

(1973) 04 OHC CK 0013
In the Orissa High Court
Case No : Civil Revision No. 10 of 1973

State of Orissa

APPELLANT

Vs

Jagannath Jena

RESPONDENT

Date of Decision : 02-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 14
Constitution of India, 1950 — Article 166, 77(3)
Evidence Act, 1872 — Section 123, 124, 162
Police Act, 1861 — Section 12, 45

Citation : (1973) 39 CLT 877

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : Advocate General, for the Appellant; L. Rath, U.K. Nanda and A.K. Misra, for the Respondent

Judgement

S.K. Ray, J.—These two revisions have been heard together because they involve identical questions of sustainability of the claim of privilege advanced by the State of Orissa who is the Petitioner in both the revisions. This order will govern them both.

2. The opposite party in C.R. No. 10/73, Jagannath Jena, has filed T.S. No. 25 of 1971 in the Court of the First Munsif, Cuttack for setting aside the order of discharge dated 9-6-1965 discharging him from the Police Training College, Angul where he had joined as a cadet Sub-Inspector of Police on 24-1-1965. The ostensible ground for discharge was that he was found much below the standard and was not likely to improve. He ultimately filed the aforesaid suit as his various representations to the Inspector General of Police and the Deputy Chief Minister against the order of discharge proved fruitless. He has impugned the order of discharge on the ground inter alia, or mala fides on the part of the concerned authorities in passing the order of discharge. In relaborating this ground he has alleged that the authorities showed favour to one Gagan Behari Mohanty, who had been similarly discharged from the training in 1964 Sessions by re-admitting

him as he was the nephew of the then Minister Sri Satyapriya Mohanty. After written statements were filed by the Defendants in this suit, the Plaintiff filed an application under Order 11, Rule 14, CPC calling for certain documents enumerated in the schedule annexed to it. The Defendants claimed privilege in respect of the documents mentioned against serial Nos. 1, 4 and 8 of the annexed schedule. In support of the claim of privilege an affidavit of the Inspector General of Police, who is the Petitioner No. 2, has been filed. The claim of privilege was disallowed by the order of the Munsif dated 24-11-1972. It is from this order that the Civil Revision No. 10/73 has been filed.

3. The opposite party in C.R. No. 11 of 1973, Hemanta Kumar Jena, who had similarly been selected as Sub-Inspector of Police and had joined training as a cadet Sub-Inspector of Police at the Police Training College, Angul, was also discharged from the Police Training College on 9-6-1965. His representations against this order of discharge having failed to yield results, he filed T.S. No. 26 of 1971 for identical relief as claimed by Jagannath Jena in T.S. No. 25 of 1971. He also imputed mala fides and malice to the concerned authorities, who were instrumental in passing order of discharge. In this suit also after the Petitioners had filed their written statements, the Plaintiff-opposite party filed an application under Order 11, Rule 14, CPC for production of the documents enumerated in the schedule annexed thereto. This schedule was identical to the schedule of documents annexed to the Petitioner of Jagannath Jena filed in T.S. No. 25 of 1971. The Petitioners-Defendants claimed privilege in respect of documents enumerated in serial Nos. 1, 4 and 8 of the schedule of documents. By an identical order dated 24-11-1972, the trial Court rejected the claim of privilege. This order is identical for word for word with the order of the same dated in T.S. No. 25 of 1971. It is from this order that the Civil Revision No. 11/72 has been filed.

4. The claim of privilege in both the cases was under Sections 123 and 124 of the Indian Evidence Act. The Inspector General of Police, Petitioner No. 2, filed the affidavit claiming privilege as the officer at the Head of Department concerned. The Plaintiff opposite party, inter alia, contended that the Inspector General of Police is not the officer at the Head of Department as envisaged u/s 123 of the Evidence Act and since the affidavit claiming privilege has not been filed by the appropriate authority, the claim must be negatived. It was also further contended that the documents in respect of which privilege is claimed do not relate to the affairs of the State nor their disclosure would cause any injury to the public interest. The learned Munsif held that the Inspector General of Police is the Head of Department and, as such, was competent to claim privilege. He also be held that the documents do not relate to the affairs of State and are not of that class in respect of which privilege can be claimed under Sections 123 and 124 of the Indian Evidence Act. He, therefore, directed the Defendants to produce the documents mentioned in serial Nos. 1, 4 and 8 of the schedule of documents.

5. The description of the documents contained in serial Nos. 1, 4 and 8 of the

schedule of documents may be extracted:

1. Opinion of the Deputy Chief Minister and corresponding file appointing the Plaintiff in a stopgaping arrangement as para 16 of the plaint vid file No. 1M-33-64.

2. Opinion of the I.G. as per para 15 of the written statement vide File No. 1A (a) 47-66.

3. Records in respect of Gagan Behari Mohanty, S.I. of Police Service Book, P.M. Form No. 102, 1964 Examination Papers at the time of Final Examination and reason of discharge, with 1965 Recruitment Examination Papers viz. Oriya. English and G.K. with Treasury Chalan with P.M. Form No. 102 before facing Central Selection Board.

6. The following questions were mooted here, namely:

(a) Whether the Inspector General of Police is the officer at the Head of Department as envisaged u/s 123 of the Indian Evidence Act, who can make the claim of privilege in respect of the aforesaid documents that is to say, who can state that the documents relate to the affairs of the State and withheld permission for putting the documents in evidence or to give evidence derived from those records.

(b) Whether the documents in respect of which privilege has been claimed are really documents which relate to the affairs of the State and whether the disclosure of their contents would be against the public interest?

7. Dealing with the first question, the learned Munsif has held that the Inspector General of Police is the Head of Department and his affidavit is in order. The majority of the Judges in the case of *The State of Punjab Vs. Sodhi Sukhdev Singh*, , dealing with the question of privileges u/s 123 of the Indian Evidence Act said:

We think that in such cases the privilege should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the Department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the secretary the Court may, in a proper case, require an affidavit of the Minister himself.

Thus their Lordships confined the expression "Head of Department" appearing in the Section 123 of the Evidence Act to the Minister, who is political head of the department and in special circumstances, the Secretary of the Department.

The meaning of the expression "Head of Department" was also considered by the learned Chief Justice Narasimham in the case of *Union of India (UOI) and Others Vs. Sudhir Kumar Roy and Others*, . He said that the expression "Head of Department" has two distinct meanings. It may be limited to Heads of the various Departments of the Secretaries, namely, the Secretaries of the

Departments, or it may also include Heads of Departments of attached Offices either under the Union Government or under the State Government. After referring to Article 77(3) of the Constitution and the Rules of Business framed by the President thereunder and the importance and responsibility of the matters to be considered under "the affairs of State", he was of opinion that the expression "Department" should be kept within well defined narrow limits, that is to say, either the Minister or the Secretary of the Departments of the Secretariate shall be the officer at the head of the Department for the purpose of Section 123 of the Evidence Act. He was dealing with the question whether the Collector or the National Savings Commissioner was to be considered to be an officer at the Head of the Department concerned within the meaning of Section 123 of the Evidence Act and decided it in negative. In the context of Rules of Business framed under Article 166, the Inspector General of Police, for identical reasons, cannot be an officer at the Head of the Department concerned for the purpose of Section 123 of the Evidence Act.

Mr. Rath, however, has tried to sustain the correctness of the decision of the Munsif on this question by placing reliance on Appendix 17 of the Orissa Police Manual, Volume II The relevant rules of that Manual are extracted hereinbelow:

Appendix-17

(Rules 357, 374 and 710)

Procedure to be followed when a Government servant is summoned by a Court to produce official documents for the purpose of giving evidence.

The law relating to the production of unpublished official records as evidence in Courts is contained in Sections 123, 124 and 162 of the Indian Evidence Act (Act I of 1872) which are reproduced below:

123 xxx

124 xxx

162 xxx

(Not necessary to be quoted)

2. For the purposes of Section 123 above, "Officer at the Head of the Department" means the Inspector-General of Police.

The aforesaid special definition of "Officer at the Head of the Department" is obviously intended to be restricted to the purposes of Rules 357, 374 and 710 of the Police Manual, Vol. II as will be seen from the above extraction. Rule 357 relates to a particular class of documents namely, Crime Directory, Part I which comprises the history sheets containing all available information about a criminal's activities, associate etc. Rule 374 relates to surveillance records which-officers-in-charge are required to keep up under Sections 12 and 45 of the Police Act. Rule 710 relates to communication by a police officer of any document or

information which has come into his possession in the course of his public duties or has been prepared or collected by him in the course of those duties. It is only when privilege is claimed in respect of the documents of the aforesaid nature as indicated in the aforesaid 3 rules of the Police Manual that the Inspector-General of Police is to be treated as the officer at the Head of the Department for the purposes of Section 123 Indian Evidence Act. The documents in respect of which the privilege is claimed in the instant case are not of the kind of documents envisaged in the aforesaid 3 rules of the Police Manual. Without deciding as to legality or intra vires character of the special definition of "an officer at the Head of the Department" in Appendix 17 of the Police Manual even for the limited purpose of claiming privilege in regard to the class of documents specified in Rules 357, 374 and 710 of the Police Manual, I am of opinion that the Inspector General of Police cannot be given the status of an officer at the Head of the Department for the purpose of claiming the privileges u/s 123 of the Evidence Act in respect of the classes of documents in question.

8. Confronted with the difficulty that if the Inspector General of Police is not to be treated as "the officer at the Head of the Department", then in absence of any claim of privilege by the Minister or Secretary concerned claim of privilege cannot be said to have been made at all, and thus no fault can be found with the order of the Munsif directing production of documents indicated above, the Petitioner has filed, in this Court, an affidavit by the Secretary to the Government of Orissa, Home Department claiming privilege. A memo also has been filed by the Standing Counsel for the Petitioner that the claim of privilege in regard to the document in item 4 of the Schedule, that is the opinion of the Inspector General of Police, has been waived because the contents of the said document have already been disclosed in para 16 of the written statement. With regard to items 1 and 8, however, the privilege is still claimed. In view of the undertaking given by the Standing counsel to produce item 4, the order of the Munsif with regard to that document is upheld. With regard to documents, contained in items 1 and 8, the matter is remitted back to him to consider the question of privilege afresh in the light of the affidavit of the Secretary of the Department concerned filed in this Court which is also sent down to him along with the records. The reasons for this remand will be apparent from the principles laid down by the Supreme Court in the case of *State of Punjab v. Sodhi Sukhdev Singh* which have to be followed in deciding the claim of privilege u/s 123 of the Evidence Act. Those principles, which are to be borne in mind by the Munsif are as follows:

(i) Section 123 of the Evidence Act provides for withholding from the Court a document which is material and relevant and that is a very serious departure from the ordinary rules of evidence, in that where a material document has been properly withheld as a result of the Section 123, no adverse inference can be drawn against the State on account of such withholding.

(ii) The departure is justified on the principle of the overriding and paramount character of public interest. In other words, in the case of a conflict between the

public interest and private interest, the latter must yield to the former. "No doubt the litigant whose claim may not succeed as a result of the nonproduction of the relevant and material document, may feel aggrieved by the result, and, the Court, in reaching the said decision may feel dissatisfied, but that will not affect the validity of the basic principle that public good and interest must override considerations of private good and private interest. Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of Section 123."

(iii) There are two classes of such documents which are said to be related to affairs of the State. One class comprises of documents whose contents, if disclosed, would affect either the national defence or public security or good neighbourly relations of the country. The other class comprises of documents whose contents may be innocuous, namely that their disclosure would not affect the national defence, public security or good neighbourly relations but would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. This class of documents would include "the notes and minutes made by the respective officers on the relevant files, opinions expressed or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy". It is further said; "In the efficient administration of public affairs Government may reasonably treat such a class of documents as confidential and urge that its disclosure should be prevented on the ground of possible injury to public interest. In other words if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public affairs."

(iv) Though Section 162 of the Evidence Act empowers the Court to inspect the document while dealing with the objection, "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." xxx "The Court can take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised even u/s 123. If the privileged document cannot be inspected the Court may well take other collateral evidence to determine its character or class". "The Court cannot permit any evidence about the contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection."

(v) "The sole and only test which should determine the decision of the Head of Department is injury to the public interest and nothingelse" .and since it is not unlikely that for collateral purposes a person can claim privilege, the responsibility of claiming such privilege is laid generally on the shoulders of the

Ministers-in-Charge or Secretaries of the Departments and privilege must be claimed in the form of an affidavit. When the affidavit is made by the Secretary, the Court may, in a proper case, also require an affidavit from the Minister himself. The affidavit, by whomsoever filed, should show that the deponent has read and considered carefully each document in respect of which privilege is claimed and that he is satisfied that its disclosure would do public injury. The affidavit should also indicate the reason as to why it is apprehended that the disclosure of the contents of the documents will be injurious to public interest.

(vi) If the affidavit produced in support of the claim of privilege is not satisfactory, the Court may summon the deponent to face cross-examination on the relevant points. The ambit of such cross-examination would be restricted to such relevant and permissible questions as the Court may think to be of help to him in determining whether the document is of privileged class or not.

9. In result, therefore, the order of the Munsif, is set aside except in regard to the document in item 4 of the schedule and the claim of privilege of the schedule of other documents will be dealt with afresh in accordance with law and in the context of the legal principles indicated above. In the circumstances, there would be no order for costs of this Court.

Revisions partly allowed and cases remanded.