

In Re: Mantubhai Mehta

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Court : Mumbai

Decided On : Dec-03-1943

Reported in : (1944)46BOMLR802

Judge : N.J. Wadia and ;Weston, JJ.

Appeal No. : Criminal Reference No. 77 of 1943

Appellant : In Re: Mantubhai Mehta

Judgement :

N.J. Wadia, J.

1. This is a reference made by the Presidency Magistrate, 5th Court, Dadar, under Section 432 of the Code of Criminal Procedure, 1898. The question referred to us for opinion arose in connection with a complaint filed before him under Section 323 of the Indian Penal Code, 1860, against certain police-officers for hurt alleged to have been caused to the complainant while he was detained in the Worli Jail on October 5, 1942. The complainant said that he did not know the names of his assailants. On October 27, 1942, the complaint was sent by the Magistrate to the Superintendent of Police, 'F' Division, to ascertain the names of the alleged assailants. The complainant was taken round the Worli Jail and he identified one of his assailants. As regards the others, the jail authorities stated that as many officers had visited the jail at various times on the day in question to quell the disturbance, it was not possible to know their names and to get them identified.

After some correspondence with the Superintendent of Police, 'F' Division, the Magistrate wrote a letter to the Superintendent of Police, 'L' Division, to ascertain the name of the first assailant, and the Superintendent, after consultation with the Deputy Commissioner of Police, sent a certified copy of an entry dated October 5, 1942, in the station-diary kept at Worli Sub-Division. It contained the names of two Indian police-officers who had visited the jail on that day. The complainant, however, said that his assailant was a European or an Anglo-Indian. He applied to the Court to supply the names of the officers who were attached to the Worli prison on October 5, 1942, and to allow him to identify his assailants from among those persons. On that application the learned Magistrate passed an order asking the Superintendent of Police, 'L' Division, to hold an identification parade of such officers and to allow the complainant to identify his assailant. This order was quashed by the High Court as one going beyond the province of the Court and encroaching upon the rights of the Executive. Thereupon the complainant asked for a witness summons to the Superintendent of Police, 'L' Division, to produce the station-diary of 'L' Division, Worli Sub-Division (Detachment), containing entries relating to October 5, 1942. On April 30, 1943, the Magistrate sent a letter of request to Inspector Leech to produce the document subject to any privilege which he might claim. It appears that nothing was done by the police till May 14, 1943, which was the next day of hearing. On that date a summons was ordered to be sent to the police-officer and it was sent on May 22. After the despatch of the summons a letter was received by the Magistrate from the Commissioner of Police informing him that no station-diary was maintained at Worli, that any books which were maintained there were for security purposes arising out of war provisions, and that he claimed privilege in respect of them as it was not in the public interests that the information should be disclosed. To this the Magistrate sent a reply that as the summons had already been issued it would be advisable for the police-officer to appear in Court and claim privilege from the witness box. Mr. Leech, who had been the Superintendent of Police, 'L' Division, up to that time, died in the meanwhile, and on June 9, 1943, Deputy Inspector Moore was sent to the Court, without the documents which he had been asked to produce, and was instructed by the Commissioner of Police not to produce the document mentioned in the summons or the document known as the Duty Register and to claim privilege in

respect thereof. In his evidence Deputy Inspector Moore stated that he had been orally instructed by the Commissioner of Police not to produce the Duty Register. From the record of the case it appears that Deputy Inspector Moore stated that the document-the Duty Register -could not be produced under any circumstances. Thereupon the Magistrate decided to make a reference to this Court. '

2. The learned Magistrate says in his letter of reference that it was necessary for the Court to find out whether the document in question was one which fell under the category of documents mentioned in Section 123 of the Indian Evidence Act, 1872, and that the Commissioner of Police had not stated in clear terms that the document fell under Section 123. The short point according to him was whether the head of the department or the Court was to decide whether a particular document was an unpublished official record relating to affairs of State.

3. The question referred for our opinion is :

Whether the Court is entitled to inspect the document in respect of which the privilege is claimed by the Commissioner of Police in order to ascertain whether the said document is an unpublished official record relating to any affairs of State within the meaning of Section 123 of the Evidence Act or not ?

Section 123 of the Indian Evidence Act says :

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.

Section 124 says :

No public officer shall be compelled! to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

The question which has been referred to us for our opinion really falls under Section 162 of the Indian Evidence Act. That section says :

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

4. The section refers to official as well as private documents, and the second paragraph of the section provides that when a document, in respect of which an objection to production or admissibility is raised, refers to matters of State, the Court has no power to inspect the document. With regard to other documents in respect of which privilege is claimed the Court, if it thinks fit, may inspect the documents. The position therefore with regard to an official document is that the officer summoned to produce it is bound to produce it in Court. He must raise the objection in Court and the question whether that objection is well-founded is one for the Court to decide. But for this purpose the Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise.

5. Although the actual question referred to us is whether the Court is entitled to inspect a document in respect of which privilege is claimed on the ground of its being an unpublished record relating to affairs of State, the answer to that question requires also an answer to the other question also mentioned in the Magistrate's letter of reference whether it is the Court or the head of the department called upon to produce a document who is to decide whether a particular document is an unpublished record relating to affairs of State, i.e. whether it is a document in respect of which privilege can properly be claimed.

6. The language of Section 162 makes it clear that this latter question is one for the Court to decide. But once the Court has decided that the document is one in respect of which privilege may be claimed, i.e. that it is an unpublished record relating to matters of State, the question whether the document should be produced or not is one entirely in the discretion of the head of the department

concerned, and the (Court has no power to inspect the document to determine the question of its admissibility.

7. The Indian Evidence Act does not say what documents are to be regarded as unpublished official records relating to affairs of State, or communications made to an officer in his official capacity. It is not every official record or register or every official communication which can be regarded as privileged. The question has been recently considered in *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624. Viscount Simon L. C. Mealing with this point said (p. 636):

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that, the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Dealing with the question of the manner in which the objection to the production of a document should be taken Viscount Simon said (p. 638):

The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself 'have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e.g., departmental minutes, to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e.g., he may be out of reach, or ill, or the department may be one where the effective head is) a permanent official) and in such cases it would be reasonable for the objection to be taken, as it has often been taken in the past, by the permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavit, and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on subpoena at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the

minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the Court is not satisfied by this method, it can request the minister's personal attendance.

In dealing with the question whether when an objection has been duly taken the Judge should treat it as conclusive, His Lordship referred to the rulings in *Hennessy v. Wright* (1888) 21 Q. B. D. 509 and *Beatson v. Skene* (1860) 5 H. & N. 838 and said (p. 642):

Although an objection validly taken to production, on the ground that this would be injurious to: the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce 'except under the order of this honourable court.' It is the judge who is in control of the trial, not me executive, but the proper ruling for the judge to give is as above expressed. In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or, in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should hear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

In the course of the judgment His Lordship pointed out that the judgment in that case was limited to civil actions, and the practice, as applied in criminal trials where an individual's life or liberty is at stake, is not necessarily the same.

8. The law in India as regards the claim of privilege for official documents has been dealt with in *The Collector of Jaunpur v. Jamna Prasad* I.L.R. (1922) All. 360. In that case it was held that a statement made to the Collector of a district by a person applying to have his estate taken under the Court of Wards setting forth his financial position is a communication made to a public officer in official confidence within the meaning of Section 124 of the Indian Evidence Act and cannot therefore be used as an acknowledgment of any liability mentioned therein. In the course of a suit an application was made on behalf of the plaintiff asking the Court to direct the Collector as Manager of the Court of Wards to produce certain documents relating to the estate of a certain person. In accordance with the summons sent to him the Collector produced the documents in Court but claimed privilege for them under Section 124 of the Indian Evidence Act on the ground that the documents contained statements which were made to him in official confidence, and that he objected to produce them on the ground that their disclosure would be prejudicial to the public interest. The Subordinate Judge before whom the claim was made overruled the plea of privilege raised by the Collector and held that the documents were admissible, and one of them was exhibited in the case. The High Court held that the view taken by the Subordinate Judge as regards the admissibility of document was wrong. But as regards the question whether it was for the officer claiming privilege or for the Court to decide whether the document was a privileged one, the High Court said (p. 365):

It is quite clear on a proper construction of this section (section 124 of the Indian Evidence Act) that it is for the court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the court decides that it was so made then it has no authority to compel the public officer to produce it, for according to the section the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests.

The question has also been very fully considered by a division bench of this Court in *Bhalchandra v. Chanbasappa* (1938) 41 Bom. L.R. 391. The facts in that case were very similar to those in *The Collector of Jaunpur v. Jamna Prasad*. A suit was filed by the mortgagee of a property against the mortgagor whose estate was in charge of the Court of Wards and the Collector was asked to produce certain documents. The Collector claimed privilege under Section 162 of the Indian Evidence Act with regard to some of the documents. It was held by this Court that the claim to privilege made by the Collector was not warranted, first, because the documents referred to were not communications in official confidence or of a political character, but were really routine papers relating to the management of a private estate in charge of the Court of Wards, nor were they official documents of a confidential nature; secondly, because the public officer, the Collector, 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. In dealing with the question of privilege Mr. Justice Wassoodew said (p. 405):

The questions involving a claim to privilege for a document in the Government records made by a public officer in charge thereof, and relating to the Court's duty upon such claim and the procedure to be observed thereupon are somewhat difficult to answer. The relevant provisions of the Indian Evidence Act bearing on the point are contained in Sections 123, 124, and 162. The last section deals with production of documents in answer to summons, and it seems that that section makes it obligatory on the witness to produce the documents called upon by the Court, and he has no right to determine whether the document shall be produced. 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. This section as well as Section 123 protects the discovery of documents referring to matters of State. That is, based on the general rule that no person can be compelled to give evidence of matters which are State secrets including communications between public officers in the discharge of their public duties (Halsbury, Vol. XXII, para. 597, at p. 427). The section makes no difference between a private witness called upon to produce private documents and a public officer summoned to produce

public record. In that respect Section 124 of the Indian Evidence Act is more particular and lays down the rule of public policy,, and the limits within which the production can be withheld, that is the character and quality of the privilege.

After quoting Section 124 the judgment proceeds (p. 406) :

It has been well recognised in England that the privilege is a narrow one and most sparingly to be exercised [see *Robinson v. State of South Australia* (No. 2) [1931] A.C. 704. According to Taylor (Law of Evidence, 12th Edn., Vol. I) the principle of the rule is public safety and accordingly the rule of exclusion is applied no further than the attainment of that object requires (see Section 939). That is not the test under the Indian law. The question that arises under Section 124 is whether the communication in question was made to the public officer in official confidence. That is the condition precedent to the claim, and the question is primarily to be decided by the Court before whom the privilege is claimed '[see *The Collector of Jaunpur v. Jamna Prasad* I.L.R. (1922) All. 360. 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. There is no rule of law requiring in terms that the public officer should state the exclusionary facts in an affidavit. Perhaps there is a difference in procedure and the Court may call for an affidavit or a statement on oath in Court in a case where the public officer or the Government 'whom he represents is a party and they are called upon to make a general discovery of the documents in their possession. But. I suppose the Court's powers are untrammelled by rigid rules in the matter of laying down the procedure which is the most suitable to the exigencies of each case. The authorities in England establish that the Court has wide powers to determine the validity of the claim [See *Asiatic Petroleum Company, Limited v. Anglo Persian Oil Company, Limited* [1916] 1 K. B. 822 and *Smith v. The East India Company* (1841) 1 Ph. 50 ...The safeguarding of the State policy is left entirely by the Indian Legislature to the care of the public officer if he can satisfy the Court that the documents refer to matters of State or that they are

communications made in official confidence.

9. These rulings, and especially the ruling of this Court in *Bhalchandra v. Chanbasappa*, furnish a clear answer to the question which the learned Magistrate has referred to us. In our opinion in view of these rulings the reference was hardly necessary. Part of the difficulty that has arisen in the present case has been due to the Magistrate's own failure to specify clearly in the summons the document which the Commissioner of Police was called upon to produce. After the Magistrate's attention had been drawn by the Commissioner of Police to the fact that no station-diary was being maintained at the Worli Jail and that the document maintained there was called a Duty Register, he should have sent a fresh summons calling upon the Commissioner of Police to produce the Duty Register. It would then have been the duty of the Commissioner of Police, if he wanted to claim privilege with regard to the Duty Register, to first produce it in Court and then claim privilege for it. It was not for him to decide the question whether the document should or should not be produced. That was a question for the Magistrate to decide.

10. The reply to the reference will therefore be that the officer claiming the privilege must appear and produce the document in Court and must satisfy the Court that his claim is well-founded. It is for the Court to decide whether the claim should be allowed or not. But once the Court holds that the document is one with regard to which privilege can be claimed, in other words, that it is a communication made to a public officer in official confidence or that it is an unpublished official record relating to affairs of State which it would not be in the public interest to disclose, the question whether privilege should be claimed for it or not is entirely within the discretion of the officer in charge of the documents. The Court for the purpose of deciding whether the claim to privilege is well-founded or not is not entitled to look at the documents. It must decide the question of the validity of the objection without looking at the documents.