

D.S. Rame Vs. the State of Maharashtra

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SooperKanoon Citation : sooperkanoon.com/338403

Court : Mumbai

Decided On : Dec-23-1971

Reported in : (1973)ILLJ213Bom

Judge : G.N. Vaidya and ;V.S. Deshpande, JJ.

Acts : Bombay Civil Services Rules, 1959 - Rule 161; Evidence Act - Sections 123 and 162; [Constitution of India](#) - Articles 163(3) and 226

Appeal No. : Special Civil Application No. 1666 of 1971

Appellant : D.S. Rame

Respondent : The State of Maharashtra

Judgement :

Vaidya, J.

1. By this petition the petitioner, who was compulsorily retired under Rule 161 (c-1) of the Bombay Civil Services Rules, 1959, challenges on several grounds the validity of the order of compulsory retirement passed against him in May, 1971. It is not necessary to repeat the grounds which are similar to the grounds, which were urged challenging the validity of the said Rule 161 (c-1) and were overruled by us in Special Civil Application No. 1488 of 1971, decided on November 22, 1971.

2. To appreciate the additional grounds urged on behalf of the petitioner in the instant case, it is necessary to state a few relevant facts. The petitioner was born on August 22, 1915. He was initially recruited as a range forest officer in 1942 in the forest department of the then Bombay State. He served as such till 1959, when he was promoted to Maharashtra Forest Service Class II. He was further promoted to Class I of that service in 1964, and was working as divisional forest officer, Ghod Project, Junnar. The petitioner alleges in the petition that though he did not belong to Indian Forest Service, due to his exceptional merits and efficiency he had been given the charge of Indian Forest Service cadre post right from his promotion to Class I service in 1964. He claims that throughout his service, his record of service was very satisfactory and without any blemish. He got all his regular increments and promotions without anybody superseding him. On the contrary, he superseded two of his senior officers at the time of promotion to Class II and Class I service. He earned good confidence throughout and particularly for three years before he filed the petition. The petitioner has averred in the petition that during his long service only on two occasions, viz., in 1961 and in 1965, he was adversely commented upon and that also to the effect that he was soft with his subordinates. He claimed to have good health and averred that he had never taken any long sick leave on medical grounds. He was not asked to get himself medically examined at any time by the administration. He thus claimed to be fit and efficient to discharge the duties of his office. Notwithstanding this, on April 9, 1971 he received a confidential memo from the Chief Conservator of Forests informing him that the Government had decided to make him retire from Government service and that he was advised in terms of Government Circular, General Administration Department, No. SRV-1068-D dated May 11, 1968 that he should voluntarily retire by giving the requisite notice, without waiting for the attainment of the age of 58 years. On April 30, 1971 the petitioner made a representation that under the circular of the Government dated January 15, 1969 bearing No. SRV/1069/D, it was the policy of the Government to continue Government servants who were physically and mentally fit and whose record was satisfactory till they attain the age of 58 years, and that since he was keeping good health and was physically and mentally fit to discharge his duties and his record of service was satisfactory, he should be allowed to continue in service till he

reached 58 years of his age. On June 1, 1971, however, the petitioner was served with the impugned order dated May 24, 1971 from the Secretary to Government, Revenue and Forest Department, compulsorily retiring him. The order was to the following effect :

'Whereas you have already completed the age of 55 years, and whereas the State Government has decided that you should be made to retire from service in the public interest under the powers vested in it by Government Notification, Finance Department, No. GCS 1462/3049-A/62-K, dated 1st April, 1966,

Now, therefore, take notice that you will be retired from service on the expiry of a period of three months from the receipt of this notice.

You may, however, apply for leave due and admissible from a date not later than three months from the date of receipt of this notice. In case you apply for such leave and it is granted, your retirement will take effect from the date of expiry of the leave.

By order and in the name of the Governor of Maharashtra,

Sd/- V. Subramanian,

Secretary to Government.'

The petitioner, therefore, filed the above petition in this Court under Art. 226 of the [Constitution of India](#) on August 9, 1971 praying for setting aside the said order dated May 24, 1971 and for an injunction restraining the respondent-State of Maharashtra from enforcing the same and consequential and incidental reliefs.

3. The said petition is opposed on behalf of respondent by relying on an affidavit in reply filed by the Under Secretary to the Government of Maharashtra, Revenue and Forest Department. Excepting a bare statement that the confidential records of the petitioner were seen by the review committee, who recommended that the petitioner should be compulsorily retired, the said affidavit in reply did not refer to any particulars of the confidential records, which formed the basis of the recommendation of the review committee and the decision of the Government to

retire the petitioner compulsorily. On behalf of the respondent reliance was also placed on an affidavit filed by the Secretary to the Government of Maharashtra, Revenue and Forests Department, stating, inter alia, as follows :

'4. I say that the confidential record of service of all Government servants belong to a class of documents, which it is the practice of the State of Maharashtra to keep secret, as such practice is necessary in the public interest for the efficient administration of public affairs and for the proper functioning of the public service. After careful consideration, I have formed the opinion that it would be injurious to the public interest to disclose the aforesaid confidential record of service as such disclosure would materially affect the freedom and candour of expression of opinion by the officers who are required to assess the work of their subordinates. I say that once it becomes known that such confidential records would be accessible to the Government servants concerned for inspection, the officers whose duty it is to maintain such records may be deterred from doing so frankly and without inhibition. The Government of Maharashtra, therefore, claims privilege in respect of the said documents.

5. I say that I have consulted the Hon'ble Minister for Revenue and he is also of the opinion that it would be injurious to the public interest to disclose the aforesaid confidential records of service and has, therefore, instructed me to claim privilege in respect thereof.

6. I have in these circumstances refused permission to Messrs. Little & Co. to produce the aforesaid documents for inspection of the petitioner or for production before this Honourable Court.'

4. Mr. Singhavi, the learned counsel for the petitioner, urged in support of the petition, in addition to the grounds referred to above and overruled in our judgment in Special Civil Application No. 1488 of 1971, four grounds : First he urged that in the administration of Rule 161 (c-1) the Government violated Art. 16(1) guaranteeing equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State by making irrational and unjustified discrimination between Government servants belonging to backward classes and Government servants belonging to other classes based on Circular

No. SRV/ 1070-D, dated November 23, 1970, which laid down, inter alia :

'It has accordingly been decided that for retention in service of a Government servant belonging to the backward classes beyond the age of 55 years the criterion that should be observed should be same as for his continuance from 50 years to 55 years, i.e., where his record is unsatisfactory and below average, such officer may be retired from service after obtaining the Government orders. But if his record is held to be average the said Government servant should be retained in service till he attains the age of 58 years. Therefore, it is not necessary to insist that for retention in Government service beyond the age of 55 years the backward class officers have to be above average (average plus).'

5. Secondly, it was urged by Mr. Singhavi that on August 27, 1970 when it is alleged that it was decided to retire the petitioner, the petitioner was more than 55 years of age and hence it should be deemed that he was cleared at 55 and was entitled to continue till he completed the age of 58 years. Thirdly, it was submitted that all that was stated in the affidavit in reply was that the Government had decided to retire the petitioner compulsorily accepting the recommendation of the review committee; but the Government had not placed before the Court any affidavit of any officer, who can be considered to be the appropriate authority for compulsorily retiring the petitioner, showing that he had applied his mind personally to the confidential record and the fitness of the petitioner to be continued or retired. Lastly, it was contended that the facts of the present case are covered by our decision in Special Civil Application No. 1487 of 1971 decided on November, 16/17/18, 1971 inasmuch as the respondent-State unable to place before this Court any relevant material to show that it was in the public interest to retire the petitioner compulsorily, as required by Rule 161 (c-1).

6. If the fourth ground is valid, it is unnecessary for us to consider the other grounds urged in support of the petition, as we have already held in the aforesaid decision in Special Civil Application No. 1487 of 1971 that an order of compulsory retirement purporting to have been made under Rule 161(c-1) without any material to support the opinion of the Government that it was 'in the public interest' to retire the Government servant compulsorily, is invalid. It is undisputed that under the

rules laid down by the Government the review committee had to take into consideration five years' confidential records of a Government servant before recommending him to be unfit to be continued in service. It is also clear that neither in the affidavit in reply filed by the Under-Secretary nor in the affidavit filed by the Secretary any indication is given of any particulars, which were considered by the review committee, according to the relevant circulars, relating to the records of service of the petitioner five years before the decision to retire him compulsorily. As stated above, the Secretary has claimed privilege in respect of the entire class of confidential documents relating to the service as confidential records of service and has even contended that the documents cannot be produced for inspection of this Court, even though this is a petition under Art. 226 of the [Constitution of India](#).

7. The main question, therefore, in this petition is as to whether the plea of privilege, made by the Secretary to the Government of Maharashtra in the Revenue and Forests Department with regard to the confidential records of service of the petitioner can be upheld. Mr. Singhavi, the learned counsel for the petitioner, submitted, relying on the decisions of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh* : [1961]2SCR371 , and in *Amar Chand Butail v. Union of India* : AIR 1964 SC1658 , and *Conway v. Rimmer* (1968) HL 910, that the confidential documents relating to the services of the petitioner did not belong to that class of documents which were entitled to the privilege of non-disclosure. He submitted, in the first instance, that the so-called documents if they existed should be produced by the respondents for inspection of this Court and if it was then found that the disclosure would not be prejudicial to the public interest or that and possibility of such prejudice was insufficient to justify their being withheld, disclosure should be ordered, and the petitioner should be given an opportunity to meet what is stated in such documents. Mr. Singhavi submitted that the petitioner had categorically stated in his petition that his service was throughout good and the only adverse remarks, which he had received, as stated above, were in the years 1961 and 1965 and further the way in which he was promoted and was considered to be fit to hold the Indian Forest Service cadre post in class I right from the year 1964 showed that there could not be any material whatsoever against him which would justify the opinion of any reasonable person that it was in the public interest to retire the petitioner compulsorily.

8. As against this argument, Mr. Joshi, the learned counsel for the respondents, merely relied on S. 123 of the Evidence Act and the decision of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh* (supra) and contended that in view of that decision it was not open to this Court to go behind the averments made in the affidavit pleading privilege for the entire class of documents relating to the confidential records of Government servants and further no adverse inference could be drawn against the respondents merely because the respondents have not produced the said documents either for inspection of this Court or for disclosure to the petitioner.

9. The question of privilege relating to affairs of State has engaged the attention of the highest Courts in England and in Commonwealth countries, including India. When the Supreme Court decided the above two cases the Supreme Court had before it the earlier decision of the House of Lords in the case of *Duncan v. Cammell Laird & Co. Ltd.* [1942] A.C. 624. Their Lordships did not have the benefit of the far-reaching decision of the House of Lords in *Conway v. Rimmer* [1968] H.L. 910. This decision of the House of Lords was hailed in England as a great protection to the citizens against dangerous executive power. It is enough to quote here what Prof. H. W. R. Wade has observed in *Law Quarterly Review*, Volume 84, at page 171 under the caption 'Crown Privilege Controlled at Last' :

'It is now at last established that where a Minister claims that documents should not be used in evidence because their production would be injurious to the public interest, the Court has power to disallow the claim and order their production, after weighing the possible injury to the public interest against the injury to the interests of justice that their suppression would cause. For this purpose the Court may inspect the documents privately, i.e., without disclosure to the parties. Moreover, the House of Lords has itself ordered the production of five documents for its own inspection, with strong indications that it may then disallow the Home Secretary's claim of privilege for at least four of them. These documents are reports about a probationer constable in the Cheshire police force who came under suspicion of having stolen an electric torch, but who was promptly acquitted (the jury having stopped the case) when prosecuted for larceny at the instance of the superintendent. Having nevertheless been dismissed from the force, he sued the

superintendent for damages for malicious prosecution, and applied for discovery of the five reports, which were crucial pieces of evidence on the issue of malice and want of probable cause. Both parties, in fact, wished the evidence to be produced. But the Home Secretary stepped in with his claim of privilege based on the 'class' principle so widely enunciated by Lord Simon in *Duncan v. Cammell Laird & Co. Ltd.* [1942] A.C. 624.

'Their Lordships heaped withering criticism upon this 'class' principle, which is that complete classes of official reports and documents ought to be kept secret, at whatever cost to the interests of litigants, merely because otherwise there would not be 'freedom and candour of communication with and within the public service'. The flimsiness (as Lord Reid called it) of this overworked argument has long been obvious and their Lordships have not shattered it without mercy. Their speeches develop many criticisms familiar to readers of this Review. A doctrine so vague and so wide was standing invitation to abuse, and Lord Pearce quoted the document that the Crown, having been given a blank cheque, yielded to the temptation to overdraw. Just how far overdrawing could go was pointed out by Lord Reid : the Attorney General did not deny that, even where a report had been published in full in a criminal case, privilege was claimed for the same report in a later civil case not because its disclosure could be injurious (for it was already public property) but in order to protect its author from liability for libel or some other tort.

'The House of Lords' decision is presented as an exercise in pure reason, and as such it has very great strength. But their achievement can fairly be said to be the culmination of widespread movement of legal opinion.

The House of Lords has contributed to Human Rights Year by bringing back into legal custody a dangerous executive power. It is a pity that it was ever allowed to escape.'

10. Similarly the decision of the House of Lords was hailed in the *Modern Law Review* in an Article entitled 'The Last Word on the Last Word', 32 *Modern Law Review*, 1969 at page 143 :

'There should be general welcome for long-awaited authoritative decision enabling the judiciary to regain its control over the whole of this field of the Law, and thereby breaching lacuna in the rule of law. England has finally been brought into line in this sphere with Scotland and a large part of the Commonwealth.'

11. After the said decision the law in England was summarised as follows in Phipson on Evidence, the Eleventh Edition, 1970 at page 240, para 562 :

'Witnesses may not be asked, and will not be allowed to state facts or to produce documents the disclosure of which would be prejudicial to the public service. And this exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interest, even when relating to commercial matters. It is the duty of the Court to prevent disclosure of facts where serious injury to the national interest would possibly be caused. In deciding whether a claim of Crown privilege should apply to a document, there are two kinds of public interest to be considered by the Court. There is (1) the public interest that harm shall not be done to the nation or the public service, and (2) the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are cases where the nature of the injury which might be done to the public service is of so grave a character that no other interest can be allowed to prevail. But there are other cases where the possible injury is much less and there the Court must balance the public interests involved in deciding whether to withhold the document or not. When a Minister's certificate suggests that a document belongs to a class which ought to be withheld, unless his reasons are of a kind that judicial experience is not competent to weigh, the test is whether the withholding of a document because it belongs to a particular class is really necessary for the functioning of the public service. If a judge decides that on balance the documents probably ought to be produced, it would generally be best that he should see them before ordering production.'

In para 565 it is further stated :

'Objections to the disclosure of such matters may be taken on oath by the head of the department, either orally or by affidavit, or by a subordinate, or counsel

instructed by him to object, or by the party interested in excluding the evidence; or by the judge himself. In *Conway v. Rimmer* dicta of Lord Simon L.C. in *Duncan v. Cammell Laird & Co.* that a judge must accept as final a Minister's decision to exclude evidence were overruled it being laid down that the Courts have power to order production and to overrule the Minister's decision to withhold if necessary on the principles enunciated in para 562.'

12. If these principles are applied to the facts of the instant case, it is clear that it was the duty of the respondent to produce the documents before this Court to enable this Court to decide whether the non-disclosure of this class of documents was really necessary in the public interest or in the interest of public service in the State, as against the highest public interest of administering justice in accordance with law for the purpose of doing which Art. 226 of the Constitution has vested the necessary powers on this Court.

13. Mr. Joshi, the learned counsel for the respondents, however, strenuously urged that whatever be the law in England as laid down in *Conway's* case, so far as this country is concerned, in view of the decision of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh*, : [1961]2SCR371, this Court cannot even in disposing of a petition under Art. 226 of the [Constitution of India](#) compel the State to produce the documents withheld relying the plea of privilege or draw an inference adverse to the State merely because the State has withheld those documents. It must be noted that in that case the question arose under Ss. 123 and 162 of the Evidence Act in a suit filed by a Government servant, who was removed from service by the State of Punjab. After a very exhaustive review of the case law on the point the Supreme Court observed :

'It would thus be clear that in view of the provisions of S. 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English Law as it obtained in England in 1872.'

14. Further with reference to *Duncan's* case [1942] A.C. 624, and the subsequent criticism thereof, their Lordships of the Supreme Court observed :

'It is unnecessary for us to consider the true nature and effect of this power because in India in this particular matter we are governed by the provisions of S. 162 which confer power on Courts to determine the validity of the objection raised under S. 123, and so there would be no occasion or justification to exercise any inherent power.'

15. The documents with respect to which the privilege was claimed in that case before the Supreme Court were :

(1) Original order passed by Pepsu Government on September 28, 1955 on the representation dated May 18, 1955 submitted by the plaintiff in that case;

(2) Original order passed by the Pepsu Government on March 8/9, 1956, reaffirming the decision passed on September 28, 1955;

(3) Original order passed by the Pepsu Government in their Cabinet Meeting dated August 11, 1956, revising their previous order; and

(4) report of the Public Service Commission on the representation of the plaintiff dated May 18, 1955, after the Pepsu Government's decision on September 28, 1955.

16. In dealing with this question and in reversing the order passed by the trial Court by which the privilege had been upheld, the High Court purported to apply the definition of the expression 'affairs of State' evolved by a single Judge of the Punjab High Court, according to which the expression 'affairs of State' as used in S. 123 has a restricted meaning and on the weight of authority, both in England and in this country, he would define 'affairs of State' as matters of a public nature in which the State is concerned, and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations. The Supreme Court overruled this view on the ground which is stated as follows :

'We have already held that in dealing with the question of privilege raised under S. 123 it is not a part of the Court's jurisdiction to decide whether the disclosure of the given document would lead to any injury to public interest; that is a matter for the

head of the department to consider and decide. We have also held that the preliminary enquiry where the character of the documents falls to be considered is within the jurisdiction and competence of the Court, and we have indicated how within the narrow limits prescribed by the second clause of S. 162 such an enquiry should be conducted. In view of this conclusion we must hold that the High Court was in error in trying to enquire into the consequences of the disclosures. We may add that the decision of the High Court suffers from the additional infirmity that the said enquiry has been confined only to the specified classes of injury specified by Khosla J., in his definition which cannot be treated as exhaustive. That being so, we think the appellant is justified in complaining against the validity of the decision of the high Court.'

17. The Supreme Court came to the conclusion, after considering the nature of the documents in respect of which the privilege was claimed, as follows :

'Therefore, in our opinion, the conclusion appears inescapable that the documents in question are protected under S. 123 and if the head of the department does not give permission for their production, the Court cannot compel the appellant to produce them. We should have stated that the two affidavits made by the Chief Secretary in support of the plea of the claim of privilege satisfied the requirements which we have laid down in our judgment, and no comment can be effectively made against them.'

18. The three orders mentioned above were considered to be privileged because the very description of the documents clearly indicated that they were documents relating to the discussion that took place amongst the members of the Council of Ministers and the provisional conclusion reached by them in regard to the respondent's representation from time to time. These documents were privileged because they embodied the minutes of the meetings of the Council of Ministers and would indicate the advice which the Council ultimately gave to the Rajpramukh. It was undisputed that the advice given by the Cabinet to the Rajpramukh or the Governor was expressly saved by Art. 163 sub Art. (3) of the [Constitution of India](#). With regard to the report of the Public Service Commission, their Lordships observed :

'Indeed it is very difficult to imagine how advice thus tendered by the Public Service Commission can be excluded from the protection afforded by S. 123 of the Act The report received by the Council from the Public Service Commission carried on its face the character of a document the disclosure of which would lead to injury of public interest. It falls in that class of documents which on grounds of public interest must as a class be withheld from production.'

19. Mr. Joshi contended that the ratio in that case would apply to the facts of the present case in view of the affidavit which is also consistent with the principles laid down in that case, and contended that this Court cannot compel Government to produce the documents, which were described by the Secretary as

'The confidential record of service of all Government servants belongs to a class of documents, which it is the practice of the State of Maharashtra to keep secret, as such practice is necessary in the public interest for the efficient administration of public affairs and for the proper functioning of the public service.'

This contention must be rejected because according to the relevant rules and general circulars of the Government relating to the confidential remarks, it is undisputed that adverse remarks in respect of relations with non-official and public reputation should invariably be communicated to the Government servants. Remarks as finally approved by the Government in respect of officers of All India and state service should be communicated by the head of department orally, and if they pertain to a serious report, they are to be communicated in writing by the Government or at least, at its instance, by the head of the department. It may be that some of the remarks were not required to be communicated; but it cannot be disputed that what is communicated cannot be considered as what is unpublished. We do not wish to lay down that in all cases of confidential records, the High Court can in exercise of its powers under Art. 226, compel the Government to disclose them. We are only concerned here with the confidential records relevant to the administration of Rule 161 (c-1) which requires the Government to form an opinion that it is in the public interest to retire a person. When an order under that rule is challenged before this Court in a petition under Art. 226 of the Constitution, it is the duty of the State to satisfy this Court that it formed an opinion that it was not in the

public interest to continue the petitioner in service on the basis of some material which can be considered to be relevant material. The state cannot come and tell this Court : 'I have compulsorily retired this Government servant on the basis of material which I cannot be compelled to disclose to the Court.'

20. The privilege which is claimed here for the entire class of confidential records is not only inconsistent with Rules of the Government relating to confidential remarks referred to above and contained in the Government Resolution, Political and Services Department, dated October 15, 1956 bearing No. CFR-1256, but even with the practice which the Government has observed in contesting the several petitions for compulsory retirement which came up before us. In most of the cases in the was contended that there was no material, except in one case, namely, Special Civil Application No. 1487 of 1971, the Government placed before us confidential records of service, which clearly showed that there was material from which a possible view could be taken that it was not in the public interest to continue the Government servant concerned. It is only in the present case that the privilege is being claimed by the Secretary without even indicating in the affidavit in reply the nature of the material in the said documents from which the Government could form the opinion that it was not in the public interest to continue the petitioner in service. We do not think that such a privilege can be claims by the State under S. 123 of the Evidence Act, when opposing a petition under Art. 226 of the Constitution without even placing before this Court sufficient materials to uphold the plea of their privilege.

21. Mr. Singhavi for the petitioner submitted that he had already called upon the respondent's attorneys by a notice to produce for inspection :

(1) The Government Notification dated April 1, 1966 referred to in the impugned order;

(2) the noting of the department regarding the promotion of the petitioner to Class I made in 1964;

(3) confidential remarks for or against the petitioner for the five years : viz. 1965-66, 1966-67, 1967-68, 1968-69 and 1969-70; and

(4) the name of the officer or officers who actually applied his or their mind to the confidential records referred to in the affidavit filed by the Secretary.

The first document is not even covered by the class of documents referred to in the affidavit, and yet the respondents are unable to produce that notification. We cannot see that public interest will be injured if the nothing which was the basis of the promotion of the petitioner to class I in 1964 was produced by the respondents. If, as stated above, the confidential remarks, which are adverse, are normally communicated to the Government servants concerned, it is difficult to imagine what led the Secretary to claim a privilege in respect of these confidential remarks of the relevant five years, which according to the Government circular must be considered by the review committee before recommending the compulsory retirement.

22. As stated above, in many of the petitions, which came up for hearing before us, the department concerned had produced these remarks and these remarks were allowed to be part of the record of this Court. In these circumstances, the only inference that can be drawn by this Court in the absence of any averments made by the Secretary regarding the nature of the contents is that they are not 'unpublished official record relating to affairs of State' within the meaning of S. 123 of the Evidence Act and that there is nothing in the said remarks or confidential records which would show that the petitioner was physically or mentally unfit to continue in service or it was in the public interest to retire him compulsorily. It is stated in the affidavit in reply that the Government decided the question of compulsory retirement on the recommendation of the review committee. It may be that nothing more could or need be stated by the Under Secretary to the Government, who has made the affidavit in reply on the basis of his record, and the requisition made in this behalf by the petitioner demanding the name of the officer or officers can be considered to be unjust or improper. But apart from saying that the documents are confidential, Mr. Joshi is unable to say whether there exists any reason for non-production of the other three documents. We do not think that the interest of maintenance of rule of law or justice which is the highest interest of mankind and the basis of constitutional Government in this country, will be served if we hold that such a plea is open to the State against

whom a petition is filed under Art. 226 challenging the validity of an order of compulsory retirement on the ground that there was no material whatsoever to support the decision of the Government that public interest required the compulsory retirement of the petitioner under Rule 161(c-1).

23. Mr. Singhavi rightly relied on the decision of the Supreme Court in *Amar Chand Butail v. Union of India* : AIR 1964 SC1658 , where following the earlier decision in the *State of Punjab v. Sodhi Sukhdev Singh* : [1961]2SCR371 , it is laid down that the claim of privilege of document under S. 123 could generally be made by the Minister-in-charge who is the political head of the department concerned and the affidavit made in that behalf should show that each document in respect of which the claim is made has been carefully read and considered and the person making affidavit is bona fide satisfied that its disclosure would lead to public injury. Mr. Singhavi relying on this remark contended that the affidavit of the Secretary in the present case did not conform to the said requirement laid down by the Supreme Court. This contention must be upheld because there is nothing in the affidavit to show that he Secretary, who was pleading privilege, had carefully read and considered the circular dated April 1, 1966, the nothing relating to the petitioner in 1964 and the confidential remarks of five years and was bona fide satisfied that their disclosure would lead to public injury. It may also be noted that in *Amar Chand Butail's* case the Supreme Court further considered the effect of the decision in the *State of Punjab v. Sodhi Sukhdev Singh*, (supra), and laid down :

'Dealing with this problem in the case of the *State of Punjab* : [1961]2SCR371 this Court has held that though under Ss. 123 and 162 of the Evidence Act, the Court cannot hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question, that matter being left for the authority concerned to decide, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under S. 123. In view of the fact that S. 123 confers wide powers on the head of the department, this court took the precaution of sounding a warning that the heads of departments should act with scrupulous care in exercising their right

under S. 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the head of the department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State.'

The Court went on to consider the manner in which the privilege should be claimed, and dealt with the affidavit filed in that case as follows :

'No doubt it contains the statement that it is solemnly affirmed but the person who made that statement probably was not familiar with the requirements which had to be satisfied in making an affidavit. The learned Additional Solicitor-General had to concede that on the face of it, the document cannot be treated as an affidavit which is required to be filed for the purpose of making a claim for privilege. On this preliminary ground alone the claim for privilege can be rejected.'

24. But the Supreme Court further considered even the merits and came to the conclusion that the minister had not seriously applied his mind to the contents of the documents and examined the question as to whether their disclosure would injure public interest, and went on to observe :

'We are constrained to observe that this case illustrates how a claim for privilege can be and is sometimes made in casual 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.'

This caveat entered by the Supreme Court is not heeded in the affidavit, which is filed in this case claiming privilege. In the affidavit, the relevant portion of which is quoted above, there is nothing to show that the Secretary applied his mind to the relevant records relating to the service of the petitioner and came to the conclusion that it was in the public interest not to disclose them or to produce the same before the Court. The privilege is claimed generally in respect of a class of documents on the ground that they are confidential forgetting that it is only then public interest

requires the non-disclosure that the documents can be withheld from scrutiny by the Courts who have to do justice to all the parties before them and if necessary to order the parties to produce all relevant documents. It is also necessary to bear in mind another warning in this behalf administered by Chagla, C.J. in *Dinbai v. Dominion of India* : AIR1951 Bom72 :

'It is unnecessary to state that a privilege of this nature should be rarely claimed and should only be claimed after the responsible minister or the head of the department has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs of State and whose disclosure will result in injury to public interests. The scales are always weighed against the subject who fights against Government and Government should be loath to throw against him more weight in the scales by refusing disclosure of documents which are relevant to the issue in the suit.'

25. In view of the above principles laid down by the Courts in the ends of justice we must, therefore, hold that the claim of privilege is made in this case on behalf of the respondents in a casual manner without placing any relevant material before this Court, and without due regard to the Rules which govern the confidential records in the Maharashtra State and also contrary to what the Government itself did in several other cases before us relating to compulsory retirement. We are here dealing with the petition under Art. 226 of the [Constitution of India](#). We must consider whether there was any basis on which the Government could decide that the petitioner's retirement was necessary in the public interest. The respondent-Government have failed to place such material before us. Physical health of a person is perhaps an objective fact which could easily be established by production of a medical certificate or the results of medical examination. If there was any adverse remark against the petitioner and if there was any reason for withholding either the source of that remark or the period of that remark, it was open to the Government to state in the affidavit what was that remark and how it was taken into consideration by the Review Committee, which recommended his retirement, and by the Government, which decided that he should be compulsorily retired in the public interest. Most of the facts stated by the petitioner with regard to his service and promotions are substantially admitted by the Under-Secretary

who has filed the affidavit in reply. The minutes of the Review Committee which were also treated as confidential but were produced before us, merely say :

'The Committee examined the confidential records of the 5 Class I officers of the Forest Department whose names are mentioned in the attached list for the last five years, in the light of the criteria laid down in Government Circular, General Administration Department, No. SRV-1069-D dated the 30th September, 1969. On the basis of the evaluation of their records, the Committee decided that - (a) Shri D. S. Rame (serial No. 4 in the list) should be retired compulsorily as his record is below average plus.'

Nothing is placed before us to justify this conclusion. There is nothing in the conclusion to indicate what was stated in the records to enable the Committee to come to the conclusion that the petitioner, who was promoted in supersession of some of the other officers and who claims to have had an excellent record, was considered by the Committee to be below average plus. We think that when the State was called upon to meet the ground stated in the petition under Art. 226 that there was no material for such a decision, it was incumbent on the State to produce whatever material was relevant and if there was anything in respect of which privilege was to be claimed to indicate why the privilege was claimed and to state further that the head of the department or the Minister concerned had applied his mind carefully to the documents and had come to the conclusion that the documents should not be disclosed in the public interest. In the absence of such affidavit and such particulars, we must draw an inference that the State has not produced any material because there is no material which could be the basis of the decision of the Government, except the recommendation of the Review Committee, which does not refer to any material other than a bald reference to the confidential record. That, in our opinion, is not sufficient to enable the State to repel the contention raised in a petition under Art 226 of the [Constitution of India](#).

26. In the result, the petition succeeds. The rule is made absolute. The order of compulsory retirement dated May 24th, 1971 passed by the Government of Maharashtra against the petitioner is quashed and a writ is issued to the State restraining it from enforcing the said order.

27. The respondents to pay the costs of the petitioner.

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