REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISIDICTION

REVIEW PETITION (CRIMINAL) NO. 46 OF 2019
IN
WRIT PETITION(CRIMINAL) No.298 of 2018

YASHWANT SINHA & ORS. ….PETITIONERS

VERSUS

CENTRAL BUREAU OF INVESTIGATION
THROUGH ITS DIRECTOR & ANR. …RESPONDSENTS

WITH

M.A.NO.58/2019 IN W.P.(CRL.)NO.225/2018
R.P.(CRL.)NO.122/2019 IN W.P.(CRL.)NO.297/2018
M.A.NO.403/2019 IN W.P.(CRL.)NO.298/2018
R.P.(C)No.719/2019 IN W.P.(C)NO.1205/2018

O R D E R

K.M. JOSEPH,J.

1. I have read the order proposed in the matter by the learned Chief Justice. While I agree with the decision, I think it fit to give the following reasons and hence, the concurring order:-

2. I do agree with the observations made by the learned chief Justice in regard to the importance which has been attached to the freedom of Press. The

Press in India has greatly contributed to the strengthening of democracy in the country. It will have a pivotal role to play for the continued existence of a vibrant democracy in the country. It is indisputable that the press out of which the visual media in particular wields power, the reach of which appears to be limitless. No segment of the population is impervious to its influence.

In *Rajendra Sail v. M.P. High Court Br Association and Others* 2005 (6) SCC 109, this Court dealing with a case under the Contempt of Court Act held *inter alia* as follows:

> **"31. The reach of the media, in the present times of 24-hour channels, is to almost ever nook and corner of the world. Further, large number of people believe as correct that which appears in media, print or electronic……"**
>
> ***(emphasis supplied)***

It must realise that its consumers are entitled to demand that the stream of information that flows from it, must remain unpolluted by considerations other than truth.

3. I would think that freedom involves many elements. A free person must be fearless. Fear can be of losing all or any of the things that is held

dear by the journalist. A free man cannot be biased. Bias comes in many forms. Bias if it is established as per the principles which are applicable is sufficient to vitiate the decisions of public authorities. The rule against bias is an important axiom to be observed by Judges. Equally the Press including the visual media cannot be biased and yet be free. Bias ordinarily implies a pre-disposition towards ideas or persons, both expressions to be comprehended in the broadest terms. It may stem from personal, political or financial considerations. Transmitting biased information, betrays absence of true freedom. It is, in fact, a wholly unjustifiable onslaught on the vital right of the people to truthful information under Article 19(1)(a) which, in turn, is the bedrock of many other rights of the citizens also. In fact, the right of the Press in India is no higher than the right of the citizens under Article 19(1)(a) and is traced to the same provision. The ability of truth to be recognised by a discerning public in the supposedly free market place of ideas forms much of the basis for the grant of the unquestionable freedom

to the Press including the Media Houses. If freedom is enjoyed by the Press without a deep sense of responsibility, it can weaken democracy. In some sections, there appears to be a disturbing trend of bias. Controlling business interests and political allegiances appear to erode the duty of dispassionate and impartial purveying of information. In this regard in an article styled 'the Indian Media' which is annexed to the Autobiography under the title "Beyond the Lines" veteran journalist Late Shri Kuldip Nayyar has voiced the following lament:

> **"Journalism as a profession has changed a great deal from what it was in our times. I feel acute sense of disappointment, not only because it has deteriorated in quality and direction but also because I do not see journalist attempting to revive the values ones practiced. The proliferation of newspapers and television channels has no doubt affected the quality of content, particularly reporting. Too many individuals are competing for the same space. What appals me most is that editorial primacy has been sacrificed at the alter of commercialism and vested interests. It hurts to see many journalists bending backwards to remain handmaidens of the proprietors, on the one hand, and of the establishment, on the other. This is so different from what we were used to."**

4. The exhortation as to who are the true beneficiaries of the freedom of speech and the Press

was articulated in the judgment of the U.S. Supreme Court in ***Time v. Hill*** 385 US 374 in the following words:

> "The constitutional guarantee of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people."
>
> *(emphasis supplied)*

5. In ***Indian Express Newspapers (Bombay) Private Ltd. And Others v. Union of India*** 1985 (1) SCC 641, this Court made the following observations:

> "……The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect 'themselves." (Per Lord Simon of Glaisdale in Attorney-General vs. Times Newspapers Limited (1973) 3 ALL ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self fulfilment, (ii) it assists in the discovery of truth, (iii)it strengthens the capacity of an individual in participating in decision making, and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. ……."

6. The wise words of Justice Douglas to be found in his dissenting judgment in *Dennis v. United States* 341 US 494 reminds one of the true goal of free speech and consequently the role of a free press. The same reads as under:

> **"Free speech has occupied an exalted position because of the high service it has given society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When idea compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilzations apart.**
>
> **Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world."**

7. Law in India relating to Crown privilege as it was originally styled in England is mainly embedded in a statutory provision namely Section 123 of the Indian Evidence Act. Also Section 124 of the said Act is relied upon in the affidavit of the Secretary. Section 124 of the Indian Evidence Act, 1872 reads as follows:-

> **"124. Official communications. —No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."**

There can be no matter of doubt that Section 124 is confined to public officers and the decisive aspect even under Section 124 is the protection of public interest.

8. Section 162 deals with the aspect of inspection of documents covered by privilege. In England, the law relating to privilege has been entirely court made. It cannot be in dispute that the claim for privilege under Section 123 of the Indian Evidence Act being based on public policy cannot be waived (see in this regard judgment of this

Court in *M/s. Doypack Systems Pvt. Ltd. Vs. Union of India and Others* 1988 (2) SCC 299 at page 327). The basis for the claim of privilege is and can only be public interest.

9. In the judgment of this Court in *State of U.P. v. Raj* Narain; AIR 1975 SC 865, Chief Justice A.N. Ray speaking on behalf of the Constitution Bench observed:-

> **"The Court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See 1973 AC 388 (supra) at p. 40). To illustrate, the**
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> **class of documents which would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes."**

10. I may also refer to the following discussion contained in *S.P. Gupta vs. Union of India* 1981 (Suppl) SCC 87 which has been also followed by the

Bench in *M/s. Doypack Systems Pvt. Ltd. Vs. Union of India and Others* 1988 (2) SCC 299.

> **"45……..."It is settled law and it was so clearly recognised in Raj Narain's case 1975 (4) SCC 428 that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and despatches from ambassadors abroad (vide *Conway v. Rimmer*, [1968] Appeal Cases 910 at pp. 952, 973, 979, 987 and 993 and *Reg v. Lewes Justices, ex parte Home Secretary*, [1973] A.C. 388 at 412, papers brought into existence for the purpose of preparing a submission to cabinet (vide *Lanyon Property Ltd. v. Commonwealth*, 129 Commonwealth Law Reports 650) and indeed any documents which relate to the framing of government policy at a high level (vide Re. *Grosvenor Hotel, London* [1964] 3 All E.R. 354 (CA)".**

The Court in Doypack (supra) held as follows:-

> **"46. Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to**

> **which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. See Geoffrey Wilson *cases and Materials on Constitutional and Administrative Law*, 2nd edn., pages 462 to 464. At page 463 para 187, it was observed:**
>
> **"The real damage with which I are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorised communication of these papers."**
>
> **See in this Connection *State of Bihar v. Kripalu Shankar*, AIR 1987 SC 1554 at page 1559 and also the decision of *Bachittar Singh v. State of Punjab* [1962] Suppl. 3 SCR 713. Reference may also be made to the observations of Lord Denning in *Air Canada and others v. Secretary of State*, [1983] 1 All ER 161 at 180."**

11. In fact, the foundation for the law relating to privilege is contained in the candour principles and also the possibility of ill-informed criticism. Regarding candour forming the premise I find the following discussion in the decision of this Court in *S.P. Gupta's case* (supra).

> **"We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in**

> ***Sankey v. Whitlam*** **(1978) 21 Australian LR 505:53, it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if these concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (vide: the observations of Lord Denning in *Neilson v, Lougharne* (1981) 1 All ER 829 at P. 835."**

12. Regarding the other premise for supporting the claim of privilege namely the possibility that disclosure will occasion ill-informed criticism and impair the smooth functioning of the Governmental machine, I notice the following in *S.P. Gupta's case* in paragraph 72 which read as follows:

> **"72. There was also one other reason suggested by Lord Reid in *Conway v. Rimmer* 1968 AC 910 for according protection against disclosure of documents belonging to this case: "To my mind", said the learned Law Lord : "the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind." But this reason does not commend itself to us. The**

object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the ministers and other government servants from criticism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open government. It is only through exposure of its functioning that a democratic government can hope to win the trust of the people. If full information is made available to the people and every action of the government is bona fide and actuated only by public interest, there need be no fear of "ill-informed or captious public or political criticism". But at the same time it must be conceded that even in a democracy, government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss?"

The role of the Court has been set out in para 73:-

"73. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its

disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing with each other out of which the court has to decide which predominates. The approach to this problem is admirably set out in a passage from the judgment of Lord Reid in *Conway v. Rimmer* 1968 AC 910:

> **It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would of might be done to the nation, or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question, would put the interest of the State in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would he proper to balance the public interests involved.**

The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-

> **disclosure of the document though relevant to the proceeding. [Vide the observations of Lord Pearson in *Reg, v. Lewes* JJ. Ex parte Home Secy 1973 AC 388 at page 406 of the report]. The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class.……"**
>
> ***(emphasis supplied)***

13. I notice that the claim for privilege may arise in the following situations. The claim for privilege may arise in a system of law where there is no statutory framework provided for such a claim. It has been considered to be the position in the United

Kingdom. In India as already noticed, Section 123 of the Evidence Act read with Section 124 and Section 162 does provide for the statutory basis for a claim of public interest privilege. The next aspect relating to the law of compelled production of documents is the constitutional embargo contained in Article 74(2) of the Constitution. Article 74(2) reads as follows:

> **"74(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."**

Therefore, it would be impermissible for a court to inquire into the advice which is tendered by the cabinet. The objection in this case raised under the Right to Information Act, is based only on Section 8(1)(a). I notice Section 8(1)(i) which provides as follows:-

> **"8(1)(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;**
>
> **Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:**

> **Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;".**

The said provision having not been pressed into service, neither its scope nor the ramification of Article 74(2) need be pursued further in this case.

14. It is at once apposite to notice the change that was introduced by the Right to Information Act, 2005.

Section 2(i) defines 'record' in the following fashion:

> **"2 (i) "record" includes—**
>
> **(i) any document, manuscript and file;**
>
> **(ii) any microfilm, microfiche and facsimile copy of a document;**
>
> **(iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and**
>
> **(iv) any other material produced by a computer or any other device;"**

The word 'right to information' defined in Section 2(j) as follows:

> **"(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—**

> (i) inspection of work, documents, records;
>
> (ii) taking notes, extracts, or certified copies of documents or records;
>
> (iii) taking certified samples of material;
>
> (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

All citizens are conferred with the right to information subject to the provisions of the Act under Section 3.

15. Section 8 deals with exemption from disclosure of information. Section 8(1)(a) which is pressed before us reads as follows:

> "8. Exemption from disclosure of information -(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;"

This is followed by Section 8(2). It reads as follows:

> "8(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may

> allow access to information, if public interest in disclosure outweighs the harm to the protected interests."

16. Before I delve more into Section (8) it is apposite that I also notice Section 22 which provides as follows:

> "22. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

17. I may lastly notice Section 24.

> "24(1). Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request."

18. Sections 22 and 24 bring up the rear. I may highlight their significance in the new dispensation which has been ushered in by Parliament. In no unambiguous terms Parliament has declared that the Official Secrets Act, a law made in the year 1923 and for that matter any other law for the time being in force *inter alia* notwithstanding the provisions of the RTI Act will hold the field. The first proviso to Section 24 indeed marks a paradigm shift, in the perspective of the body polity through its elected representatives that corruption and human rights violations are completely incompatible and hence anathema to the very basic principles of democracy, the rule of law and constitutional morality. The proviso declares that even though information available with intelligence and security organisations are generally outside the purview of the open disclosure regime contemplated under the Act, if the information pertains to allegations of corruption or human rights violations such information is very much available to be sought for under the Act. The economic development of a country

is closely interconnected with the attainment of highest levels of probity in public life. In some of the poorest countries in the world, poverty is rightfully intricately associated with corruption. In fact, human rights violations are very often the offsprings of corruption. However, the law giver has indeed dealt with corruption and human rights separately. Hence I say no more on this.

19. Reverting back to Section (8) it is clear that Parliament has indeed intended to strengthen democracy and has sought to introduce the highest levels of transparency and openness. With the passing of the Right to Information Act, the citizens fundamental right of expression under Article 19(1)(a) of the Constitution of India, which itself has been recognised as encompassing, a basket of rights has been given fruitful meaning. Section 8(2) of the Act manifests a legal revolution that has been introduced in that, none of the exemptions declared under sub-section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access

to information if the public interest in disclosure overshadows, the harm to the protected interests.

20. It is true that under Section 8(1)(a), information the disclosure of which will prejudicially affect the sovereignty and integrity of India, the security and strategic security and strategic scientific or economic interests of the State, relation with foreign State or information leading to incitement of an offence are ordinarily exempt from the obligation of disclosure but even in respect of such matters Parliament has advanced the law in a manner which can only be described as dramatic by giving recognition to the principle that disclosure of information could be refused only on the foundation of public interest being jeopardised. What interestingly Section 8(2) recognises is that there cannot be absolutism even in the matter of certain values which were formerly considered to provide unquestionable foundations for the power to withhold information. Most significantly, Parliament has appreciated that it may be necessary to pit one interest against another and to compare the relative

harm and then decide either to disclose or to decline information. It is not as if there would be no harm. If, for instance, the information falling under clause (a) say for instance the security of the nations or relationship with a foreign state is revealed and is likely to be harmful, under the Act if higher public interest is established, then it is the will of Parliament that the greater good should prevail though at the cost of lesser harm being still occasioned. I indeed would be failing to recognise the radical departure in the law which has been articulated in Section 8(2) if I did not also contrast the law which in fact been laid down by this court in the decisions of this Court which I have adverted to. Under the law relating to privilege there are two classes of documents which ordinarily form the basis of privilege. In the first category, the claim for privilege is raised on the basis of contents of the particular documents. The second head under which privilege is ordinarily claimed is that the document is a document which falls in a class of documents which entitles it to protection

from disclosure and production. When a document falls in such a class, ordinarily courts are told that it suffices and the court may not consider the contents. When privilege was claimed as for instance in the matter relating to security of the nation, traditionally, courts both in England and in India have held that such documents would fall in the class of documents which entitles it to protection from production. (See paragraph '9' of this order). The RTI Act through Section 8(2) has conferred upon the citizens a priceless right by clothing them with the right to demand information even in respect of such matters as security of the country and matters relating to relation with foreign state. No doubt, information is not be given for the mere asking. The applicant must establish that withholding of such information produces greater harm than disclosing it.

21. It may be necessary also to consider as to what could be the premise for disclosure in a matter relating to security and relationship with foreign state. The answer is contained in Section 8(2) and that is public interest. Right to justice is

immutable. It is inalienable. The demands it has made over other interests has been so overwhelming that it forms the foundation of all civilised nations. The evolution of law itself is founded upon the recognition of right to justice as an indispensable hallmark of a fully evolved nation.

22. The preamble to the constitution proclaims justice -social, economic or political, as the goal to be achieved. It is the duty of every State to provide for a fair and effective system of administration of justice. Judicial review is, in fact, recognised as a basic feature of the Constitution. Section 24 of the Act also highlights the importance attached to the unrelenting crusade against corruption and violation of human rights. The most important aspect in a justice delivery system is the ability of a party to successfully establish the case based on materials. Subject to exceptions it is settled beyond doubt that any person can set the criminal law into motion. It is equally indisputable however that among the seemingly insuperable obstacles a litigant faces are the

limitations on the ability to prove the case with evidence and more importantly relevant evidence. Ability to secure evidence thus forms the most important aspect in ensuring the triumph of truth and justice. It is imperative therefore that Section 8(2) must be viewed in the said context. Its impact on the operation on the shield of privilege is unmistakable.

23. It is clear that under the Right to Information Act, a citizen can get a certified copy of a document under Section 8(2) of the RTI Act even if the matter pertains to security or relationship with a foreign nation, if a case is made out thereunder. If such a document is produced surely a claim for privilege could not lie.

24. Coming to privilege it may be true that Section 123 of the Evidence Act stands unamended. It is equally true that there is no unqualified right to obtain information in respect of matters under Section 8(1)(a) of the RTI Act. However, the Court cannot be wholly unaffected by the new regime introduced by Parliament under the RTI Act on the

question regarding a claim for privilege. It is pertinent to note that an officer of the department is permitted under the RTI Act to allow access to information under the Act in respect of matters falling even under Section 8(1)(a) if a case is made out under Section 8(2). If an officer does not accede to the request, a citizen can pursue remedies before higher authorities and finally the courts. Could it be said that what an officer under the RTI Act can permit, cannot be allowed by a court and that too superior courts under Section 123 of the Evidence Act. I would think that the court indeed can subject no doubt to one exception, namely, if it is a matter which is tabooed under Article 74(2) of the Constitution.

25. In this case in fact, the documents in respect of which the privilege is claimed are already on record. Section 123 of the Evidence Act in fact contemplates a situation where party seeks the production of document which is with a public authority and the public authority raises claim for privilege by contending that the document cannot be

produced by it. Undoubtedly, the foundation for such a claim is based on public interest and nothing more and nothing less. In fact, in *State of U.P. VS. Raj Narain* AIR 1975 SC 861 I notice the following paragraph about the effect of publication in part in the concurring judgment of K.K. Mathew,J. which reads as under:

> **"81. I do not think that there is much substance in the contention that since, the Blue Book had been published in parts, it must be deemed to have been published as a whole and, therefore, the document could not be regarded as an unpublished official record relating to affairs of state. If some parts of the document which are innocuous have been published, it does not follow that the whole document has been published. No authority has been cited for the proposition that if a severable and innocuous portion of a document is published, the entire document shall be deemed to have been published for the purpose of S. 123."**

26. I may also notice another aspect. Under the common law both in England and in India the context for material being considered by the court is relevancy. There can be no dispute that the manner in which evidence is got namely that it was procured in an illegal manner would not ordinarily be very significant in itself in regard to the courts

decision to act upon the same (see in this context judgment of this Court in *Pooran Mal v. Director of Inspection (Investigation) of Income Tax* AIR 1974 SC 348). Therein I notice the following statements:

> **"25. So far as India is concerned its law of evidence is modeled on the rules of evidence, which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. In Barindra Kumar Ghose and others v. Emperor(1910)ILR 37 Cal 467 the learned Chief Justice Sir Lawrence Jenkins says at page, 500 :**
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> **"Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutavahana with his shrewd common-sense observes-"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks : "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed. by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized.**
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> **……. …… …….**

> **It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."**
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> ***(Emphasis supplied)***

27. Now in the context of a claim of privilege raised under Section 123 however, the evidence being requisitioned by a party against the state or public authority it may happen however that a party may obtain a copy of the document in an improper manner. A question may arise as to whether the copy is true copy of the original. If a copy is wholly improperly obtained and an attempt is made by production thereof to compel the State to produce the original, a question may and has in fact arisen whether the Court is bound to order production. In the landmark judgment by the High court of Australia in *Sankey v. Whitlam* (1978) 142 CLR 1, informations were laid against Mr. Whitlam the former Prime Minister of Australia and three members of his Ministry alleging offence under Section 86 of the Crimes Act 1914 and a

conspiracy at common law. The case also threw up the scope of the claim for privilege. It was held *inter alia* as follows in the judgment rendered by Sir Harry Gibbs, A.C.J.:

> **"43. If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to be accepted that in those circumstances the documents must be disclosed: Duncan v. Cammell, Laird & Co. [1942] UKHL 3; (1942) AC 624, at pp 633-634 ; Conway v. Rimmer (1968) AC, at pp 966-967, 987 ; Reg. v. Lewes Justices; Ex parte Home Secretary (1973) AC, at pp 407-408. Moreover, a Minister might produce a document of his own accord if it were necessary to do so to support a criminal prosecution launched on behalf of the government. The fact that state papers may come to light in some circumstances is impossible to reconcile with the view that they enjoy absolute protection from disclosure.**
>
> **48. In Robinson v. South Australia (No. 2) (1931) AC, at p 718 , it was said that "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". Other cases support that view: see Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth (No. 2) (1913) 16 CLR, at pp 188, 195, 199 ; Christie v. Ford (1957) 2 FLR 202, at p 209 . However the submission made by counsel**

> for Mr. Whitlam was that the position is different when the exclusion of a document is sought not because of its contents but because of the class to which it belongs. In such a case the document is withheld irrespective of its contents; therefore, it was said, it is immaterial that the contents are known. That is not so; for the reasons I have suggested, it may be necessary for the proper functioning of the public service to keep secret a document of a particular class, but once the document has been published to the world there no longer exists any reason to deny to the court access to that document, if it provides evidence that is relevant and otherwise admissible. It was further submitted that if one document forming part of a series of cabinet papers has been published, but others have not, it would be unfair and unjust to produce one document and withhold the rest. That may indeed be so, and where one such document has been published it becomes necessary for the court to consider whether that circumstance strengthens the case for the disclosure of the connected documents. However even if other related documents should not be produced, it seems to me that once a document has been published it becomes impossible, and indeed absurd, to say that the public interest requires that it should not be produced or given in evidence."

28. No doubt regarding publication by an unauthorised person and it being unauthenticated, the learned Judge had this to say:

> "49. What I have just said applies to cases where it is established that a true copy of

the document sought to be produced has in fact been published. The publication by an unauthorized person of something claimed to be a copy of an official document, but unauthenticated and not proved to be correct, would not in itself lend any support to a claim that the document in question ought to be produced. In such a case it would remain uncertain whether the contents of the document had in truth been disclosed. In some cases the court might resolve the problem by looking at the document for the purpose of seeing whether the published copy was a true one, but it would not take that course if the alleged publication was simply a device to assist in procuring disclosure, and it might be reluctant to do so if the copy had been stolen or improperly obtained."

29. In the same case in the judgment rendered by Stephen. J., the learned Judge observes: -

"26. The character of the proceedings has a triple significance. First, it makes it very likely that, for the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But, then, to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent power: by a decision to claim privilege dismissal of the charge will be well-nigh ensured. Secondly, and assuming for the moment that there should prove to be any substance in

the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest in non-disclosure should be shown before his privilege should be accorded. "

"31. What are now equally well established are the respective roles of the court and of those, usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. **In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the**

balance of public interest is against disclosure. It is in these areas that, even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot), a court, readily recognizing the proffered evidence for what it is, can, as many authorities establish, of its own motion enjoin its disclosure in court. Just as a claim is not essential, neither is it ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured. "

"38. Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v. Home Secretary (1973) AC, at p 400 the speeches in Conway v. Rimmer[1968] UKHL 2; (1968) AC 910 have made it clear "that there is a heavy burden of proof" on those who make class claims. Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the Glasgow Corporation Case remarked 1956 SC (HL), at p 20 that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harman L.J. in the Grosvenor Hotel Case (1965) Ch, at p 1255 : then, in Conway v. Rimmer (1968) AC 901 , Lord Reid dismissed the "candour" argument but found the true basis for the public interest in secrecy, in the case of cabinet minutes and the like, to lie in the fact that were they to

be disclosed this would "create or fan ill-informed or captious public or political criticism. . . . the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind" (1968) AC, at p 952 and see as to the ground of "candour" per Lord Morris (1968) AC, at p 959 , Lord Pearce (1968) AC, at pp 987-988 and Lord Upjohn (1968) AC, at pp 933-934 . In Rogers v. Home Secretary (1973) AC, at p 413 Lord Salmon spoke of the "candour" argument as "the old fallacy".

"41. There is, moreover, a further factor pointing in the same direction. The public interest in non-disclosure will be much reduced in weight if the document or information in question has already been published to the world at large. There is much authority to this effect, going back at least as far as Robinson v. South Australia (No. 2) (1931) AC 704, at p 718 per Lord Blanesburgh. In 1949 Kriewaldt J., sitting in the Supreme Court of the Northern Territory, had occasion to review the relevant authorities in his judgment in Christie v. Ford (1957) 2 FLR 202, at p 209 . The reason of the thing necessarily tends to deny privilege to information which is already public knowledge. As Lord Blanesburgh observed (25) "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". In Whitehall v. Whitehall 1957 SC 30, at p 38 the Lord President (Clyde) in referring to a document already the subject of some quite limited prior publicity observed that "The necessity for secrecy, which is the primary purpose of the certificate, then no longer operates…"

"44. In Rogers v. Home Secretary Lord Reid had occasion to distinguish between documents lawfully published and those which, as a result of "some wrongful means", have become public (1973) AC, at p 402 . That case was, however, concerned with a quite special class of document, confidential reports on applicants for

> **licences to run gaming establishments, a class to which must apply considerations very similar to those which affect the reports of, or information about, police informers. There is, in those cases, the clearest public interest in preserving the flow of information by ensuring confidentiality and by not countenancing in any way breach of promised confidentiality. Those quite special considerations do not, I think, apply in the present case."**
>
> ***(Emphasis Supplied)***

30. In *Rogers Vs. Home Secretary* 1973 A.C. 388, the request to produce a letter written by the Police Officer to the Gaming Board by way of response to the Gaming Board request for information in regard to applications by the appellant for certificates of consent, was not countenanced by the House of Lords. The appellant had commenced an action for criminal libel in regard to the information. Lord Reid in the course of his judgment held:-

> **"In my judgment on balance the public interest clearly requires that documents of this kind should not be disclosed, and that public interest is not affected by the fact that by some wrongful means a copy of such a document has been obtained and published by some person. I would therefore dismiss the appellant's appeal."**

31. In this case however as I have already noticed there are the following aspects. The

documents in question have been published in 'The Hindu', a national daily as noticed in the order of the learned Chief Justice. It is true that they have not been officially published. The correctness of the contents *per se* of the documents are not questioned. Lastly, the case does not strictly involve in a sense the claim for privilege as the petitioners have not called upon the respondents to produce the original and as already noted the state does not take objection to the correctness of the contents of the documents. The request of the respondents is to remove the documents from the record. I would observe that in regard to documents which are improperly obtained and which are subject to a claim for privilege, undoubtedly the ordinary rule of relevancy alone may not suffice as larger public interest may warrant in a given case refusing to legitimise what is forbidden on grounds of overriding public interest. In the writ petition out of which the review arises the complaint is that there has been grave wrong doing in the highest echelons of power and the petitioners seek action *inter alia* under the

provisions of Prevention of Corruption Act. The observations made by Stephen,J. in para 26 of his judgment and extracted by me in para 29 of my order may not be out of place.

32. I agree with the order of the learned Chief Justice.

……J.
[K.M. JOSEPH]

NEW DELHI
DATED; APRIL 10, 2019