

(1970) 03 DEL CK 0010

Delhi High Court

Case No: Civil Miscellaneous Appeal No. 78W of 1970

N.S. Maini

APPELLANT

Vs

Commissioner of Income Tax,
Delhi and Others

RESPONDENT

Date of Decision: March 26, 1970

Citation: (1970) ILR Delhi 879

Hon'ble Judges: T.V.R. Tatachari, J; Narain Andley, J

Bench: Division Bench

Advocate: S. Pappu, C.R. Soma Sekharan, J. Ramamurthy and R.M. Mehta, for the Appellant;

Judgement

T.V.R. Tatachari, J.

(1) This writ petition has been filed by Shri N. S. Maini, officiating Income Tax Officer Class II, praying for the issuance of an appropriate writ, order or direction quashing an order (Annexure "B"), dated 11th July, 1969, whereby he B was reverted as Inspector, Income Tax, on the ground that he was found unsuitable to hold the post of Income Tax Officer Class II.

(2) The respondents in the writ petition are (1) Commissioner of Income Tax, Delhi Range I, New Delhi; (2) The Central Board of Direct Taxes, through its Secretary; (3) Shri S. N. Nautial, C Inspecting Assistant Commissioner of Income Tax, Range 2; and (4) Shri R. N. Limaye, Director of Inspection.

(3) The petitioner entered the Income Tax Department on 3rd September, 1942. He was confirmed as Inspector of Income Tax in 1956. He passed the Departmental Examination held in the year 1958 and, on selection by the Departmental Promotion Committee, was promoted along with three others, as Income Tax Officer Class II, on 7th December, 1959. A copy of the order has been filed as Annexure "A". It runs as follows :-

Government of India Office Of The Commissioner Of Income Tax, U.P. Lucknow Order 2-12-1959 ESTABLISHMENT-GAZETTED-I.T. 0s. Class II- Promotions, Transfers And POSTING- Promotion No. 193. The following Inspectors of Income Tax are promoted to officiate, with effect from the 7th December, 1959 and until further orders, as Income Tax Officers Class II temporarily in the order of seniority noted below :__ 1. Shri R. L. Kalia, Senior Grade Inspector, Varanasi. 2. Shri N. S. Maini, Ordinary Grade Inspector, Meerut. 3. Shri H. P. Agarwal, Senior Grade Inspector, Meerut. 4. Shri R. K. Gupta, Ordinary Grade Inspector, Lucknow.

(4) Their promotion is subject to the condition that they will be liable to reversion at any time if after a review of the vacancies it is found that their appointments are in excess of the vacancies available in this Charge for promotees and direct recruits become available for replacing them. * * * * * Transfer And Posting

(5) The order made it clear that the petitioner and three others were B only promoted to officiate temporarily as Income Tax Officers, and that the said promotions were until further orders were passed. The petitioner was placed at Serial No. 2 in the order of seniority among the four officers thus promoted. Further, their promotion was subject to the condition that they would be liable to reversion at any time if after review of the vacancies it was found that their appointments were in excess of the vacancies available for promotees and direct recruits become available for replacing them.

(6) The petitioner officiated as Income Tax Officer from December, 1959, to October, 1963, at Kanpur when he was transferred to Meerut. He remained there till June, 1964, and was then transferred to Jodhpur. On 7th August, 1965, he was transferred to Delhi, where he continued to officiate as Income Tax Officer. On 12th July, 1969. the impugned order (Annexure "B") was passed as follows :-

"GRAMS:COMINTAX No. Est. 1/PF/N-1/4259 Government Of India Office Of The Commissioner Of Income Tax Delhi Central Revenues BLDG. Inderprastha Marg, New Delhi, the 11th July, 1969. Order Establishment-Gazetted-Class II-income tax Officer- Reversion of- Shri N. S. Maini, Officiating Income Tax Officer, Class II at present employed as Income Tax Officer, District III, Ward M(I) New Delhi and holding additional charge of District IV Wards A (1) and C(I) New Delhi having been found unsuitable to hold the post of Income Tax Officer, Class II, is hereby reverted as Inspector, Income Tax, with immediate effect. Shri Maini will hand over charges of District III Ward M(I) and District IV Ward A (I) and C(I) New Delhi, to Shri I. C. Gupta, Income Tax Officer, Distt. III Ward K(I), New Delhi, who will hold them in addition to his own. duties. sd/- I. P. Gupta Commissioner of Income Tax Delhi-1, New Delhi."

(7) It has to be noted that the petitioner was reverted as Inspector, Income Tax, on the ground that he was found unsuitable to hold the post of Income Tax Officer Class II. The other officers who were his juniours were not however reverted.

Aggrieved by the said order, the petitioner has filed the present writ petition praying that the said order may be quashed.

(8) In opposition to the writ petition, a counter-affidavit of Shri I. P. Gupta, Commissioner of Income Tax, Delhi, Range I, New Delhi, has been filed on behalf of respondents Nos.1 and 2. Shri S. N. Nautial, respondent No. 3, filed a counter-affidavit of his own. and Shri R. N. Limaye (respondent No. 4) also filed a counter-affidavit of his own. The petitioner filed separate rejoinders in answer to these counter-affidavits.

(9) The petitioner filed an application C.M. No. 78 of 1970, praying that 7 documents mentioned in the Application may be required to be produced by the respondents, as according to the petitioner, they are necessary for determining the questions which arise for determination in the Writ Petition, one of them being as to whether the reversion of the petitioner was mala fide. The said documents are:

"1. File of the Board in which the decision for reversion has been taken and the complete material on the basis of which the Board came to the aforesaid decision. 2. Complete record of the character roll for the period December 1958 to July 1969, till the petitioner was working as Income Tax Officer. 3. The recommendation of the Inspecting Assistant Commissioner of Income Tax, Range 2 VIII, November 1966 under whom petitioner was working, for crossing the Efficiency bar. 4. The file pertaining to the confirmation matter for 1968, in which the petitioner was considered fit for confirmation, by the Commissioner of 1. Tax. 5. Complete records of the Inspection conducted by Shri S. N. Nautiyal, I.A.C. with his remarks, petitioners replies counter comments of the aforesaid I.A.C. review by the Commissioner of Income Tax with his forwarding notes to the Director of Inspector, Income Tax. 6. Inspection conducted by the Director, D.D.I's reports and forwarding note by the Director to the Chairman, Central Board of Direct Taxes and with his orders thereon. 7. Complete File of M/s. Sanghi. Oxygen Co. assessment case, with the office of the Central Board of Direct Taxes also the records pertaining to the same assessed in the offices of the Commissioner of Income Tax, Delhi."

(10) As regards documents Nos. 1, 6 and 7, an affidavit of Shri R. N. Muttoo, Chairman, Central Board of Direct Taxes, and ex Officio Additional Secretary to the Government of India, Ministry of Finance (Department of Revenue and Insurance), dated 6th February, 1970, was filed claiming privilege u/s 123 of the Indian Evidence Act. Shri Muttoo stated that the said documents are contained in files Nos. (1) F.No. 32/2/68- AD.VI (Pt.), and (2) F. No. 15/4/67-S.O.(P); that he had carefully read and considered each and every one of the said documents; that the said documents which comprise Departmental notes and official correspondence are unpublished records relating to affairs of State; and that they belong to a class as to which it is the general practice to keep them secret as their disclosure will cause injury to public interest and will also materially affect the freedom and can dour of expression of opinion of public officers who have to express their views in the

course of administration which is essential for the proper functioning of the public service. As regards the other documents Nos. 2, 3, 4 and 5 also, an affidavit of Shri 1. P. Gupta, Commissioner of Income- tax, has been filed claiming privilege u/s 123 of the Indian Evidence Act. Shri Gupta also averred that the said documents are contained in files Nos. (1) C.4 (Character Roll), (2) Est.-1/PF/N/1, (3) D.P.C./July 1968, and (4) SIB/ Insp. (4)/66-67; that he had carefully read and considered each and every one of the said documents and had come to the conclusion that those documents which comprise Departmental notes and official correspondence are unpublished records relating to affairs of State and that the said documents belong to a class as to which it is the general practice to keep them secret as their disclosure will cause injury to public interest and will also materially affect the freedom and can do harm to expression of opinion of public officers who have to express their views in the course of administration which is essential for the proper functioning of the public service. However, Shri Rustam M. Mehta, learned counsel for respondents, stated before us that Shri Gupta waived the privilege claimed by him regarding document No. 5, and produced the said document for inspection by the petitioner. The privilege claimed was thus confined to the other documents only. (11) The claim of privilege is based on section 123 of the Indian Evidence Act which provides that 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. The basic principle to be applied in determining whether a particular document or record relates to affairs of State is to be found in the passage in Viscount Simon L.C.'s speech in *Duncan v. Cammell Laird & Co. Ltd.*, (1942) 1 All E.R. 587 which is as under :

"THE principle to be applied in every case is that documents 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."

(12) In *Asiatic Petroleum Co. Ltd. v. Anglo Persian Oil Co. Ltd.* (1916) All E. R. 637 Swinfen Bade, L.J. pointed out at page 640 that the test must be that the document of record cannot be disclosed without injury to the public interest, and not that the documents are confidential or official. Thus, in deciding whether the document belongs to the privileged class or not, the basic consideration is as to whether the disclosure of that document is injurious to the public interest or not and it is not enough if the document is stated to be: confidential or official. It is now well settled by the decision of the Supreme Court in [The State of Punjab Vs. Sodhi Sukhdev Singh](#), , that the assertion of the head of the Department that the document is one relating to affairs of State and that its disclosure is injurious to the public interest is

not conclusive and it is for the Court to consider and decide the validity of the claim of privilege and the objection to the production of the document in question. This is clear from the following observation of Gajendragadkar, J. (as his Lordship then was) at page 505-

"THUSour conclusion is that reading sections 123 and 162 (of the Indian Evidence Act) 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 u/s , or not. In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the Department to decide whether he should permit its production or not."

(13) In the present case, the privilege is claimed on the" ground that the documents required to be produced comprise departmental notes and official correspondence which are unpublished records relating to affairs of State, and "belong to a class as to which it is the general practice to keep them secret as their disclosure will cause injury to public interest and will also materially affect the freedom and can dour of expression of opinion of public officers who have to express their views in the course of administration which is essential for the proper functioning of the public service." The affidavits of Shri Mottoo and Shri Gupta do not give any clear indication of the nature of the contents of the documents. It is, Therefore, not possible to determine whether the contents of the documents are such that their disclosure would be injurious to the public interest. The question then is whether the documents belong to a class which, on grounds of public interest, must as a class be withheld from production on the ground that their disclosure will cause injury to public interest, and will also materially affect the freedom and can dour of expression of opinion of public officers who have to express their views in the course of administration which is essential for the proper functioning of the public service. This ground for the claim of privilege is obviously based upon the observation of Gajendragadkar, J. in Sodhi Sukhdev Singh's case (supra) at page 502 which runs as follows :-

"THEREmay be another class of documents which could claim the said privilege not by reason of their contents but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and can dour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed, or reports made, and gist of official decisions

reached in the course of the determination of the said questions of policy. In the efficient administration of public affairs Government may reasonably treat such a class of documents as confidential and urge that its disclosure should be prevented on the ground of possible injury to public interest. In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents, such documents or such class of documents may also claim the status of documents relating to public affairs."

(14) It has to be noted that according to the above observation the principle of freedom and candour of expression of opinion applies only to opinions expressed "in the determination and execution of public policies", and to notes and minutes made by the respective officers on the relevant files, opinions expressed or reports made, and gist of official decisions reached "in the course of determination of the said questions of policy", and not to each and every kind of opinion, notes, minutes, etc. Subsequent to the aforesaid decision of the Supreme Court, the claim of privilege based on the said principle of freedom and candour of expression has been criticised and commented upon by the House of Lords in *Convey v. Rimmer*, 1968 (1) All E.R. 874. The said principle appears to have been originally enunciated by Lord Lyndhurst, L.C. in *Smith v. East India Company*, (1841) 1 Ph. 50. Referring to the same, Lord Hodson observed at page 904 in *Convey's* case (supra) as follows :-

"It is, I think, at the present day impossible to justify the maintenance of the doctrine laid down by Lord Lyndhurst in its widest form. It is strange if civil servants alone are supposed to be unable to be candid in their statements in the course of duty without the protection of absolute privilege denied to other fellow subjects."

(15) Lord Pearce said at page 901. -

"IN my view, it is essential to leave the vague generalities of wide classes and get down to realities in weighing the respective injuries to the public of a denial of justice on the one side and, on the other, a revelation of governmental documents which were never intended to be made public and which might be inhabited by an unlikely possibility of disclosure. Obviously production would never be ordered of fairly wide classes of documents at a high level. To take an extreme case, production would never be ordered of cabinet correspondence, letters or reports on appointments to office of importance and the like; but why should the same yardstick apply to trivial documents and correspondence with or within a ministry?"

(16) Lord Morris observed at page 891-

"It has been clearly laid down that the mere fact that a document is private or is confidential does not necessarily produce the result that its production can be withheld. In many decided cases, however, there have been references to a suggestion that if there were knowledge that certain documents (e.g., reports) might in some circumstances be seen by eyes for which they were never intended the result would be that in the making of similar documents in the future candour

would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect our conduct? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that our conduct on the part of the writer of the report would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express. Whatever may be the strength or the weakness of the suggestion to which I have referred it seems to me that a court is as well and probably better qualified than any other body to give such significance to it as the circumstances of a particular case may warrant."

(17) Again at page 901 Lord Morris said-

"The objection to the production of the probationary reports has been explained as being put forward on the basis that those who made such reports expect them to be confidential, so that they will only be seen by police officers, and that if such reports could ever be subject to production then the future conduct of future writers of such reports would be affected, and that this would be disadvantageous to, and therefore injurious to, the public interest. While accepting that the view is held that some measure of prejudice to the public interest would or might result from production, it may be that a greater measure of prejudice to the public interest would result from their non-production."

(18) Lord Upjohn observed in his speech at pages 914-15 as follows:-

"No doubt there are many cases in which documents by their very nature fall into a class which requires protection such as, only by way of example, cabinet papers, foreign office dispatches, the security of the State high-level inter-departmental minutes and correspondence, and documents pertaining to the general administration of the naval, military and air force services. Nearly always such documents would be the subject of privilege by reason of their contents but also by their "class", in any event, they qualify for privilege. So, too, high-level inter-departmental communications, to take, only as an example on establishment matters, the promotion or transfer of reasonably high-level personnel in the service of the Crown; but no catalogue can reasonably be compiled. The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high-level communications, however innocent of prejudice to the State the actual contents of any particular document might be; that is obvious. It has nothing whatever to do, however, with our conduct or uninhibited freedom of expression; I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel, and there he has the defense of qualified privilege like everyone else

in every walk of professional industrial and commercial life, who every day has to express views on topics indistinguishable in substance from those of the servants of the Crown."

(19) The Law Lord went on to observe as follows :-

"THE test to be applied to claims for Crown privilege in "class cases" I think should be as follows : There are some documents which, apart altogether with the alleged necessity for condour, fall within the claim of protection; and probably at the same time, though not necessarily, within the "contents" class. I have already given some examples and do not repeat them; the judge still has, though I should be surprised if it were ever necessary to exercise it, the rights I have mentioned in the "contents" cases. Then within the "class" cases we come to the "condour" cases pure and simple. For my part I find it difficult, to justify this, when those in other walks of life which give rise to equally important matters of confidence in relation to security and personnel matters as in the public service can claim no such privilege."

(20) However, whatever the criticism regarding the privilege claimed on the principle of freedom and can dour of expression in the English decisions is, it has been clearly stated by the Supreme Court so far as Courts in India are concerned, that in order that privilege may be claimed on the aforesaid principle of freedom and can dour of expression in the case of official opinions, notes minutes, etc., such opinion, notes, minutes, etc., should have been expressed or made in the course of the determination and execution of public policies.

(21) In the present case, the affidavits of Shri Muttoo and Shri Gupta merely contain an assertion that the documents required to be produced contain departmental notes and official correspondence, and that their disclosure "will cause injury to public interest and will also materially affect the freedom and can dour of expression of opinion of public officers, who have to express their views in the course of administration which is essential for the proper functioning of the public service." It has not been stated in the affidavits whether the said notes and correspondence relate to "determination and execution of public policies. It has, therefore, to be assumed that the files in which the documents required to be produced are contained do not contain any notes and correspondence relating to determination and execution of public policies. In the circumstances, it has to be held that no valid ground has been made out in the affidavits in which privilege has been claimed.

(22) It is necessary to refer to document No. 2 asked for by the petitioner, viz., "complete record of the character roll for the period December 1958 to July 1969 till the petitioner was working as Income Tax Officer". In *Durga Dass & Others v. Union of India & Others*, C.W. No. 59 of 1968, on the file of the Himachal Bench of this Court, the petitioners there in applied for the production of certain records pertaining to the confidential reports on their work by their superiors. The Union of

India claimed privileges regarding the production of the said annual confidential reports. By an order, dated 24-10-1968, Deshpande, J. allowed the privilege observing, as under :-

"SUCH documents have always been considered as belonging to a class the non-disclosure of which is essential to" the proper functioning of the public services. Far, the can dour o.f express on of the authorities would suffer and the morale of the services would also be affected if the contents of the documents belonging to this class were to be disclosed. It may be that the contents of each and every document belonging to this class may not be such that their disclosure would be contrary to public interest. But, it would be impossible to scrutinise each document of this class separately and to disclose some and to withhold others. This "is why the privilege in respect of these documents is based on the fact that they belong to this particular class and not on the fact that the contents of each individual document are such that their disclosure would be contrary to public interest."

(23) Thus, the learned Judge upheld the privilege claimed regarding annual confidential reports on the principle that their disclosure would cause injury to the freedom and can dour of expression of opinion by the concerned authorities. This judgment was followed by one of us (Tatachari, J.) in *Madan Gopal Singh v. Union of India*. CM. P. No. 370 of 1968 in Civil Writ Petition No. 106 of 1968 (Himachal Bench), wherein by an order, dated 29-11-1968, the privilege claimed in that case was upheld regarding certain recommendations made by the Himachal Pradesh Government, and in *Surinder Singh v. Union of India*, C.M. No. 1902-J of 1968 in C.W. 1165 of 1967, wherein by an order, dated 7th January, 1969, the privilege claimed regarding annual confidential reports was upheld. In the aforesaid cases, no contention appears to have been advanced, as in this case, based upon the observation of Gajendragadkar, J. in *Sodhi Sukhdev Singh's case* (supra) that the opinions, notes and minutes have to be regarding the determination and execution of public policies. No decision of a Division Bench of this Court in which such a contention was advanced and considered has been brought to our notice. We are of the opinion that privilege in respect of opinions, notes and minutes made by officers can be claimed on the basis of "class" and the principle of freedom and can dour of expression only if the said opinions, notes and minutes relate to determination and execution of public policies.

(24) A similar view was taken by a Division Bench (Obul Reddy and Madhav Reddy, JJ.) of the High Court of Andhra Pradesh in Civil Miscellaneous Petition No. 15966 of 1969 (*Government of Andhra Pradesh and Others v. Rambholla Ramanna*) pronounced on 26th November, 1969, in which the learned Judges disallowed the privilege claimed by the Government of Andhra Pradesh regarding the production of (1) a factual note made by the Secretary or the Deputy Secretary to the Government; and (2) the minutes or notefile of the concerned Minister on the ground that they contained confidential notes which it was not in the interest of the public

to disclose. The learned Judges, after a detailed reference to Indian and English decisions on the question of privilege under sections 123, 124 and 162 of the Indian Evidence Act, held that no case was made out for claiming privilege. In the course of the judgment, the learned Judges referred to the observations of Gajendragadkar, J. in Sukhdev Singh's case at page 502, which have already been extracted above. Referring to" the said observations, the learned Judges pointed out as follows :-

"THEREis nothing in the affidavit of Additional Chief Secretary to suggest that the notes made relate to expression of an opinion in the determination and execution of public policies. It is with reference to the opinion expressed relating to public policies that is Lordship observed that notes, and minutes made by respective officers on relevant files would become privileged. There is nothing to suggest from what has been stated by the Supreme Court that notes and minutes made by officers, other than those pertaining to determination and execution of public policies, would come within the privileged class of documents."

(25) For the above reasons, the privilege claimed in regard to items 1 to 4, 6 and 7 cannot be upheld. We, Therefore, direct the respondents to produce the said records on 6th April before the Registrar, and the petitioner may inspect the same. Let the writ petition be posted for further bearing on 22nd April, 1970.