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Court : Allahabad

Decided On : Jun-20-1958

Reported in : AIR1959All543; 1959CriLJ1035

Judge : A.P. Srivastava, J.

Acts : Evidence Act, 1872 - Sections 123, 124 and 162; Police Act, 1861 - Sections 7

Appeal No. : Criminal Revn. No. 258 of 1958

Appellant : Tilka and ors.

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : T. Rathor, Adv.

Judgement :
ORDER

A.P. Srivastava, J.

1. The applicants made a certain complaint against one Munshi Singh, a police officer, and on the basis of that complaint Munshi Singh was tried under Section 7 of the Police Act. Certain witnesses were examined in that case and deposed

about certain incidents. Subsequently the applicants were challaned for offences punishable under Sections 147 and 323, 325 and 332 read with Section 149, I.P.C. and the same witnesses who had been examined in the proceedings under Section 7 were examined in the criminal trial. The applicants wanted to cross-examine those witnesses on the basis of their previous statements made in the proceedings under Section 7 of the Police Act as it was their case that the witnesses while giving evidence at the trial were stating things, which were directly contradictory to what they had stated in the course of the proceedings under Section 7 of the Police Act. For the purpose of confronting the witnesses with their previous statements and in that way contradicting them, the applicants summoned the record of the proceedings under Section 7 of the Police Act which contained the previous statements of the witnesses. The record was summoned from the Superintendent of Police. He sent the record in a sealed cover to the Magistrate and claimed privilege under Sections 123 and 124 of the Indian Evidence Act The Magistrate conceded the claim of privilege and decided that the applicants were not entitled to have those statements produced. The Applicants went up in revision to the Additional District Magistrate hut he declined to Interfere and agreed with the view which the learned Magistrate had taken. The applicants have, therefore, come up to this Court in revision and contend that the view taken by the two courts below in respect of the claim of privilege made by the Superintendent of Police is incorrect and that they were entitled to have the record of the previous statements of the witnesses to be able to confront the witnesses with those statements during cross-examination. Section 123, Evidence Act provides:--

'No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.' Section 124 then lays down-

'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.' Section 162 of the Evidence Act provides that-

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

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

There is a third clause also to the section, but it is immaterial for our present purposes.

2. An analysis of Section 123 shows that if two circumstances exist, i.e. (1) there is an unpublished official record relating to an affair of the State, and (2) some one is attempting to give evidence derived from that kind of record, the section provides that (3) such evidence shall nor be permitted to be produced except with the permission of the head of the department concerned. It shall be in his discretion to give or withhold the permission.

3. The question whether the record in question is an unpublished official record relating to any affair of the State must be decided first before Section 123 can be availed of by the head of the department concerned. That question cannot be decided by the head of the department himself. It is the Court which must decide whether the record in question is an unpublished record and whether it relates to an affair of the State. Under Section 162 of the Evidence Act when the record is required to be produced it must be produced. In order to decide the question the Court may inspect the document unless it relates to an affair of the State. In the latter case it will have to take other evidence relating to the nature of the document. But the privilege of deciding whether the document is an unpublished record of an affair relating to the State is that of the Court, and it is the Court alone which can deal with that matter (vide Public Prosecutor v. Venkata Narassayya, AIR 1957 Andh Pra 486). If the Court, after such evidence as it considers necessary or after seeing the document, comes to the conclusion that the document is not an unpu.bli.shed official record, or that it does not relate to an affair of the State, there is an end of the matter and Section 123 ceases to apply.

If, on the other hand, the Court comes to the conclusion that the document in question is of the kind mentioned in Section 123, i.e., it is an unpublished official record relating to any affair of the State, then, whether permission should be given to any one to give evidence on the basis of that document depends on the discretion of the head of the department concerned. It is he alone who can decide in that case whether he would grant permission or refuse to grant it. Whether he exercises that discretion in one way or the other is his own look-out. The Court cannot compel him to exercise that discretion in any particular manner.

4. Section 124 of the Evidence Act prohibits a public officer from being compelled to disclose communications made to him in official confidence jf he feels that public interest would suffer by such disclosure. For the application of this section the first question which has to be decided is whether the communication which is to be disclosed was one made to the officer in public confidence. If it is such a communication then it will be for the officer concerned to decide whether public interest would suffer on account of its disclosure or not, and if he thinks that it will suffer, ho cannot be compelled to disclose that communication.

5. Now, in the present case the record of the proceedings under Section 7 of the Police Act were sent to the Magistrate in a sealed cover. The Magistrate did not inspect the record himself. He also does not appear to have taken any evidence about its contents. There was, therefore, no material before the Magistrate on the basis of which he could have recorded the finding whether the record in question was an unpublished record of an affair relating to the State nor has the learned Magistrate recorded any finding to that effect. He has only accepted what, the Superintendent of Police had noted on the sealed cover. The learned Magistrate, therefore, failed to exercise the power which he had of deciding whether the record in question was in fact an unpublished record relating to an affair of the State, and without deciding that question he could not accept the claim of privilege made by the Superintendent of Police that he would not allow evidence to be given on the basis of that record. The stage of claiming that privilege would have arrived after the Magistrate had decided that the record was an unpublished record relating to an affair of the State. If his decision on the question was in the negative the question of claiming a privilege under Section 123 would not have arisen at all.

6. In the present case there was no question of the application of Section 124 of the Evidence Act. No public officer was being compelled to disclose communications made to him in official confidence. The statements of the witnesses previously made were being required only for contradicting those witnesses themselves. Nor can it be said that the statements had been made to any public officer in official confidence and were not known to other persons. The applicants themselves were parties to the proceedings under Section 7 of the Police Act because the proceedings had been started on their own complaint. Learned Counsel for the applicants tells me that during those proceedings when the witnesses were examined the applicants were present. In that case the applicants must have known what the statements were, and there was no question of the statements being made to any one in confidence. There could also be no question of their disclosure in any way affecting public interest. They already stood disclosed at least to the applicants and to the persons who were present at the time when those statements were made.

7. The courts below, therefore, appear to be unjustified in allowing the Superintendent of Police to claim any privilege in respect of this particular record without deciding the question whether the record was an unpublished record relating to an affair of the State. The order allowing the privilege to be claimed should, therefore, in my opinion, be set aside and the case should be sent back to the learned Magistrate so that he may first decide whether the record in question is an unpublished record of an affair relating to the State. While deciding that question the learned Magistrate may bear in mind the observations made by the Calcutta High Court in the case of Harbans Sahai v. Emperor, 13 Cri LJ 445. If the learned Magistrate decides that the record in question falls within the purview of Section 123 of the Indian Evidence Act, it will be for the Superintendent of Police, who is the head of the department, to decide whether he will allow the documents to be used or not. If, however, the Magistrate decides that the documents are not such as are covered by Section 123, the question of claiming that privilege will not arise at all.

8. The application in revision is, therefore, allowed to the above extent. Let the record be sent back to the court below for being proceeded with according to law.

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