(1984) 10 BOM CK 0031

Bombay High Court

Case No: Criminal Revision Applns. No''s. 407 of 1982 and 608 of 1983

State of Maharashtra		APPELLANT
	Vs	
O.V. Pawar and others		RESPONDENT

Date of Decision: Oct. 12, 1984

Acts Referred:

- Penal Code, 1860 (IPC) - Section 500

Citation: (1987) 11 ECC 67

Hon'ble Judges: V.V. Vaze, J; V.S. Kotwal, J

Bench: Division Bench

Judgement

Vaze, J.

Does our law issue a tacit invitation to any spiteful or eccentric busybody, such as Mr. Frankland, in The Hound of the Baskervilles, to ransack the Statute-book, draw up for his own guidance a list of offences, and watch for breaches of them, sheltered by the assurance that his identity will never be revealed to his victims ? ..... Few situations in life are more calculated to arouse resentment in a person than to be told that he has been traduced, but cannot be confronted with his traducer. Such was the querulous note struck by Prof. Hanbury writing in (1952) 68 Law Quarterly Review at 181, 182.

2. In the same strain Onkar Vithal Pawar, a building contractor, of 34/4 Kacharewadi, Erandawane, Pune 4, applied to the Court of the Additional Chief Judicial Magistrate, First Class, Pune, to issue witness summons to the Commissioner of Income Tax, Pune, for production of complaints relatable to the tax affairs of Pawar received by the Commissioner between December 1978 and January 1979 or during any other period whether anonymous or otherwise together with the enquiry papers.

3. Pawar was occupying some portion of 34/4 Kachare Wadi, Erandawane, and Shantaram, Shamkant and Vithal Ambekar were occupying the remaining portion. Shantaram was a licenced surveyor and Shamkant and Vithal were his sons. The

Ambekar family belonged to the Brahmin caste while Pawar - a Maratha - had taken a Brahmin girl from Bhave family as his bride. Pawar feels that the grisly banner of casteism soured their relationships and Ambekar family started terrorising and tormenting the Pawars by scoffing and jeering at them and hurling abuses even at the children. Pawar learnt that Shantaram and his sons maliciously filed complaints to the Income Tax Department that Pawar is a prosperous contractor who often throws ostentatious dinners and is evading Income Tax. The Ambekars allegedly filed similar complaints to other law enforcement authorities which are not relevant for the present proceedings.

4. The Income Tax authorities made enquiries which however discreet have a tendency to spread by word of mouth in the neighbourhood. Pawar filed a complaint u/s 500 of the Indian Penal Code in the Court of the Judicial Magistrate, F.C. (Anti-corruption) against the Ambekars alleging that by supplying false information they have defamed him and sought production of the complaints made by Shantaram and his two sons.

5. G. Ramchandran, Secretary to the Government of India in Ministry of Finance, New Delhi, filed an affidavit before the Chief Judicial Magistrate, Pune, averring that as the Head of the Department he has considered each document and had come to the conclusion that the documents sought to be produced were in the nature of unpublished official records relating to the affairs of the State. He claimed that a disclosure of the documents would injure public interest as they constitute an important source of information for the Department to detect tax evasion cases. He further averred that if the Department is required to disclose the documents, an important source of information will be lost to the Department which would hamper work of realisation of revenue and preventing evasion thereof.

6. The learned Chief Judicial Magistrate negatived the objection raised by the Secretary in the Ministry of Finance, and directed the Income Tax Officer concerned to produce the documents as sought by the complainant. Against this order, Criminal Revision Application No. 407 of 1982 was filed and our learned Brother Sharad Manohar J., by his Order dated 28th November 1983 felt that a very important and delicate question of law relating to departmental privilege arose in the matter which should be examined by a larger Bench. That is how this revision application has come up before this Bench.

7. In no other field of adjectival law there has been such a cleavage of a judicial opinion as in the matter of privileges claimed by servants of the Crown in producing official documents. In the early days the secrets of the State were so zealously guarded that certain class of documents were never allowed to be taken out of the hands of Her Majesty''s confidential servants even though no objection was taken by Government Officer. (See Hennessy v. Wright (1888) 21 QBD 509. In Duncan v. Cammell Laird & Co. Ltd. (1942) 1 All ER 587 : the practice of the Courts to accept the statement of one of His Majesty''s ministers that production would be prejudicial to

the public interest was given a judicial imprimatur. An earlier Privy Council case of Robinson v. State of South Australia (1931) All ER Rep 333 : (1931) AC 704 in which the judicial committee remitted a case to the Supreme Court of South Australia with a direction that it was one proper for the exercise of Court''s power of inspecting documents in order to determine whether their production would be prejudicial to public welfare was disapproved in Duncan 1942 1 All ER 587. In spite of this disapproval, the Courts in Commonwealth countries continued to follow the principles of Robinson in preference to those of Duncan. (Canada : R. v. Snider (1953) 2 DLR 9; New Zealand : Corbett v. Social Security Commission (1962) NZLR 878; Australia : Bruce v. Waldron 1963) VLR 3.

8. Then came the celebrated case of Conway v. Rimmer (1967) 1 WLR 1031 in which Lord Denning in a powerful dissent refused to follow Duncan as respects non-production of a class of documents even for the inspection of the court and his dissent was upheld by the House of Lords (1968) 1 All ER 874 . Conway''s case had an echo in the judgments of our Supreme Court also. The State of Punjab Vs. Sodhi Sukhdev Singh, was overruled by what is commonly known as Judge''s case S.P. Gupta Vs. President of India and Others,

9. The legal and moral aspect of the methodology followed by fiscal authorities in assessing tax - a subject dear to many a man of business and one with which we are presently faced - arose in Alfred Crompton Amusement Machines Ltd. v. Commrs. of Customs and Excise (No. 2) (1972) 2 All ER 353. The Company used to manufacture machines and supply them to an associated company for sale to retailers and operators. They were paying purchase tax calculated on the basis of wholesale value of machines. Disputes arose regarding the method of calculation of tax and the Commissioners of Customs and Excise sought to fix the wholesale value of the machines after investigating the affairs of the tax payers relating to the purchase and sale of the machines. For that purpose they obtained information from the customers of the company. The Company sought production of those documents in a statutory arbitration that followed. Sir Louis Petch, the Chairman of the Board of Customs and Excise, filed an affidavit objecting to the production of the documents on the ground that their disclosure would be injurious to the public interest because (a) they disclose the instructions issued to officers conducting the investigation on behalf of the commissioners; (b) they disclose the methods of enquiry adopted by the commissioners in connection with this type of case; (c) they disclose or refer to the trading practices and valuation assessments of the traders competing with the company and (d) they contain information and comment based in part on information disclosed to the commissioners and documents and copy documents supplied to the Commissioners by third parties. Sir Louis further averred that -
"Documents of the classes in question may, and usually do, have to make reference both to the trading practices and valuation assessments of competing traders. Some of that reference may, and often does, contain information or comment which is in

one degree or another discreditable to some traders, but emanates from communications made by others of them; or such discreditable references may be made of and concerning the trader whose affairs are being investigated by members of his own staff. It is essential to the proper and efficient conduct of the investigatory work which the commissioners have to carry out in cases of the instant kind that they should be able to receive and test such communications made fully, frankly and in confidence. If it were to become known that disclosure of such communications could be compelled in circumstances such as the present, investigations would, in my view, be hampered by the unwillingness of members of the staff of the trader concerned, or of other traders under comparison, or the staff of such other traders, to give information, and the hesitation of the Commissioners'' own Officers to receive and comment on such information.

10. Forbes J. before whom the affidavit was filed said that the affidavit of the Chairman of the Central Board of Taxes meant that some of the information on which the Commissioners based their fair and impartial valuation consists of statements by third parties who will be prepared to make allegations behind another trader''s back but would be afraid to do so to his face. Forbes J. condemned this attitude of revenue in no uncertain terms :

"I find this alarming ..... It appears the for the last 30 years the commissioners may have conceived it to be their duty to base their valuations in part on the tittle-tattle of the market place. If so the sooner those sources of information are subjected to independent examination the better. The taxpayer who desires to challenge the commissioners'' valuation must pay to them the whole of the disputed tax as a prerequisite of obtaining a further review of what should be a fair and impartial opinion. No doubt this has deterred some, probably many, traders in the part from challenging the commissioners'' valuation. If purchase tax has, for the last 30 years, been collected from them by the use of such material as I have described I can only regard it as a shameful episode."

Forbes J. regarded the claim by the revenue as an astonishing one and dismissed it by saying :

"We are not living in the early days of the Tudor administration. I can imagine nothing more calculated to cause resentment against the public administration than to find that administration exacting from the citizen taxation based on secret and unchallengeable material."

11. In the Court of Appeal the order of Forbes J. was set aside and it was held that the claims made by the Commissioners of privilege were well founded, not on the ground of Crown privilege but because the documents were obtained by a party to a litigation in confidence. The Court of Appeal regretted that Forbes J. should have criticised revenue in the manner he did in his judgment.

12. The matter was taken to the House of Lords, Alfred Crompton Amusement Machines Ltd. v. Commissioners of Custom and Excise (1973) 2 All ER 1169, wherein the claim of privilege was upheld. It was observed that confidentiality is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the Court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance the one against the other. In case where the considerations for and against disclosure appear to be fairly evenly balanced, the courts should uphold the claim to privilege on the ground of public interest and trust the head of the department concerned to do what he could to mitigate the ill-effects of non-disclosure.

13. As regards the observation of Forbes J. who was impressed by the possible ill-effects of non-disclosure, Lord Cross felt; (at page 1185)

"he failed to appreciate how reasonable Sir Louis''s objections to disclosure were and dismissed them with the remark, ''we are not living in the early days of the Tudor administration''. I do not regard Sir Louis as a modern Cardinal Morton. His objections to disclosure were taken in the interests of the commissioners".

14. If the views of Forbes J. came for criticism by both the appeal courts, the views of Lord Lyndhurst L.C. expressed a century ago in Smith v. The East India Company (1841) 1 Phill 50 who refused to order production of correspondence between the Court of Directors and the Board of Control in a purely commercial suit were likewise questioned by Lord Reid in Conway v. Rimmer. (1968) 1 All ER 874 at 883 :

"We now know and Lord Lyndhurst''s political experience must have made him aware, however, that relations between the board and the Company were sometimes strained : so it is just possible that disclosure of non-political documents might have afforded political ammunition to those who criticised this system of Government".

15. The "political experience" to which Lord Reid alludes probably has reference to Lord Lyndhurst''s (1772 - 1863) long innings as a parliamentarian upon whom Duke of Wellington, Sir Robert Peel and Lord Grey used to lean so greatly for advice and assistance, that, next to their, his was the most potential voice in the cabinet.

16. The frontiers of public interest litigations having covered newer fields, the expression "Crown privilege" suffers from a certain degree of obsolescence and is being replaced by "public interest privilege." The classical concept that "public interest" can be best guarded only by government functionaries does not hold the field any longer and any public spirited individual can, and often does, move the court for redress on issues of public importance. In D v. National Society for the Prevention of Cruelty to Children, (1977) 1 All ER 589 the privilege claim was made

not by a department of the Government, but by a society incorporated by an Act of Parliament, whose purpose included the prevention of public and private wrongs to children and the taking of action to enforce laws for the protection of children. The Society''s work was dependent on receiving prompt information from members of the public of suspected child abuse.

17. Upon the information supplied to the Society that the respondent''s 14 month old daughter had been ill-treated having proved to be untrue, the child''s mother wanted to know the name of the Society''s informant for the purpose of bringing proceedings against the informant. The Society''s claim for privilege regarding the names of the informant was dismissed by the master. The trial judge reversed the Master''s order. On further appeal, the Court of Appeal (1976) 2 All ER 993 re-instituted the Master''s order on the ground that the power to refuse disclosure of information to a party to proceedings on the ground of public interest, was limited to cases where the application was for disclosure by a department of Central Government. It was argued in the Court of Appeal that if names of informants are revealed then people will be put off providing information. The public interest in the prosecution of a person''s ill treating children depends on the provision of this information and outweighs the public interest in its disclosure. Scarman L.J. repelled this argument (1978) AC 171 :

"..... it has to be accepted that some may be deterred from giving information to the NSPCC if Crown Privilege cannot be claimed. This is a loss which could be damaging to the public interest. But the damage has to be considered in a wider context even than the welfare of children. What sort of society is the law to reflect ?

If it be an open society, then men must be prepared to face the consequences of giving information to bodies such as the NSPCC protected, as they will be, by the promise of the NSPCC not to disclose their sources of information save when compelled by law in subsequent legal proceedings to do so, and by the defence of qualified privilege available to them in the event of a defamation suit. If it be a society in which as a general rule informers may invoke the public interest to protect their anonymity, the law may be found to encourage a Star Chamber world wholly alien to the English tradition."

18. This argument of Star Chamber bears a close resemblance to that put forward by Forbes J. in Amusement Machine Company''s case that information regarding tax-payers'' affairs should not be collected behind his back. As in that case, here also the House of Lords refused to order disclosure by analogy with the rule relating to the immunity accorded to police informants, the public interest required that those who gave information about child abuse to the society should be immune from disclosure of their identity in legal proceedings since, otherwise, the society''s sources of information would dry up. (1977) 1 All ER 589.

19. The people''s "right to know" was epitomised in the U.S.A. Freedom of Information Act in 1966 making way for an open government but the American experience about the working of the act is none too happy. Barbara Keehn, the Freedom of Information chief has this to say about constant efforts by companies to acquire trade secrets of competitors :

"it is a form of industrial espionage, except that they do it under the law. We get very few requests from journalists and consumer groups. That is too bad, because that is who the law was written for".

(Time, December 19, 1977 Pp. 23-24)

20. A congressional sub-committee was considering the question of amendment to the Freedom of Information Act so as to conserve secrecy in government functioning and Hon''ble Alfonse M. D''Amato in his testimony give on September 24, 1981 (Congressional Digest February 1982, page 42) wants to put the clock back and quotes generally Washington :

"The necessity of procuring good intelligence is apparent and need not be argued any further. All that remains for me to add is that you keep the whole matter as secret as possible, for upon secrecy success depends in most enterprises of this kind, and for want of it, they are generally defeated however well-planned."

21. The Supreme Court, in the Judge''s case, has delved upon the concept of an open Government :

"The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Art. 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."

22. Though strong condemnatory words like "Star-Chamber", "shameful episode", "early days of Tudor administration" have sometimes been used to dismiss the claim of privilege, the courts have finally veered around to the view that it is essentially a matter of balancing of the two public interests involved and to see whether the public interest in disclosure will outweigh the larger public interest in preserving the secrecy of the document.

23. "It was as true as taxes is and nothing is truer than them", has lost none of its relevance in modern times. The Indian record of debt-servicing in the International Monetary Circles - unlike that of some Latin American countries - has been exemplary and that can only be maintained by proper resources mobilisation. A nation, like an army, marches on its stomach and not on brave words. Once the imp

of financial indiscipline resulting from part realisation of taxes gets out of the bottle, no amount of jugglery by the whiz kids of North Block or Mint Road will put the imp back in place. In a vast and variegated subcontinent like India with a 5000 kilometers long coastline and an insatiable hunger for gold and other luxury articles, it is well nigh impossible to police every kilometer of the entire coastline and frisk every fisherman or to wade through the account books of each and every businessman with a fine toothed comb. Operational costs would far exceed the receipts. Those charged with the duty of collecting taxes will have necessarily to depend upon intelligence and if the names of the informants are to be disclosed, this source of information will dry up. Same is true of groups of public spirited selfless men and women who are devoting their time and energy to identify and fight the social evils like child-abuse, dowry demands, bride-burning etc.

24. Apart from the impracticability of such disclosure, in many cases even the authorities may not be able to tell the source of information for the simple reason that they themselves do not know it. Death to the traitor being the unwritten law of the under-world, an informant may at the time of tip-off operate on an agreed code-word and upon a successful culmination of operations collect his percentage in person clad in a burkha with no questions asked and no faces shown.

25. The upshot suggests that as respects disclosure of names of informers - whether to law enforcement officers like Commissioners of Central Excise and Customs or even to incorporated societies like the NSPCC, the law seems to be settled that the public interest in preventing evasion of tax or detecting a social evil outweighs the public interest in protecting an individual from a certain amount of inconvenience to which he is likely to be put when inquiries are made from persons connected with or likely to be in the know of the true state of affairs. In the present case we find that the Department acted not only on the basis of an anonymous information, but also because they had received some more signed letters on the issue. The signatories of those other letters not only gave their names and addresses but some of them even sent reminders to make inquiries about the resultant action taken by the Department on their tips. Such may not be the case every time the Department acts in making inquiries about tax evasion. It will have to be left to the good sense and administrative experience of those charged with the duty of collecting tax or preventing tax evasion, as to how they should manage their affairs in the matter of reliance to be placed on source of informations, or information passed on by anonymous letter writers, and whether and in what manner they should cross-check the information. This may sound like putting a touching faith in those charged with the duty of tax collection but when admittedly courts have no experience in this executive field where secrecy is the soul of operations, why try to make suggestions to be dubbed at a later date as brutum foemen ? In the facts of the present case, we uphold the public interest privilege claimed by the Secretary in the Ministry of Finance.

26. We would not wish to be thought that we regard the balancing test of the two public interests involved as a test of uniform application to all types of cases including criminal cases where the disclosure of the name of the informant is necessary to prove the innocence of the accused. Quite the contrary. In a criminal case the public policy which says that an innocent man is not to be condemned when his innocence can be proved must prevail. (See Marks v. Beyfus (1890) 25 QBD 494.

27. In the result, Rule in Criminal Revision Application No. 407 of 1982 is made absolute. The Order passed by the learned Chief Judicial Magistrate, Pune, in Case No. 13265 of 1979, directing the Income Tax Officer concerned to produce the documents as sought by the complainant is quashed.

28. A Criminal Revision Application, being Criminal Revision Application No. 608 of 1983 has also been filed by the accused praying that the Order dated 5-12-1980 issuing process against them should be quashed and that the petitioners be discharged because no prima facie case has been made out. The process was issued as long back as in 1980 and hence this application is inordinately delayed. Furthermore, the complaint before the learned Chief Judicial Magistrate encompasses matters other than the production of documents relating to information of tax evasion, and hence, we see no merit in this Application. The accused/Petitioner in Criminal Revision Application No. 608 of 1983 may agitate this point before the trial Court if so advised. Rule, therefore, in Criminal Revision Application No. 608 of 1983 is discharged.

29. Ordered accordingly.