

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CRIMINAL ORIGINAL JURISDICTION**

**REVIEW PETITION (CRIMINAL) NO. 46 OF 2019**

**IN**

**WRIT PETITION (CRIMINAL) NO. 298 OF 2018**

**YASHWANT SINHA & ORS.**

**...PETITIONER(S)**

**VERSUS**

**CENTRAL BUREAU OF INVESTIGATION THROUGH**

**ITS DIRECTOR & ANR.**

**... RESPONDENT(S)**

**WITH**

**M.A.NO. 58/2019 in W.P. (CRL.) 225/2018**

**R.P. (CRL.) NO. 122/2019 IN W.P. (CRL.) 297/2018**

**M.A. NO. 403/2019 IN W.P. (CRL.) NO. 298/2018**

**R.P.(C) No. 719/2019 in W.P.(C) 1205/2018**

**JUDGMENT**

**RANJAN GOGOI, CJI**

1. A preliminary objection with regard to the maintainability of the review petition has been raised by the Attorney General on behalf of the respondents. The learned Attorney General contends

that the review petition lacks in bona fides inasmuch as three documents unauthorizedly removed from the office of the Ministry of Defence, Government of India, have been appended to the review petition and relied upon by the review petitioners. The three documents in question are:

- (a) An eight-page note written by three members of the Indian Negotiating Team ('INT') charged in reference to the Rafale Deal (note dated 01.06.2016)
- (b) Note-18 of the Ministry of Defence (Government of India), F.No. AirHQ/S/96380/3/ASR PC-XXVI (Marked Secret under the Official Secrets Act)
- (c) Note-10 written by S.K. Sharma (Deputy Secretary, MoD, Air-III), Note dated 24.11.2015 (Marked Secret under the Official Secrets Act)

2. It is contented that the alleged unauthorized removal of the documents from the custody of the competent authority of the Government of India and the use thereof to support the pleas urged in the review petition is in violation of the provisions of Sections 3 and 5 of the Official Secrets Act, 1923. It is further contended that the documents cannot be accessed under the Right to Information Act in view of the provisions contained in Section 8(1)(a) of the said

Act. Additionally, the provisions contained in Section 123 of the Indian Evidence Act, 1872 have been pressed into service and privilege has been claimed so as to bar their disclosure in the public domain. Section 3, 5(1) of the Official Secrets Act; Section 8(1)(a) and 8(2) of the Right to Information Act and Section 123 of the Evidence Act on which the learned Attorney has relied upon is extracted below.

**3. Penalties for spying.** - (1) If any person for any purpose prejudicial to the safety or interests of the State –

- (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
- (b) makes any sketch, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly, useful to any enemy; or
- (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States:

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval,

military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under this section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document, information, code or password shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.

**5. Wrongful communication, etc., of information.**-(1) If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person

holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract-

- (a) willfully communicates the code or password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or
- (b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or
- (c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or
- (d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or password or information;

He shall be guilty of an offence under this section.

(2) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

**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;
- (b) xxxx xxxx xxxx xxxx
- (c) xxxx xxxx xxxx xxxx
- (d) xxxx xxxx xxxx xxxx
- (e) xxxx xxxx xxxx xxxx
- (f) xxxx xxxx xxxx xxxx
- (g) xxxx xxxx xxxx xxxx
- (h) xxxx xxxx xxxx xxxx
- (i) xxxx xxxx xxxx xxxx

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

- (2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 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.
- (3) xxxx xxxx xxxx xxxx

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall

be final, subject to the usual appeals provided for in this Act.

**123. Evidence as to affairs of State.**- No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

3. The three documents which are the subject matter of the present controversy, admittedly, was published in 'The Hindu' newspaper on different dates in the month of February, 2019. One of the documents i.e. Note-18 of the Ministry of Defence was also published in 'The Wire' a member of the Digital Print Media.

4. The fact that the three documents had been published in the Hindu and were thus available in the public domain has not been seriously disputed or contested by the respondents. No question has been raised and, in our considered opinion, very rightly, with regard to the publication of the documents in 'The Hindu' newspaper. The right of such publication would seem to be in consonance with the constitutional guarantee of freedom of speech.

No law enacted by Parliament specifically barring or prohibiting

the publication of such documents on any of the grounds mentioned in Article 19(2) of the Constitution has been brought to our notice. In fact, the publication of the said documents in 'The Hindu' newspaper reminds the Court of the consistent views of this Court upholding the freedom of the press in a long line of decisions

commencing from ***Romesh Thappar vs. State of Madras***<sup>1</sup> and

***Brij Bhushan vs. The State of Delhi***<sup>2</sup>. Though not in issue, the present could very well be an appropriate occasion to recall the views expressed by this Court from time to time. Illustratively and only because of its comprehensiveness the following observations in

***Indian Express Newspapers (Bombay) Private Limited vs. Union***

**of India**<sup>3</sup> may be extracted:

"The freedom of press, as one of the members of the Constituent Assembly said, is one of the items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. The said freedom is attained at considerable sacrifice and suffering and ultimately it has come to be incorporated in the various written constitutions. James Madison when he offered the Bill of Rights to

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<sup>1</sup> AIR 1950 SC 124

<sup>2</sup> AIR 1950 SC 129

<sup>3</sup> 1985(1) SCC 641

the Congress in 1789 is reported as having said: "The right of freedom of speech is secured, the liberty of the press is expressly declared to be beyond the reach of this Government" (See, 1 Annals of Congress (1789-96) p. 141). Even where there are no written constitutions, there are well established constitutional conventions or judicial pronouncements securing the said freedom for the people. The basic documents of the United Nations and of some other international bodies to which reference will be made hereafter give prominence to the said right.

The leaders of the Indian independence movement attached special significance to the freedom of speech and expression which included freedom of press apart from other freedoms. During their struggle for freedom, they were moved by the American Bill of Rights containing the First Amendment to the Constitution of the United States of America which guaranteed the freedom of the press. Pandit Jawaharlal Nehru in his historic resolution containing the aims and objects of the Constitution to be enacted by the Constituent Assembly said that the Constitution should guarantee and secure to all the people of India among others freedom of thought and expression. He also stated elsewhere that "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press" [See, D. R Mankekar: The Press under Pressure (1973) p. 25]. The Constituent Assembly and its various committees and sub-committees considered freedom of speech and expression which included freedom of press also as a precious right. The Preamble to the Constitution says that it is intended to secure to all citizens among others liberty of thought expression, and

belief. In Romesh Thapar v. State of Madras<sup>4</sup> and Brij Bhushan v. The State of Delhi<sup>5</sup>, this Court firmly expressed its view that there could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19(2) and thereby made it clear that there could not be any interference with that freedom in the name of public interest. Even when clause (2) of Article 19 was subsequently substituted under the Constitution (First Amendment) Act, 1951, by a new clause which permitted the imposition of reasonable restrictions on the freedom of speech and expression in the interests of sovereignty and integrity of India the security of the State, friendly relations with foreign States, public order, decency or morality in relation to contempt of Court defamation or incitement to an offence, Parliament did not choose to include a clause enabling the imposition of reasonable restrictions in the, public interest.”

A later view equally eloquent expressed by this Court in

Printers (Mysore) Limited vs. Assistant Commercial Tax Officer<sup>6</sup> may also be usefully recapitulated.

“Freedom of press has always been a cherished right in all democratic countries. The newspapers not only purvey news but also ideas, opinions and ideologies besides much else. They are supposed to guard public interest by bringing to fore the

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<sup>4</sup> AIR 1950 SC 124

<sup>5</sup> AIR 1950 SC 129

<sup>6</sup> 1994 (2) SCC 434

misdeeds, failings and lapses of the government and other bodies exercising governing power. Rightly, therefore, it has been described as the Fourth Estate. The democratic credentials of a State is judged today by the extent of freedom the press enjoys in that State. According to Justice Douglas (An Almanac of Liberty) "acceptance by government of a dissident press is a measure of the maturity of the nation". The learned Judge observed in Terminiello v. Chicago, (1949) 93 L.Edn. 1131., that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effect as it presses for acceptance of an idea. ...There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardisation of ideas either by legislatures, courts, "or dominant political or community ground". The said observations were of course made with reference to the First Amendment to the U.S. Constitution which expressly guarantees freedom of press but they are no less relevant in the India context; subject, of course, to clause (2) of Article 19 of our Constitution. We may be pardoned for quoting another passage from Hughese, C.J., in De Jonge v. State of Oregon, (1937) 299 U.S. 353, to emphasise the fundamental significance of free speech. The learned Chief Justice said: "the greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, ferrets and free assembly in order to maintain the opportunity for free political

discussion, to the end that Government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is true that very often the press, whether out of commercial reason or excessive competition, descends to undesirable levels and may cause positive public mischief but the difficulty lies in the fact, recognised by Thomas Jefferson, that this freedom "cannot be limited without being lost". Thomas Jefferson said, "it is, however, an evil for which there is no remedy; our liberty depends on the freedom of the press and that cannot be limited without being lost". (In a letter to Dr. J. Currie, 1786). It is evident that "an able, disinterested, public-spirited press, with trained intelligence to know the right and courage to do it, can preserve that public virtue without which popular government is a sham and a mockery. A cynical, mercenary, demagogic press will produce in time a people as base as itself. The power to mould the future of the Republic will be in the hands of the journalism of future generations", as stated by Joseph Pulitzer."

5. The above views of the Supreme Court of India on the issue of the freedom of the press has been echoed by the U.S. Supreme Court in New York Times Company vs. United States<sup>7</sup> wherein

Marshall, J. refused to recognize a right in the executive

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<sup>7</sup> 403 U.S. 713 (1971)

government to seek a restraint order or publication of certain papers titled "Pentagon Papers" primarily on the ground that the first Amendment guaranteed freedom of the press and 18 U.S. Code § 793 did not contemplate any restriction on publication of items or materials specified in the said Code. By a majority of 6:3 the U.S. Supreme Court declined to pass prohibitory orders on publication of the "Pentagon Papers" on the ground that the Congress itself not having vested any such power in the executive, which it could have so done, the courts cannot carve out such a jurisdiction as the same may amount to unauthorized judicial law making thereby violating the sacred doctrine of separation of powers. We do not see how and why the above principle of law will not apply to the facts of the present case. There is no provision in the Official Secrets Act and no such provision in any other statute has been brought to our notice by which Parliament has vested any power in the executive arm of the government either to restrain publication of documents marked as secret or from placing such documents before a Court of Law which may have been called upon to adjudicate a legal issue concerning the parties.

6. Insofar as the claim of privilege is concerned, on the very face of it, Section 123 of the Indian Evidence Act, 1872 relates to unpublished public records. As already noticed, the three documents have been published in different editions of 'The Hindu' newspaper. That apart, as held in S.P.

**Gupta vs. Union of India<sup>8</sup>**

a claim of immunity against disclosure under Section 123 of the Indian Evidence Act has to be essentially adjudged on the touchstone of public interest and to satisfy itself that public interest is not put to jeopardy by requiring disclosure the Court may even inspect the document in question though the said power has to be sparingly exercised. Such an exercise, however, would not be necessary in the present case as the document(s) being in public domain and within the reach and knowledge of the entire citizenry, a practical and common sense approach would lead to the obvious conclusion that it would be a meaningless and an exercise in utter futility for the Court to refrain from reading and considering the said document or from shutting out its evidentiary worth and value. As the claim of immunity under Section 123 of the Indian Evidence

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<sup>8</sup> AIR 1982 SC, 149

Act is plainly not tenable, we do not consider it necessary to delve into the matter any further.

7. An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before the Court. In this regard, as already noticed, the documents have been published in 'The Hindu' newspaper on different dates. That apart, even assuming that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court?

In *Pooran Mal vs. Director of Inspection (Investigation) of Income-Tax, New*

*Delhi*<sup>9</sup> this Court has taken the view that the "test of admissibility of evidence lies in its 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."

8. Insofar as the Right to Information Act is concerned in *Chief Information Commissioner vs. State of Manipur*<sup>10</sup> this Court had

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<sup>9</sup> AIR 1974 SC 348

<sup>10</sup> (2011) 15 SCC,1

occasion to observe the object and purpose behind the enactment of the Act in the following terms:

“The preamble (of the Right to Information Act, 2005) would obviously show that the Act is based on the concept of an open society. As its preamble shows, the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that the Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal.”

9. Section 8(2) of the Right to Information Act (already extracted) contemplates that notwithstanding anything in the Official Secrets Act and the exemptions permissible under sub-section (1) of Section 8, a public authority would be justified in allowing access to information, if on proper balancing, public interest in disclosure outweighs the harm sought to be protected. When the documents in question are already in the public domain, we do not see how the protection under Section 8(1)(a) of the Act would serve public interest.

10. An omnibus statement has been made by the learned Attorney that there are certain State actions that are outside the purview of judicial review and which lie within the political domain. The present would be such a case. In the final leg of the arguments, the learned Attorney General states that this case, if kept alive, has the potential to threaten the security of each and every citizen residing within our territories. The learned Attorney-General thus exhorts us to dismiss this case, *in limine*, in light of *public policy* considerations.

11. All that we would like to observe in this regard is a reiteration of what had already been said by this Court in *Kesavananda Bharati Sripadagalvaru v. State of Kerala*<sup>11</sup>

“Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation, or Judge-Made Law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all

Constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that

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11 AIR 1973 SC 1461

judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision.”

(Justice Khanna – para 1535)

12. In the light of the above, we deem it proper to dismiss the preliminary objections raised by the Union of India questioning the maintainability of the review petitions and we hold and affirm that the review petitions will have to be adjudicated on their own merit by taking into account the relevance of the contents of the three documents, admissibility of which, in the judicial decision making process, has been sought to be questioned by the respondents in the review petitions.

....., CJI  
[RANJAN GOGOI]

....., J.  
[SANJAY KISHAN KAUL]

NEW DELHI  
APRIL 10, 2019