the source of his information about the commission of an offence. u/s 126, no Barrister, attorney, pleader or Vakil, can be compelled to disclose any communication made to him in the course of his employment, unless the client consents for that disclosure. In my opinion, the words "permitted" and "compelled" have been used in different contexts in the aforesaid sections. A public officer and a Magistrate or a police officer have been empowered to withhold information relating to the matters referred to in Sections 124 and 125 of the Evidence Act. Similarly, a Barrister, an attorney, a pleader or Vakil also has a right to withhold information received by him from the client in the course of his employment. Sections 124, 125 and 126 of the Evidence Act clearly give power of withholding information by certain set of persons and the law protects them from making disclosure of the same. In this regard, these sections lay down that the persons mentioned in these sections

cannot be compelled by any law court to make the disclosure.

10. In Section 123, there is a comma before the words "except with the permission of the officer at the head of the department concerned" and, therefore, to my mind, the word "permitted" governs the aforesaid expression. A reading of this section clearly indicates that the Court shall permit the disclosure of evidence regarding unpublished documents relating to the affairs of State if the officer at the head of the department so permits. The words "shall not be permitted" would, therefore have to be read with the last line which reads, "shall give or withhold such permission as he thinks fit."

11. From the above discussion it, therefore, becomes clear that even if the information is based on unpublished official records relating to the affairs of State, the same could be given in evidence in law courts, provided the head of the department has no objection and he so permits. Therefore, the question about permitting any evidence to be led could only arise when the permission had been withheld by the head of the department concerned. In my opinion, therefore, the Court will not come into picture unless the permission has been withheld. It is then and then alone that the Court would step in and find out whether the document sought to be adduced in evidence relates to the unpublished official records relating to the affairs of the State, and hold an enquiry as to whether the privilege has been rightly claimed and the claim is justified.

12. Before proceeding further, I would like to discuss various (sic) to find out at what stage and in what manner such a claim can be made. But, before deciding this question it appears necessary to decide as to whether any procedure is provided by the law or not because the contention of the learned Counsel for the other side was that every procedure should not be taken as prohibitory unless it is laid down by law. In this connection, reliance was placed on certain decisions of different High Courts and the Supreme Court.

13. The first case relied upon was Full Bench decision of this Court in Narsingh Das v. Mangal Dubey, ILR (1883) All 163 . This case has absolutely no bearing with the present case. The question in this case was about joining of different causes of action against different sets of persons.

14. The other case is Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, . In this case the question arose as to whether an amendment should be allowed or disallowed. It was held as below:--

"The order passed by the High Court cannot be sustained. Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure."

15. So far as the principle laid down in this case is concerned, there is no doubt about it. But, in the instant case, the question about the evidence to be allowed

or not to be allowed depends upon certain prerequisite conditions mentioned in Section 123 of the Evidence Act, and, therefore, no question of any technicality arises.

16. Reverting to the main point, there can be no doubt that privilege can be claimed by the Minister or head of the department through the person who is sent to the Court with the records summoned. But, the question will arise whether such a claim can be made by him orally or under affidavit signed by the officer concerned. In this connection, reliance was placed on a decision of the Supreme Court in *The State of Punjab Vs. Sodhi Sukhdev Singh*, . In this case, K. Subba Rao, J., observed as below:

"The next point is, what is the procedure to be allowed by a Judge for deciding on the said objection? When an officer of the State is summoned as a witness to produce a document, if the State seeks to take a plea of privilege then it is the duty of the minister in charge of the department concerned to file an affidavit at the first instance. The affidavit so filed shall ex facie show that the minister concerned has read and considered each of the documents in respect of which the privilege is claimed. It shall also contain the general nature of the document and the particular danger to which the State would be exposed by its production".

17. This was the view expressed in some earlier cases, and it is a well settled principle of law that privilege must be claimed by the Minister or head of the department concerned, who has to file an affidavit at the very first instance. In the instant case, no such affidavit was filed at the first instance.

All that was done, according to the contentions of the learned Counsel for the respondent and the State Counsel, was that Sri Saxena was deputed by the Home Secretary to produce this document and claim such a privilege.

18. I shall, therefore, examine the statement of Sri Saxena to see as to what he has stated regarding this matter. When a question was asked about the blue book, he replied:--

"I have brought it. I cannot file it unless permitted by the head of the department."

This statement does not go to show that he was claiming privilege or that he had been directed by the head of the department to claim such a privilege and to withhold the production of the document. To a Court question, the witness made the following statement:

"My head of department has not permitted me to file the booklet whose title is "Rules and Instructions for the Protection of Prime Minister when on tour or in travel". This booklet has been marked "SECRET" at the top of the first page."

19. Simply because it is marked "secret", it will not be a privileged document.

20. Further on, in examination-in-chief, this witness stated:--

"I have come to attend this Court under the order of the Home Secretary, Uttar Pra-desh Secretariat. He directed me to attend this Court with the papers mentioned in the summons."

He further stated:

"The Home Secretary did not instruct me not to bring to this Court any paper summoned by the Court. He had directed me to show all the papers I have brought to the Court. In obedience to the Home Secretary's order and direction, I have brought this printed booklets which is marked "SECRET" for being shown to this court. I have no instructions to produce this printed booklet in this Court."

A question was asked in his examination-in-chief as to whether the Home Secretary had given any affidavit to this witness to claim privilege u/s 123 of the Evidence Act. The witness replied in the negative. In cross-examination, this witness stated:--

"I was authorised by the Home Secretary to bring these papers to this court. Except this, he did not give me any additional authority."

To another question, this witness replied:--

"No orders were received. The L. R. gave opinion that the circulars and programmes regarding tour of the Prime Minister were secret documents and privilege should be claimed."

Yet, to another question, if he had any specific instructions from anybody about bringing the secret documents relating to the security arrangements of the Prime Minister's tour to this Court, this witness replied in the negative.

21. A reading of the entire statement of Sri Saxena, therefore, clearly indicates that at no stage he claimed any privilege u/s 123 of the Evidence Act. He stated that the Law Department had advised the Home Department to claim privilege and yet no formality was observed, nor any step was taken by the Home Minister to claim such a privilege. Therefore, it is abundantly clear that at the first instance no privilege was claimed.

22. According to Sri Saxena, this document was brought for being shown to the Court. As shown above, if it was a document relating to the affairs of the State, in accordance with Section 162 of the Evidence Act, it could not be seen by the Court as well. I am conscious of the fact that later on the law on the subject has been changed and the Court can see such a document for a limited purpose, that is, to decide whether the privilege has been properly and rightly claimed. But, all the same, the law does not permit that, except for the above purpose, even the Court can see it. When this document was brought to be shown in Court, there was no reason as to why the party should not be allowed to see or use it, specially when no such claim of privilege, as required by law, was claimed at the first instance.

23. It was contended by the learned Advocate-General that the paper had not yet been admitted in evidence and, therefore, Sri Kaul could file an affidavit claiming such a privilege even on 20-9-1973. This argument has no force in it for the simple reason that it was produced without such a claim being made at the first instance. It is evident from the statement of Sri Saxena that the head of the department had not withheld the permission. He was not filing the paper simply because he had not been specifically asked by the head of the department to file it and because at the top of the booklet the word "Secret" was printed.

24. Certain decisions were cited at the Bar about the stage when a claim for privilege could be made even at a later stage. A reference was made to *Henry Greer Robinson v. State of South Australia* AIR 1931 PC 254. In this case it was held as below:

"But the privilege has not, in their Lordships' judgment, been lost merely by the insufficiency of the form in which it has been claimed. It is quite possible that there may be amongst the scheduled documents some, at least, to which the privilege genuinely attaches, and to throw open these documents to the inspection of the plaintiff, without more, would destroy the protection of the privilege. Therefore, it would or might be contrary to the public interest to deprive the respondent State of a further opportunity of regularizing its claim to protection, by producing as its next step, an affidavit of the description already indicated."

25. Even in this case at the very first instance the claim of privilege was made, although the affidavit sworn was defective. In these circumstances, an opportunity was given to the State to file a detailed affidavit with full reasons.

26. In *Sujit Kantha v. Union of India* AIR 1970 Gau 131 in a petition certified copies of certain documents were annexed. After notice had been served, claim for privilege was made. In this case it was observed as below:

"The statute has clearly proscribed inspection of documents relating to the affairs of the State. The rule of conduct which is prescribed by this law is that no person should pry into confidences of Governmental affairs. But the conduct of the petitioner clearly runs counter to the rule for conduct laid down by the statute. It is significant, as Cohen has neatly observed in his *Ethical Systems* -- "Words are frail packages for legislative hopes. The voyage to the realm of law observance is long and dangerous." It is a question of serious import whether a person should be allowed to take advantage of his illegitimate action in securing by any means whatsoever secret and confidential documents of the Government. It is not possible to show any leniency in a matter of this description and we cannot too strongly condemn this unlawful practice and would be loath to give the erring party any advantage of his wrong action. It should be a warning to those who want to thrive from such unethical disclosures which are clearly opposed to the provisions of law."

27. In this case also privilege was claimed as soon as the matter came to the

notice of the department concerned. The facts of this case are altogether different from the instant case.

28. In *S.B. Choudhury and Another Vs. I.P. Changkakati and Another*, it was held as below:

"No particular form is prescribed for claiming any such privilege and if the Sessions Judge acted on the said affidavit and considered it sufficient, it cannot be said that the order of the Sessions Judge is vitiated even if the contention of the petitioners is accepted that the affidavit was not in proper form.

The claim of privilege can be raised in any manner as the head of the department desires. It is for the court to decide whether it will insist upon the examination on oath of the head of the department to ascertain if the documents relate to the affairs of the State or not. It is for the court to determine as I have already pointed out earlier, from the circumstances and from the nature of the documents, as to whether the documents relate to the affairs of the State or not. No particular mode of proof is prescribed in the Act."

29. This too does not lay down that even where no privilege is claimed, the Court will suo motu decide the question of privilege without being raised.

30. The Court's function begins only after a proper privilege has been claimed. A law court is not supposed to be an agent of any party. If an act has to be done by any party, it must be done by that party and then only the legal formalities following from that act would be taken up by the Court. It is thus clear that the Court's function is only to find from evidence or from the inspection of the documents if the privilege has been properly claimed and whether the information is relating to the affairs of the State and about the unpublished records.

31. A duty u/s 123 of the Evidence Act is cast on the Minister or the head of the department to claim privilege or to permit the production of the document in Court. This duty, which under the law is cast on those persons, cannot be exercised by a court nor a court would be justified in suo motu ordering that the document be not produced. The Minister or the head of the department concerned has to apply his mind as to whether the document should be produced or not. The Court's duty is only to see if that discretion has been applied in proper manner and in good faith. In this view of the matter, it cannot be argued that it is the court's duty, even without privilege being claimed, not to permit the production of a document.

32. It has next to be seen as to what is the power of the court for making enquiries u/s 123 of the Evidence Act. Would it not permit the production of a document the moment a claim is made or proceed further to enquire into the matter. This question came up for discussion in the case of *The State of Punjab Vs. Sodhi Sukhdev Singh*, and their Lordships considered three views possible. The first view, which was considered by their Lordships of the Supreme Court,

was that it was for the head of the department to decide whether the document was innocuous or noxious and when it comes to the conclusion that it was innocuous the head of the department will give the necessary permission, but if he comes to the conclusion that it is noxious, the permission will be withheld. The second view was that the courts should decide and determine after enquiry as to whether the disclosure be made or not. And, the third view was that the court could determine the question relating to the character of the document and if the court comes to the conclusion that the document is noxious it may leave it to the head of the department to decide whether it should be produced or not. In this connection, the following observation was made in the case of State of Punjab (supra):

"The last decision on which considerable reliance has been placed by Mr. Seervai is the case of *Beatson v. Skene* (1860) 5 H and N 838. It may incidentally be pointed out that Chief Baron Pollock's observations in this judgment are frequently cited in judicial decisions where the question of privilege falls to be considered. In that case the plaintiff had been a general who commanded a corps of irregular troops during the war in Crimea. Complaint having been made about the insubordination of troops the corps was placed under the superior command of V. Thereupon the plaintiff resigned his command. V directed S to inspect and report upon the state of the corps and referred S for information to the defendant who was a Civil Commissioner. The defendant in a conversation with S, made a defamatory statement respecting the conduct of the plaintiff. The plaintiff brought an action against the defendant for slander. The defence set up against the plaintiff's claim was that what had passed between the defendant and S was a privileged communication. The jury had found a verdict for the defendant. A new trial was claimed by the plaintiff, inter alia, on the ground that the learned Judge had declined to compel the production of certain documents. It appeared that the Secretary for War had been subpoenaed to produce certain letters written by the plaintiff to him and also the minutes of the Court of enquiry as to the conduct of S in writing the letter to V. The plea for a new trial was rejected on the ground that the Court was of the opinion that the non-production of the said documents furnished no ground for a new trial. There was a difference of opinion among the members of the Court on the question as to whether Bramwell, J., was justified in unholding the claim of privilege; Pollock, C. B. Bramwell, B. and Wilde, B., held that the claim for privilege was properly upheld, whereas Martin, B., took a contrary view."

Further on, it was observed:

"Reading this clause on this assumption what is its effect? It empowers the Court to inspect the document while dealing with the objection; but this power cannot be exercised where the objection relates to a document having reference to matters of State and it is raised u/s 123. In such a case the Court is empowered to take other evidence to enable it to determine the validity of the objection."

33. In this case the third view was accepted, and it was held as below:

"Thus our conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State u/s 123 or not."

34. In this case, the Supreme Court held that the court had no power to look into the document itself while dealing with the objection u/s 123 of the Evidence Act.

35. The question whether the court is empowered to peruse the document itself was again considered in *Amar Chand Butail Vs. Union of India (UOI) and Others*, . In this case it was observed as below:--

"But on the merits also we feel no doubt in rejecting the said claim. The statement made by the Home Minister does not show that he seriously applied his mind to the contents of the documents and examined the question as to whether their disclosure would injure public interest. We are constrained to observe that this case illustrates how a claim for privilege can be and is sometimes made in a causal manner without realising the solemnity and significance attached to the exercise of the power conferred on the head of the department to make that claim. As we will presently point out, one of the documents which was produced before us under our directions would tend to show that the sole reasons for claiming privilege in respect of that document was the fear rightly entertained that the disclosure of the said document would entirely defeat the whole of the defence made by respondents 1 and 2. Since it was necessary for us to consider whether the claim had been rightly upheld by the courts below, we directed respondents 1 and 2 to produce the said documents before us for our inspection. Accordingly such of the documents as were available have been produced before us and it is to one of them that we propose to refer. Having seen all the documents produced before us we were satisfied that the claim for privilege made by respondent No. 2 was not justified at all and may even be characterised as not bona fide."

36. The question as to whether a Court is empowered to look into the documents was considered in this case and, as observed above, it was held that in cases where the claim for privilege is made in a causal manner without realising the solemnity and significance attached to the exercise of the power, the court is entitled to consider the document itself. In this case it was held that the documents produced should be inspected by the court itself for deciding the question as to whether the claim for privilege had been properly exercised.

37. On behalf of the respondent reliance was placed on the following paragraph of the judgment of the Supreme Court in *Amar Chand Butail Vs. Union of India (UOI) and Others*, :

"The position in law about the liability of respondents 1 and 2 to meet the appellant's claim in regard to the dealings between the appellant and the State of Jubbal is not in doubt or dispute. If it can be shown that respondents 1 and 2 had recognised the appellant's claim against the State of Jubbal, that would give him a valid cause of action against both of them. It is hardly necessary to deal with this point elaborately because the position under Article 295 of the Constitution is fairly clear in respect of this point. Recognition of the claim made by the appellant can be proved by the appellant either by express acknowledgement or recognition or may even be established on relevant facts and circumstances which may lead to the inference of such recognition. In other words, recognition of such a claim can be either express or implied and in the latter class of cases the inference as to recognition may be drawn legitimately from facts and circumstances which reasonably support such an inference."

38. This paragraph has nothing to do with the interpretation of Section 123 or Section 162 of the Evidence Act. This discussion relates to recognition by Government, which may be express or implied. Therefore, this would not help the respondent.

39. In this connection reference was made to certain English decisions. One of the cases referred at the Bar is *Conway v. Rimmer* (1967) 2 All ER 1260. The Bench was constituted of Lord Denning, Davies and Russell, L. JJ. Lord Denning gave a dissenting judgment that the reasons of the Home Secretary were not conclusive and the document to be produced should be inspected by the court itself, although the majority took a contrary view. The same case came before the House of Lords in *Conway v. Rimmer* (1968) 1 All ER 874. The opinion given by Lord Denning was upheld and it was held that the court had the power to examine the document. In this case the law on the subject was revised and it was held as below:--

"The courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character."

40. Lord Morris in the concluding portion of his judgment observed as below:

"I have come to the conclusion that the appeal should be allowed, and that the best procedure to follow for weighing the public and private interests which are involved in this case will be to have an inspection of the five documents which are in question."

41. These two decisions coupled with the Supreme Court's decision in *Amar*

Chand Butail Vs. Union of India (UOI) and Others, leave no room for doubt that in appropriate cases the court has the power to inspect the document to keep the balance between the State and the subject even.

42. Learned Counsel for the respondent contended that in India the law was codified while in England the position was otherwise, and, therefore, these English decisions were of no help for deciding the question in issue. No doubt, our Evidence Act is a codified law, but all the same reference can be made to the English Law for appreciating the general principles of law. Lord Denning, who gave the dissenting judgment in Conway's case, referred to a number of cases from all the dominion countries for holding the view that the documents could be inspected by the Court for keeping the balance between the parties even. The following observation of Lord Denning in Conway's case can be read with advantage:

"I know that in Duncon v. Cammell, Laird and Co., Ltd. (1942) 1 All ER 587 : (1942) AC 624, the House of Lords dissented from Robinson's case (1931) All ER 333 : (1931) AC 704 but the courts of the Commonwealth being free to choose have unanimously followed Robinson's case and have endorsed the views of this court in the Grosvenor Hotel case (1964) 3 All ER 354 : (1965) Ch 1210; or in other cases have acted on like principles. Let me recite the cases. They are a veritable roll call. The Supreme Court of Canada in R. v. Snider (1954) SLR 479, and Gagnon v. Quebec Securities Commission (1964) SCR 329. The Supreme Court of Victoria in Bruce v. Waldron (1963) VLR 3. The Court of Appeal of New South Wales in Re Tunstall, Ex. P, Brown 84 CWN 13 . The Court of Appeal of New Zealand in Corbett v. Social Security Commission (1962) NZ IR 878 . The Supreme Court of India in Amar Chand Butail Vs. Union of India (UOI) and Others, . The Supreme Court of Ceylon in Apponhamy v. Illangaratue 66 CWN 17. The Court of Appeal of Jamaica in Alien v. Byfield (No. 2), (1964) 7 WIR 69 o say nothing of the Court of Session in Scotland backed in this respect by the House of Lords itself in Glasgow Corporation v. Central Land Board 966 SC 1."

Further on, he went on to observe:

"Despite this impressive array, my brethren today feel that we are still bound by the observations of the House of Lords in Duncan v. Cammell Laird and Co. Ltd. (1942) 1 All ER 587 : (1942) AC 624 and by the decision of this Court in Auten v. Rayner (1966) 3 All ER 77. I do not agree."

43. The general trend of opinion even in countries where the law on the subject is codified appears to be that in appropriate cases the court has the power to inspect the document, and the reasoning given by Lord Denning appears to be very sound and correct because instances might not be wanting where an authority might claim privilege mala fide or without exercising proper care or in a cursory manner. Therefore, in this view of the matter, there is consensus of opinion in this country as well as in other countries that the document can be inspected in appropriate cases.

44. The next question to be decided is whether the blue book is an unpublished record, as defined in Section 123 of the Evidence Act. There is evidence on the record to prove and show that a portion of this book was quoted in the Lok Sabha Debate on Wednesday, April 18, 1973. On 7-3-1973 Sri Jyotirmoy Bosu, M. P., had put the following question as a supplementary:

"If it is or it is not a fact that before November, 1969, the tours undertaken by the Prime Minister for election and other party purposes used to be paid by the party, but since November, 1969, the procedure has been changed and the expenses are now debited to the Exchequer."

45. The reply was that it was not a fact. Then, Section 71(6) of the blue book was quoted by the Hon^{ble} Member and the amendment made in that section on 19-11-1969. As given in this proceeding, Section 71(6) runs as below:

"It has been noticed that the rostrum arrangements are not always properly made because the hosts are sometimes unable to bear the cost. As the Prime Minister's security is the concern of the State, all arrangements for putting up the rostrum and the barriers at the meeting place will be borne by the State whatever may be the occasion for which the public meeting is called, except election meetings."

46. After amendment, as shown in the Lok Sabha Debates, the section now reads as below:

"It has been noticed that the rostrum arrangements are not always properly made because the hosts are sometimes unable to bear that cost. As the security of the Prime Minister is the concern of the State, all arrangements for putting up the rostrum, the barriers etc., at the meeting place including that of an election meeting will have to be made by the State Government concerned."

47. It is not denied that this quotation from the blue book is correct nor any objection was made in the Lok Sabha that it being a privileged document its contents could not be disclosed. The Minister concerned also did not deny this fact. A perusal of the proceeding would show that without denying the correctness of this quotation, an explanation was tried, to be given.

48. Not only this, on behalf of the respondent a document, paper No. A-75/1, was filed. This is the reproduction of Section 71(6) as it now stands after the amendment. Learned Counsel for the respondent contended that this paper was obtained from the record of writ proceedings in which the Union Government had filed the extracts of the amended Section 71(6) and from that case the petitioner had obtained the copy.

49. This clearly goes to show that the Union Government itself disclosed a part of this blue book, on the top of which the word "Secret" is printed. It cannot be imagined for a minute that some portion of the blue book which relates to the security of the Prime Minister when on tour or in travel is secret and other parts of it are not so. Had it been so, the entire blue book would not have been

marked "Secret". If a portion of this secret book is disclosed, there is no sanctity left behind its secrecy. If any other exigency arises, as it arose in the above writ petition, the other parts of the book could also be divulged. It might be that this booklet was intended to be an unpublished record, but due publicity was given to some parts of it and, therefore, it cannot be said that it is an unpublished record.

50. Paper No. A-75/1 reads as below: "Rule 71 (6) of the Rules and Instructions for the protection of the Prime Minister when on tour and travel is amended to read as follows:--

"It has been noticed that the rostrum arrangements are not always properly made because the hosts are sometimes unable to bear the cost. As the security of the Prime Minister is the concern of the State, all arrangements for putting up the rostrum, the barriers etc., at the meeting place including that of an election meeting will have to be made by the State Government concerned.

In the case of public meetings, other than election Meetings, all expenditure on the arrangements including provision of rostrum, the setting up of barricades, making lighting arrangements, public address system, etc., will be borne by the State Government. In the case of election meetings, all expenditure on police, setting up of barricades and making lighting arrangements will be borne by the State Government, while expenditure on the public address system and any decorative arrangements will be the responsibility of the political party concerned. (The expenditure on all these items may, in the first instance be borne by the State Government and then recovered from the political party concerned). In regard to the rostrum, only 25% of the cost of the rostrum or Rs. 2500.00 whichever is less, shall be contributed by the party as the rostrum has to be of certain specifications because of security considerations."

51. The following shall be added as a new sub-rule after Rule 71 (6):--

"71 (6). Any extravagance in expenditure should be avoided."

52. Thus, it is clear that in the writ petition from where the respondent has obtained the copy, Paper No. A-75/1, something more was disclosed than what had been disclosed in the Lok Sabha Debate, referred to above.

53. It was argued by the learned Counsel for the respondent that the word "published" means printed in large number for use of the public in general. In Law Lexicon of British India, "publish" is defined as below:--

" "publish" primarily means to make known, so that where a notice is required to be published in a newspaper, printed in German, the notice must also be in German. When printed in English, it would be merely printed, not published."

Further on, Law Lexicon says:

"To publish is the most general of these terms, conveying in its extended sense the idea of making known; but it is in many respects indefinite; we may make known to many or few; but to promulgate is always to make known to many. We

may publish that which is a domestic or a national concern; we promulgate properly only that which is of general interest; the affairs of a family or of a nation are published in the newspapers; doctrines, principles, precepts and the like are promulgated. To publish is said of that which was never before known or never before existed; to reveal and disclose are said of that which has been only concealed or lay hidden; we publish the events of the day; we reveal the secret or the mystery or a transaction; we disclose the whole affair from beginning to end which has never been properly known or accounted for."

54. In *Bhalchandra Dattatraya Bubane Vs. Chanbasappa Mallappa Warad*, , copies of the documents were allowed to be taken and then privilege was claimed. The claim was rejected on three grounds. Firstly, that it was not the document of a confidential nature, secondly, that the claim was not based on the ground that the disclosure would adversely affect public interest, and, thirdly that no claim was made when the document was produced and had been inspected by the parties. The following observation was made in this case.

"They would not come within the category of official documents of a confidential nature as was the case in *The Collector of Jaunpur Vs. Jamna Prasad*, secondly, because the public officer, the Collector in this case, did not base his claim on the ground that public interests would suffer by the disclosure of the record; and thirdly, because no privilege was claimed when the documents were produced and inspected by the parties. It was claimed so late that the object could not be served even by admitting the claim."

55. On this case reliance can be placed about the stage also when this claim should be made, and the following observations can be read with advantage:

"It seems obvious that at the time he produces it according to the exigency of the summons, it is for the witness to claim the privilege. It is the duty of the Court then to determine whether the document shall be admitted and exhibited."

Further on, it was observed:--

"As to when and how the privilege should be claimed, there is no clear-cut rule of procedure. But, it seems sufficiently clear that it should be claimed at the earliest opportunity by the public officer concerned when in reply to the summons he produces the document in his control or charge. It is futile to claim the privilege at a very late stage when there has already been a disclosure of the document given in charge of the Court."

56. In this connection, it should also be noted that when privilege is to be claimed, the document must be sent in a sealed, cover accompanied by an affidavit. For this reference be made to *P.S. Narayanaswamy Vs. The State of Madras*, . In the instant case, the document was not sent in a sealed cover. It was sealed by Sri Saxena a day after it was produced in Court and it had not been brought in a sealed cover as it should have been done.

57. In this connection, reference be made to *Chandra Dhar v. Deputy Commr.*,

Lucknow AIR 1939 Oudh 65 wherein the following observation was made:

"It has been urged by Counsel supporting this application for privilege that Section 124, Evidence Act, applies to disclosure in Courts and therefore privilege can be claimed even if there has been disclosure outside the Court I am not able to attach this restricted meaning to the Section, for I hold that the object is to prevent the disclosure of things not known outside that circle which is in confidence and this Section has no application when once there has been disclosure to what I might call a member of the public to whom the contents of such papers have not been made known in confidence. To hold otherwise would be to place Courts in an unfavourable position, while actually the Courts are favoured in the sense that they have the power to order the productions of documents which an ordinary individual has not. Even if the propagation of this knowledge is contrary to the public interests, the person who has been allowed to obtain knowledge of the contents of such documents can make known to any person what he himself has come to know, and the mischief therefore is done. I do not see that the public interests in the contemplation of the framers of the Evidence Act would suffer by promulgation in a Court of law and not by promulgation outside it."

58. Disclosure should not be taken in in narrow sense. If one is able to lay his hands on a confidential document and even if he takes notes of a part of the document disclosure is already made and, therefore, that document loses the sanctity of being an unpublished record.

59. In Union of India (UOI) and Others Vs. Sudhir Kumar Roy and Others, , the following observations can be read with advantage:

"I am, therefore, of the view that the word "unpublished" in Section 123 of the Evidence Act and the disclosure contemplated in Section 124 of that Act relates primarily to the person against whom privilege is claimed under those sections and if he has been permitted lawfully to see those papers and also to take copies of the same it will be futile for the authorities to claim privilege under either of those sections."

60. Thus, there is not the least doubt that "published" is not to mean only those documents or papers which are printed for general circulation. Even if a secret document or a part of it is revealed, the document will lose the sanctity as an unpublished record because there cannot be any guarantee as to when and in what contingency the other parts may also be made known. In this view of the matter, the document in question cannot be called an unpublished record.

61. The following observations in (1968) 1 All ER 874 decided by the House of Lords, at page 882 can be read with advantage:

"The Attorney General did not deny that, even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a later civil case; and he was quite candid about the reason for

that. Crown privilege is claimed in the civil case not to protect the document -- its contents are already public property -- but to protect the writer from civil liability should he be sued for libel or other tort."

62. Though in Conway's case (1966) 1 All ER 874 the entire document had been published, in a criminal case, but all the same it does not make any difference if part of the document, which as a whole is claimed to be unpublished record is revealed and published.

63. The contention of the learned Counsel for the petitioner in this connection was that according to the statement of Sri Saxena this book passed from table to table, from official to official, and, therefore, it was not a document which had been kept secret under lock and key by the Home Secretary or other Head of the Department entitled to keep it. It is a matter of common experience that even a most secret document in the course of daily dealings passes from one table to another in an office. But, that does not mean that the contents are divulged or published because the officers or officials concerned are duty bound to maintain is secrecy and they become liable for criminal prosecution in case the contents are leaked. The above argument has, therefore, no force in it.

64. When a part of the document has already been divulged in the Lok Sabha Debates, no secrecy can be maintained, and it cannot be said that the other parts or portions of the blue book remained secret and the disclosure of the same would be protected by calling the other part an unpublished official record. In this view of the matter, this document cannot be termed, as an unpublished record, as laid down in Section 123 of the Evidence Act.

65. It should be noted here, as stated by Sri Saxena, that there was some noting by the Law Department of the Government of Uttar Pradesh that the blue book was an unpublished record and privilege should be claimed. Even after this opinion of the Legal Remembrancer, Sri Saxena was permitted to bring the blue book without being sealed in a cover and to keep it in his possession till a day or two after his examination started. When there was such a note by the Law Department, the head of the department should have sent this document in a sealed cover along with an application and affidavit that privilege was being claimed about the production of the document, by giving grounds for the same. For the reason best known to the authorities concerned, this was not done. On the other hand, a suggestion was thrown to Sri Saxena in his cross-examination that he brought the blue book without authority and only to help the petitioner. We are not aware if this suggestion has any force what action can be taken against Sri Saxena. On the other hand, I find from the perusal of the affidavit sworn by Sri Kaul that it does not bear out the above suggestion made in the cross-examination. The application was made by Sri Saxena on 20-9-1973 stating that he had brought the blue book as directed by the Home Secretary. He further stated in this application that he had been clearly instructed to claim privilege u/s 123 of the Evidence Act. But, his statement recorded ten days earlier, referred to above does not show that at the very first instance he claimed

any privilege u/s 123 of the Evidence Act.

66. It was contended that when Sri Saxena stated that he had no instructions to file the blue book, it meant that he was claiming the privilege. When a document is summoned, a party or a witness cannot refuse to produce it in court. He can be forced to produce the same. Unless the production of the document is covered under any of the sections under Chapter IX of the Evidence Act, a witness cannot say that he has no authority to produce it, and such a statement will not amount to claim of privilege. In order to claim privilege, as shown above, the document must be produced in obedience to the summons in a sealed cover and along with it the privilege u/s 123 of the Evidence Act should be claimed. If the privilege is claimed by an affidavit and the reasons are not fully detailed therein, the Court may call for a fresh affidavit and even examine witnesses as required u/s 162 of the Evidence Act. But, in no circumstance, a witness can say that he has no permission to produce the document. He has to produce it and then claim privilege. Mere saying that he has no permission to file the document would not amount to a claim of privilege.

67. In this connection it has also to be seen as to whether the claim for privilege can be scrutinized by a law court or the claim of privilege has to be accepted without such a scrutiny. The law on the point is now very clear. It is for the court to decide whether the document is noxious document and its disclosure would be against public interest. As shown above, the law right up-to 1961 was that if the document was a noxious one then it was for the head of the department or the Minister concerned to produce it or not to produce it. But from 1961 onwards there was change in the interpretation of law on this point and now the court will look into the fact even if the document is noxious to see that privilege has been claimed judiciously and on valid grounds. It means that genuineness of the claim and the good faith has to be looked into by the court, as has been held by the Supreme Court in Amar Chand Butail's case as well as in the latest English decisions referred to above.

68. Thus, I am of the opinion that what has been said in Amar Chand Butail Vs. Union of India (UOI) and Others, and (1967) 2 All ER 1260 (supra) coupled with Section 162 of the Evidence Act is a complete answer to the above question. I have already discussed the evidence regarding the stage at which the aforesaid privilege could be claimed.

69. I would like to refer here at this stage to certain observations made in Rambhotla Ramanna by power of Attorney holder, T.V. Ramanujarao Vs. Government of Andhra Pradesh and Others, ; in this case it was observed:

"Under Section 162, when a public servant is summoned to produce the document in respect of which he wishes to claim privilege, he has first to produce the document summoned and then raise the objection claiming privilege by filing an affidavit in that behalf and if the Court comes to the conclusion that the document does not relate to any affairs of the State the claim must be negatived

and the document must be received in evidence".

70. Coming to the question as to whether the document relates to the affairs of the State the expression "affairs of State" has not been defined by the legislature. Attempts have been made in a number of decisions to show what the expression "affairs of state" means. The term "affairs of State" is of very wide amplitude and it will cover every business activity of the State in even day to day routine administration as also highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes, and advice or notes exchanged between Ministers and other heads of departments of the Government. The State activities now cover many other fields of trade, commerce etc., which would also be covered in the definition of the expression "affairs of State". But, simply because the matter relates to affairs of the State it would not be protected u/s 123 of the Evidence Act unless evidence is derived, from the unpublished record. In *Rambhotla Ramanna by power of Attorney holder, T.V. Ramanujarao Vs. Government of Andhra Pradesh and Others*, the principle laid down by the Supreme Court in the case of *State of Punjab (supra)* was followed. It was held in this case that as to what would be the affairs of the State has to be determined in each case on the relevant facts and circumstances adduced before the Court. In *Amar Chand Butail Vs. Union of India (UOI) and Others*, the Supreme Court held that in exercising right u/s 123 of the Evidence Act, heads of department should act with scrupulous care and the privilege should not only be claimed on the ground that it will defeat the defence of the State, but it should be on the ground that the disclosure would be prejudicial in public interest.

71. Even it be assumed that the blue book had not been admitted in evidence and that the affidavit filed by Sri Kaul after a lapse of ten days be taken into consideration, even then the privilege in this case cannot be claimed for the simple reason that the Central Government had allowed this book to be within the reach of individuals who have taken notes from the book of those parts which served their purpose in a debate in the Lok Sabha. Not only this, paper No. A-75/1, which is a portion of this book, has been filed by the respondent and has been perused by the parties as well as their lawyers. It cannot be said that this part was so innocent that its disclosure would not be prejudicial to public interest.

72. If privilege is claimed regarding the entire document, it would not be in the mouth of the person claiming the privilege to say that the portion of the document so published was of innocent nature and the other part of it if divulged would be prejudicial to public interest. This matter is not to rest with the authorities concerned, and they cannot be allowed to say that privilege should have been claimed only regarding that part or portion of the blue book, disclosure of which they thought to be prejudicial in public interest. In the instant case, the privilege has been claimed about the entire blue book, which includes that portion also which has already been published. In this view of the matter, even if this document relates to the affairs of the State, it is not an unpublished record, and, as such, it is not covered within the four corners of Section 123 of

the Evidence Act.

73. On behalf of the petitioner it was argued that the matter related to election petition, which arises out of the constitutional provisions, the legislative enactment cannot override the constitutional authority. Reliance was placed on Article 329 of the Constitution, which reads as below:--

"Notwithstanding anything in this Constitution--

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any Legislature."

74. On the basis of this Article, it was argued that legislative bar cannot undo a constitutional right and power, and when a right is given under the Constitution the same cannot be curtailed or modified by any legislative enactment. Chapter XV, which deals with Articles 324 to 329, relates to elections. Articles 245 and 246 of the Constitution provide that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 328 deals with the power of State to make legislation for the purposes of election. Election petitions are decided in accordance with the procedure laid down in the Representation of the People Act. Section 87 of the Representation of the people Act lays down that the provisions of the Indian Evidence Act, 1872, shall apply in all respects to the trial of an election petition, subject to the provisions of this Act. The Representation of the People Act was passed under constitutional authority and, therefore, the above argument has no force in it.

75. I have already held that the Court has power to inspect the document. But, as I have held that the blue book is not an unpublished official record, therefore, I do not feel any necessity to inspect this document regarding which the privilege has been claimed.

Smt. Indira Nehru Gandhi as Prime Minister is fully entitled to know the contents of the blue book and to possess it but certainly in her individual capacity, in which she is placed in this case, she has no right to file even a portion of the blue book in support of her defence. When a part of the blue book, that is Section 71(6) has been used by the respondent in support of her defence it cannot be said that the blue book has not been admitted in evidence. No privilege has been claimed by the State regarding use of the above portion of the blue book. The State cannot be permitted to have two yardsticks for two different individuals. Even when paper No. A-75/1 was referred by the learned Counsel for the petitioner in the course of his argument, no attempt was made by the State to

claim such a privilege, even if it be assumed that till then the State had no knowledge of such use of a portion of the blue book.

76. Besides this, the petitioner has no occasion to show to the Court about the correctness or otherwise of paper No. A-75/1 unless the blue book is made available to him. Nor he can be in a position to efficiently cross-examine the respondent's witnesses regarding paper No. A-75/1 in the absence of the blue book. The Court has to keep the balance even and it cannot tilt it in favour of one party or the other. It is, therefore, just, equitable and in accordance with the principle of natural justice that the claim of privilege regarding the blue book and other papers which are correlated with the blue book be rejected.

77. So far as the other two documents are concerned, they do not stand on a different footing. As far as the documents summoned from the Superintendent of Police, Rae-Bareilly, are concerned, they were sent under a sealed cover along with an affidavit that these documents related to the affairs of the State and being unpublished records, privilege was claimed as the Superintendent of Police came to the conclusion that their disclosure was prejudicial in public interest. In the affidavit he stated that the documents related to the security arrangements for the Prime Minister of India. All the instructions relating to the security arrangements, which were issued to the District Officers and Superintendent of Police etc., are contained in the blue book. If that very blue book cannot be called a privileged document then it cannot be said that the papers, which have been filed by the Superintendent of Police, Rae-Bareilly, which owe their existence to the blue book, relating to the security arrangements of the Prime Minister, can be called privileged documents, in accordance with Section 123 of the Evidence Act. All that the Superintendent of Police stated was that it was "Top secret security arrangements in connection with the visit of the Prime Minister of India." He did not give any reason which led him to the conclusion that the disclosure of the documents would be against public interest. As stated above, top security arrangements are derived from the blue book, and as the blue book itself cannot be said to be a privileged document, therefore, these documents also cannot be called privileged documents, as provided u/s 123 of the Evidence Act. Since I have held that privilege cannot be claimed regarding these documents, I do not feel any necessity to inspect these documents.

78. Sri K. P. Sood, who is an officer of the Accountant General's office, Central Revenue, New Delhi, filed three documents which relate to the pay and emoluments paid to Sri Y. P. R. Kapoor. No privilege u/s 123 has been claimed regarding these papers. These papers were brought in a sealed cover. As the application or affidavit has also been placed in the file of the case, I got the said sealed cover opened to find out as to whether any application or affidavit u/s 123 of the Evidence Act has been filed. The seal was opened only with this limited purpose, but the documents were not inspected. I find that only one application is attached with these papers, relevant portion of which runs as below:

"I am further to state that under I. R. L. A. System of payment, officer is not

required to submit monthly salary bill. Salary is paid on the basis of register maintained at (b) above.

These documents after perusal may kindly be returned. In case they are required by the Court, their photostat copies will be produced, provided appropriate time is allowed."

79. In view of this, it cannot be said that any privilege in respect of these documents was claimed. These papers are allowed to be produced.

80. For the reasons given above, I hold that no privilege can be claimed in respect of any of the three sets of papers and they are allowed to be produced.