VANDERGERT

v.

ZURFICK

COURT OF APPEAL.
JAYASINGHE, J.
CA 339/97.
DC Colombo 14157/MR.
24TH AUGUST, 1999.
29TH SEPTEMBER, 1999.
18TH OCTOBER, 1999.
02ND, 12TH NOVEMBER, 1999.

Evidence Ordinance, ss.122, 123, 124, 162(1) - Privileged document - Part of Unpublished Official Record relating to affairs of State - Communications made to a Public Officer in official confidence - Exclusion of same - English and Indian Principles - Are they applicable?

The Petitioner -Secretary, Ministry of Foreign Affairs (S/MF) was summoned to produce a Report dated 21. 11. 1991 sent by the Defendant Respondent to the S/MF. Before the document was tendered to Court State Counsel who appeared for the S/MF submitted that the said Report though brought in compliance with S.162(1) is a privileged document within the meaning of S.123, 124 and objected to the production of same. The Petitioner also submitted an affidavit stating that the said Report was a part of an unpublished official record relating to affairs of State within the meaning of S.123 and that they are also communications made to a Public Officer in official confidence - S.124 and therefore cannot be compelled to produce the said Report in Court.

The Court thereafter perused the said Report to ascertain whether it fell within S.123, S.124 and holding that the Report does not relate to affairs of State and that, it does not also relate to public interest ordered the production of same, observing that the said Report is necessary for the purpose of administering justice.

Held :

(1) The question of public interest arises only under S.124 and there too the Judge of whether public interest would suffer by the disclosure of the official communication made to him in official confidence is the Public Officer concerned and the courts have no power to over rule him or over rule his opinion.

The responsibility for weighing and balancing public interest is placed upon the public officer himself and not upon a court of law.

(ii) Our Evidence Ordinance provides for the exclusion of official matters from evidence. Section 123 stipulates an absolute prohibition against the production of unpublished official records relating to affairs of State **except** with the permission of the Head of the Department. Section 124 provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that public interest would suffer by the disclosure.

Per Jayasinghe, J.

"In England there appears to be no corresponding statutory provisions but the situations covered by Section 123, Section 124, Section 125 are determined by the common law under which the exclusion of evidence is founded on grounds of public policy nor is there any recognisable distinction between matters falling within the scope of our sections 123, 124."

(iii) The right of inspection by Court contemplated in Section 162(2) is expressly taken away if the document relates to matters of State.

(iv) There is no scope in our law to import into our system the Indian thinking that has been developed on the English thinking - there is no scope for such activism.

APPLICATION in Revision from on Order of the District Court of Colombo.

Cases referred to :

1. *Keerthiratne vs Gunawardena* 58 NLR 62
2. *Daniel Appuhamy vs Illangaratne* 66 NLR 97
3. *Conway vs Rimmer* (1968) AC 910
4. *Duncan vs Cammell Laird & Company* (1942) AC 624
5. *Pubjab vs Sodhi Sukhdeu Singh* (1961) AIR SC 493
6. *Utter Pradesh vs Raj Narain* (1975) AIR SC 865
7. *S.P. Gupta vs The President of India* (1982) AIR SC 149 (Judges case)
8. *Tukaram vs King Emperor* (1946) NAJ 385
9. *Chamarbaghwalla vs Parpia* (1948) 52 Bom. LR 231
10. *Nagaraja Pillai vs Secretary of State* (1914) 39 Mad. 304

11. *Pandit Chandradhar Tewani vs Deputy Commissioner of Lucknow* (1938) 14 Luck 351
12. *Jehangir vs Secretary of State* (1903) 6 Bom. LR
13. *King Emperor vs Bhagawali Prasad* (1924) 5 Lucknow 297
14. *Excelsior Film vs Union of India* (1966) 69 Bom. LR 878

Saleem Marsoof P.C., Additional Solicitor General with *Ms. S. Bari State Counsel* for Petitioner.

E.D. Wikremanayake with *Ms. Anandi Cooray* for Plaintiff Respondent.

Romesh de Silva P.C., with *Geethaka Gunawardena* for Defendant Respondent.

Cur. adv. vult.

May 25, 2000.

JAYASINGHE, J.

This is an application to revise the order of the learned District Judge of Colombo of 04. 03. 1997 where the learned District judge ordered the production in evidence a Report dated 25.11.1991 sent by the Defendant Respondent to the Secretary Ministry of Foreign Affairs on 06. 06. 1996. The Petitioner - the Secretary Ministry of Foreign Affairs received summons from the District Court of Colombo for the production before Court of the said document and consequently in compliance with the said summons the Secretary took steps to send the Deputy Director Economic Affairs to the District Court of Colombo. He was represented by State Counsel who submitted to Court that the said Report was brought in compliance to Court with Section 162(1) of the Evidence Ordinance and that the said document is a privileged document within the meaning of sections 123 and 124 and objected to the production of the said document in Court. The Petitioner had submitted by way of affidavit that the above mentioned Report was a part of an Unpublished Official Record relating to Affairs of State within the meaning of section 123 and that they are also communications made to a public officer in official confidence within the meaning of Section 124 of the Evidence Ordinance and therefore cannot be compelled

to produce the said Report in court. Having heard Counsel the learned District Judge delivered order directing the Petitioner to produce the said Report for perusal of Court in order to consider whether the document fell within the provisions of Sections 123 and 124 of the Evidence Ordinance. After perusing the document the learned District Judge delivered order on 04. 03. 1997 holding that the said Report was sent by the Defendant - Respondent to the Secretary, Ministry of Foreign Affairs under confidential cover; that the said Report related to Affairs of State; that the said document does not relate to public interest and that the said Report is necessary for the purpose of administering Justice. The present application had been filed by the petitioner for Revision of the said order of the learned District Judge.

The content of the objection of the petitioner for the production of the said Report was twofold:

(a) That the said Report is an Unpublished Official Record relating to affairs of State within the meaning of Section 123 of the Evidence Ordinance.

(b) That the said Report was a communication made to a public officer in official confidence within the meaning of section 124 of the Evidence Ordinance.

Dealing with the provision of section 123 of the Evidence Ordinance the learned Additional Solicitor General submitted that the most important feature of section 123 is that it contains a prima facie rule of prohibition, in that it prohibits the production in Court of any unpublished Official Records relating to Affairs of State except with the permission of the officer at the head of the department concerned subject only to Ministerial Control. He submitted that judicial discretion is not envisaged or sanctioned by this Section. He relied on *Keerthiratna vs. Gunawardena*[1] where H. N. J. Fernando, J. had observed that section 123 assumes that the production may be prejudicial to public interest and therefore prohibits

the production except with requisite permission. He also relied on *Daniel Appuhamy vs. Illangaratne*[2] where Basnayake, C.J. observed that - "the question whether the public interest will suffer or not does not arise under Section 123 because if the document, the production of which is sought comes within the ambit of Section 123, the Court must shut it out and is not entitled to let it in on the ground that public interest will not suffer or any other ground". He submitted that the learned District Judge in coming to a finding that the impugned document does not relate to public interest and that the said Report is necessary to administer justice relying on the judgment of the House of Lords in *Conway vs. Rimmer*[3] misunderstood the law relating to the application of Section 123 of the Evidence Ordinance. The learned Additional Solicitor General further submitted that there is no scope for the dicta in *Conway vs. Rimmer(supra)* to be absorbed into our law for once the Head of the Department produces a certificate it is deemed to be conclusive that the interest of the public would suffer. He invited the attention of Court to an observation of Basnayake C.J. in *Daniel Appuhamy vs. Illangaratne:(supra)* "in construing the Evidence Ordinance it would not be correct to approach it with preconceived notions of English Law and to treat Section 123 as a statutory declaration of the English system". Refering to the application under 124 the learned Additional Solicitor General submitted that the order of the learned District Judge was also in contravention of the provisions of Section 124 of the Evidence Ordinance. He submitted that it is an established canon of statutory interpretation that the obvious meaning of a statute should be given effect to where the meaning is clear and unequivocal; that it is clear from section 124 that a public officer cannot be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer from the disclosure.

The responsibility for weighing and balancing public interest is placed upon the public officer himself and not upon Courts of Law. The learned Additional Solicitor General drew

support for this proposition from an opinion expressed by Basnayake C. J. in *Daniel Appuhamy vs. Illangaratne(supra)* where his Lordship observed that the question of public interest arises only under Section 124 and there too the judge of whether public interest would suffer by the disclosure of the official communication made to him in official confidence is the public officer concerned and the Court has no power to overrule him or override his opinion. The Additional Solicitor General also argued that the Courts are denied the right of inspection of documents under 162(2) of the Evidence Ordinance where it relates to matters of State. He submitted that from its very nature and language, Section 162(2) has no application whatsoever to Section 123 of the Evidence Ordinance. He relied on an observation made by H. N. G. Fernando, J. in *Keerthiratne vs. Gunawardena(supra)* where His Lordship observed that "the terms of this Sub Section (162(2)) appear to indicate that in relation to "Unpublished Official Records relating to affairs of State" that is to say cases covered by section 123 Courts are denied the right of inspection if the objection to production is duly taken on behalf of the Crown. Indeed it would seem that in regard to such cases the view as to the conclusiveness expressed in *Duncan vs. Cammell Laird & Company*[4] is clearly incorporated in terms of Section 162(2) of the Evidence Ordinance". However the Additional Solicitor-General disagreed with the reasoning of H. N. G. Fernando. J. in *Keerthiratne vs. Gunawardena(supra)* where His Lordship observed ". . . . . but where it is alleged that some communication made to a public officer in official confidence, there seems to be no reason why effect cannot be given to the plain terms of section 162 which confer on the Court a right of inspection in order to determine the question of admissibility. He submitted that the judgment in the case of *Keerthiratne vs. Gunawardena(supra)* to the extent that it holds that a Judge has an overriding jurisdiction to consider the public interest when privilege under Section 124 is claimed is bad in law, for the reason that in that case the Court has restricted the application of 162(2) to Section 124. He submitted that Section 124 is an independent provision and

its obvious meaning has to be given effect to; that at most the jurisdiction of the Judge can only extend to deciding whether or not the communication was made in official confidence similar to the decision on whether or not a document related to Affairs of State under Section 123.

Both the Additional Solicitor General and Mr. Romesh de Silva, President's Counsel drew the attention of Court to chapter XI of the Evidence Ordinance. It was submitted by both counsel that the legislature had attempted to preserve and protect the sanctity and inviolability of certain relationships and situations by preventing any communications or information in respect of these relationships being published however innocuous or harmless they may be. Communications during marriage, professional communications. confidential communications with legal advisors are privileged in the same way they operate to protect Affairs of State. Mr. De Silva submitted that Section 123 prevents production of documents relating to affairs of State and Section 124 prevents the disclosure of communications made in official confidence and the two Sections read together mean that there has to be confidentiality maintained for official communications and that such communications and documents cannot be produced in Court without the requisite permission.

Mr. Wikremanayake submitted that in order to ascertain the application of Section 123 and 124 of the Evidence Ordinance it is necessary to trace the development of the law relating to the question of privilege both in England and in India as our Evidence Ordinance is based primarily on English Common law and as the Evidence Ordinance of India contains similar provisions. He submitted that *Duncan vs. Cammell Laird & Company(supra)* laid down in very wide terms that the Ministers certificate was final and conclusive He submitted that the reasoning of *Cammell Laird(supra)* was justified as it was decided during the war and the privilege claimed was for the production of a design of a submarine the production of

which would cause injury to public interest. He submitted that *Cammell Laird(supra)* was subject to much criticism both by the Bench and the Bar and the House of Lords in *Conway vs. Rimmer(supra)* laid down restrictions on the use of privilege overruling *Duncan vs. Cammell Laird(supra). Conway vs. Rimmer(supra)* held that Court had jurisdiction to peruse and arrive at an independent decision whether in fact the production of the document is injurious to public interest. He submitted that *Conway vs. Rimmer(supra)* criticized the blanket privilege claimed (hitherto) stating that the real question is whether public interest is affected in the production of the document in question. Referring to the law prevailing in India Mr. Wikremanayake submitted that in *Punjab vs. Sodhi Sukhdeu Singh*[5] it was held that the Court would not inspect the document in order to determine whether it related to Affairs of State. However it would take other evidence to determine whether in fact it related to Affairs of State. The Court could not however inquire into whether any injury could be caused to public interest in the disclosure of the document. Therefore the injury into pubic interest was to be decided solely by the Minister. In *Utter Pradesh vs. Raj Narain*[6] The Supreme Court reinterpreted Section 123 so as to bring the Indian Law in line with the modern judicial thinking in England and to curtail somewhat the Government's privilege not to produce documents in Court. The Supreme court held that the basis of privilege was injury to public interest. Public interest demanding that evidence be withheld is to be weighed against the public interest in the Administration of Justice that Court should have the fullest possible access to all relevant material, when the former out weighs the latter the evidence cannot be admitted. Courts accepted the principle that an affidavit claiming privilege is not conclusive and if the Court is not satisfied with the affidavit it had power to peruse the document in order to decide whether the protection be awarded to the document or not. In *S.P. Gupta vs. The President of India*[7] (judges case) Bahgawati, J. observed that "the basic question to which the court would therefore have to address itself for the purpose of deciding the

validity of the objection would be whether the document relates to Affairs of State or in other words it is of such a character that its disclosure would be against the interest of State or public service and if so whether the public interest in its non- disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account it should not be allowed to be disclosed. The final decision in regard to validity of an objection against disclosure raised under Section 123 would always be with the Court by reason of Section 162". Mr. Wikremanayake contended that the *Judges case(supra)* reiterated the position in *Raj Narain(supra)* holding that the Courts enjoy the power to inspect the document to decide whether it relates to Affairs of State or not.

Our Evidence Ordinance provides for the exclusion of official matters from evidence. Section 123 stipulates an absolute prohibition against the production of unpublished official Records relating to Affairs of State except with the permission of the officer at the Head of the Department concerned who shall give or withhold permission as he thinks fit subject to the control of the Minister. Section 124 provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that public interest would suffer by the disclosure and section 125 recognizes the right of the Magistrates and law enforcement officers to withhold the source of information as to the commission of offences. In England there appears to be no corresponding statutory provision but the situations covered by Sections 123, 124 and 125 are determined by the common law under which the exclusion of evidence is founded on grounds of public policy; nor is there any recognisable distinction between matters falling respectively within the scope of our sections 123 and 124. All these matters are dealt with in England as Affairs of State. Phipson in Law of Evidence (page 196) enunciated the principle that "the witness may not be asked and will not be allowed to state facts or to produce documents the disclosure of which would be prejudicial to

public service. And this exclusion is not confined to official communications or documents but extends to all other likely to prejudice public interest". Vicount Simon L. C. in *Duncan vs. Cammell Laird & Company(supra)* stated that "the question whether the production of the documents would be injurious to the public service must be determined not by the Judge but by the Head of the Department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service we think the Judge ought not to compel the production of it". However in *Conway vs. Rimmer(supra)* overruling *Cammell Laird(supra)* the House of Lords held "that the document should be produced for inspection by the House of Lords and if it was then found that disclosure would not be prejudicial to the public interest or that any possibility of such prejudice was insufficient to justify their being withheld disclosure should be ordered. When there is a clash between public interest that harm should not be done to the nation or the public service by the disclosure of certain documents and that the Administration of Justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or the public service is so grave that no other interest should be allowed to prevail over it, but where the possible injury is substantially less the Court must balance against each other the two public interests involved. When the Ministers certificate suggests that the document belongs to a class which ought to be withheld, then, unless his reasons are of a kind that judicial experience is not competent to weigh, the proper test is whether the withholding of a document of that particular class is necessary for the functioning of the public service. If on a balance, considering the likely importance of the document in the case before it, the Court considers that it should probably be produced, it should generally examine the document before ordering the production. In the present case the Court held that it was improbable that any harm would be done to the public service by the disclosure of the document in question, which might prove vital to the litigation".

Our law however does not correspond to the English Law in that there is the demarcation between unpublished official Records and communications made in Official Confidence. In the case of unpublished official Records Section 123 assumes that production may be prejudicial to public interest and prohibits the production except with the requisite permission. In *Daniel Appuhamy vs. Illangaratne(supra)* Basnayake, C.J. stated that "Although documents which are protected by Section 123 are referred to as privileged documents it is not correct to do so. When a Counsel or a public officer or any other person invites the Court not to permit the production of a document to which Section 123 applies he claims no privilege. His act is an invitation to the Court to obey the imperative prohibition in that section. The question of privilege arises under Section 124".

In England it may be open to a Minister to plead the objection of public policy in his discretion with respect to any matter falling within the category of an Affair of State and thus withhold evidence of any communication made to a public officer. The same **absolute privilege** under our Ordinance extend only to Unpublished Official Records and **not necessarily to every communication made to a public officer**. Communications made in official confidence envelopes a vast area of governmental business; as much as Affairs of State have not been defined though often used in relation to the business of the State such as matters connected with international diplomacy. minutes of public servants to their colleagues or superiors regarding business of government, State secrets and such like documents connected with State craft, communications made in official confidence is also without defined limits. Our Evidence Ordinance was enacted in 1895 at a time when activities of the State were confined to gubernatorial functions. Neither social welfare or trade came within the ambit of the State activities. Today the State is engaged in multifarious activities that can be classified as Affairs of State and within that classification there will be communications made in official confidence and the

disclosure of such communications would not place the public interest in jeopardy. Courts will relying on 162(2) inspect the document and rule on it if objection to its production is taken. However when communications made in official confidence also amounts to Unpublished Official Records relating to Affairs of State, the disclosure of which would not be in the interest of the public and where the objection is taken, Court would be denied of inspection. This is the content of the objection of the petitioner. Though the legislature has made separate provisions in Section 123 and 124 respectively for two groups of matters covered in England by one general principle of public policy, it is some times necessary to read the two sections together when the Court is invited to inspect the document under 162(2). If the communication amounts to an unpublished Official Record relating of Affairs of State then the prohibition set out in Section 123 must necessarily apply. H. N. G. Fernando, J. in *Keerthiratne vs. Gunawardana(supra)* observed that it is unsafe to ignore the distinction of matters of State referred to in Section 123 and the communications made to a public officer under Section 124. H. N. G. Fernando, J. went no to state that if objection to the production is taken under 124 the Court has to first determine whether the communication was made in official confidence and secondly whether the disclosure would place the public interest in jeapardy.

Section 162(2) provides that the Court if it sees fit may inspect the document unless it refers to matters of State or take other evidence to enable it to determine on its admissibility, while Section 123 refers to Affairs of State. The right of inspection by Court contemplated in Section 162(2) is expressly taken away if the document relates to matters of State. I for a moment cannot see a distinction between the phraseology Affairs of State and matters of State. His Lordship H. N. G. Fernando, j. observed that the exception for matters of State provided in Section 162(2) should be restricted to cases falling under Section 123 where a similar expression occurs. His Lordship went on to state that where it is alleged

that some communications were made to a public officer in official confidence, there seems to be no reason why effect cannot be given to the plain terms of Section 162(2) which confer on the Court the right of inspection in order to determine the question of admissibility. This reasoning is founded probably on the premise that communications made in official confidence is to be treated as a separate category distinct from Unpublished official record relating to affairs of State. In *Conway vs. Rimmer(supra)* the Court adopted a liberal attitude in allowing inspection moving away from *Duncan vs. Cammell Laird(supra).* But since the English common law is codified in Sections 123 and 124 there is no room to import into our law the thinking of *Conway vs. Rimmer(supra).* However in *Keerthiratne vs. Gunawardana (supra)* the Court did not give its mind to the possible over lap of Sections 123 and 124 and the possible injury to the interest of the public. H. N. G. Fernando, J. sought to restrict the application of 162(2) to Section 123 for the reason that similar expressions occur in both 123 and 162(2). But did not consider that the official communication might also amount to an Unpublished Official Record. Both Basnayake, C. J. in *Daniel Appuhamy vs. Illangaratne(supra)* and H. N. G. Fernando, J. in *Keerthiratne vs. Gunawardena* were agreed that if objection is taken to the production of a document under Section 123 the right of inspection contemplated in Section 162(2) would be denied. Basnayake, C.J. in *Daniel Appuhamy vs. Illangaratne* observed that, subsection (162(2)) is an empowering provision. It empowers the Court to inspect a document or take other evidence in order to determine on its admissibility. It confers no such power when the Court has to determine whether the document is one that need not be produced. Even when the Court has to determine the admissibility of a document, the power of inspection does not extend to documents which refer to matters of State.

Mr. Wikremanayake referred to *Utter Pradesh vs. Raj Narain* where the Supreme Court interpreted Section 123 so as to bring the Indian Law in line with the modern judicial

thinking in England and to curtail somewhat the Government's privilege not to produce documents in Court (Jain & Jain page 695) There the Court held *inter alia* that the affidavit claiming privilege in respect of a document is not conclusive and that there is a residual power in the Court to decide whether the disclosure of the document is in the interest of the public. Mr. Wikremanayake also referred to *S. P. Gupta vs. President of India* where the Indian Supreme Court ruled that the Court enjoys the power to inspect the document in question and then decide whether it relates to Affairs of State or whether its exclusion is in the public interest. The reason was that "the final decision in regard to the validity or an objection against disclosure raised under Section 123 would always be with the Court by reason of Section 162(2) that extend to matters of State". Learned Additional Solicitor General submitted that Section 162(2) which is a later section from its very nature and language has no application whatsoever not only to Section 123 but also to Section 124. He submitted that these Sections set out a prohibition and privilege respectively while Section 162(2) deals with the question of admissibility. I am inclined to agree with the submission of the Additional Solicitor General that Section 162(2) has no application not only to 123 but also to Section 124 where privilege is claimed; that Section 162(2) deals only with the question of admissibility and if the communication made to a public officer relates to matters of State and the objection is taken to its production the Court has no power of inspection.

The distinction between class of documents and nature of documents (contents claim) was recognized in India in the case of *Raj Narain(supra)*. There the Court held "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 a class which demand protection. To illustrate, the class of documents would embrace Cabinet

papers, Foreign office dispatches, Papers regarding the security of the State and high level inter departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld. In India Court observed in interpreting Section 123 in *Tukaram vs. King Emperor*[8] "the only ground sufficient to justify non production of a official document marked confidential is that production would not be in the public interest for example where disclosures would be injurious to national defence or good diplomatic relations or where the practice of keeping a class of documents, secret is necessary for the proper functioning of the public service.

It appears that in India the Courts were cautious in that care has to be taken to see that interest other than the interest of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of this section. It was consistently held in India that it is for the Court to decide whether a document falls within the category of "Unpublished Official Records relating to any Affairs of State". In doing so the Court can have regard to all the circumstances **barring the inspection of the document itself**. Apart from this there is no fetter to the jurisdiction of the Court looking at whatever material available for the purpose of ascertaining whether the document is an unpublished official record relating to Affairs of State. In *Chamarbaghwalla vs. Parpia*[9] the Court stated that what are the Affairs of State "has got to be determined by a reference to the grounds on which privilege can be claimed in respect of a particular document/ It is only such documents which relate to the affairs of State, the disclosure of which would be detrimental to the public interest that come within the category of unpublished official records relating to Affairs of State entitled to protection under this section". In *Nagaraja Pillai vs. Secretary of State*[10] and also in *Pandit Chandradhar Tewari vs. Deputy Commissioner Lucknow*[11] Courts took the view that the sole judge as to whether disclosure will harm the public interest is the public officer concerned and it is not for

the court to decide whether public interest would or would not suffer. In *Jehangir vs. Secretary of State*[12] and in *King Emperor vs. Bhagawali Prasad*[13] Courts took the view that the public officer claiming privilege has to exercise his discretion in giving or refusing disclosure. His decision must not be arbitrary or capricious. He should not claim privilege because such disclosure would either advance the case of the adversary or damage his case. Section 123 must in no event be resorted to as a cloak to shield the truth from the Court.

Excelsior Film vs. Union of India[14] and in *Punjab vs. Sodhi Sukhdeu Singh(supra)* it was held that a Court would not inspect the document in order to determine whether it is related to an Affair of State. However it could take other evidence to determine whether it is in fact an Affair of State, but held further that the Court would not inquire into whether the disclosure would cause an injury to public interest by such disclosure. Injury to public interest was to be decided solely by the official.

However there was a departure from this thinking in the case of *Uttar Pradesh vs. Raj Narain(supra)* "which sought to bring the Indian Law in line with the modern judicial thinking in England. . . . . " In *Gupta vs. The President of India(supra) (Judges case)* the Indian Supreme Court ruled that the court enjoys the power to inspect the document in question and then decide whether it relates to Affairs of State or whether it's exclusion is in the public interest. The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with Court by reason of Section 162 Examination of the *judges case(supra)* and Raj Narain(supra) would indicate that the reasoning of *Conway vs. Rimmer(supra)* has found its way into India as observed by Bhagwati, J. in *Gupta vs. The President of India(supra).* "The basic question to which the Court would therefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to "Affairs of State" in other words it is of such a character that its disclosure would be against the interest of the state or the

public service and if so whether the public interest in its non-disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account it should not be allowed to be disclosed,"

Mr. Wikremanayake invited Court to import into our system the Indian thinking that has been developed on the principles laid down in *Conway vs. Rimmer(supra).* It is my considered view that there is no scope in our law for such activism.

It is therefore appropriate to consider the reasoning of Bhagwati, J. which under lay the reception of the English law after *Conway vs. Rimmer(supra)* Bhagwati, J. having propounded the principal of open government in *Raj Narain(supra)* sought to strengthen this concept of open government in the *Judges case.* He stated that "Secrecy of the government is not a vital public interest so as to prevail over the most imperative demands of justice. Even if a document is confidential it must be produced notwithstanding its confidentiality, if it is necessary for fairly disposing of the case, unless it can be shown that its disclosure would otherwise be injurious to public interest". He ruled that "the court enjoys power to inspect the document in question and then decide whether it related to Affairs of State or whether it's exclusion is in public interest". In giving a new orientation to the statutory provision (Section 123 of the Evidence Act) Bhagwati, J. emphasised "where a society has chosen to accept democracy as its credal faith, it is elementary that the citizen ought to 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. The citizens, right to know the facts, the true facts, about the administration of the country is thus one of the pillars of the democratic State and that is why the demand of openness in the government is increasingly growing in different parts of the world." Bhagwati, J. pointed out that "if the processes and

functioning of government are kept shrouded in secrecy and hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority. But if there is an open government where means of information are available to the public, there would be greater exposure of the functioning of the government and it would help to assure the people a better and more efficient administration. Exposure to public gaze and scrutiny is "the surest means of achieving a clean and healthy administration". "An open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency. Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands . . . . . the possibility of subsequent disclosure would act as an effective check against carelessness impetuosity, arbitrariness, or *mala fides* . . . . . "

It seems therefore that the concept of open government had been the motivating factor for falling in line with the developments in England, With all due respect to Bhagwati, J., it is my considered view that judges and Courts must keep a clear distance from the machinations of State craft and political intrigue if the judicial system is to be recognized and respected as an entity devoid of political colouring. The pronouncements of Bhagawati, J. in *Raj Narain(supra)* and in the *Judges case(supra)* to my mind appear to be political than anything else. Certainly there is no scope for such activism in this country.

It is already settled law that Section 123 embodies an absolute prohibition as observed by Basnayake, C.J. in *Daniel Appuhamy vs. Illangaratne(supra).* H. N. G. Fernando, J. in *Keerthiratne vs. Gunawardana(supra)* held that Section 123 and 124 of the Evidence Ordinance do not correspond with the English Law on the same subject and the general principle by which the England Courts are guided is not applicable to cases falling under Section 124.

I have expressed an opinion elsewhere in this judgment that it is possible that an official communication made to a public officer in official confidence could also amount to an Unpublished Official Record relating to Affairs of State in which case Section 162(2) operates to shut it out. Hence there in no scope for the application of English Law in this country.

I am inclined to accept the submission of the Additional Solicitor General that the obvious meaning of a statute should be given effect to where the meaning is clear and unequivocal and that it is clear from Section 124 that a public officer cannot be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer from the disclosure. This submission of the Additional Solicitor General is strengthened by the dicta of Basnayake, C.J. in *Daniel Appuhamy(supra)* where His Lordship observed ". . . . . judge of whether public interest would suffer by the disclosure of the official communication made to him in official confidence is the public officer concerned and the courts have no power to overrule him or override his authority." When Section 124 is read with 162(2) the power of inspection is taken away where it refers to matters of State.

Mr. Romesh de Silva, Presidents Counsel also submitted that the learned District judge erred in ordering the production of the impugned document after having come to a finding that the communication related to Affairs of State. The moment the District Judge formed the opinion that the document related to an Affair of State then she was bound by the reasoning of Basnayake, C.J. in Daniel *Appuhamy vs. Illangaratne(supra).* I accordingly set aside the order of the learned District Judge dated 04. 03. 1997 ordering the production of the impugned document. The application for revision is allowed. I make no order for costs.

Application allowed.