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SooperKanoon Citation : sooperkanoon.com/682208

Court : Delhi

Decided On : Dec-09-1977

Reported in : 1978RLR345

Judge : D.K. Kapoor, J.

Acts : Evidence Act - Sections 123

Appeal No. : Civil Revision Appeal No. 358 of 1977

Appellant : Union of India

Respondent : H.S. Parasher

Advocate for Pet/Ap. : K.N. Kataria,; P.P. Agarwal and; K.K. Malhotra, Advs

Judgement :

D.K. Kapoor, J.

(1) This is an application for revision arising from an application made by the Commissioner of Income Tax u/s 123 and 124, Evidence Act before the trial court wherein privilege has been claimed regarding certain documents sought to be summoned by the plaintiff. It appears that the plaintiff was at the relevant time a Head Clerk serving in the Income Tax Department, who had sought to challenge certain remarks made adversely to him in his confidential reports by means of a suit claiming a declaration and injunction. In the course of that suit the plaintiff

summoned-(i) his confidential annual character rolls of' some years, (ii) the transfer and posting file of Class Iii non gazetted Head Clerks for 1969-70, (iii) his own Vigilance file, (iv) the seniority list of Head Clerks in September, 1969 September, 1971 and September, 1973 (v) his own personal file and (vi) The Vigilance Manual. The Subordinate Judge trying the suit decided the application against the Commissioner of Income Tax and held that only the Vigilance Manual could be treated as privileged. The remaining documents were held to be not privileged.

(2) The court below has followed the judgment of H. L. Anand, J., reported as S.N. Rai vs. Union of India, I.L.R. (1976) Ii Del 667= 1977. RL.R 12 in which a claim regarding some documents consisting of confidential reports, nothings, etc., relating to the work and conduct of civil servants was considered. In that case, most of the documents were allowed to be produced on the ground that can dour in the expression of views in matters of public administration would not operate as a bar to their disclosure in a Court of law. It was also observed that some noting which may not relate to the petitioner might be withheld from inspection because they related to matters of policy. This decision was delivered on an analysis of three judgments of Supreme Court, namely- The State of Punjab v. Sodhi Sukhdev Singh : [1961]2SCR371 , Amar Chand Butail v. Union of India, : AIR 1964 SC1658 , and State of Uttar Pradesh v. Raj Narain, : [1975]3SCR333 . It was found that there was a difference between the three judgments which seems to turn on the degree to which the Court could look into the documents concerning which privilege is sought. On a careful examination of three judgments and the judgment of Anand, J. I think, that it is possible to say that the procedure prescribed for deciding cases of privilege appears to have been overlooked by the Sub Judge in the case. It is not possible to conclude that an objection regarding privilege is ill founded till the procedure laid down by the Supreme Court has been followed. As this is a matter which arises again and again, and I have been referred to numerous other judgments in which the question of privilege has been gone into, I think a much simpler solution for deciding the question of privilege is necessary. With this point in view, I now analyze the con- conclusions of the Supreme Court in the judgments so that the question of privilege can be dealt with in a simple manner whenever it arises.

(3) In State of Punjab v. Sodhi Sukhdev Singh, : [1961]2SCR371 , the question before the Court related to the power of the Court to go into the finality of the affidavit filed on behalf of the State claiming privilege. It was indicated by the majority judgment that the purpose of the claim of privilege was not to defeat the claim of the other side nor should the apprehension that the disclosure of the document might provoke public criticism or censure in the legislature, but should be only the possibility of injury to public interest and nothing else. For this purpose, certain rules were laid down as to the procedure to be followed. The conclusion of the majority Court as set down in paragraph 25 of the judgment of Gajendragadkar J. (as he then was) was as follows :-

'THUSour conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter 'for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of state under Section 123 or not'.

(4) Thus, the suggested procedure was that the Court should hold a preliminary enquiry and determine the validity of the objection; in the course of such enquiry, it should be determined whether the document in question related to an affair of State or not. Almost all the Judges were of the view that the document concerning which privilege was claimed could not be examined by the Court. This view of the Supreme Court was altered in Amar Chand Butail v. Union of India, A.I.R. 1964. S.C. 1968 because there the Court saw the document and then found that the claim for privilege was not justified. In the last case, State of Uttar Pradesh v. Raj Narain : [1975]3SCR333 , the judgment was given in the Election Petition of Shri Raj Narain against Mrs. Indira Gandhi. The documents sought to be examined were the Blue Book maintained by the Government of Uttar Pradesh and certain documents relating to the tour arrangements for Mrs. Gandhi during her election tour in Rai Bareilly District and also the correspondence between the State of Uttar Pradesh and the Central Government regarding police arrangements for the meetings addressed by the then Prime Minister. The claim for privilege was dis-

allowed by the High Court Judge hearing the Election Petition. The Supreme Court accepted the appeal against this order and held that an enquiry should be held in more detail regarding the question whether privilege should be granted. It was again pointed out that the Court should have the fullest possible access to all relevant material and it was only when public interest out-weighs this aim that the evidence should be excluded. The procedure for dealing with the case was then indicated in the conclusion of the judgment. The parties were to file further affidavits and the Judge was to decide on the affidavits if the documents required protection from production. If he was satisfied on the material that the documents in question were not to be admitted in evidence, then the matter would end there. If in spite of the affidavits, the Judge wanted to inspect the documents, he could do so and in such case if he found that part of the document was innocuous because it did not relate to the affairs of State, the portion could be allowed to be disclosed, and the other portion could be sealed up if disclosure of the same would be undesirable.

(5) These three judgments of the Supreme Court indicate the procedure that has to be followed when deciding a question of privilege. As it is necessary to do so, I think a short summary of what the Court has to do may be set out : (1) If the claim is regarding privilege, it must relate to unpublished official records u/s 123 or official correspondence u/s 124(2) If a plea of privilege is raised u/s 123 on the ground that the official records relate to affairs of State, then a preliminary enquiry has to be held into the question whether the document in question relates to the affairs of State or not. (3) For the purpose of deciding the question whether a particular document relates to the affairs of State or not, the parties are to file affidavits in the course of the preliminary enquiry. It is desirable in such cases that the affidavits should be of the Head of the Department and may be even of a Minister as indicated in the Supreme Court's judgment. The affidavits should disclose why the document in question relates to the affairs of State. (4). If the Court is satisfied on these affidavits that the document does relate to the affairs of State, then no further question arises because the document is to be excluded. (5) If the Court is not satisfied on the basis of the affidavits that the document is to be excluded, then it may examine the document. (6) If on such examination, it is found that part of the document relates to the affairs of State but some portions

are innocuous, then the Court may seal up the portion that has to be excluded from evidence and permit the innocuous part being disclosed.

(6) The aforementioned Supreme Court judgments do not deal with the privilege claimed u/s 124. But, under this Section, the legal position is obviously different from that given in section 123, In the case of Section 123, the privilege can only be claimed if the official record relates to some affairs of State whereas u/s 124 the privilege can be claimed with regard to official communications made in confidence. Here, the objection need not be raised by the Head of the Department, but can be raised by any public officer. The objection has to relate to a communication made in official confidence and, thereforee, the scope of the Court's power is merely to find out whether the communication was made in official confidence. The decision whether it is against public interest or not is of the public officer. The cases on this point are reviewed in the Full Bench decision of the Punjab High Court in Governor General v. H. Peer Mohd. Khuda Bux A.I.R. 1950 Pun 228 where the following conclusions are noted at page 242 :-

(1)Section 124(1) applies to communications made in official confidence to a public officer and he need not be a head of the department who cannot be compelled to give evidence but is at liberty to waive the objection. (2) The basis of the prohibition is that it would restrain the freedom of communications made to public officers or by one public officer to another and would thereby injure public interest. (3) If such communications were compelled there would be a danger that the usual channels of detection of crime or of evasion of taxes would get blocked up. (4) It is for the Court to decide as to whether such communication was in official confidence or not.'

(7) Having stated the law in a summary fashion, it is necessary to see whether the decision of the trial court is correct. I cannot find from the judgment that the court has made a any preliminary enquiry and in fact the learned Subordinate Judge has not distinguished between the documents as to whether claim for privilege is u/s 123 or Section 124. It is noteworthy that the documents which have been allowed include the vigilance file of the plaintiff and the personal file of the plaintiff as well as the transfer and posting file of Class Iii non gazetted Head Clerks. Whereas, it

might readily be said that these documents do not appear to concern any affairs of State, I cannot say that the documents in question are not official communications made in confidence to which Section 124 applies. It is, thereforee, very necessary that this question of privilege should be re-examined by the trial court in the light of the distinction pointed out by me between Section 123 and Section 124. An opportunity should be given to the Commissioner of Income Tax to file affidavits to show how he claims privilege for the five sets of documents that have been allowed. This affidavit should clarify whether the objection is u/s 123 or Section 124 and on what basis. Then the same should be decided by the court keeping in view the indicea set out above.