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The Practice of Sealed Cover

An Interplay of Judicial Discretion and the Rights of the Accused

DIKSHA SINGH¹ AND PRATEEK SHARMA²

ABSTRACT

The paper is an attempt to trace and analyze the practice of submitting evidence and documents by way of a sealed cover. The paper also puts forth the effects that the said practice has had on the rights of the accused and also sheds light on the effect of the said practice on the public faith in the judicial system, through the lens of decided cases both recent and old.

I. INTRODUCTION

The exercise of submitting documents in the sealed cover is an old practice and has been taking place from the inception of the Judicial system. However, the past few years have seen a drastic increase in this practice at the Supreme Court. Traditionally, the sealed cover documents include those documents which are sensitive in nature and are capable of putting national security and public peace at risk that is why they are kept away from public perusal and as such are submitted to the court in a sealed cover. The said document is then scrutinized by the judge and the disclosure of the content of the said document depends upon the discretion of the court. The court can disclose the contents of the document when it deems fit or if it deems it necessary, the contents will remain a secret and out of public court record.

However, the past few years there has been a sharp increase in the practice of producing documents in a sealed cover and the same has led to misuse and great difficulty. The sealed documents can be averse to the case of the opposite party. As they are only meant for the eyes of the judge, the chance of defending oneself against the incriminating content of the document is lost. This exercise is prejudicial to the rights of the person and sometimes even prejudicial to the whole trial. There is absolutely no way of knowing whether the decision of the court or the judgment passed by the court has taken into account the contents of the sealed document,

¹ Student at Faculty of Law, University of Delhi, India

² Student at Faculty of Law, University of Delhi, India

thereby causing even more prejudice during the appellate stage.

Earlier the documents under sealed cover were usually used for the purpose of protection of evidence which is under the high risk of tampering. However, the practice has since evolved. Today seal covers are used extensively for all sorts of documents: be it evidence or status report filed by the investigating agency or counter-affidavits. There have been instances where counsels have even filed such documents under seal cover which do not need the protection of the seal cover. The laws are in place for the use of seal cover; however, they are not specific and stringent enough to guide the usage of this particular practice. Hence, such a light use of this practice in day to day proceedings.

II. ORIGIN AND EXPLANATION:

The Supreme Court derives its power of exercising the practice of sealed cover documents from Rule 7 Order XIII of the Supreme Court Rules³ which states:

“Notwithstanding anything contained in this order, no party or person shall be entitled as of right to receive copies of or extracts from any minutes, letter or document of any confidential nature or any paper sent, filed or produced, which the Chief Justice or the Court directs to keep in sealed cover or considers to be of a confidential nature or the publication of which is considered to be not in the interest of the public, except under and in accordance with an order specially made by the Chief Justice or by the Court.”

According to this rule of the Supreme Court, letters or documents which are confidential or not in the public interest can be kept away from public scrutiny by the direction of Chief Justice or Court. However, the rules do not illustrate any specific conditions under which the document can be withheld, it leaves the discretion with the Court whether a certain document is considered to be in the public interest or not. Hence, it depends entirely on the understanding of the judge and there are no specific conditions guiding it. Moreover, the recent time has seen a tremendous increase in the practice of seal covered documents and the judges have included this practice in day to day proceedings without rendering any proper explanation for the same.

Furthermore, Section 327 of the Code of Criminal Procedure⁴ also affords the power of withholding certain documents. However, it provides a list of conditions wherein the document

³ The Supreme Court Rules, 2013 Order 13 Rule 7

⁴ The Code of Criminal Procedure, 1973 Section 327

can be withheld. Section 327 is produced below:

1. The proceedings of the court are to be held in the open, provided that the Judge may think it fit to have the same in-camera
2. The proceedings in nature of trial under section 376, 376A, 376B, 376C and 376 D shall be held in camera
3. No person shall be allowed to publish or print any information in relation to the in-camera proceedings except with the previous permission of the court.

A document can be withheld in the conditions mentioned above. The in-camera proceedings mentioned in the above section are to be conducted in cases of crimes committed against women or crimes of a sensitive nature. To protect the identity of the victim and accused and to protect the crucial evidence, the courts conduct the proceedings in this form. The exceptions provided in this section are reasonable. However, the filing of sealed cover documents takes place in cases which do not come under the category of these exceptions. Moreover, the said section does not take away the right of the accused/defendant in such matters to cross-examine the evidence adduced in an in-camera proceeding, as the accused/defendant is present directly or via a pleader during such proceedings. Contrary to section 327, when evidence is placed a sealed cover not only the chance of cross-examination is defeated, but the contents of the document are also kept from the accused/defendant.

Moreover, the Indian Evidence Act 1872 also provides some power to this ongoing practice of sealed cover documents. Section 123 of Indian Evidence Act⁵: No person shall be allowed to produce any evidence from unpublished official records related to any affairs of State, except with the authorization of the officer at the head of the department concerned, who shall give or withhold such consent as he thinks fit, read in furtherance with section 162⁶ which reads as ; A witness summoned to produce a document in the court, should present the same if it is in his possession. The validity of the objection regarding the admissibility of the evidence will be decided by the court. The court can inspect the document, if it seems fit unless the document refers to matters of the state or it can call upon additional evidence, to determine the admissibility of the document. From a reading of section 123 it can be concluded that the section protects the unpublished documents of the state affairs and section 162 protects the documents under sealed cover till the court determines its admissibility or

⁵ Indian Evidence Act, 1872, Section 123

⁶ Indian Evidence Act, 1872, Section 162

refer it to the state. The documents produced under section 162 are kept under sealed cover till the claim is decided and if the document is claimed under section 123 then the document remains under seal cover and is referred back to the state and can be produced as evidence only with the permission of the head of the department.

However, the sealed documents are being presented or filed in the conditions apart from those mentioned in the section. Hitherto, there is no specific law or guideline which clearly demarcates where and under what circumstance the sealed documents can be filed. Thus, resulting in a plethora of cases where the sealed documents are used, even if the same was not required. This practice also creates an unnecessary hindrance for the opposite party. In the absence of stringent laws and guidelines, most courts do not deem it necessary to present any reasoning or explanations on the use of seal cover and in most of the cases the courts go about the proceedings without mentioning the seal cover in the order or judgments. There are few cases wherein the court has mentioned the seal cover but no explanation was given. There are also some cases wherein the courts have given proper reasoning behind the use of seal cover. Both categories of cases are dealt succinctly hereinunder.

III. JUDICIAL PRACTICE: INCONSISTENT PROCEDURE AND THE ABSENCE OF REASONING

This exercise is being practiced in the courts from a very long time but there are few judgments recording it until 1972, when for the first time in the leading case of *Unichem Laboratories Ltd vs The Workmen*⁷ on 24 February 1972 it was mentioned that the statements of the company were submitted under a seal of confidentiality and the content of which will not be disclosed. The reasoning provided by the Supreme Court behind this rationale is produced below:

“Normally, the statements in Ex. DU-2A could have been extracted in this judgment but for the fact that Burroughs Wellcome Company being a private limited company and the statements having been furnished in a sealed cover, they could not be made public.”

No objections were recorded in the judgment and it is also not clear from the text of the judgment whether the document was asked by the court or presented by the company voluntarily?

From the above-mentioned extract, it can be inferred that the seal cover has significant

⁷ *Unichem Laboratories Ltd vs The Workmen* [1972] SCC 3 (Supreme Court), p.552.

authority, if the document is produced under a sealed cover it cannot be made public and if the document is not made public it becomes impossible to know whether the contents of the sealed document were taken into consideration while deciding the case or not?

The ambit of sealed covered documents has increased in the past decade. The documents now also include status reports filed by the state, police diary, case diary, reports filed by Central Vigilance Commission (CVC), National Investigation Agency (NIA), Special Investigation Team (SIT), Central Bureau Investigation (CBI), etc. In the absence of proper guidelines, the legal practitioners have turned this specific practice into a common exercise conducted during the court proceedings.

In the case of *Dr. Subramanian Swamy vs Arun Shourie*⁸ On 23 July, 2014 it was mentioned that the respondent Arun Shourie had preferred to submit a signed statement in a sealed cover which according to the respondent contained some sensitive facts and cannot be disclosed in the open court. The respondent prayed that the signed sealed statement should be considered as an integral part of the counter affidavit. The court rejected his prayer on the grounds that the procedure adopted by the respondent is not consistent with the form of pleadings acceptable in court. The court also granted him the liberty to withdraw the affidavit. Though the prayer was rejected, no satisfactory reasoning was conferred by the court. Furthermore, no specifications were laid down by the court in relation to the sealed cover document or the practice that the court could deem appropriate in this context.

In another case of *Ratan N. Tata v. Union of India*⁹, wherein the most expansive use of sealed cover can be observed. The Additional Solicitor General¹⁰ submitted several copies of sealed cover documents in the court including the copy of the complaint, investigation reports of the inter-ministerial committee, transcripts of the tapes, after scrutinizing the tapes the outcome of the scrutiny and at the end report filed by the Central Bureau of Investigation (CBI). All the mentioned sealed documents were observed by the court and then sealed by the court master and returned to the learned counsel. The court also directed to keep these documents in safe custody and they are not to be disclosed without the permission of the court.

The secrecy behind the sealed document often deprives the individual with an opportunity to defend oneself. In the case of *Alok Verma* case¹¹ the court asked the Central Vigilance Commission (CVC) to file a report under sealed cover and the reasoning behind the use of

⁸ Dr. Subramanian Swamy vs Arun Shourie [2014] SCC12 (Supreme Court) p.344

⁹ Ratan N. Tata v. Union of India [2014] SCC 1 (Supreme Court) p. 93

¹⁰ Law officer of the Indian Government tasked primarily with representing the Union Government in High Courts and the Supreme Court.

¹¹ Alok Verma and Ors vs Union Of India and Ors [2019] SCC 3 (Supreme Court) p.1

sealed cover was to protect the sanctity of the CBI and to maintain the public confidence in the said institution. After pursuance of the report the court directed that before taking any decision, a copy of the report of the CVC should be furnished to the counsel appearing for the petitioner-Mr. Alok Verma and the petitioner can also file his response in the sealed cover. This was the first time that the court has allowed the disclosure of the sealed document and provided a chance of defending oneself. The court also mentioned that it was an onetime measure the part of the order is produced below:

We have perused the report of the CVC. We are of the view that, at this stage, and before taking any decision thereon a copy of the report of the CVC (along with Annexures thereto) should be furnished by the Registry of this Court, in sealed cover, to the learned counsel appearing for the petitioner – Alok Kumar Verma in Writ Petition (Civil) No.1309 of 2018. We order accordingly. It will be open for the petitioner – Alok Kumar Verma in Writ Petition (Civil) No.1309 of 2018 to file his response to the said report of the CVC again in sealed cover.

The above course of action has been considered necessary by the Court keeping in mind the need to preserve and maintain the sanctity of the institution of the CBI and public confidence in the said institution. We also make it clear that the present order requiring furnishing the report of the CVC in sealed cover to the learned counsel for the petitioner is being made in the peculiar facts of the case and as a onetime measure.

This was the only case wherein the contents of the sealed document were made available to the opposite party and was provided with an opportunity to defend oneself but the reasoning provided behind the use of seal cover is far from satisfactory in this case as well. By this reasoning all the public institutions will get this benefit on the account of maintaining public confidence.

These are the few cases where seal covered documents are mentioned but with a lack of proper reasoning. There is a plethora of cases where the practice of sealed cover documents takes place and there is no mention of it in the judgment, so to expect the reasoning behind this practice is a long shot.

IV. JUDICIAL PRACTICE: PRECEDENTS FOR REASONING

In the sea of cases where no explanation is provided for the prevalent practice there are still few cases in which the court has given valid reasoning behind the use of sealed documents.

One such case is *Board of Control for Cricket in India v. Cricket Assn. Of Bihar*¹², where the court observed that the report filed by Justice Mudgal Committee consists of allegations against 13 persons including the president of BCCI which are not established and are relevant to the subject matter of the PIL. The court held that the allegations need to be investigated and verified. Hence, it is in the interest of justice that the report should be presented under sealed cover so that the reputation of any innocent person is not compromised. Another case is of *SEBI v. Sahara India Real Estate Corpn*¹³, wherein the court observed that in order to maintain the confidentiality of the transaction involving the sale of the properties, the master agreement and the press clippings of the same should be taken on record but kept in a sealed cover. In *Sunil Bharti Mittal vs CBI*¹⁴ too, as the investigation by CBI was monitored by the court, the progress report of the investigation is filed by the counsel in a sealed envelope and after thorough perusal, the court directs the CBI to act in accordance with the views expressed by it and the said sealed envelope is handed over to the counsel.

Hence, only a small number of cases record reasoning behind this practice and the majority of cases either do not even mention the sealed document or even if they do, they lack the explanation behind it. In the case of *INX media*¹⁵, The Supreme Court held that the actions of the learned High Court judge in recording the findings based on the sealed cover is not justified. The court also held that the judge is empowered to look at the material in a sealed cover to satisfy the judicial conscience, however, the learned judge should not record the findings based on the sealed cover. In the previous case of the appellant the court refrained from opening the sealed cover in the account of not causing prejudice to the accused pre-trial. Further mentioning the same court held as follows:

.... while deciding the same case of the appellant in Crl. Appeal No.1340 of 2019, after holding so, this Court had consciously refrained from opening the sealed cover and perusing the documents lest some observations are made thereon after perusal of the same, which would prejudice the accused pre-trial. In that circumstance though it is held that it would be open for the Court to peruse the documents, it would be against the concept of fair trial if in every case the prosecution presents documents in sealed cover and the findings on the same are recorded as if the offence is committed and the same is treated as having a bearing

¹²Board Of Control For Cricket Vs. Cricket Association Of Bihar & Ors, [2014] Manu 16635 (Scor)

¹³SEBI v. Sahara India Real Estate Corpn [2015] MANU 0714 (Supreme Court)

¹⁴ Sunil Bharti Mittal vs CBI [2015] SCC 4 (Supreme Court) p. 609

¹⁵ P. Chidambaram vs. Central Bureau of Investigation [2019] AIRSC (Supreme Court) p. 5272

for denial or grant of bail.

The viewpoint taken by the Supreme Court in the above-mentioned case is commendable and creates a hope that the judicial system is still intact. However, this is not enough there is a need for defined safeguards to prevent this over-exploitation of sealed cover documents. It should be taken into consideration while accepting a document under seal cover that whether a certain document contains such sensitive content that it needs absolute secrecy, if not then the judges should reject the document or ask the counsel to withdraw it and file it in an open court.

V. THE PRACTICE OF SEALED COVER: A CONSTITUTIONAL CONUNDRUM

If we look from the constitutional point of view the validity of the sealed covered document lies in the grey area. It is hard to say whether this practice is constitutionally valid or not? Whether this practice is against the rules of natural justice or not? It is an established fact that the contents of the sealed documents are only for the eyes of the judge and in the rarest of rare cases an individual gets a chance to defend itself against the contents of the document. On account of this practice a person is divested of his right to a fair trial which is a fundamental right given by the constitution. The right to fair trial flows from Article 21¹⁶ of the constitution which is produced below:

Protection of life and liberty- No Person shall be deprived of his life or personal liberty except according to procedure established by law.

Here the deprivation of life is much more than mere animal existence. It is not just about taking away life but has a wider meaning in it. The Supreme Court in the catena of cases has explained the importance of article 21. The right to life means to live with human dignity, free from exploitation. Article 21 can be invoked in cases where there is a restraint on life or personal liberty of an individual by or under the authority of the state. It protects the individual against the arbitrary actions of the executive as well as legislative action. In *Maneka Gandhi's case*¹⁷ the court prescribed two conditions under which a person can be deprived of his life or personal liberty, first, there should be a law and second, there should be procedure prescribed by that law and that procedure must be just, fair and reasonable. In this case only the Supreme Court held that the word 'law' in Article 21 does not merely mean an enacted piece of law but must be just, fair and reasonable law, i.e. which embodies the principles of natural justice. Article 21 encompasses the right to a fair trial as well as the principles of natural justice in it. In India

¹⁶ The Constitution of India art 21

¹⁷Maneka Gandhi vs. Union of India (UOI) and Ors. [1978] SCC 1(Supreme Court) p.248

the principles of natural justice are embedded in Article 14¹⁸ and 21. Article 21 incorporates the most important principle of natural justice- *audi alterem partem* in the form of fair hearing. The *audi alterem partem* means no one should be condemned unheard. The right to know the evidence against oneself and the right to defend oneself from the adverse evidence is the most basic rights comprehended in *audi alterem partem* on which the right to fair trial is based upon. In common language fair trial means a trial conducted by an impartial, competent judge and where both the parties are given equal opportunities to defend themselves. In the case of *Rattiarum v. State of Madhya Pradesh*¹⁹ The Supreme Court held that the fair trial is a fundamental canon of our criminal jurisprudence and is in conformity with the constitutional mandate of article 21. It also observed that the denial of the right to a fair trial is a 'crucifixion' of human rights. The court explained the concept of fair trial by citing from *Mrs. Kalyani Bhaskar's case*²⁰, the para is produced below:

In Mrs. Kalyani Baskar v. Mrs. M. S. Sampooram 19, it has been laid down that 'fair trial' includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial.

In the case of *Mohd. Hussain*,²¹ the court held that the right to fair trial is a fundamental right flowing from the constitution and every person is entitled to it in the spirit of justice. The essentials of the fair trial explained by the court is produced below:

It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence.

The right to be informed about the contents and defend oneself against the evidence or any other document produced before the court is envisaged in the right to fair trial which itself is embodied in the constitution of India by virtue of article 21. Therefore, this unmonitored practice of seal cover is not constitutional apart from the exceptions provided in section 327 of the Criminal Procedure Code- in camera proceedings. It is also against the principle of natural justice as it violates the right of an individual to know the evidence against him and the right to rebut them in the court of law. These rights are an integral part of the principle

¹⁸ The Constitution of India art 14

¹⁹ *Rattiarum v. State of Madhya Pradesh* [1964] SCR 3 (Supreme Court) p.164

²⁰ *Kalyani Baskar vs. M.S. Sampornam* [2007] SCC 2 (Supreme Court) p. 258

²¹ *Mohd. Hussain, vs The State (Govt of NCT)* [2012] AIRSC (Supreme Court) p.750

audi alteram partem which is considered to be the most important principle of natural justice embedded in the constitution of India.

VI. CONCLUSION:

A common theme that has emerged from the analysis of this practice is that the court has been vested with complete discretion in matters of presenting reasoning for the admission of a document produced and submitted in a sealed cover. This practice makes one raise an important question i.e., does this practice allow for the court to implement the concept of *audi alteram partem*; while allowing this practice and refusing the individual a chance to defend himself against the contents of the sealed document? The status quo regarding this practice is that there is no proper guideline or specific law regarding it, hence, it is practiced too often and too lightly in the normal court proceedings.

There are relatively very few cases where the court mentions the reason behind the practice of accepting sealed cover documents. This power should be exercised in a very special set of circumstances but it is turning into common practice. It's time that the court should acknowledge this and lay down some proper guidelines because this practice not only interferes in the administration of justice but also hampers the rights of the opposing party. It is against the concept of open courts and transparency in the judicial system. The faith of the people in the judicial system shouldn't be shaken because of such arbitrary practices adopted by the counsels and judges.