

# Government Privileges in Legal Proceedings

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## ABSTRACT

Government privileges in legal proceedings are special legal rights conferred upon the State to ensure the protection of public interest, national security, and the effective functioning of public administration. These privileges, recognized under statutory and constitutional provisions, include the privilege against disclosure of official documents, exemption from certain procedural requirements, and protection from injunctions. While such privileges are essential for safeguarding sensitive state functions, they are not absolute and are subject to judicial scrutiny. Indian jurisprudence, through key cases like *SP Gupta v. Union of India*, has evolved to balance the need for governmental confidentiality with the principles of transparency and accountability in the justice system. This paper explores the legal framework, scope, limitations, and judicial interpretations of government privileges in India.

**Keywords:** Government Privilege, Judicial Review, Public Interest, Transparency and Accountability, State Immunity

## INTRODUCTION

In every democratic society, it is of utmost importance that the citizens get of sufficient information and knowledge about the functioning of the government. Democracy cannot survive without accountability to the public. The basic postulate of accountability is openness of the government. The very integrity of judicial system and public confidence depend on full disclosure of facts.<sup>3</sup>

## IN INDIA

In India, the basic principle is incorporated in section 123 of the Evidence Act, 1872 reads as, No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or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.<sup>4</sup>

Section 123 confers a great advantage on the government in as much as in spite of non-production of relevant evidence before the court, no adverse inference can be drawn against it if the claim of privilege is upheld by the court. Thus, it undoubtedly constitutes "a very serious departure" from the ordinary rules of evidence. The principle on which this departure can be justified is the principle of the "overriding and paramount character of public interest". The claim proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim

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<sup>3</sup> S.P. Gupta v. Union of India, 1981 supp SCC 87, 273: AIR 1982 SC 149

<sup>4</sup> Art 22(6), 74(2) and 163(3) of Constitution of India.

may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and, the court, in reaching the said decision, may feel dissatisfied, but that will not affect the validity of the basic principle that public good and public interest must override considerations of private good and private interest.

**State of Punjab v. Sodhi Sukhdev Singh**<sup>5</sup> (Sodhi Sukhdev Singh) is the leading case on the subject. One S, a District and Sessions Judge was removed from service by the President of India. In pursuance of the representation made by him, he was re-employed. Thereafter, he filed a suit for declaration that the order of removal was illegal, void and inoperative. He also claimed arrears of salary. He filed an application for production of certain documents. The State claimed privilege. The Supreme Court by majority held that the documents in question were protected under Section 123 of the Evidence Act and could be withheld from production on the ground of public interest.

The court conceded that it could not hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question.

That is a matter for the authority concerned to decide; but the court is competent, and determine the indeed is bound, to hold a preliminary enquiry validity of the objections of its production.

It true that the scope of enquiry in such is bound to be is a case narrow and of the power in the court to hold such an enquiry restricted; but the existence will itself act as a salutary check on the capricious exercise of power conferred (emphasis supplied) under Section 123.<sup>6</sup>

Section 162 of the Act confers on a court the power to decide finally the validity of the objection raised against production of document. As a general rule, the principle is that both the parties to the dispute must produce all the relevant and material evidence in their possession. The Evidence Act has prescribed elaborate rules to determine relevance and has accepted the doctrine of onus of proof. If any party fails to produce such evidence, an adverse inference can be drawn under Section 114 of the said Act.

In **Amar Chand Butail V. Union of India**,<sup>7</sup> the Supreme Court reiterated the principle laid down in Sodhi Sukhdev Singh. In this case, A had filed a suit against the for recovery government of certain amounts. During the course of the trial, A called upon defendants to produce certain documents. The defendants claimed privilege. Following Sodhi Sukhdev Singh, the Supreme Court rejected the claim of the defendants.

In **State of U.P. V. Raj Narain**<sup>8</sup> (Raj Narain), Raj Narain had filed an election petition against the then Prime Minister, Smt Indira Nehru Gandhi. During the trial he applied for production of certain documents. The government claimed privilege in respect of those documents. The Allahabad High Court rejected the claim. The Supreme Court allowed the appeal and set aside the order passed by the High Court.

Speaking for the majority, Ray CJ observed:

Public interest which demands that evidence be withheld is to be weighed against the private interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest.<sup>9</sup>

In concurring judgment, upholding the "right to know", Mathew J observed:

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<sup>5</sup> AIR 1961 SC 493: (1961) 2 SCR 371.

<sup>6</sup> AIR 505

<sup>7</sup> AIR 1964 SC 1658

<sup>8</sup> (1975) 4 SCC 428: AIR 1975 SC 865: (1975) 3 SCR 333.

<sup>9</sup> SCC 442-443, para.41: AIR 875

The Court, therefore, has to consider two things; whether the document relates to the secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in Section 123 'as he thinks fit' confer an absolute discretion on the head of the department to give or withhold such permission. An overriding power in express terms is conferred on the Court under Section 162 to decide finally on the validity of the objection. The Court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects public interest. It is, therefore, clear that even it is open though the head of the department has refused to grant permission document it is open to the Court to go into the question after examining the document and to find out whether the disclosure of the document would be injurious to public interest and the expression 'as he thinks fit' in the latter part of Section 123 need not deter the court from deciding the question afresh as Section 162 authorises the court to determine the validity of objection finally.<sup>10</sup>

In **State of U.P. v. Chandra Mohan Nigam**<sup>11</sup> the Supreme Court held:

when an order of compulsory retirement was challenged as arbitrary or mala-fide by making clear and specific allegations it will then be certainly necessary materials produce all the necessary to rebut such pleas for the Government to satisfy the court by voluntarily producing such documents as they will be complete answer to the plea. Ordinarily, the service record of a Government servant in a proceeding of this nature cannot be said to be a privileged document which should be shut out from inspection.

The well-known case of **S.P. Gupta V. Union of India**<sup>12</sup>, popularly known as the Judges Transfer case. A privilege was claimed by the government against disclosure and production of certain documents. After considering a number of English as well as American cases, the court held that the provisions of the Evidence Act, 1872 should be construed keeping in view our new democracy wedded to the basic the Constitution In democracy citizens ought to values enshrined in know what their government is doing. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government, Therefore, disclosure of information in regard to functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.<sup>13</sup> The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the court by reason of Section 162.

The court is not bound by the assertions made by a Minister or a Head of the department in an affidavit in support of a plea against non-disclosure. The court retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching the decision. Bhagwati J (as he then was) further observed

Every claim for immunity in respect of document, whatever be the ground on which the immunity is claimed, and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one & test, namely, what does public interest require-disclosure or non-disclosure the context of the exercise has to be performed in democratic ideal of an open Government.<sup>14</sup>

<sup>10</sup> SCC 451-452: AIR 882-883.

<sup>11</sup> (1977) 4 SCC 345, 358: AIR 1977 SC 241, 242.

<sup>12</sup> 1981 supp SCC 87: AIR 1982 SC 149.

<sup>13</sup> SCC para 67.

<sup>14</sup> SCC para 69,80.

In *R.K. Jain v. Union of the India*<sup>1516</sup> appointment of President an of CEGAT (Customs, Excise and Gold Control Appellate Tribunal) Was challenged in the Supreme Court. Necessary record was ordered to be produced by the court. The Attorney General claimed privilege. Negating the plea and considering various Indian and foreign decisions, the advice tendered to the court observed that except the actual file and records were open President by the Cabinet, the rest of the to in camera inspection by the court.

In *A.K. Kaul v. Union of India*<sup>17</sup>, an employee working in Intelligence Bureau in the Home Ministry of the Indian Government was dismissed from service. No enquiry as required by Article 311 of the Constitution was held against him. It was stated that the President of India was Satisfied that it was not expedient to hold an enquiry into the allegations against the employee. The order was challenged by the delinquent officer and disclosure of documents was sought. It was contended that the order was mala fide and was based on extraneous grounds.

The Supreme Court, however, negated the contention. Keeping in view the fact that the appellant was working in a highly sensitive organisation (Intelligence Bureau), the court held that non-disclosure of material documents would be in public interest. The court, however, reiterated the principle that the court could look into the documents, while deciding the claim of non-disclosure thereof to the opposite party.

## POWER AND DUTY OF COURTS

It is well-settled that a court is not bound Minister by the statement made by the Department in the affidavit claiming privilege. The court has to balance injury to the state or public against risk of injustice to the cause. In balancing competing interest it is the duty of the court to see that no harm is done to the nation by the disclosure of the document and that justice should not suffer by permitting withholding of document. The court must decide which aspect of the public interest predominates; whether the public interest which requires that the document should not be produced outweighs the public interest that requires the document to be produced. To strike a balance, the court may itself inspect the document. It is constitutional, legitimate and lawful power and duty of the court to ensure that powers, constitutional, statutory or executive are exercised by the government in accordance with the constitution and the law.<sup>18</sup> At the same time, courts should not allow production of documents if "fishing" nature. The court should not take a peep just on the off chance they of finding something useful. It should inspect documents only where it has definite grounds for expecting to find material of real importance to the party seeking disclosure.

## CONSIDERATIONS

Whenever an objection is raised against disclosure of document on the ground that it belongs to a class which in the larger public interest ought not to disclosed, it would be difficult to decide the question in a vacuum. The court must consider various factors such as, interest likely to be affected by disclosure; extent to which such interests would be affected; seriousness of the issues raised in relation to which production is sought; effect of disclosure of document on the outcome of the case; likelihood of injustice if disclosure is not allowed, etc. Each case must be considered and decided on its own facts and circumstances.<sup>19</sup>

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<sup>16</sup> (1993) 4 SCC 119

<sup>17</sup> (1995) 4 SCC 73: AIR 1995 SC 1403.

<sup>18</sup> *R.K. Jain v. Union of India*, (1993) 4 SCC 119, 139.

<sup>19</sup> SCC 162-164

## TEST

There is a natural temptation on the part of the executive to regard the interest of the department as paramount forgetting the larger and greater interest, i.e. interest of justice. Many a time, it may not be convenient for the executive to produce a particular document and it may adopt an easy course of claiming privilege. As has been rightly said, "Inconvenience and justice are often not on speaking terms. "The court must be alive of such possibility and decide the question keeping in mind the well-known maxim *populi est supreme lex* (public Welfare is the highest law)<sup>20</sup>

## CONCLUSIONS

It is submitted that the following observations of Gajendragadkar J (as he then was) in the leading case of Sodhi Sukhdev Singh<sup>21</sup> lay down correct and leading decisions on the point, His Lordship propounded: It must be clearly realised that the effect of the document on the ultimate the course of litigation or its impact on the head of the department or even Under Government in power, has no relevance in making claim for privilege Section 123. The apprehension that the disclosure may adversely affect the head of the department or the Minister or even the Government, or that it may provoke public criticism or censure in the legislature had also no relevance in the matter and should not weight in the mind of the head of the department who makes the claim. The sole and the only test which should determine the decision of the head of the departments is injury to public interest and nothing else.<sup>22</sup>

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<sup>20</sup> SCC 139,162.

<sup>21</sup> AIR 1961 SC 493: (1961) 2 SCR 371.

<sup>22</sup> AIR 504.