

J.S. Kapoor Vs. Union of India and ors.

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Court : Delhi

Decided On : May-29-1985

Reported in : 1985(9)DRJ147

Judge : Sultan Singh, J.

Acts : [Evidence Act, 1872](#) - Sections 123

Appeal No. : Civil Revision Appeal No. 529 of 1984

Appellant : J.S. Kapoor

Respondent : Union of India and ors.

Advocate for Pet/Ap. : M.L. Bhargav,; S.S. Joshi and; R.K. Anand, Advs

Judgement :

Sultan Singh, J.

(1) The petitioner has been an Upper Division Clerk as a Civilian in the Western Command of Ministry of defense, Government of India, New Delhi. He was last serving under Chief Engineer, Defendant No. 2 at Delhi. On 24th October, 1967 he proceeded on leave and according to him while he was in bed on medical leave he received one movement order dated 9th November, 1967 informing him that he had been transferred from Delhi to Nasirabad under the Garrison Engineer, Nasirabad, defendant No. 3. The petitioner challenged the movement order on

various grounds and filed a suit for mandatory injunction against the defendants-respondents to allow him to join his duties at Delhi office of the Chief Engineer, Delhi Zone, Delhi Cantt. defendant No 2. The suit was dismissed on 3rd October, 1977 by the trial court. The petitioner filed an appeal which is pending before the Addl. District Judge.

(2) During the pendency of the appeal the petitioner filed an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (for short 'the Code') for leave to file a letter dated 30th July, 1982 written by the Chief Engineer, Delhi Zone, Delhi Cantt. to the Army Headquarters, E-in-C's Branch, defense Headquarters, New Delhi on the ground that the said letter had come into existence after the filing of the appeal that it was material for the decision of the case and on various other grounds. In reply the Union of India resisted the filing of the said letter on the ground that the document was privileged document under Sections 123, 124 and 125 of the Evidence Act.

(3) The defendant-Union of India also filed an application under Sections 123 and 124 of the Indian Evidence Act, alleging that the said document to be produced by the respondent was unpublished official confidential record relevant to affairs of the State and therefore the respondent-Union of India could not be compelled to produce the same in court. The petitioner in reply refuted the claim of the respondent. The Additional District Judge by the impugned order dated 1st June, 1984 held that the letter in question was an official communication from one Officer to another Officer and that the defendant No. 3 was entitled to claim privilege. The petitioner has thus filed this revision under Section 115 of the Code.

(4) Learned counsel for the petitioner submit that the letter dated 30th July, 1982 came into existence during the pendency of the appeal, and the letter is not a privileged document, that the reply of the Union of India to the application under Order 41 Rule 27 of the Code and its application under Sections 123 and 124 of the Indian Evidence Act are not supported by any affidavit either of the Minister or Head of the Department and therefore the trial court acted illegally or with material irregularity in the exercise of its jurisdiction while holding that the said letter as a privileged document. Order 41 Rule 27 of the Code reads as under :

'27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if- (a) the court from whose decree the appeal is preferred has refused to admits evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. (b) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, the appellate Court may allow such evidence or document to be produced, or witness to be examined. (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission'.

Admittedly the letter in question came into existence during the pendency of the appeal and therefore it was not possible for the appellant to get it placed on record in the trial court. It is, therefore, clear that the petitioner-plaintiff is entitled to seek the assistance of the court under Rule 27(l)(aa) of order 41 of the Code. The petitioner in his application has submitted that after the dismissal of his suit by the trial court he had been trying to get justice from the respondents. He also filed C.W.P. No. 394 of 1972 and during the pendency of his writ he was taken on duty in Delhi office of Chief Engineer, Delhi Zone, Delhi Cantt. with effect from 21st April 1980 without prejudice to the rights of the parties. He also approached Mr. Mool Chand Daga, Member of Parliament who wrote on his behalf to the concerned authorities and during the course of the correspondence the said Member of Parliament came to know vide letter dated 30th July, 1982 by the Chief Engineer, Delhi Zone, Delhi Cantt. to Engineer-in-Chief Branch, Army Headquarter, New Delhi that some recommendation had been made by the Chief Engineer for withdrawing disciplinary action against the petitioner as early as possible. The petitioner further alleged that the Member of Parliament showed a copy of the letter dated 30th July, 1982 to him which contained the aforesaid recommendation and he obtained a copy of the said letter from the said Member of Parliament. He filed a copy of the said letter dated 30th July, 1982 along with an application under Order 41 Rule 27 of the Code. It is, therefore, clear that the

letter dated 30th July, 1982 is no more an unpublished record. It has been made public by the defendants as well as the said Member of Parliament. I have gone through the letter dated 30th July 1982 and I am of the opinion that it concerns the petitioner and there is nothing on record to show that it will affect the affairs of the State. The respondents filed an application claiming privilege supported by an affidavit of Major S.N. Virmani. Affidavit of the Minister or Head of the Department in Support of the application claiming privilege was not filed. In *The State of Punjab v. Sodhi Sukhdev Singh*, : [1961]2SCR371 it has been observed that a Minister or Head of the Department should file an affidavit claiming privilege. In *S.P.Gupta v. Union of India and another*, 1981 (Supp.) Supreme Court Cases 87 it has been observed that the claim for immunity has to be made on affidavit by the Secretary of the Department or the Minister after carefully reading and considering whether the document should be disclosed or not either because of its actual contents or because of the class of documents to which it belongs. As already stated I have gone through the impugned letter dated 30th July, 1982 and I find that the defendants are not entitled to claim privilege even on merits although no affidavit of the Minister or Head of the Department has been filed. I am further of the opinion that it is not an unpublished letter. The respondents are, therefore, not entitled to claim the privilege.

(5) Learned counsel for the respondent has not been in a position to support the impugned order holding that the letter in question was a privileged document.

(6) The revision is accepted setting aside the impugned order dated 1st June, 1984 with no order as to costs. The petitioner is allowed to place on record the copy of letter dated 30th July, 1982 from the Chief Engineer, Delhi Zone, Delhi Cantt. to the Chief Engineer, E-in-C Branch, Army Headquarters, New Delhi. The question whether the lower appellate court will admit the document in evidence for purposes of appeal shall be decided by the lower appellate court at the time of hearing of the appeal in accordance with the provisions of Order 41 Rule 27 of the Code. Parties are directed to appear before the lower appellate court on 22nd July, 1985.