**BOMBAY HIGH COURT**

R.M.D. Chamarbaghwalla

Vs.

Y.R. Parpia

O.C.J. Appeal No. 40 and Misc., No. 91 of 1948

(Bhagwati, J.)

05.08.1948

**JUDGMENT**

**Bhagwati, J.**

In the case of *Parpia v. Chamarbaghwalla*[1], the Collector of Bombay refused to renew the license granted to the applicant B.M.D. Chamarbaghwalla to run a prize competition. In support of the refusal, the Collector stated in his affidavit "I say that Government decided and laid its general policy and confidentially circulated it for the guidance of its officers' (p. 729). In that case, the appeal Court (Chagla, C.J. and Gajendragadkar, J.) sent down the case to the trial Judge and ordered Cross-examination of the Collector, stating (p. 743) : "The only question which we want the learned Judge to decide after his cross, examination is over, is whether the discretion exercised by the Collector was an unfettered discretion or whether it was fettered by any order issued by Government in respect of licenses to be issued by him." When the case reached hearing before the trial Judge (Bhagwati, J.), the Advocate-General raised a preliminary objection that the circular issued by Government was privileged from production under Section 123, Evidence Act, 1872. Bhagwati, J. :- I have heard the parties at length on the question of the admissibility of this document. The objection is really Bought to be sustained by the Advocate-General on the construction of Section 123, Evidence Act. Before, however, I consider the provisions of that section it is necessary for me to define the scope of the enquiry before me as it has been laid down in the judgment of the appeal Court. The learned Chief Justice in the course of his judgment has observed in *Parpia v. Chajmarbagwalla*[2],

> "Now, the whole question which arises is whether the discretion exercised by the Collector was his own discretion or was it a discretion that was fettered by anything the Government has done or said. In our opinion, it would not be wrong or improper for the Collector in exercising his discretion to give full weight to the general policy of Government, provided that policy is within the ambit of the Act. If the Government takes

a particular view with regard to prize competitions in the public interest and the Government enunciates that policy, the Collector would be perfectly justified and entitled to consider that policy. But consideration of policy

[1]50 Bom LR 728 : AIR 1949 Bom 109

[2]50 Bom LR 728 at p. 743 : AIR 1949 Bom 109

is one thing; to be dictated to or to ha ordered to do something is entirely a different thing. If, for instance, Government were to issue instructions that all Collectors in the province, should refuse to issue licenses to a particular class of people for particular reasons, then it would be impossible to say that the Collectors acting upon those orders would be exercising a discretion which would be free and unfettered. We must not forget that after all the Collector of Bombay is a servant of the Government of Bombay, and it is a matter for investigation to what extent his mind was dominated by this particular circular which the Government issued. Whether the domination was such as to make his discretion fettered is a matter which can only be decided after more materials are before the Court. The Advocate-General has told us that Government claims privilege for the confidential circular which it has issued. We express no opinion whatever as to whether the privilege claimed by Government is rightly claimed in law."

These observations of the appeal Court prescribe what the nature of the enquiry before me is and it is in the light of these observations that I have to consider the objection which has been put forward by the Advocate-General to the admissibility of this document.

2. Section 123, Evidence Act is as under :

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affair a of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit." There are two things which are involved in this section one, that the document should be an unpublished official record relating to any affairs of State; and (2) that the officer at the head of the department concerned may give or withhold the permission for giving the evidence derived therefrom.

3. In the various authorities which have been cited before me, the considerations which should weigh with the Court in deciding objections taken under Section 123 of the Act have been mixed up with the considerations which should weigh with the Court in deciding objections under Section 124 of the Act, and both these classes of oases have been mixed up. The objections under Section 123 of the Act and Section 124 of the Act have been treated as on a par with each other, and it is therefore that we find various dicta of the learned Judges who have decided these oases laying down principles with regard to both the sets of circumstances without discriminating one from the other. In my humble opinion, however, the matter has got to be considered only with reference to Section 123 of the Act, divorced from any considerations which may be germane to or relevant under Section 124 of the Act; and I shall try in the later part of this judgment of mine to keep these two sections apart one from the other.

4. There are observations to be found in some of the reported cases on Section 123 of the Act itself that it is for the head of the department who is in possession of the document to judge of the fact whether the unpublished records are protected from production on the ground of their relating to affairs of State, e.g. *Nazir Ahmad v. Emperor*[3], With the utmost respect to the learned Judges, who are responsible for that decision, I beg to differ from the same. As it has been laid down by our own Appeal Court in *In re Mantubhai Mehta*[4],

[3] AIR 1944 Lahore 434 : (ILR (1945) Lah 219)

[4]46 Bom LR 802 : AIR 1945 Bom 122 : 46 Cr. LJ 562

it is for the Court to decide whether a particular document is an unpublished record relating to any affairs of State, i.e., whether it is a document in respect of which privilege can properly be claimed, but once the Court has decided that the document is one in respect of which privilege may be claimed, the question, whether the document should be produced or not is one entirely in the discretion of the head of the department concerned, and the Court has no power to inspect the document to determine the question of its admissibility. The last part of the observation of the learned Judges of our Appeal Court are based on the terms of Section 162, Evidence Act, which definitely lays down that 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. These provisions definitely exclude the jurisdiction of the Court in the matter of the inspection of the particular document or documents which refer to affairs of State. The Court cannot inspect the documents in order to determine whether they are unpublished official records relating to any affairs of State, but the jurisdiction of the Court to determine whether a particular document is an unpublished official record relating to any affairs of State is not taken away by this provision enacted in Section 162 of the Act. It is for the Court, and Court only, to decide whether a document falls within that category. In order to determine whether the document falls within the category, the Court can have regard to all the circumstances, barring, of course, the inspection of the document itself. But that apart, there is no fetter to the jurisdiction of the Court looking at whatever materials are available for the purpose of ascertaining whether the document is an unpublished official record relating to any affairs of State. Counsel for the petitioner drew my attention in this behalf to the decision of their Lordships of the Privy Council in *Robinson v. State of South Australia* [5]*(No. 3),* In that case, the point for consideration by their Lordships was whether on an application for an order for inspection where privilege was claimed for any document, it was lawful for the Court or a Judge to inspect it for the purpose of deciding as to the validity of the claim. There was a rule in that behalf contained in Order 31, Rule 34, Sub-Rule (2), of the South Australian Rules of Court, which is analogous to Order 11, Rule 19(2), of our Civil Procedure Code, which entitled the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege where on an application for an order for inspection, privilege was claimed for the same. If these provisions of Order 11, Rule 19(2), had stood by themselves, there was not the slightest difficulty in following this decision of their Lordships of the Privy Council. A difficulty, however, is created by reason of the enactment of the provision in Section 162 of our Evidence Act which I have referred to above. All decisions, and even obiter dicta, of their Lordships of the Privy Council, are entitled to be respected by the

Courts here, but where there is an express provision contained in a statute enacted by our Legislature, even the weighty pronouncements of their Lordships of the Privy Council must give way to such enactment of the Legislature, and in view of the express provisions contained in Section 162, Evidence Act, I find it impossible for me to follow the decision of their Lordships of the Privy Council which has been so strongly relied upon by counsel for the petitioner. It follows therefore that I am not entitled to inspect the document for the purpose of deciding whether it is a privileged document within the meaning of the objection taken in that behalf relying upon the provisions of Section 123, Evidence Act.

5. It is therefore necessary for me to consider, first, whether the document of which production is resisted by claiming privilege under this section is a part of unpublished

[5]1931 AC 704 : (100 LJ PC 183)

official records relating to any affairs of State. "Affairs of State." is a very wide expression. Every communication which proceeds from one officer of the State to another officer of the State is not necessarily relating to the affairs of State. If such an argument was pushed to its logical extent, it would cover even orders for transfers of officers of Government departments and the most unimportant matters of administrative detail which may be addressed by one officer of the State another. That could not be within the intendment of the Act at all. What are the affairs of State within the meaning of that expression as used in Section 123, of the Act has therefore got to be determined by a reference to the grounds on which privilege can be claimed in respect of a particular document. A clue to the same is furnished in the observations of their Lordships of the Privy Council in the case which I have above referred to, *Robinson v. State of South Australia (No. 2[6]),* It was observed by their Lordships (p. 714) :

> "And, first of all, it is, their Lordships think, how recognized that the privilege is a narrow one, most sparingly to be exercised. The principle of the rule, Taylor points out in his work on Evidence, Section 939, 'is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires'... But their Lordships cannot doubt that the explanation is to be found in the judgment of Rigby L.J., in *Attorney General v. Newcastle-upon-Tyne Corporation*[7], where, himself an ex-law officer, he says : 'I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded.'

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production."

Their Lordships proceeded farther to observe (p. 715) :

> "Particularly must it be remembered is this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such 'plain overruling principle of public interest' as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But snob, an opposite view is without justification. In truth the fact that the documents if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production - one only to be overborne by the gravest considerations of State policy or security."

A farther elaboration of this point of view is to be found in the judgment of the House of

[6](1931 AC 704 : 100 LJ PC 183)

[7](1897) 2 QB 384 : (66 LJ QB). 593

Lords in *Duncan v. Cammell Laird and Co*[8]. It was there observed that an objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The mere fact that the minister or the department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should only be withheld when the public interest would otherwise be damnified, as 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. In such a case the Court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to the public interest.

6. These are the criteria for the purpose of determining whether a document in respect of which privilege is claimed relates to any of State.

7. If the matter is looked at from this point of view, and regard is bad to what the respondent himself has stated in para. 12 of his affidavit, namely,

> "I say that Government decided and laid down its general policy and confidentially circulated it for the guidance of its officers."

I really wonder how any such communication could be contended to be an unpublished official record relating to any affairs of State. The disclosure of that document would not, to use the words of their Lordships of the Privy Council in *Robinson v. State of South Australia*[9] *(No. 2)* "be withheld by the gravest considerations of State policy or security, or, again, to use the words of the noble Law Lords who decided the case of *Duncan v. Cammell, Laird and Co*[10]*.,* be withheld because a 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." These are only illustrative of the type of objections which can be taken and not exhaustive, but they give a clue to what should be the guiding considerations in the matter of objections taken to the production of these documents.It is only such documents which relate to the affairs of the State the disclosure of which would be detrimental to the public interest that come within the category of unpublished official records relating to the affairs of State entitled to protection under Section 123, Evidence Act.

8. In conformity with the above opinion, it would be unnecessary for me to consider the other aspect of the case which has been also equally strenuously urged before me, viz., that the document being a document relating to the affairs of State, the affidavit of D.S. Bakhle filed before me should be taken as concluding me is the matter and I should treat his with holding of the permission to the production of the document as final. Counsel for the petitioner urged that that affidavit was not sufficient in law inasmuch as it had not been made by the Minister in charge of the portfolio of that department or in any event by the officer at the head of the department concerned. He pointed out that the Bombay Prize Competition Tax Act, 1939, was a purely fiscal measure and that it fell within the

[8]1942 AC 624 : (111 LJ KB 406)

[9](1931 AC 704 : 100 LJ PC 183)

[10]1942 AC 624 : (111 LJ KB 406)

jurisdiction of the Revenue Department and not the Home Department. He drew my attention to Section 20 of the Act which prescribes that any person aggrieved by any order under the Act might appeal to the Commissioner or such officer as the Provincial Government may appoint in that behalf from any order passed by the Collector under the Act, and to the notification which was issued in this behalf by the Revenue Department appointing the Secretary, Revenue Department, as the authority to which appeal from a decision of the Collector lay. It may be that the Revenue Department may be concerned with the particular aspect of the enforcement of the provisions of the Act. I cannot, however, ignore the fact that the communication of which the production is sought here is a letter addressed by the Secretary, Home Department, to the Collector of Bombay. That being so, the head of the department concerned would be D.S. Bakhle, who la the Secretary to the Home Department, and I do not see much substance in the objection which has been taken in this behalf by the counsel foe the petitioner. When once the head of the department concerned has made an affidavit, it is not necessary that the Minister in charge of the portfolio, who, by the very nature of his; appointment, may be a person with changing fortunes in accordance with the exigencies of the party situation should be called upon to make any such affidavit it is the permanent incumbent of the post of the Secretary to that particular Department (permanent, not in the sense that he is not liable to be retired or removed, but permanent in the sense that the department is under his control so long as he occupies that position) would be the proper person to make such an affidavit.

9. There is, however, another objection which was taken by counsel for the petitioner against the sufficiency of this affidavit, and that objection is, in my opinion, sound. Their Lordships of the Privy Council in *Robinson v. State of South Australia*[11] *(No. 2)* observed as under (p. 721) :

> "Now their Lordships cannot refrain from expressing surprise that the complete insufficiency of this claim for protection as so made, has not been a matter of judicial observation, either in Griffin's action or in this. To their minds, as a claim for such protection this minute is entirely inadequate .. In view specially of the fact that the documents are primarily commercial documents, he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production."

It was open to D.B. Bakhle when he made the affidavit which was relied upon by counsel for the respondent to have indicated the nature of the suggested injury to the interests of the public and not to have rested content merely with the statement that he has made, viz. "Having applied my mind to the question, I have formed the opinion that the disclosure of the said letter would be against public interest." The objection taken is too vague to be considered. It merely follows the letter of Sections 123 and 124, Evidence Act, and does not convey anything more than this that he claims privilege. In my opinion, apart from claiming privilege in the manner he has done, he ought to have indicated the nature of the suggested injury to the interests of the public, and not having done so, this affidavit of D.S. Bakhle which has been filed on behalf of the respondent cannot avail him.

10. For the reasons above stated, I overrule the objection of the Advocate General.

[11](1931 AC 704 : 100 LJ PC 183)

Order accordingly.