REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10044 OF 2010

CENTRAL PUBLIC INFORMATION OFFICER,
SUPREME COURT OF INDIA ….. APPELLANT(S)

VERSUS

SUBHASH CHANDRA AGARWAL ….. RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 10045 OF 2010

A N D

CIVIL APPEAL NO. 2683 OF 2010

J U D G M E N T

SANJIV KHANNA, J.

This judgment would decide the afore-captioned appeals preferred by the Central Public Information Officer ('CPIO' for short), Supreme Court of India (appellant in Civil Appeal Nos. 10044 and 10045 of 2010), and Secretary General, Supreme Court of India (appellant in Civil Appeal No. 2683 of 2010), against the common respondent – Subhash Chandra Agarwal, and seeks

to answer the question as to *'how transparent is transparent enough'*[1] under the Right to Information Act, 2005 ('RTI Act' for short) in the context of collegium system for appointment and elevation of judges to the Supreme Court and the High Courts; declaration of assets by judges, etc.

2. Civil Appeal No. 10045 of 2010 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal*** arises from an application moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India on 6th July, 2009 to furnish a copy of the complete correspondence with the then Chief Justice of India as the Times of India had reported that a Union Minister had approached, through a lawyer, Mr. Justice R. Reghupathi of the High Court of Madras to influence his judicial decisions. The information was denied by the CPIO, Supreme Court of India on the ground that the information sought by the applicant-respondent was not handled and dealt with by the Registry of the Supreme Court of India and the information relating thereto was neither maintained nor available with the Registry. First appeal filed by Subhash Chandra Aggarwal was

[1] Heading of an article written by Alberto Alemanno: "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection" reproduced in Michal Bobek (ed.) Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts (Oxford University Press 2015).

dismissed by the appellate authority vide order dated 05th September, 2009. On further appeal, the Central Information Commission ('CIC' for short) vide order dated 24th November, 2009 has directed disclosure of information observing that disclosure would not infringe upon the constitutional status of the judges. Aggrieved, the CPIO, Supreme Court of India has preferred this appeal.

3. Civil Appeal No. 10044 of 2010 arises from an application dated 23rd January, 2009 moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India to furnish a copy of complete file/papers as available with the Supreme Court of India inclusive of copies of complete correspondence exchanged between the concerned constitutional authorities with file notings relating to the appointment of Mr. Justice H.L. Dattu**,** Mr. Justice A.K. Ganguly and Mr. Justice R.M. Lodha superseding seniority of Mr. Justice A. P. Shah, Mr. Justice A.K. Patnaik and Mr. Justice V.K. Gupta, which was allegedly objected to by the Prime Minister. The CPIO vide order dated 25th February, 2009 had denied this information observing that the Registry did not deal with the matters pertaining to the appointment of the judges to the Supreme Court of India. Appointment of judges to the Supreme Court and the High Courts are made by the President of India as per the procedure

prescribed by law and the matters relating thereto were not dealt with and handled by the Registry of the Supreme Court. The information was neither maintained nor available with the Registry. First appeal preferred by Subhash Chandra Agarwal was rejected vide order dated 25th March, 2009 by the appellate authority. On further appeal, the CIC has accepted the appeal and directed furnishing of information by relying on the judgment dated 02nd September, 2009 of the Delhi High Court in Writ Petition (Civil) No. 288 of 2009 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal & Another***. The CIC has also relied on the decision of this Court in ***S.P. Gupta*** v. ***Union of India & Others***[2] to reach its conclusion. Aggrieved, the CPIO, Supreme Court of India has preferred the present appeal stating, inter alia, that the judgment in Writ Petition (Civil) No. 288 of 2009 was upheld by the Full Bench of the Delhi High Court in LPA No. 501 of 2009 vide judgment dated 12th January, 2010, which judgment is the subject matter of appeal before this Court in Civil Appeal No.2683 of 2010.

4. Civil Appeal No. 2683 of 2010 arises from an application dated 10th November, 2007 moved by Subhash Chandra Agarwal

[2] (1981) Supp SCC 87

seeking information on declaration of assets made by the judges to the Chief Justices in the States, which application was dismissed by the CPIO, Supreme Court of India vide order/letter dated 30th November, 2007 stating that information relating to declaration of assets of the judges of the Supreme Court of India and the High Courts was not held by or was not under control of the Registry of the Supreme Court of India. On the first appeal, the appellate authority had passed an order of remit directing the CPIO, Supreme Court of India to follow the procedure under Section 6(3) of the RTI Act and to inform Subhash Chandra Agarwal about the authority holding such information as was sought. The CPIO had thereafter vide order dated 07th February, 2008 held that the applicant should approach the CPIO of the High Courts and filing of the application before the CPIO of the Supreme Court was against the spirit of Section 6(3) of the RTI Act. Thereupon, Subhash Chandra Agarwal had directly preferred an appeal before the CIC, without filing the first appeal, which appeal was allowed vide order dated 06th January, 2009 directing:

> "… in view of what has been observed above, the CPIO of the Supreme Court is directed to provide the information asked for by the appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice."

5. Aggrieved, the CPIO, Supreme Court of India had filed Writ Petition (Civil) No. 288 of 2009 before the Delhi High Court, which was decided by the learned Single Judge vide judgment dated 02nd September, 2009, and the findings were summarised as:

> "84. […]
> Re Point Nos. 1 & 2 *Whether the CJI is a public authority and whether the CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;*
>
> *Answer*: The CJI is a public authority under the Right to Information Act and the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions.
>
> Re Point No. 3: *Whether asset declaration by Supreme Court Judges, pursuant to the 1997 Resolution are "information", under the Right to Information Act, 2005.*
>
> *Answer*: It is held that the second part of the respondent's application, relating to declaration of assets by the Supreme Court Judges, is "information" within the meaning of the expression, under Section 2 (f) of the Act. The point is answered accordingly; the information pertaining to declarations given, to the CJI and the contents of such declaration are "information" and subject to the provisions of the Right to Information Act.
>
> Re Point No. 4: *If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act*
>
> *Answer*: The petitioners' argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) is insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.

Re Point No. 5: *Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act.*

Answer: It is held that the contents of asset declarations, pursuant to the 1997 resolution—and the 1999 Conference resolution—are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure under Section 8(1)(j) is inapplicable.

Re Point No. (6): *Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.*

Answer: These are not insurmountable obstacles; the CJI, if he deems it appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formats, and if required, the periodicity of the declarations to be made. The forms evolved, as well as the procedures followed in the United States—including the redaction norms—under the Ethics in Government Act, 1978, reports of the US Judicial Conference, as well as the Judicial Disclosure Responsibility Act, 2007, which amends the Ethics in Government Act of 1978 to: (1) restrict disclosure of personal information about family members of Judges whose revelation might endanger them; and (2) extend the authority of the Judicial Conference to redact certain personal information of judges from financial disclosure reports may be considered."

6. On further appeal by the CPIO, Supreme Court of India, LPA No. 501 of 2009 was referred to the Full Bench, which has vide its decision dated 12th January, 2010 dismissed the appeal. This

judgment records that the parties were ad-idem with regard to point Nos. 1 and 2 as the CPIO, Supreme Court of India had fairly conceded and accepted the conclusions arrived at by the learned Single Judge and, thus, need not be disturbed. Nevertheless, the Full Bench had felt it appropriate to observe that they were in full agreement with the reasoning given by the learned Single Judge. The expression 'public authority' as used in the RTI Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for the Chief Justice of India. While the Chief Justice of India is designated as one of the competent authorities under Section 2(e) of the RTI Act, the Chief Justice of India besides discharging his role as 'head of the judiciary' also performs a multitude of tasks assigned to him under the Constitution and various other enactments. In the absence of any indication that the office of the Chief Justice of India is a separate establishment with its own CPIO, it cannot be canvassed that "the office of the CPIO of the Supreme Court is different from the office of the CJI" (that is, the Chief Justice of India). Further, neither side had made any submissions on the issue of 'unworkability' on account of 'lack of clarity' or 'lack of security' vis-à-vis asset declarations by the judges. The Full

Bench had, thereafter, re-casted the remaining three questions as under:

> "(1) Whether the respondent had any "right to information" under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to 1997 Resolution?
>
> (2) If the answer to question (1) above is in affirmative, whether CJI held the "information" in his "fiduciary" capacity, within the meaning of the expression used in Section 8(1)(e) of the Act?
>
> (3) Whether the information about the declaration of assets by the Judges of the Supreme Court is exempt from disclosure under the provisions of Section 8(1)(j) of the Act?"

The above questions were answered in favour of the respondent-Subhash Chandra Aggarwal as the Full Bench has held that the respondent had the right to information under Section 2(j) of the RTI Act with regard to the information in the form of declarations of assets made pursuant to the 1997 Resolution. The Chief Justice did not hold such declarations in a fiduciary capacity or relationship and, therefore, the information was not exempt under Section 8(1)(e) of the RTI Act. Addressing the third question, the Bench had observed:

> "116. In the present case the particulars sought for by the respondent do not justify or warrant protection under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j).

> We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); that they are not otherwise subject to disclosure. Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them under Section 8(1)(j) that such disclosure is warranted in "larger public interest."

7. The afore-captioned three appeals were tagged to be heard and decided together vide order dated 26th November, 2010, the operative portion of which reads as under:

> "12. Having heard the learned Attorney General and the learned counsel for the respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced."

8. This order while referring the matter to a larger bench had framed the following substantial questions of law as to the interpretation of the Constitution, which read as under:

> "1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the Judiciary?
>
> 2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
>
> 3. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?"

9. We have heard Mr. K.K. Venugopal, Attorney General of India, Mr. Tushar Mehta, Solicitor General of India on behalf of the Supreme Court of India and Mr. Prashant Bhushan**,** learned advocate for Subhash Chandra Agarwal. The appellants have contended that disclosure of the information sought would impede the independence of judges as it fails to recognise the unique position of the judiciary within the framework of the Constitution which necessitates that the judges ought not to be subjected to 'litigative public debate' and such insulation is constitutional, deliberate and essential to the effective functioning of the institution. Right to information is not an unfettered constitutional right, *albeit* a right

available within the framework of the RTI Act, which means that the right is subject, among other conditions, to the exclusions, restrictions and conditions listed in the Second Schedule and in Sections 8 to 11 of the RTI Act. In support, the appellants have relied upon ***Re Coe's Estate Ebert et al*** v. ***State et. al***[3], ***Bhudan Singh and Another*** v. ***Nabi Bux and Another***[4], ***Kailash Rai*** v. ***Jai Ram***[5] and ***Dollfus Mieg et Compagnie S.A.*** v. ***Bank of England***[6]. Information sought when exempt under Section 8 of the RTI Act cannot be disclosed. Information on assets relates to personal information, the disclosure of which has no bearing on any public activity or interest and is, therefore, exempt under Section 8(1)(j) of the RTI Act. Similarly, information of prospective candidates who are considered for judicial appointments and/or elevation relates to their personal information, the disclosure of which would cause unwarranted invasion of an individual's privacy and serves no larger public interest. Further, the information on assets is voluntarily declared by the judges to the Chief Justice of India in his fiduciary capacity as the *pater familias* of the judiciary. Consultations and correspondence between the office of the Chief Justice of India and other constitutional functionaries are made on

[3] 33 Cal.2d 502
[4] 1969 (2) SCC 481
[5] 1973 (1) SCC 527
[6] (1950) 2 All E.R. 611

the basis of trust and confidence which ascribes the attributes of a fiduciary to the office of the Chief Justice. Information relating to the appointment of judges is shared among other constitutional functionaries in their fiduciary capacities, which makes the information exempt under Section 8(1)(e) of the RTI Act. The respondent, on the other hand, has by relying on the dicta in ***State of U.P.*** v. ***Raj Narain and Others***[7] and ***S. P. Gupta*** (supra) argued that disclosure of the information sought does not undermine the independence of the judiciary. Openness and transparency in functioning would better secure the independence of the judiciary by placing any attempt made to influence or compromise the independence of the judiciary in the public domain. Further, the citizens have a legitimate and constitutional right to seek information about the details of any such attempt. Thus, disclosure, and not secrecy, enhances the independence of the judiciary. No legitimate concerns exist which may inhibit consultees from freely expressing themselves or which might expose candidates to spurious allegations by disclosing the consultative process for appointing judges. Given the nature of the information sought, disclosure of the information will serve the larger public interest and, therefore, such interest outweighs the

[7] (1975) 4 SCC 428

privilege of exemption granted to personal information under Section 8(1)(j) of the RTI Act. If any personal information is involved, the same could be dealt with on a case-by-case basis by disclosing the information that serves public interest after severing the records as per Section 10 of the RTI Act. There is no fiduciary relationship between the Chief Justice and the judges or among the constitutional functionaries as envisaged under Section 8(1)(e) of the RTI Act which could be a ground for holding back the information. Reliance was placed on the decisions of this Court in ***Central Board of Secondary Education and Another*** v. ***Aditya Bandopadhyay and Others***[8] and ***Reserve Bank of India*** v. ***Jayantilal N. Mistry***[9], to contend that the duty of a public servant is not to act for the benefit of another public servant, that is, the Chief Justice and other functionaries are meant to discharge their constitutional duties and not act as a fiduciary of anyone, except the people. In arguendo, even if there exists a fiduciary relationship among the functionaries, disclosure can be made if it serves the larger public interest. Additionally, candour and confidentiality are not heads of exemption under the RTI Act and, therefore, cannot be invoked as exemptions in this case.

[8] (2011) 8 SCC 497
[9] (2016) 3 SCC 525

10. For clarity and convenience, we would deal with the issues point-wise, *albeit* would observe that Point no. 1 (referred to as point Nos.1 and 2 in the judgment in LPA No. 501 of 2009 dated 12th January, 2010) was not contested before the Full Bench but as some clarification is required, it has been dealt below.

POINT NO. 1: WHETHER THE SUPREME COURT OF INDIA AND THE CHIEF JUSTICE OF INDIA ARE TWO SEPARATE PUBLIC AUTHORITIES?

11. Terms 'competent authority' and 'public authority' have been specifically defined in clauses (e) and (h) to Section 2 of the RTI Act, which read:

> "(e) "competent authority" means—
>
> (i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;
>
> (ii) the Chief Justice of India in the case of the Supreme Court;
>
> (iii) the Chief Justice of the High Court in the case of a High Court;
>
> (iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;
>
> (v) the administrator appointed under article 239 of the Constitution;
>
> xx xx xx

> (h) "public authority" means any authority or body or institution of self-government established or constituted—
>
> (a) by or under the Constitution;
> (b) by any other law made by Parliament;
> (c) by any other law made by State Legislature;
> (d) by notification issued or order made by the appropriate Government, and includes any—
> (i) body owned, controlled or substantially financed;
> (ii) non-Government organisation substantially financed,
> directly or indirectly by funds provided by the appropriate Government;"

12. Term 'public authority' under Section 2(h) of the RTI Act includes any authority or body or an institution of self-government established by the Constitution or under the Constitution. Interpreting the expression 'public authority' in ***Thalappalam Service Cooperative Bank Limited and Others*** v. ***State of Kerala and Others***[10], this Court had observed:

> "30. The legislature, in its wisdom, while defining the expression "public authority" under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions "means" and "includes". When a word is defined to "mean" something, the definition is prima facie restrictive and where the word is defined to "include" some other thing, the definition is prima facie extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there

[10] (2013) 16 SCC 82

> would exhaust themselves. The meanings of the expressions "means" and "includes" have been explained by this Court in *DDA* v. *Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.
>
> 31. Section 2(h) exhausts the categories mentioned therein. The former part of Section 2(h) deals with:
>
> (1) an authority or body or institution of self-government established by or under the Constitution,
> (2) an authority or body or institution of self-government established or constituted by any other law made by Parliament,
> (3) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and
> (4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate Government."

13. Article 124 of the Constitution, which relates to the establishment and constitution of the Supreme Court of India, states that there shall be a Supreme Court of India consisting of a Chief Justice and other judges. It is undebatable that the Supreme Court of India is a 'public authority', as defined vide clause (h) to Section 2 of the RTI Act as it has been established and constituted by or under the Constitution of India. The Chief Justice of India as per sub-clause (ii) in clause (e) to Section 2 is the competent authority in the case of the Supreme Court. Consequently, in terms of Section 28 of the RTI Act, the Chief Justice of India is empowered

to frame rules, which have to be notified in the Official Gazette, to carry out the provisions of the RTI Act.

14. The Supreme Court of India, which is a 'public authority', would necessarily include the office of the Chief Justice of India and the judges in view of Article 124 of the Constitution. The office of the Chief Justice or for that matter the judges is not separate from the Supreme Court, and is part and parcel of the Supreme Court as a body, authority and institution. The Chief Justice and the Supreme Court are not two distinct and separate 'public authorities', *albeit* the latter is a 'public authority' and the Chief Justice and the judges together form and constitute the 'public authority', that is, the Supreme Court of India. The interpretation to Section 2(h) cannot be made in derogation of the Constitution. To hold to the contrary would imply that the Chief Justice of India and the Supreme Court of India are two distinct and separate public authorities, and each would have their CPIOs and in terms of sub-section (3) to Section 6 of the RTI Act an application made to the CPIO of the Supreme Court or the Chief Justice would have to be transferred to the other when 'information' is held or the subject matter is more closely connected with the 'functions' of the other. This would lead to anomalies and difficulties as the institution, authority or body is one. The Chief Justice of India is the head of

the institution and neither he nor his office is a separate public authority.

15. This is equally true and would apply to the High Courts in the country as Article 214 states that there shall be a High Court for each State and Article 216 states that every High Court shall consist of a Chief Justice and such other judges as the President of India may from time to time deem it appropriate to appoint.

POINT NO. 2: INFORMATION AND RIGHT TO INFORMATION UNDER THE RTI ACT

16. Terms 'information', 'record' and 'right to information' have been defined under clauses (f), (i) and (j) to Section 2 of the RTI Act which are reproduced below:

> "(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;
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> xx xx xx
>
> (i) "record" includes—
>
> (a) any document, manuscript and file;
>
> (b) any microfilm, microfiche and facsimile copy of a document;
>
> (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device;

(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

17. 'Information' as per the definition clause is broad and wide, as it is defined to mean "material in any form" with amplifying words including records (a term again defined in widest terms vide clause (i) to Section 2 of the RTI Act), documents, emails, memos, advices, logbooks, contracts, reports, papers, samples, models, data material held in electronic form, etc. The last portion of the definition clause which states that the term 'information' would include *'information relating to any private body which can be accessed by a public authority under any other law for the time being in force'* has to be read as reference to 'information' not presently available or held by the public authority but which can be accessed by the public authority from a private body under any

other law for the time being in force. The term – 'private body' in the clause has been used to distinguish and is in contradistinction to the term – 'public authority' as defined in Section 2(h) of the RTI Act. It follows that any requirement in the nature of precondition and restrictions prescribed by any other law would continue to apply and are to be satisfied before information can be accessed and asked to be furnished by a private body.

18. What is explicit as well as implicit from the definition of 'information' in clause (f) to Section 2 follows and gets affirmation from the definition of 'right to information' that the information should be accessible by the public authority and 'held by or under the control of any public authority'. The word 'hold' as defined in Wharton's Law Lexicon, 15th Edition, means to have the ownership or use of; keep as one's own, but in the context of the present legislation, we would prefer to adopt a broader definition of the word 'hold' in Black's Law Dictionary, 6th Edition, as meaning; to keep, to retain, to maintain possession of or authority over. The words 'under the control of any public authority' as per their natural meaning would mean the right and power of the public authority to get access to the information. It refers to dominion over the information or the right to any material, document etc. The words 'under the control of any public

authority' would include within their ambit and scope information relating to a private body which can be accessed by a public authority under any other law for the time being in force subject to the pre-imposed conditions and restrictions as applicable to access the information.

19. When information is accessible by a public authority, that is, held or under its control, then the information must be furnished to the information seeker under the RTI Act even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act, 1923, that restricts or prohibits access to information by the public. In view of the *non-obstante* clause in Section 22[11] of the RTI Act, any prohibition or condition which prevents a citizen from having access to information would not apply. Restriction on the right of citizens is erased. However, when access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 2(f) read with Section 22 of the RTI Act does not bring any modification or amendment in any other enactment, which bars or

[11] Section 22 of the RTI Act reads:
"22. Act to have overriding effect. -The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

prohibits or imposes pre-condition for accessing information of the private bodies. Rather, clause (f) to Section 2 upholds and accepts the said position when it uses the expression – "which can be accessed", that is the public authority should be in a position and be entitled to ask for the said information. Section 22 of the RTI Act, an overriding provision, does not militate against the interpretation as there is no contradiction or conflict between the provisions of Section 2(f) of the RTI Act and other statutory enactments/law. Section 22 of the RTI Act is a key that unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information which is accessible by a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of the public authority to access information. In other words, a private body will be entitled to the same protection as is available to them under the laws of this country.

20. Full Bench of the Delhi High Court in its judgment dated 12th January 2010 in LPA No. 501 of 2009 had rightly on the interpretation of word 'held', referred to Philip Coppel's work *'Information Rights'* (2nd Edition, Thomson, Sweet & Maxwell

2007)[12] interpreting the provisions of the Freedom of Information Act, 2000 (United Kingdom) in which it has been observed:

> "**When information is "held" by a public authority**
>
> For the purposes of the Freedom of Information Act 2000, information is "held" by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority. The Act has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person. Putting to one side the effects of s.3(2) (see para.9-009 below), the word "held" suggests a relationship between a public authority and the information akin to that of ownership or bailment of goods.
>
> Information:
> - that is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;
>
> - that is accidentally left with a public authority;
>
> - that just passes through a public authority; or
>
> - that "belongs" to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises,
>
> will, it is suggested, lack the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before it can be said that the public authority can be said to "hold" the information. …"

Thereafter, the Full Bench had observed:

> "59. Therefore, according to Coppel the word "held" suggests a relationship between a public authority and

[12] Also, see Philip Coppel, *'Information Rights'* (4th Edition, Hart Publishing 2014) P. 361-62

> the information akin to that of an ownership or bailment of goods. In the law of bailment, a slight assumption of control of the chattel so deposited will render the recipient a depository (see Newman v. Bourne and Hollingsworth (1915) 31 T.L.R. 209). Where, therefore, information has been created, sought, used or consciously retained by a public authority will be information held within the meaning of the Act. However, if the information is sent to or deposited with the public authority which does not hold itself out as willing to receive it and which does not subsequently use it or where it is accidentally left with a public authority or just passes through a public authority or where it belongs to an employee or officer of a public authority but which is brought by that employee or officer unto the public authority's premises it will not be information held by the public authority for the lack of the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before the public authority can be said to hold the information… ."

Therefore, the word "hold" is not purely a physical concept but refers to the appropriate connection between the information and the authority so that it can properly be said that the information is held by the public authority.[13]

21. In ***Khanapuram Gandaiah*** v. ***Administrative Officer and Others***[14], this Court on examining the definition clause 2(f) of the RTI Act had held as under:

> "10. […] This definition shows that an applicant under Section 6 of the RTI Act can get any information which

[13] *New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection*, [2011] UKUT 185 AAC
[14] (2010) 2 SCC 1

> is already in existence and accessible to the public authority under law. ...
>
> xx xx xx
>
> 12. […] the Public Information Officer is not supposed to have any material which is not before him; or any information he could (*sic* not) have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. …"

The aforesaid observation emphasises on the mandatory requirement of accessibility of information by the public authority under any other law for the time being in force. This aspect was again highlighted by another Division Bench in ***Aditya Bandopadhyay*** (supra), wherein information was divided into three categories in the following words:

> "59. The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are:
>
> (*i*) Information which promotes *transparency and accountability* in the working of every public authority, disclosure of which may also help in containing or discouraging corruption [enumerated in clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].
>
> (*ii*) Other information held by public authority [that is, all information other than those falling under clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].
>
> (*iii*) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.

> Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu *publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category."

The first category refers to the information specified in clause (b) to sub-section (1) to Section 4 which consists of as many as seventeen sub-clauses on diverse subjects stated therein. It also refers to clause (c) to sub-section (1) to Section 4 by which public authority is required to publish all relevant facts while formulating important public policies or pronouncing its decision which affects the public. The rationale behind these clauses is to disseminate most of the information which is in the public interest and promote openness and transparency in government.

22. The expressions 'held by or under the control of any public authority' and 'information accessible under this Act' are restrictive[15] and reflect the limits to the 'right to information'

[15] See '*Central Board of Secondary Education* v. *Aditya Bandopadhyay'* (2011) 8 SCC 497

conferred vide Section 3 of the RTI Act, which states that subject to the provisions of the RTI Act, all citizens shall have the right to information. The right to information is not absolute and is subject to the conditions and exemptions under the RTI Act.

23. This aspect was again highlighted when the terms 'information' and 'right to information' were interpreted in ***Thalappalam Service Cooperative Bank Limited*** (supra) with the following elucidation:

> "63. Section 8 begins with a non obstante clause, which gives that section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (*a*) to (*j*). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(*j*) of the RTI Act. Right to be left alone, as propounded in *Olmstead* v. *United States* is the most comprehensive of the rights and most valued by civilised man.
>
> xx xx xx
>
> 67. The Registrar of Cooperative Societies functioning under the Cooperative Societies Act is a "public authority" within the meaning of Section 2(h) of the Act. As a public authority, the Registrar of Cooperative Societies has been conferred with lot of statutory powers under the respective Act under which he is

functioning. He is also duty-bound to comply with the obligations under the RTI Act and furnish information to a citizen under the RTI Act. Information which he is expected to provide is the information enumerated in Section 2(f) of the RTI Act subject to the limitations provided under Section 8 of the Act. The Registrar can also, to the extent law permits, gather information from a Society, on which he has supervisory or administrative control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, under Section 2(f), he can also gather those information from the society, to the extent permitted by law. The Registrar is also not obliged to disclose those information if those information fall under Section 8(1)(j) of the Act. No provision has been brought to our knowledge indicating that, under the Cooperative Societies Act, a Registrar can call for the details of the bank accounts maintained by the citizens or members in a cooperative bank. Only those information which a Registrar of Cooperative Societies can have access under the Cooperative Societies Act from a society could be said to be the information which is "held" or "under the control of public authority". Even those information, the Registrar, as already indicated, is not legally obliged to provide if those information falls under the exempted category mentioned in Section 8(j) of the Act. Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a co-operative bank of a private account maintained by a member of society under law, in the event of which, in a given situation, the society will have to part with that information. But the demand should have statutory backing.

68. Consequently, if an information which has been sought for relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual, the Registrar of Cooperative Societies, even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public

> interest justifies the disclosure of such information, that too, for reasons to be recorded in writing."

Thus, the scope of the expressions 'information' and 'right to information' which can be accessed by a citizen under the RTI Act have to be understood in light of the above discussion.

POINT NO. 3: SECTIONS 8, 9, 10 AND 11 OF THE RTI ACT

24. To ensure transparency and accountability and to make Indian democracy more participatory, the RTI Act sets out a practical and pragmatic regime to enable citizens to secure greater access to information available with public authorities by balancing diverse interests including efficient governance, optimum use of limited fiscal operations and preservation of confidentiality of sensitive information. The preamble to the RTI Act appropriately summarises the object of harmonising various conflicts in the following words:

> " xx xx xx
>
> AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

> AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;
>
> xx xx xx"

25. An attempt to resolve conflict and disharmony between these aspects is evident in the exceptions and conditions on access to information set out in Sections 8 to 11 of the RTI Act. At the outset, we would reproduce Section 8 of the RTI Act, which reads as under:

> "8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
>
> (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
>
> (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
>
> (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

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

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in

> disclosure outweighs the harm to the protected interests.
>
> (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:
>
> Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

Sub-section (1) of Section 8 begins with a *non-obstante* clause giving primacy and overriding legal effect to different clauses under the sub-section in case of any conflict with other provisions of the RTI Act. Section 8(1) without modifying or amending the term 'information', carves out exceptions when access to 'information', as defined in Section 2(f) of the RTI Act would be denied. Consequently, the right to information is available when information is accessible under the RTI Act, that is, when the exceptions listed in Section 8(1) of the RTI Act are not attracted. In terms of Section 3 of the RTI Act, all citizens have right to information, subject to the provisions of the RTI Act, that is, information 'held by or under the control of any public authority', except when such information is exempt or excluded.

26. Clauses in sub-section (1) to Section 8 can be divided into two categories: clauses (a), (b), (c), (f), (g), (h) and (i), and clauses (d), (e) and (j). The latter clauses state that the prohibition specified would not apply or operate when the competent authority in clauses (d) and (e) and the PIO in clause (j) is satisfied that larger public interest warrants disclosure of such information.[16] Therefore, clauses (d), (e) and (j) of Section 8(1) of the RTI Act incorporate qualified prohibitions and are conditional and not absolute exemptions. Clauses (a), (b), (c), (f), (g), (h) and (i) do not have any such stipulation. Prohibitory stipulations in these clauses do not permit disclosure of information on satisfaction of the larger public interest rule. These clauses, therefore, incorporate absolute exclusions.

27. Sub-section (2) to Section 8 states that notwithstanding anything contained in the Official Secrets Act, 1923 or any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests. The disclosure under Section 8(2) by the public authority

[16] For the purpose of the present decision, we do not consider it appropriate to decide who would be the 'competent authority' in the case of other public authorities, if sub-clauses (i) to (v) to clause (e) of Section 2 are inapplicable. This 'anomaly' or question is not required to be decided in the present case as the Chief Justice of India is a competent authority in the case of the Supreme Court of India.

is not a mandate or compulsion but is in the form of discretionary disclosure. Section 8(2) acknowledges and empowers the public authority to lawfully disclose information held by them despite the exemptions under sub-section (1) to Section 8 if the public authority is of the opinion that the larger public interest warrants disclosure. Such disclosure can be made notwithstanding the provisions of the Official Secrets Act. Section 8(2) does not create a vested or justiciable right that the citizens can enforce by an application before the PIO seeking information under the RTI Act. PIO is under no duty to disclose information covered by exemptions under Section 8(1) of the RTI Act. Once the PIO comes to the conclusion that any of the exemption clauses is applicable, the PIO cannot pass an order directing disclosure under Section 8(2) of the RTI Act as this discretionary power is exclusively vested with the public authority.

28. Section 9 provides that without prejudice to the provisions of Section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

29. Section 10 deals with severability of exempted information and sub-section (1) thereof reads as under:

> "10. *Severability.*– (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

30. Section 11, which deals with third party information, and incorporates conditional exclusion based on breach of confidentiality by applying public interest test, reads as under:

> "11. (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:
>
> Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.
>
> (2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part

> thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.
>
> (3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.
>
> (4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision."

We shall subsequently interpret and expound on Section 11 of the RTI Act.

31. At the present stage, we would like to quote from ***Aditya Bandopadhyay*** (supra) wherein this Court, on the aspect of general principles of interpretation while deciding the conflict between the right to information and exclusions under Section 8 to 11 of the RTI Act, had observed:

> "61. Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and

accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

62. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

63. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of Section 3 and the definitions of “information” and “right to information” under clauses (*f*) and (*j*) of Section 2 of the Act. If a public authority has any information in the

> form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(*f*) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act."

Paragraph 63 quoted above has to be read with our observations on the last portion of clause (f) to Section 2 defining the word 'information', *albeit*, on the observations and findings recorded, we respectfully concur. For the present decision, we are required to primarily examine clauses (e) and (j) of sub-section (1) to Section 8 and Section 11 of the RTI Act.

Point No. 3 (A): Fiduciary Relationship under Section 8(1)(e) of the RTI Act

32. Clause (e) to Section 8(1) of the RTI Act states that information made available to a person in his fiduciary relationship shall not be disclosed unless the competent authority is satisfied that the

larger public interest warrants the disclosure of such information. The expression *'fiduciary relationship'* was examined and explained in ***Aditya Bandopadhyay*** (supra), in the following words:

> "39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.
>
> 40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or

> disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.
>
> 41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a shareholder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body."

This Court held that the exemption under section 8(1)(e) of the RTI Act does not apply to beneficiaries regarding whom the fiduciary holds information. In other words, information available with the public authority relating to beneficiaries cannot be withheld from or denied to the beneficiaries themselves. A

fiduciary would, ergo, be duty-bound to make thorough disclosure of all relevant facts of all transactions between them in a fiduciary relationship to the beneficiary. In the facts of the said case, this Court had to consider whether an examining body, the Central Board of Secondary Education, held information in the form of evaluated answer-books of the examinees in fiduciary capacity. Answering in the negative, it was nevertheless observed that even if the examining body is in a fiduciary relationship with an examinee, it will be duty-bound to disclose the evaluated answer-books to the examinee and at the same time, they owe a duty to the examinee not to disclose the answer-books to anyone else, that is, any third party. This observation is of significant importance as it recognises that Section 8(1)(j), and as noticed below - Section 11, encapsulates another right, that is the right to protect privacy and confidentiality by barring the furnishing of information to third parties except when the public interest as prescribed so requires. In this way, the RTI Act complements both the right to information and the right to privacy and confidentiality. Further, it moderates and regulates the conflict between the two rights by applying the test of larger public interest or comparative examination of public interest in disclosure of information with possible harm and injury to the protected interests.

33. In ***Reserve Bank of India*** (supra) this Court had expounded upon the expression *'fiduciary relationship'* used in clause (e) to sub-section (1) of Section 8 of the RTI Act by referring to the definition of *'fiduciary relationship'* in the Advanced Law Lexicon, 3rd Edition, 2005, which reads as under:

> "57. [...] *Fiduciary relationship*. — A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the fiduciary relationship. Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer."

Thereafter, the Court had outlined the contours of the fiduciary relationship by listing out the governing principles which read:

> "58. [...] (*i*) *No conflict rule* — A fiduciary must not place himself in a position where his own interest conflicts with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.
>
> (*ii*) *No profit rule* — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.
>
> (*iii*) *Undivided loyalty rule* — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts

> with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.
>
> (*iv*) *Duty of confidentiality* — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person."

34. Fiduciary relationships, regardless of whether they are formal, informal, voluntary or involuntary, must satisfy the four conditions for a relationship to classify as a fiduciary relationship. In each of the four principles, the emphasis is on trust, reliance, the fiduciary's superior power or dominant position and corresponding dependence of the beneficiary on the fiduciary which imposes responsibility on the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself. Section 8(1)(e) is a legal acceptance that there are ethical or moral relationships or duties in relationships that create rights and obligations, beyond contractual, routine or even special relationships with standard and typical rights and obligations. Contractual or non-fiduciary relationships could require that the party should protect and promote the interest of the other and not cause harm or damage, but the fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self-interest. A

fiduciary's loyalty, duties and obligations are stricter than the morals of the market place and it is not honesty alone, but the *punctilio* of an honour which is the most sensitive standard of behaviour which is applied {See – Opinion of Cardozo, J. in ***Meinhard*** v. ***Salmon***[17]}. Thus, the level of judicial scrutiny in cases of fiduciary relationship is intense as the level of commitment and loyalty expected is higher than non-fiduciary relationships. Fiduciary relationship may arise because of the statute which requires a fiduciary to act selflessly with integrity and fidelity and the other party, that is the beneficiary, depends upon the wisdom and confidence reposed in the fiduciary. A contractual, statutory and possibly all relationships cover a broad field, but a fiduciary relationship could exist, confined to a limited area or an act, as relationships can have several facets. Thus, relationships can be partly fiduciary and partly non-fiduciary with the former being confined to a particular act or action which need not manifest itself in entirety in the interaction and relationship between two parties. What would distinguish non-fiduciary relationship from fiduciary relationship or an act is the requirement of trust reposed, higher standard of good faith and honesty required on the part of the fiduciary with reference to a particular transaction(s) due to moral,

[17] (1928) 164 N.E. 545, 546

personal or statutory responsibility of the fiduciary as compared to the beneficiary, resulting in dependence of the beneficiary. This may arise due to superior knowledge and training of the fiduciary or the position he occupies.

35. Ordinarily the relationship between the Chief Justice and judges would not be that of a fiduciary and a beneficiary. However, it is not an absolute rule/code for in certain situations and acts, fiduciary relationship may arise. Whether or not such a relationship arises in a particular situation would have to be dealt with on the tests and parameters enunciated above.

<u>Point No. 3 (B)</u>: Right to Privacy under Section 8(1)(j) and Confidentiality under Section 11 of the RTI Act

36. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance. The RTI Act captures this interplay of the competing rights under clause (j) to Section 8(1) and Section 11. While clause (j) to Section 8(1) refers to personal information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy

of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record…which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information rights, the RTI Act also recognises the interconnectedness, yet distinctiveness between the breach of confidentiality and invasion of privacy, as the former is broader than the latter, as will be noticed below.

37. Breach of confidentiality has an older conception and was primarily an equitable remedy based on the principle that one party is entitled to enforce equitable duty on the persons bound by an obligation of confidentiality on account of the relationship they share, with actual or constructive knowledge of the confidential relationship. Conventionally a conception of equity, confidentiality also arises in a contract, or by a statute.[18] Contractually, an obligation to keep certain information confidential can be effectuated expressly or implicitly by an oral or written agreement, whereas in statutes certain extant and defined relationships are imposed with the duty to maintain details, communication

[18] See Prince Albert v. Strange, (1849) 1 Mac.&G 25, and Lord Oliver of Aylmerton, Spycatcher: Confidence, Copyright and Contempt, Israel Law Review (1989) 23(4), 407 [as also quoted in Philip Coppel, Information Rights, Law and Practice (4th Edition Hart Publishing 2014)].

exchanged and records confidential. Confidentiality referred to in the phrase 'breach of confidentiality' was initially popularly perceived and interpreted as confidentiality arising out of a pre-existing confidential relationship, as the obligation to keep certain information confidential was on account of the nature of the relationship. The insistence of a pre-existing confidential relationship did not conceive a possibility that a duty to keep information confidential could arise even if a relationship, in which such information is exchanged and held, is not pre-existing. This created a distinction between confidential information obtained through the violation of a confidential relationship and similar confidential information obtained in some other way. With time, courts and jurists, who recognised this anomaly, have diluted the requirement of the existence of a confidential relationship and held that three elements were essential for a case of breach of confidentiality to succeed, namely – (a) information should be of confidential nature; (b) information must be imparted in circumstances importing an obligation of confidentiality; and (c) that there must be unauthorised use of information (See ***Coco v. AN Clark (Engineers) Ltd.***[19]). The "artificial"[20] distinction was emphatically abrogated by the test adopted by Lord Goff of

[19] [1969] RPC 41
[20] Campbell v. Mirror Group Newspapers Limited (2004) UKHL 22

Chieveley in ***Attorney-General*** v. **Guardian *Newspaper Limited (No. 2)***[21], who had observed:

> "a duty of confidence arises when confidential information comes to the knowledge of a person... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

Lord Goff, thus, lifted the limiting constraint of a need for initial confidential relationship stating that a 'duty of confidence' would apply whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Therefore, confidential information must not be something which is a public property and in public knowledge/ public domain as confidentiality necessarily attributes inaccessibility, that is, the information must not be generally accessible, otherwise it cannot be regarded as confidential. However, self-clarification or certification will not be relevant because whether or not the information is confidential has to be determined as a matter of fact. The test to be applied is that of a reasonable person, that is, information must be such that a reasonable person would regard it as confidential. Confidentiality of information also has reference to the quality of information

[21] (1990) 1 AC 109

though it may apply even if the information is false or partly incorrect. However, the information must not be trivial or useless.

38. While previously information that could be considered personal would have been protected only if it were exchanged in a confidential relationship or considered confidential by nature, significant developments in jurisprudence since the 1990's have posited the acceptance of privacy as a separate right and something worthy of protection on its own as opposed to being protected under an actionable claim for breach of confidentiality. A claim to protect privacy is, in a sense, a claim for the preservation of confidentiality of personal information. With progression of the right to privacy, the underlying values of the law that protects personal information came to be seen differently as the courts recognised that unlike law of confidentiality that is based upon duty of good faith, right to privacy focuses on the protection of human autonomy and dignity by granting the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people (See - Sedley LJ in ***Douglas*** v. ***Hello! Ltd***[22]). In ***PJS*** v. ***News Group Newspapers Ltd.***[23], the Supreme Court of the United Kingdom had drawn a

[22] (2001) QB 967
[23] (2016) UKSC 26

distinction between the right to respect private and family life or privacy and claims based upon confidentiality by observing that the law extends greater protection to privacy rights than rights in relation to confidential matters. In the former case, the claim for misuse of private information can survive even when information is in the public domain as its repetitive use itself leads to violation of the said right. The right to privacy gets the benefit of both the quantitative and the qualitative protection. The former refers to the disclosure already made and what is yet undisclosed, whereas the latter refers to the privateness of the material, invasion of which is an illegal intrusion into the right to privacy. Claim for confidentiality would generally fail when the information is in public domain. The law of privacy is, therefore, not solely concerned with the information, but more concerned with the intrusion and violation of private rights. Citing an instance of how publishing of defamatory material can be remedied by a trial establishing the falsity of such material and award of damages, whereas invasion of privacy cannot be similarly redressed, the Court had highlighted the reason why truth or falsity of an allegation or information may be irrelevant when it comes to invasion of privacy. Therefore, claims for protection against invasion of private and family life do not depend upon confidentiality alone. This distinction is important to

understand the protection given to two different rights vide Section 8(1)(j) and 11 of the RTI Act.

39. In ***District Registrar and Collector*** v. ***Canara Bank***[24] this Court had referred to the judgment of the U.S. Supreme Court in ***United States* v. *Miller***[25] on the question of "voluntary" parting with information and under the heading '*Criticism of Miller'* had observed:

> "*48. ...(A) Criticism of Miller*
>
> (i) The majority in Miller laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'." He observes that the majority in Miller confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for *a secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

[24] (2005) 1 SCC 496
[25] 425 US 435 (1976)

> ‘Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live* without a *telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.’
>
> He concludes (p. 1400):
>
> ‘In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self.’
>
> (ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:
>
> ‘It is beginning to look as if the only way someone living in our society can avoid *‘assuming the risk’* that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*.’… ”

Thereafter, it was noticed that with the enactment of the Right to Financial Privacy Act, 1978 the legal effect of *‘Miller’* was statutorily done away.

40. The right to privacy though not expressly guaranteed in the Constitution of India is now recognized as a basic fundamental

right vide decision of the Constitutional Bench in ***K.S. Puttaswamy and Another*** v. ***Union of India and Others***[26] holding that it is an intrinsic part of the right to life and liberty guaranteed under Article 21 of the Constitution and recognised under several international treaties, chief among them being Article 12 of the Universal Declaration of Human Rights, 1948 which states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The judgment recognises that everyone has a right to the protection of laws against such interference or attack.

41. In ***K.S. Puttaswamy*** (supra) the main judgment (authored by D.Y. Chandrachud, J.) has referred to provisions of Section 8(1)(j) of the RTI Act to highlight that the right to privacy is entrenched with constitutional status in Part III of the Constitution, thus providing a touchstone on which validity of executive decisions can be assessed and validity of laws can be determined vide judicial review exercised by the courts. This observation highlights the status and importance of the right to privacy as a constitutional right. The ratio as recorded in the two concurring judgments of

[26] (2017) 10 SCC 1

the learned judges (R.F. Nariman and Sanjay Kishan Kaul, JJ.) are similar. It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy over personal choices. While physical privacy enjoys constitutional recognition in Article 19(1)(d) and (e) read with Article 21, personal informational privacy is relatable to Article 21 and right to privacy of choice is enshrined in Articles 19(1)(a) to (c), 20(3), 21 and 25 of the Constitution. In the concurring opinion, there is a reference to *'The Right to Privacy'* by Samuel Warren and Louis D. Brandeis on an individual's right to control the dissemination of personal information and that an individual has a right to limit access to such information/shield such information from unwarranted access. Knowledge about a person gives another power over that person, as personal data collected is capable of effecting representations in his decision making process and shaping behaviour which can have a stultifying effect on the expression of dissent which is the cornerstone of democracy. In the said concurring judgment, it has been further held that the right to protection of reputation from being unfairly harmed needs to be zealously guarded not only against falsehood but also against certain truths by observing:

> "623. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments."[27]

42. Privacy, it is uniformly observed in ***K.S. Puttaswamy*** (supra), is essential for liberty and dignity. Therefore, individuals have the need to preserve an intrusion-free zone for their personality and family. This facilitates individual freedom. On the question of invasion of personal liberty, the main judgment has referred to a three-fold requirement in the form of – (i) legality, which postulates the existence of law (RTI Act in the present case); (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means to be adopted to achieve them. The third requirement, we would observe, is achieved in the present case by Sections 8(1)(j) and 11 of the RTI Act and the RTI Act cannot be faulted on this ground. The RTI Act also defines the legitimate aim, that is a public interest in the dissemination of information which can be confidential or private (or held in a fiduciary relationship) when

[27] Daniel Solove: "10 Reasons Why Privacy Matters" published on 20th January 2014 and available at https://www.teachprivacy.com/10-reasons-privacy-matters/

larger public interest or public interest in disclosure outweighs the protection or any possible harm or injury to the interest of the third party.

43. Privacy and confidentiality encompass a bundle of rights including the right to protect identity and anonymity. Anonymity is where an individual seeks freedom from identification, even when and despite being in a public space. In ***K.S. Puttaswamy*** (supra) reference is made to ***Spencer*** v. ***R.***[28] which had set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity, to observe:

> "214. […] anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.
>
> xx xx xx
>
> […] The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search."

Privacy and confidentiality, therefore, include information about one's identity.

[28] 2014 SCC Online Can SC 34: (2014) 2 SCR 212: 2014 SCC 43

44. In ***K.S. Puttaswamy*** (supra), it is observed that the Canadian Supreme Court in ***Spencer*** (supra) had stopped short of recognising an absolute right of anonymity, but had used the provisions of Canadian Charter of Rights and Freedoms of 1982 to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual's "reasonable expectation of privacy". Yet the Court has observed that there has to be a careful balancing of the requirements of privacy with legitimate concerns of the State after referring to an article[29] wherein it was observed that:

> "Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents …"

45. Referring to an article titled *'Reasonable Expectations of Anonymity'*[30] authored by Jeffrey M. Skopek, it is observed that distinction has been drawn between anonymity on one hand and privacy on the other as privacy involves hiding information whereas anonymity involves hiding what makes it personal by giving an example that furnishing of medical records of a patient would amount to an invasion of privacy, whereas a State may

[29] Richard A. Posner, "Privacy, Surveillance, and Law", The University of Chicago Law Review (2008), Vol. 75, 251.
[30] Virginia Law Review (2015), Vol. 101, at pp. 691-762.

have legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic and to obviate serious impact on the population. If the anonymity of the individual/patient is preserved, it would legitimately assert a valid State interest in the preservation of public health.

46. For the purpose of the present case, we are not concerned with the specific connotations of the right to anonymity and the restrictions/limitations appended to it. In the context of the RTI Act, suffice would be to say that the right to protect identity and anonymity would be identically subjected to the public interest test.

47. Clause (j) to sub-section (1) of Section 8 of the RTI Act specifically refers to invasion of the right to privacy of an individual and excludes from disclosure information that would cause unwarranted invasion of privacy of such individual, unless the disclosure would satisfy the larger public interest test. This clause also draws a *distinction* in its treatment of *personal information*, whereby disclosure of such information is exempted if such information has no relation to public activity or interest. We would like to, however, clarify that in their treatment of this exemption, this Court has treated the word 'information' which if disclosed

would lead to invasion of privacy to mean personal information, as distinct from public information. This aspect has been dealt with in the succeeding paragraphs.

48. As per Black's Law Dictionary, 8th Edition, the word *'personal'* means *'of or affecting a* person or *of or constituting personal property'*. In Collins Dictionary of the English Language, the word *'personal'* has been defined as under:

> "1. Of or relating to the private aspects of a person's life.
>
> 2. Of or relating to a person's body, its care or its appearance.
>
> 3. Belonging to or intended for a particular person and no one else.
>
> 4. Undertaken by an individual himself.
>
> 5. Referring to, concerning, or involving a person's individual personality, intimate affairs, etc., esp. in an offensive way.
>
> 6. Having the attributes of an individual conscious being.
>
> 7. Of or arising from the personality.
>
> 8. Of or relating to, or denoting grammatical person.
>
> 9. Of or relating to movable property (Law).
>
> 10. An item of movable property (Law)."

49. In ***Peck*** v. ***United Kingdom***[31], the European Court of Human Rights had held that private life is a broad term not susceptible to exhaustive definition but includes the right to establish and develop relationships with other human beings such that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Recognised facets of an individual's private life include a person's health, ethnicity, personal relationships, sexual conduct; religious or philosophical convictions and personal image. These facets resemble what has been categorised as sensitive personal data within the meaning of the Data Protection Act, 2018 as applicable in the United Kingdom.

50. Gleeson CJ in ***Australian Broadcasting Corporation*** v. ***Lenah Game Meats Pty Ltd***[32] had distinguished between what is public and private information in the following manner:

> "An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private proper property, it has such measure of protection from the public gaze as the characteristics of the property, the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary

[31] (2003) EMLR 15
[32] (2001) 185 ALR 1

> standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

51. This test had been adopted in several English decisions including decision of the House of Lords in ***Campbell*** v. ***Mirror Group Newspapers Limited***[33] wherein Lord Hope of Craighead had further elucidated that the definition is taken from the definition of 'privacy' in the United States, where the right to privacy is invaded if the matter which is publicised is of a kind that – (a) would be highly offensive to a reasonable person and (b) not of legitimate concern to the public. Law of privacy in ***Campbell*** (supra), it was observed, was not intended for the protection of the unduly sensitive and would cover matters which are offensive and objectionable to a reasonable man of ordinary sensibilities who must expect some reporting of his daily activities. The mind that has to be examined is not that of a reader in general, but that of the person who is affected by the publicising/dissemination of his information. The question is what a reasonable person of ordinary sensibilities would feel if he/she is subjected to such publicity. Only when publicity is such that a reasonable person would feel

[33] (2004) UKHL 22

justified in feeling seriously aggrieved that there would be an invasion in the right to privacy which gives rise to a cause of action.

52. In ***Douglas*** (supra), it was also held that there are different degrees of privacy which would be equally true for information given in confidentiality, and the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction to protect the right to privacy.

53. While clause (j) exempts disclosure of two kinds of information, as noted in paragraph 47 above, that is “personal information” with no relation to public activity or interest and “information” that is exempt from disclosure to prevent unwarranted invasion of privacy, this Court has not underscored, as will be seen below, such distinctiveness and treated personal information to be exempt from disclosure if such disclosure invades on balance the privacy rights, thereby linking the former kind of information with the latter kind. This means that information, which if disclosed could lead to an unwarranted invasion of privacy rights, would mean personal information, that is, which is not having co-relation with public information.

54. In ***Girish Ramchandra Deshpande*** v. ***Central Information Commissioner and Others***[34], the applicant had sought copies of all memos, show-cause notices and censure/punishment awarded to a Government employee from his employer and also details of his movable/immovable properties, details of investment, loan and borrowings from financial institutions, details of gifts accepted by the employee from his family members and relatives at the time of the marriage of his son. In this context, it was observed:

> "12. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show-cause notices and orders of censure/punishment, etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. *On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual.* Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.
>
> 13. The details disclosed by a person in his income tax returns are "personal information" which stand

[34] (2013) 1 SCC 212

> exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information."
>
> (emphasis supplied)

55. In ***Canara Bank*** v. ***C.S. Shyam and Another***[35], the applicant had sought information on parameters with regard to transfer of clerical staff with details of individual employees, such as date of their joining, promotion earned, date of their joining the branch, the authorities who had posted the transfer letters, etc. The information sought was declared to be personal in nature, which was conditionally exempted from disclosure under Section 8(1)(j) of the RTI Act.

56. In ***Subhash Chandra Agarwal*** v. ***Registrar, Supreme Court of India and Others***[36], the applicant (who is also the respondent in the present appeals) had sought information relating to details of medical facilities availed by individual judges of the Supreme Court and their family members, including information relating to private treatment in India and abroad in last three years. This Court had held that the information sought by the applicant was

[35] (2018) 11 SCC 426
[36] (2018) 11 SCC 634

'personal' information and was protected under Section 8(1)(j) of the RTI Act, for disclosure would cause unwarranted invasion of privacy which prohibition would not apply where larger public interest justifies disclosure of such information.

57. In ***R.K. Jain*** v. ***Union of India and Another***[37], the applicant had sought inspection of documents relating to Annual Confidential Reports (ACRs) of a Member of Customs Excise and Service Tax Appellate Tribunal (CESTAT) and follow up action taken by the authorities based on the ACRs. The information sought was treated as personal information, which, except in cases involving overriding public interest, could not be disclosed. It was observed that the procedure under Section 11 of the RTI Act in such cases has to be followed. The matter was remitted to examine the aspect of larger public interest and to follow the procedure prescribed under Section 11 of the RTI Act which, it was held, was mandatory.

58. Reference can also be made to ***Aditya Bandopadhyay*** (supra), as discussed earlier in paragraph 32, where this Court has held that while a fiduciary could not withhold information from the beneficiary in whose benefit he holds such information, he/she

[37] (2013) 14 SCC 794

owed a duty to the beneficiary to not disclose the same to anyone else. This exposition of the Court equally reconciles the right to know with the rights to privacy under clause (j) to Section 8(1) of the RTI Act.

59. Reading of the aforesaid judicial precedents, in our opinion, would indicate that personal records, including name, address, physical, mental and psychological status, marks obtained, grades and answer sheets, are all treated as personal information. Similarly, professional records, including qualification, performance, evaluation reports, ACRs, disciplinary proceedings, etc. are all personal information. Medical records, treatment, choice of medicine, list of hospitals and doctors visited, findings recorded, including that of the family members, information relating to assets, liabilities, income tax returns, details of investments, lending and borrowing, etc. are personal information. Such personal information is entitled to protection from unwarranted invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied. This list is indicative and not exhaustive.

60. In ***Arvind Kejriwal*** v. ***Central Public Information Officer and Another***[38], the Delhi High Court had examined and interpreted Section 11 of the RTI Act in the following manner:

> "12. Section 11(1), (2), (3) and (4) are the procedural provisions which have to be complied with by the PIO/appellant authority, when they are required to apply the said test and give a finding whether information should be disclosed or not disclosed. If the said aspect is kept in mind, we feel there would be no difficulty in interpreting Section 11(1) and the so called difficulties or impartibility as pointed out by the appellant will evaporate and lose significance. This will be also in consonance with the primary rule of interpretation that the legislative intent is to be gathered from language employed in a statute which is normally the determining factor. The presumption is that the legislature has stated what it intended to state and has made no mistake. (See *Prakash Nath Khanna* vs. ***CIT***, (2004) 9 SCC 686; and several judgments of Supreme Court cited in ***B. Premanand and Ors. vs. Mohan Koikal and Ors.***.
>
> 13. Read in this manner, what is stipulated by Section 11(1) is that when an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or "maybe yes", then the procedure prescribed in Section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information per se or ex facie cannot be regarded as confidential, then the procedure under section 11 is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law

[38] AIR 2012 Delhi 29

is required to be disclosed etc. The aforesaid interpretation takes care of the difficulties visualised by the appellant like marks obtained in an examination, list of BPL families, etc. In such cases, normally plea of privacy or confidentiality does not arise as the said list has either been made public, available in the public domain or has been already circulated to various third parties. On the other hand, in case the word "or" is read as "and", it may lead to difficulties and problems, including invasion of right of privacy/confidentiality of a third party. For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person. Such examples can be multiplied. Furthermore, the difficulties and anomalies pointed out can even arise when the word "or" is read as "and" in cases where the information is furnished by the third party. For example, for being enrolled as a BPL family, information may have been furnished by the third party who is in the list of BPL families. Therefore, the reasonable and proper manner of interpreting Section 11(1) is to keep in mind the test stipulated by the proviso. It has to be examined whether information can be treated and regarded as being of confidential nature, if it relates to a third party or has been furnished by a third party. Read in this manner, when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been prima facie treated by the said third party as confidential, again the procedure prescribed under Section 11(1) has to be followed.

xx xx xx

16. Thus, Section 11(1) postulates two circumstances when the procedure has to be followed. Firstly when the information relates to a third party and can be

> prima facie regarded as confidential as it affects the right of privacy of the third party. The second situation is when information is provided and given by a third party to a public authority and prima facie the third party who has provided information has treated and regarded the said information as confidential. The procedure given in Section 11(1) applies to both cases."

61. We would clarify that Section 11 is not merely procedural but also a substantive provision which applies when the PIO intends to disclose information that relates to or has been supplied by a third party and has been treated as confidential by that third party. It requires the PIO to issue notice to the third party who may make submission in writing or orally, which submission has to be kept in view while taking a decision. Proviso to Section 11(1) applies in all cases except trade or commercial secrets protected by law. Pertinently, information including trade secrets, intellectual property rights, etc. are governed by clause (d) to sub-section (1) of Section 8 and Section 9 of the RTI Act. In all other cases where the information relates to or has been supplied by the third party and treated as confidential by that third party, disclosure in terms of the proviso may be allowed where the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. Confidentiality is protected and preserved in law because the public interest requires such

protection. It helps and promotes free communication without fear of retaliation. However, public interest in protecting confidentiality is subject to three well-known exceptions. The first exception being a public interest in the disclosure of iniquity for there cannot be any loss of confidentiality involving a wrongdoing. Secondly, there cannot be any public interest when the public has been misled. Thirdly, the principle of confidentiality does not apply when the disclosure relates to matters of public concern, which expression is vastly different from news value or news to satiate public curiosity. Public concern relates to matters which are an integral part of free speech and expression and entitlement of everyone to truth and fair comment about it. There are certain circumstances where the public interest in maintaining confidentiality may be outweighed by the public interest in disclosure and, thus, in common law, it may not be treated by the courts as confidential information. These aspects would be relevant under the proviso to Section 11(1) of the RTI Act.

62. Proviso to Section 11(1) of the RTI Act is a statutory recognition of three exceptions and more when it incorporates public interest test. It states that information, otherwise treated confidential, can be disclosed if the public interest in disclosure outweighs the possible harm and injury to the interest of such a third party. The

expression ‘third party’ has been defined in clause (n) to Section 2 to mean a person other than the citizen making a request for information and includes a public authority. Thus, the scope of ‘information’ under Section 11 is much broader than that of clause (j) to Section 8 (1), as it could include information that is personal as well as information that concerns the government and its working, among others, which relates to or is supplied by a third party and treated as confidential. Third-party could include any individual, natural or juristic entity including the public authority.

63. Confidentiality in case of personal information and its co-relation with the right to privacy and disclosure of the same on the anvil of the public interest test has been discussed above. We now proceed to look at confidentiality of information concerning the government and information relating to its inner-workings and the difference in approach in applying the public interest test in disclosing such information, as opposed to the approach adopted for other confidential/personal information. The reason for such jurisprudential distinction with regard to government information is best expressed in ***Attorney General (UK)*** v. ***Heinemann***

Publishers Pty Ltd.[39] wherein the High Court of Australia had observed:

> "[…] the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern contractual, property, commercial and private confidences are not fully applicable where the plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further own interests… [whereas] governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which equity determines whether it will protect information which a government or governmental body claims is confidential."

The High Court of Australia had earlier in ***Commonwealth*** v. ***John Fairfax and Sons Ltd.***[40] observed:

> "The question, then when the executive government seeks the protection given by equity, is: What detriment does it need to show?
>
> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.

[39] (1987) 10 NSWLR 86 at 191.
[40] (1980) 147 CLR 39 at 51.

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."

The above principles have also been reiterated and relied upon by the courts in the United Kingdom [*See* ***Coco*** (supra),

Attorney General v. Jonathan Cape Ltd.[41]]. In ***Guardian Newspapers*** (supra), Lord Keith of Kinkel had observed:

> "The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. In some instances disclosure of confidential information entrusted to a servant of the Crown may result in a financial loss to the public. In other instances such disclosure may tend to harm the public interest by impeding the efficient attainment of proper governmental ends, and the revelation of defence or intelligence secrets certainly falls into that category. The Crown, however, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case. In a question with a Crown servant himself, or others acting as his agents, the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice."

64. In ***R.K. Jain*** v. ***Union of India***[42], this Court, while examining Section 123 of the Evidence Act, 1872, had paraphrased the earlier judgment of the Constitution Bench of this Court penned down by Fazal Ali, J. in ***S.P. Gupta*** (supra) (the first Judge's case) in which the question of privilege against disclosure of correspondence between the Chief Justice of Delhi High Court,

[41] [1976] QB 752
[42] (1993) 4 SCC 119

Chief Justice of India and the Law Minister of the Union had arisen, in the following words:

> "41. [...] in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how the Govt. is functioning and that they can fulfill their own democratic rights given to them and make the democracy a really effective participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. By disclosure of information in regard to the functioning of the Govt. must be the rule and secrecy can be exceptionally justified only where strict requirement of public information was assumed. The approach of the court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind all the time that the disclosure also serves an important aspect of public interest."

65. In ***R.K. Jain*** (1993) (supra), reference was also made to Articles 74(2) and 75(3) of the Constitution, to observe:

> "21...Article 74(2) precludes this Court from enquiring into the nature of the advice tendered to the President and the documents are, therefore, immuned from disclosure. The disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-committee causing serious injury to public service. Therefore, Cabinet papers, minutes of discussion by heads of departments; high level documents relating to the inner working of the government machine and all papers concerned with the government policies belong to a class documents which in the public interest they or contents thereof must be protected against disclosure.
>
> xx xx xx

> 30. Collective responsibility under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism.
>
> xx xx xx
>
> 34. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favourable or unfavourable, every other member will keep it secret. Maintenance of secrecy by an individual's contribution to discussion, or vote in the Cabinet guarantees most favourable and conducive atmosphere to express view formally…"

It was held that the Ministers and the government servants were required to maintain secrecy and confidentiality in the performance of the duties of the office entrusted by the Constitution and the laws. Elucidating on the importance of confidentiality, it was observed:

> "34. [...] Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or effectivity of collective decision to elongate public interest. To hamper and impair them without any compelling or at least strong reasons, would be detrimental to the efficacy of public administration. It would tantamount to wanton rejection of

> the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance."

66. Thereafter, reference was made to the decision of the House of Lords in ***Burmah Oil Ltd v. Governor And Company Of The Bank Of England And Another***[43] wherein the Lords had rejected the notion that "any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off chance that they might have to be produced in a litigation as grotesque" to hold that this contention would be utterly insubstantial ground to deny access to the relevant document. In ***Burma Oil Ltd.*** (supra), it was held that the candour doctrine stands in a different category from that aspect of public interest, which, in appropriate circumstances, may require that the *'sources and nature of information confidentially tendered'* should be withheld from disclosure. Several other cases were also referred expressing the same ratio [See – ***Butters Gas and Oil Co.*** v. ***Hammer***[44]; ***Air Canada*** v. ***Secretary of State for***

[43] [1980] AC 1090
[44] 1982 AC 888 (H.L.)

Trade[45]; and ***Council of Civil Service Unions*** v. ***Minister for the Civil Service***[46]].

67. Having held so, the Bench in ***R.K. Jain*** (1993) (supra) had proceeded to observe:

> "48. In a democracy it is inherently difficult to function at high governmental level without some degree of secrecy. No Minister, nor a Senior Officer would effectively discharge his official responsibilities if every document prepared to formulate sensitive policy decisions or to make assessment of character rolls of co-ordinate officers at that level if they were to be made public. Generally assessment of honesty and integrity is a high responsibility. At high co-ordinate level it would be a delicate one which would further get compounded when it is not backed up with material. Seldom material will be available in sensitive areas. Reputation gathered by an officer around him would form the base. If the reports are made known, or if the disclosure is routine, public interest grievously would suffer. On the other hand, confidentiality would augment honest assessment to improve efficiency and integrity in the officers.
>
> 49. The business of the Govt., when transacted by bureaucrats, even in personal, it would be difficult to have equanimity if the inner working of the Govt. machinery is needlessly exposed to the public. On such sensitive issues it would hamper to express frank and forthright views or opinions. therefore, it may be that at that level the deliberations and in exceptional cases that class or category or documents get protection, in particular, on policy matters. Therefore, the court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved.

[45] 1983 2 AC 394 (H.L.)
[46] 1985 AC 374 (H.L.)

xx xx xx

> 54. […] In President Nixon's case, the Supreme Court of the United States held that it is the court's duty to construe and delineate claims arising under express powers, to interpret claims with respect to powers alleged to derive from enumerated powers of the Constitution, In deciding whether the matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of the court as ultimate interpreter of the Constitution…"

68. At the same time, it was held:

> "55. [...] Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council of Ministers to the President and the question whether any and if so, what advice was tendered by the Minister or Council of Ministers to the President, shall not be enquired into by the court. In other words the bar of Judicial review is confined to the factum of advice, its extent, ambit and scope but not the record i.e. the material on which the advice is founded. In S.P. Gupta's case this Court held that only the actual advice tendered to the President is immuned from enquiry and the immunity does not extend to other documents or records which form part of the advice tendered to the President.
>
> 56. There is discernible modern trends towards more open government than was prevalent in the past. In its judicial review the court would adopt in camera procedure to inspect the record and evaluate the balancing act between the competing public interest and administration of justice. It is equally the paramount consideration that justice should not only be done but also would be publicly recognised as having been done. Under modern conditions of responsible government, Parliament should not always be relied on as a check on excess of power by the Council of

> Ministers or Minister. Though the court would not substitute its views to that of the executive on matters of policy, it is its undoubted power and duty to see that the executive exercises its power only for the purpose for which it is granted. Secrecy of the advice or opinion is by no means conclusive. Candour, frankness and confidentiality though are integral facets of the common genus i.e., efficient governmental functioning, per se by means conclusive but be kept in view in weighing the balancing act. Decided cases show that power often was exercised in excess thereof or for an ulterior purpose etc. Sometimes the public service reasons will be decisive of the issue, but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed, and the likely injury to the cause of justice must also be assessed and weighed. Its weight will vary according to the nature of the proceedings in which disclosure is sought, level at which the matter was considered; the subject matter of consideration; the relevance of the documents and that degree of likelihood that the document will be of importance in the litigation. In striking the balance, the court may always, if it thinks it necessary, itself inspect the documents. It is, therefore the constitutional, legitimate and lawful power and duty of this Court to ensure that powers, constitutional, statutory or executive are exercised in accordance with the Constitution and the law. This may demand, though no doubt only in limited number of cases, yet the inner workings of government may be exposed to public gaze. The contentions of Attorney General and Solicitor General that the inner workings of the government would be exposed to public gaze, and that some one who would regard this as an occasion without sufficient material to ill-informed criticism is no longer relevant. Criticism calculated to improve the nature of that working as affecting the individual citizen is welcome."

69. The aforesaid passages highlight the relevance of confidentiality in the government and its functioning. However, this is not to state

that plea of confidentiality is an absolute bar, for in terms of proviso to Section 11(1) of the RTI Act, the PIO has to undertake the balancing exercise and weigh the advantages and benefits of disclosing the information with the possible harm or injury to the third party on the information being disclosed. We have already referred to the general approach on the right of access to government records under the heading *"Section 8(1)(j) and Section 11 of the RTI Act"* with reference to the decisions of the High Court of Australia in ***Heinemann Publishers Pty Ltd.*** (supra) and ***John Fairfax and Sons Ltd.*** (supra).

70. Most jurists would accept that absolute transparency in all facets of government is neither feasible nor desirable,[47] for there are several limitations on complete disclosure of governmental information, especially in matters relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. There is also a need to accept and trust the government's decision-makers, which they have to also earn, when they plead that confidentiality in their meetings and

[47] Michael Schudson, 'The Right to Know vs the Need for Secrecy: The US Experience' The Conversation (May 2015) <https://theconversation.com/the-right-to-know-vs-the-need-for-secrecy-the-us-experience-40948>; Eric R. Boot, 'The Feasibility of a Public Interest Defense for Whistleblowing', Law and Philosophy (2019). See generally Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975 (Cambridge (MA): Harvard University Press 2015).

exchange of views is needed to have a free flow of views on sensitive, vexatious and pestilent issues in which there can be divergent views. This is, however, not to state that there are no dangers in maintaining secrecy even on aspects that relate to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. Confidentiality may have some bearing and importance in ensuring honest and fair appraisals, though it could work the other way around also and, therefore, what should be disclosed would depend on authentic enquiry relating to the public interest, that is, whether the right to access and the right to know outweighs the possible public interest in protecting privacy or outweighs the harm and injury to third parties when the information relates to such third parties or the information is confidential in nature.

POINT NO. 4: MEANING OF THE TERM 'PUBLIC INTEREST'

71. In ***Union of India*** v. ***Association for Democratic Reforms and Another***[48] recognising the voters' right to know the antecedents of the candidates and the right to information which stems from Article 19(1)(a) of the Constitution, it was held that directions could

[48] (2002) 5 SCC 294

be issued by the Court to subserve public interest in creating an informed citizenry, observing:

> "46. […] The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:
>
> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Article 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest."

Clearly, the larger public interest in having an informed electorate, fair elections and creating a dialectical democracy had outweighed and compelled this Court to issue the directions notwithstanding disclosure of information relating to the personal assets, educational qualifications and antecedents including previous involvement in a criminal case of the contesting candidate.

72. Public interest, sometimes criticised as inherently amorphous and incapable of a precise definition, is a time tested and historical conflict of rights test which is often applied in the right to information legislation to balance right to access and protection of the conflicting right to deny access. In ***Mosley*** v. ***News Group Papers Ltd.***[49] it has been observed:

> "130… It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria."

The RTI Act is no exception. Section 8(1)(j) of the RTI Act prescribes the requirement of satisfaction of *'larger public interest'* for access to information when the information relates to personal information having no relationship with any public activity or interest, or would cause unwarranted invasion of privacy of the individual. Proviso to Section 11(1) states that except in case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. The words '*possible harm or injury'* to the interest of the third party is preceded by the word '*importance*' for the purpose of comparison.

[49] 2008 EWHC 1777 (QB)

'Possible' in the context of the proviso does not mean something remote, far-fetched or hypothetical, but a calculable, foreseeable and substantial possibility of harm and injury to the third party.

73. Comparison or balancing exercise of competing public interests has to be undertaken in both sections, *albeit* under Section 8(1)(j) the comparison is between public interest behind the exemption, that is personal information or invasion of privacy of the individual and public interest behind access to information, whereas the test prescribed by the proviso to Section 11(1) is somewhat broader and wider as it requires comparison between disclosure of information relating to a third person or information supplied and treated as confidential by the third party and possible harm or injury to the third party on disclosure, which would include all kinds of 'possible' harm and injury to the third party on disclosure.

74. This Court in ***Bihar Public Service Commission*** v. ***Saiyed Hussain Abbas Rizwi and Another***[50] has held that the phrase *'public interest'* in Section 8(1)(j) has to be understood in its true connotation to give complete meaning to the relevant provisions of the RTI Act. However, the RTI Act does not specifically identify factors to be taken into account in determining where the public

[50] (2012) 13 SCC 61

interest lies. Therefore, it is important to understand the meaning of the expression 'public interest' in the context of the RTI Act. This Court held 'public interest' to mean the general welfare of the public warranting the disclosure and the protection applicable, in which the public as a whole has a stake, and observed:

> "23. The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to the circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India."

75. Public interest in access to information refers to something that is in the interest of the public welfare to know. Public welfare is widely different from what is of interest to the public. “Something which is of interest to the public” and “something which is in the public interest” are two separate and different parameters. For example, the public may be interested in private matters with which the public may have no concern and pressing need to know. However, such interest of the public in private matters would repudiate and directly traverse the protection of privacy. The object and purpose behind the specific exemption vide clause (j) to Section 8(1) is to protect and shield oneself from unwarranted access to personal information and to protect facets like reputation, honour, etc. associated with the right to privacy. Similarly, there is a public interest in the maintenance of confidentiality in the case of private individuals and even government, an aspect we have already discussed.

76. The public interest test in the context of the RTI Act would mean reflecting upon the object and purpose behind the right to information, the right to privacy and consequences of invasion, and breach of confidentiality and possible harm and injury that would be caused to the third party, with reference to a particular information and the person. In an article ‘*Freedom of Information*

and the Public Interest: the Commonwealth experience' published in the Oxford University Commonwealth Law Journal,[51] the factors identified as favouring disclosure, those against disclosure and lastly those irrelevant for consideration of public interest have been elucidated as under:

> "it is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interests of the public to know and matters which were merely interesting to the public (i.e. which the public would like to know about, and which sell newspapers, but... are not relevant).
>
> Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancement of scrutiny of decision-making; and protecting against danger to public health or safety.
>
> Factors that have been found to weigh against disclosure include: the likelihood of damage to security or international relations; the likelihood of damage to the integrity or viability of decision-making processes: the public interest in public bodies being able to perform their functions effectively; the public interest in preserving the privacy of individuals and the public interest in the preservation of confidences.

[51] Published online on 28th August, 2017

> Factors irrelevant to the consideration of the public interest have also been identified. These include: that the information might be misunderstood; that the requested information in overly technical in nature; and that disclosure would result in embarrassment to the government or to officials."

77. In ***Campbell*** (supra), reference was made to the Press Complaints Commission Code of Practice to further elucidate on the test of public interest which stands at the intersection of freedom of expression and the privacy rights of an individual to hold that:

> "1. Public interest includes:
>
> (i) Detecting or exposing crime or a serious misdemeanour.
>
> (ii) Protecting public health and safety.
>
> (iii) Preventing the public from being misled by some statement or action of an individual or organisation...."

78. Public interest has no relationship and is not connected with the number of individuals adversely affected by the disclosure which may be small and insignificant in comparison to the substantial number of individuals wanting disclosure. It will vary according to the information sought and all circumstances of the case that bear upon the public interest in maintaining the exemptions and those in disclosing the information must be accounted for to judge the right balance. Public interest is not immutable and even time-gap

may make a significant difference. The type and likelihood of harm to the public interest behind the exemption and public interest in disclosure would matter. The delicate balance requires identification of public interest behind each exemption and then cumulatively weighing the public interest in accepting or maintaining the exemption(s) to deny information in a particular case against the public interest in disclosure in that particular case. Further, under Section 11(1), reference is made to the 'possible' harm and injury to the third party which will also have to be factored in when determining disclosure of confidential information relating to the third parties.

79. The last aspect in the context of public interest test would be in the form of clarification as to the effect of sub-section (2) to Section 6 of the RTI Act which does not require the information seeker to give any reason for making a request for the information. Clearly, 'motive' and 'purpose' for making the request for information is irrelevant, and being extraneous cannot be a ground for refusing the information. However, this is not to state that 'motive' and 'purpose' may not be relevant factor while applying the public interest test in case of qualified exemptions governed by the public interest test. It is in this context that this Court in ***Aditya Bandopadhyay*** (supra) has held that beneficiary

cannot be denied personal information relating to him. Similarly, in other cases, public interest may weigh in favour of the disclosure when the information sought may be of special interest or special significance to the applicant. It could equally be a negative factor when the 'motive' and 'purpose' is vexatious or it is a case of clear abuse of law.

80. In the RTI Act, in the absence of any positive indication as to the considerations which the PIO has to bear in mind while making a decision, the legislature had intended to vest a general discretion in the PIO to weigh the competing interests, which is to be limited only by the object, scope and purpose of the protection and the right to access information and in Section 11(1), the 'possible' harm and injury to the third party. It imports a discretionary value judgment on the part of the PIO and the appellate forums as it mandates that any conclusion arrived at must be fair and just by protecting each right which is required to be upheld in public interest. There is no requirement to take a fortiori view that one trumps the other.

POINT NO. 5: JUDICIAL INDEPENDENCE

81. Having dealt with the doctrine of the public interest under the RTI Act, we would now turn to examining its co-relation with

transparency in the functioning of the judiciary in matters of judicial appointments/selection and importance of judicial independence.

82. Four major arguments are generally invoked to deny third-party or public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (ii) reputation of those being considered in the selection process, especially those whose candidature/eligibility stands negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.[52] These arguments have become subject matter of considerable debate, if not outright criticism at the hands of jurists and authors.[53] Yet there are those who have expressed cynicism about the 'interview' process undertaken by the Judicial Service Commission (JSC) in recommending judges for appointment in South Africa, by pointing out the precariousness and the chilling effect it has on prospective candidates and consequently the best candidates often do not apply.[54] Recently, the majority judgment of the Constitutional Court

[52] See: How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections by Alberto Alemanno in Michal Bobek (ed.), Selecting Europe's Judges, 2015 Edition.

[53] Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom' Osgoode Hall Law Journal (2007) 44, 557.

[54] WH Gravett, 'Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures' 2017 (80) THRHR.

of South Africa in ***Helen Suzman Foundation*** v. ***Judicial Service Commission***[55] by relying upon Rule 53(1)(b) of the Uniform Rules of Court, South Africa,[56] had directed the JSC to furnish the record of its deliberations, rejecting the contrary argument of candour and robustness as that of 'timorous fainthearts'. Debating with candour, the Court observed, is not equivalent to expression of impropriety. The candidates, it was noticed, had undergone gruelling scrutiny in the public interviews, and therefore disclosure of deliberation would not act as a dampener for future candidates. More importantly, the Constitutional Court had distinguished the authority and power with the Courts under Rule 53 to access the deliberation record, with the different right to access information under the Promotion to Access to Information Act, 2000 (PAIA), which was the basis of the minority judgment for rejection of production of the JSC's deliberation record. The majority held that PAIA and Rule 53 serve different purposes, there being a

[55] Case 289/16 decided on 24th April 2018

[56] Rule 53(1)(b) of the Uniform Rules of Court, South Africa states:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) […]

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

difference in the nature of, and purposes, and therefore it would be inapt to transpose PAIA proscriptions on access under Rule 53. The PAIA grants any person or busybody a right to access any information without explaining whatsoever as to why she or he requires the information. This had to be balanced, with the need to incentivise people to furnish private information, where such information is required for facilitating the government machinery, and therefore, considerations of confidentiality are applied as the person furnishing information must be made aware that the information would not be unhesitatingly divulged to others, including busybodies, for no particular reason. This facilitates the exercise of power and performance of functions of the state functionaries. In court matters under Rule 53, concerns of confidentiality could be addressed by imposing stringent and restrictive conditions on the right to access information, including furnishing of confidentiality undertakings for restraining the divulgence of details to third parties.

83. The United Kingdom's Data Protection Act, 2018 grants class exemption to all personal data processed for the purpose of assessing a person's suitability for judicial office, from certain rights including the right of the data subject to be informed, guaranteed under the European Union General Data Protection

Regulation being given effect to by the Data Protection Act.[57] Similarly, in the context of the European Union, opinions of 'the Article 255 Panel'[58] and 'the Advisory Panel'[59], entrusted with the task of advising on the suitability of candidates as judges to the Court of Justice of the European Union and the European Court of Human Rights are inaccessible to the public and their opinions have limited circulation, as they are exclusively forwarded to the representatives of governments of the member states in the case of European Union[60] and the individual governments in the case of Council of Europe[61], respectively. The Council of the European Union,[62] for instance, in consultation with 'Article 255' Panel, has denied requests for public access to opinions issued by the Panel,[63] in light of the applicable exceptions provided for in Regulation No 1049/2001[64]. Such opinions, the Council has

[57] Schedule 2, Part-2, Paragraph 14.

[58] Article 255, Treaty on the Functioning of the European Union states:
"A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254…"

[59] Set up under Resolution 'Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights', CM/Res (2010) 26 adopted by the Committee of Ministers on 10 November 2010.

[60] CJEU is the judicial branch of the European Union, administering justice in the 28 member states of the international organisation.

[61] Comprising of 47 member European states, Council of Europe adopted the European Convention on Human Rights, which established ECtHR.

[62] One of the seven constituent bodies of the European Union comprising of the ministers from the member states of the European Union.

[63] Reply Adopted by the Council on 12 July 2016 to Confirmatory Application 13/c/01/16 pursuant to Article 7(2) of Regulation (EC) No 1049/2001 for public access to all the opinions issued by the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union.

[64] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

observed, largely include personal data of the candidates, viz. factual elements concerning the candidates' professional experience and qualifications and the Panel's assessment of the candidate's competences and, therefore, access to relevant documents is denied in order to protect the privacy and integrity of the individual.[65] However, a part of these opinions which do not contain personal data and provide a description of the procedure adopted and criteria applied by the Panel have been released as "Activity Reports" in the framework of partial access to such information. Opinions that are unfavourable to the appointment of the candidates will be exempt from disclosure as they can hamper commercial interests of the candidates in their capacity as legal practitioners,[66] whereas positive opinions are exempted from disclosure as such opinions can lead to comparison and public scrutiny of the most and least favoured qualities of the successful candidates, potentially interfering with the proceedings of the Court of Justice.[67] Lastly, disclosure of opinions, the Council has observed, will be exempted if such disclosure could "seriously

[65] Article 4(1)(b), Regulation No 1049/2001
[66] First indent of Article 4(2), Regulation No 1049/2001
[67] Second indent of Article 4(2), Regulation No 1049/2001

undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."[68]

84. More direct and relevant in the Indian context would be the decision of this Court in ***Supreme Court Advocates-on-Record Association*** v. ***Union of India***[69], where a Constitutional Bench of five judges had dealt with the constitutional validity of the National Judicial Appointments Commission. A concurring judgment had dealt with the aspect of transparency in appointment and transfer of judges and the privacy concerns of the judges who divulge their personal information in confidence, to opine as under:

> "949. In the context of confidentiality requirements, the submission of the learned Attorney General was that the functioning of NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of Judges in the Collegium System has been extremely secret in the sense that no one outside the Collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a Judge of the Supreme Court or the High Courts. Reference was made to *Renu* v. *District & Sessions Judge*, (2014) 14 SCC 50 to contend that in the matter of appointment in all judicial institutions "complete darkness in the lighthouse has to be removed".
>
> 950. In addition to the issue of transparency a submission was made that in the matter of appointment of Judges, civil society has the right to know who is being considered for appointment. In this regard, it was

[68] Article 4(3), Regulation No 1049/2001
[69] (2016) 5 SCC 1

held in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* (1985) 1 SCC 641 that the people have a right to know. Reliance was placed on *Attorney General* v. *Times Newspapers Ltd.* 1974 AC 273: (1973) 3 WLR 298: (1973) 3 All ER 54 (HL) where the right to know was recognised as a fundamental principle of the freedom of expression and the freedom of discussion.

951. In *State of U.P.* v. *Raj Narain* (1975) 4 SCC 428 the right to know was recognised as having been derived from the concept of freedom of speech.

952. Finally, in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.

953. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

954. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a Judge might not have a right to privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it

> ought not to be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat."

85. Earlier, the Constitution Bench of nine judges had in Second Judges' Case, that is ***Supreme Court Advocates on Record Association and Others*** v. ***Union of India***[70] overruled the majority opinion in ***S.P. Gupta*** (supra) (the first Judge's case) and had provided for primacy to the role of the Chief Justice of India and the collegium in the matters of appointment and transfer of judges. Speaking on behalf of the majority, J.S. Verma, J., had with regard to the justiciability of transfers, summarised the legal position as under:

> "480. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.

[70] (1993) 4 SCC 441

The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* which expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India* (1992) 4 SCC 605. It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, t avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the cases of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

86. That the independence of the judiciary forms part of our basic structure is now well established. ***S. P. Gupta*** (supra) (the first Judge's case) had observed that this independence is one amongst the many other principles that run through the entire fabric of the Constitution and is a part of the rule of law under the Constitution. The judiciary is entrusted with the task of keeping the other two organs within the limits of law and to make the rule of law meaningful and effective. Further, the independence of judiciary is not limited to judicial appointments to the Supreme Court and the High Courts, as it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It consists of many dimensions including fearlessness from other power centres, social, economic and political, freedom from prejudices acquired and nurtured by the class to which the judges belong and the like. This wider concept of independence of judiciary finds mention in ***C. Ravichandran Iyer*** v***. Justice A.M. Bhattacharjee and Others***[71], ***High Court of Judicature at Bombay*** v. ***Shashikant S. Patil***[72] and ***Jasbir Singh*** v. ***State of Punjab***[73].

[71] (1995) 5 SCC 457
[72] (1997) 6 SCC 339
[73] (2006) 8 SCC 294

87. In ***Supreme Court Advocates' on Record Association*** (2016) (supra) on the aspect of the independence of the judiciary, it has been observed:

> "713. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said:
>
> "[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed."
>
> It is this fragile bastion that needs protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.
>
> 714. The independence of the judiciary takes within its fold two broad concepts: (*1*) Independence of an individual Judge, that is, decisional independence; and (*2*) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips said:
>
> > "In order to be impartial a Judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State."
>
> xx xx xx
>
> 726. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a Judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is "decisional independence". It is also manifested in the ability of the institution to have "functional independence". A comprehensive and composite definition of "independence of the judiciary" is elusive but it is easy to perceive."

It is clear from the aforesaid quoted passages that the independence of the judiciary refers to both decisional and functional independence. There is reference to a report titled *'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights'*[74] which had observed that judges are not elected by the people (relevant in the context of India and the United Kingdom) and, therefore, derive their authority and legitimacy from their independence from political or other interference.

88. We have referred to the decisions and viewpoints to highlight the contentious nature of the issue of transparency, accountability and judicial independence with various arguments and counter-arguments on both sides, each of which commands merit and cannot be ignored. Therefore, it is necessary that the question of judicial independence is accounted for in the balancing exercise. It cannot be doubted and debated that the independence of the judiciary is a matter of ennobled public concern and directly relates to public welfare and would be one of the factors to be

[74] Contributors: Professor Dr. Jutta Limbach, Professor Dr. Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr. Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr. Andrzej Zoll. <http://www.interights.org/document/142/index.html>

taken into account in weighing and applying the public interest test. Thus, when the public interest demands the disclosure of information, judicial independence has to be kept in mind while deciding the question of exercise of discretion. However, we should not be understood to mean that the independence of the judiciary can be achieved only by denial of access to information. Independence in a given case may well demand openness and transparency by furnishing the information. Reference to the principle of judicial independence is not to undermine and avoid accountability which is an aspect we perceive and believe has to be taken into account while examining the public interest in favour of disclosure of information. Judicial independence and accountability go hand in hand as accountability ensures, and is a facet of judicial independence. Further, while applying the proportionality test, the type and nature of the information is a relevant factor. Distinction must be drawn between the final opinion or resolutions passed by the collegium with regard to appointment/elevation and transfer of judges with observations and indicative reasons and the inputs/data or details which the collegium had examined. The rigour of public interest in divulging the input details, data and particulars of the candidate would be different from that of divulging and furnishing details of the output,

that is the decision. In the former, public interest test would have to be applied keeping in mind the fiduciary relationship (if it arises), and also the invasion of the right to privacy and breach of the duty of confidentiality owed to the candidate or the information provider, resulting from the furnishing of such details and particulars. The position represents a principled conflict between various factors in favour of disclosure and those in favour of withholding of information. Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future.

Questions referred to the Constitution Bench are accordingly answered, observing that it is not possible to answer these questions in absolute terms, and that in each case, the public interest test would be applied to weigh the scales and on balance determine whether information should be furnished or would be

exempt. Therefore, a universal affirmative or negative answer is not possible. However, independence of judiciary is a matter of public interest.

CONCLUSIONS

89. In view of the aforesaid discussion, we dismiss Civil Appeal No.2683 of 2010 and uphold the judgment dated 12th January, 2010 of the Delhi High Court in LPA No. 501 of 2009 which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship rule in terms of clause (e) to Section 8(1) of the RTI Act is inapplicable. It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.

90. As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to

the CPIO, Supreme Court of India to re-examine the matter after following the procedure under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. We have refrained from making specific findings in the absence of third parties, who have rights under Section 11(1) and their views and opinions are unknown.

The reference and the appeals are accordingly disposed of.

.....CJI
(RANJAN GOGOI)

.....J.
(N.V. RAMANA)

.....J.
(DR. D.Y. CHANDRACHUD)

.....J.
(DEEPAK GUPTA)

.....J.
(SANJIV KHANNA)

NEW DELHI;
NOVEMBER 13, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10044 OF 2010

CENTRAL PUBLIC INFORMATION OFFICER, SUPREME COURT OF INDIA ... **APPELLANT**

VERSUS

SUBHASH CHANDRA AGRAWAL ... **RESPONDENT**

WITH

CIVIL APPEAL NO. 10045 OF 2010
AND
CIVIL APPEAL NO. 2683 OF 2010

J U D G M E N T

N.V. RAMANA, J.

"In the domain of human rights, right to privacy and right to information have to be treated as co-equals and none can take precedence over the other, rather a balance needs to be struck"

1. I have had the opportunity to peruse the erudite judgments of my learned brothers, who have reflected extensively on the importance of this case, concerning the aspect of privacy and right to information in detail. However, while concurring with the view of the majority, I feel the need to provide independent reasons with respect to certain aspects for coming to the aforesaid conclusion,

as this case has large ramification on the rights of an individual in comparison to the rights of the society. The aspect of transparency and accountability which are required to be balanced with right to privacy, has not been expounded by this Court anytime before, thereby mandating a separate opinion.

2. This case concerns the balance which is required between two important fundamental rights i.e. right to information and right to privacy. Often these two rights are seen as conflicting, however, we need to reiterate that both rights are two faces of the same coin. There is no requirement to see the two facets of the right in a manner to further the conflict, what is herein required is to provide balancing formula which can be easily made applicable to individual cases. Moreover, due to the fact of infancy in privacy jurisprudence has also contributed to the meticulous task we are burdened herein.

3. In this view, this case is before us to adjudicate whether the application dated 06.07.2009 (hereinafter referred to as "**first application**") seeking information by the respondent, separate

applications dated 23.01.2009 (hereinafter referred to as "**second application**") and 10.11.2007 (hereinafter referred to as "**third application**") are maintainable or not. The first application concerns the information relating to complete correspondence between the Chief Justice of India and Mr. Justice R. Reghupati. The second application concerns the collegium file notings relating to the appointment of Justice H. L. Dattu, Justice A. K. Ganguly and Justice R. M. Lodha. The third application relates to information concerning declaration of assets made by the puisne judges of the Supreme Court to the Chief Justice of India and the judges of the High Courts to the Chief Justices of the respective High Courts.

4. The respondent/applicant submitted that the aforesaid three applications before the Central Public Information Officer of the Supreme Court of India (hereinafter "**CPIO, Supreme Court of India**") came to be dismissed *vide* orders dated 04.08.2009, 25.02.2009 and 30.11.2007 respectively.

5. Aggrieved by rejection of the first application the respondent approached the first appellate authority in appeal which was also

dismissed *vide* order dated 05.09.2009. Being aggrieved, the respondent further preferred a second appeal to the Central Information Commission [for short "**CIC**"]. The CIC allowed this appeal *vide* order dated 25.11.2009 and directed the disclosure of information sought. Aggrieved by the same, the CPIO, Supreme Court of India has preferred Civil Appeal No. 10045 of 2010.

6. Concerning the second application, the CPIO, Supreme Court of India, by order dated 25.02.2009 had denied the information sought therein. Being aggrieved, the respondent preferred the first appeal which came to be dismissed *vide* order dated 25.03.2009 by the first appellate authority. The second appeal filed before the CIC was allowed *vide* order dated 24.11.2009. Aggrieved the CPIO, Supreme Court of India has preferred Civil Appeal No. 10044 of 2010.

7. The third application was dismissed by the CPIO, Supreme Court of India *vide* order dated 30.11.2007 on the ground that the information was not held by the Registry of the Supreme Court of India. The first appeal was disposed of with an order directing the CPIO, Supreme Court of India to consider the question of

applicability of Section 6(3) of the Right to Information Act, 2005 (hereinafter "**the RTI Act**"). The CPIO *vide* order 07.02.2009 required the respondent/applicant to approach the concerned public authority of the High Courts. Aggrieved the respondent/applicant directly approached the CIC in appeal which was allowed by order dated 06.01.2009. Aggrieved by the same the appellant filed Writ Petition (C) No. 288 of 2009 before the Delhi High Court. The Ld. Single Judge by order dated 02.09.2009 directed the CPIO, Supreme Court of India to release the information sought by the respondent. Being aggrieved, the CPIO, Supreme Court of India filed Letter Patent Appeal No. 501 of 2009 which was subsequently referred to a full Bench of the High Court. The full Bench by order dated 12.01.2010 dismissed the letter patent appeal. Aggrieved, CPIO, Supreme Court of India has filed Civil Appeal No. 2683 of 2010 before this Court.

8. In this context, all the three appeals were tagged by an order dated 26.11.2010, a reference was made for constituting a larger Bench and accordingly it is before us.

9. Before we dwell into any other aspect a preliminary objections were taken by the appellants that this Bench could not have dealt with this matter considering the fact that this Court's functionality had a direct impact on the same. We do not subscribe to the aforesaid opinion for the reason that this Court while hearing this matter is sitting as a Court of necessity. In the case of ***Election Commission of India v. Dr Subramaniam Swamy,*** (1996) 4 SCC 104, it was held as under:

> **16.** We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit there from. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between

> allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.

10. In this light, appellants have to accept the decision of this Court which is the final arbiter of any disputes in India and also the highest court of constitutional matters. In this light, such objections cannot be sustained.

11. Before we proceed any further we need to have a brief reference to the scheme of RTI Act. The statement of objects and reasons envisage a noble goal of creating a democracy which is consisting of informed citizens and a transparent government. It also provides for a balance between effective government, efficient operations, expenditure of such transparent systems and requirements of confidentiality for certain sensitive information. It recognises that these principles are inevitable to create friction *inter se* and there needs to be harmonisation of such conflicting interests and there is further requirement to preserve

the supremacy of democratic ideal. The recognition of this normative democratic ideal requires us to further expound upon the optimum levels of accountability and transparency of efficient operations of the government. Under Section 2(f), information is defined as '*any material in any form including records, documents, memos, e-mails, opinions, advises, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force*.'

12. The purport of this section was to cover all types of information contained in any format to be available under the ambit of the RTI Act. The aforesaid definition is further broadened by the definition of '*record'* provided under Section 2(i) of the RTI Act. Right to Information as defined under Section 2(j) of the RTI Act means the right to information accessible under this Act which is held by or under the control of any public authority.

13. Chapter II of the RTI Act begins with a statement under Section 3 by proclaiming that all citizens shall have right to information

subject to the provisions of the RTI Act. Section 4 creates an obligation on public authorities to maintain a minimum standard of data which would be freely available for the citizens. Further this section also mandates proactive dissemination of data for informing the citizens by utilizing various modes and means of communications. Section 5 requires every public authority to designate concerned CPIO or SPIO, as the case may be for providing information to those who seeks the same.

14. Section 6 of the RTI Act provides for procedure required to be followed by a person who desires to obtain information under the RTI Act. Section 7 further provides the time frame within such designated officers are to decide the applications filed by the information seeker. For our purposes Section 8 deems relevant and is accordingly extracted hereunder –

> "**8. Exemption from disclosure of information**.—
>
> (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,
>
> …
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive

position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

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

15. It may be relevant to note Section 10 of the RTI Act which deals with severability of the exempted information. The mandate of the section is that where a request for access to information contains both exempted as well as non-exempted parts, if the non-exempted parts could be revealed, such parts which could be reasonably severed and can be provided as information under the Act.

16. Section 11 which is material for the discussion involved herein states as under -

*"**11. Third party information.—***

(1) Where a Central Public Information Officer or the State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an

opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision."

17. The mandate under Section 11 of the RTI Act enshrines the principles of natural justice, wherein, the third party is provided with an opportunity to be heard and the authority needs to consider whether the disclosure in public interest outweighs the possible harm in disclosure to the third party. It must be noted that the use of term 'confidential' as occurring under Section 11, subsumes commercial confidential information, other types of confidential information and private information.

18. We may not concentrate on other procedural section provided under the RTI Act as they do not have any bearing on the case concerned.

19. Having observed the scheme of the RTI Act we need to understand that right to information stems from Article 19(1)(a) of the

Constitution which guarantees freedom of expression. Accordingly, this Court in ***State of Uttar Pradesh v. Raj Narain***, (1975) 4 SCC 428 and ***S.P. Gupta v. Union of India***, (1981) Supp. (1) SCC 87, held that a citizen cannot effectively exercise his freedom of speech and expression unless he/she is informed of the governmental activities. Our country being democratic, the right to criticise the government can only be effectively undertaken if accountability and transparency are maintained at appropriate levels. In view of the same, right to information can squarely said to be a corollary to the right to speech and expression.

20. Firstly, the appellants have contended that the information are not held with the Registry of the Supreme Court, rather the Chief Justice of India is holding the aforesaid information concerning the exchanges between Mr. Justice R. Reghupati and the then Chief Justice of India. In this context, the term *'held'* acquires important position. The term *'held'* usually connotes the power, custody, or possession with the person. However, the mandate of the Act requires this term to be interpreted wherein the association between held and the authority needs to be taken into

consideration while providing a meaning for the aforesaid term. At this juncture, we need to observe the case of ***University of New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection***, *[2011] UKUT 185 AAC*, wherein the upper tribunal has held as under –

> *"'Hold' is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s.1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority*

may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk; that does not mean that the information is held by the authority."

21. From the aforesaid it can be concluded that a similar interpretation can be provided for term 'held' as occurring under Section 2(j) of the Act. Therefore, in view of the same the term 'held' does not include following information –

> 1. That is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;
>
> 2. That is accidentally left with a public authority;
>
> 3. That just passes through a public authority;
>
> 4. That 'belongs' to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises.[1]

Having clarified the aforesaid aspect we are of the opinion that the nature of information in relation to the authority concerned requires to be seen. The fact that the information sought in the instant matter is in custody with the Chief Justice of India as he is the administrative head of the Supreme Court, squarely require

[1] Phillip Coppel, Information Rights Law and Practice (4th Edn. (2014)), Pg. 362.

us to hold that the concerned authority is holding the information and accordingly the contention of the appellants does not have any merit.

22. The appellants have argued that the information with respect to the assets declared with the Chief Justice of India or Chief Justices of respective High Courts are held in confidence, fiduciary capacity; moreover, the aforesaid information is private information of the judges which cannot be revealed under the RTI Act.

23. The exemptions to right to information as noted above are contained under Section 8 of the RTI Act. Before we analyse the aforesaid provision, we need to observe basic principles, concerning interpretation of exemption clauses. There is no doubt it is now well settled that exemption clauses need to be construed strictly. They need to be given appropriate meaning in terms of the intention of the legislature [see ***Commissioner of Customs (Import) v. Dilip Kumar & Ors.,*** *(2018) 9 SCC 40*; ***Rechnungshof v. Österreichischer Rundfunk and Ors.,*** *C-465/00*].

24. At the cost of repetition we note that the exemption of right to information for confidential information is covered under Section 8(1)(d), exemption from right to information under a fiduciary relationship is covered under Section 8(1)(e) and the exemption from private information is contained under Section 8(1)(j) of the RTI Act.

25. The first contention raised by the appellants is that the aforesaid information is confidential, therefore the same is covered under the exemption as provided under Section 8(1)(d) of the RTI Act. The aforesaid exemption originates from a long time of judge made law concerning breach of confidence (which are recently termed as misuse of private information).

26. Under the classic breach of confidence action, three requirements were necessary for bringing an action under this head. These conditions are clearly mentioned in the opinion of Megarry, J., in ***Coco vs. Clark***, [1968] FSR 415; wherein, the conditions are *first*, the information itself, i.e. 'information is required to have necessary quality about confidence of the same'; *second*, 'the information must have been imparted in circumstances importing

an obligation of confidence'; *third*, 'there must be unauthorized use of information which will be detriment to the party communicating'.

27. Breach of confidence was not an absolute right and public interest, incorporated from long time under the common law jurisprudence. This defence of public interest can be traced to initial case of ***Gartside v. Outram***, (1856) 26 LJ Ch (NS) 113, wherein it was held that there is no confidence as to disclosure in iniquity. This iniquity was later expanded by Lord Denning in ***Fraser v. Evans***, [1969] 1 QB 349, wherein the iniquity was referred as merely as an example of 'justice cause or excuse' for a breach of confidence. This iniquity was widened further in Initial ***Service v. Putterill***, [1968] 1 QB 396, wherein it was held that iniquity covers any misconduct of nature that it ought to be disclosed to others in the public interest. In this line of precedents Thomas Ungoed, J., in ***Beloff v. Pressdram***, [1973] 1 All ER 24, noted that iniquity would cover 'any matter, carried out or contemplated, in breach of country's security or in breach of law including statutory duty, fraud or otherwise destructive of the

country or its people and doubtless other misdeeds of similar gravity.'

28. Eventually the language of iniquity was shaken and discourse on public interest took over as a defence for breach of confidence [*See* ***Lion Laboratories v. Evans***, [1985] QB 526]. It would be necessary to quote Lord Goff in ***Her Majesty's Attorney General v. The Observer Ltd. & Ors.,*** [1991] AC 109, wherein he noted that "it is now clear that the principle [of iniquity] extends to matters of which disclosure is required in public interest".

29. The aforesaid expansion from the rule of iniquity to public interest defence has not caught the attention of Australian courts wherein, Justice Gummow, in ***Corrs Pavey Whiting and Byrne v. Collector of Customs***, (1987) 14 FCR 434 and ***Smith Kline and French Laboratories [Australia] Ltd. v. Department of Community Services and Health***, (1990) 22 FCR 73, reasoned that public interest was "picturesque if somewhat imprecise" and "not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on ad-hoc basis as to whether, on the facts

overall, it is better to respect or to override the obligation of confidence".

30. Even in England there has been a shift of reasoning from an absolute public interest defence to balancing of public interest. At this point we may observe the case of ***Woodward v. Hutchins***,[1977] 1 WLR 760, wherein it was observed "It is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth".

31. Section 8(1)(d) of the RTI Act has limited the action of defence of confidentiality to only commercial information, intellectual property rights and those which are concerned with maintaining the competitive superiority. Therefore, aforesaid section is only relatable to breach of confidence of commercial information as classically developed. Although there are examples wherein commercial confidentiality are also expanded to other types of breach of confidential information, however, under Section 8(1)(d) does not take into its fold such breach of confidential information actions.

32. Coming to other types of confidentiality, we need to note that the confidentiality cannot be only restricted to commercial confidentiality, rather needs to extend to other types of confidentialities as well. [***Duchess of Argyll v. Duke of Argyll***, 1967 Ch 302] Under the RTI Scheme such other confidential information are taken care under Section 11 of the RTI Act. The language and purport under Section 11 extends to all types of confidentialities, inclusive of both commercial and other types of confidentialities. The purport of this Section is that an opportunity should be provided to third party, who treats the information as confidential. The 'test of balancing public interest' needs to be applied in cases of confidential information other than commercial information as well, under Section 11 of the RTI Act, as discussed. In this light, the concerned third parties need to be heard and thereafter the authorities are required to pass order as indicated herein.

33. Further, the appellants have contended that the information sought herein relating to the third party are covered under exemptions as provided in Section 8(1)(j) of the RTI Act i.e. private information.

34. The development from breach of confidence to misuse of private information/privacy claim was gradual. There was shift from the focus on relationship to whether the information itself had a requisite confidential quality [refer to Her ***Majesty's Attorney General*** case (supra)]. This shift in focus resulted in the evolution of misuse of private information or privacy claim, from its predecessor of confidentiality. In the case of ***Campbell v. M.G.N***., [2004] UKHL 22, wherein the breach of misuse of private information evolved as cause of action. The modification which happened in the new cause of action is that the initial confidential relationship was not material, which was earlier required under the breach of confidence action. The use of term confidential information was replaced with more natural descriptive term information in private. The change from breach of confidence which was an action of equity, to misuse of private information, which was a tort provided more structural definitiveness and reduced the discretionary aspect.

35. The purport of the Section 8(1)(j) of the RTI Act is to balance privacy with public interest. Under the provision a two steps test

could be identified wherein the first step was: (i) whether there is a reasonable expectation of privacy, and (ii) whether on an ultimate balancing analysis, does privacy give way to freedom of expression? We should acknowledge that these two tests are very difficult to be kept separate analytically.

FIRST STEP

36. The first step for the adjudicating authority is to ascertain whether the information is private and whether the information relating the concerned party has a reasonable expectation of privacy. In ***Murray v. Express Newspaper plc***, [2009] Ch 481, it was held as under

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

37. From the aforesaid discussion we can note that there are certain factors which needs to be considered before concluding whether there was a reasonable expectation of privacy of the person concerned. These non-exhaustive factors are;

1. The nature of information.
2. Impact on private life.
3. Improper conduct.
4. Criminality
5. Place where the activity occurred or the information was found.
6. Attributes of claimants such as being a public figure, a minor etc and their reputation.
7. Absence of consent.
8. Circumstances and purposes for which the information came into the hands of the publishers.
9. Effect on the claimant.
10. Intrusion's nature and purpose.

These non-exhaustive factors are to be considered in order to come to a conclusion whether the information sought is private or does the persons has a reasonable expectations of privacy. In certain cases we may conclude that there could be certain information which are inherently private and are presumptively

protected under the privacy rights. These informations include gender, age and sexual preferences etc. These instances need to be kept in mind while assessing the first requirement under the aforesaid test.

38. If the information is strictly covered under the aforesaid formulation, then the person is exempted from the right to information unless 'the public interest test' requires to trump the same.

SECOND STEP

39. Having ascertained whether the information is private or not, a judge is required to adopt a balancing test to note whether the public interest justifies discloser of such information under Section 8(1)(j) of the RTI Act. The term 'larger public interest' needs to be understood in light of the above discussion which points that a 'balancing test' needs to be incorporated to see the appropriateness of discloser. There are certain basic principles which we need to keep in mind while balancing the rights which are relevant herein.

40. That the right to information and right to privacy are at an equal footing. There is no requirement to take an *a priori* view that one right trumps other. Although there are American cases, which have taken the view that the freedom of speech and expression trumps all other rights in every case. However, in India we cannot accord any such priority to the rights.

41. The contextual balancing involves '***proportionality test***'. [*See* ***K S Puttaswamy v. Union of India,*** (2017) 10 SCC 1]. The test is to see whether the release of information would be necessary, depends on the information seeker showing the 'pressing social need' or 'compelling requirement for upholding the democratic values'. We can easily conclude that the exemption of public interest as occurring under Section 8(1)(j) requires a balancing test to be adopted. We need to distinguish two separate concepts i.e. "*interest of the public*" and "*something in the public interest.*" Therefore, the material distinction between the aforesaid concepts concern those matters which affect political, moral and material welfare of the public need to be distinguished from those for public entertainment, curiosity or amusement. Under Section 8(1)(j) of the RTI Act requires us to hold that only the former is an

exception to the exemption. Although we must note that the majority opinion in ***K S Puttaswamy*** (*supra*) has held that the data privacy is part of the right to privacy, however, we need to note that the concept of data protection is still developing [*refer* **Google Spain v. AEPD**, C/131/12; ***Bavarian Lager* v *Commission***, [2007] ECR II-4523]. As we are not concerned with the aforesaid aspects, we need not indulge any more than to state that there is an urgent requirement for integrating the principles of data protection into the right to information jurisprudence.

42. Coming to the aspect of transparency, judicial independence and the RTI Act, we need to note that there needs to be a balance between the three equally important concepts. The whole bulwark of preserving our Constitution, is trusted upon judiciary, when other branches have not been able to do so. As a shield, the judicial independence is the basis with which judiciary has maintained its trust reposed by the citizens. In light of the same, the judiciary needs to be protected from attempts to breach its independence. Such interference requires calibration of

appropriate amount of transparency in consonance with judicial independence.

43. It must be kept in the mind that the transparency cannot be allowed to run to its absolute, considering the fact that efficiency is equally important principle to be taken into fold. We may note that right to information should not be allowed to be used as a tool of surveillance to scuttle effective functioning of judiciary. While applying the second step the concerned authority needs to balance these considerations as well.

44. In line with the aforesaid discussion, we need to note that following non-exhaustive considerations needs to be considered while assessing the 'public interest' under Section 8 of the RTI Act-

a. Nature and content of the information

b. Consequences of non-disclosure; dangers and benefits to public

c. Type of confidential obligation.

d. Beliefs of the confidant; reasonable suspicion

e. Party to whom information is disclosed

f. Manner in which information acquired

g. Public and private interests

h. Freedom of expression and proportionality.

45. Having ascertained the test which is required to be applied while considering the exemption under Section 8(1)(j) of the RTI Act, I may note that there is no requirement to elaborate on the factual nuances of the cases presented before us. Accordingly, I concur with the conclusions reached by the majority.

.....J.

(N.V. Ramana)

NEW DELHI;
November 13, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 10044 of 2010

Central Public Information Officer, Supreme Court of India **…Appellant**

Versus

Subhash Chandra Agarwal **…Respondent**

WITH

Civil Appeal No. 10045 of 2010

AND WITH

Civil Appeal No. 2683 of 2010

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

INDEX

A Introduction

The backdrop

1. This batch of three civil appeals[1] raises questions of constitutional importance bearing on the right to know, the right to privacy and the transparency, accountability and independence of the judiciary.

2. In the first of the appeals[2] ("**the appointments case**"), the Central Public Information Officer[3] of the Supreme Court of India challenges an order dated 24 November 2009 of the Central Information Commission[4]. The order directs the CPIO to provide information sought by the respondent in application under the Right to Information Act 2005[5]. The respondent, in an application dated 23 January 2009 sought copies of the correspondence exchanged between constitutional authorities together with file notings, relating to the appointment of Justice H L Dattu, Justice A K Ganguly and Justice R M Lodha (superseding the seniority of Justice A P Shah, Justice A K Patnaik and Justice V K Gupta). The appellant declined to provide the information sought in the application on the ground that the Registry of the Supreme Court does not deal with matters pertaining to the appointment of judges, and appointments of judges to the higher judiciary are made by the President of India, according to procedure prescribed by law. The first appellate authority rejected the appeal on the ground that the information sought by the respondent was not covered within the ambit of

[1] Civil Appeal no 10044/2010, Civil Appeal no 10045/2010 and Civil Appeal no 2683/2010
[2] Civil Appeal no 10044 of 2010
[3] "CPIO"
[4] "CIC"
[5] "RTI Act"

Section 2 (f)[6] and (j)[7] of the RTI Act. The respondent preferred a second appeal before the CIC. On 24 November 2009, the CIC directed the appellant to provide the information sought by the respondent. The appellant has moved this Court under Article 136 of the Constitution challenging the decision of the CIC ordering disclosure.

3. In the second of the three appeals[8] ("**the assets case**"), the appellant challenges a judgment dated 12 January, 2010 of a Full Bench of the Delhi High Court upholding the orders of the Single Judge[9] dated 2 September 2009 and the CIC dated 6 January 2009[10] directing the disclosure of information. On 10 November 2007, the respondent filed an application seeking a copy of the resolution dated 7 May 1997 of the judges of the Supreme Court requiring every sitting judge, and all future judges upon assuming office, to make a declaration of assets in the form of real estate or investments held in their names or the names of their spouses or any person dependant on them to the Chief Justice of the Court within a reasonable time. The respondent also requested "information on any such declaration of assets etc to respective Chief Justices in State". While the appellant provided a copy of the resolution dated 7 May 1997, the CPIO declined (by an order dated 30 November 2007) to provide information concerning the declaration of assets by judges of the Supreme Court and the

[6] **Section 2(f)** – "Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.
[7] **Section 2(j)** – "Right to Information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to— (i) inspection of work, documents, records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.
[8] Civil Appeal no 2683 of 2010
[9] The CPIO, Supreme Court of India v Subhash Chandra Agarwal & Anr, Writ Petition (C) 288/2009
[10] Appeal no CIC/WB/A/2008/00426

High Court on the ground that the Registry of the Supreme Court did not hold it. The information pertaining to the declaration of assets by High Court judges, the appellant stated, were in the possession of the Chief Justices of the High Courts. The first appellate authority remanded the matter back to the appellant for transfer of the RTI application to the High Courts under Section 6(3)[11]. The appellant declined to transfer the RTI application to the CPIOs of the High Courts on the ground that when the respondent filed the RTI application, he was aware that the information with respect to the declaration of assets by the judges of the High Court was available with the High Courts which formed distinct public authorities. On 6 January 2009, the CIC held in the second appeal that the information concerning the judges of the Supreme Court was available with its Registry and that the appellant represented the Supreme Court as a public authority. Therefore, the appellant was held to be obliged to provide the information under the RTI Act unless, the disclosure of information was exempted by law. The CIC held that the information sought by the respondent was not covered under the exemptions in clauses (e) or (j) of Section 8(1)[12] and directed the appellant to provide the information sought by the respondent. The

[11] **Section 6 (3)** - Where an application is made to a public authority requesting for an information,—
(i) which is held by another public authority; or
(ii) the subject matter of which is more closely connected with the functions of another public authority,
the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:
Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

[12] **Section 8** - Exemption from disclosure of information.
(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

appellant instituted a writ petition[13] before the Delhi High Court. On 2 September 2009, a Single Judge of the High Court dismissed the petition holding, *inter alia*, that the declaration of assets furnished by the judges of the Supreme Court to the Chief Justice of India and its contents constituted "information", subject to the provisions of the RTI Act. The Single Judge held that: (i) judges of the Supreme Court hold an independent office; (ii) there exist no hierarchies in judicial functions; (iii) the Chief Justice of India does not hold such "information" in a fiduciary capacity; and (iv) the information sought by the respondent was not exempt under Section 8 (1)(e). In a Letters Patent Appeal, the Full Bench of the Delhi High Court upheld the decision of the Single Judge. The appellant has challenged the decision of the Full Bench.

4. In the third civil appeal ("**the undue influence case**"), the appellant has challenged the order of the CIC dated 24 November 2009[14], by which the appellant was directed to provide information sought by the respondent in his RTI application. On 6 July, 2009, the respondent filed an RTI application on the basis of a newspaper report seeking the complete correspondence exchanged with the Chief Justice of India in regards to a Union Minister having allegedly approached Justice R Raghupati of the Madras High Court, through a lawyer to influence a judicial decision. The application sought a disclosure of the name of the Union Minister and the lawyer, and of the steps taken against them for approaching the judge of the Madras High Court for influencing the judicial decision. On 4 August 2009, the appellant rejected the request on the ground that no such information was available with the Registry of the Supreme Court. The first appellate

[13] Writ Petition (C) 288/2009
[14] Appeal no CICWB/A/2009/000859

authority rejected the appeal. The second appeal before the CIC led to a direction on 24 November 2009, to provide the information sought, except information sought in questions 7 and 8 on recourse taken to the in-house procedure. The appellant approached this Court challenging the decision of the CIC.

B Reference to the Constitution Bench

5. On 26 November 2010, a two judge Bench of this Court directed the Registry to place the present batch of appeals before the Chief Justice of India for constituting a Bench of appropriate strength and framed the following substantial questions of law:

> "1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?
>
> 2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
>
> 3. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?"

6. On 17 August 2016, a three judge Bench referred these civil appeals to a Constitution Bench for adjudication.

C Submissions of Counsel

7. Mr K K Venugopal, Attorney General for India appearing on behalf of the appellant made the following submissions:

(i) The present case is not covered by the decision of this Court in **S P Gupta** v **Union of India**[15], which is based on distinguishable facts. The decision in **S P Gupta** does not consider the relationship between the restrictions on the right to know and the restrictions existing under Article 19 (2) of the Constitution. Once Article 19(1)(a) is attracted, the restrictions under Article 19 (2) become applicable. The RTI Act came into force in 2005 and lists out the rights and restrictions on the right to information. The provisions of the RTI Act must be construed in a manner which makes it consistent with constitutional values including the independence of the judiciary;

(ii) Information of which disclosure is sought under Section 2 (f) of the RTI Act, includes only that information which is in a physical form and which is already in existence and accessible to a public authority under law. The judge can decide to disclose assets voluntarily and place relevant information in the public domain. A third party cannot seek information on the disclosure of assets of a judge which does not exist in the public domain;

(iii) The decision of this court in **S P Gupta** is based on a factually distinct situation where disclosure of correspondence regarding the non-

[15] 1981 Supp SCC 87

appointment of an additional judge was ordered on the ground that the judge was a party to the proceeding before the Court. Further, the decision established a restriction on the disclosure of information to third parties;

(iv) The correspondence and file notings with respect to recommendations for appointments of judges to the higher judiciary falls under a "class of information" that is highly confidential. Disclosure will result in damage to the institution and adversely affect the independence of the judiciary;

(v) The process of concurrence by the members of the Collegium requires free and frank discussion on the character, integrity and competence of prospective appointee judges in order to ensure that the most suitable judges are appointed. It is in the public interest to uphold candour in matters of appointment and transfer of judges and to avoid unnecessary litigative debate by third parties. Disclosure of such information would undermine the independence of the judiciary and adversely impact the candour or uninhibited expression of views by the Collegium. Independence of judiciary is not limited to independence from executive influence. It is multi-dimensional and also independence from other pressure and prejudices including fearlessness from power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which judges belong (**C Ravichandran Iyer** v **Justice A M Bhattacharjee**[16]);

[16] (1995) 5 SCC 457

(vi) Information sought regarding the assets and liabilities of judges and correspondence and file notings relating to character, conduct, integrity and competence of a judge includes certain “personal information” and is hence, exempt under Section 8 (1)(j) of the RTI Act;

(vii) The correspondence and file notings that form the basis of the decision under Article 124 (2) of the Constitution includes information received from third parties in a fiduciary capacity. The information is held by the Chief Justice of India as a result of disclosure by third parties who give the information in confidence, complete good faith, integrity and fidelity. Therefore, disclosure of such information is exempt under Section 8 (1)(e);

(viii) The disclosure of correspondence relating to conduct, character, integrity and competence of a judge may cause irreparable loss to their reputation, violate their right to privacy and adversely affect their functioning. There is also no remedy available to a judge for the comments made in the appointment process as the Chief Justice of India along with other judges are protected from civil/criminal proceedings under Section 3(1) of the Judges (Protection) Act 1985. While regulating the disclosure of information, the Supreme Court is required to balance the right of an individual to reputation and privacy under Article 21 and the right to information of third-party parties under Article 19(1)(a). The doctrine of proportionality has to be applied to resolve the conflict between the two rights and the right to reputation and privacy of a judge should prevail over the right to information of third parties; and

(ix) Legislation and rules with respect to disclosure of assets and liabilities of public servants do not provide for placing such information in the public domain or granting third party access to such information. The judiciary is seeking self-regulation by providing a voluntary disclosure of assets and liabilities and it is up to the Supreme Court to disclose such information. No third party can seek information which is not in the public domain.

8. On the contrary, Mr Prashant Bhushan, learned Counsel appearing on behalf of the respondent made the following submissions:

(i) The observations made by the seven judge Bench of this Court in **S P Gupta** are binding on the present Bench. Even though certain aspects of the judgment have been overruled in **Supreme Court Advocates-on-Record Assn** v **Union of India**[17], the decision of this Court vis-à-vis the disclosure of correspondence in respect of the appointment process remains unaffected. If **S P Gupta** has to be overruled, this could be only done by a Bench comprising of more than seven judges;

(ii) This Court has interpreted Article 19(1)(a) to include the right to information under the ambit of free speech and expression even before the RTI Act was enacted by the Parliament. Disclosure of the information sought in the present batch of cases is an essential part of the freedom of speech and expression guaranteed in Article 19(1)(a) and involves a significant public interest;

(iii) Free flow of information to citizens is necessary, particularly in matters which form part of public administration for ensuring good governance and

[17] (1993) 4 SCC 441

transparency. The fundamental right of free speech and expression includes every citizen's right to know about assets, criminal antecedents and educational backgrounds of candidates contesting for public office. To cover public acts with a veil of secrecy is not in the interest of the public and may lead to oppression and abuse by, and distrust of, public functionaries. The lack of transparency, accountability and objectivity in the collegium system does not enhance the credibility of the institution. Disclosure of the information sought, on the other hand, would promote transparency and prevent undue influence over the judiciary;

(iv) The claim of class privilege or class immunity to the correspondence between the Chief Justice of India and the Law Minister was rejected in **S P Gupta**. After the enactment of the RTI Act, information otherwise held by a public authority cannot be excluded from disclosure unless it falls under the exemptions laid down in Section 8 or relates to an institution excluded under Section 24[18] of the RTI Act. When information regarding a judge is

[18] **Section 24** - Act not to apply to certain organisations
(1)Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request.
(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.
(3) Every notification issued under sub-section (2) shall be laid before each House of Parliament.
(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request. (5) Every notification issued under sub-section (4) shall be laid before the State Legislature.

provided to the Chief Justice of India, it constitutes information held by a public authority and thus, would be amenable to the provisions of the RTI Act;

(v) In **S P Gupta**, the argument that disclosure of correspondence between constitutional functionaries in relation to the appointment process of judges would preclude the free and frank expression of opinions was rejected. During the drafting of the Right to Information Bill, the argument that disclosure will deter consultees from expressing themselves freely and fairly and that the dignity and reputation of people would be tarnished was rejected. The argument of candour does not fall under any of the exemptions under the RTI Act and therefore, this disclosure of information cannot be excluded from the purview of the RTI Act;

(vi) The disclosure of assets of judges is warranted in the larger public interest. It cannot be argued that information regarding the assets of judges, who are public functionaries, is personal information having no relationship with any public activity or interest. Hence, the information sought is not exempt under Section 8 (1)(j);

(vii) There exists no fiduciary relationship between those who are vested with the responsibility of determining whether an appointee is suitable for elevation as a judge and the appointee herself. The duty of a public servant is to act in the interest of the public and not in the interest of another public servant. The entire process of consultation and making information available to the members of the collegium regarding credentials and the suitability of the appointee is a matter of public interest.

Further, when judges act in their official capacity in compliance with the 1997 resolution and disclose their assets, it cannot be said that the Chief Justice of India acts in a fiduciary capacity for the judges. The Chief Justice of India and other members of the collegium discharge official duties vested in them by the law and the information sought is not exempt under Section 8(1)(e). Even if some part of the information is personal, that part can be severed after due examination on a case to case basis under Section 10; and

(viii) The argument that the independence of the judiciary will be affected prejudicially due to the disclosure of information is misconceived. The independence of the judiciary means independence from the legislature and the executive and not from the public. It is a constitutional and legal right of the respondent to access information and identify the persons who have attempted to compromise the functioning of the judiciary. Disclosure of such information is essential for the citizenry to maintain their faith in the independence of the judiciary.

9. The rival submissions fall for our consideration.

D Relevant statutory provisions

10. For the purpose of the present dispute it is necessary to analyse the relevant provisions contained in the statutory framework of the RTI Act. Sections 2 and 3 read:

> "2. Definitions. – In this Act, unless the context otherwise requires, -

…

(e) "competent authority" means –

(i) the Speaker in the case of the House of People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States of a Legislative Council of States;

(ii) the Chief Justice of India in the case of the Supreme Court;

(iii) the Chief Justices of the High Court in the case of a High Court;

(iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;

(v) the administrator appointed under article 239 of the Constitution;

(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any law for the time being in force.

…

(h) "public authority" means any authority or body or institution of self-government established or constituted,-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government Organisation substantially financed,

Directly or indirectly by finds provided by the appropriate Government;

…

(j) "right to information" means the right to information accessible under the Act which is held by or under the control of any public authority and includes the rights to –

(i) inspection of work, documents, records;

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

…

3. Right to information. – Subject to the provisions of this Act, all citizens shall have the right to information.

11. Both the terms “public authority” and “information” have been broadly defined. Section 2(j) which defines the “right to information” stipulates that the information accessible under the RTI Act is held by or under the control of any “public authority”, which is defined in Section 2(h) of the RTI Act. Section 3 of the Act confers on all citizens the substantive right to seek information covered within the ambit of the Act, subject to its provisions. The remaining scheme of the RTI Act operationalises the substantive right conferred by Section 3. Section 4 imposes a statutory duty on public authorities to create and maintain a record of the activities stipulated therein to ensure that these records are available to applicants. Section 6 empowers an individual to file a request with the relevant Central Public Information Officer (“**CPIO**”) or State Public Information Officer (“**SPIO**”) or their corresponding Assistant Officers (collectively hereafter “**Information Officer**”). Section 7 empowers the Information Officer to either provide the information sought or reject the application for reasons set out in Section 8 and 9.

12. For an authority to be covered under the RTI Act, it must be a “public authority” as defined under Section 2(h) of the Act. “Public authority” is defined as any authority or body or institution or self-government which falls within the ambit of any of the enumerated provisions in that sub-section. The Supreme Court of India is established by virtue of Article 124(1) of the Constitution of India. Similarly, Article 214 of the Constitution stipulates that there shall be a High Court for each state. In terms of Section 2(h)(a), a body or an institution which is established or constituted by or under the Constitution would be a public authority. But virtue of being established by the Constitution, the Supreme Court

and the High Courts would fall within the ambit of “public authority” in Section 2(h) of the Act.

13. Section 2(e)(ii) expressly stipulates that the competent authority means the Chief Justice of India in the case of the Supreme Court and Section 2(e)(iii) stipulates that the competent authority in the case of a high Court is the Chief Justice of that Court. Significantly, Article 124 of the Constitution of India stipulates that there shall be a Supreme Court of India consisting of a Chief Justice of India and other judges. The office of the Chief Justice of India is not distinct from the Supreme Court of India. The Supreme Court is constituted by virtue of the Constitution and consists of judges, of which the Chief Justice is the head. This however, does not mean that the Supreme Court and the Chief Justice are two separate ‘public authorities’ within the RTI Act.

14. The term information under Section 2(f) has been defined broadly to include “any material in any form”. The word ‘including’ denotes the intention of the Parliament to provide a non-exhaustive list of materials that fall within the ambit of the sub-clause. The sub-clause includes information relating to any private body “which can be accessed by a public authority under any law for the time being in force”. The import of this phrase is that information relating to a third party is included only where the requisite pre-conditions of any law in force to access such information is satisfied. The right sought to be exercised and information asked for should fall within the scope of ‘information’ and ‘right to information’ as defined under the Act. The information sought must be in existence and must be held or under the control of the public authority.

15. Section 8(1) begins with a non-obstante phrase “Notwithstanding anything contained in this Act”. The import of this phrase is that clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. The scope of the exception and its applicability to the present dispute shall be discussed in the course of the judgment.

16. Section 22[19] contains a non-obstance clause and stipulates that the RTI Act has an overriding effect over laws. The import of this provision is to impart priority to the salient objectives of the Act and ensure that where information is held by or is under the control of a public authority, such information must be furnished to the applicant notwithstanding any prohibition in any other law in force at that time. It is pertinent to state that Section 22 does not obviate legal restrictions that apply to a public authority to the access to any information which is clarified by the use of the phrase “which can be accessed by a public authority under any law for the time being in force” in Section 2(f).

[19] 22. **Act to have overriding effect.** – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

E *S P Gupta*, candour and class immunity

17. Relevant to the present controversy, is the question whether the decision of this Court in **S P Gupta** v **Union of India**[20] is a binding precedent on the issues raised. Mr Prashant Bhushan, learned counsel appearing on behalf of the respondent contended that the points for determination that arise in the present case have been answered by the seven judge Bench in **S P Gupta** where this Court ordered the disclosure of the correspondence between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister which concerned the non-appointment of an additional judge for a full term of two years. Counsel contended that this Court held that the public interest in disclosure outweighed the potential harm resulting from disclosure and that a free and open democratic society mandated the disclosure of correspondences concerning the appointment process of judges.

18. Opposing the submission, Mr K K Venugopal, learned Attorney General for India appearing on behalf of the appellant, urged that the decision of this Court in **S P Gupta** was based on a factually distinguishable situation. The Court in that case was concerned with the disclosure of the correspondence concerning the appointment process for the purpose of adjudicating the case before it. Moreover the judge whose appointment was in issue was a party to the case. The court did not address the potential harm to public interest by the disclosure of correspondence in all circumstances. The Attorney General contended that the

[20] 1981 Supp SCC 87

decision assessed the right to know in a passing observation and contrary to the submission of the respondent, it established a restriction on the disclosure of personal information.

19. In **S P Gupta**, this Court was concerned with two issues: (i) the initial appointment of additional judges and their reappointment on the expiry of their terms; and (ii) the transfer of High Court judges and the Chief Justices of the High Courts. Among the issues involved in the proceedings, one concerned the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to grant an extension in the tenure to Justice O N Vohra and Justice S N Kumar as additional judges of the Delhi High Court by a period of three months. It was contended that Justice O N Vohra should have been appointed as a permanent judge and that Justice S N Kumar should have been reappointed as an additional judge for the complete tenure of two years upon the expiry of their initial tenure. During the course of the proceedings, their terms expired and a decision was communicated by the Central Government to not renew their terms. An application was filed to contend that the withholding of the re-appointment was mala fide and unconstitutional. Both former judges were impleaded as respondents. While Justice O N Vohra did not appear in the proceedings, Justice S N Kumar appeared through counsel and contended that the decision of the Central Government to not reappoint him for a complete term of two years was vitiated since it was reached without full and effective consultation with the Chief Justice of India.

20. The government resisted the disclosure of the correspondence and urged that as it formed a part of the advice tendered by the Council of Ministers to the President of India, the court was precluded from ordering disclosure by virtue of Article 74(2)[21] of the Constitution. It was also contended that the correspondence related to the 'affairs of the state' and its disclosure was precluded by virtue of Section 123[22] of the Indian Evidence Act 1872.

21. An interim order dated 16 October 1981 ordered the disclosure of the correspondence to the Court. In its final judgment dated 30 December 1981, the Court, by a majority, rejected the contention of the Central Government and upheld the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to not continue Justice S N Kumar as an additional Judge of the Delhi High Court for another full term.

22. Mr K K Venugopal, learned Attorney General for the Union of India sought to distinguish the decision in **S P Gupta** by contending that the order of disclosure was made in the specific context of Sections 123 and 162[23] of the Indian Evidence Act and in respect of judicial proceedings to which Justice S N Kumar was a party. Hence he urged that the decision does not establish the duty to disclose the correspondence in all circumstances. Justice S N Kumar had

[21] "The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

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

[23] "162. *Production of documents.—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 on by the court.

The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility…."

actively participated in the proceedings before the Court and information regarding his non-appointment was sought during the course of the proceedings to adjudicate upon the contention that there was no effective consultation between the Central Government and the Chief Justice of India. The balancing of interests in that case was between the public harm resulting from disclosure and the public interest in the administration of justice (by securing complete justice for the litigant before the court) which, it is urged, is materially different from the present case.

23. In **S P Gupta**, this Court, by an interim order directed the disclosure of the file notings only in respect of the non-renewal of the term of Justice S N Kumar. Justice O N Vohra had chosen to not appear in or participate in the proceedings before the court. As no relief was sought by the latter before the Court, the Court held that the correspondence pertaining to him was not relevant to the controversy. Consequently, the Union of India was not required to disclose it. Justice PN Bhagwati (as he then was) noted the comparably distinct role of Justice S N Kumar in the proceedings in the following terms:

> "58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar."

24. In its final judgment, the Court first rejected the contention that the correspondence formed part of the advice tendered to the President by the Council of Ministers. The Court noted that while the advice tendered by the Council of Ministers to the President is information protected under Article 74(2), the principal question was whether the correspondence between the Chief Justice of India, Chief Justice of the Delhi High Court and the Law Minister formed part of the advice tendered by the Council of Ministers to the President so as to preclude its disclosure by virtue of Article 74(2). The Court rejected this contention and held that any advice tendered by the Council of Ministers would be *based* on the views expressed by the two Chief Justices and their views would not form part of the advice tendered. In this view, the material on the basis of which the Council of Ministers formed a view and subsequently tendered the same to the President would not constitute advice protected under Article 74(2). Justice Bhagwati held:

> "61…The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under clause (2) or Article 74 is only the advice tendered by the Council of Ministers…But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice."

25. The Court then proceeded to the claim against disclosure under Section 123 of the Indian Evidence Act. It held that where protection from disclosure is

sought under Section 123 on the ground that the correspondence relates to the affairs of the state, the court, by virtue of Section 162, is called upon to carry out a balancing task between "the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding". It held that the court balances the competing aspects of public interest and decides which should prevail in the particular case before it. A claim for non-disclosure, in this view, would be sustainable where the disclosure of the document would be injurious to the public interest to a greater degree than the harm caused to the administration of justice by non-disclosure. Analysing the claim in the context of Section 123, Justice Bhagwati noted:

> "73. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. **The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the nondisclosure would thwart the administration of justice by keeping back from the court a material document**…The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence."
>
> (Emphasis supplied)

26. The Court held that the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of importance that the document holds in the litigation are relevant factors in the balancing process. If the correspondence alone would furnish evidence relevant to adjudicating the dispute before the court, it would be inappropriate to 'exclude these documents which constitute the only evidence, if at all, for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution.' The Court held thus:

> "82. …**Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations** … It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the Additional Judge…**The harm that would be caused to the public interest in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the non-disclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just**."
>
> (Emphasis supplied)

The Court held that the potential injury caused by disclosure is outweighed by the public interest in justice as the non-disclosure of documents relevant to decide the controversy would inevitably lead to the dismissal of the writ petition. On a balancing of the above two competing public interests, the Court upheld the

interim order requiring the disclosure of the correspondence concerning the reappointment in respect of Justice S N Kumar.

27. The Court in **S P Gupta** was required to adjudicate claims resisting disclosure of documents in a judicial proceeding based on Sections 123 and 162 of the Indian Evidence Act. The balancing exercise was between the public harm resulting from a disclosure of documents relating to the affairs of the state and the public interest in the administration of justice. The public interest in the administration of justice pertained to the disposal of the case instituted before the court in which the judge was a party. The decision in **S P Gupta** did not lay down a general proposition that the correspondence between constitutional functionaries in regard to the appointment process must be disclosed to a member of the public in all circumstances. The view that the disclosure was ordered in the specific context of a judicial proceeding was also affirmed in the separate opinion of Justice E S Venkataramiah (as he then was):

> "1194. It may be necessary to deal with the question of official secrecy in greater detail in a case where the constitutionality of the claim for official secrecy, **independently of the power of the Court to order discovery of official documents in judicial proceedings, arises for consideration. We are concerned in this case with the power of the Court to direct the disclosure of official documents in judicial proceedings.**
>
> 1203… we felt that a decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case."
>
> (Emphasis supplied)

28. Though, the decision in **S P Gupta** is not a precedent in support of a proposition for general disclosure in all circumstances, it is, however, relevant to the present dispute for it rejected the contention that: (i) disclosure and candour are incompatible; and (ii) such correspondence is entitled to class immunity.

Candour

29. The Court addressed the contention that the reason for protecting a certain class of documents is that they concern decision making at the highest level of government and only complete freedom from public gaze will enable freedom of expression and candour amongst government functionaries. In this view, public scrutiny was contended to adversely affect the ability of the participants in the decision-making process to express their opinion in a free and frank manner. The Court, however, rejected the contention that candour and frankness justify the grant of complete immunity against disclosures. Justice PN Bhagwati (as he then was) addressed the argument founded on candour in the following terms:

> "71…The candour argument has also not prevailed with judges.
> The candour argument has also not prevailed with Judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book *Executive Privilege": A Constitutional Myth* at page 264:
>
> > "Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees**. It is merely another testimonial to the greedy expansiveness of power, the costs of**

> **which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excess bred by the claim of executive privilege.**

We agree with these learned Judges that **the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in *Sankey* v. *Whitlam*, it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it** (vide: the observations of Lord Denning in Neilson v, Lougharre (1981) 1 All ER at P. 835.

…

81. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters…We have no doubt **that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed…We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted — and of this we have no doubt — that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality…**"

(Emphasis supplied)

The Court held that though candour may be a **factor** in determining what set of communications require protection, the measure of protection depends whether, on a **balance of all competing interests**, public interest favours disclosure or secrecy. While the Court noted that candour may be a relevant factor to prevent disclosure in some circumstances, it expressly rejects its weight as a relevant factor when it comes to constitutional functionaries such as the Chief Justice of India and the Chief Justices of the High Courts. Constitutional functionaries are bound to the oath of their office to discharge their duties in a fair manner in accordance with the principles enshrined in the Constitution. It cannot be countenanced that public gaze or subsequent disclosure will detract an individual from discharging their duty in an effective manner true to the dignity and ethic associated with their office. Candour and frankness cannot be the reason to preclude disclosures of correspondence between constitutional functionaries which concern the appointment process of judges.

Class immunity

30. The second argument rejected in **S P Gupta** and relevant to the present case is the contention that the correspondence between “the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf”, belong to a protected class of documents. It was contended that the disclosure of these

documents would be prejudicial to national interest and the dignity of the judiciary. In this view, the court is not required to assess the effects of the disclosure of correspondence in a particular case, as all correspondence of such nature belongs to a special class which is exempt from disclosure. In this view, disclosure is not precluded because of the specific contents of the documents, but because of its membership of a certain class of documents that require non-disclosure.

31. Justice Bhagwati, with whom five other judges agreed, held that a claim for class immunity is an 'extraordinary claim' which is granted as a 'highly exceptional measure' as such broad claims are contradictory to and destructive of the concept of an open government. He cautioned against blanket immunity and lay emphasis on the commitment to an open and transparent government in the following terms:

> "80…**It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open Government with the concomitant right of the citizen to know what is happening in the Government, the court should be reluctant to expand the classes of documents to which immunity may be granted**. The court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large secrecy is the badge of an authoritarian Government…"
>
> (Emphasis supplied)

The Court adopted a high standard for the conferral of class immunity which would be accorded "only under the severest compulsion of the requirement of public interest". With these observations, the Court rejected the contention that

correspondence between constitutional functionaries constitutes a class of documents exempt from public disclosure:

> "81. …it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure…Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure…"

Thus, the disclosure of correspondence between constitutional functionaries was held not to fall within a protected category exempt from disclosure. Disclosure is precluded only where it is injurious to public interest. Justice Bhagwati clarified that the principal consideration before the Court when assessing a claim for the non-disclosure of any document is that of public interest:

> "80…Every claim for immunity in respect of a document, **whatever be the ground on which the immunity is claimed** and **whatever be the nature of the document**, must stand scrutiny of the court with reference to one and only one test, namely, **what does public interest require — disclosure or non-disclosure…this exercise has to be performed in the context of the democratic ideal of an open Government.**"
>
> (Emphasis supplied)

32. A claim of immunity from disclosure for any document is subject to the controlling factor of public interest – a determination informed by the commitment to an open and transparent government:

> "**67**…**The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a).** Therefore, disclosure of

> information in regard to the functioning of Government must be the rule and secrecy **an exception justified only where the strictest requirement of public interest so demands.** The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."
>
> (Emphasis supplied)

Justice Bhagwati expanded on the socio-political background that must inform any approach in a "democratic society wedded to the basic values enshrined in the Constitution". He drew an interconnection between democracy, transparency and accountability to hold that a basic postulate of accountability, which is fundamental to a democratic government, is that information about the government is accessible to the people. He held that participatory democracy is premised on the availability of information about the functioning of the government. The right to know as a "pillar of a democratic state" imputes positive content to democracy and ensures that democracy does not remain static but becomes a "continuous process". Thus, a limitation on transparency must be supported by more than a claim to confidentiality – it must demonstrate the public harm arising from disclosure is greater than the public interest in transparency. Justice Bhagwati emphasized transparency in the judicial apparatus in the following terms:

> "**85**…**We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers**. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined

> only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. **We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances**."
>
> (Emphasis supplied)

The Court extended its observations on the indispensable nature of openness and transparency to the judiciary and held that there is no basis to conclude that information concerning appointments must be protected against disclosure "at all events and in all circumstances." The circumstances which justify disclosure on one hand and non-disclosure on the other calls into consideration a variety of factors which shall be adverted to in the course of the judgment. At this juncture, it is sufficient to note the observations of this Court that transparency in the functioning of the government serves a cleansing purpose:

> "66….Now, if secrecy were to be observed in the functioning of Government and the processes of Government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open Government with means of information available to the public, there would be greater exposure of the functioning of Government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest

> means of achieving a clean and healthy administration. It has been truly said that an open Government is clean Government and a powerful safeguard against political and administrative aberration and inefficiency."

33. The approach adopted by Justice Bhagwati in **S P Gupta**, with which we are in agreement provides a bright line standard for the Court on the approach that must be adopted when answering questions of disclosure in regards to the appointment process. The principal consideration will always be that of public interest. Any balancing must be carried out in the context of our commitment to the transparency and accountability of our institutions. The specific content of public interest and its role in the balancing process will be explored in the course of the judgment.

It was contended by the respondents that the decision of this Court in **S P Gupta** did not deal with the trade-off between disclosure and judicial independence. It is necessary to turn to this issue.

F Judicial independence

34. Mr K K Venugopal, learned Attorney General for India appearing on behalf of the appellant, contended that the disclosure of file notings between constitutional functionaries which concern the appointment process will erode the independence of the judiciary, which is part of the basic structure of the Constitution. It was further contended that disclosures will result in damage to the institution and adversely impact the independence of the judiciary. It is necessary to briefly analyse the contours of this concept in assessing the contention urged.

35. At the outset, it must be noted that while the term 'independence of the judiciary' is not new, its meaning is still imprecise.[24] There may be a debate over various facets of judicial independence: for instance, from whom and to do what is independence engrafted. Broadly speaking, judicial independence entails the ability of judges to adjudicate and decide cases without the fear of retribution. Judicial independence and the ability of judges to apply the law freely is crucial to the rule of law.

In his seminal work "**Cornerstone of a Nation**", Granville Austin states:

> "The [Constituent] Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect."[25]

However, it was the independence of the judiciary, and not its absolute insulation that appeared to be the prevailing view of members of the Constituent Assembly.[26] This, they believed was necessary for the preservation of inter-institutional equilibrium. The starting point of the independence of the judiciary is constitutional design through the provisions of the Constitution.

36. Article 124(2) guarantees a security of tenure for judges. Article 124(4) stipulates that a Judge of the Supreme Court shall not be removed from their office except on the ground of proved misbehaviour or incapacity. The proviso to clause (2) of Article 125 guarantees that a judges' privileges, allowances and rights in respect of leave of absence or pension shall not be varied to their

[24] MP Jain, Securing the Independence of the Judiciary – The Indian Experience, Indian International and Comparative Law Review, p. 246
[25] Granville Austin, Cornerstone of a Nation (1999), p. 164
[26] Arghya Sengupta, Independence and Accountability of the Indian Higher Judiciary (2019), p. 17

disadvantage after their appointment. Article 129 empowers the Supreme Court to punish for the contempt of itself. Article 145 empowers the Supreme Court to make rules for regulating generally the practice and procedure of the Court. Clauses (1) and (2) of Article 146 stipulate that the Chief Justice of India or such other Judge or officer of the Court, as may direct, shall be responsible for the appointments and prescription of rules governing the conditions of service of the officers and servants of the Supreme Court. Clauses (1) and (2) of Article 229 assign responsibility to the Chief Justice of a High Court or such other judge or officer of the court, as they may direct, in respect of matters of appointment and prescription of rules governing the conditions of service of the officers and servants of a High Court.

37. Article 215 empowers the High Court to punish for contempt of itself. Article 217 provides security of tenure. The proviso to clause (2) of Article 221 stipulates that the allowances of a Judge of a High Court as well as the rights in respect of leave of absence or pension shall not be varied to their disadvantage after their appointment. Article 227(2) stipulates that each High Court may, by virtue of its power of superintendence under Article 227(1): (i) call for returns from certain courts and tribunals, (ii) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (iii) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

38. These provisions reflect constitutional safeguards to ensure the independence of the judiciary and guarantee to it the freedom to function

independent of the will of the legislature and executive. Supriya Routh discusses these provisions in the following words:

> "[T]he Constitution provides for adequate safeguards in furtherance of the independence of the judiciary in a democratic republic. It separates the judiciary from the executive and prohibits the Parliament and the state legislatures from questioning the conduct of judges of the higher judiciary in furtherance of their judicial duties...It also provides for an arduous and elaborate process for the impeachment of judges..."[27]

The constitutional safeguards for judicial independence were noticed by this Court in **L Chandra Kumar** v **Union of India**[28]. Chief Justice AM Ahmadi, speaking for a seven judge Bench of this Court held:

> "78…While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed with such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions."

Justice Ruma Pal discussed the position in the following words:

> "To ensure freedom from Executive and Legislative control, the pay and pension due to judges in the superior courts are charged on the Consolidated Funds of the States in the case of High Court judges and the Consolidated Fund of India in the case of Supreme Court judges and are not subject to the vote of the Legislative Assembly in the case of the former or Parliament in the latter case. Salaries are specified in the Second Schedule to the Constitution and cannot be varied without an amendment of the Constitution."[29]

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[27] Supriya Routh, Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary, 13 Washington University Global Studies Law Review 321 (2014)
[28] (1997) 3 SCC 261
[29] "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture, November 10, 2011.

39. The above provisions are indicative of the intention of the founders of the Constitution to create a strong foundation to secure the independence of the judiciary. This also marked a strong departure from the 'pleasure doctrine' under the pre-constitutional colonial framework. Under the Government of India Act, 1935 the judges of the High Court held office during the pleasure of the Crown. Through Article 217(1) of the Constitution of India, tenure at the pleasure of the Crown was substituted with a fixed tenure subject to limited exceptions. Justice Srikrishna (speaking in non-judicial capacity) elucidates upon the importance of this tradition in the following words:

> "A judge of the High Court or Supreme Court is thus not removable from office except for proved misbehaviour or incapacity during his tenure of office. The very obviation of the pleasure doctrine as controlling the tenure of office of a judge of the High Court or the Supreme Court is explicit of the intention of the founding fathers to insulate the judges of the superior courts from the pleasure of the executive. The several Articles embedded in the Constitution ensure that a judge is fully independent and capable of rendering justice not only between citizens and citizens but also between citizens and the State, without let, hindrance, or interference by anyone in the State polity. This kind of insulation or immunity from the pleasure of the executive is essential in view of the fact that the Constitution has guaranteed several fundamental rights to the citizens and persons and also empowered the High Courts and Supreme Court under Article 226 and 32 to render justice against acts of the State."[30]

It becomes evident that judicial independence is secured through security over judicial tenure. The edifice of judicial independence is built on the constitutional safeguards to guard against interference by the legislature and the executive. Judicial independence is not secured by the secrecy of cloistered halls. It cannot be said that increasing transparency would threaten judicial independence.

[30] Justice BN Srikrishna, Judicial Independence, The Oxford Handbook of the Indian Constitution (2016) at p. 350.

40. The need for transparency and accountability has been emphasised in decisions of this Court. In **Supreme Court Advocates-on-Record Association** v **Union of India**[31] ('**NJAC**'), a Constitution Bench of this Court struck down the 99th Constitutional Amendment Act setting up the National Judicial Appointments Commission as *ultra vires* the Constitution by a four-to-one majority. Significantly, Justice Kurian Joseph, in his separate concurring opinion and Justice Chelameswar, in his dissenting opinion, pointed to the lack of transparency and accountability in the manner of making appointments to the judiciary. Justice Kurian Joseph observed:

> "990. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium system, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the framers of the Constitution… To me, it is a curable situation yet."

The need for greater transparency and accountability in the appointment procedure or the lack of the same, has also been highlighted by other eminent

[31] (2016) 5 SCC 1

retired judges such as Justice JS Verma and Justice Ruma Pal. In an article quoted in Justice Lokur's separate concurring opinion in the **NJAC** decision, Justice Verma while speaking about the collegium system observed:

> "546…Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability."

Furthermore, Justice Chelameswar, in his dissenting opinion, references a speech made by Justice Ruma Pal,[32] where she stated thus:

> "… [T]he process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."

41. The collegium system has come under immense criticism for its lack of transparency. As early as in **S P Gupta**, this Court acknowledged that disclosure would lead to *bona fide* consideration and deliberation and proper application of mind on the part of the judges.[33] Even in **NJAC**, the need for transparency and accountability has not been denied in any of the separate opinions. The 99th Constitutional Amendment was struck down on the ground that it would adversely affect the independence of the judiciary by giving the executive a

[32] "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture, November 10, 2011.
[33] S.P. Gupta v. Union of India, 1981 Supp SCC 87, 85 (per Bhagwati J.)

definitive say in the appointment of judges. The dilution of the judiciary's autonomy in the context of making judicial appointments was deemed to be unconstitutional. However, the need to reduce the opacity and usher in a regime of transparency in judicial appointments has not been denied and has in fact been specifically acknowledged by some of the learned Judges.

42. Scholars caution that while judicial independence is important, one should not lose sight of the larger goals and purposes which judicial independence is intended to serve. Charles Gardner Geyh considers such ends to include upholding of the rule of law, preserving the separation of governmental powers, and promotion of due process, amongst many others. Therefore, he believes that if judges are free to disregard such ends in their decision making, judicial independence serves no purpose. He notes thus:

> "Most thoughtful scholars recognize that judicial independence is an instrumental value-a means to achieve other ends. As an instrumental value, judicial independence has limits, defined by the purposes it serves…[Hence,] judges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further. Judicial accountability is yin to the judicial independence yang."[34]

Burt Neuborne in his incisive article on the Supreme Court of India observes: "We care about constitutional courts not for the aesthetic value of their structures, but because where certain prerequisites are assembled, constitutional courts are capable of preserving the values of open, democratic governance."[35]

[34] Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric', 56 Case Western Reserve Law Review 911 (2006)
[35] *International Journal of Constitutional Law*, Volume 1, Issue 3, July 2003, Pages 476–510

43. Lorne Sossin argues that transparency is necessary to ensure the public perception of the judiciary as independent. In the context of judicial appointments, he believes that appointments may happen on a proper, well-justified, substantive understanding of judicial 'merit'. However, in order for the same to be truly independent, they must include within themselves the transparency of the criteria and openness of the process. He notes that:

> "What matters most in a democracy, I would suggest, is not the precise criteria for merit but the transparency of the criteria, and the authenticity of the reasons for choosing one individual over another. Merit, in other words, is as much about process as substance." [36]

He then goes on to address how the transparency of criteria and the process is a logical extension of the judicial appointment being 'meritorious', and that doing so would remove the 'arbitrariness' of the process, leading to upholding of rule of law:

> "We often frame our concern with the rule of law as one designed to prevent "arbitrary" decisions. Arbitrary decisions are not, however, decisions taken for no reason. **They are, rather, decisions taken for undisclosed reason.** In a democracy, some reasons for judicial selection will and should be seen as more legitimate than others. Increasingly, however, **it is the demand for justification itself that is coming to define our democratic aspirations.** This demand, in my view, not only arises as a logical extension to the requirement of merit, but is also justified as a necessary condition of judicial independence."
>
> (Emphasis supplied)

44. The fault that was identified with the purported framework under Article 124A of the Constitution of India for ensuring transparency was the lack of

[36] Lorne Sossin, 'Judicial Appointment, Democratic Aspirations, and the Culture of Accountability', 58 University of New Brunswick Law Journal 11 (2008)

adequate safeguards for protecting the right to privacy of the appointees.[37] This was in the context of the deliberations of the **NJAC** falling within the purview of the RTI Act. Justice Madan B Lokur in his separate concurring opinion noted that the right to know was circumscribed by the right to privacy of individuals:[38]

> "555. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance."

None of these failings of the specific framework envisaged by the 99th Constitutional Amendment Act however can be interpreted as a denial of the importance of disclosure, transparency and accountability in the context of judicial appointments or of its constitutionality. They only point to the need for a **balance** between the right to know and the right to privacy, the specific contours of which will be explored shortly.

[37] NJAC., 953
[38] Id

45. Judicial independence cannot be used as a byword for avoiding the accountability and criticism that accompanies transparency:

> "[T]hrough judicial activism, the Supreme Court of India has completely insulated the judiciary from any democratic deliberation, thereby sacrificing accountability and transparency in the functioning of the judges…Accountability and transparency are not only necessary for upholding the democratic underpinnings of the Constitution, but are also necessary for the independence of the judiciary itself, because if public trust and confidence in the judiciary cannot be maintained, the judiciary is destined to lose its independence."[39]

The judiciary is an important organ of the Indian state, and it has a vital role in the proper functioning of the state as a democracy based on the rule of law. The integrity, independence, and impartiality of the judiciary are preconditions for fair and effective access to justice and for the protection of rights. The judiciary has a vital role to play as a bulwark of the integrity infrastructure in the country.

Failure to bring about accountability reforms would erode trust in the courts' impartiality, harming core judicial functions. Further, it also harms the broader accountability function that the judiciary is entrusted with in democratic systems including upholding citizens' rights and sanctioning representatives of other branches when they act in contravention of the law. Transparency and the right to information are crucially linked to the rule of law itself.

F.1 Judicial accountability

46. Questions of judicial accountability raise three interconnected questions:

[39] Supriya Routh, Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary, 13 Washington University Global Studies Law Review 321 (2014)

(i) What is the source of accountability?;

(ii) To whom is the accountability owed?; and

(iii) What does accountability entail?

Judicial independence and judicial accountability are often seen as conflicting values. It is believed that judicial independence, which mandates that adjudication take place free from interference by the legislature and the executive, is compromised by the questions of responsibility which judicial accountability entails. In this view, accountability compromises the ability of judges to decide free from external pressure and is undesirable. There is a fallacy about the postulate that independence and accountability are conflicting values.

47. Judicial independence is defined by the existence of conditions which enable a judge to decide objectively, without succumbing to pressures and influences which detract from the course of justice. To be independent a judge must have the ability to decide 'without fear or favour, affection or ill will'. The Constitution creates conditions to secure the independence of judges by setting out provisions to govern appointments, tenure and conditions of service. These are provisions through which the conditions necessary to secure judicial independence are engrafted as mandatory institutional requirements. These are intrinsic elements of our constitutional design. But constitutional design must be realised through the actual working of its functionaries. Mechanisms which facilitate independence are hence a crucial link in ensuring that constitutional design translates into the realisation of judicial independence. Facilitative mechanisms include those which promote transparency. For true judicial

independence is not a shield to protect wrong doing but an instrument to secure the fulfilment of those constitutional values which an independent judiciary is tasked to achieve. Judicial independence is hence not a *carte blanche* to arbitrary behaviour. Where the provisions of the Constitution secure a standard of judicial independence for free and impartial adjudication, the independence guaranteed by the Constitution must be employed in a manner that furthers the objective for which it was secured. In the quest for a balance between the freedom guaranteed and the responsibility that attaches to the freedom, judicial independence and judicial accountability converge.

48. Accountability, defined narrowly, is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences"[40]. The narrow conception of accountability however suffers from a straight-jacket view devoid of general guiding principles. Professor Stephen Burbank stipulates:

> "…the concept of accountability, defined inclusively …includes a broader complex of values which public organisations must adopt based in the fundamental values of democratic regimes. Accountability is conceived in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens."[41]

In this view, accountability is the search for normative values informed by democratic values that guide the exercise of power and freedom granted by the

[40] M Bovens, Analysing and Assessing Accountability: A Conceptual Framework, European Law Journal (2007), p. 450.
[41] Contini, F and Mohr, R, Reconciling independence and accountability in judicial systems, Utrecht Law Review (2007), p. 31

Constitution. The judiciary, like other institutions envisaged by the Constitution, is essentially a human institution. The independence of the judiciary was not envisaged to mean its insulation from the checks and balances that are inherent in the exercise of constitution power. The independence of the judiciary, is a constitutional guarantee of freedom. Notions of accountability however, concern the manner and ends for which the freedom guaranteed is employed. Where judicial independence focuses on freedom, judicial accountability is concerned with the manner in which that freedom is exercised by the adjudicator.

49. Article 124(6) and Article 219 of the Constitution of India prescribe that every person who is appointed to be a judge of the Supreme Court or the High Court respectively, shall, prior to entering office, make and subscribe to an Oath or affirmation set out in the Third Schedule of the Constitution. The Oath for the office reads:

> "I, (name), having been appointed Chief Justice (or a Judge) of the Supreme Court of India, do swear in the name of God (or affirm) that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will **duly and faithfully** and to the best of my ability, knowledge and judgment perform the duties of my office **without fear or favour**, **affection or ill-will** and that **I will uphold the Constitution** and the laws."
>
> (Emphasis supplied)

Prior to the advent of the Constitution, the oath or affirmation for a person appointed to the Federal Court was prescribed in Schedule IV to the Government of India Act, 1935. Significantly, the words "without fear or favour, affection or ill-will", contained in the present Constitution in Form VIII did not find place in the

oath prescribed[42] in Schedule IV to the Government of India Act, 1935. Added to the present Constitution, these are words with significance. The framers of the Constitution were alive to the need for the exercise of judicial power in accordance with the ethics of judicial office. The express inclusion of these words indicates that persons entering judicial office bind themselves to the principles inherent in the effective discharge of the judicial function, in conformity with the rule of law and the values of the Constitution.

50. The oath of office postulates that the judge shall discharge the duties of the office without fear or favour, affection or ill-will. Any action that abridges the discharge of judicial duty in conformity with the principles enunciated in the oath negates the fundamental precept underlying the conferment of judicial power. Commenting on the significance of the inclusion of the term in its application to judges of the High Courts in **Union of India** v **Sankalchand Himatlal**[43], Justice PN Bhagwati (as he then was) held:

> "These words, of course, do not add anything to the nature of the judicial function to be discharged by the High Court Judge because, even without them, the High Court Judge would, by the very nature of the judicial function, have to perform the duties of his office without fear or favour, **but they serve to highlight two basic characteristics of the judicial function, namely, independence and impartiality**…"
>
> (Emphasis supplied)

As constitutional functionaries tasked with adjudication, judges of the High Courts and Supreme Court are bound to discharge their duties in a fair and impartial

[42] "I, A.B., having been appointed Chief Justice [or a judge] of the Court do solemnly swear [or affirm] that saving the faith and allegiance which I owe to C.D., his heirs and successors, I will be faithful and bear true allegiance in my judicial capacity to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."
[43] (1977) 4 SCC 193

manner in accordance with law and the principles enshrined in the Constitution. But this indeed is only a restatement of a principle which attaches to all judicial office. The principles embodied in the oath furnish a non-derogable obligation upon the person affirming it to abide by its mandate.

51. On 21 November 1993, the then Chief Justice of India constituted a Committee to draft and circulate a statement on the values that must be reflected in judicial life. In December 1999, the Conference of Chief Justices of all High Courts resolved and adopted the Restatement of Values of Judicial Life. The statement serves as a guiding light of the values that must be followed in conformity with the dignity and ethic required of judicial life. The statement, apart from mentioning 16 values of judicial life concludes that the values enumerated are not exhaustive but illustrative of what is expected of a judge. The Bangalore Principles of Judicial Conduct 2002 which were adopted at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague in 2002 defined six main values as an inherent element of the judicial system: independence, impartiality, integrity, propriety, equality and competence, and diligence.

52. Judicial accountability also stems from the principle that the entrustment and exercise of power in a constitutional democracy is not unfettered. The Constitution confers upon judges with the power to dispense justice, which is a foundational value in the Preamble to the Constitution. Judicial power, conferred in public interest as a necessary element in the administration of justice cannot be used to achieve extraneous ends. The private interests of an individual have

no nexus to the discharge of the official duties of a judge. Professor TRS Allen stipulates:

> "Powers may be conferred on public officials and agencies for the attainment of appropriate ends, consistent with a plausible account of the public good; but such powers must not be abused for extraneous ends, serving only private interests, nor wielded in a manner that undermines the ideal of freedom as independence. No one should be at the mercy of unfettered official discretion; and the enforcement of legal constraints on such discretion is a necessary part of the idea of government according to law."[44]

The rule of law commands compliance with the law, without exception. It requires the protection of individuals against the unfettered discretion by officials on one hand and the protection of individuals from depredations by other private individuals.

53. Adjudicators in robes are human and may be pre-disposed to the failings that are inherently human. But the law demands that they must aspire to a standard of behaviour that does not condone those failings of a human persona in the discharge of judicial duties. Recognition of the fallibility of individuals who work constitutional institutions and of the need for safeguards to prevent the abuse of power found articulation in the Constitutional Assembly Debates. Dr B R Ambedkar, K T Shah, H V Kamath, S Nagappa, Hussain Imam, Pandit Lakshmi Kanta Maitra, Alladi Krishnaswami Ayyar, B Pocker Sahib Bahadur, Z H Lari, A K Ghosh, and R K Sidhva all emphasized the possibility of human error in the inherently human institutions that the Constitution envisaged. This idea was given its clearest articulation in by Dr B R Ambedkar when he reminded us that:

[44] TRS Allen, Accountability to Law, in Accountability in the Contemporary Constitution (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online, p. 84

"however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot.'

54. To equate the actions of an individual which have no nexus with the discharge of official duties as a judge with the institution may have dangerous portents. The shield of the institution cannot be entitled to protect those actions from scrutiny. The institution cannot be called upon to insulate and protect a judge from actions which have no bearing on the discharge of official duty. It is for this reason that judicial accountability is an inherent component of the justice delivery system. Accountability is expected to animate the day to day functioning of the courts. Judges are required to issue reasoned orders after affording an opportunity to both sides of a dispute to present their case. Judicial ethic requires that a judge ought to recuse herself from hearing a case where there is a potential conflict of interest. These illustration norms serve to further the democratic ideal that no constitutional functionary is above the rule of law.

55. In the view explored above, judicial accountability traces itself from both the oath of office and the nature of the judicial power itself. In a broader sense however, there is a significant public interest in ensuring the smooth and efficient functioning of the justice delivery system, consistent with the requirements of justice in individual cases. The legitimacy of the institution which depends on public trust is a function of an assurance that the judiciary and the people that work it are free from bias and partiality. Mark Tushnet explores the idea of judicial accountability in the following terms:

> "Under prevailing understandings in liberal democracies, law is a human artefact, so accountability 'to law' must involve

> accountability to someone. Roughly, 'political accountability' refers to accountability to contemporaneous power-holders as representatives of today's people, whereas **'accountability to law' refers to accountability to the people and their representatives in the more distant past. Accountability to law is a form of indirect accountability to the people in the past, taking its route through their enactments of law**.[45]
>
> (Emphasis supplied)

In this view, accountability is not confined to elected posts. The creation of the legal system founded on constitutional precept marked a break from its colonial past. An independent judiciary is the guardian and final arbiter of the text and spirit of the Constitution. To ensure this, the Constitution envisages a system of checks and balances. Article 124(4)[46] of the Constitution stipulates that a judge of the Supreme Court may be removed by an order of the President on the ground of proven misbehavior or incapacity. Article 218[47] of the Constitution makes the substantive provisions in Article 124(4) and Article 124(5) applicable to judges of the High Courts. The Judges (Enquiry) Act 1986 was enacted in furtherance of Article 124(5) which empowered the Parliament to regulate the presentation of an address and investigation of judges. A notice of motion to present an address to the President of India for the removal of judge is given in the Lok Sabha on receiving the signatures of not less than one hundred members or in the Rajya Sabha on receiving the signature of not less than fifty members. The Speaker of the Lok Sabha or the Chairman of the Rajya Sabha constitutes a Committee as

[45] Mark Tushnet, Judicial Accountability in Comparative Perspective, in Accountability in the Contemporary Constitution (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online at Tushnet, p. 69

[46] 124(4) - A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after as address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

[47] 218 – The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

stipulated in the Act to enquire into the alleged misbehavior of incapacity. If the report of the Committee finds that a judge is guilty of misbehavior or suffers from any incapacity, each house of the Parliament votes on the motion in accordance with Article 124(4) of the Constitution. The Lok Sabha and the Rajya Sabha must both pass a motion to impeach the judge with a majority of not less than two-thirds of the members of the house present and voting. The stringent procedure adopted by the Parliament for the impeachment of a judge draws a balance between ensuring the independence of judges from political will and ensuring the accountability of judges for their actions.

56. Judicial independence does not mean the insulation of judges from the rule of law. In a constitutional democracy committed to the rule of law and to the equality of its citizens, it cannot be countenanced that judges are above the law. The notion of a responsible judiciary furthers the ideal for which an independent judiciary was envisaged. It is the exercise of the decision making authority guaranteed by judicial independence in a just and responsible manner, true to the ethos of judicial office that sub-serves the founding vision of the judiciary. Professor Stephen Burbank has characterized judicial independence and accountability as "different sides of the same coin".[48]Professor Charles Gardner has stated that:

> "Judicial accountability is yin to the judicial independence yang. Although some trumpet judicial accountability as if it were an end in itself, accountability-like independence-is better characterized as an instrumental value that promotes three discrete ends: the rule of law, public confidence in the courts, and institutional responsibility."[49]

[48] Stephen Burbank, The Past and Present of Judicial Independence, California Law Review (1999).
[49] Charles Gardner, Rescuing Judicial Accountability from the Realm of Political Rhetoric (2006), p .916

Hence, independence and accountability are mutually reinforcing concepts. The specific form of accountability which this Court has been called to address is in regard to the appointment process and disclosure of assets owned by judges. This form of accountability involves competing interests between the need for transparency and accountability and the privacy interests of judges. The nature and balancing of the competing interests involved in such a determination shall be explored in the course of the judgment.

57. The executive in a cabinet form of government in accountable to the legislature. Ministers of the government are elected members of the legislature. Collectively, the government is accountable to the legislature as an institution and through the legislature to the people. Unlike the elected representatives of the people, judges of the district and higher judiciary are not elected. The accountability which the political process exacts from members of the legislature is hence distinct from the accountability of judges who are accountable to the trust which is vested in them as independent decision makers. Making them accountable in the discharge of that trust does not dilute their independence. The independence of judges is designed to protect them from the pressures of the executive and the legislature and of the organised interests in society which may detract judges from discharging the trust as dispassionate adjudicators. Scrutiny and transparency, properly understood are not placed in an antithesis to independence. They create conditions where judges are protected against unwholesome influences. Scrutiny and transparency are allies of the conscientious because they are powerful instruments to guard against influences which threaten to suborn the judicial conscience. To use judicial independence

as a plea to refuse accountability is fallacious. Independence is secured by accountability. Transparency and scrutiny are instruments to secure accountability.

G Fiduciary relationship

58. The appellant argued that the information about the assets of judges is exempt from disclosure, by virtue of Section 8(1)(e) of the RTI Act which casts a fiduciary duty on the Chief Justice of India to hold the asset declarations in confidence. It is argued by the respondent that judges, while declaring their assets, do so in their official capacity in accordance with the 1997 resolution and not as private individuals. It is urged that the process of information gathering about the assets of the judges by the Chief Justice of India, is in his official capacity and therefore, no fiduciary relationship exists between them.

59. In order to determine whether the Chief Justice of India holds information with respect to asset declarations of judges of the Supreme Court in a fiduciary capacity, it is necessary to assess the nature of the relationship and the power dynamics between the parties. Justice Frankfurter of the United States Supreme Court in **SEC** v **Chenery Corp**[50], while determining the question whether officers and directors who manage a holding company in the process of reorganisation occupy positions of trust, stated:

> " But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect

[50] SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1942)

has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"[51]

60. **Black's Law Dictionary**[52], defines "fiduciary relationship" thus:

> "A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships – such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client – require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations : (1) when one person places trust in the faithful integrity of another, **who as a result gains superiority or influence over the first,** (2) **when one person assumes control and responsibility over another,** (3) **when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship,** or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, **as with a lawyer and a client or a stockbroker and a customer.**"
>
> (Emphasis supplied)

In **Words and Phrases**[53] the term "fiduciary" is defined:

> "Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another... It refers to integrity and fidelity... It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction… The term includes those informal relations which exist **whenever one party trusts and relies upon another, as well as technical fiduciary relations.**"
>
> (Emphasis supplied)

In **Corpus Juris Secundum**[54] "fiduciary" is defined thus:

> "A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction,

[52] Black's Law Dictionary, Tenth Edition, p. 744
[53] Words and Phrases, Volume 16-A, St. Paul: West Pub. Co, 1940
[54] Corpus Juris Secundum: A Complete Restatement of the Entire American Law As Developed by All Reported Cases, Volume 36-A, p. 38

> refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.
>
> The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note."

61. In **CBSE** v **Aditya Bandopadhyay**[55], a two judge Bench of this Court while discussing the nature of fiduciary relationships relied upon several decisions and explained the terms "fiduciary" and "fiduciary relationship" thus:

> "39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. **The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s).** The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party."
>
> (Emphasis supplied)

[55] (2011) 8 SCC 497

62. In **RBI** v **Jayantilal N Mistry**[56], a two judge Bench of this Court reiterated the observations made in **CBSE** v **Aditya Bandopadhyay** and held that RBI did not place itself in a fiduciary relationship with other financial institutions by virtue of collecting their reports of inspections, statements of the banks and information related to the business. It was held that the information collected by the RBI was required under law and not under the pretext of confidence or trust:

> "64. The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. **However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.** As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship."
>
> (Emphasis supplied)

63. The Canadian Supreme Court in the case of **Hodgkinson v Simms**[57], discussed the term 'fiduciary' thus:

> "A party becomes a fiduciary where it, acting pursuant to statute, agreement or unilateral undertaking, has an obligation to act for the benefit of another and that obligation carries with it a discretionary power. Several indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.
>
> The term fiduciary is properly used in two ways. The first describes certain relationships having as their essence

[56] (2016) 3 SCC 525
[57] [1994] 3 SCR. 377

> discretion, influence over interests, and an inherent vulnerability. A rebuttable presumption arises out of the inherent purpose of the relationship that one party has a duty to act in the best interests of the other party. The second, slightly different use of fiduciary exists where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In such a case the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive examples of evidentiary factors to be considered in making this determination. Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary."

64. Dr Paul Finn in his comprehensive work on "**Fiduciary Obligations**"[58], describes a fiduciary as someone who has an obligation to act "in the interests of" or "for the benefit of" their beneficiaries in some particular matter. For a person to act as a fiduciary they must first have bound themselves in some way to protect and further the interests of another.[59] Where such a position has been assumed by one party then that party's position is potentially of a fiduciary.[60] The Federal Court of Australia in the case of **Australian Sec & Inv Comm'n** v **Citigroup Global Markets Australia Pty Ltd**[61] has held:

> "The question of whether a fiduciary relationship exists, and the scope of any duty, will depend upon the factual circumstances and an examination of the contractual terms between the parties... Apart from the established categories, perhaps the most that can be said is that **a fiduciary**

[58] P.D. Finn "Fiduciary Obligations", Carswell 1977 at p. 15
[59] P.D. Finn "Fiduciary Obligations", Carswell 1977 at p. 9
[60] P.D. Finn "Fiduciary Obligations", Carswell 1977 at p.9
[61] Australian Sec. & Inv. Comm'n v Citigroup Global Markets Australia Pty. Ltd., [2007] FCA 963 (Citing P.D. Finn, The Fiduciary Principle, in Equity, Fiduciaries and Trusts (T. Youden ed., 1989))

> **relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary… The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship.** It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the fiduciary expectation." (Emphasis supplied)

65. A fiduciary must be entrusted with a degree of discretion (power) and must have freedom to act without resorting to prior approval of the beneficiary.[62] The greater the independent authority to be exercised by the fiduciary, the greater the scope of fiduciary duty.[63] The person so entrusted with power is required to determine how to exercise that power.[64] Fiduciaries are identified by ascendancy, power and control on the part of the stronger party and therefore, a fiduciary relationship implies a condition of superiority of one of the parties over the other.[65] It is not necessary that the relationship has to be defined as per law, it may exist under various circumstances, and exists in cases where there has been a special confidence placed in someone who is bound to act in good faith and with due regard to the interests of the one reposing the confidence. Such is normally the case with, *inter alia*, attorney-client, agent-principal, doctor-patient, parent-child, trustees-beneficiaries[66], legal guardian-ward[67], personal representatives, court appointed receivers and between the directors of company and its shareholders. In **Needle Industries (India) Ltd** v **Needle Industries**

[62] Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011
[63] Scott, Austin W. "The Fiduciary Principle." *California Law Review* 37, no. 4 (1949): 539-55.
[64] Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011
[65] Ken Coghill, Charles Sampford and Tim Smith "Fiduciary Duty and the Atmospheric Trust", Ashgate (2012)
[66] Section 88, Indian Trusts Act 1882
[67] Section 20, Guardians and Wards Act 1890

Newey (India) Holding Ltd[68] and **Dale & Carrington Invt (P) Lt** v **P K Prathaphan**[69], this Court held that the directors of the company owe a fiduciary duty to its shareholders. In **P V Sankara Kurup** v **Leelavathy Nambier**[70], this Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

66. Other structural properties of the fiduciary relationship are dependence and vulnerability, where the beneficiary is dependent upon the fiduciary to exercise power and impact the practical interests.[71] Once a fiduciary relationship is established, fiduciary duties include the duty of loyalty and duty of care towards the interests of the beneficiaries.[72]

67. From the discussion above, it can be seen that a fiduciary is someone who acts for and on behalf of another in a particular matter giving rise to a relationship of trust and confidence. A fiduciary relationship implies a condition of superiority of one of the parties over the other, where special confidence has been reposed in an individual to act in the best interests of another.

68. The dispute before us is whether the Chief Justice of India while exercising its official function and holding asset declaration information of the judges acts in a fiduciary capacity. The Full Bench of the Delhi High Court agreed with the learned single judge and held:

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[68] (1981) 3 SCC 333
[69] (2005) 1 SCC 212
[70] (1994) 6 SCC 68
[71] Gold, Andrew S.; Miller, Paul B. “Philosophical foundations of fiduciary law” Oxford University Press, 2016.
[72] Tamar Frankel, “Fiduciary Law” Oxford University Press, 2011

> "The CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. In these circumstances, it cannot be held that the asset information shared with the CJI, by the Judges of the Supreme Court, are held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty."

We are in agreement with the above observation. The words "held by" or "under the control of" under Section 2(j) of the RTI Act will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority while exercising functions in its official capacity. The 1997 resolution on declaration of judge's assets as adopted on 7 May 1997 states:

> "RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential."

69. The Chief Justice of India in exercising his official functions in accordance with the 1997 resolution while holding asset information of other judges does not act for and on behalf of other judges of the Supreme Court. There exists no fiduciary relationship between them. The Chief Justice of India is not entrusted

with the power to protect and further the interests of individual judges who disclose their assets. The information is required by the mandate of the resolution dated 7 May 1997 passed by all the then sitting judges of the Supreme Court and it cannot be said that such information is being provided in any personal capacity. The Chief Justice of India merely holds the information in accordance with the official functions and not in any fiduciary capacity. The judges of the Supreme Court, including the Chief Justice of India occupy a constitutional office. There exists no set hierarchies between the judges and they enjoy the same judicial powers and immunities. The judges who disclose their assets cannot be said to be vulnerable to and dependent on the Chief Justice of India. In these circumstances, it cannot be held that asset information shared with the Chief Justice of India, by the judges of the Supreme Court, are held by him in a fiduciary capacity, which if revealed, would result in breach of fiduciary duty. Therefore, the argument that the information sought is held in a fiduciary capacity is inapplicable and cannot be used to prevent the information from being made public.

70. While we have not accepted the argument of the appellant regarding the existence of the fiduciary relationship between the Chief Justice of India and the judges, it is relevant to point out the application of the fiduciary principle to public institutions where judges hold citizens' interests in public trust, guided by fiduciary standards.[73] A Judge's public fiduciary obligation towards the citizen includes a duty of loyalty, duty of care and the cluster comprising the duties of

[73] Robert G. Natelson, "Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders", 11 Tex. Rev. L. & PoL 239, 245

candour, disclosure and accounting.[74] The duty of loyalty for a judge entails them being loyal to the citizenry by remaining impartial towards the litigants before them.[75] The duty of care for judges includes the expectation from judges to fulfil their responsibilities with reasonable diligence and to engage in reason based decision making.[76] The duties of candour, disclosure and accounting are based on the premise of judicial transparency and judicial honesty.

H The right to privacy and the right to know

71. The third referral question to be answered by this Court is: "Whether the information sought for is exempt under Section 8(1)(j) of the RTI Act[77]." The question requires this Court to determine whether and under what circumstances the information sought by the applicant should be disclosed under the provisions of the RTI Act. This Court is cognisant that in interpreting the statutory scheme of the RTI Act, the constitutional right to know and the constitutional right to privacy of citizens are also implicated. In answering the question, it is necessary to analyse the scheme of the RTI Act, the role of the exemptions under Section 8, the interface between the statutory rights and duties under Section 8(1)(j) and the constitutional rights under Part III of the Constitution.

[74] Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, no. 3 (2013): 699-753.
[75] Matthew Conaglen, Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias, 2008 PUB. L. 58 (2008)
[76] Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, no. 3 (2013): 699-753. See also Alon Harel & Tsvi Kahana, The Easy Core Case for Judicial Review, 2 J. LEGAL analysis 227, 249 n.23 (2010).
[77] "RTI Act"

72. In order to facilitate effective governance, the government or 'public authority' must be empowered to efficiently coordinate diverse activities and at the same time be constrained to ensure that it does not override the freedoms of those it serves. In explaining the system of checks and balances in the American Constitution, James Madison noted:

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. **In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.** A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[78]
>
> (Emphasis supplied)

Our Constitution institutes and operationalises the functions of government. It is necessary to empower the government to operationalise the public functions of the state and ensure the governance of the public lives of citizens. However, the framers of our Constitution recognised that this act of empowerment also carried certain associated risks, that no government of people is infallible and that in addition to democratic controls, certain additional checks and balances on governmental power are necessary. Part III of the Constitution represents a crucial aspect of the constitutional scheme by which governmental power is restricted, and the government is obligated to respect the rights and freedoms of citizens.

[78] James Madison, Federalist No 51 (1788)

Scheme of Sections 8 and 11

73. The RTI Act was enacted in furtherance of the principles found in Part III of the Constitution. The RTI Act operationalises the disclosure of information held by 'public authorities' in order to reduce the asymmetry of information between individual citizens and the state apparatus. The RTI Act facilities transparency in the decisions of public authorities, the accountability of public officials for any misconduct or illegality and empowers individuals to bring to light matters of public interest. The RTI Act has provided a powerful instrument to citizens: to individuals engaged in advocacy and journalism. It facilitates a culture of assertion to the citizen – activist, to the whistle-blower, but above all to each citizen who has a general interest in the affairs of the state. The preamble of the RTI Act notes:

> "An Act to provide for setting out the practical regime of right to information for citizens **to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority**, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.
> …
> AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;"
>
> (Emphasis supplied)

As observed earlier in the judgement, the provisions of the RTI Act are dedicated to operationalising access to information held by public authorities. The scheme of the RTI Act and its applicability to the judiciary has already been examined in detail. In answering the third referral question, this Court can confine itself to the

statutory exemptions carved out from the general obligation of disclosure. When enacting the RTI Act, Parliament was cognisant that the unrestricted disclosure of information could be fiscally inefficient, result in real world harms and infringe on the rights of others. In addition to the extracts above, the preamble to the RTI Act also states:

> "AND WHEREAS **revelation of information in actual practice is likely to conflict with other public interests** including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;"
>
> (Emphasis supplied)

74. To address the harms that may result from an unrestricted disclosure of information, the legislature included certain qualified and unqualified exemptions to the general obligation to disclose under Sections 3, 4 and 7 of the RTI Act. Section 8(1) sets out certain classes of information, the disclosure of which, the legislature foresaw may result in harm to the nation or the rights and interests of other citizens. Section 8 reads as under:

> "8. **Exemption from disclosure of information** –
> (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, -
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
>
> (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
>
> (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
>
> (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that

> the larger public interest warrants the disclosure of such information;
>
> (f) information received in confidence from foreign Government;
>
> (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
>
> (h) information which would impede the process of investigation or apprehension or prosecution of offenders;
>
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:
>
> Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
>
> Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
>
> (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
>
> Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
>
> (2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests…."

Section 8(1) begins with a non-obstante phrase "Notwithstanding anything contained in this Act". The import of this phrase is that clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. By expressly enumerating the circumstances in which the

disclosure of information may be restricted on the grounds of certain identified harms, the RTI Act negates the notion that information may be withheld on the grounds of confidentiality simpliciter. A harm under clause (1) of Section 8 must be identified and invoked to justify the non-disclosure of a document requested for under the RTI Act.

75. It is also pertinent to note that clauses (a), (b), (c), (f), (g) and (h) to clause (1) of Section 8 provide an absolute exemption from the obligation of disclosure under the RTI Act. However, clauses (d), (e), (i) and (j) to clause (1) of Section 8 provide a qualified exemption from disclosure. For example, clause (a) to sub section (1) of Section 8 provides an unconditional exemption where it is determined that disclosure of the information sought "would prejudicially affect the sovereignty and integrity of India". On the other hand, while clause (d) to Section 8(1) similarly provides that information is exempt from disclosure where such disclosure "would harm the competitive position of a third party" the exemption is further qualified by the phrase, "unless the competent authority is satisfied that larger public interest warrants the disclosure". Thus, the exemption under clause (d) is not absolute but is qualified and cannot be invoked where there exists a "larger public interest". Where the Information Officer determines that the "larger public interest" warrants a disclosure, the exemption in clause (d) cannot be invoked and the information must be disclosed.

76. Clause (j) of Section 8(1) provides a qualified exemption from disclosure where the information sought relates to "personal information the disclosure of which has no relationship to any public activity or interest" or the disclosure of the

information would cause an "unwarranted invasion of the privacy". However, the exemption may be overridden where the Information Officer is "satisfied that the larger public interest justifies the disclosure". Clause (j) is not an absolute exemption from the disclosure of information on the ground of privacy but states that disclosure is exempted in cases where "personal information" is sought and there exists no "larger public interest". Where the Information Officer is satisfied that the existence of the "larger public interest" justifies the disclosure of the "personal information", the information must be disclosed. The exact contours of the phrases "personal information" and "larger public interest" with respect to members of the judiciary, and the exact manner in which they relate to each other form the subject matter of the third referral question and shall be analysed during the course of this judgement.

77. Sections 2(n) and 11 of the RTI Act read as under:

> "2(n) "**third party**" means a person other than the citizen making a request for information and includes a public authority"
>
> "**11. Third party information.**—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, **which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be,** shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:
> Provided that except in the case of trade or commercial secrets protected by law, **disclosure may be allowed if the**

> **public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.**
> (2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.
>
> (Emphasis supplied)

The definition of a "third party" includes a public authority. 'Third party information' is information which "relates to or has been supplied by any other person (including a public authority) other than the information applicant and has been treated as confidential by such third party. Where disclosure of 'third party information' is sought, and such information has been *prima facie* treated as confidential by the third party in question, the procedure under Section 11 of the RTI Act is mandatory. The Information Officer shall, within five days of receiving the request for 'third party information' notify the relevant third party to whom the information relates or which had supplied it. The notice shall invite the third party to submit reasons (in writing or orally) as to whether or not the information sought should be disclosed. Section 11(2) provides the third party with a right to make a representation against the proposed disclosure within ten days of receiving the notice. The provision expressly mandates the Information Officer to take into consideration the objections of the third party when making a decision with respect to disclosure or non-disclosure of the information. It encapsulates the fundamental idea that a party whose personal information is sought to be disclosed is afforded the opportunity to contest disclosure. The proviso to sub section (1) of Section 11 permits disclosure where the "public interest" in

disclosure "outweighs" any possible harms in disclosure highlighted by the third party.

78. Sections 8 and 11 must be read together. Other than in a case where the information applicant seeks the disclosure of information which relates to the information applicant herself, information sought that falls under the category of "personal information" within the meaning of clause (j) of Section 8(1) is also "third party information" within the ambit of Section 11. Therefore, in every case where the information requested is "personal information" within the operation of clause (j) of sub section 1 of Section 8, the procedure of notice and objections under Section 11 must be complied with. The two provisions create a substantive system of checks and balances which seek to balance the right of the information applicant to receive information with the right of the third party to prevent the disclosure of personal information by permitting the latter to contest the proposed disclosure.

79. In **Arvind Kejriwal** v **Central Public Information Officer**[79] it was contended that the procedure for notifying the third party and inviting objections under Section 11 only applied to situations where the information sought was directly supplied by the third party, and not to situations where the information 'related to' the third party but was not supplied by it. Rejecting this contention, Justice Sanjeev Khanna, (as our learned Brother then was) speaking for a Division Bench of the Delhi High Court held:

[79] AIR 2012 Del 29

> "13… On the other hand, in case the word 'or' is read as 'and', it may lead to difficulties and problems, including the invasion of right of privacy/confidentiality of a third party. **For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person**. … when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been prima facie treated by the said third party as confidential, again the procedure under Section 11(1) has to be followed.
> …
> 15. Section 11 also ensures that the principles of natural justice are complied with. Information which is confidential relating to a third party or furnished by a third party, is not furnished to the information seeker without notice or without hearing the third party's point of view. **A third party may have reasons, grounds and explanations as to why the information should not be furnished, which may not be in the knowledge of the PIO/appellate authorities or available in the records.** The information seeker is not required to give any reason why he has made an application for information. **There may be facts, causes or reasons unknown to the PIO or the appellant authority which may justify and require denial of information. Fair and just decision is the essence of natural justice. Issuance of notice and giving an opportunity to the third party serves a salutary purpose and ensures that there is a fair and just decision.** In fact issue of notice to a third party may in cases curtail litigation and complications that may arise if information is furnished without hearing the third party concerned. Section 11 prescribes a fairly strict time schedule to ensure that the proceedings are not delayed.
>
> (Emphasis supplied)

The procedure under Section 11 must be complied with not only in cases where information has been supplied to the public authority by a third party, but equally when the information which is held by the public authority "relates to" a third party. Section 11 is not merely a procedural provision, but a substantive

protection to third parties against the disclosure of their personal information held by public authorities, without their knowledge or consent. The mere fact that the public authority holds information relating to a third party does not render it freely disclosable under the RTI Act. A third party may have good reason to object to the disclosure of the information, including on the ground that the disclosure would constitute a breach of the right to privacy. By including the requirement of inviting objections and providing a hearing on the proposed disclosure of third party information to the very party who may be adversely impacted by the disclosure, Section 11 embodies the principles of natural justice.

80. In the present case, the information sought pertains to the declaration of assets of members of the judiciary and official file notings and correspondence with respect to the elevation of judges to the Supreme Court. The information sought with respect to the assets of judges is not generated by the Supreme Court itself, but is provided by individual judges to the Supreme Court. The file notings with respect to the elevation of judges do not merely contain information regarding the operation of the Supreme Court, but also relate to the individual judges being considered for elevation. Thus, the information sought both “relates to” and “has been supplied by” a third party and has been treated as confidential by that third party”. The procedure under Section 11 is applicable in regard to the information sought by the respondent and must be complied with.

Constitutional rights implicated

81. The RTI Act, although a statutory enactment, engages the rights contained in Part III of the Constitution of India. Article 19(1)(a) of the Constitution contains

the right to freedom of expression which grants all citizens not merely the right to free speech, but also the right to freely disseminate speech. The freedom of the press to disseminate speech has long been recognised under our Constitution.[80] An inherent component of the right to disseminate speech freely is the corresponding right of the audience to receive speech freely. The right to receive information disseminated has also been recognised as a facet of the freedom of expression protected by Article 19(1)(a) of the Constitution.[81] In addition to the right to receive information already being disseminated in the public domain, Article 19(1)(a) includes a positive right to information. Contrasted with the negative content of the right to receive information, which prohibits the State from restricting a citizen's access to information already in the public domain, the right to information, as a facet of Article 19(1)(a), casts a positive duty on the State to make available certain information not already in the public domain.

82. In **State of Uttar Pradesh** v **Raj Narain**[82], Chief Justice A N Ray, speaking for a Constitution Bench of this Court observed:

> "74. In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. **The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.** [See *New York Times Co.* v. *United States*, 29 L Ed 822: 403 US 713] To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the

[80] **Express Newspaper** v **Union of India** 1959 SCR 12
[81] **Bennet Coleman** v **Union of India** (1972) 2 SCC 788
[82] (1975) 4 SCC 428

> purpose of parties and politics or personal self-interest or bureaucratic routine…"
>
> (Emphasis supplied)

These observations were reiterated by the seven judge Bench of this Court in case of **S P Gupta** v **Union of India**[83]. Justice P N Bhagwati (as he then was) noted:

> "64. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. **The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government.** It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. **A popular Government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both**". The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State…"
>
> (Emphasis supplied)

The above-mentioned extract accurately and succinctly summarises the position of law and has been consistently followed by this Court.[84] The right to freedom of expression under Article 19(1)(a) casts both positive and negative obligations on the State. It restricts the State from interfering with the right of citizens to receive information and its freely disseminated. It also imposes an obligation on the State

[83] (1981) Supp SCC 87

[84] **People's Union for Civil Liberties** v **Union of India** (2003) 4 SCC 399; **Thalappalam Service Cooperative Bank Limited** v **State of Kerala** (2013) 16 SCC 82 and **Reserve Bank of India** v **Jayantilal Mistry** (2016) 3 SCC 525.

to provide citizens with information about the public functioning of government to ensure accountability and create an informed electorate.

83. Parliament enacted the RTI Act in pursuance of the State's positive obligation to provide citizens with information about the functioning of government. It is a statute to operationalise the right of citizens to access information, otherwise only held by the government, under the 'right to know' or 'right to information' as protected by Article 19(1)(a). In requesting for information under the provisions of the RTI Act, a citizen engages certain statutory rights and duties under its provisions, but simultaneously also engages the 'right to know' under the Article 19(1)(a) of the Constitution. The 'right to know' is not absolute. The RTI Act envisages certain restrictions on the 'right to know' in the form of exemptions enumerated in clause (1) to Section 8. Crucially, restrictions on the disclosure of information under the RTI Act also constitute restrictions on the information applicant's 'right to know' which is protected under Article 19(1)(a) of the Constitution. The constitutional permissibility of the statutory restrictions on disclosure contained within the RTI Act is not in challenge before this Court. But it is trite to state that any restrictions on the disclosure of information would necessarily need to comport with the existing law on the protection of the 'right to know' as a facet of the freedom of expression. In the decision in **Thalappalam Service Cooperative Bank Limited** v **State of Kerala**[85] Justice Radhakrishnan, speaking for a two judge Bench of this Court, noted:

> "56. The Right to Information Act, 2005 is an Act which provides for setting up the practical regime of right to information for citizens to secure access to information under the control of public authorities in order to promote

[85] (2013) 16 SCC 82

> transparency and accountability in the working of every public authority. The Preamble of the Act also states that the democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. Citizens have, however, the right to secure access to information of only those matters which are "under the control of public authorities", the purpose is to hold "the Government and its instrumentalities" accountable to the governed. **Consequently, though right to get information is a fundamental right guaranteed under Article 19(1)(*a*) of the Constitution, limits are being prescribed under the Act itself, which are reasonable restrictions within the meaning of Article 19(2) of the Constitution of India**."
>
> (Emphasis supplied)

The court expressly acknowledged that the RTI Act was enacted to fulfil the positive content of the right to know that existed under Article 19(1)(a). Further, restrictions on the disclosure of information under the RTI Act constitute restrictions on the 'right to know' as a facet of Article 19(1)(a).

84. Clause (j) of sub section (1) of Section 8 uses the phrases "personal information" and "unwarranted invasion of the privacy of the individual". In interpreting the harm to be caused in disclosing personal information, this Court must be cognisant that the privacy of the individual is the subject of constitutional protection. In **K S Puttaswamy** v **Union of India**[86] a nine judge bench of this Court unanimously held that there exists a constitutional right to privacy located within Part III of the Constitution. Justice D Y Chandrachud, speaking for a plurality of four judges, held:

> "250. … The nine primary types of privacy are, according to the above depiction:
> (*i*) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to

[86] (2017) 10 SCC 1

prevent others from violating one's body or from restraining the freedom of bodily movement;

(*ii*) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy;

…

(*ix*) **informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information.**

…

320. **Privacy is a constitutionally protected right** which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

…

323. **Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture.** While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

…

325. **Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights**. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. **An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a**

> **rational nexus between the objects and the means adopted to achieve them.**
>
> 326. **Privacy has both positive and negative content.** The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.
>
> 327. **Decisions rendered by this Court subsequent to *Kharak Singh* upholding the right to privacy would be read subject to the above principles.**"
>
> (Emphasis supplied)

Justice R F Nariman in his separate concurring opinion made the following observations:

> "521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:
> • Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;
> • **Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right**; and
> • The privacy of choice, which protects an individual's autonomy over fundamental personal choices….
> …
> 536. **This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India**. *M.P. Sharma* [*M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] and the majority in *Kharak Singh* [*Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] , to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising privacy as a fundamental right do not need to be revisited.
>
> (Emphasis supplied)

85. The right to privacy is a constitutional right emanating from the right to life and personal liberty in Article 21 of the Constitution and from the facets of

freedom and dignity embodied in Part III of the Constitution. Any restriction on the right to privacy by the State must be provided for by law, pursue a legitimate aim of the State and satisfy the test of proportionality. The requirement of proportionality is satisfied when the nature and extent of the abridgement of the right is proportionate to the legitimate aim being pursued by the State. The constitutional protection of privacy encompasses not merely personal intimacies but also extends to decisional and informational autonomy. An individual has a constitutionally protected right to control the dissemination of personal information. The unauthorised use of information abridges a citizen's right to privacy.

86. The information disclosed under the RTI Act may include personal information relating to individuals. The RTI Act does not contain any restrictions on the end-use of the information disclosed under its provisions. The information disclosed by an Information Officer of the State pursuant to a right to information application may subsequently be widely disseminated. Clause (j) of sub section (1) of Section 8 provides that, in certain situations, even personal information of an individual may be disclosed under the RTI Act. Where the RTI Act contemplates the disclosure of "personal information", the right to privacy of the individual is engaged. The Act recognise that the absolute or unwarranted disclosure of an individual's personal information under the RTI Act would constitute an "unwarranted invasion of the right to privacy" under the statutory provisions of the RTI Act and also abridge the individual's constitutional right to privacy. However, the RTI Act has various checks and balances to guard against the unadulterated disclosure of personal information under the RTI Act.

87. The constitutional validity of the RTI Act as a measure abridging the right to privacy is not in question before this Court. But it is trite to say that the RTI Act satisfies the test of legality (by virtue of being a legislation) and also pursues a legitimate state aim of ensuring, transparency and accountability of government and an informed electorate. By requiring the Information Officer to balance the public interest in disclosure against the privacy harm caused, clause (j) creates a legislatively mandated measure of proportionality to ensure that the harm to the individual's right to privacy is not disproportionate to the aim of securing transparency and accountability.

A balancing of interests

88. The RTI Act is a legislative enactment which contains a finely tuned balancing of interests between the privacy right of individuals whose information may be disclosed and the broader public interest in ensuring transparency, accountability and an informed electorate. Both these interests have significant implications as they engage constitutional rights under Part III. The overarching scheme of the RTI Act, and in particular Sections 3, 4 and 7 constitutes a mandate to fulfil the positive content of the 'right to information' as a facet of Article 19(1)(a) of the Constitution. The privacy interest protected by clause (j) to sub section (1) of Section 8 engages the principle of informational privacy as a facet of the constitutional privacy as recognised by this Court in **K S Puttaswamy**. Neither the 'right to information' as a facet of Article 19(1)(a) nor the right to informational privacy as a facet to the right to privacy are absolute. The rights under Article 19(1)(a) may be restricted on the grounds enumerated in

clause (2) of Article 19. The right to privacy and its numerous facets may be permissibly restricted where the abridgement is provided by law, pursues a legitimate State objective and complies with the principle of proportionality.

89. Clause (j) of sub section (1) of Section 8 requires the Information Officer to first determine whether the information sought falls within the meaning of "personal information". Where the information sought falls within the scope of "personal information" and has "no relationship to any public activity or interest" the information is exempt from disclosure under the RTI Act. However, where there exists a 'public interest' in the disclosure of the information sought, the test to be applied by the Information Officer is different. The Information Officer must evaluate whether the "larger public interest" justifies the disclosure of the information notwithstanding the fact that the information is "personal information". In doing so, the Information Officer must balance the privacy interest of the individual whose personal information will be disclosed with the right to information of the public to know the information sought. The substantive content of the terms "personal information" and "public interest" must be informed by the constitutional standards applicable to the 'right to know' and the 'right to privacy' as disclosure and non-disclosure under the RTI Act directly implicate these constitutional rights. In striking a balance within the framework of the RTI Act, the Information Officer must be cognisant of the substantive contents of these rights and the extent to which they can be restricted within our constitutional scheme. It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfil the legitimate

interest of the countervailing interest in question. It is now necessary to examine the content of “personal information” and “public interest”.

Defining Personal Information

90. To understand the scope of information which is protected from disclosure under the RTI Act, it is of relevance to identify the nature of information which may be regarded as “personal information”. The RTI Act does not put forth a definition of the term “personal information”. However, “personal information” has been defined under other statutory frameworks. These definitions obviously do not bind the interpretation of the RTI Act but are useful sources of guidance in understanding the amplitude of the expression. We must of course read them with a caveat because the context of usage is not the same.

Section 2(i) of the Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011 defines the term “personal information” in the following terms:

> “Personal information means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.”

Thus, any information which is capable of identifying a natural person is classified as personal information.

91. **Article 4(1) of the EU General Data Protection Regulation (GDPR)** defines personal data in similar terms:

> “Personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an

> identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

The data protection regime in the European Union regards information such as the name and surname, home address, location data, data held by a hospital or doctor and identification card number of an individual as personal data.[87] Courts from the jurisdiction have interpreted the term "personal data" broadly to even include information relating to the professional life of an individual.

In **Worten** v **Autoridade para as Condições de Trabalho**[88], the European Court of Justice held the work timings of an employee constitute personal data:

> "19. In that respect, it suffices to note that, as maintained by all of the interested parties who submitted written observations, the data contained in **a record of working time** such as that at issue in the main proceedings, which concern, in relation to each worker, the **daily work periods and rest periods**, constitute personal data within the meaning of Article 2(a) of Directive 95/46, because they represent 'information relating to an identified or identifiable natural person"
>
> (Emphasis supplied)

In **Rechnungshof** v **Österreichischer Rundfunk**,[89] the European Court of Justice held that details of professional income received by employees from an organisation subject to regulation by the Austrian Court of Audit amounts to "personal data". It was held:

> "It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by

[87] What is personal data?, Official Website of the European Union https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en

[88] C-342/12 dated 30 May 2013

[89] Joined cases (C-465/00), (C-138/01) and (C-139/01) dated 20 May 2003

> certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being information relating to an identified or identifiable natural person. **Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive."**
>
> (Emphasis supplied)

92. **The Protection of Personal Information Act, 2013** of South Africa contains an illustrative and comprehensive definition of personal information**:**

> ''personal information'' means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—
> (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
> (b) information relating to the education or the medical, financial, criminal or employment history of the person;
> (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
> (d) the biometric information of the person;
> (e) the personal opinions, views or preferences of the person;
> (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
> (g) the views or opinions of another individual about the person; and
> (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person."

Protection from disclosure of personal information has been recognised as a facet of the right to privacy in South Africa. In **National Media Limited** v

Jooste[90], it was alleged by the respondent that intimate details of her personal life had been published by the appellant publishers without her consent. The information published included details of her child as well as her relationship with the father of the child. Justice Harms elucidated the right to privacy in the following terms:

> "**A right to privacy encompasses the competence to determine the destiny of private facts**. The individual concerned is entitled to dictate the ambit of disclosure e g to a circle of friends, a professional adviser or the public. He may prescribe the purpose and method the disclosure. Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public…"
>
> (Emphasis supplied)

In **NM** v **Smith**[91], the names of three women who were HIV positive were disclosed in a biography. It was alleged by the women that their names had been disclosed without any prior consent and their rights to privacy, dignity and psychological integrity had been violated by the disclosure. The opinion of four judges in Puttaswamy noted the two conceptions of privacy that emerged from the judgement of the Constitutional Court of South Africa which recognised the value of privacy in medical information:

> "According to the decision in *Smith case* , there are two interrelated reasons for the constitutional protection of privacy—one flows from the "constitutional conception of what it means to be a human being" and the second from the "constitutional conception of the State":
> "An implicit part of [the first] aspect of privacy is the right to choose what personal information of ours is released into the public space. **The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be**

[90] 1996 (3) SA 262 (SCA)
[91] [2007] ZACC 6

> **made by others. This aspect of the right to privacy must be respected by all of us, not only the state.**
>
> … Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the State… In authoritarian societies, the state generally does not afford such protection. People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity. In democratic societies, this is impermissible."
>
> ….
>
> On the interrelationship between the right to privacy, liberty and dignity, the Court observed that:
> "The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it **highlights the interrelationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore interdependent and mutually reinforcing.** We value privacy for this reason at least—that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community."
>
> (Emphasis supplied)

93. In **Australian Broadcasting Corporation** v **Lenah Game Meats**[92], the Australian High Court heard an appeal with regard to an application for an interlocutory injunction to restrain the broadcasting of a film depicting the activities of the Respondent. The Respondent was a processor and supplier of game meat and sold possum meat for export. Unknown persons had entered the respondent's premises and installed hidden cameras. The possum-killing operations were filmed without the knowledge or consent of the respondent. It was claimed that the film was made surreptitiously and unlawfully and supplied to

[92] [2001] HCA 63

the appellant with the intention that the appellant would broadcast the film. In determining the Respondent Corporation's claim to privacy, Chief Justice Gleeson made the following observations:

> "42. There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. **Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."**
>
> (Emphasis supplied)

94. In **Campbell** v **MGN Limited**[93], the claimant was a supermodel who had instituted proceedings against a publication called the 'Mirror' for publishing details of her efforts to overcome her drug addiction along with pictures of her attending meetings of the 'Narcotics Anonymous'. The appeal was before the House of Lords. In her opinion, Baroness Hale noted:

> "145. It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the

[93] [2003] 1 All ER 224

> doctor-patient relationship but from the nature of the information itself…"
>
> ….
>
> 147. I start, therefore, from the fact - indeed, it is common ground - **that *all* of the information about Miss Campbell's addiction and attendance at NA which was revealed in the Daily Mirror article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information.** But the starting point must be that it was all private and its publication required specific justification.
>
> (Emphasis supplied)

95. Courts in India have interpreted the scope of information which constitutes "personal information" under the RTI Act. In **Girish Ramchandra Deshpande** v **Central Information Commissioner**[94], the petitioner sought copies of memos, show-cause notices and punishments awarded to the third respondent by his employer along with details of movable and immovable properties, investments, lending and borrowing from banks and other financial institutions. The petitioner also sought the details of gifts stated to have been accepted by the third respondent. A large portion of the information sought was located in the income tax returns of the third respondent. A two judge bench of the Court classified the information sought as "personal information" and held:

> "12. … The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of

[94] (2013) 1 SCC 212

> privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.
>
> 13. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information."

Thus, even in cases where information may be classified as "personal information", the CPIO is required to undertake an enquiry on a case to case basis to determine if the disclosure of information is justified.

96. In **R K Jain** v **Union of India**[95], the appellant's application to the Chief Information Commissioner seeking copies of note-sheets and files relating to a member of CESTAT, was rejected. The two-judge bench of this Court placed reliance on the holding in **Girish Deshpande** and rejected the appellant's claim for inspection of documents relating to the Annual Confidential Reports of the member of CESTAT, including documents relating to adverse entries in the Annual Confidential Reports and the "follow-up action" taken. In **Canara Bank** v **C S Shyam**[96], the respondent was employed by the appellant bank as clerical staff and had asked for information relating to the transfer and posting of other clerical staff employed by the bank. This information sought included personal details such as the date of joining, designation of employee, details of promotion

[95] (2013) 14 SCC 794
[96] (2018) 11 SCC 426

earned, date of joining to the branch. Speaking for a two-judge Bench of this Court, Justice A M Sapre considered the holding in **Girish Deshpande** and held

> "14. In our considered opinion, the aforementioned principle of law applies to the facts of this case on all force. It is for the reasons that, firstly, the information sought by Respondent 1 of individual employees working in the Bank was personal in nature; secondly, it was exempted from being disclosed under Section 8(1)(*j*) of the Act and lastly, neither Respondent 1 disclosed any public interest much less larger public interest involved in seeking such information of the individual employee nor was any finding recorded by the Central Information Commission [*C.S. Shyam* v. *Canara Bank*, 2007 SCC OnLine CIC 626] and the High Court [*Canara Bank* v. *CIC*, 2007 SCC OnLine Ker 659] as to the involvement of any larger public interest in supplying such information to Respondent 1."

97. In **Subhash Chandra Agarwal** v **Registrar, Supreme Court of India**[97], the appellant had filed an application under the RTI Act seeking information relating to the details of the medical facilities availed by the Judges of the Supreme Court and their family members in the preceding three years, including information relating to expenses on private treatment in India or abroad. The Court held that disclosure of information regarding medical facilities availed by judges amounts to an invasion of privacy:

> "11. The information sought by the appellant includes the details of the medical facilities availed by the individual Judges. The same being personal information, we are of the view that providing such information would undoubtedly amount to invasion of the privacy. We have also taken note of the fact that it was conceded before the learned Single Judge by the learned counsel for the appellant herein that no larger public interest is involved in seeking the details of the medical facilities availed by the individual Judges. It may also be mentioned that the total expenditure incurred for the medical treatment of the Judges for the period in question was already furnished by the CPIO by his letter dated 30-8-2011 and it is

[97] (2018) 11 SCC 634

> not the case of the appellant that the said expenditure is excessive or exorbitant. That being so, we are unable to understand how the public interest requires disclosure of the details of the medical facilities availed by the individual Judges. In the absence of any such larger public interest, no direction whatsoever can be issued under Section 19(8)(a)(iv) of the Act by the appellate authorities. Therefore on that ground also the order passed by the CIC dated 1-2-2012 is unsustainable and the same has rightly been set aside by the learned Single Judge."

Thus, it emerges from the discussion that certain category of information such as medical information, details of personal relations, employee records and professional income can be classified as personal information. The question of whether such information must be disclosed has to be determined by the CPIO on a case to case basis, depending on the public interest demonstrated in favour of disclosure.

Public Interest

98. The right to information and the need for transparency in the case of elected officials is grounded in the democratic need to facilitate better decision making by the public. Transparency and the right to information directly contribute to the ability of citizens to monitor and make more informed decisions with respect to the conduct of elected officials. Where the misconduct of an elected representative is exposed to the public, citizens can choose not to vote for the person at the next poll. In this manner, the democratic process coupled with the right to information facilitates better administration and provides powerful incentives for good public decision making. In the case of judges, citizens do not possess a direct agency relationship. Therefore, the 'public interest' in disclosing

information in regard to a judge cannot be sourced on the need for ensuring democratic accountability through better public decision making but must be located elsewhere.

99. In common law countries, public interest has always been understood to operate as an interest independent to that of the State. Public interest operates equally against the State as it does against non-State actors. This is of significance in the context of the RTI Act as the right to information seeks to bring about disclosure of information previously held exclusively by the State. Public interest therefore operates as a standalone viewpoint independent of whether the interest of the State favours disclosure or non-disclosure. At its core, the objective test for 'public interest' is far broader than democratic decision making and takes into consideration both shared conceptions of the common good in society at any given point and yet recognises that such conceptions are always the product of contestation and disagreement, necessitating a robust set of viewpoints to facilitate the self-fulfilment of the individual and the search for truth.

100. In **Secy., Ministry of Information & Broadcasting, Govt. of India** v **Cricket Assn. of Bengal**[98] Justice P B Sawant speaking for a three judge bench of this Court observed:

> "43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible

[98] (1995) 2 SCC 161

> range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach."

The right to information is not solely premised on improving the quality of democratic decision making but also finds its roots in other bases of freedom of expression, including the self-fulfilment of the individual, the introduction of competing views into the 'marketplace of ideas' and the autonomy and dignity of the individual. Limiting the term 'public interest' to information that allows individuals to make better public choices with respect to public officials fails to take into consideration the powerful benefits that the dissemination of information held by public authorities may have on the development of discourse, private decision making and the nourishment of the individual.

101. We have already observed that the accountability of the judiciary to the citizenry is inherent in the office of the judge. The administration of justice in our country is a vast, crucial and expensive endeavour that impacts millions of citizens on a daily basis. The contention that merely because a judge cannot be elected out of office, the conduct of judges and their general administration is not a matter of great public interest cannot be countenanced. The disclosure of information about the conduct of judges and their administration is necessary to ensure that the broader societal goals in the administration of justice are

achieved. The disclosure of information can highlight areas where robust mechanisms of oversight and accountability are required. Lastly, the disclosure of information with respect to the judiciary also facilitates the self-fulfilment of the freedom of expression of individuals engaged in reporting, critiquing and discussing the activities of the court. The freedom of the press in exercising its role as a 'public watchdog' is also facilitated by the disclosure of information.

102. The factors that weigh in favour of disclosure in the 'public interest' are specific to each unique case. However, over the years several authorities have given shape to the concept of public interest and provided indicative factors that weigh in favour of the disclosure of information. In an article titled "**Freedom of information and the public interest: the Commonwealth experience**"[99] the authors lay down several factors that, when found to exist in any given case, would weigh in favour of disclosure. The authors state:

> "It is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interest of the public to know and matters which were merely interesting to the public (ie which the public would like to know about, and which sell newspapers, but … are not relevant)'
> Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancements of scrutiny of decision-making; and protecting against danger to public health or safety."

[99] Moira Paterson and Maeve McDonagh, Freedom of information and the public interest: the Commonwealth experience, Oxford University Commonwealth Law Journal, 17:2, 189-210 pp. 201.

The factors identified fulfil a significantly broader gamut of goals than merely holding democratically elected officials accountable. The contribution made by the disclosure of information to debate on matters of public importance is in itself a factor in favour of disclosure. Where the disclosure of documents casts a light on the adequate performance of public authorities and any *mala fide* actions or wrongdoings by public figures, facilitating the broader goal of accountability, there exists a public interest in favour of disclosure.

103. In **Campbell** v **MGN Limited**[100] the House of Lords was called upon to balance the freedom of expression with the right to privacy. The claimant was a model who had been photographed leaving a drug rehabilitation meeting. The photographs were published, and the claimant claimed compensation for a breach of confidentiality. While the claimant admitted that there existed a public interest in the photographs of her attending the drug rehabilitation therapy, in evaluating the right of the defendant to publish the information Baroness Hale made the following observations:

> "148. What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. **Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy.** Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. **Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in**

[100] [2004] UKHL 22

> **society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value.** No doubt there are other kinds of speech and expression for which similar claims can be made."
>
> (Emphasis supplied)

As a facet of the freedom of expression, the 'public interest' element of the right to information has several jurisprudential bases. The public interest in disclosure extends to information which informs political debate and the organisation of "economic, social and political life". There also exists public interest in information which is "intellectual or educational" and furthers the development of the individual. Lastly, public interest would also cover information which is of artistic relevance or fosters and nourishes the individual.

104. The opinion of Baroness Hale indicates a priority of interests in the determination of whether speech is in the 'public interest' and is deserving of protection. However, this Court should caution against such an approach. The freedom of expression protects a broad range of ideas, including those that 'offend, shock and disturb'. In deciding whether information should be disclosed in the public interest, it is not for the Court to sit in judgement of society and make a determination on whether society would be 'better off' or 'worse off' if the information is disclosed. In the prescient words of Justice Tugendhat: "It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have."[101] It is well established that 'public interest' does not amount to what the public may find interesting. However, where the information sought to be disclosed falls within the various fields

[101] Terry (previously 'LNS') v Persons Unknown [2010] EWHC 119

discussed above, including the promotion of public debate, intellectual or educational information or artistic information, the information possesses a 'public interest' connotation in favour of disclosure.

105. Section 11B of the Australian Freedom of Information Act 1982 provides a list of indicative factors that may be used by courts to determine whether a document should be disclosed in the "public interest". Section 11B is as under:

> "**11B Public interest exemptions – factors**
> (1) This section applies for the purpose of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
> (2) This section does not limit subsection 11A(5).
> Factors favouring access
> (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
> (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
> (b) inform public debate on a matter of public importance;
> (c) promote effective oversight of public expenditure;
> (d) allow a person to access his or her own personal information."

The Australian statute notes that "public interest" must be interpreted as the factors and circumstances that promote the objectives of the legislation. In addition to these objectives, crucial factors weighing in favour of public interest are the promotion of public debate and matters relating to public expenditure.

106. The understanding that, in interpreting the phrase 'public interest' courts should pay heed to the objects of the legislation has been adopted in our country as well. In **Bihar Public Service Commission** v **Saiyed Hussain Abbas**

Rizwi[102], Justice Swatanter Kumar speaking for a two judge bench of this Court made the following observations:

> "22. **The expression "public interest" has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act.** The expression "public interest" must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. **In its common parlance, the expression "public interest", like "public purpose", is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs** (*State of Bihar* v. *Kameshwar Singh* [AIR 1952 SC 252]). It also means the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake [*Black's Law Dictionary* (8th Edn.)]."
>
> (Emphasis supplied)

The Court noted that the phrase 'public interest' must be understood within the context of the enactment the phrase is used in. In the present case, the use of the phrase 'public interest' must be understood in light of the object and purpose of the RTI Act. The Court in **Bihar Public Service Commission** observed that the existence of certain exemptions from disclosure under clause (1) of Section 8 would lead to a narrow reading of the phrase "public interest". This is not the correct approach. As noted previously in this judgement, the overarching principle of the RTI Act is to operationalise the disclosure of information held by public authorities in furtherance of the right to information under Article 19(1)(a) of the Constitution. Merely because the provisions of the RTI Act contain certain restrictions on the disclosure of information cannot lead to a conclusion that the phrase "public interest" under the RTI Act must be construed narrowly. Rather, under the scheme of clause (j) of clause (1) of Section 8, "public interest" is the

[102] (2012) 13 SCC 61

measure of factors favouring the disclosure of information, which is subsequently weighed against the factors of privacy which weight in favour of non-disclosure. The existence of the balancing test creates a restriction on disclosure under the RTI Act but does not affect the wide meaning independently accorded to “public interest” understood as emanating from the freedom of speech and expression.

107. Clause (j) of clause (1) of Section 8 requires the Information Officer to weigh the “public interest” in disclosure against the privacy harm. The disclosure of different documents in different circumstances will give rise to unique “public interest” factors in favour of disclosure. However, a few broad principles may be laid out as to how the phrase “public interest” is to be understood. Where factors fall within this interpretation “public interest” so interpreted, they are factors that weigh in favour of disclosure. The principles are as follows:

(i) Public interest is not limited to information which directly promotes the democratic accountability of elected officials;

(ii) There exists public interest in the disclosure of information where the information sought informs political debate, is educational or intellectual or serves artistic purposes;

(iii) Where the information sought will promote public debate on political, economic or social issues, there exists a public interest in disclosure;

(iv) Judges and Information Officers should not pass a value judgement on whether the speech in question furthers their own conception of societal good or interest for it to satisfy the test of public interest;

(v) As an indicative list, information concerning the accountability of officials, public expenditure, the performance of public duties, the handling of complaints, the existence of any wrongdoing by a public official, inefficiency in public administration and unfairness in public administration all possess public interest value, their relative strength to be determined on a case by case basis;

(vi) Where the disclosure of information would promote the aims and objectives of the RTI Act, there exists a "public interest" in disclosing such information; and

(vii) The object and purpose of the RTI Act is the fulfilment of the positive obligation on the State to provide access to information under Article 19(1)(a) of the Constitution and the existence of the restrictions on the disclosure of information does not restrict the meaning of "public interest" under the Act.

Balancing interests in disclosure with privacy interests

108. We have adverted to the substantive content of "personal information" and "public interest" as distinct factors to be considered by the Information Officer when arriving at a determination under clause (j) of clause (1) of Section 8. In the present case, the information sought by the respondent raises both considerations of "public interest" and "personal information". The text of clause (j) requires the Information Officer to make a determination whether the "larger public interest justifies the disclosure" of personal information sought. The

Information Officer must conduct balancing or weighing of interests in making a determination in favour of disclosure or non-disclosure. The Information Officer must be cognisant that any determination under clause (j) of clause (1) of Section 8 implicates the right to information and the right to privacy as constitutional rights. Reason forms the heart of the law and the decision of the Information Officer must provide cogent and articulate reasons for the factors considered and conclusions arrived at in balancing the two interests. In answering the third referral question in its entirety, this Court would be remiss in not setting out the analytical approach to be applied by the Information Officer in balancing the interests in disclosure with the countervailing privacy interests. Justice S C Agrawal speaking for a Constitution Bench of this Court in **S N Mukherjee** v **Union of India**[103] observed:

> "9. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier **the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making.** Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that **the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.** The rules of natural justice are not embodied rules.
>
> (Emphasis supplied)

The requirement to record reasons is a principle of natural justice and a check against the arbitrary exercise of power by judicial and quasi-judicial bodies. In making a determination under clause (j) of clause (1) of Section 8 in a given case, it would not be satisfactory if an Information Officer were merely to record

[103] (1990) 4 SCC 495

that the privacy interest outweighed the public interest. Something more is required. By providing an analytical framework to address the two interests to be weighed and requiring the Information Officer record detailed reasons within this framework, the arbitrary exercise or discretion of the Information Officer is guarded against.

109. In the prescient words of Lord Denning:

> "…each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same."[104]

Neither the right to information nor the right to privacy are absolute rights under the framework of the RTI Act. Where the right to information of an information applicant in requesting information touches upon the right to privacy of the person whose information is sought, the RTI Act calls upon the Information Officer to weigh the two interests and determine which is stronger. In **Thalappalam Service Coop. Bank Ltd.** v **State of Kerala**[105] Justice K S P Radhakrishnan, speaking for a two judge bench of this Court, noted:

> "61. **The right to information and right to privacy are, therefore, not absolute rights,** both the rights, one of which falls under Article 19(1)(*a*) and the other under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. **Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act**…. **The citizens, in that event, can always claim a**

[104] Lord Denning, Freedom Under the Law (Hamlyn Lectures) 1968 (Sweet & Maxwell).
[105] (2013) 16 SCC 82

> **right to privacy**, the right of a citizen to access information should be respected, so also a citizen's right to privacy."
>
> (Emphasis supplied)

110. In setting out the precise approach to be adopted by the Information Officer in making a determination under clause (j) of clause (1) of Section 8 it is worth adverting to the decision of **Campbell** v **MGM Limited**[106] the facts of which have already been discussed above. In that case, the House of Lords was called upon to balance the privacy rights of the claimant, being photographed leaving a 'Narcotics Anonymous' meeting, under Article 8 of the European Convention of Human Rights[107] and the right of the defendant to publish the information under Article 10 of the ECHR which provides for the freedom of expression. Although not a case with respect to the disclosure of documents, the House of Lords makes several notable observations about balancing privacy and free speech interests. Lord Nicholls observed:

> "20. I should take this a little further on one point. **Article 8(1) recognises the need to respect private and family life.** Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. **Article 10(1) recognises the importance of freedom of expression.** But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. **When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.**"
>
> (Emphasis supplied)

[106] [2004] UKHL 22
[107] "ECHR"

The first question of significance is whether the right to privacy of the person whose information is sought is engaged. This approach was subsequently applied by the Court of Appeal in **HRH Prince of Wales** v **Associated Newspapers Ltd**[108]. The text of clause (j) of clause (1) of Section 8 also articulates this threshold. For clause (j) to be engaged at the first instance, the information sought must constitute "personal information". This is an inquiry independent to the question of how the privacy interest should be balanced with the free speech interest.

111. Where the information sought is "personal information" the court must next balance the interest in disclosure or dissemination with the privacy interest at stake. Baroness Hale in her opinion in **Campbell** stated:

> "137. It should be emphasised that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.
> …
> 140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. **It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it.**
> 141. Both parties accepted the basic approach of the Court of Appeal in In re S [2003] 3 WLR 1425, 1451-1452, at paras 54 to 60. This involves looking **first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering**

[108] [2006] EWHA Civ 1776

> **with or restricting each of those rights; and applying the proportionality test to each.** The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the Article 10 right while the respondent argued that the trial judge had assumed primacy for the Article 8 right.
>
> (Emphasis supplied)

112. Once the information sought has been identified as "personal information" the Information Officer must identify the actual rights being claimed in the individual case. In setting out the substantive content of 'public interest' and 'privacy' various facets of these concepts have been set out. In any given case, the Information Officer must identify the precise interests weighing in favour of 'public interest' disclosure, and those interests weighing in favour of 'privacy' and non-disclosure. The Information Officer must then examine the justifications for restricting each right and whether they are countenanced under the scheme of RTI Act and in law generally. The ground of confidentiality simpliciter is not a ground to restrict the right to information under the RTI Act or Article 19(1)(a) of the Constitution. Lastly, the Information Officer must employ the principle of proportionality. As observed by Baroness Hale, both the right to privacy and the right to information are legitimate aims. In applying the principle of proportionality, the Information Officer must ensure that the abridgement of a right is not disproportionate to the legitimate aim sought to be achieved by enforcing the countervailing right.

113. Take the example of where an information applicant sought the disclosure of how many leaves were taken by a public employee and the reasons for such leave. The need to ensure accountability of public employees is of clear public

interest in favour of disclosure. The reasons for the leave may also include medical information with respect to the public employee, creating a clear privacy interest in favour of non-disclosure. It is insufficient to state that the privacy interest in medical records is extremely high and therefore the outcome should be blanket non-disclosure. The principle of proportionality may necessitate that the number of and reasons for the leaves be disclosed and the medical reasons for the leave be omitted. This would ensure that the interest in accountability is only abridged to the extent necessary to protect the legitimate aim of the privacy of the public employee.

114. Having adverted to the analytical test to be applied by the Information Officers in balancing the two interests, it is also worth setting out certain factors that should not be considered in such a balancing. Section 11B of the **Australian Freedom of Information Act 1982** lays down certain 'Irrelevant factors' that should not be considered in determining whether to disclose information. Section 11B is as under:

> "…*Irrelevant factors*
> (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
> (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
> (b) access to the document could result in any person misinterpreting or misunderstanding the document;
> (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
> (d) access to the document could result in confusion or unnecessary debate."

The factors set out above are not relevant or permissible restrictions on the right to information and should not be considered in determining whether or not to disclose information under the RTI Act. Clause (2) of Section 6 of the RTI Act provides that an information applicant need not provide any reason as to why the information is sought. It would not be open for an Information Officer to deny the disclosure of information on the ground that the information would lead to confusion, embarrassment or unnecessary debate in the public sphere. By enumerating the grounds on which information may be exempted from the general obligation to disclose, clause (1) of Section 8 negates the notion that information may be withheld on the sole ground of confidentiality.

I Conclusion

115. The information sought by the respondent pertains to (1) the correspondence and file notings relating to the elevation of three judges to the Supreme Court, (2) information relating to the declaration of assets made by judges pursuant to the 1997 resolution, and (3) the identity and nature of disciplinary proceedings instituted against the lawyer and judge named in the newspaper report. The third referral question requires this Court to determine whether the disclosure of the information sought is exempt under clause (j) of clause (1) of Section 8. In arriving at a determination on whether the information sought is exempt under clause (j), it is necessary to (i) determine whether the information sought is “personal information” and engages the right to privacy, (ii) identify, in the facts of the present case, the specific heads of public interest in favour of disclosure and the specific privacy interests claimed, (iii) determine the

justifications for restricting such interests and (iv) apply the principle of proportionality to ensure that no right is abridged more than required to fulfil the legitimate aim of the countervailing right. The process under Section 11 of the RTI must be complied with where the information sought is 'third party information'. The substantive content of the terms 'personal information' and 'public interest' have also been set out in the present judgement.

J Directions

116. The information sought in Civil Appeal No 2683 with respect to which judges of the Supreme Court have declared their assets does not constitute the "personal information" of the judges and does not engage the right to privacy. The contents of the declaration of assets would fall within the meaning of "personal information" and the test set out under clause (j) of clause (1) of Section 8 would be applicable along with the procedure under Section 11 of the RTI Act. In view of the above observations, Civil Appeal No. 2683 of 2010 is dismissed and the judgement of the Delhi High Court dated 12 January 2010 in LPA No 501 of 2009 is upheld.

117. Civil Appeals Nos 10044 and 1045 of 2010 are remanded to the CPIO, Supreme Court of India to be examined and a determination arrived at, after applying the principles set out in the present judgement. The information sought in these appeals falls within the meaning of 'third party information' and the procedure under Section 11 must be complied with in arriving at a determination.

Brother Justice Sanjiv Khanna has observed that:

> "Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future"

I wish to add a few thoughts of my own on the subject. The collegium owes its birth to judicial interpretation. In significant respects, the collegium is a victim of its own birth – pangs. Bereft of information pertaining to both the criteria governing the selection and appointment of judges to the higher judiciary and the application of those criteria in individual cases, citizens have engaged the constitutional right to information, facilitated by the RTI Act.

If the content of the right and the enforcement of the statute are to possess a meaningful dimension in their application to the judiciary – as it must, certain steps are necessary. Foremost among them is that the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm. This is not only in terms of the procedure which is followed in making appointments but also in terms of the substantive norms which are adopted while making judicial appointments. There can be no denying the fact that there is a vital element of public interest in knowing about the norms which are taken into consideration in selecting candidates for higher judicial office and making judicial appointments. Knowledge is a powerful instrument which secures

consistency in application and generates the confidence that is essential to the sanctity of the process of judicial appointments. This is essentially because the collegium system postulates that proposals for appointment of judges are initiated by the judges themselves. Essential substantial norms in regard to judicial appointments include:

(i) The basis on which performance of a member of the Bar is evaluated for the purpose of higher judicial office;

(ii) The criteria which are applied in determining whether a member of the Bar fulfils requirements in terms of:

a) Experience as reflected in the quantum and nature of the practice;

b) Domain specialization in areas which are geared to the evolving nature of litigation and the requirements of each court;

c) Income requirements, if any, having regard to the nature of the practice and the circumstances prevailing in the court or region concerned;

d) The commitment demonstrated by a candidate under consideration to the development of the law in terms of written work, research and academic qualifications; and

e) The social orientation of the candidate, defined in terms of the extent of *pro bono* or legal aid work;

(iii) The need for promoting the role of the judiciary as an inclusive institution and its diversity in terms of gender, representation to minorities and the marginalised, orientation and other relevant factors.

The present judgment does not seek to define what the standards for judicial appointments should be. However, what needs to be emphasised is that the substantive standards which are borne in mind must be formulated and placed in the public realm as a measure that would promote confidence in the appointments process. Due publicity to the norms which have been formulated and are applied would foster a degree of transparency and promote accountability in decision making at all levels within the judiciary and the government. The norms may also spell out the criteria followed for assessing the judges of the district judiciary for higher judicial office. There is a vital public interest in disclosing the basis on which those with judicial experience are evaluated for elevation to higher judicial office particularly having regard to merit, integrity and judicial performance. Placing the criteria followed in making judicial appointments in the public domain will fulfil the purpose and mandate of Section 4 of the RTI Act, engender public confidence in the process and provides a safeguard against extraneous considerations entering into the process.

…….....J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
November 13, 2019.

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL/CRIMINAL ORIGINAL JURISDICTION

Review Petition (Crl.) No.46 of 2019

IN

Writ Petition (Crl.) No.298 of 2018

YASHWANT SINHA & ORS. ….Petitioners

Versus

CENTRAL BUREAU OF INVESTIGATION
Through its DIRECTOR & ANR. ….Respondents

(I.A. No. 69008/2019 – CLARIFICATION/DIRECTION, I.A. No. 69006/2019 – INTERVENTION APPLICATION, I.A. No. 71047/2019 – PRODUCTION OF RECORDS and I.A. No. 69009/2019 – STAY APPLICATION)

WITH

MA 58/2019 in W.P.(Crl.) No. 225/2018 (PIL-W) (I.A. No. 182576/2018 – CORRECTION OF MISTAKES IN THE JUDGMENT)

R.P.(Crl.) No. 122/2019 in W.P.(Crl.) No. 297/2018 (PIL-W)

MA 403/2019 in W.P.(Crl.) No. 298/2018 (PIL-W)

(I.A. No. 29248/2019 – INITIATING CRIMINAL PROCEEDINGS U/S 340 OF CRPC)

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

CONMT.PET.(Crl.) No. 3/2019 in R.P.(Crl.) No. 46/2019 in W.P.(Crl.) No. 298/2018 (PIL-W)

(I.A. No. 63168/2019 – EXEMPTION FROM FILING O.T., I.A. No.71678/2019 – EXEMPTION FROM FILING O.T. and I.A. No. 66253/2019 – EXEMPTION FROM FILING O.T.)

J U D G M E N T

SANJAY KISHAN KAUL, J.

(I.A. No. 63168/2019 – EXEMPTION FROM FILING O.T., I.A. No.71678/2019 – EXEMPTION FROM FILING O.T. and I.A. No. 66253/2019 – EXEMPTION FROM FILING O.T.)

1. Allowed subject to just exception.

MA 58/2019 in W.P.(Crl.) No. 225/2018 (PIL-W) (I.A. No. 182576/2018 – CORRECTION OF MISTAKES IN THE JUDGMENT)

2. The Union of India has filed the present application seeking correction of what they claim to be an error, in two sentences in para 25 of the judgment delivered by this Court on 14.12.2018. This error is stated to be on account of a misinterpretation of some sentences in a note handed over to this Court in a sealed cover.

3. The Court had asked vide order dated 31.10.2018 to be apprised of the details/cost as also any advantage, which may have accrued on that account, in the procurement of the 36 Rafale fighter jets. The confidential note in the relevant portions stated as under:

> "The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC. Only a redacted version of the report is placed before the Parliament and in public domain."

4. It is the submission of the learned Attorney General that the first sentence referred to the sharing of the price details with the CAG. But the second sentence qua the PAC referred to the process and not what had already transpired. However, in the judgment this portion had been understood as if it was already so done.

5. On hearing learned counsel for the parties, we are of the view that the confusion arose on account of two portions of the paragraph referring to both what had been and what was proposed to be done. Regardless, what we noted was to complete the sequence of facts and was not the rationale for our conclusion.

6. We are, thus, inclined to accept the prayer and the sentence in para 25 to the following effect - "The pricing details have, however, been shared with the Comptroller and Auditor General (hereinafter referred to as "CAG"), and the report of the CAG has been examined by the Public Accounts Committee (hereafter referred to as "PAC"). Only a redacted portion of the report was placed before the Parliament and is in public domain" should be replaced by what we have set out hereinafter:

> "The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC in the usual course of business. Only a redacted version of the report is placed before the Parliament and in public domain."

7. The prayer is accordingly allowed.

8. The application stands disposed of.

R.P. (Crl.) No.46/2019 in WP (Crl.) No.298/2018
R.P.(Crl.) No. 122/2019 in W.P.(Crl.) No. 297/2018 (PIL-W)
MA 403/2019 in W.P.(Crl.) No. 298/2018 (PIL-W)

(I.A. No. 29248/2019 – INITIATING CRIMINAL PROCEEDINGS U/S 340 OF CRPC)

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

9. The review petitions were listed for hearing in Court and elaborate submissions were made by learned counsel for the parties.

10. We may note that insofar as the preliminary objection raised by the Attorney General is concerned qua certain documents sought to be produced by the petitioners, that aspect was dealt with by our order dated 10.4.2019 and the said preliminary objection was overruled.

11. We cannot lose sight of the fact that unless there is an error apparent on the face of the record, these review applications are not required to be entertained. We may also note that the application under Section 340 of the Code of Criminal Procedure, 1973 partly emanates

from an aspect which has been dealt with in our order passed today on the application for correction of the order filed by the Union of India.

12. We have elaborately dealt with the pleas of the learned counsel for the parties in our order dated 14.12.2018 under the heads of 'Decision Making Process', 'Pricing' and 'Offsets'. However, before proceeding to deal with these aspects we had set out the contours of the scrutiny in matters of such a nature. It is in that context we had opined that the extent of permissible judicial review in matters of contract, procurement, etc. would vary with the subject matter of the contract and that there cannot be a uniform standard of depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. In fact, when two of these writ petitions were listed before the Court on 10.10.2018, we had embarked on a limited enquiry despite the fact that we were not satisfied with the adequacy of the averments and the material in the writ petitions. It was the object of the Court to satisfy itself with the correctness of the decision making process.

13. We cannot lose sight of the fact that we are dealing with a contract for aircrafts, which was pending before different Governments for quite some time and the necessity for those aircrafts has never been in dispute. We had, thus, concluded in para 34 noticing that other than the aforesaid three aspects, that too to a limited extent, this Court did not consider it appropriate to embark on a roving and fishing enquiry. We were, however, cautious to note that this was in the context of the writ petition filed under Article 32 of the Constitution of India, the jurisdiction invoked.

14. In the course of the review petitions, it was canvased before us that reliance had been placed by the Government on patently false documents. One of the aspects is the same as has been dealt with by our order passed today on the application for correction and, thus, does not call for any further discussion.

15. The other aspect sought to be raised specifically in Review Petition No.46/2019 is that the prayer made by the petitioner was for registration of an F.I.R. and investigation by the C.B.I., which has not been dealt with and the contract has been reviewed prematurely by the Judiciary without

the benefit of investigation and inquiry into the disputed questions of facts.

16. We do not consider this to be a fair submission for the reason that all counsels, including counsel representing the petitioners in this matter addressed elaborate submissions on all the aforesaid three aspects. No doubt that there was a prayer made for registration of F.I.R. and further investigation but then once we had examined the three aspects on merits we did not consider it appropriate to issue any directions, as prayed for by the petitioners which automatically covered the direction for registration of FIR, prayed for.

17. Insofar as the aspect of pricing is concerned, the Court satisfied itself with the material made available. It is not the function of this Court to determine the prices nor for that matter can such aspects be dealt with on mere suspicion of persons who decide to approach the Court. The internal mechanism of such pricing would take care of the situation. On the perusal of documents we had found that one cannot compare apples and oranges. Thus, the pricing of the basic aircraft had to be compared which was competitively marginally lower. As to what should be loaded

on the aircraft or not and what further pricing should be added has to be left to the best judgment of the competent authorities.

18. We have noted aforesaid that a plea was also raised about the "non-existent CAG report" but then at the cost of repetition we state that this formed part of the order for correction we have passed aforesaid.

19. It was the petitioners' decision to have invoked the jurisdiction of this Court under Article 32 of the Constitution of India fully conscious of the limitation of the contours of the scrutiny and not to take recourse to other remedies as may be available. The petitioners cannot be permitted to state that having so taken recourse to this remedy, they want an adjudication process which is really different from what is envisaged under the provisions invoked by them.

20. Insofar as the decision making process is concerned, on the basis of certain documents obtained, the petitioners sought to contend that there was contradictory material. We, however, found that there were undoubtedly opinions expressed in the course of the decision making process, which may be different from the decision taken, but then any

decision making process envisages debates and expert opinion and the final call is with the competent authority, which so exercised it. In this context reference was made to (a) Acceptance of Necessity ('AON') granted by the Defence Acquisition Council ('DAC') not being available prior to the contract which would have determined the necessity and quantity of aircrafts; (b) absence of Sovereign Guarantee granted by France despite requirement of the Defence Procurement Procedure ('DPP'); (c) the oversight of objections of three expert members of the Indian Negotiating Team ('INT') regarding certain increase in the benchmark price; and (d) the induction of Reliance Aerostructure Limited ('RAL') as an offset partner.

21. It does appear that the endeavour of the petitioners is to construe themselves as an appellate authority to determine each aspect of the contract and call upon the Court to do the same. We do not believe this to be the jurisdiction to be exercised. All aspects were considered by the competent authority and the different views expressed considered and dealt with. It would well nigh become impossible for different opinions to be set out in the record if each opinion was to be construed as to be

complied with before the contract was entered into. It would defeat the very purpose of debate in the decision making process.

22. Insofar as the aforesaid pleas are concerned, it has also been contended that some aspects were not available to the petitioner at the time of the decision and had come to light subsequently by their "sourcing" information. We decline to, once again, embark on an elaborate exercise of analyzing each clause, perusing what may be the different opinions, then taking a call whether a final decision should or should not have been taken in such technical matters.

23. An aspect also sought to be emphasized was that this Court had misconstrued that all the Reliance Industries were of one group since the two brothers held two different groups and the earlier arrangement was with the Company of the other brother. That may be so, but in our observation this aspect was referred to in a generic sense more so as the decision of whom to engage as the offset partner was a matter left to the suppliers and we do not think that much can be made out of it.

24. It is for the aforesaid reasons also that we find that there was no ground made out for initiating prosecution under Section 340 Cr.P.C.

25. We are, thus, of the view that the review petitions are without any merit and are accordingly dismissed, once again, re-emphasising that our original decision was based within the contours of Article 32 of the Constitution of India.

CONMT.PET.(Crl.) No. 3/2019 in R.P.(Crl.) No. 46/2019 in W.P.(Crl.) No. 298/2018 (PIL-W)

26. The contempt petition emanates from an allegation against Mr. Rahul Gandhi, the then President of the Indian National Congress, on account of utterances made in the presence of several media persons on 10.4.2019 by him alleging that the Supreme Court had held that "*Chowkidar* (Mr. Narendra Modi, Prime Minister) is a thief." The Supreme Court was also attributed to having held in consonance with what his discourse was, i.e., that the Prime Minister of India stole money from the Air Force and gave it to Mr. Anil Ambani and that the Supreme

Court had admitted that Mr. Modi had indulged in corruption. It was stated that the Supreme Court had said that the *Chowkidar* is a thief.

27. On notice being issued, reply affidavit dated 22.4.2019 was filed averring that the comments were made on the basis of a *bona fide* belief and general understanding of the order even though the contemnor had not himself had the opportunity to see, read or analyse the order at that stage. It was further averred that there had not been the slightest intention to insinuate anything regarding the Supreme Court proceedings in any manner as the statements had been made by the contemnor in a "rhetorical flourish in the heat of the moment" and that his statement has been used and misused by his political opponents to project that he had deliberately attributed the utterances to the Supreme Court. In that context, it was averred that "nothing could be farther from my mind. It is also clear that no Court would ever do that and hence the unfortunate references (for which I express regret) to the Court order and to the political slogan in juxtaposition the same breath in the heat of political campaigning ought not to be construed as suggesting that the Court had given any finding or conclusion on that issue."

28. The acceptance of such an affidavit was opposed by the petitioner, a BJP Member of Parliament, in the contempt petition. It was stated that instead of expression of any remorse or apology, attempt was made to justify the contemptuous statement as having been made in the heat of the moment.

29. On arguments having taken place in this context, and realizing the seriousness of the matter and the inadequacy of the affidavit, learned counsel for the contemnor took liberty to file an additional affidavit. *Vide* order dated 30.4.2019, this Court left the admissibility and acceptance of such an affidavit to be considered on the subsequent date. An additional affidavit was filed on 8.5.2019 stating that the contemnor held this Court in the highest esteem and respect and never intended to interfere with the process of administration of justice. An unconditional apology was tendered by him by stating that the attributions were entirely unintentional, non-willful and inadvertent.

30. The matter was, once again, addressed by the learned counsel. We have given our thoughtful consideration to this issue.

31. We must note that it is unfortunate that without verification or even perusing as to what is the order passed, the contemnor deemed it appropriate to make statements as if this Court had given an imprimatur to his allegations against the Prime Minister, which was far from the truth. This was not one sentence or a one off observation but a repeated statement in different manners conveying the same. No doubt the contemnor should have been far more careful.

32. The matter was compounded by filing a 20 page affidavit with a large number of documents annexed rather than simply accepting the mistake and giving an unconditional apology. Better wisdom dawned on the counsel only during the course of arguments thereafter when a subsequent affidavit dated 8.5.2019 was filed. We do believe that persons holding such important positions in the political spectrum must be more careful. As to what should be his campaign line is for a political person to consider. However, this Court or for that matter no court should be dragged into this political discourse valid or invalid, while attributing aspects to the Court which had never been held by the Court. Certainly Mr. Gandhi needs to be more careful in future.

33. However, in view of the subsequent affidavit, better sense having prevailed, we would not like to continue these proceedings further and, thus, close the contempt proceedings with a word of caution for the contemnor to be more careful in future.

(I.A. No. 69008/2019 – CLARIFICATION/DIRECTION, I.A. No. 69006/2019 – INTERVENTION APPLICATION, I.A. No. 71047/2019 – PRODUCTION OF RECORDS and I.A. No. 69009/2019 – STAY APPLICATION)

34. In view of the orders passed above, these applications do not survive for consideration and the same are disposed of. Any other pending applications also stands disposed.

.....C.J.I.
[Ranjan Gogoi]

.....J.
[Sanjay Kishan Kaul]

New Delhi.
November 14, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CRIMINAL) NO. 46 OF 2019

IN

WRIT PETITION (CRIMINAL) NO. 298 OF 2018

YASHWANT SINHA AND OTHERS ... PETITIONER(S)

VERSUS

CENTRAL BUREAU OF INVESTIGATION
THROUGH ITS DIRECTOR AND ANOTHER ... RESPONDENT(S)

AND CONNECTED MATTERS

J U D G M E N T

K.M. JOSEPH, J.

1. I have perused the Order proposed by my learned Brother, Justice Sanjay Kishan Kaul. While I agree with the final decision subject to certain aspects considered by me, I would, by my separate opinion, give my reasons, which are as hereunder.

2. The common judgment in four Writ Petitions has generated three Review Petitions, a Contempt Petition and a Petition under Section 340 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.PC' for short) and an application seeking correction.

3. Review Petition (Criminal) No. 46 of 2019 is filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018. In the said Writ Petition, relief sought, *inter alia*, was to register an FIR and to investigate the complaint which was made by the petitioners and to submit periodic status reports. The reliefs, as are made in the clauses 'a' to 'e' of the prayer, read as follows:

> **"a. Issue writ of mandamus or any other appropriate writ directing Respondent No.1 to register an F.I.R. on the complaint that was made by the Petitioners on the 04th of October, 2018.**
>
> **b. Issue writ of mandamus or any other appropriate writ directing the Respondent No.1 to investigate the offences disclosed in the said complaint**

in a time bound manner and to submit periodic status reports to the Court.

c. Issue writ of mandamus or any other appropriate writ directing the Respondent No.2 to cease and desist from influencing or intimidating in any way the officials that would investigate the offences disclosed in the complaint.

d. Issue writ of mandamus or any other appropriate writ directing the Respondent No.1 and Respondent No.2 to not transfer the C.B.I. officials tasked with investigation of the offences mentioned in the complaint.

e. Issue writ of mandamus or any other appropriate writ to ensure that the relevant records are not destroyed or tampered with and are transferred to the CBI."

4. Review Petition (Criminal) No. 122 of 2019 is filed by the petitioner in Writ Petition (Criminal) No. 297 of 2018. The reliefs sought in the said Writ Petition is as follows:

"(a) to constitute a Special Investigating Team (SIT) under the supervision of the Hon'ble Supreme Court with following mandate:

i. to investigate the reasons for cancellation of earlier deal for the purchase of 126 Rafale Fighter Jets.

ii. As to how the figure of 36 Fighter Jets was arrived at without the formalities associated with such a highly sensitive defence procurement.

iii. to look into the alterations made by the Respondent No.2 about the pricing of the Rafale Fighter Jets in view of the earlier price of Rs.526 crores per Fighter Jets alongwith requisite equipments, services and weapons and Rs.670 crores without associated equipments, weapons, India specific enhancements, maintenance support and services; which resulted into the escalation of price of each Fighter Jets from Rs.526 crores to more than 1500 crores;

iv. to investigate as to how a novice company viz. Reliance Defence came in picture of this highly sensitive defence deal involving Rs.59,000 crores without having any kind of experience and expertise in making of Fighter Jets.

v. As to why name of 'Hindustan Aeronautics Limited' was removed from the deal?

vi. As to whether the decision of purchase of only 36 Rafale Fighter Jets instead of 126 was a compromise with the security of the Country or not?

vii. Whether the Reliance Defence or it's sister concern or any other individual or intermediary company has/have influenced the decision making of the purchase of Rafale Fighter Jets at substantially higher prices in the backdrop of the statement given by the then President of French Republic and the investment made by the Reliance Entertainment into the Julie Gayet's Firm Rouge International was made with a purpose to influence the decision of removal of the HAL and induction of Reliance Defence as partner of the Dassault;

(b) to terminate/cancel the inter-governmental agreement with the Govt. of French Republic signed on 23-09-2016 for the purchase of 36 Rafale Fighter Jets and to give direction to the Respondent No.3 to lodge an FIR and to report the progress of investigation to this Hon'ble Court;

(c) to restore the earlier deal for the purchase of 126 Rafale Fighter Jets

which was cancelled on 24.06.2015 by the Govt. of India.

(d) to bar the Dassault Reliance Aerospace Limited (DRAL) from handling/manufacturing the Rafale Fighter Jets;

(e) to direct the Respondent 1&2 to propose the Public Sector Company Hindustan Aeronautics Limited as the Indian Offset Partner of Dassault;"

5. Review Petition (Criminal) No. 719 of 2019 has been filed again by a sole petitioner in Writ Petition (Criminal) No. 1205 of 2018. The reliefs sought in the said Writ Petition is as follows:

"a) Issue an appropriate writ or order or direction directing the respondents to file the details of the agreement entered into between the Union of India and Government of France with regard to

the purchase of 36 Rafale Fighter Jets in a sealed envelope.

b) Issue an appropriate writ or order or direction directing the respondents to furnish in a sealed envelope the information with regard to the present cost of Rafale Fighter Jets and also the earlier cost of the Rafale Fighter Jets during the regime of UPA Government;

c) Issue an appropriate writ or order or direction directing the respondents to furnish any other information in sealed envelope before the Hon'ble Supreme Court with regard to the controversy erupted in the purchase of Rafale Fighter Jets;"

THE IMPUGNED JUDGMENT

6. The three Writ Petitions, as also Writ Petition in which no Review is filed, came to be dismissed. This Court has referred to the reliefs which have been sought in the four Writ Petitions. This Court referred to the parameters of judicial review. The extent of permissible judicial review of contracts, procurement, etc., was found to vary with the subject matter of the contract. It was further observed that the scrutiny of the challenges before the Court, will have to be made keeping in mind the confines of national security, the subject of procurement being crucial to the nation's sovereignty.

7. The findings of this Court in paragraph 15 throws light on the controversy as was understood by the Court. Paragraph 15 reads as follows:

> **"15. It is in the backdrop of the above facts and the somewhat constricted power of judicial review that, we have held, would be available in the present matter that we now proceed to scrutinise the controversy raised in the writ petitions which raise three broad**

areas of concern, namely, (*i*) the decision-making process; (*ii*) difference in pricing; and (*iii*) the choice of IOP."

(Emphasis supplied)

8. Thereafter, this Court had proceeded to consider the decision-making process, pricing and offsets and did not find in favour of the petitioners. It is after the discussion, as aforesaid, it is to be noted that this Court finally concluded as follows:

> **"33. Once again, it is neither appropriate nor within the experience of this Court to step into this arena of what is technically feasible or not. The point remains that DPP 2013 envisages that the vendor/OEM will choose its own IOPs. In this process, the role of the Government is not envisaged and, thus, mere press interviews or suggestions cannot form the basis for judicial review by this Court, especially when there is categorical denial of the statements made in the Press, by both the sides. We do not find any substantial material on record to show that this is a case of commercial favouritism to any party by the Indian Government, as the option to choose IOP does not rest with the Indian Government.**

Conclusion

34. In view of our findings on all the three aspects, and having heard the matter in detail, we find no reason for any intervention by this Court on the sensitive issue of purchase of 36 defence aircrafts by the Indian Government. Perception of individuals cannot be the basis of a fishing and roving enquiry by this Court, especially in such matters. We, thus, dismiss all the writ petitions, leaving it to the parties to bear their own costs. We, however, make it clear that our views as above are primarily from the standpoint of the exercise of the jurisdiction under Article 32 of the Constitution of India which has been invoked in the present group of cases."

(Emphasis supplied)

9. Upon consideration of the Review Petitions and Applications, by Order dated 26.02.2019, prayer for hearing in the open court was allowed. We have heard learned counsel. We heard parties in Review Petition (Criminal) No. 46 of 2019, the learned Attorney General and learned Solicitor General.

10. As far as petitioners in Review Petition (Criminal) No. 46 of 2019 is concerned, the complaint appears to be that

this Court has totally overlooked the relief sought in Writ Petition (Criminal) No. 298 of 2018.

11. The first respondent is the Central Bureau of Investigation (CBI) and the second respondent is the Union of India in Writ Petition (Criminal) No. 298 of 2018. The substance of the Writ Petition is that after following the due process under the Defence Procurement Procedure (DPP), to procure Advanced Fighter Aircrafts, and as per the authority under the DPP, the IAF Service Headquarters, after a widely consultative process with multiple Institutions, prepared Services Qualitative Requirements (SQR), specifying the number of aircrafts required as 126. There was the recommendation of the Committee that Make in India by Hindustan Aeronautics Limited (HAL), a Public Sector Enterprise, under a Transfer Technology Agreement, should be the mode of procurement. The Defence Acquisition Council granted the mandatory Acceptance of Necessity (AON). A Request for Proposal (RFP) was, accordingly, issued. There were six vendors. In 2011, it

was announced that Dassault's Rafale and Eurofighter GmbH Typhoon met the IAF requirements. In March of 2014, a Work Share Agreement was entered into between Dassault Aviation and HAL. Accordingly, HAL would do 70 per cent of the work on 108 planes. On 25.03.2015, it is alleged that Dassault was in the final stages of negotiations with India for 126 aircrafts and HAL was to be the partner of Dassault.

12. It was the further case of the petitioners that a new deal was, however, inexplicably negotiated and announced by the Prime Minister without following the due procedure. Number of aircrafts were reduced to 36. This involved complete violation of all laid down Defence Procurement Procedure. There are various allegations made against the deal to purchase 36 planes in place of 126. In particular, there is reference to Mr. Anil Ambani not owning any company engaged in manufacture of products and services mentioned in the list of products and services eligible for discharge of offset obligations. A company was incorporated as Reliance Defence Limited on 28.03.2015, just twelve days

before the new deal was suddenly announced on 10.04.2015. There is also the case that DPP was bypassed for collateral considerations. In the complaint lodged with CBI, there is reference to the Prevention of Corruption Act, 1988, as it stood prior to amendment. Their request is to register an FIR under the provisions which are mentioned therein which fall under the Prevention of Corruption Act, 1988 and to investigate the matter. Other reliefs are already referred to.

13. The petitioners in the said case, premise their case on the judgment of this Court in Lalita Kumari v. Government of Uttar Pradesh and others[1]. It is their case that though reference was made to the relief at the beginning of the judgment, thereafter, this Court focused only on the merits of the matter in terms of the powers available to it under judicial review. Reliefs sought in other Writ Petitions were focused upon. The only prayers of the petitioners in Writ Petition (Criminal) No. 298 of 2018, as noticed, was

[1] (2014) 2 SCC 1

a direction to follow the command of Lalita Kumari (supra) and to register an FIR as they have filed a complaint which is produced along with Writ Petition and as no action was taken as mandated by the Constitution Bench of this Court, they have approached this Court. The error is apparent in not even considering the impact of the Constitution Bench and requires to be redressed through the Review Petition. The petitioners also, undoubtedly, point out that there was suppression of facts by the respondents. This Court was sought to be misled. There is also a case that the petitioners have obtained documents which suggest that there were parallel negotiations being undertaken by the Prime Minister's Office (PMO) which was strenuously objected to by the Indian Negotiating Team (INT). The statement in the judgment that the pricing details have been shared with the Comptroller and Auditor General of India (CAG) and the Report of the CAG has been examined by the Public Accounts Committee (PAC) and that only a redacted portion of the Report was placed before the Parliament, are pointed out to be patently false. It is primarily in regard

to the same that an Application is filed purporting to be under Section 340 of the Cr.PC. There is an Application for Correction and there is complaint of wholesale suppression of facts. Errors are also referred to.

14. The stand of the Government of India is that the Review Petitions are meritless. This Court has elaborately considered the matter and found that there was nothing wrong. It is the case of the Government that the impugned judgement addresses contentions of the petitioners on compelling principles with regard to the scope of the judicial inquiry in cases involving the security and defence of the nation and it lays down the correct law. It is pointed out that there is no grave error apparent on the face of record. Reliance is placed on judgment of this Court in Mukesh v. State (NCT of Delhi)[2]. A fishing inquiry is impermissible. There was additional benefit to the country as a result of the deal which is sought to be questioned. Reliance is placed on the findings of the CAG. It is

[2] (2018) 8 SCC 149

contended that the CAG has conclusively held that the basis of the benchmark by the INT was unrealistic.

15. The CAG has held that 36 Rafale aircrafts deal was 2.86 per cent lower than the audit aligned price. Regarding the offset guidelines being amended initially to benefit an industrial group, it is stoutly denied. The waiver of sovereignty/bank guarantee in Government to Government agreements is pointed out to be not unusual. Support is sought to be drawn from the Report of the CAG, *inter alia*, finding that the French Government was made equally responsible to fulfil its obligations. The production and delivery schedule are monitored by high-level Committee with representatives of both Governments of France and India.

16. As far as mandate of Lalita Kumari (supra), not being followed, it is stated that disclosing *prima facie* that a cognizable offence is committed is mandatory, which is lacking in the present case especially once this Court has concluded that on decision-making process, pricing and

Indian Offset Partners, there was no reason to intervene. Once this Court has held that perception of individuals cannot be the basis for a fishing and roving inquiry, no cognizable offence is made out *prima facie* so as to order registration of an FIR. There is no concealment of facts or false presentation of facts.

CONTOURS OF REVIEW JURISDICTOIN

17. Article 137 of the Constitution confers jurisdiction on the Supreme Court of India to exercise power of review. It reads as follows:

> **"137. Review of judgments or orders by the Supreme Court Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."**

18. Rules have been made known as The Supreme Court Rules, 2013. Order XLVII of the said Rules, deals with review (In The Supreme Court Rules, 1966, it was contained in Order XL) and it reads as follows:

"ORDER XLVII
REVIEW

1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

The application for review shall be accompanied by a certificate of the Advocate on Record certifying that it is the first application for review and is based on the grounds admissible under the Rules.

2. An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.

3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. Where on an application for review the Court reverses or modifies its former decision in the case on the ground of mistake of law or fact, the Court, may, if it thinks fit in the interests of justice to do so,

direct the refund to the petitioner of the court-fee paid on the application in whole or in part, as it may think fit.

5. Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter."

19. Thus, a perusal of the same would show that the jurisdiction of this Court, to entertain a review petition in a civil matter, is patterned on the power of the Court under Order XLVII Rule 1 of The Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC', for short).

20. Order XLVII Rule 1 of the CPC, reads as follows:

"ORDER XLVII : REVIEW

1. Application for review of judgement

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgement to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation.- The fact that the decision on a question of law on which the judgement of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgement."

21. It will be noticed that in criminal matters, review lies on an error apparent on the face of record being established. However, it is necessary to notice what a

Constitution Bench of this Court laid down in P.N. Eswara Iyer And Others v. Registrar, Supreme Court of India[3]:

> **"34. The rule [Ed.:Order 40, Rule 1 of the Supreme Court Rules] , on its face, affords a wider set of grounds for review for orders in *civil proceedings*, but limits the ground vis-a-vis *criminal proceedings* to "errors apparent *on the face* of the record". If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the "deceased" shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here "record" means any material which is already on record**

[3] **(1980) 4 SCC 680**

or may, with the permission of the court, be brought on record. If justice summons the Judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the rule (Order 40 Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression "record" is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47 Rule 1, CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source."

(Emphasis supplied)

22. In Suthendraraja A*lias Suthenthira Raja Alias Santhan* and others v. State Through DSP/CBI, SIT, Chennai[4], ,

[4] (1999) 9 SCC 323

referring to the judgement in P.N. Eswara Iyer (supra), it was, *inter alia*, held that the scope of review was widened considerably by the pronouncement.

23. In Haridas Das v. Usha Rani Banik (Smt.) and others[5], the question arose out of an appeal in the High Court, wherein the High Court accepted the prayer for review. This Court held as follows:

> **"13. … The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent**

[5] (2006) 4 SCC 78

decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection. …"

(Emphasis supplied)

24. Jain Studios Ltd. Through Its President v. Shin Satellite Public Co. Ltd.[6] involved an order passed by Judge in Chambers. It was sought to review the order passed which is reported in Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.[7]. In the Arbitration Petition which was the main matter, there was a prayer to appoint an Arbitrator by the review petitioner. The same was heard and rejected. The learned Judge, in the said circumstances, held as follows:

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had

[6](2006) 5 SCC 501
[7](2006) 2 SCC 628

been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases."

(Emphasis supplied)

25. In State of West Bengal and others v. Kamal Sengupta and another[8], this Court, *inter alia*, held as follows:

"21. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not

[8] (2008) 8 SCC 612

within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier."

(Emphasis supplied)

26. In Moran Mar Basselios Catholicos and another v. Most Rev. Mar Poulose Athanasius and others[9], the question, which fell for consideration was, whether misconception of the court about a concession by counsel, furnished a ground for review. A court may pronounce a judgement on the basis that a concession had been made by the counsel when none had been made. The court may also misapprehend the terms of the concession or the scope of a concession. When such misconception underscores a judgment, whether review would lie? Answering the said question, this Court proceeded to hold as follows:

"36. … Patanjali Sastri, J. (as he then was) sitting singly in the Madras High Court definitely took the view in *Rekhanti Chinna Govinda Chettiyar* v. *S. Varadappa Chettiar* [AIR 1940 Mad. 17] that a misconception by the court of a concession

[9] **AIR 1954 SC 526**

made by the advocate or of the attitude taken up by the party appears to be a ground analogous to the grounds set forth in the first part of the review section and affords a good and cogent ground for review. The learned Attorney-General contends that this affidavit and the letters accompanying it cannot be said to be part of "the record" within the meaning of Order 47 Rule 1. We see no reason to construe the word "record" in the very restricted sense as was done by Denning, L.J., in *Rex* v. *Northumberland Compensation Appeal Tribunal Ex parte Shaw* [(1952) 2 KB 338 at pp. 351-52] which, was a case of certiorari and include within that term only the document which initiates the proceedings, the pleadings and the adjudication and exclude the evidence and other parts of the record. Further, when the error complained of is that the court assumed that a concession had been made when none had in fact been made or that the court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the court by way of an affidavit as suggested by the Privy Council as well as by this Court and this can only be done by way of review. The cases to which reference has been made indicate that the misconception of the court must be regarded as sufficient reason analogous to an error on the face of the record. In our opinion it is permissible to rely on the affidavit as an additional ground for review of the judgment."

(Emphasis supplied)

27. It is pertinent to notice that this Court did not confine the word "record" in the narrow sense in which it was interpreted as in the case of an application of Writ of *Certiorari*. This Court also sanctioned support being drawn from an affidavit by the counsel in this regard, as additional ground for review. Misconception by a court, was found embraced within the scope of the expression "sufficient reasons".

28. Non-advertence to the particular provision of the Statute, which was pertinent and relevant to the *lis*, was held to be a ground to seek review. In Girdhari Lal Gupta v. D.N. Mehta and another[10], this Court held as follows:

> **"16. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to sub-section 23-C(2) and the**

[10] **AIR 1971 SC 2162**

light it throws on the interpretation of sub-section (1).”

(Emphasis supplied)

29. Also, see in this regard, judgment in Deo Narain Singh v. Daddan Singh and others[11] where finding that this Court had decided the case on the basis of a Statute, which was inapplicable in the facts, review was granted.

30. In Sow Chandra Kante and another v. Sheikh Habib[12], the judgment involved a request to review the decision of this Court refusing special leave to appeal in a matter, this Court held as follows:

> **“… A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. …”**
>
> **(Emphasis supplied)**

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[11] 1986 (Supp) SCC 530
[12] (1975) 1 SCC 674

31. Two documents, which were part of the record, were considered by the Judicial Commissioner to allow review by the High Court. This Court, in appeal, in the judgement in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and others[13], found as follows:

> **"4. In the present case both the grounds on which the review was allowed were hardly grounds for review. That the two documents which were part of the record were not considered by the Court at the time of issue of a writ under Article 226 cannot be a ground for review especially when the two documents were not even relied upon by the parties in the affidavits filed before the Court in the proceedings under Article 226. Again that several instead of one writ petition should have been filed is a mere question of procedure which certainly would not justify a review. We are, therefore, of the view that the Judicial Commissioner acted without jurisdiction in allowing the review. The order of the Judicial Commissioner dated December 7, 1967 is accordingly set aside and the order dated May 25, 1965, is restored. The appeal is allowed but without costs."**
>
> **(Emphasis supplied)**

[13] **(1979) 4 SCC 389**

32. M/s. Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi[14] was a case which fell to be considered under Article 137 of the Constitution of India. The relevant discussion is found in paragraphs 8 and 9. They read as follows:

> **"8. It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so: *Sajjan Singh* v. *State of Rajasthan* [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377] . For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: *G.L. Gupta* v. *D.N. Mehta* [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750]. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: *O.N. Mohindroo* v. *Distt. Judge, Delhi* [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27] . Power to review**

[14] **(1980) 2 SCC 167**

its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order 40 Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility": *Sow Chandra Kante* v. *Sheikh Habib* [(1975) 1 SCC 674 : 1975 SCC (Tax) 200 : (1975) 3 SCR 933].

9. Now, besides the fact that most of the legal material so assiduously collected and placed before us by the learned Additional Solicitor General, who has now been entrusted to appear for the respondent, was never brought to our attention when the appeals were heard, we may also examine whether the judgment suffers from an error apparent on the face of the record. Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If

the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record."

33. Question in the said case arose under the Bengal Finance (Sales Tax) Act, 1941. The case was based on new material sought to be adduced by the Revenue to establish that the transaction amounted to a sale.

34. The foundations, which underlie the review jurisdiction, has been examined by this Court at some length in the judgment in S. Nagaraj and others v. State of Karnataka and another[15]:

> **"18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and**

[15] 1993 Supp (4) SCC 595

fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

19. Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility.

Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In *Raja Prithwi Chand Lal Choudhury* v. *Sukhraj Rai* [AIR 1941 FC 1, 2 : 1940 FCR 78 : (1941) 1 MLJ Supp 45] the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *Rajunder Narain Rae* v. *Bijai Govind Singh* [(1836) 1 Moo PC 117 : 2 MIA 181 : 1 Sar 175] that an order made by the Court was final and could not be altered:

> **"… nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in …. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must**

possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

> **"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."**

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (*c*) of Article 145 permitted this Court to frame rules as to the conditions

subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

(Emphasis supplied)

35. The decision in S. Nagaraj(supra), has been followed in various judgements of this Court (See Lily Thomas and others v. Union of India and others[16]; Haryana State Industrial Development Corporation Limited. v. Mawasi and

[16] (2000) 6 SCC 224

others[17]**; Kamlesh Verma v. Mayawati and others**[18]**; Usha Bharti v. State of Uttar Pradesh and others**[19] **and Vikram Singh Alias Vicky Walia and another v. State of Punjab and another**[20]**).**

36. In Kamlesh Verma (supra), this Court in paragraph 20, laid down its conclusions, which reads as follows:

> **"*Summary of the principles***
>
> **20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:**
>
> **20.1. When the review will be maintainable:**
>
> **(*i*) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;**
>
> **(*ii*) Mistake or error apparent on the face of the record;**
>
> **(*iii*) Any other sufficient reason.**

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[17] (2012) 7 SCC 200
[18] (2013) 8 SCC 320
[19] (2014) 7 SCC 663
[20] (2017) 8 SCC 518.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram* v. *Neki* [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius* [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India* v. *Sandur Manganese & Iron Ores Ltd.* [(2013) 8 SCC 337: JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(*i*) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(*ii*) Minor mistakes of inconsequential import.

(*iii*) Review proceedings cannot be equated with the original hearing of the case.

(*iv*) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(*v*) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(*vi*) The mere possibility of two views on the subject cannot be a ground for review.

(*vii*) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(*viii*) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(*ix*) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

37. In a very recent judgment, in fact, relied upon by the Union of India, viz., Mukesh (supra), in a review petition in a criminal appeal, this Court reiterated that a review is not rehearing of an original matter. Even establishing another possible view would not suffice [See Vikram Singh (supra), which was relied upon].

38. The anxiety of this Court that the consideration of rendering justice remain uppermost in the mind of the Court, has led to the Constitution Bench judgement in Rupa Ashok

Hurra v. Ashok Hurra and another[21]. It is in the said case that the concept of a curative petition was devised to empower a litigant to seek a reconsideration of a matter wherein the review petition also is unsuccessful. Certain steps have been laid down in this regard which stand incorporated in The Supreme Court Rules, 2013 [in Part IV Order XLVIII thereof].

39. Undoubtedly, any error to be an error on the face of the record, cannot be one which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions or if the error requires lengthy and complicated arguments to establish it, a Writ of *Certiorari* would not lie (See Satyanarayan Laxminarayan Hegde and others v. Mallikarjun Bhavanappa Tirumale[22]). This principle is equally applicable to a review petition also.

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[21] (2002) 4 SCC 388
[22] AIR 1960 SC 137

40. On a conspectus of the above decisions, the following conclusions appeared to be inevitable and they also provide the premise for review:

> **Justice above all. While a review petition has not been understood as an appeal in disguise and a mere erroneous decision may not justify a review, a decision which betrays an error which is apparent, does entitle the court to exercise its jurisdiction under Article 137 of the Constitution. The founding fathers were conscious that this Court was the final Court. There are two values, which in any system of law, may collide. On the one hand, recognizing that men are not infallible and the courts are manned by men, who are prone to err, there must be a safety valve to check the possibility of grave injustice being reached to a litigant, consequent upon an error, which is palpable or as a result of relevant material despite due diligence by a litigant not being made available or other sufficient reason. The other value which is**

ever-present in the mind of the law giver, is, there must be finality to litigation. Be it judgments of a final court, if it becomes vulnerable to indiscriminate reopening, unless a strong ground exists, which itself is based on manifest error disclosed by the judgment or the other two grounds mentioned in Order XLVII of the CPC in a civil matter, it would spawn considerable inequity.

41. It must be noticed that the principle well-settled in regard to jurisdiction in review, is that a review is not an appeal in disguise. The applicant, in a review, is, on most occasions, told off the gates, by pointing out that his remedy lay in pursuing an appeal. In the case of a decision rendered by this Court, it is to be noticed that the underpinning based on availability of an appeal, is not available as this Court is the final Court and no appeal lies.

42. It is no doubt true that the Supreme Court Rules, 2013, certain powers are conferred on the Registrar as also on the Judge holding Court in Chambers and appeals, indeed, are provided in respect of certain orders passed by the Registrar.

43. The fact that no appeal lies from the judgment of this Court may not, however, result in the jurisdiction of this Court under Article 137 of the Constitution being enlarged. However, when the Court is invited to exercise its power of review, this aspect may also be borne in mind, viz., that unlike the other courts from which an appeal may be provided either under the Constitution or other laws, or by special leave under Article 136 of the Constitution, no appeal lies from the judgment of this Court, and it is in that sense, the final Court. The underlying assumption for the principle that a review is not an appeal in disguise, being that the decision is appealable, is really not available in regard to a decision rendered by this Court, is all that is being pointed out.

44. A review petition is maintainable if the impugned judgment discloses an error apparent on the face of the record. Unlike a proceeding in *Certiorari* jurisdiction, wherein the error must not only be apparent on the face of the record, it must be an error of law, which must be apparent on the face of the record, for granting review under Article 137 of the Constitution read with Order XLVII Rule 1 of the CPC, the error can be an error of fact or of law. No doubt, it must be apparent on the face of record. Such an error has been described as a palpable error or glaring omission. As to what constitutes an error apparent on the face of record, is a matter to be found in context of the facts of each case. It is worthwhile to refer to the following discussion in this regard by this Court in Hari Vishnu Kamath v. Ahmad Ishaque and Others[23], wherein, this Court held as follows:

> **"23. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is**

[23] **AIR 1955 SC 233**

essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.

Mr Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in *Batuk K. Vyas* v. *Surat Municipality* [AIR 1953 Bom 133] that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

(Emphasis supplied)

45. The view of this Court, in the decision in Girdhari Lal Gupta (supra) as also in Deo Narain Singh (supra), has been noticed to be that if the relevant law is ignored or an inapplicable law forms the foundation for the judgement, it would provide a ground for review. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be *per incuriam*. No doubt, the concept of *per incuriam* is apposite in the context of its value as the precedent but as between the parties, certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision.

46. As regards fresh material forming basis for review, it must be of such nature that it is relevant and it undermines the verdict. This is apart from the requirement that it could not be produced despite due diligence.

47. The dismissal of a special leave petition takes place at two levels. In the first place, the Court may dismiss

or reject a special leave petition at the admission stage. Ordinarily, no reasons accompany such a decision. In matters where a special leave petition is dismissed after notice is issued, also reasons may not be given ordinarily. Several elements enter into the consideration of this Court where a special leave petition is dismissed. The task for a review applicant becomes formidable as reasons are not given. An error apparent on the face of the record becomes difficult to establish. In a writ petition where pleadings are exchanged and reasons are given in support of the verdict, a self-evident error is detected without much argument. No doubt, a Court, in review, does not reappreciate and correct a mere erroneous decision. That reappreciation is tabooed, is not the same as holding that a Court will not appreciate the case as reflected in the pleadings and the law by which the Court is governed.

48. In this case, the short point, which this Court is called upon to consider, is the effect of the impugned judgment not dealing with a binding decision rendered by

a Constitution Bench which was relied upon by the petitioners in Writ Petition (Criminal) No. 298 of 2018 and rendered in Lalita Kumari (supra). It is apposite that I set out what this Court, speaking through the aforesaid Constitution Bench judgment, has laid down in paragraph 120:

> "***Conclusion/Directions***
>
> **120. In view of the aforesaid discussion, we hold:**
>
> **120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.**
>
> **120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.**
>
> **120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure**

must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(*a*) Matrimonial disputes/family disputes

(*b*) Commercial offences

(*c*) Medical negligence cases

(*d*) Corruption cases

(*e*) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

(Emphasis supplied)

49. It is their contention, therefore, that the writ petition came to be clubbed along with other writ petitions. This Court proceeded to undertake judicial review of the processes which led to the decision to purchase 36 planes going back on the earlier decision which was to purchase 136 planes.

50. According to the petitioners, therefore, this Court committed a clear error in not focusing on the relief sought in their writ petition which was based on the Constitution

Bench of this Court which was binding on a Bench of lesser strength (three). All this Court is being asked to do, according to the petitioners, having regard to the law binding on it, is to direct the registration of the FIR. There is also relief sought to submit reports in the same.

51. The procedure, which is to be adopted by the authorities, has been elaborated upon. There can be no escape from the mandatory procedure laid down by this Court.

52. Where a party institutes a proceeding, if the proceeding is of a civil nature, there would be a cause of action. There would be reliefs sought on the basis of the cause of action. Materials are produced both in support and against the claim. The Court thereafter renders a judgement either accepting the case or rejecting the case. When the Court rejects the case, it necessarily involves refusing to grant the relief sought for by the plaintiff/petitioner. It may transpire that the petitioner may not press for certain reliefs. The Court may, after applying its mind to the case, find that the petitioner is not entitled to the

relief and decline the prayers sought. It may also happen that the court does refer to the reliefs sought but thereafter does not undertake any discussion regarding the case for the relief sought and proceeds to non-suit the party. It is clear that in this case, it is the last aspect which is revealed by the judgment sought to be reviewed.

53. A judgment may be silent in regard to a relief which is sought by a party. It is apposite, in this regard, to notice Section 11 of the CPC. If a decree is silent, as regards any relief which is claimed by the plaintiff, Explanation V to Section 11 declares that the relief must be treated as declined. The Explanation reads as follows:

> **"Section 11, Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused."**

54. No doubt, if the relief is expressly refused, then also, the matter would become *res judicata*. It is, therefore, of vital importance that when a case is decided,

the Court considers the claim and the relief sought, applies the Statute which is applicable and the law which is laid down particularly when it is by a Constitution Bench in deciding the case. Just as, in the case of a judgement, where the applicable Statute, not being applied, would result in a judgment which becomes amenable to be corrected in review, there can be no reason why when a binding judgment of this Court, which is enlisted by the party, is ignored, it should have a different consequence. In fact, since a review under Article 137 of the Constitution, in a civil matter, is to be exercised, based on what is contained in Order XLVII Rule 1 of the CPC, the Explanation therein, may shed some light. The Explanation which was inserted by the Act of 1976, following the recommendations of the Law Commission of India, in its 54th Report, declares that the law is laid down by a superior court reversing an earlier decision, on a question of law, will not be a ground for the review of a judgment.

55. The Law Commission, in fact, in the said Report reasoned that adopting the view taken by the Kerala High Court in the decision in Thadikulangara Pylee's son Pathrose v. Ayyazhiveettil Lakshmi Amma's son Kuttan and others[24] that a later judgment would amount to discovery of new and important matter, and in any case an error on the face of the record, would keep alive the possibility of review indefinitely. This impliedly would mean that when a court decides a case, it must follow judgments which are binding on it. This is not to say that a smaller Bench of this Court, if it entertains serious doubts about the correctness of an earlier judgment, may not consider referring the matter to a larger Bench. However, as long as it does not undertake any such exercise, it cannot refuse to follow the judgment and that too of a Constitution Bench. Any such refusal to follow the decision binding on it, would undoubtedly disclose an error which would be palpable being self-evident.

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[24] **AIR 1969 KER 186**

56. In this case, when this Court rendered the judgment, sought to be reviewed, the judgment of the Constitution Bench in Lalita Kumari (supra), undoubtedly, held the field having been rendered on 12.11.2013. The said judgement was, indeed, pressed before the Court.

57. To put it in other words, having regard to the relief sought by the petitioners, the dismissal of the writ petition would be, according to petitioners, in the teeth of a binding judgment of this Court. Just as in the case of a binding Statute being ignored and giving rise to the right to file a review, neither on logic nor in law would the refusal to follow a binding judgement, qualify for a different treatment if a review is filed. Be it a civil or a criminal matter, an error apparent on the face of the record, furnishes a ground for review.

58. This is not a case where an old argument is being repeated in the sense that after it has been considered and rejected, it is re-echoed in review. It is an argument which was undoubtedly pressed in the original innings. It is not

the fault of the party if the court chose not even to touch upon it. No doubt, it may be different in a case where a ground or relief sought is ignored and it is found justified otherwise. But where a ground, which is based on principles laid down by a Constitution Bench of this Court, is not dealt with at all and it is complained of in review, it will rob the review jurisdiction of the very purpose it is intended to serve, if the complaint otherwise meritorious, is not heeded to.

59. A learned Single Judge, in an arbitration request, turned down a plea to appoint a person as Arbitrator. In review, the request was sought to be resurrected. It was in this context that a learned Single Judge of this Court, sitting in Chambers, in the decision reported in Jain Studios Ltd. (supra), laid down that once such a relief was refused in the main matter, no review petition would lie. However, following the said judgment, this Court, in the decision reported in Kamlesh Verma (supra), summarising the principle, came to declare in paragraph 20.2(ix), that

review is not maintainable when the same relief sought at the time of arguing the main matter, has been negatived.

60. With regard to the said principle, the context in which it was laid down in the decision by a learned Single Judge in Jain Studios Ltd. (supra), has already been noted. The said principle, as stated, cannot be treated as one that is cast in stone to apply irrespective of facts. Illustrations come to the fore where it is better related to the factual context and not as an immutable axiom not admitting of exceptions. Take a case where a Writ of Mandamus is sought for after a demand is made. The demand is placed on record and is not even controverted. In the main proceeding, Mandamus is refused on the ground that there is no demand. It amounts to denial of relief. But the verdict is clearly afflicted with palpable error, and if the complaint is made in a review about the denial of relief on a ground which is patently untenable, certainly, a review would lie. There can be many other examples where the denial of relief is palpably wrong and self-evident. It is

different, if on an appreciation of evidence or applying the law, and where two views are possible, relief is refused. In fact, broadly, denial of relief can occur in two situations. There are situations where the grant of relief itself is discretionary. There are other situations where if a certain set of facts are established, the plaintiff/appellant cannot be told off the gates. A defendant, who appeals against a time-barred suit being decreed, establishes that a suit is time-barred, and the facts, as stated in the judgment itself, unerringly point to such premise. If still, the Appellate Court decrees the suit and denies relief to the defendant/appellant, can it be said that a review will not lie? The answer can only be that a review will lie.

61. To test the hypothesis that on the facts this Court was wrong and manifestly so in declining in not following the *dicta* of the Constitution Bench in Lalita Kumari (supra), a reverse process of reasoning can be employed to appreciate the matter further. Can it be said that refusing to follow

a Constitution Bench, laying down the response of the Officers to a complaint alleging the commission of a cognizable offence, has not been observed in its breach? If the review petition, in other words, is rejected, in substance this Court would be upholding its judgment which when placed side-by-side with the pronouncement of the Constitution Bench in Lalita Kumari (supra), the two judgments cannot be squared. It must co-exist despite the patent departure, the impugned judgment manifests from the law laid down by the Constitution Bench. But that being impossible, the Constitution Bench must prevail and the impugned judgment stand overwhelmed to the extent it is inconsistent. It may be true that in view of the fact that four writ petitions were heard together, this Court has proceeded to focus on the merits of the matters itself undoubtedly from the standpoint of the limited judicial review which it could undertake in a matter of the nature in question. On the basis of the said exercise, the Court has concluded that there were no materials for the Court to interfere. But this is a far cry from holding that it

will not follow the mandate of the Constitution Bench of this Court in regard to the steps to be undertaken by the Officer on receipt of a complaint purporting to make out the commission of a cognizable offence. This Court may declare that it was non-suiting the petitioners seeking judicial review, having regard to the absence of materials which would have justified holding the award of the contract in question vulnerable. It would not mean that it is either precluded or that it was not duty-bound to still direct that the law laid down by the Constitution Bench in Lalita Kumari (supra) be conformed to.

62. If the complaint of the petitioner does make out the commission of the cognizable offence and FIR is to be registered and matter investigated, it will be no answer to suggest that this Court, has approved of the matter in judicial review proceedings under Article 32 of the Constitution and making it clear that entire exercise must be viewed from the prism of the limited judicial review the Court undertakes in such proceedings and this Court would

end up paying less than lip service to the law laid down by the Constitution Bench in Lalita Kumari (supra).

63. As far as the judicial review of the award of the contract is concerned, apart from the fact that a review does not permit reappreciation of the materials, there is the aspect of the petitioner seeking judicial review approaching the court late in the day. There is also the aspect relating to the court's jurisdiction not extending to permit it to sit in judgment over the wisdom of the Government of the day, particularly in matters relating to purchase of the goods involved in this case. Therefore, in regard to review, sought in relation to the findings relating to the judicial review, they cannot be found to be suffering from palpable errors.

64. Though, the stand of the Government of India has been noticed, which is the second respondent in Writ Petition (Criminal) No. 298 of 2018, the party, which has a say in the matter or rather a duty in the matter in terms of the law laid down by this Court in Lalita Kumari (supra),

is the first respondent, viz., Central Bureau of Investigation (CBI) before which petitioners have moved the Exhibit P1-complaint. It is quite clear that the first respondent, the premiere investigating agency in the country, is expected to act completely independent of the Government of the day. The Government of India cannot speak on behalf of the first respondent. Whatever that be, the fact remains that a decision in terms of what is laid down in Lalita Kumari (supra), is to be taken.

65. One objection, which has apparently weighed with my learned and noble Brother, is that, this Court, having dealt with the merits of the case, there could be no occasion for directing the compliance in terms of Lalita Kumari (supra) by the first respondent. Reasoning of the Court has been noticed. This Court has approached the matter proclaiming that it was doing so in the context of somewhat constricted power of judicial review. It is further made clear that the Court found that it is neither appropriate nor is it within the experience of this Court to step into

the arena of what is technically feasible. This Court also did not find any substantial material on record to show it to be a case of commercial favouritism to any party by the Indian Government as the option to choose the IOP did not rest with the Indian Government. In the concluding paragraph, it was clearly mentioned that the Court's views were primarily from the standpoint of exercise of jurisdiction under Article 32 of the Constitution, which was invoked in this case.

66. The question would, therefore arise, whether in such circumstances, the relief sought in Writ Petition (Criminal) No. 298 of 2018, seeking compliance with Lalita Kumari (supra), was wrongly declined. Differently put, the question would arise whether the petitioners, having participated in the proceedings and inviting the Court to pronounce on the merits as well and cannot persuade the Court to take a different view on the merits, could still ask the Court to find an error and that too a grave error

in not heeding to the prayer in Writ Petition (Criminal) No. 298 of 2018.

67. As noticed earlier, it is one thing to say that with the limited judicial review, available to the Court, it did not find merit in the case of the petitioners regarding failure to follow the DPP, presence of over-pricing, violation of Offset Guidelines to favour a party, and another thing to direct action on a complaint in terms of the law laid down by this Court. It is obvious that this Court was not satisfied with the material which was placed to justify a decision in favour of the petitioners. It is also apparent that the Court has reminded itself of the fact that it was neither appropriate nor within the experience of the Court to step into the arena. It is equally indisputable that the entire findings are to be viewed from the standpoint of the nature of the jurisdiction it exercised. There are no such restrictions and limitations on an Officer investigating a case under the law. Present a case, making out the commission of cognizable offence,

starting with the lodging of the FIR after, no doubt, making a preliminary inquiry where it is necessary, the fullest of amplitude of powers under the law, no doubt, are available to the Officer. The discovery of facts by Officer carrying out an investigation, is completely different from findings of facts given in judicial review by a Court. The entire proceedings are completely different.

68. In the impugned judgment, under the heading "Offsets", there is, at paragraph 28, reference to the complaint that favouring the Indian Business Group, has resulted in an offence being committed under the Prevention of Corruption Act. This Court extracted Clause (4.3) of the Offset Clause which provides that OEM/Vendor, Tier-1 Sub-Vendor will be free to select the Indian Offset Partner for implementing the offset obligation provided it has not been barred from doing business with the Ministry of Defence. This Court dealt with the same contentions in paragraph 32 of the impugned judgment, which reads as follows:

"32. It is no doubt true that the company, Reliance Aerostructure Ltd., has come into being in the recent past, but the press release suggests that there was possibly an arrangement between the parent Reliance Company and Dassault starting from the year 2012. As to what transpired between the two corporates would be a matter best left to them, being matters of their commercial interests, as perceived by them. There has been a categorical denial, from every side, of the interview given by the former French President seeking to suggest that it is the Indian Government which had given no option to the French Government in the matter. On the basis of materials available before us, this appears contrary to the clause in DPP 2013 dealing with IOPs which has been extracted above. Thus, the commercial arrangement, in our view, itself does not assign any role to the Indian Government, at this stage, with respect to the engagement of IOP. Such matter is seemingly left to the commercial decision of Dassault. That is the reason why it has been stated that the role of the Indian Government would start only when the vendor/OEM submits a formal proposal, in the prescribed manner, indicating details of IOPs and products for offset discharge. As far as the role of HAL, insofar as the procurement of 36 aircrafts is concerned, there is no specific role envisaged. In fact, the suggestion of the Government seems to be that there were some contractual problems and Dassault was circumspect about HAL carrying out the contractual obligation, which is also stated to be responsible for the non-conclusion of the earlier contract."

69. The very first statement in paragraph 32 would appear to point to the Court taking into account Press Release suggesting that there was possibly an arrangement between the parent Reliance Company and Dassault starting from the year 2012. It is stated as to what transpired between the two Corporates would be best left to them. In this regard, in the Review Petition, it is pointed out that this Court has grossly erred in confusing Reliance Industries of which Mr. Mukesh Ambani is the Chairman with that of Reliance Infrastructure of which Mr. Anil Ambani is the Chairman. It is further contended that Mr. Anil Ambani's Reliance Infrastructure is the parent company of Reliance Aerostructure Limited (RAL), which is the beneficiary of the Offset Contract, and there is no possibility of any arrangement between Reliance Infrastructure Limited with Dassault Aviation in 2012. There appears to be considerable merit in the case of the petitioners that in this regard, this Court had fallen into clear error that there was possibly an arrangement between the parent Reliance Company and Dassault dated back to the year 2012. The parent

Reliance Company which was referred in the judgment is Reliance Industries which is a completely different corporate body from Reliance Infrastructure which appears, according to the petitioners, to be the parent company of RAL. Thereafter, there is reference to the denial of the interview by the Former French President. It is further noted that on the basis of the materials, the commercial arrangement does not assign any role to the Indian Government at this stage with reference to the arrangement of the IOP. After making certain observations about HAL and role of the Indian Government starting only when the Vendor/OEM submitted a formal proposal, this Court went on to make the observation contained in paragraph 33 which has already been extracted.

70. From the standpoint of the jurisdiction in judicial review proceedings and under Article 32 of the Constitution, as also absence of any substantial material to show to be a case of commercial favouritism, it may be true that the findings other than which has been referred

to may not disclose a palpable error. This Court's lack of experience of what is technically feasible, as noted by the Court, has weighed with it.

POWERS OF POLICE OFFICER WIDER AND DIFFERENT FROM THAT OF WRIT COURT

71. The 'statutory right of the police to investigate about a cognizable offence' is well settled. In King-Emperor v. Nazir Ahmad Khwaja[25], the Privy Council has, *inter alia*, held as follows:

> **"In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an**

[25] **AIR 1945 PC 18**

> **appropriate case when moved under S. 491 of the C.P.C. to give directions in the nature of habeas corpus. In such a case as the present, however, the Courts functions begin when a charge is preferred before it and not until then. …"**

72. Following the same, this Court in M.C. Abraham and another v. State of Maharashtra and others[26], held as follows:

> **"13. This Court held in the case of *J.A.C. Saldanha* [(1980) 1 SCC 554 : 1980 SCC (Cri) 272] that there is a clear-cut and well-demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the police department, the superintendence over which vests in the State Government. It is the bounden duty of the executive to investigate, if an offence is alleged, and bring the offender to book. Once it investigates and finds an offence having been committed, it is its duty to collect evidence for the purpose of proving the offence. …"**

73. The Police Officer is endowed with wide powers. Nothing that constricted or limited this Court in the impugned

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[26] (2003) 2 SCC 649

judgment, applies to an Officer who has undertaken an investigation into the commission of a cognizable offence. In fact, in this case, the first respondent-CBI is the premiere investigation agency of the country. It is equipped to undertake all forms of investigations, be it technical or otherwise. The factors which concerned this Court can be recapitulated to bring out the true role of an Investigator. This Court held, it is neither appropriate nor within the Court's experience to step into what is technical feasible or not. No such limitation applies to an Investigator of a cognizable offence. What is important is that it is the duty of the Investigating Officer to collect all material, be it technical or otherwise, and thereafter, submit an appropriate report to the court concerned, be it a final report or challan depending upon the materials unearthed. This Court relied on absence of substantial material. This is not a restriction on the Investigating Officer. Far from it, the very purpose of conducting an investigation on a complaint of a cognizable offence being committed, is to find material. There can be

no dispute that the first respondent is the premiere investigating agency in the country which assumedly employs state of the art techniques of investigation. Professionalism of the highest quality, which embraces within it, uncompromising independence and neutrality, is expected of it. Again, the restriction which underlies the impugned judgment is the limited scope of judicial review and also the writ jurisdiction under Article 32 of the Constitution. It is clear as a mountain stream that both these considerations are totally irrelevant for an Officer who has before him a complaint making out the commission of a cognizable offence.

74. However, the directions contained in paragraph 120 of the Constitution Bench decision in Lalita Kumari (supra) must be further appreciated. In this case, the petitioners in Writ Petition (Criminal) No. 298 of 2018, have indeed moved an elaborate written complaint before the first respondent-CBI. The complaint that is made, attempts to make out the commission of a cognizable offences under the

Prevention of Corruption Act. Paragraph 120.1 of Lalita Kumari (supra), declares registration of FIR is mandatory if information discloses commission of a cognizable offence. The Constitution Bench debarred any preliminary inquiry in such a situation. It is apposite that paragraph 120.5 is noticed at this stage. This Court held that the scope of the preliminary inquiry is not to verify the veracity or otherwise of the information received but it is only to ascertain whether the information reveals any cognizable offence. Coming back to paragraph 120.2, it is laid down by this Court that if the information does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. It is beyond dispute that the offences which are mentioned in the complaint filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018 are cognizable offences. Again, coming back to paragraph 120.3 in Lalita Kumari (supra) read with paragraphs 120.2 and 120.5, if the inquiry discloses commission of a cognizable offence, the

FIR must be registered. Where, however, the preliminary inquiry ends in closing the complaint, the first informant must be informed in writing forthwith and not later than a week. That apart, reasons, in brief, must also be disclosed.

75. Paragraph 120.6 deals with the type of cases in which preliminary inquiry may be made. Corruption cases are one of the categories of cases where a preliminary inquiry may be conducted. Also, cases where there is abnormal delay or laches in initiating criminal prosecution, for example over three months delay in reporting the matter without satisfactorily explaining the reasons for the delay. As can be noticed from paragraph 120.6, medical negligence cases, matrimonial disputes, commercial offences are also cases in which a preliminary inquiry may be made. In order to appreciate the scope of paragraph 120.6, it is necessary to advert to paragraphs 115 to 119, which read as follows:

> **"*Exceptions***
>
> **115. Although, we, in unequivocal terms, hold that Section 154 of the Code**

postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

116. In the context of medical negligence cases, in *Jacob Mathew* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1: 2005 SCC (Cri) 1369], it was held by this Court as under: (SCC p. 35, paras 51-52)

> **"*51*. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such**

malicious proceedings have to be guarded against.

***52*. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the *Bolam* [*Bolam* v. *Friern Hospital Management Committee*, (1957) 1 WLR 582 : (1957) 2 All ER 118] test to the facts collected in the investigation. A doctor accused of**

rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

117. In the context of offences relating to corruption, this Court in *P. Sirajuddin* [*P. Sirajuddin* v. *State of Madras*, (1970) 1 SCC 595 : 1970 SCC (Cri) 240] expressed the need for a preliminary inquiry before proceeding against public servants.

118. Similarly, in *Tapan Kumar Singh* [*CBI* v. *Tapan Kumar Singh*, (2003) 6 SCC 175 : 2003 SCC (Cri) 1305] , this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable

offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

(Emphasis supplied)

76. As can be noticed that medical negligence cases constitute an exception to the general rule which provides for mandatory registration of FIR in respect of all

cognizable offences. The Court, in clear terms, held that it will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint. It relied on a decision of this Court in Jacob Mathew v. State of Punjab and another[27].

77. In paragraph 117 of Lalita Kumar (Supra), this Court referred to the decision in P. Sirajuddin, Etc. v. State of Madras, Etc.[28] and took the view that in the context of offences related to corruption in the said decision, the Court has expressed a need for a preliminary inquiry before proceeding against public servants.

78. In P. Sirajuddin (supra), relied upon by the Constitution Bench in Lalita Kumari (supra), what this Court has held, and which has apparently been relied upon by the Constitution Bench though not expressly referred to is the following statement contained in paragraph 17:

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[27] (2005) 6 SCC 1
[28] (1970) 1 SCC 595

> **"17. … Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. …"**
>
> **(Emphasis supplied)**

79. In Lalita Kumari (supra), one of the contentions which was pressed before the Court was that in certain situations, preliminary inquiry is necessary. In this regard, attention of the Court was drawn to CBI Crime Manual. The following paragraphs of the Lalita Kumari (supra) may be noticed, which read as follows:

> **"89. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute**

and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act.

90. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

> **"4.*Trial of offences under the Indian Penal Code and other laws*.—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.**
>
> **(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any**

enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

It is thus clear that for the offences under the laws other than IPC, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial, etc. of those offences. Section 4(2) of the Code protects such special provisions.

91. Moreover, Section 5 of the Code lays down as under:

"5.*Saving*.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

Thus, special provisions contained in the DSPE Act relating to the powers of CBI are protected also by Section 5 of the Code.

92. In view of the above specific provisions in the Code, the powers of CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code."

80. It is thereafter that under the caption "Exceptions", the Constitution Bench has proceeded to deal with offences relating to corruption as already noted and contained in paragraph 117 of Lalita Kumari (supra), which has already been extracted. Chapter 8 of the CBI Crime Manual deals with complaints and source of information. Chapter 9 deals with preliminary enquiries. Clause (8.6) of Chapter 8 provides for the categories of complaints which are to be considered fit for verification. It provides, *inter alia*, complaints pertaining to subject matters which fall within the purview of the CBI, either received from official channels or from well-established and recognized organizations or from individuals who are known and who can be traced and examined. Undoubtedly, petitioners are known and can be traced and examined. A complaint against a Minister or a Former Minister of the Union Government is to be put up before the Director of the CBI. The complaints which are registered for verification, with the approval of the competent authority, would only be subjected to secret verification. Clause (9.1) of Chapter 9 contemplates that

when a complaint is received, *inter alia*, after verification and which may after verification indicates serious misconduct on the part of the public servant but is not adequate to justify registration of a regular case, under the provisions of Section 154 of the Cr.PC, a preliminary inquiry may be registered after obtaining approval of the competent authority. Clause (9.1) also, no doubt, deals with cases entrusted by this Court and the High Courts. The Manual further contemplates that the preliminary inquiry will result either in registration of regular cases or departmental action *inter alia*.

81. The Constitution Bench in Lalita Kumari(supra), had before it, the CBI Crime Manual. It also considered the decision of this Court in P. Sirajuddin (supra) which declared the necessity for preliminary inquiry in offences relating to corruption. Therefore, the petitioners may not be justified in approaching this Court seeking the relief of registration of an FIR and investigation on the same as such. This is for the reason that one of the exceptions where

immediate registration of FIR may not be resorted to, would be a case pointing fingers at a public figure and raising the allegation of corruption. This Court also has permitted preliminary inquiry when there is delay, laches in initiating criminal prosecution, for example, over three months. A preliminary inquiry, it is to be noticed in paragraph 120.7, is to be completed within seven days.

82. The petitioners have not sought the relief of a preliminary inquiry being conducted. Even assuming that a smaller relief than one sought could be granted, there is yet another seemingly insuperable obstacle.

83. In the year 2018, the Prevention of Corruption (Amendment) Act, 2018 (hereinafter referred to as '2018 Act' for short) was brought into force on 26.07.2018. Thereunder, Section 17A, a new Section was inserted, which reads as follows:

> **"17A. <u>(1) No police officer shall conduct any enquiry or inquiry or investigation</u> into any offence alleged to**

have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval— (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government; (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government; (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed: Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person: Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.“”.

(Emphasis supplied)

84. In terms of Section 17A, no Police Officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence

alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, *inter alia*, of the authority competent to remove the public servant from his Office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent-CBI, is done after Section 17A was inserted. The complaint is dated 04.10.2018. Paragraph 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paragraphs 6 and 7 of the complaint are relevant in the context of Section 17A, which reads as follows:

> **"6. We are also aware that recently, Section 17(A) of the act has been brought in by way of an amendment to introduce the**

> **requirement of prior permission of the government for investigation or inquiry under the Prevention of Corruption Act.**
>
> **7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the government under Section 17(A) of the Prevention of Corruption Act for investigating this offence and under which, "*the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month*".**"

85. Therefore, petitioners have filed the complaint fully knowing that Section 17A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24.10.2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17A. Under the law, as it stood, both on the date

of filing the petition and even as of today, Section 17A continues to be on the Statute Book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17A but when it comes to the relief sought in the Writ Petition, there was no relief claimed in this behalf.

86. Even proceeding on the basis that on petitioners complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17A. I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may have made out a case, having regard to the law actually laid down in Lalita Kumari (supra), and more importantly, Section 17A of the Prevention of Corruption Act, in a Review Petition, the petitioners cannot succeed. However, it is my view that the judgment sought to be reviewed, would not stand in the way of the first respondent

in Writ Petition (Criminal) No. 298 of 2018 from taking action on Exhibit P1-complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17A of the Prevention of Corruption Act.

87. **Subject as hereinbefore stated, in regard to the other Petitions and Applications, I agree with the proposed Order of Brother Justice Sanjay Kishan Kaul.**

.....J.
(K.M. JOSEPH)

New Delhi,
November 14, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9828 OF 2013

D.A.V. COLLEGE TRUST AND
MANAGEMENT SOCIETY & ORS. …APPELLANT(S)

VERSUS

DIRECTOR OF PUBLIC
INSTRUCTIONS & ORS. …RESPONDENT(S)

With

CIVIL APPEAL NOS. 9844-9845 OF 2013

CIVIL APPEAL NOS. 9846-9857 OF 2013

CIVIL APPEAL NO. 9860 OF 2013

J U D G M E N T

Deepak Gupta, J.

Whether non-governmental organisations substantially financed by the appropriate government fall within the ambit of 'public authority' under Section 2(h) of the Right to Information Act, 2005 is the issue for consideration in this case.

2. The Right to Information Act (for short 'the Act') was enacted by Parliament in the year 2005, for the purpose of setting out a practical

regime of right to information for citizens to secure access to information. The relevant portion of the Objects & Reasons of the Act reads as follows:-

> "…AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
>
> AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal; …"

3. Under the Act, a public authority is required to maintain records in terms of Chapter II and every citizen has the right to get information from the public authority. 'Public authority' is defined in Section 2(h) of the Act which reads as follows:-

> "…
> (h) "public authority" means any authority or body or institution of self-government established or constituted –
>
> (a) by or under the Constitution;
> (b) by any other law made by Parliament;
> (c) by any other law made by State Legislature;
> (d) by notification issued or order made by the appropriate Government,
>
> and includes any –
>
> (i) body owned, controlled or substantially financed;
> (ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government;"

4. The appellants before us are all colleges or associations running the colleges and/or schools and their claim is that Non-Governmental Organisations (NGOs) are not covered under the Act. According to the appellants, the objective of the Act was to cover only Government and its instrumentalities which are accountable to the Government. It has also been urged that the words 'public authority' mean any authority or body or institution of self-government and such body or institution must be constituted under the Constitution, or by any law of Parliament, or by any law made by the State Legislature or by a notification issued or order made by the appropriate Government.

5. It is urged that unless a specific notification is issued, in terms of clause (d), no body or institution outside the ambit of clauses (a) to (c) of Section 2(h) can be deemed to be public authority. It is further urged that there are 4 types of public authorities as pointed out above, i.e., those set up (a) under the Constitution, (b) by an Act of Parliament, (c) by any law made by State Legislature, or (d) by notification issued or order made by the appropriate Government. No other authority can be considered a public authority. Since the

appellants do not fall under any of the above mentioned 4 categories, they cannot be termed to be public authority.

6. As far as definition of public authority is concerned this Court has dealt with the matter in detail in ***Thalappalam Service Cooperative Bank Ltd. and Ors.*** v. ***State of Kerala and Ors***.[1] It would however, be pertinent to mention that in that case the Registrar of Cooperative Societies had issued a Circular No. 23 of 2006 directing that all cooperative societies would fall within the ambit of the Act. This notification was challenged before this Court. Dealing with Section 2(h) of the Act, this Court in the aforesaid judgment held as follows:-

> "**30.** The legislature, in its wisdom, while defining the expression "public authority" under Section 2(*h*), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(*h*) has used the expressions "means" and "includes". When a word is defined to "mean" something, the definition is prima facie restrictive and where the word is defined to "include" some other thing, the definition is prima facie extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there would exhaust themselves. The meanings of the expressions "means" and "includes" have been explained by this Court in *DDA* v. *Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.
>
> **31.** Section 2(*h*) exhausts the categories mentioned therein. The former part of Section 2(*h*) deals with:
>
> (*1*) an authority or body or institution of self-government established by or under the Constitution,
>
> (*2*) an authority or body or institution of self-government established or constituted by any other law made by Parliament,

1 (2013) 16 SCC 82

(*3*) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and

(*4*) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate Government.

32. The Societies, with which we are concerned, admittedly, do not fall in the abovementioned categories, because none of them is either a body or institution of self-government, established or constituted under the Constitution, by law made by Parliament, by law made by the State Legislature or by way of a notification issued or made by the appropriate Government. Let us now examine whether they fall in the latter part of Section 2(*h*) of the Act, which embraces within its fold:

(*5*) a body owned, controlled or substantially financed, directly or indirectly by funds provided by the appropriate Government,

(*6*) non-governmental organisations substantially financed directly or indirectly by funds provided by the appropriate Government."

7. At this stage we may note that in the ***Thalappalam case*** (supra) there was an order issued directing that cooperative societies would fall within the ambit of the Act. The validity of this order was challenged on the grounds that the cooperative societies were neither bodies owned, controlled and/or substantially financed by the government nor could they be said to be NGOs substantially financed, directly or indirectly, by funds provided by the appropriate Government.

8. It is a well settled statutory rule of interpretation that when in the definition clause a meaning is given to certain words then that meaning alone will have to be given to those words. However, when the definition clause contains the words 'means and includes' then

both these words must be given the emphasis required and one word cannot override the other.

9. In ***P. Kasilingam*** v. ***P.S.G. College of Technology & Ors.***[2] this Court was dealing with the expression 'means and includes', wherein Justice S.C. Agrawal observed as follows:-

> "**19.** …A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See : *Gough* v. *Gough*; *Punjab Land Development and Reclamation Corpn. Ltd.* v. *Presiding Officer, Labour Court*.) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See : *Dilworth* v. *Commissioner of Stamps* (Lord Watson); *Mahalakshmi Oil Mills* v. *State of A.P.* The use of the words "means and includes" in Rule 2(*b*) would, therefore, suggest that the definition of 'college' is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(*b*) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time…"

This judgment was followed in ***Bharat Coop. Bank (Mumbai) Ltd***. v. ***Coop. Bank Employees Union***[3] and ***Delhi Development Authority*** v. ***Bhola Nath Sharma (Dead) by L.Rs. and Ors***.[4]

2 (1995) Supp 2 SCC 348
3 (2007) 4 SCC 685
4 (2011) 2 SCC 54

10. It is thus clear that the word 'means' indicates that the definition is exhaustive and complete. It is a hard and fast definition and no other meaning can be given to it. On the other hand, the word 'includes' enlarges the scope of the expression. The word 'includes' is used to signify that beyond the meaning given in the definition clause, other matters may be included keeping in view the nature of the language and object of the provision. In ***P. Kasilingam's case*** (supra) the words 'means and includes' has been used but in the present case the word 'means' has been used in the first part of sub-section (h) of Section 2 whereas the word 'includes' has been used in the second part of the said Section. They have not been used together.

11. One of the arguments raised before us is that the words "self-government" occurring in the opening portion of Section 2(h) will govern the words 'authority', 'body' or 'institution'. It is urged that only such authorities, bodies or institutions actually concerned with self-governance can be declared to be public authorities. This objection has to be rejected outright. There are three categories in the opening lines viz., (a) authorities; (b) bodies; and (c) institutions of self-government. There can be no doubt in this regard and, therefore, we reject this contention.

12. The next contention is that a public authority can only be an authority or body or institution which has been established or constituted (a) under the Constitution; (b) by any law of Parliament; (c) by any law of State Legislature or (d) by notification made by the appropriate Government. It is the contention of the appellants that only those authorities, bodies or institutions of self-government which fall in these four categories can be covered under the definition of public authority. It is also contended that in the ***Thalappalam case*** (supra) the Court did not consider the effect of clause (d) on the remaining portion of the definition.

13. On the other hand, on behalf of the respondents it is urged that the reading of Section 2(h) clearly shows that in addition to the four categories referred to in the first part, there is an inclusive portion which includes (i) body owned, controlled or substantially financed; (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.

14. The Section, no doubt, is unartistically worded and therefore, a duty is cast upon us to analyse the Section, find out its true meaning and interpret it in a manner which serves the purpose of the Act.

15. If we analyse Section 2(h) carefully it is obvious that the first part of Section 2(h) relates to authorities, bodies or institutions of self-government established or constituted (a) under the Constitution; (b) by any law of Parliament; (c) by any law of State Legislature or (d) by notification made by the appropriate Government. There is no dispute with regard to clauses (a) to (c). As far as clause (d) is concerned it was contended on behalf of the appellants that unless a notification is issued notifying that an authority, body or institution of self-government is brought within the ambit of the Act, the said Act would not apply. We are not impressed with this argument. The notification contemplated in clause (d) is a notification relating to the establishment or constitution of the body and has nothing to do with the Act. Any authority or body or institution of self-government, if established or constituted by a notification of the Central Government or a State Government, would be a public authority within the meaning of clause (d) of Section 2(h) of the Act.

16. We must note that after the end of clause (d) there is a comma and a big gap and then the definition goes on to say 'and includes any –' and thereafter the definition reads as:

> "(i) body owned, controlled or substantially financed;
> (ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government;"

The words 'and includes any', in our considered view, expand the definition as compared to the first part. The second part of the definition is an inclusive clause which indicates the intention of the Legislature to cover bodies other than those mentioned in clauses (a) to (d) of Section 2(h).

17. We have no doubt in our mind that the bodies and NGOs mentioned in sub-clauses (i) and (ii) in the second part of the definition are in addition to the four categories mentioned in clauses (a) to (d). Clauses (a) to (d) cover only those bodies etc., which have been established or constituted in the four manners prescribed therein. By adding an inclusive clause in the definition, Parliament intended to add two more categories, the first being in sub-clause (i), which relates to bodies which are owned, controlled or substantially financed by the appropriate Government. These can be bodies which may not have been constituted by or under the Constitution, by an Act of Parliament or State Legislature or by a notification. Any body which is owned, controlled or substantially financed by the Government, would be a public authority.

18. As far as sub-clause (ii) is concerned it deals with NGOs substantially financed by the appropriate Government. Obviously,

such an NGO cannot be owned or controlled by the Government. Therefore, it is only the question of financing which is relevant.

19. Even in the ***Thalappalam case*** (supra) in para 32 of the judgment, this Court held that in addition to the four categories there would be two more categories, (5) and (6).

20. The principle of purposive construction of a statute is a well-recognised principle which has been incorporated in our jurisprudence. While giving a purposive interpretation, a court is required to place itself in the chair of the Legislature or author of the statute. The provision should be construed in such a manner to ensure that the object of the Act is fulfilled. Obviously, if the language of the Act is clear then the language has to be followed, and the court cannot give its own interpretation. However, if the language admits of two meanings then the court can refer to the Objects and Reasons, and find out the true meaning of the provisions as intended by the authors of the enactment. Justice S.B. Sinha in ***New India Assurance Company Ltd***. v. ***Nusli Neville Wadia and Anr.***[5] held as follows:-

> "**51**. ...to interpret a statute in a reasonable manner, the court must place itself in the chair of reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled; which in turn would lead the

5 (2008) 3 SCC 279

beneficiary under the statutory scheme to fulfil its constitutional obligations as held by the court inter alia in Ashoka Marketing Ltd."

Justice Sinha quoted with approval the following passage from Barak's treatise on Purposive Interpretation in Law,[6] which reads as follows:-

> "**52.** …Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfil their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."

21. Justice M.B. Lokur speaking for the majority in ***Abhiram Singh*** v. **C.D. *Commachen (Dead) by L.Rs. and Ors***.[7] held as follows:-

> "**39**. …Ordinarily, if a statute is well drafted and debated in Parliament there is little or no need to adopt any interpretation other than a literal interpretation of the statute. However, in a welfare State like ours, what is intended for the benefit of the people is not fully reflected in the text of a statute. In such legislations, a pragmatic view is required to be taken and the law interpreted purposefully and realistically so that the benefit reaches the masses…"

22. Therefore, in our view, Section 2(h) deals with six different categories and the two additional categories are mentioned in sub clauses (i) and (ii). Any other interpretation would make clauses (i)

6 (2008) 3 SCC 279: Aharon Barak, Purposive Interpretation in Law, (2007) at pg.87
7 (2017) 2 SCC 629

and (ii) totally redundant because then an NGO could never be covered. By specifically bringing NGOs it is obvious that the intention of the Parliament was to include these two categories mentioned in sub clauses (i) and (ii) in addition to the four categories mentioned in clauses (a) to (d). Therefore, we have no hesitation in holding that an NGO substantially financed, directly or indirectly, by funds provided by the appropriate government would be a public authority amenable to the provisions of the Act.

23. NGO is not defined under the Act or any other statute as far as we are concerned. In fact, the term NGO appears to have been used for the first time describing an international body which is legally constituted but non-governmental in nature. It is created by natural or legal entities with no participation or representation by the Government. Even NGOs which are funded totally or partially by the Governments essentially maintain the NGO status by excluding Government representations in all their organisations. In some jurisprudence, they are also referred to as civil society organisations.

24. A society which may not be owned or controlled by the Government, may be an NGO but if it is substantially financed directly or indirectly by the government it would fall within the ambit of sub-clause (ii).

25. That brings us to the second limb of the argument of the appellants that the colleges/schools are not substantially financed. In this regard, we may again make reference to the judgment in the ***Thalapplam case*** (supra) wherein this Court dealing with the issue of substantially financed made the following observations:-

> "**47.** We often use the expressions "questions of law" and "substantial questions of law" and explain that any question of law affecting the right of parties would not by itself be a substantial question of law. In *Black's Law Dictionary* (6th Edn.) the word "substantial" is defined as
>
> "*Substantial.*—Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. … Something worthwhile as distinguished from something without value or merely nominal. … Synonymous with material."
>
> The word "substantially" has been defined to mean "essentially; without material qualification; in the main; in substance; materially". In *Shorter Oxford English Dictionary* (5th Edn.), the word "substantial" means "of ample or considerable amount of size; sizeable, fairly large; having solid worth or value, of real significance; solid; weighty; important, worthwhile; of an act, measure, etc. having force or effect, effective, thorough". The word "substantially" has been defined to mean "in substance; as a substantial thing or being; essentially, intrinsically". Therefore the word "substantial" is not synonymous with "dominant" or "majority". It is closer to "material" or "important" or "of considerable value". "Substantially" is closer to "essentially". Both words can signify varying degrees depending on the context.
>
> **48.** Merely providing subsidies, grants, exemptions, privileges, etc. as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist. The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from NABARD, etc. but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body within the fold of "public authority" under Section 2(*h*)(*d*)(*i*) of the Act. But, there are instances, where private educational institutions getting ninety-five per cent grant-in-aid from the appropriate Government, may answer the definition of public authority under Section 2(*h*)(*d*)(*i*)."

26. In our view, 'substantial' means a large portion. It does not necessarily have to mean a major portion or more than 50%. No hard and fast rule can be laid down in this regard. Substantial financing can be both direct or indirect. To give an example, if a land in a city is given free of cost or on heavy discount to hospitals, educational institutions or such other body, this in itself could also be substantial financing. The very establishment of such an institution, if it is dependent on the largesse of the State in getting the land at a cheap price, would mean that it is substantially financed. Merely because financial contribution of the State comes down during the actual funding, will not by itself mean that the indirect finance given is not to be taken into consideration. The value of the land will have to be evaluated not only on the date of allotment but even on the date when the question arises as to whether the said body or NGO is substantially financed.

27. Whether an NGO or body is substantially financed by the government is a question of fact which has to be determined on the facts of each case. There may be cases where the finance is more than 50% but still may not be called substantially financed. Supposing a small NGO which has a total capital of Rs.10,000/- gets a grant of Rs.5,000/- from the Government, though this grant may be

50%, it cannot be termed to be substantial contribution. On the other hand, if a body or an NGO gets hundreds of crores of rupees as grant but that amount is less than 50%, the same can still be termed to be substantially financed.

28. Another aspect for determining substantial finance is whether the body, authority or NGO can carry on its activities effectively without getting finance from the Government. If its functioning is dependent on the finances of the Government then there can be no manner of doubt that it has to be termed as substantially financed.

29. While interpreting the provisions of the Act and while deciding what is substantial finance one has to keep in mind the provisions of the Act. This Act was enacted with the purpose of bringing transparency in public dealings and probity in public life. If NGOs or other bodies get substantial finance from the Government, we find no reason why any citizen cannot ask for information to find out whether his/her money which has been given to an NGO or any other body is being used for the requisite purpose or not.

30. It is in the light of the aforesaid proposition of law that we now propose to examine the cases individually.

Civil Appeal No. 9828 of 2013

31. This has been filed by D.A.V. College Trust and Management Society, New Delhi; D.A.V. College, Chandigarh; M.C.M. D.A.V. College, Chandigarh and D.A.V. Senior Secondary School, Chandigarh.

32. Appellant no.1 is the Society which runs various colleges/schools but each has an identity of its own and, in our view, each of the college/school is a public authority within the meaning of the Act. It has been urged that these colleges/schools are not being substantially financed by the Government in as much as that they do not receive more than 50% of the finance from the Government. Even the documents filed by the appellants themselves show that M.C.M. D.A.V. College, Chandigarh, in the years 2004-05, 2005-06 and 2006-07, has received grants in excess of 1.5 crores each year which constituted about 44% of the expenditure of the College. As far as D.A.V. College, Chandigarh is concerned the grant for these three years ranged from more than 3.6 crores to 4.5 crores and in percentage terms it is more than 40% of the total financial outlay for each year. Similar is the situation with D.A.V. Senior Secondary School, Chandigarh, where the contribution of the State is more than 44%.

33. Another important aspect, as far as the colleges are

concerned, is that 95% of the salary of the teaching and non-teaching staff of the College is borne by the State Government. A major portion of the remaining expenses shown by the College is with regard to the hostels, etc. It is teaching which is the essential part of the College and not the hostels or other infrastructure like auditorium, etc. The State has placed on record material to show that now these grants have increased substantially and in the years 2013-14, 2014-15 and 2015-16, the D.A.V. College, Chandigarh received amounts more than Rs.15 crores yearly, M.C.M. D.A.V. College, Chandigarh received amounts more than Rs.10 crores yearly and the D.A.V. Senior Secondary School, Chandigarh received grant of more than Rs.4 crores yearly. It can be safely said that they are substantially financed by the Government.

34. During the course of hearing, some information was placed on record by the learned counsel for the respondents showing how much is the fund being granted to these institutions from the year 2013-14 to 2015-16. As far as these institutions are concerned the payments received are as follows:-

Institution	**2013-14 (Rs.)**	**2014-15 (Rs.)**	**2015-16 (Rs.)**
D.A.V. College, Sector 10, Chandigarh	14,97,31,954/-	15,15,91,074/-	17,57,90,476/-

M.C.M. D.A.V. College, Sector-36, Chandigarh	10,06,91,020/ -	10,47,79,495/ -	11,33,94,771/ -
D.A.V. Sr. Sec. School, Sector-8, Chandigarh	3,97,39,280/-	4,17,85,658/-	5,06,88,770/-

35. These are substantial payments and amount to almost half the expenditure of the Colleges/School and more than 95% of the expenditure as far as the teaching and other staff is concerned. Therefore, in our opinion, these Colleges/School are substantially financed and are public authority within the meaning of Section 2(h) of the Act.

CIVIL APPEAL NOS. 9844-9845 OF 2013
CIVIL APPEAL NOS. 9846-9857 OF 2013
CIVIL APPEAL NO. 9860 OF 2013

36. As far as these cases are concerned, we find from the judgments of the High Court that the aspect with regard to substantial financing has not been fully taken into consideration, as explained by us above. Therefore, though we hold that these bodies are NGOs, the issue whether these are substantially financed or not needs to be decided by the High Court. The High Court shall give

both the parties opportunity to file documents and decide the issue in light of the law laid down by us.

37. With these observations, all the appeals are disposed of in the aforesaid terms. Civil Appeal No. 9828 of 2013 is dismissed. Civil Appeal Nos. 9844-9845 of 2013, 9846-9857 of 2013 and 9860 of 2013 are remitted to the High Court for determination whether the institutions are substantially financed or not. The High Court shall treat the writ petitions to be filed in the year 2013 and give them priority accordingly.

.....J.
(Deepak Gupta)

.....J.
(Aniruddha Bose)

New Delhi
September 17, 2019

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

REVIEW PETITION (CRIMINAL) NO. 46 OF 2019

IN

WRIT PETITION (CRIMINAL) NO. 298 OF 2018

YASHWANT SINHA & ORS. ...PETITIONER(S)

VERSUS

CENTRAL BUREAU OF INVESTIGATION THROUGH ITS DIECTOR & ANR. ... RESPONDENT(S)

WITH
M.A.NO. 58/2019 in W.P. (CRL.) 225/2018
R.P. (CRL.) NO. 122/2019 IN W.P. (CRL.) 297/2018
M.A. NO. 403/2019 IN W.P. (CRL.) NO. 298/2018
R.P.(C) No. 719/2019 in W.P.(C) 1205/2018

JUDGMENT

RANJAN GOGOI, CJI

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

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

(a) An eight-page note written by three members of the Indian Negotiating Team ('INT') charged in reference to the Rafale Deal (note dated 01.06.2016)

(b) Note-18 of the Ministry of Defence (Government of India), F.No. AirHQ/S/96380/3/ASR PC-XXVI (Marked Secret under the Official Secrets Act)

(c) Note-10 written by S.K. Sharma (Deputy Secretary, MoD, Air-III), Note dated 24.11.2015 (Marked Secret under the Official Secrets Act)

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

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

> **3. Penalties for spying**.- (1) If any person for any purpose prejudicial to the safety or interests of the State –
>
> (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
>
> (b) makes any sketch, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly, useful to any enemy; or
>
> (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States:
>
> he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval,

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

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

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

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

(a) willfully communicates the code or password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or password or information;

He shall be guilty of an offence under this section.

(2) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

8. Exemption from disclosure of information. – (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, -

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) xxxx xxxx xxxx xxxx

(c) xxxx xxxx xxxx xxxx

(d) xxxx xxxx xxxx xxxx

(e) xxxx xxxx xxxx xxxx

(f) xxxx xxxx xxxx xxxx

(g) xxxx xxxx xxxx xxxx

(h) xxxx xxxx xxxx xxxx

(i) xxxx xxxx xxxx xxxx

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

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) xxxx xxxx xxxx xxxx

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

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

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

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

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

the publication of such documents on any of the grounds mentioned in Article 19(2) of the Constitution has been brought to our notice. In fact, the publication of the said documents in 'The Hindu' newspaper reminds the Court of the consistent views of this Court upholding the freedom of the press in a long line of decisions commencing from ***Romesh Thappar vs. State of Madras***[1] and ***Brij Bhushan vs. The State of Delhi***[2]. Though not in issue, the present could very well be an appropriate occasion to recall the views expressed by this Court from time to time. Illustratively and only because of its comprehensiveness the following observations in ***Indian Express Newspapers (Bombay) Private Limited vs.Union of India***[3] may be extracted:

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

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1 AIR 1950 SC 124
2 AIR 1950 SC 129
3 1985(1) SCC 641

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

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

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

A later view equally eloquent expressed by this Court in ***Printers (Mysore) Limited vs. Assistant Commercial Tax Officer***[6] may also be usefully recapitulated.

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

4 AIR 1950 SC 124

5 AIR 1950 SC 129

6 1994 (2) SCC 434

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

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

5. The above views of the Supreme Court of India on the issue of the freedom of the press has been echoed by the U.S. Supreme Court in ***New York Times Company vs. United States***[7] wherein Marshall, J. refused to recognize a right in the executive

7 403 U.S. 713 (1971)

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

6. Insofar as the claim of privilege is concerned, on the very face of it, Section 123 of the Indian Evidence Act, 1872 relates to unpublished public records. As already noticed, the three documents have been published in different editions of 'The Hindu' newspaper. That apart, as held in ***S.P. Gupta vs. Union of India***[8] a claim of immunity against disclosure under Section 123 of the Indian Evidence Act has to be essentially adjudged on the touchstone of public interest and to satisfy itself that public interest is not put to jeopardy by requiring disclosure the Court may even inspect the document in question though the said power has to be sparingly exercised. Such an exercise, however, would not be necessary in the present case as the document(s) being in public domain and within the reach and knowledge of the entire citizenry, a practical and common sense approach would lead to the obvious conclusion that it would be a meaningless and an exercise in utter futility for the Court to refrain from reading and considering the said document or from shutting out its evidentiary worth and value. As the claim of immunity under Section 123 of the Indian Evidence

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8 AIR 1982 SC, 149

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

7. An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before the Court. In this regard, as already noticed, the documents have been published in 'The Hindu' newspaper on different dates. That apart, even assuming that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court? In ***Pooran Mal vs. Director of Inspection (Investigation) of Income-Tax, New Delhi***[9] this Court has taken the view that the "test of admissibility of evidence lies in its relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."

8. Insofar as the Right to Information Act is concerned in ***Chief Information Commissioner vs. State of Manipur***[10] this Court had

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9 AIR 1974 SC 348
10 (2011) 15 SCC,1

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

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

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

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

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

> "Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation, or Judge-Made Law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. **That all Constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that**

11 AIR 1973 SC 1461

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

(Justice Khanna – para 1535)

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

....., CJI
[RANJAN GOGOI]

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

NEW DELHI
APRIL 10, 2019

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISIDICTION

REVIEW PETITION (CRIMINAL) NO. 46 OF 2019
IN
WRIT PETITION(CRIMINAL) No.298 of 2018

YASHWANT SINHA & ORS. ….PETITIONERS

VERSUS

CENTRAL BUREAU OF INVESTIGATION
THROUGH ITS DIRECTOR & ANR. …RESPONDSENTS

WITH

M.A.NO.58/2019 IN W.P.(CRL.)NO.225/2018
R.P.(CRL.)NO.122/2019 IN W.P.(CRL.)NO.297/2018
M.A.NO.403/2019 IN W.P.(CRL.)NO.298/2018
R.P.(C)No.719/2019 IN W.P.(C)NO.1205/2018

O R D E R

K.M. JOSEPH,J.

1. I have read the order proposed in the matter by the learned Chief Justice. While I agree with the decision, I think it fit to give the following reasons and hence, the concurring order:-

2. I do agree with the observations made by the learned chief Justice in regard to the importance which has been attached to the freedom of Press. The

Press in India has greatly contributed to the strengthening of democracy in the country. It will have a pivotal role to play for the continued existence of a vibrant democracy in the country. It is indisputable that the press out of which the visual media in particular wields power, the reach of which appears to be limitless. No segment of the population is impervious to its influence.

In *Rajendra Sail v. M.P. High Court Br Association and Others* 2005 (6) SCC 109, this Court dealing with a case under the Contempt of Court Act held *inter alia* as follows:

> **"31. The reach of the media, in the present times of 24-hour channels, is to almost ever nook and corner of the world. Further, large number of people believe as correct that which appears in media, print or electronic……"**
>
> ***(emphasis supplied)***

It must realise that its consumers are entitled to demand that the stream of information that flows from it, must remain unpolluted by considerations other than truth.

3. I would think that freedom involves many elements. A free person must be fearless. Fear can be of losing all or any of the things that is held

dear by the journalist. A free man cannot be biased. Bias comes in many forms. Bias if it is established as per the principles which are applicable is sufficient to vitiate the decisions of public authorities. The rule against bias is an important axiom to be observed by Judges. Equally the Press including the visual media cannot be biased and yet be free. Bias ordinarily implies a pre-disposition towards ideas or persons, both expressions to be comprehended in the broadest terms. It may stem from personal, political or financial considerations. Transmitting biased information, betrays absence of true freedom. It is, in fact, a wholly unjustifiable onslaught on the vital right of the people to truthful information under Article 19(1)(a) which, in turn, is the bedrock of many other rights of the citizens also. In fact, the right of the Press in India is no higher than the right of the citizens under Article 19(1)(a) and is traced to the same provision. The ability of truth to be recognised by a discerning public in the supposedly free market place of ideas forms much of the basis for the grant of the unquestionable freedom

to the Press including the Media Houses. If freedom is enjoyed by the Press without a deep sense of responsibility, it can weaken democracy. In some sections, there appears to be a disturbing trend of bias. Controlling business interests and political allegiances appear to erode the duty of dispassionate and impartial purveying of information. In this regard in an article styled 'the Indian Media' which is annexed to the Autobiography under the title "Beyond the Lines" veteran journalist Late Shri Kuldip Nayyar has voiced the following lament:

> **"Journalism as a profession has changed a great deal from what it was in our times. I feel acute sense of disappointment, not only because it has deteriorated in quality and direction but also because I do not see journalist attempting to revive the values ones practiced. The proliferation of newspapers and television channels has no doubt affected the quality of content, particularly reporting. Too many individuals are competing for the same space. What appals me most is that editorial primacy has been sacrificed at the alter of commercialism and vested interests. It hurts to see many journalists bending backwards to remain handmaidens of the proprietors, on the one hand, and of the establishment, on the other. This is so different from what we were used to."**

4. The exhortation as to who are the true beneficiaries of the freedom of speech and the Press

was articulated in the judgment of the U.S. Supreme Court in *Time v. Hill* 385 US 374 in the following words:

> **"The constitutional guarantee of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people."**
>
> ***(emphasis supplied)***

5. In *Indian Express Newspapers (Bombay) Private Ltd. And Others v. Union of India* 1985 (1) SCC 641, this Court made the following observations:

> **"……The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect 'themselves." (Per Lord Simon of Glaisdale in Attorney-General vs. Times Newspapers Limited (1973) 3 ALL ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self fulfilment, (ii) it assists in the discovery of truth, (iii)it strengthens the capacity of an individual in participating in decision making, and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. ……."**

6. The wise words of Justice Douglas to be found in his dissenting judgment in *Dennis v. United States* 341 US 494 reminds one of the true goal of free speech and consequently the role of a free press. The same reads as under:

> **"Free speech has occupied an exalted position because of the high service it has given society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When idea compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilzations apart.**
>
> **Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world."**

7. Law in India relating to Crown privilege as it was originally styled in England is mainly embedded in a statutory provision namely Section 123 of the Indian Evidence Act. Also Section 124 of the said Act is relied upon in the affidavit of the Secretary. Section 124 of the Indian Evidence Act, 1872 reads as follows:-

> **"124. Official communications. —No public 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."**

There can be no matter of doubt that Section 124 is confined to public officers and the decisive aspect even under Section 124 is the protection of public interest.

8. Section 162 deals with the aspect of inspection of documents covered by privilege. In England, the law relating to privilege has been entirely court made. It cannot be in dispute that the claim for privilege under Section 123 of the Indian Evidence Act being based on public policy cannot be waived (see in this regard judgment of this

Court in *M/s. Doypack Systems Pvt. Ltd. Vs. Union of India and Others* 1988 (2) SCC 299 at page 327). The basis for the claim of privilege is and can only be public interest.

9. In the judgment of this Court in *State of U.P. v. Raj* Narain; AIR 1975 SC 865, Chief Justice A.N. Ray speaking on behalf of the Constitution Bench observed:-

> **"The Court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See 1973 AC 388 (supra) at p. 40). To illustrate, the**
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> **class of documents which would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes."**

10. I may also refer to the following discussion contained in *S.P. Gupta vs. Union of India* 1981 (Suppl) SCC 87 which has been also followed by the

Bench in *M/s. Doypack Systems Pvt. Ltd. Vs. Union of India and Others* 1988 (2) SCC 299.

> **"45……..."It is settled law and it was so clearly recognised in Raj Narain's case 1975 (4) SCC 428 that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and despatches from ambassadors abroad (vide *Conway v. Rimmer*, [1968] Appeal Cases 910 at pp. 952, 973, 979, 987 and 993 and *Reg v. Lewes Justices, ex parte Home Secretary*, [1973] A.C. 388 at 412, papers brought into existence for the purpose of preparing a submission to cabinet (vide *Lanyon Property Ltd. v. Commonwealth*, 129 Commonwealth Law Reports 650) and indeed any documents which relate to the framing of government policy at a high level (vide R*e. Grosvenor Hotel, London* [1964] 3 All E.R. 354 (CA)".**

The Court in Doypack (supra) held as follows:-

> **"46. Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to**

which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. See Geoffrey Wilson *cases and Materials on Constitutional and Administrative Law*, 2nd edn., pages 462 to 464. At page 463 para 187, it was observed:

"The real damage with which I are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorised communication of these papers."

See in this Connection *State of Bihar v. Kripalu Shankar*, AIR 1987 SC 1554 at page 1559 and also the decision of *Bachittar Singh v. State of Punjab* [1962] Suppl. 3 SCR 713. Reference may also be made to the observations of Lord Denning in *Air Canada and others v. Secretary of State*, [1983] 1 All ER 161 at 180."

11. In fact, the foundation for the law relating to privilege is contained in the candour principles and also the possibility of ill-informed criticism. Regarding candour forming the premise I find the following discussion in the decision of this Court in *S.P. Gupta's case* (supra).

"We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in

> ***Sankey v. Whitlam (*1978) 21 Australian LR 505:53, it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if these concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (vide: the observations of Lord Denning in *Neilson v, Lougharne* (1981) 1 All ER 829 at P. 835."**

12. Regarding the other premise for supporting the claim of privilege namely the possibility that disclosure will occasion ill-informed criticism and impair the smooth functioning of the Governmental machine, I notice the following in *S.P. Gupta's case* in paragraph 72 which read as follows:

> **"72. There was also one other reason suggested by Lord Reid in *Conway v. Rimmer* 1968 AC 910 for according protection against disclosure of documents belonging to this case: "To my mind", said the learned Law Lord : "the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind." But this reason does not commend itself to us. The**

object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the ministers and other government servants from criticism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open government. It is only through exposure of its functioning that a democratic government can hope to win the trust of the people. If full information is made available to the people and every action of the government is bona fide and actuated only by public interest, there need be no fear of "ill-informed or captious public or political criticism". But at the same time it must be conceded that even in a democracy, government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss?"

The role of the Court has been set out in para 73:-

"73. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its

disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing with each other out of which the court has to decide which predominates. The approach to this problem is admirably set out in a passage from the judgment of Lord Reid in *Conway v. Rimmer* 1968 AC 910:

> **It is universally recognised that there are two kinds of public interest 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 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 of 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. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question, would put the interest of the State in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would he proper to balance the public interests involved.**

The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-

disclosure of the document though relevant to the proceeding. [Vide the observations of Lord Pearson in *Reg, v. Lewes* JJ. Ex parte Home Secy 1973 AC 388 at page 406 of the report]. The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class.……"

(emphasis supplied)

13. I notice that the claim for privilege may arise in the following situations. The claim for privilege may arise in a system of law where there is no statutory framework provided for such a claim. It has been considered to be the position in the United

Kingdom. In India as already noticed, Section 123 of the Evidence Act read with Section 124 and Section 162 does provide for the statutory basis for a claim of public interest privilege. The next aspect relating to the law of compelled production of documents is the constitutional embargo contained in Article 74(2) of the Constitution. Article 74(2) reads as follows:

> **"74(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."**

Therefore, it would be impermissible for a court to inquire into the advice which is tendered by the cabinet. The objection in this case raised under the Right to Information Act, is based only on Section 8(1)(a). I notice Section 8(1)(i) which provides as follows:-

> **"8(1)(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;**
>
> **Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:**

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;".

The said provision having not been pressed into service, neither its scope nor the ramification of Article 74(2) need be pursued further in this case.

14. It is at once apposite to notice the change that was introduced by the Right to Information Act, 2005.

Section 2(i) defines 'record' in the following fashion:

"2 (i) "record" includes—

(i) any document, manuscript and file;

(ii) any microfilm, microfiche and facsimile copy of a document;

(iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(iv) any other material produced by a computer or any other device;"

The word 'right to information' defined in Section 2(j) as follows:

"(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

All citizens are conferred with the right to information subject to the provisions of the Act under Section 3.

15. Section 8 deals with exemption from disclosure of information. Section 8(1)(a) which is pressed before us reads as follows:

> **"8. Exemption from disclosure of information -(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—**
>
> **(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;"**

This is followed by Section 8(2). It reads as follows:

> **"8(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may**

allow access to information, if public interest in disclosure outweighs the harm to the protected interests."

16. Before I delve more into Section (8) it is apposite that I also notice Section 22 which provides as follows:

"22. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

17. I may lastly notice Section 24.

"24(1). Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request."

18. Sections 22 and 24 bring up the rear. I may highlight their significance in the new dispensation which has been ushered in by Parliament. In no unambiguous terms Parliament has declared that the Official Secrets Act, a law made in the year 1923 and for that matter any other law for the time being in force *inter alia* notwithstanding the provisions of the RTI Act will hold the field. The first proviso to Section 24 indeed marks a paradigm shift, in the perspective of the body polity through its elected representatives that corruption and human rights violations are completely incompatible and hence anathema to the very basic principles of democracy, the rule of law and constitutional morality. The proviso declares that even though information available with intelligence and security organisations are generally outside the purview of the open disclosure regime contemplated under the Act, if the information pertains to allegations of corruption or human rights violations such information is very much available to be sought for under the Act. The economic development of a country

is closely interconnected with the attainment of highest levels of probity in public life. In some of the poorest countries in the world, poverty is rightfully intricately associated with corruption. In fact, human rights violations are very often the offsprings of corruption. However, the law giver has indeed dealt with corruption and human rights separately. Hence I say no more on this.

19. Reverting back to Section (8) it is clear that Parliament has indeed intended to strengthen democracy and has sought to introduce the highest levels of transparency and openness. With the passing of the Right to Information Act, the citizens fundamental right of expression under Article 19(1) (a) of the Constitution of India, which itself has been recognised as encompassing, a basket of rights has been given fruitful meaning. Section 8(2) of the Act manifests a legal revolution that has been introduced in that, none of the exemptions declared under sub-section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access

to information if the public interest in disclosure overshadows, the harm to the protected interests.

20. It is true that under Section 8(1)(a), information the disclosure of which will prejudicially affect the sovereignty and integrity of India, the security and strategic security and strategic scientific or economic interests of the State, relation with foreign State or information leading to incitement of an offence are ordinarily exempt from the obligation of disclosure but even in respect of such matters Parliament has advanced the law in a manner which can only be described as dramatic by giving recognition to the principle that disclosure of information could be refused only on the foundation of public interest being jeopardised. What interestingly Section 8(2) recognises is that there cannot be absolutism even in the matter of certain values which were formerly considered to provide unquestionable foundations for the power to withhold information. Most significantly, Parliament has appreciated that it may be necessary to pit one interest against another and to compare the relative

harm and then decide either to disclose or to decline information. It is not as if there would be no harm. If, for instance, the information falling under clause (a) say for instance the security of the nations or relationship with a foreign state is revealed and is likely to be harmful, under the Act if higher public interest is established, then it is the will of Parliament that the greater good should prevail though at the cost of lesser harm being still occasioned. I indeed would be failing to recognise the radical departure in the law which has been articulated in Section 8(2) if I did not also contrast the law which in fact been laid down by this court in the decisions of this Court which I have adverted to. Under the law relating to privilege there are two classes of documents which ordinarily form the basis of privilege. In the first category, the claim for privilege is raised on the basis of contents of the particular documents. The second head under which privilege is ordinarily claimed is that the document is a document which falls in a class of documents which entitles it to protection

from disclosure and production. When a document falls in such a class, ordinarily courts are told that it suffices and the court may not consider the contents. When privilege was claimed as for instance in the matter relating to security of the nation, traditionally, courts both in England and in India have held that such documents would fall in the class of documents which entitles it to protection from production. (See paragraph '9' of this order). The RTI Act through Section 8(2) has conferred upon the citizens a priceless right by clothing them with the right to demand information even in respect of such matters as security of the country and matters relating to relation with foreign state. No doubt, information is not be given for the mere asking. The applicant must establish that withholding of such information produces greater harm than disclosing it.

21. It may be necessary also to consider as to what could be the premise for disclosure in a matter relating to security and relationship with foreign state. The answer is contained in Section 8(2) and that is public interest. Right to justice is

immutable. It is inalienable. The demands it has made over other interests has been so overwhelming that it forms the foundation of all civilised nations. The evolution of law itself is founded upon the recognition of right to justice as an indispensable hallmark of a fully evolved nation.

22. The preamble to the constitution proclaims justice -social, economic or political, as the goal to be achieved. It is the duty of every State to provide for a fair and effective system of administration of justice. Judicial review is, in fact, recognised as a basic feature of the Constitution. Section 24 of the Act also highlights the importance attached to the unrelenting crusade against corruption and violation of human rights. The most important aspect in a justice delivery system is the ability of a party to successfully establish the case based on materials. Subject to exceptions it is settled beyond doubt that any person can set the criminal law into motion. It is equally indisputable however that among the seemingly insuperable obstacles a litigant faces are the

limitations on the ability to prove the case with evidence and more importantly relevant evidence. Ability to secure evidence thus forms the most important aspect in ensuring the triumph of truth and justice. It is imperative therefore that Section 8(2) must be viewed in the said context. Its impact on the operation on the shield of privilege is unmistakable.

23. It is clear that under the Right to Information Act, a citizen can get a certified copy of a document under Section 8(2) of the RTI Act even if the matter pertains to security or relationship with a foreign nation, if a case is made out thereunder. If such a document is produced surely a claim for privilege could not lie.

24. Coming to privilege it may be true that Section 123 of the Evidence Act stands unamended. It is equally true that there is no unqualified right to obtain information in respect of matters under Section 8(1)(a) of the RTI Act. However, the Court cannot be wholly unaffected by the new regime introduced by Parliament under the RTI Act on the

question regarding a claim for privilege. It is pertinent to note that an officer of the department is permitted under the RTI Act to allow access to information under the Act in respect of matters falling even under Section 8(1)(a) if a case is made out under Section 8(2). If an officer does not accede to the request, a citizen can pursue remedies before higher authorities and finally the courts. Could it be said that what an officer under the RTI Act can permit, cannot be allowed by a court and that too superior courts under Section 123 of the Evidence Act. I would think that the court indeed can subject no doubt to one exception, namely, if it is a matter which is tabooed under Article 74(2) of the Constitution.

25. In this case in fact, the documents in respect of which the privilege is claimed are already on record. Section 123 of the Evidence Act in fact contemplates a situation where party seeks the production of document which is with a public authority and the public authority raises claim for privilege by contending that the document cannot be

produced by it. Undoubtedly, the foundation for such a claim is based on public interest and nothing more and nothing less. In fact, in *State of U.P. VS. Raj Narain* AIR 1975 SC 861 I notice the following paragraph about the effect of publication in part in the concurring judgment of K.K. Mathew,J. which reads as under:

> **"81. I do not think that there is much substance in the contention that since, the Blue Book had been published in parts, it must be deemed to have been published as a whole and, therefore, the document could not be regarded as an unpublished official record relating to affairs of state. If some parts of the document which are innocuous have been published, it does not follow that the whole document has been published. No authority has been cited for the proposition that if a severable and innocuous portion of a document is published, the entire document shall be deemed to have been published for the purpose of S. 123."**

26. I may also notice another aspect. Under the common law both in England and in India the context for material being considered by the court is relevancy. There can be no dispute that the manner in which evidence is got namely that it was procured in an illegal manner would not ordinarily be very significant in itself in regard to the courts

decision to act upon the same (see in this context judgment of this Court in *Pooran Mal v. Director of Inspection (Investigation) of Income Tax* AIR 1974 SC 348). Therein I notice the following statements:

> **"25. So far as India is concerned its law of evidence is modeled on the rules of evidence, which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. In Barindra Kumar Ghose and others v. Emperor(1910)ILR 37 Cal 467 the learned Chief Justice Sir Lawrence Jenkins says at page, 500 :**
>
> **"Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutavahana with his shrewd common-sense observes-"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks : "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed. by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized.**
>
> **……. …… …….**

It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."

(Emphasis supplied)

27. Now in the context of a claim of privilege raised under Section 123 however, the evidence being requisitioned by a party against the state or public authority it may happen however that a party may obtain a copy of the document in an improper manner. A question may arise as to whether the copy is true copy of the original. If a copy is wholly improperly obtained and an attempt is made by production thereof to compel the State to produce the original, a question may and has in fact arisen whether the Court is bound to order production. In the landmark judgment by the High court of Australia in *Sankey v. Whitlam* (1978) 142 CLR 1, informations were laid against Mr. Whitlam the former Prime Minister of Australia and three members of his Ministry alleging offence under Section 86 of the Crimes Act 1914 and a

conspiracy at common law. The case also threw up the scope of the claim for privilege. It was held *inter alia* as follows in the judgment rendered by Sir Harry Gibbs, A.C.J.:

> **"43. If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to be accepted that in those circumstances the documents must be disclosed: Duncan v. Cammell, Laird & Co. [1942] UKHL 3; (1942) AC 624, at pp 633-634 ; Conway v. Rimmer (1968) AC, at pp 966-967, 987 ; Reg. v. Lewes Justices; Ex parte Home Secretary (1973) AC, at pp 407-408. Moreover, a Minister might produce a document of his own accord if it were necessary to do so to support a criminal prosecution launched on behalf of the government. The fact that state papers may come to light in some circumstances is impossible to reconcile with the view that they enjoy absolute protection from disclosure.**
>
> **48. In Robinson v. South Australia (No. 2) (1931) AC, at p 718 , it was said that "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". Other cases support that view: see Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth (No. 2) (1913) 16 CLR, at pp 188, 195, 199 ; Christie v. Ford (1957) 2 FLR 202, at p 209 . However the submission made by counsel**

for Mr. Whitlam was that the position is different when the exclusion of a document is sought not because of its contents but because of the class to which it belongs. In such a case the document is withheld irrespective of its contents; therefore, it was said, it is immaterial that the contents are known. That is not so; for the reasons I have suggested, it may be necessary for the proper functioning of the public service to keep secret a document of a particular class, but once the document has been published to the world there no longer exists any reason to deny to the court access to that document, if it provides evidence that is relevant and otherwise admissible. It was further submitted that if one document forming part of a series of cabinet papers has been published, but others have not, it would be unfair and unjust to produce one document and withhold the rest. That may indeed be so, and where one such document has been published it becomes necessary for the court to consider whether that circumstance strengthens the case for the disclosure of the connected documents. However even if other related documents should not be produced, it seems to me that once a document has been published it becomes impossible, and indeed absurd, to say that the public interest requires that it should not be produced or given in evidence."

28. No doubt regarding publication by an unauthorised person and it being unauthenticated, the learned Judge had this to say:

"49. What I have just said applies to cases where it is established that a true copy of

the document sought to be produced has in fact been published. The publication by an unauthorized person of something claimed to be a copy of an official document, but unauthenticated and not proved to be correct, would not in itself lend any support to a claim that the document in question ought to be produced. In such a case it would remain uncertain whether the contents of the document had in truth been disclosed. In some cases the court might resolve the problem by looking at the document for the purpose of seeing whether the published copy was a true one, but it would not take that course if the alleged publication was simply a device to assist in procuring disclosure, and it might be reluctant to do so if the copy had been stolen or improperly obtained."

29. In the same case in the judgment rendered by Stephen. J., the learned Judge observes: -

"26. The character of the proceedings has a triple significance. First, it makes it very likely that, for the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But, then, to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent power: by a decision to claim privilege dismissal of the charge will be well-nigh ensured. Secondly, and assuming for the moment that there should prove to be any substance in

the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest in non-disclosure should be shown before his privilege should be accorded. "

"31. What are now equally well established are the respective roles of the court and of those, usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the

balance of public interest is against disclosure. It is in these areas that, even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot), a court, readily recognizing the proffered evidence for what it is, can, as many authorities establish, of its own motion enjoin its disclosure in court. Just as a claim is not essential, neither is it ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured. "

"38. Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v. Home Secretary (1973) AC, at p 400 the speeches in Conway v. Rimmer[1968] UKHL 2; (1968) AC 910 have made it clear "that there is a heavy burden of proof" on those who make class claims. Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the Glasgow Corporation Case remarked 1956 SC (HL), at p 20 that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harman L.J. in the Grosvenor Hotel Case (1965) Ch, at p 1255 : then, in Conway v. Rimmer (1968) AC 901 , Lord Reid dismissed the "candour" argument but found the true basis for the public interest in secrecy, in the case of cabinet minutes and the like, to lie in the fact that were they to

be disclosed this would "create or fan ill-informed or captious public or political criticism. . . . the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind" (1968) AC, at p 952 and see as to the ground of "candour" per Lord Morris (1968) AC, at p 959 , Lord Pearce (1968) AC, at pp 987-988 and Lord Upjohn (1968) AC, at pp 933-934 . In Rogers v. Home Secretary (1973) AC, at p 413 Lord Salmon spoke of the "candour" argument as "the old fallacy".

"41. There is, moreover, a further factor pointing in the same direction. The public interest in non-disclosure will be much reduced in weight if the document or information in question has already been published to the world at large. There is much authority to this effect, going back at least as far as Robinson v. South Australia (No. 2) (1931) AC 704, at p 718 per Lord Blanesburgh. In 1949 Kriewaldt J., sitting in the Supreme Court of the Northern Territory, had occasion to review the relevant authorities in his judgment in Christie v. Ford (1957) 2 FLR 202, at p 209 . The reason of the thing necessarily tends to deny privilege to information which is already public knowledge. As Lord Blanesburgh observed (25) "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". In Whitehall v. Whitehall 1957 SC 30, at p 38 the Lord President (Clyde) in referring to a document already the subject of some quite limited prior publicity observed that "The necessity for secrecy, which is the primary purpose of the certificate, then no longer operates…"

"44. In Rogers v. Home Secretary Lord Reid had occasion to distinguish between documents lawfully published and those which, as a result of "some wrongful means", have become public (1973) AC, at p 402 . That case was, however, concerned with a quite special class of document, confidential reports on applicants for

> **licences to run gaming establishments, a class to which must apply considerations very similar to those which affect the reports of, or information about, police informers. There is, in those cases, the clearest public interest in preserving the flow of information by ensuring confidentiality and by not countenancing in any way breach of promised confidentiality. Those quite special considerations do not, I think, apply in the present case."**
>
> ***(Emphasis Supplied)***

30. In *Rogers Vs. Home Secretary* 1973 A.C. 388, the request to produce a letter written by the Police Officer to the Gaming Board by way of response to the Gaming Board request for information in regard to applications by the appellant for certificates of consent, was not countenanced by the House of Lords. The appellant had commenced an action for criminal libel in regard to the information. Lord Reid in the course of his judgment held:-

> **"In my judgment on balance the public interest clearly requires that documents of this kind should not be disclosed, and that public interest is not affected by the fact that by some wrongful means a copy of such a document has been obtained and published by some person. I would therefore dismiss the appellant's appeal."**

31. In this case however as I have already noticed there are the following aspects. The

documents in question have been published in 'The Hindu', a national daily as noticed in the order of the learned Chief Justice. It is true that they have not been officially published. The correctness of the contents *per se* of the documents are not questioned. Lastly, the case does not strictly involve in a sense the claim for privilege as the petitioners have not called upon the respondents to produce the original and as already noted the state does not take objection to the correctness of the contents of the documents. The request of the respondents is to remove the documents from the record. I would observe that in regard to documents which are improperly obtained and which are subject to a claim for privilege, undoubtedly the ordinary rule of relevancy alone may not suffice as larger public interest may warrant in a given case refusing to legitimise what is forbidden on grounds of overriding public interest. In the writ petition out of which the review arises the complaint is that there has been grave wrong doing in the highest echelons of power and the petitioners seek action *inter alia* under the

provisions of Prevention of Corruption Act. The observations made by Stephen,J. in para 26 of his judgment and extracted by me in para 29 of my order may not be out of place.

32. I agree with the order of the learned Chief Justice.

……J.
[K.M. JOSEPH]

NEW DELHI
DATED; APRIL 10, 2019

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 137 OF 2018

Aseer Jamal **... Petitioner**

Versus

Union of India & Ors. **... Respondents**

J U D G M E N T

Dipak Misra, CJI

Almost a century back, Nobel Laureate T.S. Eliot had disenchantingly written, "Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?" Though the content of the statement cannot be said to have lost its fragrance or flavour, yet today, information has become a strong sense of power. Right to information has been treated as a right to freedom of speech and expression as contained in Article 19(1)(a) of the

Constitution of India. The right to acquire and to disseminate information has been regarded as an intrinsic component of freedom of speech and expression, as stated in ***Secretary, Ministry of Information & Broadcasting, Government of India and others v. Cricket Association of Bengal and others.***[1] and ***People's Union for Civil Liberties and another v. Union of India and others.***[2]

2. Having stated about the right to information, we would advert to the assertions made in the writ petition. It is set forth in the writ petition that India, which is a vast country having large population, has few millions of illiterate adults and certain States, as per the 2011 Census, have more illiterates.

3. Referring to Section 6(1) of the Right to Information Act, 2005 (for brevity, 'the Act'), it is urged that the illiterate persons and the visually impaired persons or persons afflicted by other kinds of disabilities are not in a position to get the information. It is contended that the provision contained in

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1 (1995) 2 SCC 161

2 (2004) 2 SCC 476

Section 6 suffers from unreasonable classification between visually impaired and visually abled persons and thereby invites the frown of Article 14 of the Constitution. It is further contended that certain provisions of the Act are not accessible to orthopaedically impaired persons, persons below the poverty line and persons who do not have any access to the internet. Though in the petition, it has been asseverated as regards the violation of Article 14 of the Constitution, yet the prayer is couched in a different manner and we are obliged to say so because we feel that there is no need or necessity to deal with the constitutional validity of Section 6 of the Act. In fact, it is further necessary to mention that in the course of hearing, the prayer was centered on getting the reliefs, namely, to direct the Union of India, the States and the Union Territories to provide an effective machinery for the enforcement of the fundamental right to have access to information of illiterate citizens and to provide effective machinery to visually impaired persons and such impaired persons who are unable to have access to the internet. That

being the fact situation, we sought the assistance of Mr. K.K. Venugopal, learned Attorney General for India in the matter.

4. We have heard Mr. Aseer Jamal, the petitioner, who has appeared in-person and Mr. K.K. Venugopal, learned Attorney General for India. Though the chart prepared by Mr. Venugopal indicates the objections and the response, yet we intend to deal with it in a holistic manner.

5. The Statement of Objects and Reasons of the Act reads as follows:-

> "An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.
>
> WHEREAS the Constitution of India has established democratic Republic;
>
> AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold

Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

6. Section 2(j) of the Act deals with "right to information", which reads thus:-

"(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device"

7. Section 6 of the Act that deals with 'request for obtaining information' stipulates as under :-

"6. **Request for obtaining information.**— (1) A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to—

(a) the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority;

(b) the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, specifying the particulars of the information sought by him or her:

Provided that where such request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally to reduce the same in writing.

(2) An applicant making request for information shall not be required to give any reason for requesting the information or any other personal

details except those that may be necessary for contacting him.

(3) Where an application is made to a public authority requesting for an information,—

(i) which is held by another public authority; or

(ii) the subject matter of which is more closely connected with the functions of another public authority,

the public authority, to which such application is made. shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

Provided that the tiansfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application."

8. Mr. Venugopal, learned Attorney General, has emphasized the proviso to Section 6(1) to highlight that it is obligatory on the part of the Central Public Information Officer or State Public Information Officer to render all reasonable assistance to the persons making the request orally to reduce the same in writing. As we understand from the said proviso,

it will be the duty of the officer to listen to the persons and to reduce it in writing and process the same.

9. Section 6(3) of the Act takes care of the apprehension of the persons for whose cause the petitioner espouses, by making the provision pertaining to appropriate competent public authority. On a careful reading of the same, we do not find that there can be any difficulty for any person to find out the public authority as there is a provision for transfer.

10. As far as the grievance relating to visually impaired persons is concerned, as stated earlier, assistance has to be rendered under Section 6(1) of the Act to the persons who are unable to write or have difficulty in writing. Mr. K.K. Venugopal has brought to our notice that several States provide information in Braille since the year 2012. Every time the authority receives an RTI application seeking information in Braille, it prepares a reply in the printed format and forwards it to the National Institute for the Visually Handicapped where it is converted to Braille. The visually impaired citizens of Bihar were the first in the country to get

copies under the Right to Information (RTI) Act and the Rules made by the State Government for its implementation in Braille script. Audio files are also being prepared.

11. From the chart filed by Mr. Venugopal, it is vivid that several hotline numbers providing toll free access to information are available on the RTI website. Furthermore, a help desk is also available for any query or feedback related to the portal. The contact number is 011-24622461.

12. The next thing that requires to be emphasized upon is the plight of the people who are below the poverty line. It is useful to mention that in exercise of the powers conferred by Section 27 of the Act, the Central Government has framed a set of rules, namely, the Right to Information Rules, 2012. Rules 3, 4, 5 and 6 of the said Rules read as follows:-

> "3. **Application Fee.**—An application under sub-section (1) of Section 6 of the Act shall be accompanied by a fee of rupees ten and shall ordinarily not contain more than five hundred words, excluding annexures, containing address of the Central Public Information Officer and that of the applicant:

Provided that no application shall be rejected only on the ground that it contains more than five hundred words.

4. **Fees for providing information.**— Fee for providing information under sub-section (4) of Section 4 and sub-sections (I) and (5) of Section 7 of the Act shall be charged at the following rates, namely :—

(a) rupees two for each page in A-3 or smaller size paper;

(b) actual cost or price of a photocopy in large size paper;

(c) actual cost or price for samples or models;

(d) rupees fifty per diskette or floppy;
(e) price fixed for a publication or rupees two per page of photocopy for extracts from the publication;

(f) no fee for inspection of records for the first hour of inspection and a fee of rupees 5 for each subsequent hour or fraction thereof; and

(g) so much of postal charge involved in supply of information that exceeds fifty rupees.

5. **Exemption from Payment of Fee.**— No fee under rule 3 and rule 4 shall be charged from any person who, is below poverty line provided a copy of the certificate issued by the appropriate

Government in this regard is submitted alongwith the application.

6. **Mode of Payment of fee.**— Fees under these rules may be paid in any of the following manner, namely:—

(a) in cash, to the public authority or to the Central Assistant Public Information Officer of the public authority, as the case may be, against a proper receipt; or

(b) by demand draft or bankers cheque or Indian Postal Order payable to the Accounts Officer of the public authority; or

(c) by electronic means to the Accounts Officer of the public authority, if facility for receiving fees through electronic means is available with the public authority."

13. Rule 5 takes care of the situation that has been highlighted by the petitioner. If an applicant belongs to below poverty line (BPL) category, he/she has to submit a proof in support of his/her claim that he/she belongs to the said category and as far as the mode of payment is concerned, various modes are provided and the criticism that it is restricted is unacceptable.

14. In view of the obtaining situation, as has been brought out by the learned Attorney General for India, as presently advised, we are disposed to think that no further direction needs to be issued except granting liberty to the petitioner to submit a representation to the competent authority pointing out any other mode(s) available for getting information under the Act. If such a representation is submitted, the same shall be dealt not only with sympathy but also with concern and empathy. We say so as differently abled persons, which include visually impaired persons, should have the functional facility to receive such information as permissible under the Act. They should not be deprived of the benefit of such a utility. As indicated in the beginning, the information makes one empowered. Additionally, we think it appropriate to ask the authorities to explore any kind of advanced technology that has developed in the meantime so that other methods can be introduced. We are absolutely sure that if the petitioner would point out, the cognizance of the same shall be taken. We are also certain that the authority shall, with all sincerity

and concern, explore further possibilities with the available on-line application/mechanism.

15. The writ petition is, accordingly, disposed of. There shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Dr. D.Y. Chandrachud)

New Delhi;
September 27, 2018

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.9064-9065 of 2018
[Arising out of SLP(C) Nos.32073-32074/2015]

FERANI HOTELS PVT. LTD. ….APPELLANT

versus

THE STATE INFORMATION COMMISSIONER GREATER MUMBAI & ORS. ….RESPONDENTS

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The present appeal raises the issue of disclosure under the Right to Information Act, 2005 (hereinafter referred to as the 'said Act'), seeking information regarding the plans submitted to public authorities by a developer of a project.

2. Late Shri E.F. Dinshaw was the owner of three plots in Malad (West), Mumbai and Mr. Nusli Neville Wadia/respondent No.3 is the sole administrator of the estate and effects of late Shri E.F. Dinshaw. It may be noted that there is litigation pending *qua* the functioning of respondent No.3 as an administrator, but it is not in doubt that at present, there is no interdict against him in performing his role as the sole administrator. A Development Agreement dated 2.1.1995 was executed *inter se* respondent No.3 and Ferani Hotels Private Limited /appellant for carrying out the development on the said three plots. This Agreement was coupled with an irrevocable Power of Attorney executed by respondent No.3 in favour of the appellant. However, disputes are stated to have arisen between the parties some time in the year 2008.

3. As a consequence of the disputes having arisen, respondent No.3 is stated to have terminated the Power of Attorney and the Development Agreement on 12.5.2008 and, on the very next day, Suit No.1628/2008 was filed by respondent No.3 for *inter alia* declaration that the said Power of Attorney and the Development Agreement had been validly terminated. Interim relief, pending consideration of the suit, *qua* further construction and demolition was also sought.

4. The question of grant of interim relief has also had a chequered history. The interim relief was originally granted by learned Single Judge of the Bombay High Court vide order dated 19.7.2010, limited to the extent of restraining the appellant from putting any party in possession of any constructed premises, except with the approval of respondent No.3, during the pendency of the suit. This order was assailed before the Division Bench, which initially stayed the interim order on 26.7.2010, and finally vacated it on 19.7.2012, calling upon the learned Single Judge to first consider the issue as to whether the suit was within time. The order of the Division Bench was assailed before this Court, in ***Nusli Neville Wadia vs. Ferani Hotels (Pvt.) Ltd. & Ors.,***[1] where the legal issue raised related to the local amendment in Maharashtra, to the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'), whereby Section 9A was inserted. Section 9 of the said Code mandates trial of suits of civil nature excepting suits in which their cognizance is either expressly or impliedly barred. In terms of Section 9A, notwithstanding anything contained in the said Code, or any other law for the time being in force, in case of an objection being raised as to the jurisdiction of the Court to entertain a suit, the Court is mandated to proceed to determine the same as a preliminary

1 Order dated 8.4.2015 in CA No.3396/2015.

issue, before proceeding with the question of granting or setting aside of an interim order. It is the interpretation of this provision, which received the attention of the Supreme Court in the Special Leave Petition filed in this Court, against the order of the Division Bench. In terms of the order dated 8.4.2015, it was held that Section 9A, introduced as the Maharashtra Amendment, was mandatory in nature.

5. The aforesaid proceedings are relevant for the present case only for limited purposes, since we are only concerned, herein, with an application under the provisions of the said Act. In the application for interim relief filed before the learned Single Judge, one of the prayers made was for disclosure of a set of documents, as sought for by the counsel for respondent No.3 vide letter dated 29.3.2012, which the counsel for the appellant had refused to disclose. However, neither in the adjudication before the learned Single Judge, nor before the Division Bench, nor before this Court, was this aspect discussed at all, even though this relief had been claimed throughout. The adjudication, instead, rested on the issue of the provisions of Section 9A, inserted by way of a Maharashtra Amendment in the said Code, coupled with the plea of limitation. We may add here, that as per learned counsel for respondent No.3, these set of documents are not identical to what forms the

subject matter of information sought, now, under the said Act.

6. We may now turn to the direct controversy in question, which emanates from an application filed by respondent No.3 under Section 6(1) of the said Act before the Public Information Officer (for short 'PIO'), Municipal Corporation of Greater Mumbai. Vide application dated 10.12.2012, the following information in respect of the plots in question was sought:

> "(a) Certified copies of all PR cards submitted.
>
> (b) Certified copies of all plans and amendments therein from time to time submitted by the Ferani Hotels Ltd. and/or by its any divisions and/or its Architect.
>
> (c) Certified copies of all Layouts, Sub-Division Plans and amendments therein form(sic.)[2] time to time submitted by the Ferani Hotels Ltd. and/or by its any divisions and/or its Architect.
>
> (d) Certified copies of all development plans and any amendments therein from time to time submitted by the Ferani Hotels Ltd. and/or its any divisions and/or its Architect.
>
> (e) Certified copies of all Reports submitted to the Municipal Commissioner and his approvals to the same."

7. The Advocates for the appellant, however, objected to the disclosure of the information on the grounds, as per Section 11(1) of the said Act:

(a) That it did not serve any social or public interest but was for the

2 To be read as 'from'.

private interest of respondent No.3 in the suit filed before the Bombay High Court.

(b) That the information sought in the suit proceedings had not been granted by the High Court of Bombay, and an appeal against the said findings were pending before this Court, thereby making the information sought, *sub-judice*.

(c) That respondent No.3 was a competitor in business and, thus, disclosure would cause harm and injury to the appellant's competitive position, as well as to their valuable intellectual property rights. The information sought for was stated to involve commercial and trade secrets, disclosure of which would be detrimental to the interest of the appellant.

(d) That the architect of the appellant informed that all rights in respect of the plans, clarifications, designs, drawings, etc. and the work comprised therein, including intellectual property rights and in particular copyright, were reserved and vested exclusively in the appellant.

The PIO, vide its letter dated 8.1.2013, declined to give information in view of the objections filed by the counsel for the appellant. This

communication stated that the information could not be given as per Sections 8(1)(d), 8(1)(g), 8(1)(j) as well as Sections 9 and 11(1) of the said Act, since there was no public interest, as also on account of the claim of copyright.

8. Respondent No.3 filed an appeal under Section 19(1) of the said Act on 12.2.2013, which was disposed of by the First Appellate Authority, vide order dated 1.4.2013, permitting the information sought under the first head to be given, while declining the information under heads 2 to 4 for the same reasons as set out by the PIO. The 5th information sought was stated to be too detailed and hence was not possible to be given out. This resulted in a second appeal before the State Chief Information Commissioner (for short 'SCIC') under Section 19(3) of the said Act on 28.6.2013. Respondent No.3 succeeded in the second appeal in terms of order dated 31.1.2015, the order being predicated on the reasoning that the development of the property has connection with public interest, as flats erected thereon would be purchased by the citizens at large.

9. It was now the turn of the appellant to assail this order, before the High Court, by filing a writ petition, being Writ Petition (L) No.1806/2015, which was dismissed vide impugned order dated 30.10.2015. The reasoning

was based on the very object of the said Act being incorporated, which was to secure access to information, under the control of public authorities, to citizens, in order to promote transparency and accountability. The documents sought, being for the development of land and being copies of plans, layouts, sub-division plans, etc., which had in turn received the attention and approval of the Commissioner of the Corporation (a public authority), and were under his control, the same were to be supplied to anyone seeking the same. The Division Bench then proceeded to refer to the exceptions carved out under Sections 8 & 9 of the said Act to ultimately hold that the information sought for was part of public record and had to be revealed in public interest, and could not be said to be in the nature of trade secrets or of commercial confidence, or of a nature which would harm the competitive position of the appellant. It also dealt with the objection of the appellant *qua* the endeavour of respondent No.3 to seek the information in the suit proceedings to hold that the said Act was a legislation which confers independent legal right *de hors inter se* rights between the parties.

10. The aforesaid order has, thus, given rise to the present appeal filed by the appellant. We heard Dr. A.M. Singhvi, learned senior counsel for the appellant and Mr. Gourab Banerji, learned senior counsel for respondent

No.3, both seeking to forcefully put forth their stand. We may note that the private disputes *inter se* the appellant and respondent No.3 have given rise to this contentious proceeding, where the issue in question was, in our opinion, really innocuous. We have considered the submissions advanced by learned counsel.

11. We may note, at the inception itself, that Mr. Gourab Banerji, learned senior counsel for respondent No.3 did not even press the last set of documents sought, which was earlier held to be rather expansive in nature. The first set of information sought is stated to have already been disclosed. The controversy, thus, related to the 2nd to 4th set of information sought, which consists of the plans with amendments, layouts, sub-division plans with amendments and all other development plans with amendments. At the inception of the hearing, we had, in fact, put to learned senior counsel for the appellant, as to what serious objection could they have to the disclosure of these documents, which were really public documents, having been submitted to the concerned authority and forming part of the sanction process. The persistence over this issue, as noticed above, is clearly the result of the private dispute, rather than any objective consideration *qua* the issue of disclosure of information.

12. The first objection raised by learned senior counsel for the appellant flowed from the endeavour of respondent No.3 to seek information in the suit proceedings, which endeavour had not been successful. Learned senior counsel contended that no leave had been taken *qua* that aspect of the matter and, thus, applying any of the principles whether of issue estoppel, constructive *res judicata*, or election of remedy, respondent No.3 could not be permitted to agitate the issue twice over. Learned counsel sought to refer to the result of the endeavour to obtain interim reliefs in general by respondent No.3, but that, to our mind, would be completely irrelevant. In this behalf, the information sought for, arising from the letter of the counsel for respondent No.3, dated 29.3.2012, has to be examined. We have perused that letter. In substance what has been sought is communications *inter se* the appellant and public authorities, approvals granted by the Corporation, compliances, occupation certificate, application submitted to authorities, revenue records, documents pertaining to stamp duty, agreement with prospective flat buyers, etc. If we compare this information sought with what has been sought under the said Act, there is little doubt that the information sought under the said Act is different and specific, i.e., dealing with the approved plans and their modifications, which is part of the record

of the public authority's sanction. Not only that, even if we look at the aspect of the relief prayed for, arising from the letter; that has not really formed the subject matter of adjudication, before any of the three judicial forums; what received the attention of the Court was quite different, and related to preliminary determination arising from the provision introduced in the Maharashtra Amendment by way of inserting Section 9A in the said Code. This is apart from the aspect, which we will discuss a little later, of the scope and operation of the said Act, in respect of information being sought by any person, even a third party. We have, thus, no hesitation in rejecting this objection that the plea for disclosure of information arose in previous civil proceeding, *inter se* the parties, and had been denied.

13. The second defence against public disclosure of this information, raised by learned senior counsel for the appellant, is that respondent No.3 has failed to disclose any 'larger public interest', as mandated under the said Act, and that the third respondent has no *locus standi* to seek such information especially when the information falls under Sections 8(1)(d) & 8(1)(j) of the said Act. To buttress the plea, a reference has been made to the judgment of this Court in ***Thalappalam Service Cooperative Bank Ltd. & Ors. vs. State of Kerala & Ors.***[3] opining that if the information falls under

3 (2013) 16 SCC 82.

clause (j) of sub-section (1) of Section 8 of the said Act, in the absence of *bona fide* public interest, such information is not to be disclosed. It may be noted, at this stage, that even clause (d) of sub-section 1 of Section 8 of the said Act allows for disclosure of exempted information in larger public interest, and hence a similar test would apply.

14. To appreciate this submission, one would have to turn to the very Statement of Objects & Reasons of the said Act, which has also been discussed in the impugned order. The said Act was a milestone in the endeavour to make government authorities more accountable to public at large by facilitating greater and more effective access to information. The Preamble, thus, itself states that "the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority" was being established. Section 2(f) of the said Act defines 'Information' and reads as under:

> "**2. Definitions. –** In this Act, unless the context otherwise requires, -
>
> xxxx xxxx xxxx xxxx
>
> (f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and

information relating to any private body which can be accessed by a public authority under any other law for the time being in force;"

The 'Right to Information' is defined under Section 2(j) of the said Act, which reads as under:

"**2. Definitions. –** In this Act, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx

(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

We may note that there is no dispute that the Corporation is a public authority within the definition of Section 2(h) of the said Act.

We may also note the definition of a 'third party' in Section 2(n) of the said Act, which provides as follows:

"**2. Definitions. –** In this Act, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx

(n) "third party" means a person other than the citizen making a request for information and includes a public authority."

15. The purport of the said Act is apparent from Section 6 of the said Act, which provides for the manner of making a request for obtaining information. In terms of sub-section (2) of Section 6 of the said Act, there is no mandate on an applicant to give any reason for requesting the information, i.e., anybody should be able to obtain the information as long as it is part of the public record of a public authority. Thus, even private documents submitted to public authorities may, under certain situations, form part of public record. In this behalf, we may usefully refer to Section 74 of the Indian Evidence Act, 1872, defining 'public documents' as under:

"**74. Public documents. —** The following documents are public documents:—

(1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;

(2) Public records kept [in any State] of private documents."

16. The only exemption from disclosure of information, of whatever nature, with the public authority is as per Sections 8 & 9 of the said Act. Thus, unless the information sought for falls under these provisions, it would be mandatory for the public authorities to disclose the information to an applicant.

17. The endeavour of the appellant is to bring the information sought for by respondent No.3, under the exemption of Section 8, more specifically clauses (d) and (j) of sub-section (1), as also Section 9 of the said Act. The provisions read as under:

> "**8. Exemption from disclosure of information.—**
>
> (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,
>
> xxxx xxxx xxxx xxxx
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
>
> xxxx xxxx xxxx xxxx
>
> (j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the

State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

…. …. …. ….

"**9. Grounds for rejection to access in certain cases.—**Without prejudice to the provisions of section 8, a Central Public Information Officer or State Public Information Officer, as the case may be may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State."

18. The issue of the test of larger public interest would, thus, arise if it falls within those exceptions.

19. Now turning to the information sought for, as enunciated above, they are really, plans relating to the property in question. These plans are required to be submitted by the person proposing to construct on the property, to the Commissioner of the Corporation. The appellant has submitted these plans to the Corporation, in pursuance of the Development Agreement and the Power of Attorney executed by respondent No.3. As to how these plans are processed, is referred to in the order of the State Information Commissioner dated 31.1.2015, in para 7, which reads as under:

"(7) On inquiry, the Public Information Officer in the Building Proposal Department of the Municipal Corporation of Greater Mumbai, clarified that there is prevailing procedure under Right to

Information Act, for giving copy of map and proposal received from developer. The proposals received from developer, are being sent to the Tax Assessment Department, Water Engineer Department, as well as to the office of concerned Administrative Ward. Besides, also to the Rain Water Drainage Department, Road Department & Fire Brigade etc., of which department no objection or specific approval is required. Besides this, if it is necessary as per local circumstance the reference is also made to Railway Department, Airport Authority and to other Committees. In the Building Proposals received, it includes the particulars of plot, the information related to F.S.I. of open space, sectional plan and drawing."

The aforesaid, thus, shows that considerable processing is required before the plans reach the stage of sanction level.

20. The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the 'Maharashtra Act') in Section 3 provides for the General Liabilities of Promoters. In terms of sub-section (2) of Section 3, a promoter, who constructs or intends to construct a block or building of flats was required to comply with many disclosure requirements, *inter alia* clause (l), which reads as under:

> "(l) display or keep all the documents, plans or specifications (or copies thereof) referred to in clauses (a), (b) and (c), at the site and permit inspection thereof to persons intending to take or taking one or more flats;"

21. The object of the aforesaid was that the purchaser should be able

to get full information of the sanction plan. It can hardly be said that while a purchaser can get the information, the person who administers the land as owner and grants the authority through a Power of Attorney to develop the land, would not have such a right.

22. We may note that this Act was, however, repealed specifically by Section 92 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'RERA'), which now, under Section 11 of the RERA, provides the functions and duties of promoters. The duties are more elaborate, as under Section 11(1) of the RERA the promoter has to create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing. The promoter, in terms of sub-section (3) of Section 11 of the RERA is required to make available to the allottee information about sanctioned plans, layout plans along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the Regulations made by the Authority. The object is clearly to bring greater transparency.

23. The fate of purchase of land development and investments is a matter of public knowledge and debate. Any judicial pronouncement must

squarely weigh in favour of the fullest disclosure, in this behalf. In fact, the Division Bench of the Madras High Court in ***Dr. V.I. Mathan & Ors. vs. Corporation of Chennai & Ors.***[4] (to which one of us, Sanjay Kishan Kaul, J. was a party) opined that though the Chennai Metropolitan Development Authority mandated plans to be displayed at the site and also be made available on the website, the same principle should apply to the Corporation for all other sanctioned plans and, thus, issued directions for display of the plans on the website of the Corporation, and at the site, with clear visibility. This was just prior to the RERA coming into force.

24. In the aforesaid circumstances, even by a test of public interest, it can hardly be said that the same would not apply in matters of full disclosure of information of development plans to all and everyone. If we turn to the provisions of Section 8 of the said Act and the clauses under which the exception is sought, clause (d) deals with information relating to commercial confidence, trade secrets or intellectual property, which has the potentiality to harm the competitive position of a third party. Firstly, as observed aforesaid, the definition of a third party under Section 2(n) of the said Act means a person other than a citizen requesting for information to a public authority. Under Section 11 of the said Act, the third party has a right to be

4 Order dated 22.3.2016 in WP No.4057/2016.

heard and to object to the disclosure of information. The disclosure of plans, which are required to be in public domain, whether under the repealed Act or RERA, can hardly be said to be matters of commercial confidence or trade secrets. In fact, *ex facie*, these terms would not apply to the matter at hand. Similarly, insofar as the intellectual property is concerned, the preparation of the plan and its designs may give rise to the copyright in favour of a particular person, but the disclosure of that work would not amount to an infringement and, in fact, Section 52(1)(f) of the Copyright Act, 1957 specifically provides that there would be no such infringement if there is reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force. This is what is exactly sought for by respondent No.3 – certified copies of the approved plans and its modifications, from the public authority, being the Corporation. We may also note that Section 22 of the said Act provides for an overriding effect with a notwithstanding clause *qua* any inconsistency with any other Act, which reads as under:

> "**22. Act to have overriding effect.—**The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

25. The aforesaid provision would not imply that a disclosure

permissible under the Copyright Act, 1957 is taken away under the provisions of the said Act, but rather, if a disclosure is prescribed under any other Act, the provisions of the said Act would have an overriding effect.

26. Similarly, clause (j) of sub-section (1) of Section 8 of the said Act *ex facie* would have no relevance. There is no 'personal information' of which disclosure is sought. Further it cannot be said that it has no relation to public activity or interest, or that it is unwarranted, or there is an invasion of privacy. These are documents filed before public authorities, required to be put in public domain, by the provisions of the Maharashtra Act and the RERA, and involves a public element of making builders accountable to one and all. That respondent No.3, in fact, happens to be the administrator of the property in question, which will certainly not reduce his rights as opposed to anyone else, including a flat buyer.

27. We, thus, reject the submission based on clauses of sub-section (1) of Section 8 read with Section 9 of the said Act.

28. We also fail to appreciate the submissions of the learned senior counsel for the appellant of "vendetta". What is the vendetta involved in seeking disclosure of plans approved by a builder? To say the least, this is really carrying things too far, just for the sake of creating an obstruction in

disclosure. Thus, the reference to the judgment in ***Reliance Industries Ltd. vs. Gujarat State Information Commission & Ors.,***[5] would be of no avail.

29. Another limb of the submission of learned senior counsel for the appellant was that the provisions of Sections 10 & 11 of the said Act have been rendered nugatory. The underlying documents of the development plans, drawings, etc. ought not to have been directed to be disclosed and only the grant of permission and approval by the Corporation, i.e., commencement certificate and occupation certificate could have been so directed at best.

30. Section 10 of the said Act refers to severability, i.e., information, which ought to be disclosed and not to be disclosed can be severed. This in turn would require a pre-requisite that the information sought contains some element which has been protected under Section 8 of the said Act. Having held that Section 8 of the said Act has no application, this plea is only stated to be rejected.

31. Insofar as Section 11 of the said Act is concerned, dealing with third party information, and the right to make submissions regarding disclosure of information, that provision has been complied with by permitting the appellant and even the architect to raise objections, and has

5 AIR 2007 Gujarat 203.

been dealt with by the PIO, and even by the State Information Commission, on appeal.

32. Lastly, the irony of the situation. The Development Agreement and the Power of Attorney is sought to be relied upon, by the appellant, to contend that it was the responsibility and authority of the attorney holder to obtain necessary permissions, sanctions and approvals, and that respondent No.3 is not entitled to deal with, nor liable to any authority in respect of the same, but is entitled to only 12 per cent of the monetary shares from sale proceeds of the constructed premises. Thus, no information should be disclosed under the said Act!

33. If we put this in the correct perspective, it means that the owner of the property, who has given authority to a developer under an agreement to develop the property and obtain sanctions, is precluded from obtaining any information about the sanctions, because ultimately he would be entitled to only a percentage of the monetary share of sale proceeds of what is constructed on the premises. Such a proposition is only stated to be rejected, and in a sense seeks to put the developer and holder of the Power of Attorney on a pedestal. This is, of course, *de hors* any private *lis* pending between the parties.

34. In the end, we would like to say that keeping in mind the provisions of RERA and their objective, the developer should mandatorily display at the site the sanction plan. The provision of sub-section (3) of Section 11 of the RERA require the sanction plan/layout plans along with specifications, approved by the competent authority, to be displayed at the site or such other places, as may be specified by the Regulations made by the Authority. In our view, keeping in mind the ground reality of rampant violations and the consequences thereof, it is advisable to issue directions for display of such sanction plan/layout plans at the site, apart from any other manner provided by the Regulations made by the Authority. This aspect should be given appropriate publicity as part of enforcement of RERA.

35. The result of the aforesaid is that we find no merit in the appeal and consider it a legal misadventure. The dispute, though in respect of information to be obtained, derives its colour from a private commercial dispute. We note this because, if judicial time is taken, and legal expenses incurred by one side on account of such a misadventure, appropriate costs should be the remedy.

36. We, thus, dismiss the appeals with costs quantified at Rs.2.50 lakhs (Rupees two lakhs & fifty thousand), payable by the appellant to respondent No.3 (though hardly the actual expenses!).

.....J.
[Kurian Joseph]

....J.
[Sanjay Kishan Kaul]

New Delhi.
September 27, 2018.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5665/2014

INSTITUTE OF COMPANIES SECRETARIES OF INDIA **...Appellant**

VERSUS

PARAS JAIN **...Respondent**

O R D E R

1. This appeal is directed against the order dated 22.04.2014 of the Delhi High Court wherein, while allowing the Letters Patent Appeal, filed by the respondent herein, it set aside Guideline No.3 notified by the statutory council of appellant–Institute of Companies Secretaries of India and directed it to charge fee prescribed as per Rule 4 of the Right to Information (Regulation of Fee and Cost) Rules, 2005.

2. The factual matrix of the case is that the respondent appeared in the final examination for Company Secretary conducted by the Appellant in December, 2012. On being unsuccessful in qualifying the examination, the respondent made an application under the Right to Information Act for

inspection of his answer sheets and subsequently, sought certified copies of the same from the appellant. The appellant thereafter has demanded Rs.500/- per answer sheet payable for supply of certified copy(ies) of answer book(s) and Rs.450/- per answer book for providing inspection thereof respectively as per Guideline No.3 notified by the statutory council of the appellant. It is to be noted that the respondent obtained the said information under the Right to Information Act, 2005.

3. Being aggrieved by the demand made by the appellant, the respondent preferred a Writ Petition before the Delhi High Court wherein the Learned Single Judge dismissed the petition. A Letters Patent Appeal was thereafter preferred by the respondent wherein, the Division Bench quashed Guideline No.3 notified by the appellant and held that the appellant can charge only the prescribed fee under Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005.

4. The short issue before us is when the answer scripts of appellant's examination is sought whether the fee prescribed under Rule 4 of the Right to Information (Regulation of Fee and Cost) Rules, 2005 payable or that

under Guideline No. 3 of the Guideline, Rules and Procedures for Providing Inspection and/or Supply of Certified Copy(ies) of Answer Book(s) to Students, framed by the Examination Committee of appellant's statutory Council at its 148th Meeting held on 14.08.2013.

5. The learned counsel appearing on behalf of the appellant argued that it is undisputed that the Right to Information Act, 2005 is applicable to the appellant. However, in light of specific guidelines formulated under the Company Secretaries Act, 1980, the same should be applicable and not that which is provided under the Right to Information Act. He further contends that owing to quashing of Guideline No. 3 by the Division Bench of Delhi High Court, the appellant cannot collect any amount of fee except the one prescribed under Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005 which adds to financial strain on the appellant.

6. On the other hand, the learned counsel appearing on behalf of the respondent submitted that any candidate who seeks his answer scripts under Right to Information Act, 2005 can only be charged under Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005.

Further, the learned counsel submits that the candidates must have a choice to seek the answer scripts either by the avenue under Right to Information Act or under the Guidelines of the appellant framed by the examination committee of statutory Council under the Company Secretaries Act, 1980.

7. Having heard the learned counsels appearing for the parties and we have also meticulously perused the record.

8. The appellant is governed by the provisions of Company Secretaries Act, 1980 and under Sections 15, 15A and 17, the Examination Committee of the statutory Council has framed Guideline No. 3 providing an avenue to the candidates to either inspect their answer scripts or seek certified copies of the same on payment of the stipulated fees. Guideline no.3 stipulates payment of Rs. 500 for obtaining certified copies and Rs. 450 for seeking inspection of the same.

> "3. Fee of ₹500 per subject/answer books payable for supply of certified copy(ies) of answer book(s) and ₹450 per answer book for providing inspection thereof respectively. The fee shall be paid through Demand Draft drawn in favour of "The Institute of Company Secretaries of India", payable at New Delhi."

9. On the contrary, Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005 stipulates,

> "4. For providing the information under sub-section (1) of section 7, the fee shall be charged by way of cash against proper receipt or by demand draft or bankers cheque or Indian Postal Order payable to the Accounts Officer of the public authority at the following rates:—
> **(a) rupees two for each page (in A4 or A3 size paper) created or copied;**
> (b) actual charge or cost price of a copy in larger size paper;
> (c) actual cost or price for samples or models; and
> **(d) for inspection of records, no fee for the first hour; and a fee of rupees five for each subsequent hour (or fraction thereof).**"
>
> **(emphasis supplied)**

10. Thus it is clear that the avenue for seeking certified copies as well as inspection is provided both in the Right to Information Act as well as the statutory guidelines of the appellant.

11. We are cognizant of the fact that guidelines of the appellant, framed by its statutory council, are to govern the modalities of its day-to-day concerns and to effectuate smooth functioning of its responsibilities under the Company Secretaries Act, 1980. The guidelines of the

appellant may provide for much more than what is provided under the Right to Information Act, such as re-evaluation, re-totaling of answer scripts.

12. Be that as it may, Guideline no.3 of the appellant does not take away from Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005 which also entitles the candidates to seek inspection and certified copies of their answer scripts. In our opinion, the existence of these two avenues is not mutually exclusive and it is up to the candidate to choose either of the routes. Thus, if a candidate seeks information under the provisions of the Right to Information, then payment has to be sought under the Rules therein, however, if the information is sought under the Guidelines of the appellant, then the appellant is at liberty to charge the candidates as per its guidelines.

13. The appellant has submitted that the Division Bench of Delhi High Court erred in quashing Guideline no.3 which is affecting not only the appellant but also the candidates. Taking into consideration the fact that such quashing was done despite no prayer being made to that effect on behest of the respondent, we hold that quashing of Guideline No.3 was unwarranted. It is to this limited extent that we allow

the appeal and set aside the impugned order of Division Bench of Delhi High Court whereby it quashed Guideline No.3.

14. Learned counsel appearing for the appellant further submitted that owing to nominal fee fixed under the Right to Information Act, the dissemination of information by the appellant has become financially burdensome and he wants to make a representation to the Government for enhancing the fee prescribed under the Right to Information Act. It is left open to him to make such a representation.

15. The appeal is disposed of in the afore-stated terms and pending applications, if any, shall also stand disposed of.

.....J.
(N.V.RAMANA)

.....J.
(S. ABDUL NAZEER)

NEW DELHI;
APRIL 11, 2019.

ITEM NO.102(PH) COURT NO.3 SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 5665/2014

INST. OF COMPANIES SECRETARIES OF INDIA Appellant(s)

VERSUS

PARAS JAIN Respondent(s)

(IA 2/2014-VACATING STAY)

Date : 11-04-2019 This matter was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE N.V. RAMANA
HON'BLE MR. JUSTICE S. ABDUL NAZEER

For Appellant(s)
Mr. Vikas Mehta, AOR
Mr. Adith, Adv.
Mr. Vasanth Bharani, Adv.
Mr. R.D. Makheeja, Adv.

For Respondent(s)
Mr. Prashant Bhushan, AOR (N.P.)
Mr. Pranav Sachdeva, Adv.
Ms. Neha Rathi, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is disposed of in terms of the signed order.

Pending applications, if any, shall also stand disposed of.

(VISHAL ANAND) (RAJ RANI NEGI)
COURT MASTER (SH) ASSISTANT REGISTRAR
(Signed Order is placed on the file)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).1966-1967 OF 2020
(Arising out of SLP(C) No.5840 of 2015)

CHIEF INFORMATION COMMISSIONER .....Appellant

VERSUS

HIGH COURT OF GUJARAT AND ANOTHER .....Respondents

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. The point falling for determination in this appeal is as regards the right of a third party to apply for certified copies to be obtained from the High Court by invoking the provisions of Right to Information Act without resorting to Gujarat High Court Rules prescribed by the High Court.

3. Brief facts which led to filing of this appeal are as follows:-

An RTI application dated 05.04.2010 was filed by respondent No.2 seeking information pertaining to the following cases – Civil Application No.5517 of 2003 and Civil Application No.8072 of 1989

along with all relevant documents and certified copies. In reply, by letter dated 29.04.2010, Public Information Officer, Gujarat High Court informed respondent No.2 that for obtaining required copies, he should make an application personally or through his advocate on affixing court fees stamp of Rs.3/- with requisite fee to the “Deputy Registrar”. It was further stated that as respondent No.2 is not a party to the said proceedings, as per Rule 151 of the Gujarat High Court Rules, 1993, his application should be accompanied by an affidavit stating the grounds for which the certified copies are required and on making such application, he will be supplied the certified copies of the documents as per Rules 149 to 154 of the Gujarat High Court Rules, 1993.

4. Being aggrieved, respondent No.2 preferred Appeal No.84 of 2010 before the Appellate Authority-Registrar Administration under Section 19 of the Right to Information Act, 2005 (for short “RTI Act”). The appeal was dismissed vide order dated 04.08.2010 on the ground that for obtaining certified copies, the alternative efficacious remedy is already available under the Gujarat High Court Rules, 1993 and that under the provisions of RTI Act, no certified copies can be provided.

5. Respondent No.2 then filed Second Appeal No.1437 of 2010-11 before the Appellant-Chief Information Commissioner and notice

was sent to respondent No.1. Respondent No.1-High Court filed its response reiterating the position that there are provisions under Rules 149 to 154 of the Gujarat High Court Rules for anybody who wants to obtain the certified copies as per which, application/affidavit should be filed stating the grounds for which the documents are required and with requisite court fee stamps. Respondent No.1 stated that despite the letter dated 02.07.2010 by the Deputy Registrar (CC Section), Decree Department, Gujarat High Court to respondent No.2 informing him of the procedure for getting certified copies, respondent No.2 has not made application as per the rules of the High Court and that the Public Information Officer cannot be compelled to breach the High Court Rules and hence, the appeal filed before the Chief Information Commissioner (CIC) is liable to be dismissed. Relying upon Sections 6(2) and 22 of the RTI Act, the appellant-Chief Information Commissioner vide its order dated 04.04.2013 directed Public Information Officer of the Gujarat High Court to provide the information sought by respondent No.2 within twenty days.

6. Challenging the order of Chief Information Commissioner, respondent No.1 filed Special Civil Application No.7880 of 2013 before the High Court. The learned Single Judge, while admitting

the petition, passed an interim order dated 11.10.2013 directing respondent No.1 to provide the information sought by respondent No.2 within four weeks. The learned Single Judge held that the legality and validity of the direction given by the appellant and the right of respondent No.2 to receive the copies under RTI Act will be considered at the stage of final hearing. It was however clarified that supply of information by respondent No.1 shall not be construed as acceptance of applicability of RTI Act to the High Court.

7. Being aggrieved by the interim order, respondent No.1-High Court preferred Letters Patent Appeal No.1348 of 2013 before the Division Bench contending that the party who seeks certified copies has to make an application along with the copying charges and requisite court fees stamp as per Rules 149 to 154 of the Gujarat High Court Rules. As per the Rules, if the certified copy is sought by a person who is not a party to the litigation, his application has to be accompanied by an affidavit stating therein the purpose for which he requires the certified copies. Vide impugned order, the High Court allowed the Letters Patent Appeal holding that when a particular field is governed by the rules which are not declared ultra-vires, then there is no question of applying the fresh rules and make the situation confusing. The High Court held that in the light of the High

Court Rules, certified copies may be given on payment of charges as per the Rules and also the applicant (respondent No.2) has to file an affidavit disclosing the purpose for which the certified copies are required and there is no question of making an application under the RTI Act. The Division Bench set aside the order of the Chief Information Commissioner by observing that when a copy is demanded by any person, the same has to be in accordance with the Rules of the High Court on the subject.

8. As the question involved is concerned with all the High Courts and having regard to the importance of the matter, we have requested Mr. Atmaram N.S. Nadkarni, learned Additional Solicitor General (ASG) to appear as *amicus curiae* to assist the Court which the learned ASG readily agreed. Mr. Nadkarni collected information from all the High Courts and filed a compilation of the information obtained by him about the Rules framed by various High Courts in exercise of their power under Article 225 of the Constitution of India and under Section 28 of the Right to Information Act, 2005.

9. Mr. Preetesh Kapoor, learned Senior counsel for the appellant has contended that Section 6(2) of the RTI Act specifically provides that an applicant making a request for information shall not be required to give reasons for requesting the information sought and

whereas under the Gujarat High Court Rules, applications made by third parties seeking copies of the documents shall be accompanied by an affidavit stating the grounds on which they are required and there is direct inconsistency between the provisions of the RTI Act and the Gujarat High Court Rules, 1993. It was submitted that in view of the inconsistency between the provisions of the RTI Act and the Gujarat High Court Rules, harmonious construction between the two is not possible and in the event of conflict between the provisions of RTI Act and any other law made by the Parliament or State Legislature or any other authority, the former must prevail. It was submitted that Section 22 of the RTI Act specifically provides that the provisions of the RTI Act will have an overriding effect over any other laws for the time being in force. The learned Senior counsel submitted that the High Court Rules have been framed in exercise of the powers under Article 225 of the Constitution of India which would be subject to any other law and the *non-obstante* clause in Section 22 of the RTI Act shows that the provisions of the RTI Act would override the High Court Rules. The learned Senior counsel *inter alia* relied upon the recent judgment of the Constitution Bench in *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agrawal* **2019 (16) SCALE 40**.

10. Mr. Prashant Bhushan, learned counsel appearing for the intervenors submitted that there can be no apprehension that allowing an applicant to seek information from the High Court under RTI Act can prejudicially affect the privacy/rights of other parties or the administration of justice. Reiterating the submission of Senior counsel, Mr. Preetesh Kapoor, Mr. Prashant Bhushan submitted that Rule 151 of the Gujarat High Court Rules is not in consonance with Section 6(2) of the RTI Act and the provisions of RTI Act prevails over the relevant Rules of Public Authorities/Gujarat High Court Rules. Taking us through Section 22 of the RTI Act, learned counsel submitted that RTI Act is a general law made by the Parliament with the avowed object of dissemination of information and ensuring transparency in the functioning of the Public Authorities and in view of *non obstante* clause of Section 22 of the RTI Act, in case of any conflict regarding "access to information from public authorities", the provisions of RTI Act will prevail over any other law. In support of his contention, the learned counsel placed reliance upon *Institute of Companies Secretaries of India v. Paras Jain* **2019 SCC Online SC 764** and the Constitution Bench judgment in *Subhash Chandra Agrawal*.

11. Mr. Aniruddha P. Mayee, learned counsel appearing for respondent No.1-High Court of Gujarat submitted that the Gujarat High Court Rules 149 to 154 do not stipulate anything contra to Section 22 of the RTI Act and the Gujarat High Court Rule 151 is in consonance with the RTI Act. The learned counsel submitted that respondent No.2 was only informed to make an application as per the procedure stipulated under the Gujarat High Court Rules, 1993 and since respondent No.2 was not a party to the proceedings, he was informed that his application shall be accompanied with an affidavit stating the grounds for which the certified copies are required. The learned counsel submitted that when an efficacious remedy is available under Rule 151 of the Gujarat High Court Rules which is in consonance with the provisions of RTI Act, the provisions of the RTI Act cannot be invoked and the High Court rightly held that there is no question of making an application under the RTI Act and rightly quashed the order of the appellant-Chief Information Commissioner.

12. Mr. Nadkarni, learned *amicus* has taken us through the information received from the various High Courts and submitted that in exercise of power under Article 225 of the Constitution of India, the High Court Rules are framed and the Rules provide for a

mode for furnishing of information by way of certified copies to persons who are party to the litigation after making payment of requisite fees. It was submitted that insofar as third parties i.e. persons who are not party to the litigation are concerned, the same is also provided under the Rules, if the third party files an affidavit stating the reasonable grounds to receive such information/certified copies. The learned *amicus* submitted that there is no inconsistency between the RTI Act and the Rules framed by the High Court so as to furnish information. It was also submitted that although Section 22 of the RTI Act has an overriding effect over any other laws, in case there are inconsistencies, Section 22 of the RTI Act does not contemplate to override those legislations which also aim to ensure access to information. The learned *amicus* submitted that so far as the information on the judicial side of the High Court, the Rules framed by the High Court provide for dissemination of information to third party as per the High Court Rules by filing an application with requisite fee and filing an affidavit stating the grounds. Insofar as the information on the administrative side of the High Court, the learned *amicus* submitted that access to such information could be had through the Rules framed by the various High Courts and the Rules framed under the RTI Act by the High Courts. Drawing our attention to the judgment of the Delhi High Court in *The Registrar,*

Supreme Court of India v. RS Misra **(2017) 244 DLT 179** and judgment of the Karnataka High Court in *Karnataka Information Commissioner v. State Public Information Officer and another* **WP(C) No.9418 of 2008**, the learned *amicus* submitted that the High Courts have taken a consistent view that the information can be accessed through the mechanism provided under the Supreme Court Rules, 2013 and the High Court Rules and once any information can be accessed through the mechanism provided under the Statute or the Rules framed, the provisions of the RTI Act cannot be resorted to.

13. We have carefully considered the contentions and perused the impugned judgment and materials on record. The following points arise for consideration in this appeal:-

(i) Whether Rule 151 of the Gujarat High Court Rules, 1993 stipulating that for providing copy of documents to the third parties, they are required to file an affidavit stating the reasons for seeking certified copies, suffers from any inconsistency with the provisions of RTI Act?

(ii) When there are two machineries to provide information/certified copies – one under the High Court Rules and another under the RTI Act, in the absence of any inconsistency in the High Court Rules, whether the provisions of RTI Act can be resorted to for obtaining certified copy/information?

14. Section 2(f) of the Right to Information Act, 2005 explains the meaning of the term “**information**” which reads as under:-

> **2. Definitions. –** In this Act, unless, the context otherwise requires,-
>
> …….
>
> (f) "**information**" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

15. Section 2(h) of the RTI Act defines “**public authority**”. The term “**public authority**” has been given very wide meaning in the RTI Act. Section 2(h) of the RTI Act reads as under:-

> **2. Definitions. –** In this Act, unless, the context otherwise requires,-
>
> …….
>
> (h) "**public authority**" means any authority or body or institution of self-government established or constituted,—
>
> (a) by or under the Constitution;
>
> (b) by any other law made by Parliament;
>
> (c) by any other law made by State Legislature;
>
> (d) by notification issued or order made by the appropriate Government, and includes any—
>
> (i) body owned, controlled or substantially financed;
>
> (ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

16. Section 2(i) of the RTI Act defines “**record**” which is an inclusive definition. Section 2(j) explains “**right to information**”. Sections 2(i) and 2(j) of the RTI Act read as under:-

> **2. Definitions. –** In this Act, unless, the context otherwise requires,-
>
> …….

(i) "**record**" includes—

(i) any document, manuscript and file;
(ii) any microfilm, microfiche and facsimile copy of a document;
(iii)any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
(iv) any other material produced by a computer or any other device;

(j) "**right to information**" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;
(ii)taking notes, extracts or certified copies of documents or records;
(iii) taking certified samples of material;
(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

17. Section 8(1) of the RTI Act provides for exemption from disclosure of information. Right to information is subject to exceptions or exemptions stated in Section 8(1)(a) to 8(1)(j) of the RTI Act. There are ten clauses of Section 8(1) of the RTI Act. Clause (a) of sub-section (1) of Section 8 deals with information that would compromise the sovereignty or integrity of the country and like matter; clause (b) covers any information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; clause (c) covers such matters which would cause a breach of privilege of the Parliament or the State Legislatures; clause (d) protects information of commercial nature and trade secrets and intellectual

property; clause (e) exempts the disclosure of any information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; clause (f) prevents information being disseminated, if it is received in confidence from any foreign Government; clause (g) exempts the disclosure of any information which endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; clause (h) bars access to such information which would impede the process of investigation or apprehension or prosecution of offenders; clause (i) forbids records and papers relating to deliberations of ministers and officers of the executive being made available, subject to a proviso; and, clause (j) prohibits disclosure of personal information unless there is an element of public interest involved.

18. In *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agrawal* **2019 (16) SCALE 40***,* the Supreme Court upheld the order passed by the Central Information Commissioner directing the CPIO, Supreme Court of India to furnish information as to the assets declared by the Hon'ble Judges of the Supreme Court. The Constitution Bench held that such disclosure would not, in any way, impinge upon the personal information and

right to privacy of the Judges. The fiduciary relationship rule in terms of Section 8(1)(e) of the RTI Act was held inapplicable. Learned counsel appearing for the parties extensively relied upon the observations of the Supreme Court in *Subhash Chandra Agarwal.* Since the issue before us is the High Court Rules vis-a-vis., the RTI Act, we do not propose to refer the various observations copiously relied upon by the learned counsel appearing for the parties.

19. Article 124 relates to the establishment and constitution of the Supreme Court. Article 124 states that the Supreme Court of India consist of Chief Justice of India and other Judges. Under Article 145 of the Constitution, the Supreme Court may, from time to time, with the approval of the President, make Rules for regulating generally the Practice and Procedure of the Court. In exercise of the powers under Article 145 of the Constitution, the Supreme Court has framed "Supreme Court Rules". Order XIII of the Supreme Court Rules lays down the procedure in respect of grant of certified copies of pleadings, judgments, documents, decrees or orders, deposition of the witnesses, etc. to the parties to the litigation and also to the third parties. The parties to a proceeding in the Supreme Court shall be entitled to obtain certified copies by making appropriate application

and the court fees payable as per the “Supreme Court Rules”. So far as the third parties are concerned, as per Order XIII Rule 2 of the Supreme Court Rules, the court on the application of a person who is not a party to the case, appeal or matter, pending or disposed of, may on good cause shown, allow such person to receive such copies as is or are mentioned in the Order XIII Rule 1 of the Supreme Court Rules. Thus, as per the Supreme Court Rules also, the third party is required to show good cause for obtaining certified copies of the documents or orders.

20. Article 216 relates to the constitution of High Courts. Every High Court consists of a Chief Justice and other Judges as the President of India may from time to time appoint. The High Court Rules are framed under Article 225 of the Constitution of India. The procedure followed for furnishing of copies/certified copies of orders/documents etc., being information on the judicial side, are governed by the Rules framed by the High Court under Article 225 of the Constitution of India. Insofar as the RTI Act is concerned, in exercise of the powers under Section 28 of the RTI Act, various High Courts have framed the Rules under RTI Act and the information on the administrative side of the High Court can be

accessed as per the Rules framed by the High Courts under RTI Act.

21. In the present case, we are concerned with Gujarat High Court Rules. Grant of certified copies to parties to the litigation and third parties are governed by Rules 149 to 154 of Gujarat High Court Rules. As per the Rules, on filing of application with prescribed court fees stamp, litigants/parties to the proceedings are entitled to receive the copies of documents/orders/judgments etc. The third parties who are not parties in any of the proceedings, shall not be given the copies of judgments and other documents without the order of the Assistant Registrar. As per Rule 151 of the Gujarat High Court Rules, the applications requesting for copies of documents/judgments made by third parties, shall be accompanied by an affidavit stating the grounds for which they are required. Rule 151 reads as under:-

> "151. Parties to proceedings entitled to copies; application by third parties to be accompanied by affidavits. Copies of documents in any Civil or Criminal Proceedings and copies of judgment of the High Court shall not be given to persons other than the parties thereto without the order of the Assistant Registrar. Applications for copies of documents or judgment made by third parties shall be accompanied by an affidavit stating the grounds on which they are required, provided that such affidavit shall be dispensed with in case of applications made by or on behalf of the Government of the Union, the Government of any State or the Government of any foreign State."

22. The learned *amicus* has obtained information from various High Courts as to the procedure followed by the High Courts for furnishing certified copies of orders/judgments/documents. As per the Rules framed by various High Courts, parties to the proceedings are entitled to obtain certified copies of orders/judgments/documents on filing of application along with prescribed court fees stamp. Insofar as furnishing of certified copies to third parties, the Rules framed by the High Courts stipulate that the certified copies of documents/orders or judgments or copies of proceedings would be furnished to the third parties only on the orders passed by the court or the Registrar, on being satisfied about the reasonable cause and *bona fide* of the reasons seeking the information/certified copies of the documents. We may refer to the Rules framed by the High Courts of Bombay, Gujarat, Himachal Pradesh, Karnataka, Madras and various other High Courts which stipulate similar provisions for furnishing information/certified copies to third parties. The Rules stipulate that for the third parties to have access to the information on the judicial side or obtaining certified copies of documents/judgments/orders, the third parties will have to make an application stating the reasons for which they are required and on payment of necessary court fees stamp. As pointed out earlier, Supreme Court Rules also stipulate that certified copies of

documents or orders could be supplied to the third parties only on being satisfied about the reasonable cause. Be it noted, the access to the information or certified copies of the documents/judgments/orders/court proceedings are not denied to the third parties. The Rules of the High Court only stipulate that the third parties will have to file an application/affidavit stating the reasons for which the information/certified copies are required. The Rules framed by the Gujarat High Court are in consonance with the provisions of the RTI Act. There is no inconsistency between the provisions of the RTI Act with the Rules framed by the High Court in exercise of the powers under Article 225 of the Constitution of India.

23. Mr. Preetesh Kapoor, learned Senior counsel for the appellant has submitted that Section 6(2) of the RTI Act grants a substantive right and the person who is seeking information/copies is not required to give any reason and this right cannot be curtailed or whittled down by procedural laws framed by the High Court under Article 225 of the Constitution of India. In support of his contention that the rules framed by the High Court in exercise of powers under Article 225 cannot make or curtail any substantive law, reliance was placed upon *Raj Kumar Yadav v. Samir Kumar Mahaseth and Others* **(2005) 3 SCC 601.** Learned Senior counsel further

submitted that Section 22 of the RTI Act specifically provides that the provisions of the RTI Act will have an overriding effect over other laws for the time being in force. It was therefore, submitted that in the event of any conflict between the provisions of the RTI Act and any other laws made by the Parliament or a State Legislature or any other authority, the provisions of the RTI Act must prevail and therefore, the RTI Act would prevail over the rules framed by the High Court. Mr. Prashant Bhushan, learned counsel for the intervention applicants also reiterated the same submission.

24. In order to consider the contentions urged by the learned Senior counsel for the appellant and Mr. Prashant Bhushan, let us briefly refer to the various categories of information held by the High Court, which are broadly as under:-

(a) information held by the High Court relating to the parties to the litigation/proceedings – pleadings, documents and other materials and memo of grounds raised by the parties;

(b) orders and judgments passed by the High Court, notes of proceedings, etc.;

(c) In exercise of power of superintendence over the other courts and tribunals, information received in the records submitted/called for by those courts and tribunals like subordinate judiciary, various tribunals like Income Tax Appellate Tribunal, Customs Excise

and Service Tax Appellate Tribunal and other tribunals;

(d) information on the administrative side of the High Court viz. appointments, transfers and postings of the judicial officers, staff members of the High Court and the district judiciary, disciplinary action taken against the judicial officers and the staff members and such other information relating to the administrative work.

(e) Correspondence by the High Court with the Supreme Court, Government and with the district judiciary, etc.;

and

(f) information on the administrative side as to the decision taken by the collegium of the High Court in making recommendations of the Judges to be appointed to the High Court; information as to the assets of the sitting Judges held by the Chief Justice of the High Court.

25. Information under the categories (a), (b) and (c) and other information on the judicial side can be accessed/certified copies of documents and orders could be obtained by the parties to the proceedings in terms of the High Court Rules and the parties to the proceedings are entitled to the same. So far as the third parties are concerned, as of right, they are not entitled to access the information/obtain the certified copies of documents, orders and other proceedings. As per rules framed by the High Court, a third

party can obtain the certified copies of the documents, orders or judgments or can have access to the information only by filing an application/affidavit and by stating the reason for which the information/copies of documents or orders are required. Insofar as on the administrative side i.e. categories (d), (e) and (f), one can have access to the information or copies of the documents could be obtained under the rules framed by the various High Courts or under the rules framed by the High Court under the RTI Act. Insofar as the disclosure of information as to the assets of the Judges held by the Chief Justice of the High Court, the same is now covered by the judgment of the Constitution Bench reported in *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agrawal* **2019 (16) SCALE 40.**

26. The preamble to the RTI Act suggests that the Act was enacted *"to promote transparency and accountability in the working of every public authority……".* The Act was enacted by keeping in view the right of *"an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed…..".* The preamble opens with a reference to the Constitution having established a democratic

republic and the need therefore, for an informed citizenry. The preamble reveals that legislature was conscious of the likely conflict with other public interest including efficient operations of the Governments and optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and the necessity to harmonise these conflicting interests. A citizen of India has every right to ask for any information subject to the limitation prescribed under the Act. The right to seek information is only to fulfill the objectives of the Act laid down in the preamble, that is, to promote transparency of information.

27. Rule 151 of the Gujarat High Court Rules, 1993 requires a third party applicant seeking copies of documents in any civil or criminal proceedings to file an application/affidavit stating the reasons for which those documents are required. As such, the High Court Rules do not obstruct a third party from obtaining copies of documents in any court proceedings or any document on the judicial side. It is not as if the information is denied or refused to the applicant. All that is required to be done is to apply for the certified copies with application/affidavit stating the reasons for seeking the information. The reason insisting upon the third party for stating the grounds for obtaining certified copies is to satisfy the court that the

information is sought for *bona fide* reasons or to effectuate public interest. The information is held by the High Court as a trustee for the litigants in order to adjudicate upon the matter and administer justice. The same cannot be permitted by the third party to have access to such personal information of the parties or information given by the Government in the proceedings. Lest, there would be misuse of process of court and the information and it would reach unmanageable levels. If the High Court Rules framed under Article 225 provide a mechanism for invoking the said right in a particular manner, the said mechanism should be preserved and followed. The said mechanism cannot be abandoned or discontinued merely because the general law – RTI Act has been enacted.

28. As discussed earlier, the object of the RTI Act itself recognizes the need to protect the institutional interest and also to make optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The procedure to obtain certified copies under the High Court Rules is not cumbersome and the procedure is very simple – filing of an application/affidavit along with the requisite court fee stating the reasons for seeking the information. The information held by the High Court on the judicial

side are the “personal information” of the litigants like title cases and family court matters, etc. Under the guise of seeking information under the RTI Act, the process of the court is not to be abused and information not to be misused.

29. In exercise of supervisory jurisdiction under Article 227 of the Constitution of India, if the records are received by the High Court from tribunals like Income Tax Appellate Tribunal, it may contain the details disclosed by an assessee in his Income Tax Return. As held in *Girish Ramchandra Deshpande v. Central Information Commissioner and Others* **(2013) 1 SSC 212**, the details disclosed by a person in his Income Tax Return are personal information which stands exempted from disclosure unless it involves a larger public interest and the larger public interest justifies the disclosure of such information. While seeking information or certified copies of the documents, the High Court Rules which require the third party to a proceeding to file an affidavit stating the reasons for seeking the information, the same cannot be said to be inconsistent with the provisions of the RTI Act in as much as the rejection if any, made thereafter will be for the very reasons as stipulated in Section 8 of the RTI Act.

30. Considering the implementation of RTI Act and observing that the existing mechanism for invoking the said right should be preserved and operated, in *Institute of Chartered Accountants of India v. Shaunak H. Satya and Others* **(2011) 8 SCC 781**, the Supreme Court held as under:-

> **"24.** One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed. The object of the RTI Act is to harmonise the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective.
>
> **25.** Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. Therefore, in dealing with information not falling under Sections 4(1)(*b*) and (*c*), the competent authorities under the RTI Act will not read the exemptions in Section 8 in a restrictive manner but in a practical manner so that the other public interests are preserved and the RTI Act attains a fine balance between its goal of attaining transparency of information and safeguarding the other public interests."

31. While examining the issue of where two mechanisms exist for obtaining the information i.e. the Supreme Court Rules and the RTI

Act, in *The Registrar Supreme Court of India v. R S Misra* **(2017) 244 DLT 179**, the Delhi High Court held that *"once any information can be accessed through the mechanism provided under another statute, then the provisions of the RTI Act cannot be resorted to."* In **(2017) 244 DLT 179**, the Delhi High Court held as under:-

> "**53**. The preamble shows that the RTI Act has been enacted only to make accessible to the citizens the information with the public authorities which W.P.(C) 3530/2011 Page 22 of 36 hitherto was not available. Neither the Preamble of the RTI Act nor does any other provision of the Act disclose the purport of the RTI Act to provide additional mode for accessing information with the public authorities which has already formulated rules and schemes for making the said information available. Certainly if the said rules, regulations and schemes do not provide for accessing information which has been made accessible under the RTI Act, resort can be had to the provision of the RTI Act but not to duplicate or to multiply the modes of accessing information.
>
> **54**. This Court is further of the opinion that if any information can be accessed through the mechanism provided under another statute, then the provisions of the RTI Act cannot be resorted to as there is absence of the very basis for invoking the provisions of RTI Act, namely, lack of transparency. In other words, the provisions of RTI Act are not to be resorted to if the same are not actuated to achieve transparency.
>
> **55**. Section 2(j) of the RTI Act reveals that the said Act is concerned only with that information, which is under the exclusive control of the 'public authority'. Providing copies/certified copies is not separate from providing information. The SCR not only deal with providing 'certified copies' of judicial records but also deal with providing 'not a certified copy' or simply a 'copy' of the document.

> The certification of the records is done by the Assistant Registrar/Branch Officer or any officer on behalf of the Registrar. In the opinion of this Court, in case of a statute which contemplates dissemination of information as provided for by the Explanation to Section 4 of the RTI Act then in such situation, public will have minimum resort to the use of the RTI Act to obtain such information.
>
> **56**. There are other provisions of the RTI Act which support the said position, namely, Sections 4(2), (3) and (4) which contemplate that if an information is disseminated then the public will have minimum resort to the use of the RTI Act to obtain information. In the present case, the dissemination of information under the provisions of the SCR squarely fits into the definition of "disseminated" as provided in the aforesaid Explanation to Section 7(9) and the Preamble contemplate a bar for providing information if it „disproportionally diverts the resources of the public authority".
>
> **57**. Section 4(2) also provides that it shall be constant endeavour of every public authority to take steps in accordance with the requirements of subSection (1) thereof and to provide as much information suo-motu to the public at regular intervals through various means of communications including intervals so that the public has minimum resort to the use of the RTI Act to obtain information." [**Underlining added**]

The same view was taken up by the Karnataka High Court in *State Public Information Officer and Deputy Registrar (Establishment) v. Karnataka Information Commission and Another* **WP No.26763 of 2013** dated 09.01.2019.

32. We fully endorse above views of the Delhi High Court. When the High Court Rules provide for a mechanism that the information/certified copies can be obtained by filing an

application/affidavit, the provisions of the RTI Act are not to be resorted.

33. Sub-section (2) of Section 4 of the RTI Act provides that every public authority to take steps to provide as much information *suo motu* to the public at regular intervals through various means of communications including internet, so that the public have minimum resort to the use of the RTI Act to obtain information. *Suo motu* disclosure of information on important aspects of working of a public authority is therefore, an essential component of information regime. The judgments and orders passed by the High Courts are all available in the website of the respective High Courts and any person can have access to these judgments and orders. Likewise, the status of the pending cases and the orders passed by the High Courts in exercise of its power under Section 235 of the Constitution of India i.e. control over the subordinate courts like transfers, postings and promotions are also made available in the website. In order to maintain the confidentiality of the documents and other information pertaining to the litigants to the proceedings and to maintain proper balance, Rules of the High Court insist upon the third party to file an application/affidavit to obtain information/certified copies of the documents, lest such application

would reach unmanageable proportions apart from the misuse of such information.

34. Section 22 of the RTI Act lays down that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than RTI Act. Learned Senior counsel for the appellant has submitted that since the requirement under Rule 151 of the Gujarat High Court Rules of filing an affidavit stating the grounds for seeking the information is directly contrary to Section 6(2) of the RTI Act and there is direct inconsistency between the provisions of the RTI Act and the Gujarat High Court Rules and in the event of conflict between the provisions of the RTI Act and any other law made by the Parliament or a State Legislature or any other authority, the RTI Act must prevail.

35. In the *non obstante* clause of Section 22 of the RTI Act, three categories have been mentioned:- (i) the Official Secrets Act, 1923; and (ii) any other law for the time being in force; or (iii) any instrument having effect by virtue of any law other than this Act. In case of inconsistency of any law with the provisions of the Right to Information Act, overriding effect has been given to the provisions of

the Right to Information Act. Section 31 of the RTI Act which is a repealing clause repeals only the Freedom of Information Act, 2002 and not other laws. The Right to Information Act has not repealed the Official Secrets Act or any of the laws providing confidentiality which prohibits the authorities to disclose information. Therefore, all those enactments including Official Secrets Act, 1923 continue to be in force. This Act however, has an overriding effect to the extent they are inconsistent.

36. The *non-obstante* clause of the RTI Act does not mean an implied repeal of the High Court Rules and Orders framed under Article 225 of the Constitution of India; but only has an overriding effect in case of inconsistency. A special enactment or rule cannot be held to be overridden by a later general enactment simply because the latter opens up with a *non-obstante* clause, unless there is clear inconsistency between the two legislations. In this regard, we may usefully refer to the judgment of the Supreme Court in *R.S. Raghunath v. State of Karnataka* **(1992) 1 SCC 335** wherein, the Supreme Court held as under:-

> "**38.** In *Ajoy Kumar Banerjee* v. *Union of India* (1984) 3 SCC 127, Sabyasachi Mukharji, J. (as His Lordship then was) observed thus :
>
> > "As mentioned hereinbefore if the scheme was held to be valid, then the question what is the general law and what is the special law and which law in case of conflict would prevail would have arisen and that would have necessitated the application of the principle "*generalia specialibus non*

> *derogant*". The general rule to be followed in case of conflict between the two statutes is that the later abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied:
>
> (*i*) The two are inconsistent with each other.
>
> (*ii*) There is some express reference in the later to the earlier enactment.
>
> If either of these two conditions is fulfilled, the later law, even though general, would prevail."

37. As pointed out earlier, Section 31 of the RTI Act repeals only the Freedom of Information Act, 2002 and not other laws. If the intention of the legislature was to repeal any other Acts or laws which deal with the dissemination of information to an applicant, then the RTI Act would have clearly specified so. In the absence of any provision to this effect, the provisions of the RTI Act cannot be interpreted so as to attribute a meaning to them which was not intended by the legislature. In the RTI Act, there is no specific reference to the rules framed by the various High Courts or any other special law excepting the Freedom of Information Act, 2002.

38. As discussed earlier, Rule 151 of the Gujarat High Court Rules requires a third party to the proceedings to file an affidavit and state the reasons for seeking access to the information or grant of certified copies of records and there is no inconsistency of the High Court Rules with the provisions of the RTI Act. The Gujarat High Court Rules neither prohibit nor forbid dissemination of information

or grant of certified copies of records. The difference is only insofar as the stipulation of filing an application/affidavit or payment of fees, etc. is concerned, there is no inconsistency between the two provisions and therefore, the RTI Act has no overriding effect over Rule 151 of the Gujarat High Court Rules.

39. Ten categories of information are exempted from disclosure under Section 8(1)(a) to (j) of the RTI Act. Section 8(1)(j) excludes disclosure of personal information, the disclosure of which:- (i) has no relationship to any public activity or interest; or (ii) would cause unwarranted invasion of the privacy of the individual. However, in both the cases, the Central Public Information Officer or the appellate authority may order disclosure of such information, if they are satisfied that larger public interest justifies disclosure. This would imply that personal information which has some relationship to any public activity or interest may be liable to be disclosed. An invasion of privacy may be held to be justified if the larger public interest so warrants.

40. The information held by the High Court on the judicial side are the personal information of the parties to the litigation or information furnished by the Government in relation to a particular case. There may be information held by the High Court relating to the cases

which have been obtained from the various tribunals in exercise of the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. For instance, the matters arising out of the orders by the Income Tax Appellate Tribunal, Customs Excise and Service Tax Appellate Tribunal and other tribunals over which the High Court exercises the supervisory jurisdiction. The orders/judgments passed by the High Court though are the documents which are concerned to the rights and liabilities of the parties to the litigation. Under Section 8(1)(j) of the RTI Act, the Central Public Information Officer or the appellate authority may order disclosure of personal information if they are satisfied that the larger public interest justifies disclosure. Insofar as the High Court Rules are concerned, if the information or certified copies of the documents/record of proceedings/orders on the judicial side of the Court is required, all that the third party is required to do is to file an application/affidavit stating the reasons for seeking such information. On being satisfied about the reasons for requirement of the certified copy/disclosure of information, the Court or the concerned Officer would order for grant of certified copies. As discussed earlier, Order XIII Rule 3 of the Supreme Court Rules also stipulate the same procedure insofar as the third party seeking certified copy of the documents/records.

41. Yet another contention advanced is that the information held by the High Court may be furnished to the applicant by following the procedure under Section 11 of the RTI Act. Section 11 of the Act deals with **third party information.** As per Section 11 of the Act, if the requisite information or record or part thereof has been supplied by a third party and has been treated as confidential by that third party, then the Central Public Information Officer or State Public Information Officer, as the case may be, within five days of receipt of the request give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record or part thereof and invite the third party to make a submission in writing or orally regarding whether such information should be disclosed and such submission of the third party shall be kept in view while taking a decision about the disclosure of the information.

42. We do not find any merit in the above submission and that such cumbersome procedure has to be adopted for furnishing the information/certified copies of the documents. When there is an effective machinery for having access to the information or obtaining certified copies which, in our view, is a very simple procedure i.e.

filing of an application/affidavit with requisite court fee and stating the reasons for which the certified copies are required, we do not find any justification for invoking Section 11 of the RTI Act and adopt a cumbersome procedure. This would involve wastage of both time and fiscal resources which the preamble of the RTI Act itself intends to avoid.

43. We summarise our conclusion:-

(i) Rule 151 of the Gujarat High Court Rules stipulating a third party to have access to the information/obtaining the certified copies of the documents or orders requires to file an application/affidavit stating the reasons for seeking the information, is not inconsistent with the provisions of the RTI Act; but merely lays down a different procedure as the practice or payment of fees, etc. for obtaining information. In the absence of inherent inconsistency between the provisions of the RTI Act and other law, overriding effect of RTI Act would not apply.

(ii) The information to be accessed/certified copies on the judicial side to be obtained through the mechanism provided under the High Court Rules, the provisions of the RTI Act shall not be resorted to.

44. In the light of aforesaid reasonings, the impugned order dated 13.03.2014 passed by the High Court of Gujarat at Ahmedabad in

Letters Patent Appeal No.1348 of 2013 is confirmed and these appeals are dismissed. We place on record the valuable assistance rendered by Mr. Atmaram N.S. Nadkarni as *amicus.*

.....J.
[R. BANUMATHI]

.....J.
[A.S. BOPANNA]

.....J.
[HRISHIKESH ROY]

New Delhi;
March 04, 2020.