

(1962) 12 OHC CK 0008

In the Orissa High Court

Case No : Civil Revision No"s. 116 and 156 of 1961

Union of India (UOI) and Others

APPELLANT

Vs

Sudhir Kumar Roy and Others

RESPONDENT

Date of Decision : 18-12-1962

Acts Referred:

Evidence Act, 1872 — Section 123, 124

Citation : AIR 1963 Ori 111 : (1963) 29 CLT 179 : (1963) 29 CLT 178

Hon'ble Judges : R.L. Narasimham, C.J

Bench : Single Bench

Advocate : Government Advocate, for the Appellant; D. Mohanty, Y.S.N. Murty, L.K. Das Gupta and R. Das, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Narasimham, C.J.—These two revisions arise out of two orders dated the 28th February 1961 and 29th April 1961, passed by the Second Munsif, Cuttack, in Title Suit No. 297 of 1960, rejecting the petitioner's claim of privilege u/s 123 and 124 of the Indian Evidence Act, in respect of certain documents called for by the opposite party plaintiff.

2. The plaintiff was formerly working as an Assistant in Cuttack Collectorate. Subsequently in 1950 he was appointed to the higher post of District Organiser and then of Assistant National Savings Officer in a Central Govt. Office known as the Regional National Savings Organisation and worked in those posts on a higher salary, for about 10 years. On the 20th July 1960, he was informed that the National Savings Commissioner had decided to revert him to his parent post in the office of the Cuttack Collectorate.

He then filed a suit alleging that the reversion was made mala fide on account of some personal animosity towards him on the part of the National Savings Commissioner (defendant No, 2) and some of his subordinate officials. The Union of India was made defendant No. x, the National Savings Commissioner Nagpur

was made defendant No. 2, and the other subordinate officials of that Department were made defendants Nos. 3, 4, 5 and 6. In addition to these principal defendants, the plaintiff impleaded 4 pro forma defendants, namely the Chief Secretary to the Government of Orissa (defendant No. 7) the finance Secretary (Sri Somenath Nanda) (defendant No. 8), the Collector of Cuttack (defendant No. 9) and the Additional District Magistrate of Cuttack (defendant No. 10).

3. Apart from the allegations of mala fide it was further alleged that the plaintiff held a permanent post under the National Savings Organisation and that his reversion to his post in the Collectorate would amount to "reduction in rank" and that as Article 311 of the Constitution was not complied with, the order was invalid.

4. During the course of suit the plaintiff called for certain documents from the defendants alleging that they were very necessary for establishing his case. By his affidavit dated 20-2-61 he further stated that true copies or true extracts of those documents (mentioned in serials 1 to 14 of that affidavit) were already obtained by him partly during the course of his service under the National Savings Organization and subsequently when he was permitted by the Officers concerned to go through the relevant papers. One of those documents (serial No. 12 attached to the said affidavit) is letter No. 1775/Adm : 10 (3) P- dated the 4th June 1960 from the National Savings Commissioner, addressed to the Chief Secretary to the Government of Orissa, The other document Serial No. 14 is DO No. 2110/Adm 10 (s)-P-1 dated the 8th July 1960 addressed to Shri R. C. Patro the then Additional District Magistrate by Shri S. M. Mathur of the National Savings Organization. In respect of these two documents the Finance Secretary (Mr. Somenath Nanda) and the Collector of Cuttack (Mr. Chakravarty) claimed privilege, both u/s 123 and u/s 124 of the Evidence, Act and filed the necessary affidavits. The learned Munsif rejected their claim by his order dated the 28th February 1961. The claim of the Collector was rejected on the following two grounds:-

(i) That he is not a "Head of Department" within the meaning of Section 123 of the Evidence Act; and

(ii) That the letter (serial No. 14 of the affidavit of the opposite party dated 20-2-1961) was not addressed to him and hence he was not the "public officer" referred to in Section 124 of the Evidence Act. The claim of the Finance Secretary was rejected on the ground that the document in question (serial No. 12) did not deal with "affairs of State" and that his affidavit did not show the extent and nature of the injury to the public interest that would be caused by the disclosure of the contents of that document. Civil Revision No. 116 of 1961 is against this order of the Munsif.

5. Defendant No. 2 (Mr. N. V. Naidu) the National Savings Commissioner, Government of India, filed an affidavit on the 28th March 61 and another

supplementary affidavit on 19th April 1961 claiming privilege in respect of some files, including correspondence called for from his office under both Sections 123 and 124 of the Evidence Act. The learned Munsif rejected his claim u/s 123 on the ground that the National Savings Organisation is only a branch office and not a Department of the Government of India and that consequently he was not a "Head of Department" within the meaning of that Section. As regards his claim u/s 124 the Munsif allowed the same in respect of certain documents addressed to the Officer (namely serials 2, 4, 6, 11, 12 and 14 of Schedule B of his supplementary affidavit dated 19th April 1961) and rejected the same in respect of others on the ground that those documents were not communicated to him as required by Section 124 of the Evidence Act. Civil Revision No. 156 of 1961 was filed against this order.

6. Full particulars about the documents which were called for by the plaintiff, in respect of which privilege was claimed by the officers concerned will be found in the affidavits and also in the order of the lower court dated 29th April 1961. It is unnecessary to refer to them in detail here. But I should state here that Mr. D. Mohanty for the plaintiff submitted that though the files were called for, his client was interested only in some letters that passed between the officials concerned and not with the noting on the file, either in the " Secretariat or in the Collectorate, or in the office of the National Savings Organization.

7. The documents in respect of which there is controversy may be divided into two categories :

(i) Those documents of which true copies were taken by the opposite party when he was permitted to inspect the same, by the officials concerned, and which were described in the various serials of his affidavit dated 20th February 1961; and

(ii) Those documents of which certified copies were granted to him by the learned lower Court after he had inspected the same. I should also mention that after certified copies were granted to him a petition was filed by the learned Government Advocate objecting to the granting of such copies on the ground that by mistake, these documents had not been kept with the confidential records in a sealed cover. The Court however noted in the order-sheet that as certified copies had already been granted nothing could be done on such a belated petition.

8. Counsel for both sides have relied on a recent decision of the Supreme Court reported in *The State of Punjab Vs. Sodhi Sukhdev Singh*, regarding the true scope and content of Sections 123 and 162 of the Evidence Act. It is unnecessary to summarise the principles laid down by their Lordships as these are now well known. For the purpose of disposing of these two Civil Revisions petitions the following three important questions arise : --

(i) What is the true meaning of the expression "head of Department" occurring in Section 123?

(ii) If a document is shown to a party by the officials concerned and he is allowed to take either true copies or certified copies or extracts of the same, can privilege be subsequently claimed in respect of that document, either on the ground that it is an "unpublished official record" within the meaning of Section 123 or an "undisclosed communication" for the purpose of Section 124 of Evidence Act?

(iii) Is the expression "public officer" referred to in Section 124 restricted to the officer to whom the communication is directly addressed, or will it also include any other public officer to whom the former might have passed it on, for disposal or for further action?

9. The expression "Head of Department" has two distinct meanings. . It may be limited to Heads of the various Departments of the Secretariat, namely the Secretaries of the Departments, or else it may also include Heads of Departments of attached offices either under the Union Government or under the State Government. Thus Rule 2 (10) of the Supplementary Rules defines a Head of Department as any authority which the President may by order declare to be a Head of Department. A list of such Heads of Departments is given in appendix II to these Rules. Similarly, in the Orissa Service Code Vol. I in appendix III, a list of the Heads of Department for the purposes of that Code has been given in pursuance of Rule 20 of the Said Rules.

The learned Government Advocate strenuously contended that though these Heads of Departments were defined, as such, only for the purposes either of Supplementary Rules or of the Orissa Service Code, nevertheless, they should be deemed to be "Heads of Departments" for the purpose of Section 123 of the Evidence Act also.

Mr. D. Mohanty for the plaintiff contended that the "Head of Department" mentioned in Section 123 of the Evidence Act must be given a restricted meaning as referring to Heads of the Departments of the Secretariat inasmuch, as that section refers to "affairs of State" about which the Departments of the Secretariat alone are competent to speak with authority. He relied on Article 77(8) of the Constitution under which the President framed rules of business for the convenient transaction of work of the Government of India. In S. O. No. 196 dated the 18th January 1961 of the Cabinet Secretariat published in the Gazette of India Extraordinary, dated 18th January 1961, Part II, Section 3 Sub-section (ii) it was stated as follows (in paragraph 2):

"The business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule to these Rules (all of which are hereinafter referred to as "departments")".

In the First Schedule only the Departments in the Secretariat have been described and hence, according to Mr. D. Mohanty only the Secretary of the Department concerned would be the "Head of Department" here the Finance Secretary for the purpose of Section 123 of the Evidence Act. Similarly, in the Rules of Business made by the Government of Orissa under Article 166 of the

Constitution, the various Departments in the Secretariat have been described and Rule 4 of the said Rules says :-

"The business of the Government shall be transacted in the departments specified in the first schedule and shall be classified and distributed between those Departments and their branches as laid down therein".

The plaintiff's contention on this point is fully supported by the observations of the Supreme Court in the aforesaid case. There, in paragraph 23 (at page 504), the majority view is expressed in the following terms : -

"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".

Here their Lordships described the Secretary alone as the Departmental Head. They have not extended the meaning of the expression "Head of Department" by including therein the head of a Department as denned either in the Supplementary Rules or in the Service Code of the respective Governments. The reason for thus limiting the expression to the highest officials in the State is obvious. Privilege u/s 123 of the Evidence Act is only claimed in respect of "affairs of State" and it is ordinarily expected that neither the Minister concerned nor the Secretary of the Department would lightly make such a claim, whereas the Heads of Departments of subordinate offices may not be fully alive to their responsibility in this matter, and interests other than public interest may masquerade in the grab of public interest and take undue advantage of the provisions of Section 123. In England as pointed out by Lord Simon in *Duncan v. Cammell Laird and Co., Ltd.* 1942 AC 624 such privilege could be claimed by the Minister who alone is held to be the political "Head of the Department". But in India in view of the Rules of Business framed under the relevant provisions of the Constitution, Secretaries may also be included in the expression "Head of Department". I should further point out that Justice Subba Rao of the Supreme Court took an even narrow view of the expression "Head, of Department" and in the aforesaid case (see paragraph 102) observed that only the Minister in charge of the Department and not even the Secretary would come within the scope of the expression.

10. The learned Government Advocate thereupon contended that the expression "Head of Department" had been construed in the past in several decisions of the High Court so as to include even the Heads of Departments outside the Secretariat, and that these decisions have not been expressly overruled by the aforesaid decision of the Supreme Court, and that a narrow construction of the expression was not justified. He relied on the following decisions: *Crown v. Raghunath Singh* AIR 1946 Lah 459 (where a Commissioner was held to be a Head of Department); *Chiragh Din Muhammad Baksh v. The Crown* 52 CrI. LJ 161 (Lah). (Where the Inspector General of Police was held to be a Head of the

Department); Governor General in Council v. Peer Mohd. Khuda Bux AIR 1950 EP 228 (237) (where the Director General of Disposal was held to be Head of the Department); Public Prosecutor v. Venkata Narasayya, AIR 1957 Andh Pra 486 (where the Registrar of Co-operative Societies was held to be Head of Department); and Lakhuram Hariram Vs. Union of India (UOI) and Another, (where the Chief Commercial Superintendent of a Railway was held to be a Head of Department).

In Emperor v. Rais Rasulbaksh AIR 1944 Sind 145 however the learned Judges observed that the Minister or the Secretary was alone competent to file the necessary affidavit claiming, privilege under Section 123 of the Evidence Act. In Debajyoti Burman v. Dr. Nalinakshya Sanyal, AIR 1954 Cal 216 the Secretary, Board of Secondary Education was not held to be a Head of Department. In all these decisions, however, the Rules of Business made under the provisions of the Constitution or under the corresponding provisions of the Government of India Act 1935, were not specifically noticed though in The Public Prosecutor Vs. Damera Venkata Narasayya, it was observed that the question as to who is the Head of Department was essentially a question of fact (see paragraph 8). But when the expression "Department" is found in the Rules of Business made under the Constitution and when it is well recognised that Section 123 of the Evidence Act is in the nature of an exception to the general rule which should be kept within well defined narrow limits, the aforesaid decisions may not be taken as sufficient authority for widening the meaning of the expression "Head of Department". Moreover in those decisions it is not clear whether the Officers who swore affidavits claiming privileges had the authority to swear such affidavits, conferred on them by Secretaries of the Departments concerned.

It might have been argued with some justification that though Section 123 requires that a claim of privilege must be made by the Head of the Department it does not expressly say that the affidavit also must be sworn to him. It is true that in view of the pronouncement of the Supreme Court in the aforesaid case this argument will not be available now and the affidavits also must be sworn either by the Minister in Charge or the Secretary of the Department concerned. But the earlier decisions may be distinguished on this ground also and if they purported to lay down a law to the contrary it must be deemed to have been impliedly overruled by the aforesaid clear pronouncement of the Supreme Court. The majority of Judges in the aforesaid Supreme Court case have pointed out that generally privilege should be claimed only by the Minister who is the political Head of the Department though they also recognised that in some special circumstances the Secretary of the Department also may make such a claim. But they further added that if the affidavit is filed by the Secretary the Court may, in proper cases insist on an affidavit by the Minister himself. This only emphasises that the claim of privilege should be made by the highest officials in charge of the Department.

11. I must therefore hold that as the National Saving Commissioner (defendant

No. 2) is admittedly not the Secretary of the Department concerned (which is the Finance Department in this case) his claim of privilege u/s 123 of the Evidence Act must fail.

12. The same reasoning would apply in respect of the claim of privilege made by the Collector of Cuttack. In his case the claim is still weaker because he is not a Head of Department even for the purpose of the Orissa Service Code, as he is not included in the list of such officers in appendix III.

13. Section 123 of the Evidence Act by its own terms is limited, to "unpublished official records". In *Henry Greer Robinson v. State of South Australia* AIR 1931 PC 254 (at p. 259) their Lordships observed :-

"Lastly the privilege -- the reason for it being what it is -- can hardly be asserted in relation to documents the contents of which have already been published".

The learned Government Advocate contended that the word "unpublished" in Section 123 of the Evidence Act should be given the same meaning as is given to that expression in the law of libel and that mere communication of the contents of a document to a party will not amount to publication. No authority has been cited to show that the principles dealing with publication applicable to the law of libel should apply for the construction of Section 123 of the Evidence Act. Prima facie the two must necessarily differ because in actions for libel, it is injury to the reputation of a person, caused by wide dissemination of libellous matter that is involved. But the privilege u/s 123 of the Evidence Act is claimed against a particular litigant in a case, and if the papers concerned have already been shown to him by the officer in charge of the papers and if in respect of some of the papers, certified copies have also been granted to him, it will be difficult to say that the document still retained its "unpublished" character. In *Mehtab Singb v. Secy. of State* AIR 1933 Lah 157, a letter addressed to a person and received by him was held to be not an unpublished document. In principle, I see no difference between a letter addressed to a person and a letter shown to him and of which he is permitted to take a copy. In *Bhalchandra Dattatraya Bubane Vs. Chanbasappa Mallappa Warad*, "It is futile to claim privilege at a very late stage, when there is clearly a disclosure of the document, given in charge of the Court."

To a similar effect are the observations in *Chandra Dhar v. Deputy Commr. Lucknow* AIR 1939 Ondh 65 where it was held that if a document is shown to a member of the public to whom such papers have not been made known, in confidence, the question of claiming privilege for that document u/s 124 of the Evidence Act did not arise. Here, as I have already stated, the documents were shown to the plaintiff and he was allowed to take copies of the same.

14. 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.

15. The learned Government Advocate thereupon urged relying on *Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another*, that if a party either surreptitiously or by unfair means obtains a copy of a confidential document the claim of privilege made in respect of such a document should not be defeated. But here there is no finding, nor was it urged before the lower Court, that the opposite party obtained copies of those documents either surreptitiously or by unfair means. On the other hand, his own affidavit was to the effect that the officials in charge of the Department permitted him to see the same and that he took copies. There is no counter affidavit by any party challenging this statement of fact. So far as certified copies are concerned, these were given by the Court after inspection because these documents were not kept in a separate sealed or confidential cover. But because of a mistake committed by the Departmental officers in consequences of which certified copies of certain documents were handed over to the opposite party, it cannot be said that such copies were obtained by unfair means. In my opinion *Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another*, has no application.

16. Turning to the third question, it will be noticed that Section 124 of the Evidence Act merely says that no public officer shall be compelled to disclose a communication "made to him". It does not say "made directly to him". Hence the learned Government Advocate contended that though a communication may be made to a particular public officer, if that officer forwards it to another officer for further action, the communication should be held to have been addressed to the latter officer for the purpose of Section 124 of the Evidence Act, and an affidavit from the officer to the effect that public interest would suffer by its disclosure should be taken as sufficient to support a claim of privilege.

I am inclined to accept this argument. Ordinarily in Government offices communications addressed to some officers are in the ordinary course forwarded to another officer dealing with the subject for further action, and where they are so forwarded it will not be an undue strain of the language to say that the communications are made to the latter officer also. This point is very relevant in respect of the claim of privilege made by the Finance Secretary, in respect of letter No. 1775/ Adm 10(P) dated 4th June 1960. This letter was addressed to the Chief Secretary but the Original letter shows that the Chief Secretary himself endorsed it to the Finance Secretary for necessary action. Hence it may be reasonably held that the Finance Secretary was also a public officer to whom the communication was made. But even this view will not materially help the Finance Secretary's claim of privilege because a true copy of that particular letter was obtained by the opposite party. Hence though the Finance Secretary may be the competent authority for claiming privilege for that document, both under Sections 123 and 124 of the Evidence Act, nevertheless this document ceased to be either an unpublished document or an undisclosed document for the purpose of either of these Sections.

17. For these reasons the two revision petitions are dismissed with costs. There shall be a consolidated hearing fee of Rs. 200/- to be paid half and half by the Union of India and by the State Government to the plaintiff.