
The Central Intelligence Officer Vs The Commissioner of Inquiry (Marad Incidents)

W.A. No"s. 518, 628 and 705 of 2004 and W.P. (C) No. 6259 of 2004

Court: High Court Of Kerala

Date of Decision: March 17, 2005

Acts Referred:

Atomic Energy Act, 1962 " Section 18#Civil Procedure Code, 1908 (CPC) " Order 11 Rule 1, Order 16 Rule 6, 4#Commissions of Inquiry Act, 1952 " Section 12, 3, 4, 5, 5(2)#Constitution of India, 1950 " Article 372, 395, 77(3)#Criminal Procedure Code, 1973 (CrPC) " Section 102, 103, 482#Evidence Act, 1872 " Section 123, 124, 162#Government of India Act, 1935 " Section 40(2)#Kerala Commission of Inquiry Rules, 1958 " Rule 14, 15, 16, 3, 4#Penal Code, 1860 (IPC) " Section 175, 176, 177, 178, 179#Unlawful Activities (Prevention) Act, 1967 " Section 3

Citation: (2005) CriLJ 2944 : (2005) 2 ILR (Ker) 109 : (2005) 2 KLT 927

Hon'ble Judges: Cyriac Joseph, Acting C.J.; K. Padmanabhan Nair, J

Bench: Division Bench

Advocate: K.K. Sud, Additional Solicitor General, T.D. Rajalakshmi, S.C.G.S.C., M. Ratna Singh, General, Neeraj Jain and Hari, for the Appellant; Govind K. Bharathan, Manu Mohan and V.V. Surendran, for the Respondent

Judgement

K. Padmanabhan Nair, J.

W.A. No. 518 of 2004 is filed by the Joint Deputy Director, Subsidiary Intelligence Bureau, Trivandrum

challenging an interim order passed by the learned Single Judge on 23.2.2004 in W.P.(C) No. 6259 of 2004 which was filed by the appellant

challenging Ext.P1 notice by which he was called upon "to produce all reports received or collected by him for the period from December, 2001

to 2.5.2003 in connection with the Marad Incidents" and also Ext.P2 order of the Commission of Inquiry (Marad Incidents) dated 16.2.2004 by

which the Commission of Inquiry had rejected the privilege claimed by the petitioner-appellant under Sections 123 and 124 of the Indian Evidence

Act and directed him to produce the documents ordered to be produced under Ext.P1 in that Writ Petition.

2. W. A.No. 628 of 2004 is filed by the Director General of Police and three others challenging the final judgment rendered by the learned Single

Judge disposing of W.P.(C) No. 5006 of 2004. That Writ Petition was filed by the Director General of Police and others challenging an order

passed by the Commission of Inquiry rejecting the privilege claimed by them under Sections 123 and 124 of the Indian Evidence Act.

3. W.A.No. 705 of 2004 is filed by the Joint Deputy Director, Subsidiary Intelligence Bureau challenging the judgment of the learned Single Judge

in W.P.(C) No. 5006 of 2004 after obtaining leave.

4. We shall briefly state the background of these cases. On 2.5.2003 nine people were killed and a number of persons sustained injuries in an

incident took place at Marad, a fishing hamlet on the coast off Kozhikode. The incident is stated to be the sequel to the clashes took place

between the members of two communities during January, 2002 in which three Muslims and two Hindus were killed within a time span of 48

hours. It was alleged that in order to wreak vengeance of killing of the Muslims in an earlier incident the members of that community hatched a

conspiracy, attacked the Hindus causing death of eight persons. It was further alleged that one of the members of the attacking party was also

accidentally killed by the members of his own group. As usual, there was demand for setting up of Commission of Inquiry to conduct a judicial

inquiry into the incidents.

5. The Government of Kerala constituted a one man Inquiry Commission as per Section 3 of the Commissions of Inquiry Act, 1952. Sri. Thomas

P. Joseph, who was then working as the District and Sessions Judge, Manjeri was appointed as Commission of Inquiry as per notification No.

24507/SSA2/2003/Home dated 23.8.2003. By notification No. 24507/SSA2/2003/Home dated 27.9.2003 the Government fixed the terms of

reference of the Commission of Inquiry. The terms of reference are as follows:

(i) the facts and circumstances which led to the incidents at Marad Beach, Kozhikode on 2.5.2003 resulting in the death of nine persons, serious

injuries to many others and damage to property;

(ii) whether there was involvement of any external or internal organization or organizations in the planning and execution of the incidents;

(iii) whether there was any lapse on the part of the police or administrative machinery in taking timely preventive and remedial action and in dealing

with the situation;

(iv) such other matters as are incidental to and arising out of the above terms; and

(v) to suggest suitable measures to avoid such unfortunate incidents in future.

All provisions of Sub-sections (2), (3), (4) and (5) of Section 5 of the Commissions of Inquiry Act, 1952 are also made applicable to the

Commission of Inquiry as per the notification. The Commission of Inquiry issued a notification calling upon the interested parties to file statements.

Several persons and organizations appeared before the Commission and filed statements. The Commission was of the opinion that the District

Collector, Civil Administration, Kozhikode and the Commissioner of Police, Kozhikode were capable of giving information on the points of

reference. So the Commission ordered notice to them to appear and file statements in the form of affidavits. Based on the stand taken in the

statements filed by various persons and organisations who appeared before the Commission they were grouped as "A", "B", "C", "D", "E", "F"

and "G" parties. There are seven sub groups in "A" party. They include Hindu Aikyaedi, Marad Araya Samajam, Viswa Hindu Parishath,

Bharatiya Janatha Party, the Chief Sub Editor, Mathrubumi, Kozhikode etc. There are 27 sub groups in "B" group. They include Janatha Dal,

National Democratic Front, Kerala Women's Front, Communist Party of India (Marxist), Indian Union Muslim League Committee, Beypore

Constituency, Confederation of Human Rights organisation, All India Milly Council, DYFI, NCP District Committee, Sunni Yuvajana Sangam,

Samastha Kerala Sunni Yuvajana Sangham, District Congress (I) Committee, Communist Party of India District Committee, Kozhikode and

various individuals. The Civil Administration, Kozhikode, represented by the District Collector is arrayed as the "E" party. The Police

Administration, Kozhikode, represented by the Commissioner of Police, Kozhikode city is arrayed "F" party. Sri. A.M. Kassim is arrayed as "G"

party. The Commission ruled that the Civil Administration, Kozhikode shall adduce evidence first in view of the provisions of the Act and Rules. It

was also ruled that after the Civil Administration, the Police Administration shall adduce evidence and thereafter parties "A", "B" and "G" shall

adduce evidence. It was also ruled that the order of cross-examination will be also in the very same order.

6. Learned counsel for the Commission of Inquiry filed a petition (Ext.P2 in W.P.(C) No. 5006 of 2004) on 29.12.2003 for a direction to the

District Collector and Commissioner of Police, Kozhikode to submit detailed statements with reference to the questionnaire stated in that petition

along with supporting and necessary documents. On the very same day the counsel for Commission filed Ext.P3 petition under Sections 4 and 5(2)

of the Commissions of Inquiry Act for a direction to the Additional Director General of Police (Intelligence), Trivandrum, Commissioner of Police,

Kozhikode City, Superintendent of State Special Branch, Kozhikode or any other officer who has custody of the documents to produce the daily

reports submitted to them by the staff of the District Special Branch and the State Special Branch for the operation in Beypore Police Station limits

during the period between January, 2002 and 2.5.2003. Both applications were allowed. The Commission issued Ext.P6 notice to the Deputy

Superintendent of Police, State Special Branch (C.I.D.), Kozhikode and Ext.P8 notice to the Assistant Commissioner of Police, District Special

Branch, Kozhikode calling upon them to produce the reports stated in Ext.P3 petition. The Commissioner of Police filed reply to the questionnaire

except question Nos. F to K in the questionnaires. He also filed a reply stating that question Nos. F to K relate to intelligence wing of the Police

Department and those documents are unpublished official records pertaining to the security of the State or communications made among public

officers in official confidence. It was averred that production of those documents before the Commission would cause public interests to suffer

adversely and therefore, the Director General of Police, who is the head of the department refused to grant permission to produce those

documents. The officer claimed privilege under Sections 123 and 124 of the Indian Evidence Act. The answers to questions "F" to "K" with

relevant intelligence reports and connected documents were produced before the Commission in a double sealed cover marked "secret". It was

prayed that those documents may not be inspected even by the Commission. It was further stated that in case the Commission overrule the

objection and decide to inspect the documents, the same may be perused by the Commission alone and they may not be disclosed to anybody else

including the counsel appearing for parties. It was further contended, that even in simple communal incidents, there could be hints of a bigger design

to destabilize the State with some sinister ulterior motive, or there could be involvement of groups/organizations which derive their ideological

sustenance from foreign sources hostile to the State. It was further stated that the intelligence report pertaining to such incident would be touching a

much wider area, involving sensitive issues having a direct bearing on the security of the State and disclosure of such intelligence report may

damage the interest of the Police Department, Civil Administration and to a larger extent the security of the State.

7. The Deputy Superintendent of Police, State Special Branch (C.I.D.) also filed a statement claiming privilege regarding the documents sought to

be produced under Ext.P6 notice on the ground that those documents are unpublished official records pertaining to the security of the State and

communications made among public officers in the official confidence. It was contended that disclosure of such documents would cause public

interests to suffer adversely and therefore, considering its seriousness the Director General of Police who is the Head of the Department withheld

permission to produce them.

8. The Deputy Superintendent of Police also filed another statement raising the very same contentions raised by the Commissioner of Police.

9. The Assistant Commissioner of Police, District Branch, Kozhikode also filed a statement claiming privilege under Sections 123 and 124 of

Indian Evidence Act in respect of the documents directed to be produced under Ext.P8 notice.

10. The Commission of Inquiry considered all those statements together and found that to ascertain whether sufficient information was given by the

Intelligence Wing to the local police a perusal of the reports are absolutely necessary. The Commission also took a view that even if statements

contained in the sealed cover are disclosed, it will not affect security of the State and rejected the privileges claimed. Challenging that order the

Director General of Police and others filed W.P.(C) No. 5006 of 2004.

11. On 10.2.2004 the learned Single Judge directed the Commission of Inquiry to open the sealed cover by himself, peruse the same and forward

a report to this Court as to whether the report in part can be published and whether any part of it is entitled to immunities etc. Thereafter the Writ

Petition itself was disposed of by judgment dated 16.3.2004. W.A.No. 628 of 2004 is filed challenging the interim order as well as the final

judgment.

12. On 16.1.2004 "A" party Nos.1 and 2 filed a petition for a direction to the Central Intelligence Officer, Subsidiary Intelligence Bureau,

Thiruvananthapuram to produce all the intelligence collected by him regarding the Marad carnage, and the details of the persons to whom the

intelligence reports were forwarded. The Commission issued notice on 16.1.2004 directing the Central Intelligence Officer, Subsidiary Intelligence

Bureau, Thiruvananthapuram to produce all the reports received or collected by him for the period from December, 2001 to 2.5.2003 in

connection with the Marad Incidents. The Joint Deputy Director, Subsidiary Intelligence Bureau, Thiruvananthapuram filed an affidavit before the

Inquiry Commission contending that the report contains materials pertaining to the affairs of the State and the file contains other letters and

communications of the Head Quarters as well as other offices which are of secret nature. It was also contended that the documents concerned

relate to the question of public policy and they cannot be revealed. Those documents are official records pertaining to the affairs of the State and

hence are privileged documents as contemplated u/s 123 of the Indian Evidence Act and the disclosure of the information will compromise the

source of information of the Intelligence Bureau. It was also contended that the reports on Marad are not confined to the Marad incident alone but

are compiled intelligence reports collected from various channels by different officers relating to other matters also. It was further contended that

the Intelligence Bureau co-relate other incidents also to find out whether the incident concerned was by chance or a pre-planned action having a

bearing on the security of the State itself and therefore the reports collected are affairs of the State and are privileged, documents. There are

documents that forms part of a different category seeking protection not as state document as political or strategic, but require protection on the

ground that "candour" must be ensured. It was contended that if the contents of the reports are disclosed it will go against the interest of the public

and the nation besides compromising the source of information.

13. The Commission of Inquiry by order dated 16.2.2004 overruled the privilege claimed by the Joint Deputy Director, Subsidiary Intelligence

Bureau. The Commission of Inquiry took a view that the information required are not affairs of the State, but pertains to only a law and order

question and in respect of such reports no privilege could be claimed. It is also found that the law does not contemplate to withhold production of

document even for the perusal by the Commission. It is further clarified that any document containing any other information touching the source of

information, name of informers, intelligence staff and of such other secret information concerning the affairs of the State and not relevant for the

enquiry will not be disclosed to anybody. Challenging that order the Joint Deputy Director, Subsidiary Intelligence Bureau filed W.P.(C) No. 6259

of 2004.

14. The learned Single Judge by interim order dated 23.2.2004 directed the Joint Deputy Director to produce the intelligence report and

information collected pertaining to Marad from December, 2001 to May, 2003 before the Commission for perusal, screening and for forwarding

report to this Court as done in W.P.(C) No. 5006 of 2004 filed by the Director General of Police and others. It was further directed that the

Intelligence Agency will depute a person to be present while the Commission peruses the reports and the Commission will classify the information

between publishable and items immune from publication and will forward a report to this Court. The Commission of Inquiry was directed not to

publish any intelligence information until further orders. Challenging that interim order the Joint Deputy Director, Subsidiary Intelligence Bureau filed

W.A.No. 518 of 2004.

15.W.A.No. 518 of 2004 was heard and admitted. The learned Advocate General was requested to assist this Court in W.A.No. 518 of 2004.

In the meanwhile, W.P.(C) No. 6259 of 2004 was also posted along with the Writ Appeal.

16. The Joint Deputy Director filed I.A.No. 1125 of 2004 seeking Special Leave to challenge the judgment passed in W.P.(C) No. 5006 of 2004

filed by the Director General of Police and others. Leave was granted and W.A.No. 705 of 2004 was filed by the appellant in W.A.No. 518 of

2004 challenging the final judgment passed in the W.P.(C) No. 5006 of 2004.

17. Since a common questions of fact and law arise in all these Writ Appeals and the Writ Petition, the three Writ Appeals and the Writ Petition

were heard together and disposed of by a common judgment.

18. The Additional Solicitor General Sri. K.K. Sud appearing for the appellant in W.A.No. 518 of 2004 and W.A.No. 705 of 2004 has argued

that the procedure adopted by the Commission of Inquiry is illegal and improper. It is argued that there is no plaintiff or defendant, no prosecutor

or accused; there are no pleadings defining issues to be tried, no charges, indictments, or depositions and as such there is no adjudication

warranting a judgment or order which will be binding and enforceable. It is also argued that the function of the Commission is to make a fair fact

finding enquiry subscribed by the terms of reference and not to embark upon a roving enquiry. It is further argued that the Commission made a

fundamental mistake of impleading persons and organisations as parties to the proceedings and there is no provision for arraying individuals or

organisations as parties.

19. Sri. K.K. Sud relied on the decision reported in Kehar Singh and Others Vs. State (Delhi Administration), , in which it was held as follows:--

237. The Commission under our Act is given the power to regulate its own procedure and also to decide whether to sit in camera or in public. A

Commission appointed under the Act does not decide any dispute. There are no parties before the Commission. There is no lis. The Commission

is not a Court except for a limited purpose. The procedure of the Commission is inquisitorial rather than accusatorial.....

It is true that the Commission is not expected and indeed not competent to finally adjudicate upon any issue or charge or pronounce any judgment

or order binding and enforceable. Its function is only to inquire and submit a report to the appropriate Government.

20. The Commissions of Inquiry Act was enacted in the year 1952 to provide for appointment of Commission of Inquiry. Section 3 of the

Commissions of Inquiry Act confers power to the appropriate Government to appoint a Commission of Inquiry for the purpose of making an

enquiry into any definite matter of public importance if it is of opinion that it is necessary to do so. Section 4 of the Act provides that the

Commission shall have certain powers of a Civil Court, while trying a suit under the Code of Civil Procedure, in respect of the matter enumerated

in that Section. Section 5 deals with additional powers of Commission. Section 6 of the Act grants immunity to any person who files statement

before Commission from any civil or criminal proceedings. Section 8 of the Act deals with the procedure to be followed by the Commission. The

Commission is given power to frame its own Regulations to regulate the procedure. Section 8-B provides that persons likely to be prejudicially

affected are to be heard. Section 8-C deals with right of cross-examination and representation by legal practitioner. Section 12 of the Act confers

power on the appropriate Government to make rules to carry out the purposes of the Act.

21. In exercise of the powers conferred by Section 12 of the Commissions of Inquiry Act the Government of Kerala had framed "Kerala

Commission of Inquiry Rules, 1958". The rules came into force with effect from 28.3.1958. Rule 14 of the said Rules provides that the

Commission may, determine the party or parties, if any, to the enquiry. Rule 14, 15 and 16 are relevant and read as follows:

14. The Commission may, determine the party or parties, if any, to the inquiry.

15. The Commission may, on application made to it on that behalf, if it considers expedient so to do, allow any person to enter appearance as a

party or as an additional party.

16. No person other than a party shall have the right to produce evidence.

A reading of the Rule 14, 15 and 16 of the Rules shows that the Commission has power to determine the party or parties, if any, to the enquiry.

The Rules were framed as early as in the year 1958. The Rules are not challenged in the Writ Petition. In the Writ Appeal also there is no challenge

against the Rules. It is to be noted that Section 8 of the Commissions of Inquiry Act confers power on the Commission of Inquiry to regulate its

own procedure. So the Commission has got every power and right to regulate its own proceedings. It is pointed out by the Counsel for the

Commission that the Commission had taken a decision on 4.12.2003 to classify various persons and organisations based on the points raised in the

statements filed before it into different groups.

22. The book "Commentaries to Commissions of Inquiry Act, 1952" written by Sri. K.A. Ramasubramaniam (first edition) contains the

Regulations or Procedure framed by Sarkaria Commission of Inquiry (Appendix page 125). Clause 11 of the Regulation is relevant. It reads as

follows:

11. The parties/persons filing an affidavit may file seven spare copies thereof so that they may be exchanged between the parties.

Clause 14 of the Regulations provides that no party will have the right to insist on oral examination of any deponent of an affidavit. Clause 15

provides that in case oral evidence is recorded, cross-examination shall be allowed to all parties and persons as indicated in Section 8C of the Act.

A reading of the Regulations framed by Sarkaria Commission shows that a Commission of Inquiry appointed by the Central Government also has

got power to classify different persons or institutions as parties for the convenience of the conduct of the proceedings. So there is absolutely no

merit in the argument of the learned Additional Solicitor General that the Commission committed a fundamental mistake by arraying parties to the

proceedings. Of course the respondent Commission of Inquiry could have framed its own Regulations regarding procedure such as office hours,

the language to be followed, etc. If such regulations were framed and published, it would have given a clear picture. But that does not mean that

there is any illegality in the procedure followed by the Commission. Sri. P. Hari, the counsel for the Commission submitted that the Commission

had issued specific orders before hand regarding the procedure to be followed in the inquiry proceedings.

23. The learned Additional Solicitor General has argued that the appellant is not aware who are "A" party Nos.1 and 2 and the nature of the

information required by them. It is argued that the appellant was not served with a copy of the petition. It is also contended that the Commission of

Inquiry had elicited certain details from the State Intelligent Department about the incident by way of questionnaire put to them. It is contended that

the law and order is the State subject and the scope of enquiry is limited to enquire into the law and order situation which is entirely in the realm of

the State administration. It is argued that the State Intelligence Unit is impleaded as a party in the proceedings but the appellant is not a party. It is

contended that hence there is wide difference between the claims made by the State Intelligence and the appellant.

24. Ext.P1 produced in W.P.(C) No. 6259 of 2004 filed by the appellant is a notice issued by the Secretary in pursuance of an order passed by

the Commissioner of Inquiry. Though Ext.P1 is captioned as a notice in fact and substance it is nothing but a summons issued by the Commission

calling upon a witness to produce documents. The Central Rules as well as the State Rules confer power on the Commission to issue summons to

a person to produce documents or to give oral evidence or for both. Rule 3 of the Rules confers power on the Commission to issue summons to

persons whose attendance is required either to give evidence or to produce documents. Rule 4 prescribes the manner in which summons are to be

issued. Rule 7 deals with the manner of service of summons on the persons. Rule 5 and 6 of the Rules deals with the production of documents

alone. Rule 5 and 6 of the Kerala Commissions of Inquiry Rules, 1958 read as follows:

5. A person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce

a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to

produce the same.

6. A summons to produce documents may be for the production of certain specified documents or for the production of all documents of certain

description in the possession or power of the person summoned.

The Central Government also framed Commissions of Inquiry (Central) Rules, 1972. Rule 4 of the said Rules deals with issue and service of

summons. Rule 5 deals with procedure of Inquiry.

25. Ext.P1 in W.P.(C) No. 6259 of 2004 was signed by the Secretary in pursuance of an order passed by the Commission of Inquiry. The

appellant was directed to produce the documents on or before 24.1.2004. The nature of the documents required to be produced were ""all the

reports received or collected by the witness for the period from December, 2001 to 2.5.2003 in connection with the Marad incident"". It is

evidently clear that the summons was issued for production of all documents of a specified description in the possession or power of the person

summoned. Ext.P1 was sent by registered post with acknowledgment due. So, though Ext.P1 was styled as notice, it is a summons issued to a

witness to produce documents alone u/s 4(a) of the Act read with Order XVI Rule 6 of the Code of Civil Procedure.

26. The appellant in W.A.No. 518 of 2004 has argued that the documents sought to be produced are not specified report and the period shown is

vague. It is argued that the Central Intelligence Department is not dealing with law and order situation of any State, but its primary duty is to collect

information touching national security and strategic intelligence which is part of the Union Government activity. It is also argued that the report

relates to public policy which will seriously jeopardize the role of the appellant as a nodal agency in countering terrorism. It is also argued that the

reports which the Commission has directed to produce may contain secret information pertaining to the State policy and not necessarily the subject

specific to the Marad incident.

27. The file maintained by the appellant may contain various matters. But the Commission has not directed the witness to produce the entire file or

all reports in its entirety. The direction in the summons was to produce specific reports received or collected in connection with the Marad incident

alone. There is no need to produce the entire file. It is not even necessary to produce the full text of the reports also. A report received on a

particular day may contain various other matters dealing with the affairs of the State. In such cases the appellant need only to produce that part of

the report which deals with the Marad incidents. So there is no basis in the apprehension made by the Additional Solicitor General that by

producing the report, various sensitive matters which are not connected with the Marad incident will also be revealed.

28. There is no merit in the argument that the appellant was not served with a copy of the petition. It is not necessary to inform the appellant what

were the averments contained in the affidavit filed in support of the petition filed by any of the parties to the proceedings or what are the contents of

the reports filed by the State Police. The appellant was summoned as a witness to produce certain specified documents alone. A witness is not

interested in the outcome of the enquiry. The documents were directed to be produced before the Commission for its perusal. In the order itself it

was stated that the documents will be perused by the Commission of Enquiry alone, that too in the presence of a responsible officer deputed by the

appellant. It is further stated that the Commission will identify the documents which contain the reports regarding the violence at Marad and that

any information which is not relevant for the enquiry or the source of information or the names of informants or intelligence staff or any other secret

information concerning the affairs of the State will not be disclosed to anybody. The order shows that Commission had taken every possible

precaution to keep the secrecy of the matters touching the affairs of the State.

29. The action of the appellant straight away approaching this Court challenging the notice is not proper. Section 123 of the Evidence Act deals

with procedure to be followed in claiming privilege. Section 5(2) of the Commission of Enquiry Act makes the provisions of Section 123

applicable to the proceeding before the Commission. The appellant ought to have produced the reports called for and then claimed privilege. If no

such reports were received, the appellant could have filed an affidavit stating that fact. The stand taken by the appellant that since it is a Central

Agency, it is not bound to produce the documents before the Commission appointed by the State and furnish the details called for is also wrong.

The Commission of Inquiry has got power to summon any witness from anywhere in India u/s 4(a) read with Order XVI Rule 6 of the Code of

Civil Procedure.

30. It is argued that the powers conferred on the Commission of Inquiry can be exercised only against the parties. It is also argued that since the

appellant is not a party to the proceedings it shall not be placed on par with the State Intelligence Department. These arguments are based on the

assumption that some of the powers conferred on the Commission can be exercised only against the parties to the proceedings in view of the

provisions of the Code of Civil Procedure. In Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, , it was held that an order under Order

XI can be passed only against a party to the proceeding. It was held as follows:-

The returning officer is not a party to an election petition and an order for production of the ballot papers cannot be made under Order XI Code

of Civil Procedure"".

The Apex Court was considering the power of the Election Tribunal to issue interrogatories under Order XI of the C.P.Code. There cannot be any

dispute regarding that point. The Commission of Enquiry is conferred with not only the powers under the provisions of C.P.Code. It has got other

powers also. In addition to the powers conferred on the Commission to issue summons to produce a document u/s 4(a) read with Order XVI Rule

6 of the CPC the Commission of Enquiry has got powers u/s 5(2) of the Act to require any person to furnish required information also. So there is

no merit in the contention that the appellant stands on a different footing. The Commission has got power to add the appellant also a party in view

of the powers conferred on it under the Rules framed under the Act and then pass orders such as the one contemplated under Order XI Rule 1 of

the C.P.Code.

31. The learned Additional Solicitor General has argued that in view of the provisions of Rule 9 of the Rules of Business made u/s 40(2) of the

Government of India Act, 1935 the Director of Intelligence Bureau is entitled to decline to give any information that he judges it necessary to

withhold. Iris argued that Article 77(3) of the Constitution of India confers power on the President to make rules for the more convenient

transaction of the business of the Government of India. It is pointed out that though Article 395 of the Constitution of India repealed Government

of India Act, the Rules of Business framed u/s 40(2) of the Government of India Act are still in force in view of the provisions of Article 372 of the

Indian Constitution. Mr. Sud also relied on the provisions contained in Section 3 of the Unlawful Activities (Prevention) Act, 1967 and the Proviso

to Rule 5 of the Rules framed under the above said Act. He also invited our attention to Section 18 of the Atomic Energy Act, 1962.

32. Now we shall consider how far the privilege claimed by the State as well as the Central Intelligence Officer is sustainable. At the outset I may

state that the State Police had produced the records which, according to them, are in their possession regarding the Marad incidents. The

Commission of Inquiry had already perused the same in pursuance of an interim order passed by the learned Single Judge. But the Joint Deputy

Director who is the appellant in W.A.No. 518 of 2004 did not produce the documents, but approached this Court challenging the order passed by

the Commission of Inquiry.

33. The power of the Commission to summon document and examine witnesses is conferred by Sections 4 and 5 of the Commissions of Inquiry

Act. Section 4 of the Act reads as follows:

4. Powers of Commission.-- The Commission shall have the powers of a Civil Court, while trying a suit under the Code of Civil Procedure, 1908

(5 of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing Commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

Section 5 reads as follows:--

5. Additional powers of Commission.--

(1) Where the appropriate Government is of opinion that, having regard to the nature of the inquiry to be made and other circumstances of the

case, all or any of the provisions of Sub-section (2) or Sub-section (3) or Sub-section (4) or Sub-section (5) should be made applicable to a

Commission, the appropriate Government may, by notification in the Official Gazette, direct that all or such of the said provisions as may be

specified in the notification shall apply to that Commission and on the issue of such a notification, the said provisions shall apply accordingly.

(2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the

time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the

subject-matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of

Section 176 and Section 177 of the Indian Penal Code, 1860 (45 of 1860).

(3) The Commission or any Officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any

building or place where the Commission has reason to believe that any books of account or other documents relating to the subject-matter of the

inquiry may be found, and may seize any books of account or documents or take extracts or copies therefrom, subject to the provisions of

Sections 102 and 103 of the Code of Criminal Procedure, 1898 (5 of 1898), in so far as they may be applicable.

(4) The Commission shall be deemed to be a Civil Court and when any offence as is described in Section 175, Section 178, Section 179, Section

180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of the Commission, the Commission may, after

recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1898 (5 of 1898),

forward the case to a magistrate having jurisdiction to try the same and the magistrate to whom any such case is forwarded shall proceed to hear

the complaint against the accused as if the case had been forwarded to him u/s 482 of the Code of Criminal Procedure, 1898.

(5) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian

Penal Code (45 of 1860)".

Section 4 confers on the Commission the powers of a Civil Court, while trying a suit under the Code of Civil Procedure. Such powers can be

exercised only in accordance with the relevant provisions of the Code of Civil Procedure. Section 5 deals with additional powers which may be

conferred on the Commission by the appropriate Government. Those powers can be exercised only if they are specifically conferred by the

appropriate Government. In the case at hand the provisions of Sub-sections (2) to (5) of Section 5 of the Act are made applicable. So the

Commission is having power to require a person to furnish information on such points or matters as in the opinion of the Commission may be useful

or relevant to the subject-matter of the enquiry. Section 5(2) provides that the person is bound to furnish such information subject to the privilege

that he may claim. Any person so required is legally bound to furnish such information within the meaning of Sections 176 and 177 of the Indian

Penal Code.

34. The power of the Commission to direct a witness to produce documents and the nature and scope of privilege such a person can claim came

up for consideration before the Supreme Court on a number of occasions. In *The State of Punjab Vs. Sodhi Sukhdev Singh*, a Constitution

Bench consisting of five Judges had considered the scope of Sections 123 and 162 of the Indian Evidence Act. It was held as follows:

Reading of Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the

disclosure of the document in respect of which privilege is claimed u/s 123. 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 relate to an affair of State u/s 123 or not.

It was further held that if the Court comes to the conclusion that the document relates to affairs of State it should leave it to the head of the

department to decide whether he should permit its production or not. The matter was again considered by another Constitution Bench consisting of

five Judges in The State of U.P. Vs. Raj Narain and Others, . The Apex Court considered the principle laid down in Sodhi Sukhdev Singh"s case

and various other decisions and held as follows:

An objection u/s 123 is raised by an affidavit affirmed by the Head of the Department. The Court may also require a Minister to affirm an

affidavit. That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is

satisfied with the affidavit evidence that the document should be protected in public interest from production the matter ends there. If the Court

would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court. Objection as to

production as well as admissibility contemplated in Section 162 is decided by the Court in the enquiry.

It was further held as follows:

If the Court found on inspection that any part of the document was innocuous in the sense that it did not relate to affairs of State the Court could

order disclosure of the innocuous part provided that would not give a distorted or misleading impression. Where the Court orders disclosure of an

innocuous part the Court should seal up the other parts which are said to be noxious because their disclosure would be undesirable.

The matter again came up for consideration before a Constitution Bench consisting of seven Judges in S.P. Gupta Vs. President of India and

Others, . It was held as follows:

Though public interest lies at the foundation of the claim for protection against disclosure enacted in Section 123, Evidence Act, 1872, the claim

which comes into conflict with it is not private interest of the litigant in disclosure but the public interest in fair administration of justice. Court has to

balance these two public interests and decide which aspect predominates in each particular cases before it.

It was further held that the final decision in regard to the validity of the objection against disclosure raised u/s 123 of the Indian Evidence Act will

always be with the Court by reason of Section 162. The Apex Court relied on the decision reported in Raj Narain"s case (supra) and overruled

some of the principles laid down in Sodhi Sukhdev Singh "s case (supra). Regarding the right of the Court to inspect the document the Apex Court

held as follows:

So even where a claim for immunity against disclosure of a document is made u/s 123, the Court may in an appropriate case inspect the document

in order to satisfy itself whether its disclosure would, in the particular case before it, be injurious to public interest and the claim for immunity must

therefore be upheld. Of course this power of inspection is a power to be sparingly exercised, only if the Court is in doubt, after considering the

affidavit, if any, filed by the minister or the secretary, the issues in the case and the relevance of the document whose disclosure is sought.

So it was held that an objection claiming immunity should be raised by an affidavit affirmed by the Head of the Department. In *R.K. Jain v. Union*

of India and Ors., (1993) 4 SCC 199, the Apex Court had held as follows:

By operation of Section 162 of Evidence Act the final decision in regard to the validity of an objection against disclosure raised u/s 123 would

always be with the Court.

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The contention, therefore, that the claim of public interest immunity claimed in the affidavit of the State Minister for Finance and the Secretary

needs privacy and claim for immunity of State documents from disclosure is unsustainable.

It was further held as follows:

Confidentiality, candour and efficient public service often bear a common mask. Lord Keith in *Burmah Oil*'s case observed that the notion that

any competent or conscientious public servant would be inhibited in the candour of his writings by consideration of the off-chance that they might

have to be produced in litigation is grotesque. The possibility that it impairs the public service was also nailed. This Court in *S.P. Gupta* 's case

also rejected the plea of hampering candid expression of views or opinion by constitutional functionaries and bureaucrats.

The Apex Court also held as follows:

The factors to decide the public interest immunity would include (a) where the contents of the documents are relied upon, the interests affected by

their disclosure; (b) where the class of documents is invoked, whether the public interest immunity for the class is said to protect; (c) the extent to

which the interests referred to have become attenuated by the passage of time or the occurrence of intervening events since the matters contained

in the documents themselves came into existence; (d) the seriousness of the issues in relation to which production is sought; (e) the likelihood that

production of the documents will affect the outcome of the case; (f) the likelihood of injustice if the documents are not produced."" "

It was also held as follows:

There is a discernible modern trend towards more open Government than was prevalent in the past. In its judicial review the Court would adopt in

camera procedure to inspect the record and evaluate the balancing act between the competing public interest and administration of justice.

The matter again came up for consideration before the Supreme Court in *Dinesh Trivedi, M.P. and Others Vs. Union of India (UOI) and Others*, .

The Apex Court has held that the citizens have a right to know about the affairs of the Government. But in transactions which have serious

repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not

publicly disclosed or disseminated. The matter again came up for consideration in *People's Union for Civil Liberties and Anr. v. Union of India* and

Ors. AIR 2004 SCW 379. The Apex Court after an exhaustive survey of various decisions held that the Central Government is entitled to

withhold certain information u/s 18 of the Atomic Energy Act, 1962.

35. Thus the law on the point is very clear. There should be a proper affidavit sworn to by the Head of the Department claiming privilege. In

appropriate cases if the Court feels necessary, it can ask for additional affidavit. The Court can also examine the documents in camera. Thereafter

the Court should consider the claim of public interest made by the claimant and take a decision in the matter. Since the Commission in this case has

been conferred with the powers u/s 4 and Sub-sections 2 to 5 of Section 5 of the Commissions of Inquiry Act, 1952, the Commission can

exercise the above mentioned powers of a Civil Court in the manner stated above.

36. It is argued that any person can be appointed as the Commission of Inquiry and the Commissioner need not be a serving or retired Judicial

Officer. It is argued that in case it is found that the Commission of Inquiry has got unbridled power to direct production of any document, it will

lead to a dangerous situation. There is no merit in that argument. In the absence of a notification u/s 5(2) of the Act the Commission can exercise

the powers conferred on it u/s 4 of the Act. It is for the appropriate Government to choose the person considering the seriousness of the issue

involved. After appointing a person as the Commissioner neither the State nor its officers can be allowed to contend that the Commission shall not

be allowed to peruse its records.

37. The appellant in W.A.No. 518 of 2004 has produced a copy of the affidavit filed before the Commission of Inquiry claiming privilege. The

appellant is the Joint Deputy Director, Subsidiary Intelligence Bureau, Trivandrum. Admittedly, he is not the Head of the Department of the

Intelligence Bureau. The affidavit itself shows that the same was filed only as per the directions of the Headquarters of the Intelligence Bureau.

38. The reasons stated by the deponent in the affidavit for claiming privilege are the following:

(i) The report contains material pertaining to the "affairs of the State" and the file contains other letters and communications of the Head Quarters

as well as other offices which are of secret nature.

(ii) The documents concerned also relate to the question of public policy and they cannot be revealed. These documents are official records

pertaining to the "affairs of the State" and hence are privileged documents as contemplated u/s 123 of the Indian Evidence Act.

(iii) The disclosure of the information will compromise our source of information.

Apart from using the expression "affairs of the State" no other details are given in the affidavit. The affidavit contains extracts from a number of

Indian as well as English decisions. The mere assertion that the documents sought to be produced are documents dealing with the "affairs of the

State" is not sufficient to hold that those documents are privileged documents. Necessary details which will help the Commission to decide the

issue ought to have been stated in the affidavit. The affidavit claiming privilege is not sworn to by the proper person and it does not contain

necessary details and particulars. So the Commission of Inquiry was justified in rejecting the claim of privilege put forward by the appellants in

W.A.No. 518 of 2004.

39. According to the appellant in W.A.No. 518 of 2004, the reports the Intelligence Bureau collected or received contain various matters touching

the security of the State also. So there is every possibility that such reports may contain very sensitive information which cannot be made public.

The Commission is directed to enquire into and report the following aspects also:--

i. Whether there was involvement of any external or internal organization or organizations in the planning and execution of the incidents; and

ii. Whether there was any lapse on the part of the police or administrative machinery in taking timely preventive and remedial action and in dealing

with the situation.

The only agencies who could provide useful information and supply materials to the Commission to find out whether there was involvement of any

external or internal organization or organizations in the planning and execution of the incidents are the State Police as well as the Intelligence

Bureau. As rightly observed by the learned Single Judge, if those two agencies are allowed to withhold such information and materials, the

Commission of Inquiry will not be able to collect any material and submit a report regarding the involvement of any organization. Likewise, whether

the Intelligence Bureau had informed the State about the possibility of any such incident and whether the State Police or the administrative

machinery had ignored the warning etc. can be found out only from the Intelligence Bureau.

40. The learned Single Judge while disposing of W.P.(C) No. 5006 of 2004 opined that the Commission is free to disclose the reports to all

parties appearing before the Commission after removing or erasing the names of persons involved. But the Commission need only find out whether

there was involvement of any external or internal organization in the incidents. The Commission can take note of that fact and include the same in

the report. The State Police had already furnished the details. If the Intelligence Bureau had collected any information regarding the involvement of

any external or internal organization, in the incidents it is bound to produce such reports before the Commission. The Commission is not concerned

about the source from which the Intelligence Bureau collected that information, or the correctness of the information. In this particular case the

summons was issued for production of documents alone. So the question of adducing oral evidence or cross-examination of any witness does not

arise at present. In the absence of witness giving oral evidence, there is no right for cross-examination to any other parties.
Section 8C of the

Commissions of Inquiry Act confers right of cross-examination to the persons mentioned therein only if the Commission records the oral evidence

of a witness. Of course if any of the parties or the Commission proposes to orally examine the witness the other parties have got a right to cross-

examine the witness also. There is no need to disclose the contents of the reports to any of the parties appearing before the Commission. The

correctness or otherwise of the information is not a matter to be considered by the Commission. The only question is whether there was any report

regarding the involvement of external or internal organization and whether the agencies of the State had taken action at the proper time. If the

Intelligence Bureau had passed on any information to the State in time, it is for the State Police and District Administration to explain what action

they had taken in the matter on receipt of such information.

41. For the purpose of preparing the report the Commission requires information as to whether there was any involvement of any external or

internal organization. For getting such information the Commission can either make the Intelligence Bureau also a party to the proceeding and serve

questionnaire/interrogatory calling upon them to furnish the required information or issue summons to them to produce the reports, if any, or such

portion of the reports, which they had received in respect of the incidents which took place at Marad. If no such reports were received, it is open

to the appellant to file an affidavit to that effect. The appellants are bound to produce the documents summoned before the Commission subject to

the claim of privilege under the relevant provisions of the Evidence Act. If any privilege is claimed that issue shall be decided first, if necessary,

even by perusing the records in camera. If the claim for privilege is upheld, the information received by such perusal shall not be disclosed even in

the report of the Commission and the contents of those reports/documents shall not be disclosed either to the parties or to any counsel.

42. The appellants in W.A.No. 628 of 2004 had produced the reports, which according to them, are in their possession in connection with the

incidents. The Commission has already perused those reports. To that extent the Writ Appeal has become infructuous. Hence the Commission can

use the information received from such perusal for preparing the report.

43. The observations made by the learned Single Judge regarding the recalling of the Commission or the Commission relinquishing the assignment

were unnecessary and unwarranted and hence they are liable to be expunged.

44. In the result, the Writ Appeals and the Writ Petition are disposed of in the following manner: --

(1) W.A.No. 518 of 2004, W.A.No. 705 of 2004 and W.P.(C) No. 6259 of 2004.

(a) The appellant/petitioner shall produce before the Commission the reports or such "" portion of the reports which the appellant had collected or

received, regarding the communal tension prevailed in Marad area in Kozhikode, during the period from December, 2001 till May, 2003 in a

sealed cover within three weeks from today. It is open to the appellant/petitioner to raise any claim of privilege by filing necessary and proper

affidavit. If any privilege is claimed that question shall be decided first by the Commission and then proceed with the enquiry in accordance with

law. It will be open to the appellant to depute a responsible officer of the Intelligence Bureau to be present and to give any clarification to the

Commission at the time of perusal of the documents by the Commission. The Commission shall not disclose the contents of the documents either to

the parties or to any counsel. If the claim of privilege is upheld by the Commission, any information contained in the documents in respect of which

claim is upheld shall not be used or discussed in the report of the Commission.

(b) It is open to the Commission to add the Intelligence Bureau as a party to the enquiry and to serve on them interrogatory or questionnaire,

requiring them to furnish specified information. If such interrogatory or questionnaire is, served on the appellant, they shall furnish the required

information in a sealed cover and the Commission can examine the answers in accordance with law.

(ii) W.A.No. 628 of 2004.

(a) The finding of the learned Single Judge in the impugned judgment that the Commission is free to disclose the reports to all parties appearing

before the Commission after removing or erasing the names of persons involved is hereby set aside. The Commission of Inquiry shall not disclose

the contents of any of the documents produced by the Police to any of the parties or their counsel. However, as stated earlier in this judgment, the

Commission can use any information received from the said documents, for conducting further enquiry and for preparing its report.

(b) The following observations of the learned Single Judge in the impugned order shall stand expunged:

If the Government claims complete immunity for the entire intelligence information, then obviously the Commission cannot effectively enquiry into

the main question referred to it and discussed above and it would be better for the Government to recall the Commission as otherwise the purpose

will be defeated. If the Commission feels that the State and its agencies are not furnishing Intelligence information and materials without which the

Commission cannot enquire into and report on the specific questions it has to answer to the Government in its report, it will be open to the

Commission to consider relinquishing the assignment instead of proceeding with an empty formality of submitting a report which will not serve the

purpose for which the Commission is constituted.