PATNA HIGH COURT

Lakhuram Hariram

Vs

Union of India

Civil Revn. No. 497 of 1956

(V. Ramaswami, C.J. and Kanhaiya Singh, J.)

12.08.1959

JUDGMENT

V. Ramaswami, C.J.

1. In this case the petitioner has brought a money suit in the Court of the Munsif, 1st Court, Chapra, against the opposite party for realising a sum of Rs. 2520 and odd, being the value of goods which were not delivered out of a particular consignment. In paragraph 5 of the plaint the petitioner alleged that notices under Section 77 of the Indian Railways Act and section 80 of the Civil Procedure Code had been sent to the opposite party per registered post on the 5th of June, 1950. The suit was contested by the opposite party on the ground that notices under Section 77 of the Indian Railways Act and Section 80 of the Civil Procedure Code, had not been served. During the trial of the suit the petitioner made an application on the 3rd of November, 1954, praying that the opposite party should be called upon to produce the register in which there were entries regarding receipt of notice and letters. The opposite party filed a rejoinder on the 23rd November, 1954, that no such register was maintained. Later on, on the 6th of January 1956, the petitioner made an application to the trial Court to the effect that they had come to know that a file No. NCS/338/CPR of 1951 was maintained in the office of the Traffic Manager Gorakhpur, now called the Chief Commercial Superintendent of the North Eastern Railway with regard to his case and the petitioner requested that the opposite party should be called upon to produce the aforesaid file. Summons was issued by the Court on the Chief Commercial Superintendent of the North Eastern Railway at Gorakhpur calling upon him to produce the file NCS/338/CPR of 1951 and also the register of notices kept in the General Managers office, showing receipt of notices for the month of June, 1950. On the 16th of March, 1956, a petition was filed in the trial Court by Sri Suraj Prasad Upadhya on behalf of the opposite party in obedience to the summons sent to the Chief Commercial Superintendent of the North Eastern Railway. It was stated in that petition that the file in question could not be produced in Court because it contained privileged communications under Section 124 of the Indian Evidence Act. On the 27th April, 1956, there

was an affidavit filed by the Senior law Inspector Sri R. S. Prasad to the effect that privilege was claimed by the Chief Commercial Superintendent under Section 123 of the Indian Evidence Act. It was also stated in the affidavit that the register could not be traced out though it had been diligently searched for. A rejoinder was filed by the Petitioner on 27-4-1956, contending that the file in question related to commercial transactions and was not in the nature of unpublished official records relating to affairs of State. It was submitted by the petitioner that the Court should itself inspect the documents and decide the question of privilege. The trial Court held it was satisfied from the affidavit of the Chief Commercial Superintendent that privilege was properly claimed under Section 123 of the Indian Evidence Act and it was not permissible for the Court to look into the file on the question of privilege. Accordingly, the trial Court allowed the claim of the opposite party that the file in question was a privileged document within the meaning of Section 123 of the Indian Evidence Act.

2. In support of this application the point taken on behalf of the petitioner is that the trial Court should have itself looked into the file before deciding the claim of privilege under Section 123 of the Indian Evidence Act. We do not think that this argument is correct. Section 123 of the Indian Evidence Act is in the following terms :

> "123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs 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."

Section 162 is also relevant in this connection and is reproduced below :

> "162. A witness summoned to produce a document shall if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

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.
If for such a purpose it is necessary to cause any document to be translated the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and if the interpreter disobeys such direction he shall be held to have committed an offence under Section 166 of the Indian Penal Code." Reliance was however placed by learned Counsel on behalf of the petitioner on Order 11, Rule 19(2) of the Civil Procedure Code. It reads as follows :

> "19 (1) * * * * *
> (2) Where on an application for an order for inspection privilege is claimed for any

document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege."

But in our opinion, Order 11, Rule 19 of the Civil Procedure Code cannot override the provisions of Section 123 of the Indian Evidence Act which is a special provision of law. The result therefore, is that sub-rule (2) of Rule 19 of Order 11, has not the effect of repealing pro tanto the provisions of Section 123 of the Indian Evidence Act though the Civil Procedure Code is a later enactment. The legal position, therefore, is as follows: The head of the department must in the first place examine the document and consider whether privilege should or should not be claimed in respect of the document. He may then appear in person before the Court to raise the objection or he may direct one of his subordinates to do so on his behalf with a certificate signed by him and stating that he has examined the document. But where the latter course is followed, the head of the department will not be absolved from the obligation of appearing in person and satisfying the Court that the objection taken by him is valid. The Court may require him to give an affidavit or make a statement on oath and may put any further questions to him for satisfying itself that the privilege has been validly claimed. But it is important to say that the Court is not entitled to inspect the document, nor put such questions to the head of the department or any other witness, either directly or indirectly to reveal its contents. The scope of the enquiry that the Court can hold is, therefore, limited. This view is in accordance with the majority view of the Full Bench decision in *Governor General in Council v. H. Peer Mohd. Khuda Bux*[1], with which we respectfully agree. The same view has been enunciated by Lord Simon in *Duncan v. Cammell, Laird and Co. Ltd*[2]., as follows :

"The essential matter is that the decision to object should be taken by the Minister who is the political head of the department and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e. g. departmental minutes to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e. g.) he may be out of reach, or ill or the department may be one where the effective head is a permanent official and in such cases it would be reasonable for the objection to be taken as it has often been taken in the past by the permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavits and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on subpoena at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the court is not satisfied by this method, it can request the minister's personal attendance."

A similar view has been expressed by the Bombay High Court in *In re Mantubhai Mehta*[3], and Wadia J. observed in that case as follows :

> "The question therefore with regard to an official document is that the officer summoned to produce it is bound to produce it in Court. He must raise the objection in Court and the question whether that objection is well founded is one for the Court to decide. But for this purpose the Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise."

3. In our opinion, the principle is correctly expressed in all these authorities. In the present case, therefore, it is manifest that the contention of learned Counsel for the petitioner that the Court should have inspected the document to decide the question of privilege is unwarranted. It appears from the facts in this case that the lower Court was satisfied from the affidavit sworn by the Chief Commercial Superintendent that the document in question related to affairs of State as contemplated by Section 123 of the Indian Evidence Act. It was of course open to the lower Court to have taken other evidence on the point or even to have examined the Chief Commercial Superintendent in person. But the actual scope of the enquiry in the particular case is a matter of discretion with the trial Court. In the present case it is apparent that the trial Court was satisfied with the affidavit sworn by the Chief Commercial Superintendent and allowed the claim of privilege under Section 123 of the Indian Evidence Act. In our opinion there has been no error of law committed by the lower Court. There is no merit in this application. We accordingly dismiss this application with costs. Hearing fee Rs. 100/-.

Application dismissed.

Cases Referred.

[1] AIR 1950 EP 228
[2]1942 AC 624
[3] AIR 1945 Bom 122