

Khairati Lal Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Mar-01-1974

Reported in : ILR1974Delhi51; 1974RLR403

Judge : T.V.R. Tatachari, J.

Acts : [Evidence Act, 1872](#) - Sections 123; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : Civil Revision Appeal No. 109 of 1972

Appellant : Khairati Lal

Respondent : Delhi Development Authority and anr.

Advocate for Pet/Ap. : S.N. Chopra,; M.M. Kalra,; Keshav Dayal,;

Judgement :

T.V.R. Tatachari, J.

(1) This Civil Revision Petition has been filed against an order of Shri R. P. Gupta, Subordinate Judge 1st Class, Delhi, dated November 6, 1971, whereby the learned Subordinate Judge upheld a claim of privilege under section 123 of the Evidence Act in respect of two documents.

(2) The petitioner herein, Khairati Lal, filed a suit, No. 231 of 1968, against the Delhi Development Authority, for a perpetual injunction restraining the latter from interfering with or disturbing the possession of the petitioner-plaintiff in respect of a land measuring about 161 square yards and situate in khasra No. 202/15, Motia Khan, Delhi, and a shop, bearing No. 47, which was constructed on the said land, and from demolishing the said shop.

(3) In the course of the proceedings, the petitioner-plaintiff sought for the production of two documents, viz. '(i) File No. W.II-73- (10)/54 dated 22nd February, 1952, from the Ministry of Works Production and Supply - to the Chief Commissioner, Delhi) ' and '(ii) Letter No. 11662-W-11-51 dated 19th November, 1951, from the Ministry of Works, Production and Supply to the Chief Commissioner, Delhi'. On August 30, 1968', Shri K. K. Sethi, Subordinate ' Judge, Delhi, issued a summons for the production of the said documents. In answer to the summons, an affidavit of Shri B. P. Patel, Secretary to the Government of India, Ministry of Works, Housing and Supply, dated November 6, 1968, was filed claiming privilege in respect of the said documents under section 123 of the Indian Evidence Act. It was averred in the said affidavit that the deponent was the Head of the Department and was as such in charge and control of its records, that he carefully read and considered the file at No. (i) and the letter at No. (ii) which were sought to be produced, that the file at No. (i) contained notes portion and correspondence and also many other documents, including letter No. 11662- W-11-52, dated February 22, 1952, and as such it may not be summoned as a whole, that they were unpublished official records relating to the affairs of State, that they contained executive instructions based upon speeches made by the Hon'ble Minister of Works, Production and Supply during the debates on Delhi Premises (Requisitioning and Eviction) Amendment Bill, 1951, in Parliament, and thus had political implications, that the determination and execution of public policies would be materially affected by the disclosure of the said documents, that the proper functioning of Government Departments and execution of public policy must be ensured in public interest and in the interest of the State, that the disclosure of the contents of the said documents would effect materially the freedom and can dour of expression of opinion in the determination and execution of public policy, and that he would not, thereforee, give permission to any one

under section 123 of the Indian Evidence Act to produce the said documents or to give evidence derived there from.

(4) The petitioner-plaintiff filed objections to the said claim of privilege. The petitioner submitted that the documents in respect of which privilege was claimed were in respect of certain assurances given by the Hon'ble Mr. Gadgil and contained the manner in which the said assurances were to be implemented, that the petitioner-plaintiff was a displaced person from West Punjab, that the Government of India gave such displaced persons solemn assurances that those displaced persons who had occupied any public land before August, 1950 would not be evicted there from and any construction raised by them would not be demolished or removed unless they were provided with alternative accommodation and payment of compensation for the structure, that the said assurances were contained in the Report of the Parliamentary Select Committee and were reiterated on the floor of the Parliament in September, 1951, that the said documents were materially related to the controversy in the suit and the withholding of such documents constituted a serious departure from the ordinary rule of evidence, that the said documents could not be said to be unpublished documents relating to affairs of the State and the production of the said documents would not cause any injury to public interest, that the affidavit filed by the Secretary, Ministry of Works, Housing and Supply was vague and did not show how the documents related to affairs of State, that the lower Court had held by an order, dated October 21, 1967, in Nirmal Singh and other v. D.D.A. that no privilege could be claimed in respect of the said documents under section 123 of the Evidence Act, and that the privilege claimed could not, therefore, be upheld.

(5) By his order, dated November 6, 1971, the learned Subordinate Judge held that the documents in question related to affairs of State and, in that view, upheld the claim of privilege relying upon an order of a learned Judge of this Court, B. C. Misra J., in Union of India V. Ramgopal Civil Revision No. 65 of 1968, decided on May 26, 1970(1), upholding a claim of privilege in respect of letter, No. 1622- W- IJ/52 dated February 22, 1952, regarding implementation of 'Gadgil Assurances' and 'Parliamentary Report' thereon. It is against the said order that the present Civil Revision Petition has been filed by the petitioner-plaintiff, Khairati Lal.

(6) Shri S. N. Chopra, learned counsel for the petitioner, stated at the out-set, that the petitioner does not want the production of the entire file at No. (i), but only wants the production of the letter dated February 22, 1952, which is in that file, and the letter at No. (ii). He conceded that in Union of India V. Ramgopal (supra) B.C. Misra, J. held that the letter, dated February 22, 1952, regarding the implementation of 'Gadgil Assurances' and 'Parliamentary Report' thereon related to affairs of State and upheld the claim of privilege in respect thereof. The learned counsel, however, submitted that in Suit No. 292 of 1966, Mela Ram V. D.D.A. (the case Nirmal Singh and others V. D.D.A. mentioned in the objections of the petitioner is stated to be incorrect, Shri K. K. Sethi, Subordinate Judge 1st Class, Delhi, held by an order dated October 21, 1967, that the said letter dated February 22, 1952, and the letter at No. (ii), dated November 1951, which are sought to be produced by the present petitioner. Khairati Lal, did not relate to affairs of State and disallowed the claim of privilege in respect of the said letters. A certified copy of the said letter has been produced along with an affidavit of the petitioner, Khairati Lal. Against the said order dated October 21, 1967, Civil Revision Petition No. 467 of 1967, was preferred by the Union of India to this High Court, and the Revision Petition was subsequently dismissed by S. N. Shankar J. on October 21, 1969. A typed copy of the said order of S.N. Shankar, J. has been produced. According to the affidavit of Khairati Lal, after the dismissal of the said revision, the aforesaid documents which were sought to be produced by Mela Ram have been placed on the record in the file in Suit No. 292 of 1966 for being read as evidence in that suit. Mr. S. C. Dhanda, who appeared for Mr. Harish Chandra, learned counsel for Union of India (respondent 2), admitted that the two documents mentioned above have been placed on the record in Suit No. 292 of 1966 as stated in the affidavit of Khairati Lal.

(7) Relaying on the above fact, Shri S. N. Chopra contended that a claim of privilege can be made only in respect of unpublished official records or documents, and since the letters sought to be produced by the present petitioner Khairati Lal were already placed on record in Suit No. 292 of 1966, they ceased to be unpublished official records or documents within the meaning of Section 123 of the Evidence Act, and that no 'claim of privilege could, therefore, be made in respect of such official records or documents. In reply to the said contention, Mr.

Dhanda contended that the mere fact that the documents in question were placed on record in the aforesaid suit of Mela Ram, to which Khairati Lal was not a party, does not mean that the said records or documents ceased to be unpublished official records or documents so far as Khairati Lal is concerned, that the documents were placed on record by virtue of an order of the Court and not voluntarily by the Head of the Department concerned, and that the said documents cannot, therefore, be said to have ceased to be unpublished records or documents within the meaning of section 123 of the Evidence Act for the purposes of the suit of Khairati Lal. The learned counsel referred to Rule 5(iii) in Chapter 17A of Volume IV of the Rules and Orders of this High Court according to which a stranger to a civil suit has no right to obtain copies of exhibits put in as evidence except with the consent of the person by whom they were produced or, if deceased, with the consent of the Court.

(8) Thus, the 'question for consideration is whether the documents in question which were produced and placed on record in Suit No. 292 of 1966 can be regarded as unpublished records or documents within the meaning of Section 123 of the Evidence Act so far as the parties in the present suit of Khairati Lal are concerned. It cannot be disputed that the provision in section 123 applies only to unpublished official records or documents. therefore, even if the official records or documents relate to affairs of state, privilege cannot be claimed in respect of them if they have already, been published. As pointed out in the State of Punjab v. Sodhi Sukhdev Singh, : [1961]2SCR371 , the principle on which the provision in Section 123 is based is that the production or disclosure of unpublished official records or documents relating to affairs of State would cause injury to public interest, and once the records or documents are held to relate to affairs of State, it is for the Head of the Department concerned to decide whether he would permit their production or disclosure or not. The section gives discretion to the Head of the Department to permit the production or disclosure of such documents or records even if they relate to affairs of State. That being so, it is clear that the safeguard in Section 123 can in the very nature of things apply only to such official records or documents which have not been published. When once they are published, there can be no claim of privilege thereafter under section 123. The expression 'unpublished' in Section 123 can in the context mean only 'unpublished'

or 'undisclosed' to any member of the public other than the officials concerned with it in the Department. In the present case, when the documents in question were placed on record in the suit of Mela Ram for being read in evidence therein, it is obvious that the documents were published or disclosed to persons other than the officials in the Department concerned. It is true that Khairati Lal was not a party to the said suit, and being a stranger to the suit he may have no right to obtain copies of the said documents produced in that suit except in the manner provided in Rule 5(iii) of the High Court Rules and Orders referred to by Mr. Dhanda. But, that has nothing to do with the question as to whether the documents in question are unpublished official documents. When they were placed on record in the suit of Mela Ram for being read as evidence therein, they became disclosed and available to the parties in that suit who are not the officials in the department concerned with the documents. The Head of the Department has no longer any control over the production of copies or disclosure of the contents of the documents as the parties in that suit are free to obtain copies thereof and pass them on to others. It does not, therefore, stand to reason to say that the documents did not cease to be 'unpublished' documents. The argument of Mr. Dhanda that the production in the Court by virtue of the order of the Court is not 'publication' within the meaning of Section 123 of the Evidence Act, and that there must be voluntary publication by the Head of the Department concerned is not tenable. The order made by the Court directing the production of the documents was quite within the jurisdiction of that Court and was a lawful order. Their production and disclosure in the Court in pursuance of the order of the Court was thus a lawful production or disclosure in those circumstances no question of any voluntary production or disclosure by the Head of the Department arises.

(9) In this connection, reference may usefully be made to the observations in some decisions which support the view taken by me above.

(10) In *Henry Greer Robison V. State of South Australia*, A.I.R. 1931 PC 254, referring to certain general considerations in the matter of a claim of privilege, the Privy Council observed at page 259 column 2 that '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.'

(11) In Union of India and others V. Sudhir Kumar Roy and others, : AIR1963 Ori111 , (4) R. L. Narsimham, C.J., referred to the aforesaid observation of the Privy Council in the case of Henry Greer Robinson (supra), and observed in paragraph 13 that Section 123 of the Evidence Act by its own terms is limited to 'unpublished official records'.

(12) In (Sardar Saheb) Mehtab Singh V. Secretary of State for India, A.I.R. 1933 Lah 157 Dalip Singh, J. held at page 158 column I that if certain letters addressed by the Head of a Department reached the addressee, those letters 'would not be unpublished documents within the meaning of Section 123 of the Evidence Act.'

(13) In Lady Dinbai Dinshaw Petit and others V. The Dominion of India and another, : AIR1951 Bom72 , (6) Chagia, C.J. and Bhagwati, J. observed in paragraph 15 at page 80 that 'looking to the terms of Section 123, it is clear that privilege only applies to unpublished official records relating to any affairs of State.'

(14) In Chandra Dhar Tewari and others V. Deputy Commissioner, Lucknow, Air 1939 Oudh 65 referring to the provision in Section 124 of the Evidence Act, Hamilton, J. observed at page 66 column I as under:-

'IN my opinion, section 124 is designed to prevent knowledge of official papers, that is to say papers in official custody beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied, that the knowledge should go no further.'

Then, to a contention that Section 124 applies to disclosure in courts and, therefore, privilege can be claimed even if there has been disclosure outside the Court, the learned Judge observed as follows:- '

'I am not able to attach this restricted meaning to the Section, for I hold that the object is to prevent the disclosure of things not known outside that circle which is in confidence and this Section has no application when once there has been disclosure to what I might call a member of the public to whom the contents of

such papers have not been made known in confidence. To hold otherwise would be to place Courts in an unfavorable position, while actually the Courts are favored in the sense that they have the power to order the productions of documents which an ordinary individual has not. Even if the propagation of this knowledge is contrary to the public interests, the person who has been allowed to obtain knowledge of the contents of such documents can make known to any person what he himself has come to know, and the mischief thereforee is done. I do not see that the public interests in the contemplation of the framers of the Evidence Act would suffer by promulgation in a Court of law and not by promulgation outside it. As regards these documents thereforee, I am of opinion that the word 'disclosure' means the first disclosure of communications made in official confidence and does not apply to disclosure in a Court of law of what has already been disclosed outside it. thereforee, I hold that S. 124 Evidence Act, does not apply to any of these documents . . . '

(15) Mr. Dhanda, learned counsel for the Union of India, referred to the decision in Brij Ballabh Goyal V. Shri Satya Dev and another (8). In that case, the Circle Manager, Bank of Bikaner filed a complaint under Section 500 of the Indian Penal Code against two persons, the first being the Internal Auditor and the second being the General Manager of the Bank. The complaint was that the Internal Auditor made a re- port in respect of the complainant's works, and that the report contained several defamatory remarks. The General Manager placed the report of the Internal Auditor in admeeting of the Board of Directors. One of the contentions was that the General Manager, by placing the report before the Board of Directors, had 'published' the imputations made by the Internal Auditor in the report, that the word 'publish' used in Section 499 Indian Penal Code . means 'to make known to others', and that since the General Manager made the defamatory report known to the Board of Directors, his action came within the purview of the said section. Dealing with the said contention, D. S. Dave, J. observed in paragraph 5 of the judgment that 'the word 'publish' in Section 499 Indian Penal Code . does not contemplate those communications which one is bound to make to others in the normal course of his legal duties', that it was not alleged by the complainant against the General Manager that the latter made any remarks of his own which might be defamatory against the complainant, and that whatever was done by the

General Manager 'was done by him in the normal course and in discharge of his legal duties and, therefore, it cannot be said that he had published any imputation regarding the Complainant'. Relying upon the said observations, Mr. Dhanda argued that in the present case the Head of the Department was under a duty to produce the letters in the Court in pursuance of the order of the Court for being read as evidence in Mela Ram's suit (No. 292 of 1966), and could not, therefore, be said to have published the said letters within the meaning of Section 123 of the Evidence Act. The argument cannot be accepted. The observations were made by Dave, J. in the context of the offence of defamation as defined in Section 499 Indian Penal Code . A reading of Section 499 shows that one of the essential ingredients of the offence is that the imputation should have been made or published with the intention of harming or with the knowledge or with reasons to believe that the imputation will harm the reputation of the person against whom the imputation has been made or published. There is thus the element of intention or means read in the case of offence of defamation. On the other hand, in the case of privilege under section 123 of the evidence Act, the question of intention or means read or the state of the mind of the Head of the Department is not involved and is, therefore, immaterial. All that is necessary for the purposes of section 123 is that the record or document in question should be an unpublished one, i.e.; it should not have already been made known to a member of the public other than the officers of the Department concerned. The case of Brij Ballabh Goyal is, therefore, distinguishable, and the observations therein cannot be of any assistance to the learned counsel in the present case.

(16) Mr. Dhanda also referred to the decision in *Edmondson V. Birch & Co. Limited* and *Homer*, (1907) Kb 371. In that case, a business communication containing defamatory statements concerning the plaintiff was made by the defendants, a company, to another company. In an action for libel, the defense set up was, in substance, privilege. The learned trial Judge held (vide page 377) that the occasion on which the communication was made was privileged, and that there was no evidence of any actual malice to take away the privilege, but although that was so, there had been a publication of the statements in the communication which did not fall within the privilege, because it was made to persons who had no correlative interest in the matter, by way of inter-mediarities,

namely, the clerks in the defendant's own office, who took down the communications to be sent to the addressee company and wrote them out. The Court of Appeal held (vide page 380) that where there is a duty as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business, and if so, it will not destroy the privilege, and that the publication to the clerks of the company exercising privilege was reasonable and in the ordinary course of business and hence not actionable. The distinction between a claim of privilege in defense to an action for libel and a claim of privilege under section 123 of the Evidence Act was pointed out by R. L. Narsimham, C.J. in the case of Union of India and other V. Sudhir Kumar Roy and others (supra) at page 115 column 1 as under:-

'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 under Section 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.'

Thus, case of Edmondson V. Birch & Co. limited (supra) is clearly distinguishable from the present case, and the learned counsel cannot derive any assistance from it.

(17) In the case of Union of India V. Ram Gopal the contention that the letters in question ceased to be unpublished official records or documents does

not appear to have been urged, and the same was not, therefore, considered by B. C. Misra, J. in that case. Mr. Dhanda cannot, therefore, derive any assistance from the said decision also.

(18) For the foregoing reasons, it has to be held that the documents in question are not 'unpublished' official records within the meaning of Section 123 of the Evidence Act. and there can consequently be no claim of privilege regarding them under the said section.

(19) Section 123 of the Evidence Act prohibits a Court from permitting the giving of evidence derived from unpublished official records relating to any affairs of State. In other words, a Court would have no jurisdiction to permit the production of any unpublished official record or the giving of evidence derived there from, if the said records relate to affairs of State. Whether such records relate to affairs of State or not is thus a jurisdictional fact, and the correctness of the findings in open to revision by the High Court as held by the Supreme Court in *Roshan Lal Mehra V. Ishwar Dass*, : [1962]2SCR947 , (10). It is settled principle that where the question is one. on the decision of which the jurisdiction of the Court depends, the Court cannot, by an erroneous finding, confer on itself a jurisdiction which it does not possess, and its order is liable to be revised by the High Court, vide *Periannan and others V. Airabadeeswarar Soundaranayagi Amman Kovil of O'Siruvayal*, : AIR1952 Mad323 (paragraph 13) (II). If it does so. the order of the Court can be revised by the High Court under section 115(a) or (c) of the Code of Civil Procedure on the ground of exercise of jurisdiction not vested in it or on the ground of illegality or material irregularity in the exercise of its jurisdiction. In the present case, in the view taken by me that the documents in question are not unpublished official records, and that there can consequently be no claim of privilege regarding them under Section 123 of the Evidence Act, the learned Subordinate Judge has to be held to have acted without jurisdiction or in any case illegally or with material irregularity in the exercise of his jurisdiction in allowing the claim of privilege, and his order is liable to be set aside in revision-under section 115(a) or (c) of the Code of Civil Procedure.

(20) Accordingly, the Civil Revision Petition is allowed, and the order of Shri R. P. Gupta, Subordinate Judge 1st Class, Delhi, dated November 6, 1971, is set aside, and the privilege claimed by the Delhi Development Authority in respect of the letters in question is disallowed. In the circumstances, the parties are directed to bear their own costs in this Civil Revision Petition.

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