Gujarat High Court
Narottamdas L. Shah vs State Of Gujarat And Anr. on 4 November, 1970
Equivalent citations: (1971) 12 GLR 894
Author: D Desai
Bench: J Mehta, D Desai
JUDGMENT D.A. Desai, J.

1. A fundamental question of far reaching importance going to the root of administration of justice as adopted in our country is raised in this group of Criminal Revision Applications. The applicant in each of the applications who is original accused is the editor of a daily news paper Jai hind published simultaneously from Rajkot and Ahmedabad. In the Rajkot edition of the JAI HIND daily published on 21st January 1969, 22nd January 1969, 23rd January 1969, 25th January 1969 and 4th February 1969 there appeared certain articles adversely reflecting upon the purity and efficiency of administration in Police Department of Rajkot district. One Mr. P.G. Navani was the District Superintendent of Police Rajkot District at the relevant time. Certain passages in the said articles in particular and all articles in general were considered to be per se defamatory of Mr. Navani a public servant in discharge of his duty. The State Government accordingly directed the Public Prosecutor of Rajkot to file five different complaints against the applicant for having committed an offence under Section 500 of the Indian Penal Code in the Court of Sessions at Rajkot. The Public Prosecutor filed five separate complaints against the applicant in the Court of Sessions at Rajkot. When the trial of the offence was about to commence, the Public Prosecutor in charge of the case on behalf of the State gave a single line application in each case: that the case be held in camera, purporting to be under Sub-section (5A) of Section 198B of the Criminal Procedure Code. The present applicant contested the application on various grounds. The learned Sessions Judge, even though he was satisfied that the case is not of such a nature which will serve any public purpose by holding the trial in camera, was constrained to grant the request to hold trial in camera at the desire of the Public Prosecutor in view of the language of Sub-section (5A) of Section 198B. The applicant preferred five separate Revision Applications challenging the aforementioned order inter alia on the ground that a portion of sub-Section 5A of Section 198B is ultra vires An. 14 and ArticleS 19(1)(a), 19(1)(d) and 19(1)(f) of the Constitution. In view of the importance of the question raised in these applications, our learned brother S.H. Sheth, J. referred the applications to the Division Bench. That is how these applications have come up before us for hearing.

2. Sections 190 to 198B grouped together under Part B of Chapter XV headed "Conditions requisite for initiation of proceedings" provide for taking cognizance of offences by Courts generally and in certain specified offences at the instance of persons directly affected by the offence. The general rule is that anyone can move a Criminal Court for taking cognizance of an offence which is committed. There are well recognised exceptions to this general rule. Section 198 provides that no Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under Sections 492 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence. There is a proviso to the section which is not material for our purpose. Section 198B(1) provides that notwithstanding anything contained in the Code, when any offence falling under Chapter XXI of the Indian Penal Code is alleged to have been committed against the President, Or the Vice President, or the Governor of a State, or a Minister, or any other

public servant employed in connection with the affairs of the Union or of a State, in respect of the conduct in the discharge of his public functions, a Court of Sessions may take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor. Therefore, when any one complains that he is defamed, he alone can move the Court for taking cognizance of the offence and the offender can be brought to book on his complaint alone. Since some years past a tendency was discernible that very often unwarranted and vicious attacks were made in press and from public platform on public servants employed in connection with the affairs of the Union or of a State in respect of their conduct in discharge of public functions. In order to vindicate his honour, the public servant had to file a complaint and go through the gamut of occasionally long and protracted criminal trial, but looking to the time and expenses involved in a protracted trial, the public servant appeared to be reluctant to initiate proceedings and the offender went scot free. But this brought in some demoralization in the public service and the whole thing was found unsatisfactory. The Parliament intervenes and by the Code of Criminal Procedure (Amendment) Act (26 of 1955) introduced Section 198B which made notable departure in initiation of proceedings for offence of defamation. In the absence of Section 198B, the person defamed alone could initiate the proceeding. By Section 198B, the Parliament enacted a provision by which upon a sanction of the relevant authority, the Public Prosecutor can initiate proceedings for offences falling under Chapter XXI of the Indian Penal Code (particularly offence of defamation) if it is committed against such high dignitaries as President, Vice President, Governor or a Minister of a State or any other public servant employed in connection with the affairs of Union or of a State so far as the offence is committed in respect of their conduct in the discharge of their public functions. When Section 198B was initially introduced the Public Prosecutor on a sanction from the Government could initiate proceedings of the offence of defamation if defamation was committed by means other than spoken words. Subsequently by anti-Corruption Laws (Amendment) Act (40 of 1964) the words "other than the offence of defamation by spoken words" were deleted, and simultaneously Sub-section (5A) was introduced a portion of which is impugned in these applications. A bare perusal of the provisions contained in Sections 198 and 198B would show at a glance that if an offence of defamation is committed in respect of a person other than high dignitaries and public servants as hereinbefore mentioned, the Court can take cognizance of an offence upon a complaint of the person defamed and the Court of the Judicial Magistrate First Class, within whose local limit the offence is committed would be competent to try the offence. On the introduction of Section 198B, the jurisdiction to take cognizance of an offence of defamation, if it is committed in respect of the aforementioned high dignitaries or the public servant appointed in connection with the affairs of the Union or of a State and if the offence is committed in discharge of his public functions, the Court of Sessions can take cognizance of the offence upon a complaint filed by the public prosecutor who can file complaint after tin sanction is accorded by the competent authority. Thus Section 198 B makes a notable departure from Section 198 in that two Courts which can take cognizance are entirely different and power to initiate the proceedings vests in different persons. In all other respect the procedure is the same, namely, that the offence of defamation will have to be tried according to the procedure prescribed for trial of a warrant case. One other departure of which we must notice is that the Court of Sessions ordinarily cannot take cognizance of an offence unless the accused is committed to it. But in the case of an offence falling under Chapter XXI, committed in connection with the aforementioned persons, the Court of Sessions is empowered to take cognizance of the offence upon a complaint of the Public Prosecutor. Sub-section (5A) as stated earlier was introduced

on 18-12-1964. It reads as under:

Every trial under this section skill by held court if either party thereto so desires or if the Court of Session so thinks fit to do.

In these applications, the applicant has challenged the constitutional validity of that part of Sub-section (5A) by which the Court would be under an obligation to hold trial in camera on the mere expression of a desire to that effect by either party to the proceeding. The impugned provision is "if either party thereto so desires." We should like to make it distinctly clear that the learned Advocates for the applicant has at no time challenged the vires of Sub-section (5 A) as a whole and in fact they specifically stated that power to hold trial in camera at the discretion of the Court must always be there in the Court. The real grievance was that the Court would be under an obligation to hold trial in camera at the dictate of a party. We would, therefore, consider the constitutional validity of the aforementioned portion of Sub-section (5A).

3. Mr. H.M. Mehta and Mr. M.R. Barot learned Advocates who appeared for the applicant in these applications formulated the following propositions for our consideration:

1. Open trial of a Criminal case being not only the soul of justice but an inalienable facet of rule of law as guaranteed by Article 14, a provision in the Criminal Procedure Code like sub-Section (5A) of Section 198B by which a party to the proceeding enjoys the privilege of denying it just at its desire would be the very negation of rule of law and would be violative of Article 14 of the Constitution.

2. The provision contained in Sub-section (5A) of Section 198B is discriminatory in procedure for trial of the same offence (namely, the offence of defamation) as discrimination is writ large on its face and would be violative of Article 14.

3. Even if the public servants who are defamed form a distinct and separate class, the classification is not reasonable as it is not based on intelligible differentia and has no rational relation to die object sought to be achieved by the provision.

4. The impugned provision infringes the freedom of speech and expression which includes within its ambit the freedom of press and right to report proceed ingsof the Court guaranteed by Article 19(l)(a) and freedom of moving freely throughout the territory of India guaranteed by Article 19(1)(d) and freedom to acquire, hold and dispose of the property, guaranted by Art 19(1)(f) and cannot be sustained as reasonable restriction within the meaning of Article 19(2) and 19(5) of the Constitution.

4. The first ground of attack at once raises a question as to the method of holding trial of criminal case in the system of administration of justice adopted in our country. It is a historical truism that but for a few minor changes of an insignificant character we have largely adopted the British system of justice in our country. The most important and probably the most valuable limb of it is that the trial shall be held in open Court in public gaze. Public trial in open Court is the essence of administration of justice. In view of the decision in Naresh Shridhar Mirajkar v. State of

Maharashtra , we need not dilate on this point. If there is one point on which both the majority and minority judgments are agreed it is on the point that all cases brought before the Court whether civil, criminal or others must be heard in open Court. A few passages from the judgment of that case will bring out in bold relief this all important facet of a criminal trial. Gajendragadkar C.J. speaking for the majority has observed at page 8:

It is well settled that in general, all cases brought before the Courts, whether civil, criminal or others, must be heard in open Court Public trial in open Court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness activity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, the Courts must generally hear causes in open and must permit the public admission to the Court-room.

The following passage of Bentham taken from the case of Scott v. Scott was quoted with approval:

In the darkness of secrecy sinister interest, and evil in every shape, have fall swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial in the sense that the security of securities is publicity.

Sarkar, J. has observed in that case:

It is well recognised that power to hold trial in camera is given in the interest of administration of justice and administration of justice is a matter of public interest.

Hidayatullah, J. (as he then was) in the minority judgment has in this connection observed at page 25 that all trials are held ostilis apertis, that is with open doors. This principle is old and according to Hallam it is direct guarantee of civil liberty and it moved Bentham to say that it was the soul of justice and that in proportion as publicity had place, the checks on judicial injustice could be found. Except for trials before the Council all trials in England including those before the notorious Star Chamber were public and with observance of the law terms. At other stage it is observed that in India the position is not different. Public hearing of cases before Courts is as fundamental to our democracy and system of justice as to any other country. That our legal system so understands it is quite easily demonstrable. Shah J. has observed that hearing of proceedings in open Court undoubtedly tends to ensure untainted administration of justice and departure from that course may be permitted in exceptional circumstances, when the Court is either by statutory injunction compelled, or is in the exercise of its discretion satisfied, that unless the public are excluded from the Court-room, interests of justice may suffer irreparably. Hearing in open Court of causes is of the utmost importance for maintaining confidence of the public in the impartial administration of justice as it operates as a wholesome check upon judicial behavior as well as upon the conduct of the

contending parties and their witnesses. Bachavat, J. has observed at page 39 that a Court of justice is a public forum. It is through publicity that the citizens are convinced that the Court renders even-handed justice, and it is, therefore, necessary that the trial should be open to the public and there should be no restraint on the publication of the report of the Court proceeding. The publicity generates public confidence in the administration of justice. In rare and exceptional cases only, the Court may hold the trial behind closed doors, or may forbid the publication of the report of its proceedings during the pendency of the litigation. It would thus appear that there is complete unanimity on the point that all causes brought before the Court should be heard in open Court. Undoubtedly, the majority judgment recognised certain exceptions to which we would presently refer. But it appears well settled that subject to those well recognised exceptions to be presently referred, all trials shall be held in open Court in public gaze and that appears to be the law of the land.

5. Leading English case on the subject which has been extensively referred to in Mirajkar's case (supra) is the case of Scott v. Scott 1911 (13) A.E.R.I. The question came before the Court in the following circumstances: In a nullity proceeding, the Court directed trial to be held in camera. After conclusion of the proceedings one of the parties published to a third party, transcript of the evidence given at the hearing of the suit. An action for contempt of Court was initiated against Mrs. Scott and her Solicitors. The question considered was whether the Court can impose perpetual silence on the parties by directing that the trial shall be held in camera and even after the conclusion of the proceedings, the evidence cannot be disclosed to third person. The action for the contempt of Court failed; but the wider question considered was whether the Court has jurisdiction and power to direct a trial to be held in camera. Viscount Haidane L.C. observed that "the power of ordinary Court of justice to hear in private cannot rest merely on the discretion of the justice or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private." Then comes the important observation which is as under:

If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be basad on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the Judge.

The broad principle accepted is that the Court must as between the parties administer justice in public. Some well recognised exceptions to the general rule were: care of wards or the lunatics where the Court is sitting primarily, to guard the interest of the ward or lunatics. The other exception recognised is in respect of litigation as to secret process where the effect of publicity would be to destroy the subject matter. But if there is any exception to the general principle that the cause shall be tried in public, it must be based on some other and overriding principle which defines the field of exception and cannot be left to the discretion of the Judge in individual case. The exception itself must be the outcome of a more fundamental principle such as the paramount duty of the Court to do justice and if by holding the trial in public the Court would not be able to achieve its paramount object that itself would be an exception for holding the trial in camera. Subject however to such well recognised exceptions which again must be based on the application of some other and overriding principle, the general principle, appears to be well recognised that administration of justice must

take place in open Court. The contention which was urged before that Court may be noticed because similar contention was also advanced before us. It was urged that in nullity proceedings sentiments of parties and delicacy of matter may itself be an overriding consideration for directing a trial to be held in camera at the instance of a party. In this connection it was observed that a mere desire to consider feelings of the parties or delicacy of the matter or to exclude from publicity details which it would be desirable not to publish is not enough as the law now stands. We would particularly notice the observation that a mere desire to consider either delicacy of the matter or feelings of the parties by itself would not be good consideration for making departure from the well established and well settled principle of administration of justice, namely, holding trial in public, to direct that trial should be held in camera. We may also refer to some of the observations from the speech of Lord Shaw who doubted the very power of the Court to direct a trial in camera. At p. 34 he has observed that the order to heat the ease camera was not only a mistake but was beyond the judge's power. Referring to the contention that the principle of openness of justice may yield to compulsory serene in Cases involving matrimonial interests and property, such as those affecting trade secrets or confidential documents; may not the Fear of giving evidence in public, questions of status like tries present, deter witnesses of delicate filing from giving testimony and rather induces the abandonment of their just tight by sensitive sectors, Lord Shaw has observed that "the concession to these feelings would, in opinion, tend to bring about those very matters to liberty in general and to society at large against which publicity tends to keep us secure, and it must further be remembered that in question of status society as such of which remarriage' is one of the finely institutions has also a real and grave interest as well as have the parties to individual cause.... The policy of widening the area of secure is always a of one; bat this is for Parliament, and this to whom the subject has been consigned by Parliament to consider." It would appear that Lord Show doubted the very power of the Court to direct a camera trial; We are concerned with a provision which enables a party to a proceeding to impose camera trial on the Court and the opposite party. The impunged provision if literally construed would impel the Court to grant a camera trial even when the Court does not consider it necessary in order to do justice between the parties. We would also like to point out that dictum of Lord Shaw to the extent he has put, has not been accepted in Mirajkar's case by the Supreme Court.

6. We may next refer to Re. William Oliver, 333 U.S. 257. Michigan statute provides for one-man grand jury system. It carries out some inquisitorial functions. William was called upon before this one man grand jury to testify and in the course of recording his evidence, the judge-jury concluded that the evidence was false and evasive. Immediately he was charged with contempt of Court and was convicted and sentenced to sixty days in jail. Three days later, a lawyer filed on his behalf in Michigan Supreme Court a petition for writ of habeas corpus. The writ being refused, the matter was taken before the Supreme Court. It was contended on behalf of the petitioner in that case that the Sixth Amendment to the Constitution directed that in all criminal proceedings, the accused shall enjoy the right to a speedy and public trial and as he was tried at a secret trial and was not given reasonable opportunity to defend himself and had no access to his legal advisor, the trial was bad and vitiated. The provision contained in the Sixth Amendment could not be availed of because the proceedings for contempt of Court cannot be put on par with criminal trial. The petitioner thereupon contended that he has been deprived of his liberty without due process of law as guaranteed by Fourteenth Amendment. Accepting this contention the Supreme Court observed as

under:

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common Law heritage. The exact date of its origin is obscure but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." Most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision requires that all criminal trials be open to the public. The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber and to the French monarch's abuse of the letter de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognised as a safeguard against any attempt to employ our Courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

At other stage it was observed that without exception ail Courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offence he may be charged. The sentence for contempt was set aside holding that the petitioner was called as a witness to testify in secret before one man grand jury investigation. In the midst of the petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial' and grand-jury became a judge and the witness became an accused charged with contempt of Court-all in secret. Following a charge, conviction and sentence, the petitioner was led away to prison still without any break in the secrecy. While setting aside the sentence for contempt of Court, it was finally observed that "in view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom and the universal requirement of our federal and state governments that criminal trial be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison." Strictly speaking, as it was a proceeding for contempt of Court, it could not be on par with criminal trial and, therefore, Sixth Amendment guaranteeing public trial could not be attracted, yet the proceedings were set at naught on the ground that the petitioner was deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment. Denial of public trial was considered violative of due process clause.

7. Mr. Mehta invited our attention to Fundamentals of Soviet Law edited P.S. Romashkin, Corresponding Member of the Acadamy of Sciences of the U.S. S.R. wherein, at p. 449 it is observed:

All cases are heard in public, with the exception of cases where that is prejudicial to the preservation of state secrets. All persons wishing to attend a trial may do so. Cases may also be heard in camera by a motivated decision of the Court when it deals with crimes committed by persons under the age of 16 years, sex crimes, and also with other cases where it is deemed necessary to prevent the spread of intimate information about these concerned in the case. In all cases sentences are pronounced in Public.

The provision that trial can beheld in camera by a motivated decision of the Court would indicate that the discretion is with the Court to direct the trial to be held in camera. Where the case arises out of an offence committed by a person below 16 years of age or it is a sex crime or where it is necessary to prevent spread of intimate information about those concerned with the case, the Court at its discretion may direct a trial in camera. However, the broad recognised principle is that all the cases are to be heard in public and if the case falls within the class of cases set out in the provision the Court has a discretion to direct a camera trial. It is not clear from the passage quoted above whether when a case involves state secret a trial should be held in camera, by the order of the Court or at the instance of the prosecution. Subject however to the case involving state secret it does appear that in U.S.S.R. the cases must be heard in public. Mr. Mehta also referred to Article 82 of the Constitution of Japan which provides:

Trials shall be conducted and judgment declared publicly. Where a Court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offences, involving the press or cases" wherein the rights of people as guaranteed in Chapter III of the Constitution are in question shall always be conducted publicly.

This Constitution was considered as colonial constitution because it was drawn up at the instance of Gen. Macarthur the Supreme Commandar of the occupation Army of the Japan after the second World War. Even in such a colonial constitution, Mr. Mehta emphasised the fact that the provision is that any offence involving press or wherein rights of the people have been guaranteed by Chapter III which is skin to part HI of our constitution, the trial ought to be held in public.

8. Professor Wade has at one place observed that lawyers have learned by centuries of experience that it is of the essence of justice that it should be dispensed in public. The seat of justice is in the market place. Or, if you prefer, all the dirty linen must be washed in public. Lord Atkins once said that justice was not a cloistered virtue, that the path of criticism was a public way and that the wrong headed were permitted to err therein.

9. Section 352 of the Criminal Procedure Code provides as under:

352. The place in which any Criminal Court is held for the purposes of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall

not have access to, or be or remain in, the room or building used by the Court." This can be said to be a statutory 'recognition of the principle of open trial.

10. As against these decisions, Mr. B.R. Shah learned Assistant Government Pleader who appeared for the respondent, urged that in our Constitution there is no provision that all cases shall be tried in public or in other words, there should always be a public trial. It was urged that it is not a rule of universal acceptance that the trial of a case should be held in public. There is no such fundamental right guaranteed in the Constitution, it was urged, nor is there any provision from which such right could be spelt out. The procedure for the trial of the case, Mr. Shah contended can be prescribed by statute and the Parliament will have the power to lay down the procedure. Mr. Shah further urged that apart from the fact that there is no such provision guaranteeing a public trial, there is authority for the proposition that trial may not always be held in public and: that it may be held in camera and camera trial can be directed not merely by an order of Court but even at the desire of a party. Mr. Shah in this connection first referred to Halsbury's Laws of England 9th Vol. Third Edn. p. 345 para 813 wherein it is observed:

In general, all cases, both civil and criminal, must be beard in open Court but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of public, the Court may sit in camera. Thus the Court may so sit, either throughout the whole or part of the hearing, where it is necessary for the public safety or where the subject matter of the suit would otherwise be destroyed, for example, for the disclosure of a secret process to of a secret document, or where the Court is of opinion that witnesses are hindered in or prevented from, giving evidence by the presence of the public. The Court may also be directed or may be given power by statute or statutory rules to exclude the public in particular proceedings. The general rule has no application in sitting in an administrative capacity, or in cases concerning wards of Court or persons of unsound mind, or where a judge, by consent, sits as an arbitrator.

Mr. Shah also referred to Judicial Review of Administrative Action (Second Edn.) by S.A. De Smith p. 179 where the author has observed that the Court are not obliged always to sit in public. Reference was also made to Me Pherson C.L. v. Me Pherson C.L. 1936 A.C. 177. After referring to the observations of Lord Halsbury in Scott v. Scott (supra) that every Court of justice is open to every subject of the King, it was further observed that publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it, can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception. In that case, the judge disposed of divorce action in his library, access to which was through a double swing door in the wall of a public corridor. One wing of that door was always fixed, the other, although swinging close, was usually unfastened. On the fixed wing was a brass plate with the word 'private' in block letters, A decree passed in such a proceeding was subsequently challenged as nullity. The Court held that the decree was voidable and not void. Relying on this decision, Mr. Shah strenuously urged that if public trial is the universal rule and which admits of no exception, then any decree passed in a trial not held in public would be void and not merely voidable. Mr. Shah further urged that at best one can go so far that ordinarily a trial should be in public subject to a law of competent legislature providing for camera trial and if such a law is enacted it would not violate ArticleS 14, 19 or 21. We would like to point out that Me Pherson's case does not overrule the observation in Scott v. Scott. In

fact some of the observations in Scott v. Scott have been reproduced, and accepted. Even in the latter case it was pointed out that trial of the divorce case shall always take place in fullest, term in open Court.

11. Having considered all the aforementioned cases, it appears well-settled that a case brought before the Court must be heard in open Court. This rule is subject to well recognised exceptions which we have pointed out while considering the case of Scott v. Scott and the exceptions must be based on some overriding principle. One particular exception which has been considered in Mirajkar's case (supra) is founded upon the para-amount duty for performing which the Courts are constituted, viz. to do justice between the parties. If in a given case, holding of a public trial, looking to the facts and circumstances of the case, would impede or obstruct the course of justice that would be an overriding consideration on which the Court can hold the trial in camera. The Court would not so direct in order to satisfy the susceptibility of a party, not merely because of the delicacy of the matter itself, not merely because sentiment and sentimentalism is involved in the matter, but primarily because it would not be able to achieve its paramount object-namely, doing justice. The cases of wards of Court and lunatics and trade secrets are well recognised exceptions which in a case like the instant one, have no place. But subject to these well recognised exceptions, it appears clearly well settled that the trial of a case shall be in public.

12. If a cause should ordinarily be tried in public a provision like Sub-section (5A) by which trial must be held in camera at the mere desire of a party to the proceeding would be an exception to the rule or would be a restriction. A provision by which the presiding judge is empowered to ask some or all persons present in the Court to leave the Court cannot be construed to mean that the Court thereby directs the case to be heard in camera. When trial is directed to be held in camera, it means that there will be a seal on proceedings. The parties and their counsels and the judge alone will have full knowledge of the record because at the conclusion of the trial, the record will be permanently sealed and there will be silence in perpetuity. It is undoubtedly true that whole trial may be directed to be held in camera or a portion of it may be held in camera. But the proceeding and record of the whole or portion of the trial directed to be held in camera will be sealed in perpetuity. In Mirajkar's case, Tarkunde, J. while hearing an action for damages for defamation directed by an oral order that Goda's evidence should not be published. It was not made clear, whether the evidence could not be published either during the course of the trial or at any time there after. By a majority judgment the Supreme Court upheld the order on specific assumption that the ban imposed on the publication of Goda's evidence was imposed during the period of the trial and not thereafter. It appears that majority judgment while abhorring perpetual silence upheld the order, on the assumption that the ban on publication of evidence was for the period of the trial. In a given case if the trial is directed to be held in camera without any qualification, it must mean that the record shall be perpetually sealed and even subsequently no part of it could be disclosed to any other person. If trial is directed to be held in camera, not only the evidence given in the trial shall not be published any where but we apprehend that at the conclusion of the trial, the judgment cannot be published. Even if the accused were to be convicted, the fact that he has been convicted for defamation after a protracted trial cannot be published. Conversely, if the accusation was found to be frivolous and the accused was fully exonerated even that fact cannot be published. These, in our opinion, are the implications of a camera trial. If we are right in our conclusion that the trial has to be in public subject to well

recognised exceptions, we will examine the nature and effect of the restriction imposed by the impugned portion of Sub-section (5A).

13. Let us examines the first contention. It was urged that Parliament has enacted a law prescribing procedure for trial of an offence. If anyone is accused of committing that offence he can be tried in accordance with the procedure so prescribed. If he is convicted at the conclusion of the trial he is deprived of liberty in accordance with procedure established by law. That would satisfy the constitutional guarantee enshrined in Article 21 and the validity of such law cannot be challenged as infringing Articles 14 and 19 because Article 21 is a complete code by itself. The question is whether the impugned provision violates any constitutional guarantee. Article 14 of the Constitution which is a command to the State provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 19(1)(a) guarantees freedom of speech and expression, Article 19(l)(d) guarantees freedom to move freely throughout the territory of India; Article 19(1)(f) guarantees right to acquire, hold and dispose of property. The freedoms guaranteed by Articles 19(1)(a), 19(1)(d) and 19(1)(f) would be subject to reasonable restrictions as set out in clauses (2) and (5) of Article 19. Then comes Article 21 which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The outcome of a criminal prosecution may, in a given case, be conviction and sentence of imprisonment and fine. If a man is imprisoned, he is certainly deprived of his personal liberty. If he is fined, his freedom to acquire, held and dispose of property would be in jeopardy and if any one is to be deprived of his personal liberty, constitutional guarantee is that it cannot be done except according to the procedure established by law. There shall be a trial and the trial shall be according to the procedure established by law. The words "procedure established by law" would mean procedure set out in a State or Legislature made law. In the past of course, there was a controversy whether the word 'law' in Article 21 would mean 'juts' or 'lax We would be presently referring to Gopalan's case in detail wherein this controversy has been considered. Before referring to it, implication of Article 21 as it stands may be examined. Could it ever be urged with seriousness that Article 21 itself does not provide any constitutional guarantee? In our opinion, Article 21 itself provides a constitutional guarantee against deprivation of one's own life or personal liberty except according to the procedure established by law. Article 14 has contributed to a great extent to the establishment of rule of law. But there is equally some note worthy contribution of Article 21 to the establishment of rule of law in this country. Before any one can be deprived of his personal liberty even in that restricted sense it can only be done after following the procedure established by law. But it is now too late in the day to argue that Article 21 and Article 19 each guarantee a distinct and separate right, one having no impact on the other. We would presently point out that any law to '03 valid under Article 21 must satisfy freedoms guaranteed by Article 19 arid test of rationality as also equality before law and equal protection of law as guaranteed by Article 14. It is again too late in the day to say that Article 21 is a separate code by itself for guaranteeing procedural due process and that once requirements of Article 21 are satisfied, the validity of law cannot be questioned as infringing Article 19 or 14. But before we take over detailed examination of this aspect we would first refer to Gopalan's case and then examine the change in law brought about by Cooper's case. Gopalan who was detained under the Preventive Detention Act, moved a petition for a writ of habeas corpus in the Supreme Court. It was contended on his behalf that as Ire was detained the freedoms guaranteed under Articles 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(d), 19(1)(e) and 19(1)(g) had been

infringed. Article 22 enables the Parliament to enact law for preventive detention. The contention was that even if the law as to preventive detention was valid under Article 22 and the order detaining the petitioner was valid as per law in force, yet if thereby the freedoms guaranteed to the petitioner under Article 19 were infringed the validity of the law must be examined under Article 19 and especially it must be found out whether the restriction upon the freedom stands the scrutiny of the various sub-articles of Article 19. Kania, C.J. with whom Patanjali Sastri, Mahajan, Mukherjea and Das, JJ. agreed held that Article 19 of the Constitution has no application to a law which relates directly to preventive detention even though as a result of an order of detention the freedoms referred to in Sub-clauses (a) to (e) and (g) in general, and Sub-clause (d) in particular of (1) of Article 19 may be restricted or abridged; and the constitutional validity of a law relating to such detention cannot therefore be judged ID the one of the test prescribed in Clause (5) of the said Article. In considering the validity of the legislation it must first be found out whether it is in respect of the rights mentioned in various sub-clauses of Article 19(1). The true approach according to Kania, C.J. is only to consider the directness of the legislation and not what would be the result of the detention otherwise valid on the mode of the detenue's life. Relying on these observations it was urged that this Court must first find out whether the provisions contained in Sub-section (5A) is a legislation in respect of any of freedoms guaranteed by Article 19. We would presently point out that in view of Cooper's case this argument is no more available to the respondents. Approaching the case from the aforementioned angle, it was held that the legislation as to preventive detention was not the legislation in respect of one of the rights mentioned in various sub-clauses of Article 19(1) and, therefore, its validity cannot be examined as infringing freedom guaranteed by Article 19. As a corollary it was also held that Article 19 should be held as a separate and complete article by itself and Articles 21 and 22 should be read as a complete code regarding procedural due process. The other proposition which emerges from the majority judgment and which has been approved by Das J. is that Article 19(1) postulates a legal capacity to exercise the rights guaranteed by it and if a citizen loses the freedom of his person by reason of lawful detention, as a result of a conviction for an offence or otherwise he cannot claim the rights under Sub-clauses (a) to (e) and (g) because the freedoms end where lawful detention begins and therefore the validity of a preventive detention Act cannot be judged by Article 19(5). The third proposition to which reference was made and which emerges from the majority judgment is that the concept of the right to move freely throughout the territory of India referred to in Article 19(1)(d) of the Constitution is entirely different from the concept of the right to 'personal liberty' referred to in Article 21 and Article 19 should not, therefore, be read as controlled by the provisions of Article 21. The view that Article 19 guarantees substantive rights and Article 21 prescribes the procedure is incorrect. One more proposition that emerges from the majority judgment is that the word 'according to procedure established by law' in Article 21 would mean procedure established by law made by the State. We may also refer a few of the observations in the minority judgment of Fajalali, J., more particularly with reference to interpretation of the expression 'procedure established by law'. Fajalali, J. was of the opinion that the words 'procedure established by law' in Article 21 in terms takes in its stride the procedural due process of the Fourteenth Amendment of the American Constitution. The essentials of the procedural due process are: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, (4) orderly course of procedure. Professor Willis in his book 'On Constitutional Law' has observed that ordinary course of procedure requires a public trial.

14. Mr. Shah urged that if at the conclusion of the trial of a criminal case the conviction and sentence are likely to follow which in turn would result in deprivation of the personal liberty of the accused, obviously, he could not be deprived of his personal liberty except according to the procedure established by law as held by the Supreme Court in Gopalan's case but the law here would not mean the principles of natural justice or law which ought to be reasonable. In other words, the law must be State made law or Legislature made law. Mr. Shah urged that once law is made by legislature competent to pass law a trial in accordance with the procedure prescribed therein would satisfy constitutional guarantee contained in Article 21. It was contended with utmost vehemence that the validity of the law to satisfy constitutional guarantee under Article 21 need not be examined with reference to Article 19 because they operate in entirely different fields. It was also contended that at any rate the freedom to move freely throughout the territory of India as interpreted in Gopalan's case would not be infringed by the procedure for trial of a criminal case. The personal liberty guaranteed by Article 21 is entirely different from the freedom to move freely throughout the territory of India as guaranteed by Article 19. The question is whether the test laid down in Gopalan's case still holds the field. In Kharak Singh v. Stale of U.F. A.I.R. 1968 S.C. 1295, the question raised was about the precise relationship between the freedom enunciated in Article 19(1)(d) oft the one hand and personal liberty guaranteed under Article 21 on the other, and the construction of consequence of the words "procedure established by law" in the latter article both of which were the subject matter of elaborate discussion in Gopalan's case. In that case, validity of the regulation for domiciliary visits at night by the police at the house of the suspect was challenged on the ground that it Was deprivation of personal liberty as guaranteed by Article 21. It was contended that an unauthorised intrusion into the persons home and disturbance caused to him thereby was violation of common law right of a man, an ultimate essential of ordered liberty if riot of the Very concept of civilization. Clause (b) of Regulation 236 of the U.P. Police Regulation was struck down as violative of Article 21 on the ground that there was no law on which the same can be justified and it would be unconstitutional. This conclusion was reached without in any way differing from some of the observations in Gopalan's case. We would like to point out that there was unanimity of the opinion on the question that if there was no enacted law to sustain deprivation of liberty, the action would be struck down as violative of personal liberty guaranteed under Article 21. In passing, we would like to point out that the interpretation put on Article 19(1)(d) has not been accepted by Subbarao, J. in his judgment. Subbarao J. has observed that freedom to move under Article 19(1)(d) must be a movement in a free country, i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. This would be a notable departure from the interpretation put on the words 'move freely throughout India' in Gopalan's case. It may also be pointed out that while considering whether fundamental right guaranteed under Article 19(1)(d) is infringed by domiciliary visit, Subbarao, J. has observed that fundamental right of life and personal liberty had many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not

infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. To some extent it would appear that the observations in Gopalan's case have been watered down.

15. We would now refer to R.C. Cooper v. Union of India A.I.R. 1970 S.C. 564 wherein the Full Court has examined in minute detail the ratio of Gopalan's case and in certain aspects has differed from the same, Taking up the first proposition laid down in Gopalan's case that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive-each article enacting a code relating to protection of distinct rights, the Full Court has overruled the same. There is some long discussion referring to ratio of earlier decisions of the Supreme Court under Article 19(1)(f) and 31 and also under Articles 21 and 22 and after examining two distinct lines of authority on the subject, the Supreme Court has observed as under:

In our judgment, the assumption in A.K. Gopalan's Case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of 'law' which authorises deprivation of property and 'a law' which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon this right to hold property which are not reasonable restrictions in the interests of the general public. It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purposes maybe presumed to impose reasonable restrictions in the interests of the general public.

Two propositions laid down in Gopalan's case are overruled; one, that in determining whether there is infringement of the fundamental guaranteed rights, the object and form of the State action alone need be considered and the effect of the laws on the fundamental rights of the individual will be ignored and secondly that each article enacts a separate and distinct code by itself and any law infringing it must satisfy for its validity the provision of that article alone. In paragraph 61 it is clearly brought out that one thread runs through all articles contained in Part III of the Constitution in that they seek to protect the right of the individual or group of individuals against infringement of those rights within specific limits. It is necessary to bear in mind that enunciation of guarantee of fundamental rights has taken different forms. It is finally observed that the guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights. These observations would in terms overrule the proposition laid down in Gopalan's case that each article is a complete code by itself and the validity of each legislation must be decided from the directness of its impact on that article alone. In Cooper's case, the validity of legislation with regard to acquisition of property was decided in the light; of the provisions contained in Articles 19(1)(f) and 19(5). The Intention that the challenge to the validity of the provision for acquisition is liable to be decided only on the ground of non-compliance with Article 31(2) was in terms rejected. It was

observed that acquisition must be under the authority of law and the expression law means a law which is within the competence of the Legislature and does not impair the guarantee of the rights in Part III. Some of the decisions which took the view that Articles 19(l)(f) and 31(2) are mutually exclusive were specifically overruled. As an illustration it was pointed out that if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f). Therefore, the position that now emerges after the decision in Cooper's case is that any law prescribing procedure as required by Article 21 must also satisfy constitutional guarantee under Articles 19 and 14. In other words, the validity of law prescribing procedure for deprivation of personal liberty to satisfy constitutional guarantee under Article 21 can also be examined to find out whether it in any way infringes the freedoms guaranteed by Article 19 or equality before law guaranteed by Article 14. In order to be a valid law under Article 21, it must be law which either should not infringe any of the freedoms guaranteed by Article 19 or if it puts any restriction it must satisfy the test of reasonableness as provided by various Sub-clauses of Article 19. It must be a reasonable provision, because if it is wholly unreasonable, it would not satisfy the test of rationality and would infringe Article 14. The submission made by Mr. Shah on the ratio of Gopalan's case that while examining validity of the impugned provision in the light of the guarantee contained in Article 21 the Court must examine the impugned provision and satisfy the test whether the procedure is established by law cannot be accepted. It was urged that once the law is enacted by the Legislature competent to enact it that law for the purpose of Article 21 is valid. If this submission is to be accepted, it would mean that if Parliament were tomorrow to pass a legislation by which procedure is prescribed that accused shall always be tried in his absence which would neither infringe Article 21 or 22, its validity can only be contested on the ground whether it is law enacted by Legislature competent to enact it. It was urged that it cannot be struck down on the ground that it is the very antithesis of rule of law. In fact, in view of the decision in Cooper's case, it appears well settled that various rights guaranteed by different articles in Part III provide a scheme of series of liberties and freedoms in respect of citizens or in respect of all in this country and that each has an impact on the other and that legislation to be valid must not only satisfy the article in respect of which legislation is enacted but it must be a valid law and to be valid law it must not infringe any of the fundamental rights guaranteed by Part III because once it is infringed it would cease to be a valid law and it could not be subsisting valid law by which procedure is established as required by Article 21. We are, therefore, unable to accept the submission of Mr. Shah that while examining the validity of the impugned provision the Court must only rest content by finding out whether for trial of the offence the impugned provision is enacted by valid principles of legislation and validity of legislation must be examined from this limited angle, whether it is enacted by legislature competent to enact it. Even if it is procedural provision or the provision in the domain of procedure it is in respect of a trial of an offence at the, end of which the accused may be deprived of his liberty. Therefore, there must be procedure established by law and that law must not infringe any of the fundamental rights guaranteed either under Article 19 or under Article 14.

16. The question is whether the impugned provision contained in Sub-section (5A) infringes any of the three freedoms contained in Articles 19(1)(a), 19(1)(d), and 19(1)(f) or it infringes Article 14. Article 19(1)(a) guarantees freedom of speech and expression which undoubtedly implies freedom of press and the right to publish report of proceedings. Article 19(1)(d) guarantees freedom to move

freely throughout the territory of India. Article 19(1)(f) guarantees freedom to acquire, hold and dispose of the property. Mr. Shah very strenuously contended that a trial in camera infringes none of the three freedoms guaranteed by Article 19(1)(a), 19(1)(d) and 19(1)(f) and at any rate, it does not infringe the right to equality guaranteed by Article 14. Mr. Shah urged that it is not open to the Court to strike down any provision in a statute merely on the ground that it is thoroughly unreasonable. Before answering this question we would first examine the effect of the impugned provision.

17. By reference to various authorities and system of jurisprudence adopted by us we have pointed out above that in order to ensure a fair and just trial and fair administration of justice the trial shall be held in public subject to those well recognised exceptions which we have pointed out above. By the impugned provision a trial for the offence of defamation committed in respect of high dignitaries as President, Vice President, a Minister of the State or public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of public functions can be held in camera at the desire of a party thereto. A party to a trial for such an offence has merely to express a desire that the trial shall be held in camera and the Court is bound to respect the same. There is no option to the Court. Once the desire is expressed by either party to the proceeding, the mandate of the section is that the Court shall direct the trial to be held in camera. A trial in camera is not wholly unknown to law. There are express provisions in certain statutes and as recognised in Mirajkar's case, the Court has inherent power to direct the trial to be held in camera. The Court after considering all the aspects of the matter in its discretion may direct that the trial may be held in camera. Without going so far, as done by Lord Shaw in Szott v. Scott (supra), that the Court has no power to direct that the trial be held in camera, we would say that the exception to general rule may be carved out on an overriding principle on which exception can be based that trial shall be in camera. It is not merely a case of the individual discretion of a Judge in a given case that trial should ordinarily be held in camera but it must be on an overriding principle on which the exception should be based. One such exception recognised in Mirajkar's case was that if the primary object for which the Courts are constituted is to do justice between the parties, if the very object would stand defeated by an open trial, then in order to achieve the object for which the Court exists the trial can be directed to be held in camera. The impugned provision shifts the power from the discretion of the Court to the desire of a party. The mischief enacted by the section can be well gauged by a simple illustration. On a complaint being filed by a public prosecutor as envisaged by Section 198B the Court of Sessions starts to commence the trial. At that time the accused can walk into the Court and tell the presiding judge to ask every one to clear out of Court except of course be Judge, the complainant and his advocate and the accused assisted by his advocate. The Court will have lo direct every one to clear out of the Court not because the Judge thinks that the ends of justice will be defeated by holding the trial in public, but because it is so dictated by the whim, fancy or caprice of a party. On a mere expression of a desire by a party, the procedure for trial can be dictated one way or the other and the party expressing desire need not support it by any cogent or convincing reasons. If public trial is the essence or inalienable facet of rule of law, negation of it by a mere desire of a party would be the very antitheses of rule of law. It was once said that to remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundation of freedom from the rock to sand. The present situation would be almost inconceivable. Here the maintenance of the right is to be remitted not to the judicial discretion but to put it most mildly to the whim, caprice or fancy of a party. When we examine a little later the question of any object sought to be achieved by

such a provision, we would like to point out that except in one case the provision is likely to be self defeating. Apart from that, can any one visualise a case in which trial of a judicial proceeding is to be regulated, not according to judicial decorum, not according to prescribed procedure, not according to discretion to be exercised by Judge keeping in view inherent powers of the Court but according to the dictate of a party. Such is the effect of the provision more especially of the words "every trial shall be held in camera if either party thereto so desires". In our opinion this provision confers a very arbitrary privilege undoubtedly on both the parties to the proceedings to claim a trial in camera. If public trial is the rule and exception is to be based on some overriding principle, we fail to see how the provision by which a party at his sweet will can deny general principle of public trial and claim a camera trial can be said to be a reasonable or a just provision founded on some overriding principle. It will not only impose fetter on Court's power but it will undoubtedly put fetter on justice. Such is the effect of the provision contained in Sub-section (5 A). It undoubtedly puts a very serious restriction on the power of the Court to continue to hold a public trial. Even if the presiding Judge was of the opinion considering the facts and circumstances in which trial is held and in a given case such as where there is hostile atmosphere even as against the accused because of a gruesome offence committed by him to direct a camera trial yet it will be judicial discretion which will have to be exercised before a trial in camera is directed and if directed in exercise of the judicial discretion, it can be corrected by superior Court. But if public trial is to be denied just at the expression of a desire of a party only, it cannot be denied or resisted by presiding judge even if he is of the contrary opinion and in our opinion it cannot be even corrected by a superior Court because the discretion vests in the party and not in the Court. The far-reaching consequence of the provision can be gauged by saying that not only the original trial can be in camera with all the implications of a camera trial such as perpetual seal on the record of the case but even the proceeding in appeal which is only a continuation of the trial can be sealed. A provision by which such an arbitrary privilege is conferred upon a party could hardly stand the test of rationality or reasonableness.

18. Mr. Shah however urged that before examining reasonableness or rationality of the provision which prima facie appears to be thoroughly unreasonable, this Court should examine the nature of the trial, object sought to be achieved and the nature of the evidence that in a given case may have to be led and delicacy of the matter all of which may have weighed with the Parliament in conferring power on a party to a proceeding to ask for and obtain as of right a camera trial. It is undoubtedly true that Section 198B contemplates a prosecution in respect of the offence of defamation committed qua such high dignitaries as President, Vice President, Governor of a State or Minister or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in discharge of his public functions. Mr. Shah is undoubtedly right when he says that the President, Vice President, Governor and Minister of a State are high dignitaries of the State. If the offence of defamation is committed in respect of such high dignitaries they can be grouped together and form a class and special procedure in respect of the trial of an offence of defamation conferring jurisdiction on a higher Court like the Court of Sessions can be validly enacted. But this procedure Mr. Shah forgets is also in respect of public servants employed in connection with the affairs of the Union or a State in respect of their conduct in discharge of their public functions. Mr. Shah urged that it is not every public servant if defamed, that complaint under Section 198B can be filed by the public prosecutor. There are three pre-requisites before a complaint under Section 198B can be filed by public prosecutor. These three pre-requisites are : that the person defamed must be a

public servant and must be employed in connection with the affairs of the Union or of State and defamation must be in respect of his conduct in the discharge of public functions. Mr. Shah urged that once these pre-requisites are taken into account the qualifying clause becomes so large that group of persons fulfilling the three requirements would comprise a small number. Mr. Shah urged that even if the three pre-requisites are satisfied a complaint under Section 198B cannot be straightway filed unless the prosecution is sanctioned by the competent authority. Mr. Shah, therefore, urged that when the State after considering all the matters, sanctions the prosecution which enables the public prosecutor to file a complaint it would be satisfied that the public servant of the class aforementioned is defamed in respect of his conduct in discharge of public functions. The defamation must be arising out of his conduct as disclosed in discharge of his public functions and not in the private capacity of a public servant. Mr. Shah urged that if such be the class of defamed persons for whom prosecution can be launched under Section 198B, it may in a given case necessitate leading evidence in respect of the State secrets or such confidential matters which State would not divulge in public. Therefore, it was urged that the Legislature considered it advisable not to leave granting of a camera trial to the discretion of the Court but conferred power on the party to the proceeding one of which will necessarily be State as represented by public prosecutor to ask for camera trial. It was further urged that in order to see that both parties to the trial are put on the same footing that the same privilege was extended to the accused as well.

19. For a moment it is not suggested that in a given case a camera trial may all the more be necessary. A trial in camera or trial in secrecy as stated by Lord Shaw is not unknown to our jurisprudence. In fact there are several provisions such as Section 22 of the Hindu Marriage Act, Section 33 of the Special Marriage Act and Section 53 of the Indian Divorce Act which provide for camera trial and that too at the desire of a party. That part of these provisions by which camera trial may be granted cannot be seriously questioned. We are examining whether such a trial can be asked for and obtained as of right at the desire of a party. Mr. Shah also pointed out that we need not be too much oppressed by the situation that the Judge has to act at the behest of a party. We would certainly take a strong exception to the provision by which procedure of a trial can be regulated not according to the provision contained in the Statute nor according to the discretion or inherent powers of the Court but according to the desire of a party the desire, which need not be reasonable, sensible or just, the desire which need not be based on any cogent or convincing reasons. It was however pointed out to us that there are several provisions which impel the Court to act at the behest of a party. Reference in this connection was made to Sections 123 and 124 of the Indian Evidence Act. Section 123 provides that 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. Section 124 provides that no 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. The officer at the head of the department is the sole judge whether to claim privilege or to waive the same. The Court cannot compel the production of unpublished official records if the officer at the head of the department declines to waive the privilege. It was contended that when privilege is claimed under Section 123, the Court has to act at the behest of the officer at the head of the department. The submission was that if head of the department claims privilege, the Court cannot examine the claim of privilege or validity of the claim and after rejecting the validity of the

claim-ultimately compel production thereof. Mr. Shah urged that the Legislature in its wisdom wherever it decided not to permit disclosure of the State secrets which might seriously injure public interest has made provision by which the power of the Court to do certain things is circumscribed or controlled and that power in fact remains in executive officer of the State. It was therefore urged that the proposition that in the course of a trial the Judge has to act at the behest of a party is not wholly unknown to law. Section 123 does not give a blanket power to the officer who is the head of the department just to claim privilege and the Court i not rendered entirely powerless to examine the validity of the claim. In fact if the claim of privilege is founded upon the language of Section 123, the Court would examine whether document in respect of which privilege is claimed, is an unpublished official record relating to any affairs of the Slate, and if these two conditions are satisfied, the question would be left to the discretion of the officer whether to claim privilege or to waive the same. But Section 123 does not render the Court wholly powerless to examine the validity of the claim. It may be that the Court may not insist upon looking into the document to decide the validity of the claim of privilege. If a proper affidavit is made disclosing all the circumstances in which privilege is claimed, the Court can certainly examine if necessary by parol evidence as to whether the claim is justified. If the Court comes to the conclusion that the claim is justified, in response to a higher duty not to injure public interest by disclosure of State secret,, the Court would leave it to the officer who is head of the department to decide whether to continue to claim privilege or to waive the same. But the language of Section 123 does not justify the submission that it confers blanket power on the officer who is the head of the department to claim in his absolute discretion the privilege and the Court cannot examine at all the validity of the claim. It is not proper to read Section 123 in isolation. It will have to be read with Section 162 of the Indian Evidence Act which provides that a witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the Court. Second part of Section 162 provides that 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. It is, therefore, crystal clear that even when privilege is claimed under Section 123, it would be open to the Court to take evidence to enable it to determine its admissibility especially in the inquiry which the Court can make. Incidentally it can take in its sweep claim to privilege. Of course, if once it is held that a document is of the class set out in Section 123, it would be a right of the officer concerned to claim privilege or to waive the same. The scheme of Section 123 read with Section 162 of the Indian Evidence Act has been examined by the Supreme Court in The State of Punjab v. S.S. Singh wherein it has been observed that while examining principle underlying Section 123, it may be pertinent to enquire whether fair and fearless administration of justice itself is not a matter of high public importance. Fair administration of justice between a citizen and a citizen or between a citizen and the State is itself a matter of great public importance, much more so would the administration of justice as a whole be a matter of Very high public importance; even so, on principle, if there is a real not imaginary or fictitious conflict between public interest and the interest of ail individual in a pending case, it may reluctantly have to be Conceded that the interest of the individual cannot prevail over the public interest. If social security and progress which are necessarily included in the concept of public good are the ideal then Injury to the said ideal must on principle be avoided ever at tile cost of the interest of an individual involved in a particular case. Examining the words 'affairs of state' as used in Section 123, it was observed that having regard to the notion about governmental

functions and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighborly relations. If the contents of the document were such that their disclosure would affect either the national defence or public security or good, neighborly relations they could claim the character of a document relating to affairs of State. Considering further the power of the Court in an inquiry that can be made under Section 162, before claim of privilege is upheld, it was observed that there should be an affidavit by the Secretary or by the Minister himself and the affidavit must show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If the document clearly falls within the category of privileged documents no serious dispute generally arises; it is only when Courts are dealing with marginal or border line documents that difficulties are experienced in deciding whether the privilege should be upheld or not, and it is particularly in respect of such documents that it is expedient and desirable that the affidavit should give some indication about the reasons why it is apprehended that public interest may be injured by their disclosure. If the affidavit produced in support of the claim for privilege is found to be unsatisfactory, the person making the affidavit may be called to face cross-examination on the relevant point. In the course of such cross-examination, it would be open to the person contesting the claim of privilege to put such relevant and permissible questions as he may think of to help the Court in determining whether the document belongs to the privileged class or not. The scope of inquiry in such a case is bound to be narrow and restricted; but the existence of the power in the Court to hold such an enquiry will itself act as a salutary check on the capricious exercise of the power conferred under Section 123, and as some of the decisions show, the existence of this power is not merely a matter of theoretical abstraction. In the course of the enquiry, the Court should find out whether the document falls in the class of innocuous or noxious documents. If it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit its production or not. It was observed that the view about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of Section 123 and Section 162 read together, which recognises the power conferred on the Court by CI. (1) of Section 162 and also gives due effect to this discretion vested in the head of the department by Section 123. We would like to point out that while reaching this conclusion it is clearly evident from the record of the judgment that the Court was considerably influenced by the observations of House of Lords in Duncan v. Cammell Laird & Co. Ltd. 1942 A.C. 624. We specifically refer to this aspect because we would presently point out that Duncan v. Cammell is no more good law in the land in which it was pronounced and it has been specifically overruled by House of Lords in its latter decision in Conway v. Rimmer and Anr. (1968) A.C. 911. It is however an undeniable fact that ratio of Duncan v. Cammell (supra) is discernible in as many as 18 paragraphs of the judgment in Singh's case (supra). Even with this influence and ignoring the case of Robinson v. State of South Australia (1931) 2 A.C. 704 which has found acceptance in the latter case, the Supreme Court, did recognise the jurisdiction in the Court to hold an enquiry by even allowing cross-examination of the Secretary or Minister making affidavit claiming privilege to pass upon the validity of the claim of privilege. In Conway v. Rimmer (supra) the Secretary of State for Home Affairs objected in proper form to the production of all five documents on the ground that each fell within a class of documents the production of which would be injurious to the public interest. On behalf of the Crown reliance was placed on Duncan v. Cammell (supra). Lord Reid in his

speach referred to the speech of Lord Simon L.C. in Duncan's case observing that throughout he had primarily in mind cases where discovery or disclosure would involve a danger of real prejudice to the national interest. Lord Reid did not believe that the speech of Lord Simon would have been the same if the case had related, as the one which was before them, to discovery of routine reports on a probationer constable. Lord Reid observed that it would be grotesque to speak of the interest of the State being put in jeopardy by disclosure of a routine report on a probationer. It was further observed that there are two kinds of public interests 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 also 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 or 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. It is further observed that there may be cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interest involved. It would not be true to say that the smallest probability of injury to the public interest must always outweigh the gravest frustration of the administration of justice. The question then posed was whether the Court is to have any right to question finality of the Minister's certificate, and second and incidental question posed was that if the Court had such a right how and in what way the right has to be exercised and made effective. Lord Reid further observed that he saw nothing wrong in the Judge seeing documents without their being shown to the parties. If the Court has, power to see document, the Court can properly weigh the reasons put forth by the Minister and the probable importance of the document in the case before him or other evidence sought to be withheld. If the Court decides that on balance the documents probably ought to be produced the Court can so order. Lord Morris of Borth-y-Guest in his speech stated that if a Minister or the Crown gave a certificate that a document should flat be produced, the Courts would be obliged to give full effect to such certificate and, in every case and without exception to treat it as binding, final and conclusive. Such a system would in his view, be out of harmony with the spirit which in that country had guided the ordering of affairs and in particular the administration of justice. If a responsible Minister stated that production of a document would jeopardies public safety, it is inconceivable that any Court would make an order for its production. The desirability of refusing production would heavily outweigh the desirability of requiring it. Other examples will readily come to mind of claims to protection from production which would at once be conceded. However there will be cases where the balance of desirabilities will not be so clearly evident. Someone will then have to decide. Should it be Court or should it be the executive? Lord Hodson posed a question in his speech whether Duncan v. Cammell is open to reconsideration. In so doing it was worth remembering that the conclusion was reached under a misapprehension as to the corresponding law of Scotland. By unanimous decision the decision in Duncan v. Cammell v/as overruled, aid the House of Lords called for the documents and examined them and rejected the claim of privilege even though affidavit was in the proper form. This decision would throw light on the vexed question of the privilege and how the ambit of the Court's power to examine the validity of the claim of privilege is fast widening. The old fetters are being thrown away though new may be forged in public interest. But the belief that the executive officer well recognises what is in public interest which a responsible Judge would not be able to do is a truism, we are unable to accept. If such be the position even with regard to privilege claimed for non-production of document concerning the affairs of the Stale, it is rather too late in the day to say

that Section 123 will afford a guideline to the procedural provision by which the Court acts at the behest of a party. We, therefore, feel that the submission of Mr. Shah to that effect cannot be accepted.

20. Reverting, now to the discussion whether the provision by which a trial should be regulated according to the behest of a party is-reasonable or not or is so utterly unreasonable and irrational as to be unsustainable, before examining that aspect in detail, we would dispose of one submission of Mr. Shah. Mr. Shah urged that apart from the claim of privilege, camera trial itself is not antagonistic to the, rule of law. The question is not whether camera trial by itself is the antithesis of rule of law, the question is whether the procedure for trial is to be regulated at the instance or at the behest or at the dictate of a party or according to law which must be reasonable. The aspect of privilege we have already examined. We will now examine the Second submission that the public interest will suffer in a given ease where high dignitary or public servant defamed in discharge of public function is the complainant and in an attempt to prove the prosecution case, reliance may have to be placed on documents involving State secrets and if a public trial is held the documents will become public. Conversely, in such a situation the State "may not permit production and cause of justice would suffer. Mr. Shah contended that if privilege is claimed, the State will not be able to lead its evidence and if privilege is not claimed and a camera trial cannot be insisted upon, the Stale would be seriously inconvenienced because it may have either to give up the prosecution oh the pain or disclosure of its State secrets or it will have to permit publication of State secrets. This approach overlooks another statutory provision in the section which provides that the Court has a discretion to hold a trial in camera. Both the inconveniences can be avoided by requesting the Court to hold a camera trial, because times without number we have indicated that there should be a power in the Court to direct camera trial for safeguarding public interest. If the State feels that it must lead evidence of a document containing State secrets and that it should not be published, it would be open to the State to move the Court to direct a camera trial. The latter portion of Sub-section (5 A) certainly provides for it. Mr. Shah is right in his submission that Section 352 of the Criminal Procedure Code does not include in its ambit all the ingredients of a full camera trial. It undoubtedly provides for a public trial. By its proviso it confers power on the Court to exclude certain persons from the Court-room but there ends the Court's power. If the Courts were to exclude certain persons from its precincts such an order would not have the effect of a camera trial because anyone who is entitled to be in the Court can publish the proceeding and the very purpose may be frustrated. In our opinion, it is the Court who alone must have power to decide whether in a given case the trial must be in public or in camera. While deciding the motion the Court must put in balance the public interest achieved by administration of justice in public and disclosure of State secrets which might cause injury to public interest and find out which way the balance tilts and decide accordingly. If the Court can be trusted to do justice between the parties by reaching a conclusion on the evidence placed before it we fail to see how the same Court could not be trusted to decide whether the trial shall or shall not be in camera. We fail to see how public interest is to be achieved by conferring such a privilege on the parties to a proceeding depriving Court of any discretion in the matter.

21. It is so well recognised as not to require any elaborate arguments that when a person commits an offence not only he causes an injury to the individual against whom the offence is committed, but he does wrong to the society. The theory of punishment inculcates that by suffering penalty, the wrong

doer repairs the wrong done to the society, and pays his debt to the society. Therefore, in the administration of criminal justice, apart from the individual who is the victim of the offence, public is equally and vitally interested. If at the instance of an officer the prosecution is launched against a responsible journalist for defamation and if the journalist is ultimately honourably acquitted, the public should know that a frivolous prosecution was launched and unnecessarily the journalist was harassed. Vice versa, if an irresponsible journalist defames a responsible public servant, the society would be interested in seeing that such a person is brought to book and how thoroughly he is exposed in the criminal trial. If in a given case, the State has nothing to hide from the public, the accused in order to shield himself from public disgrace may ask for a camera trial, and the very provision by which the State wants to arm itself from disclosing its secret, would be used to its own disadvantage. We shudder at the idea that the legislature ever intended to shield a really guilty person from public gaze or really irresponsible public servant launching frivolous prosecution, both of them by avoiding a public trial. In our opinion, the provision is so grotesque as to cut at the root of our system of administration of justice. To say that it is unreasonable is begging the question.

22. At this stage we will examine the scope of the constitutional guarantee enshrined in Article 14. Article 14 guarantees equality before law or equal protection of laws within the territories of India. In Raja Kulkarni v. State of Bombay I.L.R. 1965 Bombay 318, the High Court observed that equality before the law does not mean an absolute equality of men but it postulates that there shall not be any special privilege by reason of birth or creed or the like in favour of an individual. Equal protection must mean that there will not be arbitrary discrimination made by the laws themselves in their administration. In essence both terms mean equal justice. The concept of equality before the law may be defined as equal subjection of all persons to the ordinary law of land. The term 'equality before the law is a negative concept implying the absence of any privilege in favour of an individual while the term equal protection of the laws' is a more positive concept implying equality of treatment in equal circumstances. Jennings has at one stage said that the right to sue or be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status and political influence. If such be the concept of guarantee enshrined in Article 14 when it is read with Article 21 which guarantees personal liberty and deprivation thereof only in accordance with the procedure established by law, the law must stand the test of rationality. Anything so unreasonable as to be against the law of the land, would certainly be denial of the equality guaranteed by Article 14. Without going into the question, of discretion at this stage, it should be made distinctly clear that Article 14 saves citizens and non citizens from executive and legislative tyranny. In Basheshar Nath v. I.T. Commissioner S.R. Das, C.J. has examined the scope and ambit of the right: of equality guaranteed by Article 14. It has been observed that right to equality before the law is thus completely, and without any exception, secured from all legislative discrimination. The very language of Article 14 of the Constitution expressly directs that the State shall not deny to any person equality before the law or equal protection of the law. Thus Article 14 protects us from both legislative and executive tyranny by way of discrimination. If such is the impact of Article 14, could it ever be urged with seriousness that because there is validly enacted law by the Legislature whatever be its nature, its validity cannot be questioned under Article 14? Article 14 is a command directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person in the territory of India is to enjoy. So far as Article 14 is

concerned there is no relaxation of the restriction imposed by it such as there are in some of the other Articles e.g. Article 19 els. (2) to (6). Article 14 combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution. Therefore, if the law though enacted by Legislature competent to enact is so thoroughly unreasonable as to result in the negation of rule of law guaranteed by Article 14, then it would not be law valid for the purpose of Article 21 and if trial is held in accordance with such law which is not valid, it would be an infringement of the constitutional guarantee enshrined in Article 21. Even Mr. Shah conceded that any procedure to be prescribed by law under Article 21 must answer essential attributes of Judicial procedure. But he further urged that Sub-section (5 A) pertains to domain of procedure and no one has a vested right to procedure. The illustration given in Cooper's case would wholly answer this submission and negative it. As stated earlier by us, suppose the Parliament which is competent to enact procedure for trial of offences were to enact a procedure by which the accused shall not be entitled to remain present in the course of the trial and at the time of the passing of the sentence and if the trial were to be held in accordance with this law, it would certainly be a trial in accordance with the procedure established by law. None the less no one would be bold enough to say that such a procedure would not infringe constitutional guarantee contained in Article 21 because the law would not be valid both under Articles 14 and 19.

23. Viewed from the angle of Article 19 it would appear that if a trial is to be held contrary to the established procedure for trial at the instance of a party and not under the order of the Court, it will be a fetter on justice. It will be something contrary to orderly liberty. It will be against fundamental notion of a Criminal Trial. Section 352 makes a statutory provision apart from what we have discussed above that trial of criminal case shall been public. The Court, if the case can be brought within the proviso may direct certain persons to keep out of the precincts of the Court during the whole or a portion of the trial. But if there is provision by which a party can compel camera trial it will apart from being a fetter on partly, it will be a fetter on justice and the provision would be so unreasonable as to impose unreasonable restriction on freedom guaranteed by Articles 19(1)(a), 19(1)(d) and 19(1)(f), and if they are restrictions they will be thoroughly unreasonable and cannot be sustained either in public interest or for any other valid reasons. We are satisfied that open trial of a criminal case apart from being soul of justice is an inalienable facet of rule of law as guaranteed by Article 14. We are further of the opinion that the provision like the one contained in Sub-section (5A) of Section 198B by which party to the proceeding enjoys a privilege of denying it just at his desire, would be the very negation of rule of law and would be violative of Article 14 of the Constitution and for the reasons hereinbefore mentioned would be an unreasonable restriction and wholly unsustainable.

24. Turning to the next ground of attack it was urged that the provision contained in Sub-section (5A) of Section 198B is discriminatory in procedure for trial of the same offence (namely the offence of defamation) as discrimination is writ large on its face and would be violative of Article 14. Section 198 provides for initiation of proceedings for the offences set out in Chapter XXI of the Indian Penal Code. In its bare outlines Section 198 provides that a person aggrieved by offence of defamation will alone be entitled to initiate proceedings in a Court of competent jurisdiction. The proceeding will have to be initiated in the Court of Judicial Magistrate First Class within the local limits of whose jurisdiction the offence is committed. Now, Section 198B carves out a special procedure for trial of

the offence of defamation committed in respect of such high dignitaries as President, Vice President etc. and public servant employed in connection with the affairs of the Union or the State and if the offence is committed in the discharge of public functions. There is undoubtedly, therefore, a special procedure for trial of the same Offence of defamation if it is committed in respect of general public and in respect of the aforementioned high dignitaries and public servants. Section 198B not only carves out a special procedure but it also carries out a special forum for the trial of the same offence of defamation when it is committed in connection with the aforementioned persons. Mr. Mehta urged that Section 198B suffers from triple discrimination. The wider discrimination Mr. Mehta urged was qua Section 198 and narrower one was between class of persons who can initiate proceedings under Section 198 and class of persons who can initiate proceedings under Section 198B and still wider discrimination is contained in respect of same persons under Section 198B. It does appear that for certain class of high dignitaries and public servants a special procedure is enacted and a special forum is set up for the trial of the same offence (namely the offence of defamation). In respect of the latter class privilege is conferred to compel trial in camera at the desire of a party. The question then is whether this classification is founded on intelligible differentia which distinguishes persons that are grouped together from those others left cut of the group and secondly that differentia has a reasonable relation to the object sought to be achieved by the statute in question. It is now well-settled that Article 14 forbids class legislation but it does not forbid classification for the purpose of legislation. It is equally well-settled that Article 14 condemns discrimination not only by substantive law but also by a law of procedure. If, therefore, there is a discriminatory procedure it must satisfy two-fold test namely classification which has been done by the legislation is founded on intelligible differentia which distinguishes persons that are grouped together from those left out of the group; and secondly that the differentia must have reasonable relation to the object sought to be achieved by the statute in question There will not be much difficulty in answering the first question in the affirmative. Such high dignitaries as President, Vice-President, Governor and Minister and public servants employed in connection with the affairs of the Union or of a State would form a distinct class. They are likely to be defamed not so much in their personal capacity but as they would be very much in the public eye their actions would be reflected in the mirror of public opinion and because their activities would be so closely interwoven with the fabric of the society that they may be differentiated in relation to their conduct as disclosed in discharge of their public functions. The classification of such persons, who would, be in the public give because of the onerous duty undertaken by them as public servants, would be based on intelligible differentia. This class can be distinguished from the persons who are grouped together from those left out of it. Those grouped together are persons who because of the position they are occupying and because the functions they are discharging, are likely to be in public gaze and their conduct as disclosed or reflected in discharging public functions is likely to be the subject matter of adverse comments. The classification for the purpose of Section 198 B of such persons grouped together is certainly based on intelligible differentia. The differentia is that they are persons holding public office and they are vocally concerned with the affairs of the State and their conduct would be reflected discharge of the public functions. In fact this classification appears to have been upheld by the Supreme Court in P.C. Joshi and Anr. v. The State of Uttar Pradesh A.I.R. 1951 S.C. 387 wherein it is observed that Section 198B which deals with a certain category of the offence of defamation of high dignitaries of the State, and of Ministers and public servants in respect of their conduct in the discharge of public functions, the Court of Sessions may entertain a complaint of defamation of the

high dignitaries and of Ministers and public servants in respect of their conduct in the discharge of their public functions only if these conditions exist. Section 198 requires that complaint for defamation may be initiated by the person aggrieved and no period of limitation is prescribed in that behalf. Such a complaint can only be entertained by a Magistrate of the First Class. But Section 198B in the larger public interest has made a departure from that rule; the accusation is to be entertained not by a Magistrate, but by the Court of Sessions without a committal within six months of the offence on a complaint in writing by the Public Prosecutor with the previous sanction of the specified authorities. At other stage, it is observed that Section 198B is enacted to provide machinery for vindicating the conduct of High dignitaries, Ministers and public scrvanis when they are exposed to defamatory attacks. It is not disputed that a provision which enables a prosecution to be launched By the State and at State expense for defamation of members of the first class having regard to their status in public life is preeminently designed in the public interest. These observations do indicate 10 some extent that classification is founded on intelligible differentia which distinguishes the persons that are grouped together from ethers left out of the group, namely, those private individuals who are defamed and who can initiate proceedings under Section 198. It is the second test which reality presents serious difficulty. It is not sufficient that the classification must be founded on an intelligible differentia but the differentia must have a reasonable relation to the object sight to be achieved by the Legislature in enacting that part of the provision contained in Sub-section (5 A) by which trial has to be held in Sarrlera at the desire of a party. Mr. Shah urged that the object sought to be achieved is the preservation of State secrets and the State being compelled not to claim privilege so as to frustrate the very object of proving the case, by the impunged provision the object sought to be achieved is certainly preservation of the State secrets. That might be the aimed result of the provision. The whole of Section 198B has been introduced in order to provide for a special procedure, special machinery for trial of offence of defamation committed in respect of the aforementioned persons. We fail in see how that object of bringing to book the accused, who is guilty of committing the offence by defaming such persons who themselves Were reluctant to initiate proceedings at their own cost and whose failure to initiate proceedings would result in demoralization of public service could be achieved by camera trial. One can visualise such object as purity of public administration and not impairing of efficiency of public service by bringing to book the parsons who have made false and defamatory accusation against public servants in respect of their conduct as disclosed in discharge of their public functions. But if the object is to vindicate purity and efficiency of administration by bringing to book the persons who are guilty of committing defamation and who would go scot free on account of indifference of such high dignitaries to initiate proceedings on their own, in our opinion, the very object would stand frustrated by the provision of the nature enacted in Sub-section (5A). If the persons who are guilty of such defamatory attacks on the high dignitaries are to be tried and punished, they themselves would be ability mere expressing a desire to have trial in camera to put a perpetual seal on the record and the public at large would never come to know how such a person has been dealt with. The provision, therefore, instead of achieving the object, appears to us to be self-defeating. One can well appreciate the classification of public servants who are defamed in respect of their conduct as disclosed in discharge of their public functions. One can appreciate the prosecution at the State expense to vindicate the honour of such public servant so as to repose confidence. But one fails to see what reasonable relation such differentia has to the object sought to be achieved by the provisions like Sub-section (5A) by which one or the other party can put perpetual seal on the record of the case. In

our opinion, therefore, evert if it can be said that the classification is founded on intelligible differential, it has no reasonable relation to the object sought to be achieved by the Impugned provision. To that extent, the provision Would surfer from the vice of discrimination. It suffers from triple discrimination which we would presently mention. The broad principle is that the Legislature should not arbitrarily place persons or bodies above its general laws and that if it does the Courts would pronounce such law to be unconstitutional unless it is shown to be otherwise valid.

25. While reacting Criminal Procedure Code, the Legislature was conscious of the fact that there may be a class of persons brought before the Court in whose cases to attain higher objective for which the Courts were constituted, namely, to do justice, it would be reasonable to keep out certain persons from the Court. While, therefore, enacting Section 352 first a provision was made for assuring fair administration of justice, namely, that a trial shall be held in public. Therefore, the Court shall be deemed to be an open Court by first part of Section 352. A proviso was incorporated in it by which power was conferred upon the Presiding Judge that at any stage of any inquiry into, or trial of, any particular case, if he thinks fit that the public generally, or any particular person, shall not have access to or be or remain in the room or building used by the Court he may make an order accordingly. This power was limited to exclude certain persons from the Court during the course of the hearing of the case. This power conferred by the proviso would not enable the Court to direct a camera trial with all its implications. Therefore, it can be said that for the trial of offence concerning high dignitaries and public officials wherein in a given case the evidence as to matters considered secret by the State may have to be given that a camera trial may itself become necessary for achieving higher object for which the Courts are constituted. But in that case, the power shall be in the Court and it shall not be the privilege of a party. Therefore, in enacting a portion of Sub-section (5 A) by which power was conferred upon the Court to direct a camera trial, the provision would be proper and legitimate. The Legislature far exceeded the requirement by conferring privilege upon a party to claim camera trial at its mere desire. As between the individuals who are defamed and who have to initiate proceedings under Section 198 and the high dignitaries and public officials who are defamed and in whose case a prosecution can be launched by public prosecutor under Section 198D, there is discrimination. However, the classification is founded on intelligible differentia and even if the differentia had reasonable relation to the object sought to be achieved, the Legislature far exceeded its requirement by enacting latter portion of Sub-section (5A) by which party to the proceedings can compel the Court to hold a trial in camera. In our opinion, the provision, therefore, is far in excess of the requirement and/or the object sought to be achieved by introducing Section 198B. This particular provision cannot be said to further the object sought to be achieved. Even in the class of persons covered by Sections 198 and 198B there is discrimination and even the still narrower one which Mr. Mehta urged was that as between some persons on whose behalf prosecution is initiated under Section 198B a request for camera trial may be made while in other case it may not be made. The distinction is rather too fine and subtle. But for two valid reasons that the provision made is far in excess of the requirement of the object sought to be achieved and for the further reason that in a given case the very provision may become self-defeating, in our opinion, the provision does not stand the rationality test and only that part of Sub-section (5A) of Section 198B must be struck down as unconstitutional. That portion of Sub-section (5A) of Section 198B "if either party thereto so desires or" is unconstitutional and must be struck down and cannot be given any effect to. 26. Before parting with this judgement, we may notice one submission of Mr. B.R Shah. It

was urged that the Court should not take upon itself to decide constitutional validity of the impugned provision but rather interpret the word 'shall' as 'may' in Sub-section (5A) or in the alternative read 'and' in place of 'or' and the whole difficulty would be solved. It was urged that if Sub-section (5A) be read as:

Every trial under this section may beheld in camera if either party thereto so desires, or if the Court so thinks fit to do,

26. The Court would not be compelled to direct a camera trial at the instance of a party, and the matter will be left to the discretion of the Court. Alternatively, it was urged that Sub-section (5A) may be read as: "Every trial under this section shall be held in camera if either party thereto so desires, and if the Court so thinks fit to do." This construction is suggested with the end in view that in every case the insistence on camera trial shall not be at the desire of a party but the discretion of the Court shall be interposed therein. If the Legislature enacted the provision so as to take away discretion from the Court where a party desires camera trial or so as to invest power in the party to a proceeding under Section 198B to insist upon a camera trial it would not be open to us to read 'shall' as 'may'. That would defeat the purpose for which the provision is enacted and again that would render the words "if either party thereto so desires" superfluous. If the mandate of the section is removed and if section is read to mean that the Court may direct camera trial, it would mean that the matter is left to the discretion of the Court and not to the desire of a party. That would mutilate the section beyond repair and a part of it would be rendered superfluous. But it was urged that the Court may exercise its discretion one way or the other on its own motion or at the desire of the party. It is too well recognised to bear repetition that whenever a matter is left to the discretion of the Court, the Court can exercise its discretion on being moved by a party. If camera trial was left to the discretion of the Court on necessary facts brought to its notice, it is immaterial whether the Court would do on its own or the Court is moved by a party. In the circumstances, the words "if either party thereto so desires" are rendered superfluous or useless. It is not open to us to mutilate the section in this fashion so as to render superfluous a portion of the section. Similarly, the other construction suggested is, in our opinion, still more unacceptable. It is suggested that the word 'or' which is disjunctive should be interpreted as 'and' as conjunctive which will have the effect of transferring privilege of a party to ask for a camera Trial 10 the discretion of the Court. In other words, if the section were to be read as suggested, the Court could not on its own direct a camera trial even if it is so satisfied unless one or the other party moves the Court for such a trial. That would be whittling down the power of the Court from what it has been even at this stage. Therefore, it is not open to us to rewrite the section as suggested and both the suggestions would mutilate the section beyond repair. Therefore, we are unable to accept either of the two constructions so as to avoid a discussion of constitutional issue raised in this case.

27. In view of the aforesaid discussion, portion of Sub-section (5A) of Section 198B "if either party thereto so desires or" is unconstitutional and no effect can be given to it. The learned Sessions Judge was constrained to grant camera trial in view of the aforementioned provision which is invalid. Therefore, the order under revision cannot be sustained and must be quashed and set aside. Mr. B.R. Shah, learned Assistant Government Pleader had made no attempt to support the order on merits as there is no ground even mentioned in the application seeking camera trial except the

expression of desire. Rule is therefore made absolute in each case. Interim stay of proceedings vacated.