ANDHRA PRADESH HIGH COURT

Public Prosecutor

Vs.

Damera Venkata Narasayya

Criminal Revn. Cases Nos. 240 and 263 of 1955

(Krishna Rao, J.)

31.03.1955. or 09.03.1955. 08.11.1956

JUDGMENT

Krishna Rao, J.

1. These revision petitions have been filed by the Public Prosecutor against two orders made by the Additional First Class Magistrate, Vijayawada, in C. C. No. 354 of 1954 on his file, over-ruling a claim of privilege put forward under sections 123, and 124 of the Evidence Act in respect of 'certain documents summoned for by the respondent.

2. The respondent is the accused in the case and was the President of the Co-operative Society, Pulluru from 11th October, 1952, to 4th February, 1954. The Police charge-sheet against him alleges that he committed criminal breach of trust in respect of a sum of Rs. 4,807 and odd belonging to the society and gave statements, admitting his misappropriation, to P. Ws. 23 and 24 in the charge sheet the Executive Officer of the Cooperative Central Bank and the Sub-Registrar of Co-operative Societies respectively. The Sub-Registrar of Co-operative Societies was examined as P W. 7 before the Magistrate. The Deputy Registrar of Co-operative Societies, Viayawada and the Co-operative Supervisor, Mylavaram were examined as P. Ws. 9 and 10. The respondent's defence, so far as the alleged confessional statements are concerned, is said to be that they were obtained from him by false inducements in the same manner as similar statements were obtained from Secretaries and Presidents of some other co-operative societies. He, therefore, applied to the Magistrate on 18th January, 1955 and 24th January, 1955, for summoning certain documents as being necessary for cross examining P. Ws. 7, 9 and 10. The dispute now relates to two sets of documents, which he wanted to be produced by P. W. 9, the Deputy Registrar. They were, (i) the records of enquiries under section 38 of the Madras Co-operative Societies Act VI of 1932 during 1953-54 made by P. W. 7 in respect of Jujjur and Chattanavaram societies and (ii) the audit reports of these two and seven other societies for the year 1953-54. The Deputy Registrar filed a counter on 24th January, 1955, stating that these documents had no bearing on the case against the respondent and that the enquiry reports submitted by P. W. 7 had been referred to the Police for investigation. However, the Magistrate made an order on the same date for summoning the Deputy Registrar to produce the documents; The Deputy Registrar did not produce the documents at the subsequent hearing on 8th March,

1955 but filed instead an affidavit of the Registrar of Co-operative Societies, who as the Head of the Department of Co-operation stated therein as follows :

> "I have carefully considered the relevant documents and have come to the conclusion that they are unpublished official records relating to affairs of State and their disclosure will be prejudicial to public interest for the following reasons: (1): Out of the nine societies referred to in the summons, the Co-operative Sub-Registrar (General) Sri T. J. Samuel Raju enquired under section 38 only two societies, i.e., Jujjur and Chattanavaram societies and their reports are required for the police investigation into cases of misappropriation launched already. The other seven societies were not at all enquired into by him.
> 2. The Audit reports of the nine societies have no bearing on the case." The Magistrate after considering this claim of privilege coming under section 123 of the Evidence Act. passed an order on 9th March, 1955, negativing it on the ground that the documents related to the conduct of co-operative societies and had nothing to do with the affairs of the State in any manner. Crl. R. C. No. 263 of 1955 is filed against this order. When the case again came up for hearing before the Magistrate on 30th March, 1955. the prosecution filed a memo, reiterating that the documents were irrelevant and claiming privilege under section 124 of the Evidence Act.

This was traversed by the defense on the ground that the documents were relevant and material to show that the respondent, just like a number of Secretaries and Presidents of other cooperative societies, gave statements on the faith or false promises made by the officers of the Cooperative Department. It was urged that neither the enquiry imports nor the audit reports were of a confidential character, as enquiry reports were being sent to the Police for investigation and the audit reports were being sent to the societies concerned. The Magistrate passed an order on 31st March, 1955, negativing the privilege claimed under section 124 of the Evidence Act, on the ground that neither the reports under section 38 of the Madras Co-operative Societies Act VI of 1932; nor the audit reports were sent up in official confidence. He directed that the reports summoned for should be placed on record and against this order Crl. R C. No. 240 of 1955 has been filed.

3. The learned Public Prosecutor's contention, with regard to the privilege claimed under section 123 is that the Magistrate ought to have accepted as conclusive the affidavit bf the Registrar of Co-operative Societies, who is the Head of the Department of Co-operation, and withheld permission to give evidence derived from the documents in question. As regards the privilege claimed under section 124, he urges that the Magistrate ought to have at least perused the documents before negativing it and that his decision without doing this is premature and erroneous.
4. The law relating to the claim of privilegage under sections 123 and 124 of, the Evidence Act has been discussed in a number of decisions of different High Courts. In *Vythilinga Pandarasannidhi v Secretary of State*[1], Venkata Subba Rao, J., said:

> "There are two matters involved in this section, first whether a particular

[1] AIR 1935 Mad 342 (1), dealing with section 124

> document for which the privilege is claimed, falls within it, that is to say, whether the document is a communication made to a public officer in official confidence. On a proper construction of the section, it is for the Court to decide that question. Secondly, should the Court decide that the document is of the nature contemplated by the section, then, the public officer himself, is the sole judge as to whether by its disclosure public interests would suffer (that alone being the ground of privilege).

This distinction between the two matters involved in the section is pointed out and recognized in *Venkatachala Chettti v. Sampathu Chettiar*[2], which case has been treated as having settled the law for the Presidency in the later decision in *Nagaraja Pillai v. .Secretary of State*[3] cited by the lower Court: see also Collector of *Jaunpur v Jamma Prasad*[4]. **"**

5. In *Ijjatali Talukdar v. Emperor*[5], Das, J., who delivered the judgment of the Division Bench of the Calcutta High Court, referred to the principles enunciated by the Judicial Committee in Henry, *Greer Robinson v State of South Australia*[6], and said.

> "the occasion for claiming privilege under this section (section 123) only arises where it is sought to give any evidence derived from unpublished official records relating, to any affairs of State. That is the condition precedent. When the condition precedent is fulfilled and the oecagion for claim of privilege arises, it is then for the officer at the head of the department concerned to waive' or claim the privilege. Likewise,. Section 124. of the Act provides that 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.

Here again the condition precedent to give rise to a claim of privilege is that the communication had been made to the public officer in official confidence and he is asked to disclose the same. When this condition is fulfilled it is for the public officer to decide whether public interest would suffer by the disclosure. Both the sections are, however, silent as to who is to decide whether the condition precedent has been fulfilled, namely, as regards section 123 whether the document In question is of the nature or kind mentioned in that section and as regards section 124 whether the communication in question was made to the public officer in official confidence. Is it, to be left to the lose dixit of the head of the department in one case or the public officer in the other or is it to be decided by the Court? Here the provisions of section 162 of the Act come into play.

* * *

The first paragraph gives the Court power to decide the validity of the claim of privilege and the second paragraph only provides the method or means by which the Court will be able to decide the question namely, (1) by inspecting the document or

[2] ILR 32 Mad 62 [4] AIR 1922 All 37 [6] AIR 1931 PC 254
[3] AIR 1915 Mad 1113 [5] AIR 1943 Cal 539

(2) by taking evidence. It is only in case of documents relating to affairs of State that the Court cannot inspect the document. It only means that in cases of such documents one of the

method or means by which the Court is to decide the question is not available to it. The duty of deciding the question is still on the Court under the first paragraph of the section. In case of document relating to affairs of state it may be difficult for the Court to decide the question, yet. it need not be necessarily impossible (or the Court to do it. Ordinarily, no difficulty will arise, because heads of department, or public officers are not expected to act capriciously and ordinarily the Court will accept their statement.

* * *

If however, the Court finds that an overzealous officer is capriciously putting forward claim of privilege the Court will .decide, as best as it can, by, the means available to it whether the claim is well founded.

* * *

All the above cases indicate that the ultimate decision as to whether a claim of privilege is well founded or not rests with the Court and the Court jealously guards its powers."

6. In AIR 1931 PC 254, the Judicial Committee explained that the foundation for the privilege is that the information cannot be disclosed wihout injury to the public interest This was also the view taken in a subsequent decision of the House of Lords in *Duncan v. Cammell Laird and Co.*[6], where Viscount Simon L. C., said:

> "The principle to be applied in every case is that a document otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of. the particular document or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.
> * * * *
> "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents 'is the decision of the judge ..... In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objection to production. It is not a sufficient ground that the documents are "State documents" or - "Official" or are marked "confidential."

It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses; or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that

[6](1942) AC, 624 at pp. 636, 642

production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. . In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the

responsibility of withholding production except in cases where the public interest would otherwise be dandified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." The principle enunciated in 1942 AC 624, was quoted with approval and applied in construing Sections 123, 124 and 162 of the Indian Evidence Act in Governor-General in *Council v. peer Mahomed*[7] and *Din Bai v. Dominion of India*[8]

7. In the light of the aforesaid decisions the position under the Indian law may therefore be stated thus: It is obligatory for a person who has been summoned to produce a document in his possession or control, to bring is into Court, even if there is any objection to its production, or to its being admitted in evidence as under Section 123 or 124 of the Evidence Act. The Court will decide on the validity of the objection and he is not entitled to withhold the evidence if the objection is overruled. In enquiring into the validity of the objection, the Court will of course bear in mind that it should not exercise its powers in such a way as to occasion the mischief, which the law providing for the objection is designed to guard against. If the objection is a claim of privilege under Section 123, the Court has no power to inspect the document, but may only take other evidence for the purpose of deciding on the objection. If it is a claim of privilege under Section 124, the Court may inspect the document in its discretion. If the Court comes to the conclusion that the evidence proposed to be given will be derived from an unpublished record relating to the affairs of the State it will have to uphold the privilege under Section 123. Then it will be left to the head of the department concerned to give or withhold permission for the giving of the evidence. Similarly if the Court comes to the conclusion that the communication in question was made to a public officer in official confidence, it will have to uphold the privilege claimed under Section 124 and leave the public officer concerned to decide whether or not to disclose the communication. The criterion for the head of the department and the public officer is whether or not the disclosure would cause injury to public interest. But they are the sole Judges of that matter and the Court cannot interfere with their discretion, once it upholds their claim of privilege either under Section 123 or 124 of the Evidence Act.

8. The learned counsel for the respondent argued that the privilege under Section 123 has not been properly claimed here because the affidavit was filed only by the Registrar of Co-operative Societies and not by the Secretary to the Government in the Department of Co-operation. He relied on the English decisions already cited, according to which the claim has to be made in the form of an affidavit either by the Minister or by the Secretary of State in charge of the department concerned. But as pointed out by Rajago-pala Ayyangar, J., in *State of Madras v S. A. Baf-fakki*[9] the English decisions are based on Common Law, in the absence of any statutory

[7] AIR 1950 E. Punj 228
[8] AIR 1951 Bom 72
[9] AIR 1954 Mad 926

provision similar to Section 123 of the Indian Evidence Act. They proceed on the principle that the best evidence which the Court could safely accept without question should be adduced. Under Section 123 of the Evidence Act, the officer at the head of the department concerned is the authority to decide whether to permit or to withhold the evidence. The question as to who is the head of the department depends on the particular facts. In AIR 1954 Madras 926, the affidavit was filed by a Secretary to the Government who stated that he was the head of the department concerned, of Food and Agriculture. Here the Registrar of Cooperative Societies says in his affidavit that he la the head of the department of co-operation and there is nothing to show

contra.
The learned counsel points out that under Act VI of 1932. the State Government have revisional powers, over the Registrar of Co-operative Societies and that Registrar is not therefore the highest executive authority in the State for the department. But the State Government is necessarily the highest executive authority in a State and Section 123 of the Evidence Act does not mention the State Government as the authority to give or withhold permission. It mentions only the head of the department concerned and the Government may designate any officer as the Head of the Department for the purpose.

9. The learned Public Prosecutor's contention is that the Magistrate should have accepted the Registrar's affidavit as conclusive for deciding the privilege claimed under Section 123. But the statute does not say that the evidence of the head of the department shall be conclusive proof. As the decision on the validity of the Claim is that of the Court, it is to be based on the entire evidence available; on the question. The affidavit of the Head of the Department is only a piece of such evidence; Here the affidavit of the Registrar itself showed that the enquiry reports form the first information for the investigation by the Police of an ordinary criminal offence.
The audit reports were published to the societies concerned and the only reason given in the Registrar's affidavit for bringing them under Section 123 is that they were irrelevant to the case against the respondent. This reason has no substance because the relevancy was a matter for the Magistrate to decide. The Magistrate is therefore right in overruling the claim of privilege Under Section 123. Criminal Revision Case No. 263 of 1955 must therefore be dismissed.

10. With regard to the privilege claimed under Section 124, I am Inclined to agree with the Public Prosecutor's contention that the Magistrate ought not to have finally decided the question without perusing the documents themselves. It may be that there are portions in the enquiry reports and audit reports which cannot be disclosed without injury to public interest. No doubt the conduct of the officers in charge of the prosecution before the Magistrate in not bringing the documents before the Court and putting forward their claim of privilege piecemeal was most objectionable. But public interest cannot be allowed to suffer on account of their conduct. Criminal Revision Case No. 240 of 1955 is therefore allowed, the Magistrate's order is set aside and he is directed to decide the question of the privilege claimed under Section 124 afresh after inspecting the documents and hearing both the parties. Crl. R. C. No. 263 of 1955 dismissed:, Crl. R.C. No. 240 of 1955 allowed.