

A CENTRAL PUBLIC INFORMATION OFFICER, SUPREME
COURT OF INDIA

v.

SUBHASH CHANDRA AGRAWAL
(Civil Appeal No. 10044 of 2010 etc.)

B NOVEMBER 26, 2010

**[B. SUDERSHAN REDDY AND SURINDER SINGH
NIJJAR, JJ.]**

C *RIGHT TO INFORMATION ACT, 2005:*

ss.6 and 8(1)(j) – Request to CPIO, Supreme Court of India to furnish complete file/s (only as available in Supreme Court) inclusive copies of complete correspondence exchanged between constitutional authorities concerned with file notings relating to appointments of certain Judges of Supreme Court and High Courts – Request declined – Ultimately, direction by CIC to CPIO, Supreme Court to furnish the information sought by respondent – Order of CIC challenged before Supreme Court – Held: The case raises important questions of constitutional importance relating to the position of the Chief Justice of India under the Constitution and independence of Judiciary in the scheme of the Constitution on the one hand and, on the other, fundamental right to freedom of speech and expression, of which right to information is an integral part – A substantial question of law as to the interpretation of the constitution is involved in the case which is required to be heard by a Constitution Bench – Matter directed to be placed before Chief Justice of India for constitution of a Bench of appropriate strength.

G Respondent no. 1 in C.A. No. 10044 of 2010 requested the CPIO, Supreme Court of India to arrange to send him a copy of complete file/s (only as available in Supreme Court) inclusive of copies of complete

correspondence exchanged between the constitutional authorities concerned with file notings relating to appointments of certain Judges of the Supreme Court and High Courts, as allegedly objected to by Prime Minister's Office also. He further requested the CPIO not to invoke s. 6 (3) of the Right to Information Act, 2005. The CPIO informed the respondent that the information sought by him was "neither maintained nor available in the Registry". The appeal of the respondent was dismissed. He preferred a further appeal before the CIC purported to be u/s 19 (3) of the Act. The CIC having set aside the orders passed by the authorities and directed the CPIO, Supreme Court to furnish the information sought by the respondent, the latter filed the appeal.

It was mainly contended for the appellant that disclosure of the information sought for by the respondent could not be furnished in public interest, i.e., to keep the appointment and transfer from "needless intrusions by strangers and busy bodies in the functioning of the judiciary". It was submitted by the Attorney General that the information made available to the Chief Justice of India in respect of appointment of Judges of the High Courts and the Supreme Court was held by him in trust and in fiduciary capacity. The submission received considerable support from various High Courts pursuant to the notices issued by the Supreme Court.

Referring the matter to a larger Bench, the Court

HELD:

1.1 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

- A position of the Chief Justice of India under the Constitution of India 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. 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. [para 12] [1127-H; 1128-A-C]

D 1.2 Following substantial questions of law as to the interpretation of the Constitution arise for consideration:

E 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?

F 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?

G 3. Whether the information sought for is exempt u/s 8(i) (j) of the Right to Information Act? [para 15] [1129-H; 1130-A-D]

H 1.3 Registry directed to place the matter before the Chief Justice of India for constitution of a Bench of appropriate strength. [para 17] [1130-E]

CEN. PUB. INFORMATION OFFICER, SCI v. SUBHASH 1123
CHANDRA AGRAWAL

S.P. Gupta Vs. Union of India 1982 SCR 365 = 1981 A
Suppl. SCC 87; *Supreme Court Advocates-on-Record
Association Vs. Union of India* 1993 (2) Suppl. SCR 659 =
1993 (4) SCC 441; and *Subhash Sharma Vs. Union of
India* 1990 (2) Suppl. SCR 433 = 1991 (1) Suppl. SCC 574
– referred to. B

Case Law Reference:

1982 SCR 365 referred to para 6

1993 (2) Suppl. SCR 659 referred to para 7 C

1990 (2) Suppl. SCR 433 referred to para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No.
10044 of 2010.

From the Judgment & Order dated 24.11.2009 of the D
Central Information Commission in Appeal No. CIC2B/A/2009/
000529.

WITH

C.A. Nos. 10045 & 2683 of 2010. E

G.E. Vahanvati, AG, A. Mariapuham, Adv. Gen., V. Giri,
P.P. Rao, Raju Ramchandran, Devadatt Kamat, B. Krishna
Prasad, Prashant Bhushan, Pranav Sachdeva, Pyoli, Sushil
Kumar Jain, Puneet Jain, Trishna, Anil, Ravi P. Malhotra, Vibhu F
Tiwari, A.P. Mayee, Charudatta, Rucha A. Mayee, Jesal,
Bharat Sangal, Vernika Tomar, Ajingwa Thungwa, M.P. Vinod,
Ajay K. Jain, Hari Kumar, Satish C. Joshi, P.I. Jose, Raja
Chatterjee, Sachin Das, G.S. Chatterjee, Aman Kumar Jha,
Arjun Garg, Somandri Gaud, Sameer Parekh, Rachana G
Srivastava, Janaranjan Das, Swetaketu Mishra, P.P. Nayak,
Aruna Mathur, Amarjeet Singh Girsu, Yusuf Khan, Aman
Ahalwati, Kuldip Singh, Parekh & Co. Sushil Kumar Jain,
Rachana Srivastava, Sunil Fernandes, Sunil Kumar Verma,
Krishnand Pandeya, V.N. Raghupathy, Bharat Sangal, H

- A Aniruddha P. Mayee, C.K. Sucharita, Hemantika Wahi, R. Nedumaran, Arputham, Aruna & Co., G.S. Chatterjee, M.P. Vinod, Aruneshwar Gupta for the appearing parties.

The Judgment of the Court was delivered by

- B **B. SUDERSHAN REDDY, J.**

Special Leave Petition (c) Nos. 32855 of 2009

1. Leave granted.

- C 2. This appeal is directed against the impugned order dated 24th November, 2009 passed by the Central Information Commission (CIC) whereby and whereunder the CIC having allowed the appeal preferred by Subhash Chandra Agrawal, respondent herein, directed the Central Public Information Officer (CPIO), Supreme Court of India to furnish information as sought by him.
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3. The respondent Subhash Chandra Agarwal requested the CPIO, Supreme Court of India to arrange to send him a copy of "complete file/s (only as available in Supreme Court) inclusive of copies of complete correspondence exchanged between concerned constitutional authorities with file notings relating to said appointment of Mr. Justice HL Dattu, Mr. Justice AK Ganguly and Mr. Justice RM Lodha superseding seniority of Mr. Justice P Shah, Mr. Justice AK Patnaik and Mr. Justice VK Gupta as allegedly objected to Prime Minister's Office (PMO) also". He further requested the CPIO not to invoke Section 6(3) of the Right to Information Act (for short 'the Act').
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- F

4. The CPIO, Supreme Court of India promptly replied to the application so filed under the said Act duly informing the respondent that the Registry does not deal with the matters pertaining to the appointment of Hon'ble Judges of the Supreme Court of India. Appointments of Hon'ble Judges of the Supreme Court and High Courts are made by the President of India as per the procedure prescribed by law and the matters
- G
- H

relating thereto are not dealt with and handled by the Registry of the Supreme Court of India. The CPIO accordingly informed the respondent that the information sought by him is "neither maintained nor available in the Registry".

5. The respondent Subhash Chandra Agrawal preferred appeal before the appellate authority of the Supreme Court of India challenging the said order. The appellate authority dismissed the appeal and confirmed the order of the CPIO. Thereafter, the respondent preferred a further appeal before the CIC purported it to be under Section 19 of the Act. The CIC having set aside the orders passed by the authorities, directed the CPIO, Supreme Court to furnish the information sought by the respondent. It is that order which is under challenge before us.

6. The CIC mainly relied upon the order passed by the learned Single Judge of the Delhi High Court in Writ Petition No. 288 of 2009 titled *Central Public Information Officer, Supreme Court of India Vs. Subhash Chandra Agarwal*. Of course, the CIC also relied on the decision of this Court in *S.P. Gupta Vs. Union of India*¹.

7. The learned Attorney General appearing on behalf of the appellants while placing strong reliance upon the decision of this Court in *Supreme Court Advocates-on-Record Association Vs. Union of India*² inter alia submitted that the ratio of the decision in *S.P. Gupta* (supra) is required to be understood and appreciated in the light of the observations made by this Court in *Supreme Court Advocates-on-Record Association* inasmuch as *S.P. Gupta's* case has been explained by the larger Bench. The submission was that disclosure of the information sought for by the respondent cannot be furnished in public interest. It is in the public interest to keep the appointment and transfer from "needless intrusions by strangers

1. (1981) Supp SCC 87.

2. (1993) 4 SCC 441.

A and busybodies in the functioning of the judiciary”. Learned Attorney General placed particular reliance on the following paragraph of the said decision.

B “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 busybodies in the functioning of the judiciary under the garb of public interest litigation...”

D 8. It was further submitted that the appointment of Judges is essentially a discharge of constitutional trust as laid down by this Court in *Subhash Sharma Vs. Union of India*³. The submission was that the information made available to the Chief Justice of India in respect of appointment of Judges of the High Court and as well as the Supreme Court is held by him in trust and in fiduciary capacity. This submission of the learned Attorney General received considerable support from the various High Courts of the country except the High Court of Guwahati as is evident from their response filed pursuant to the notices issued by this Court.

F 9. The learned counsel for the respondent Mr. Prashant Bhushan placed heavy reliance on paragraphs 83, 84 and 85 of the decision of this Court in *S.P. Gupta*.

G 10. That on a holistic reading of the said judgment, it appears to us that the Court was mainly dealing with the question as to whether any immunity could be claimed from production of the records in respect of the correspondence between the Law Minister and the Chief Justice of India and the relevant notings made by them in regard to the transfer of a High Court Judge including the Chief Justices of the High

H 3. (1991) Supp.1 SCC 574.

Court which were extremely material for deciding whether there was full and effective consultation? It is observed at more than one place that the non-disclosure of the said documents would seriously handicap the petitioner therein in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest. It is observed:

"It would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true."

The Court felt that "all relevant documents should be produced before the court so that the full facts may come before the people, who in a democracy are the ultimate arbiters". The Court further observed : "We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an Additional Judge are relevant to the *issues arising in a judicial proceeding, they should not be disclosed*. ... Where it becomes relevant *in a judicial proceeding, why should the Court and the opposite party and through them, the people not know what are the reasons for which a particular appointment is made or a particular Additional Judge is discontinued or a particular transfer is effected*. We fail to see what harm can be caused by the disclosure of true facts *when they become relevant in a judicial proceeding*".

11. Whether the said decision would be applicable when such information is sought under the provisions of the Right to Information Act is an important question that is required to be gone into.

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

A 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,
 B 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
 C 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.

D 13. The Constitution is fundamentally a public text—the
 monumental character of a Government and the people—and
 Supreme Court is required to apply it to resolve public
 controversies. For, from our beginnings, a most important
 consequence of the constitutionally created separation of
 E powers has been the Indian habit, extraordinary to other
 democracies, of casting social, economic, philosophical and
 political questions in the form of public law remedies, in an
 attempt to secure ultimate resolution by the Supreme Court. In
 this way, important aspects of the most fundamental issues
 F confronting our democracy finally arrive in the Supreme Court
 for judicial determination. Not infrequently, these are the issues
 upon which contemporary society is most deeply divided. They
 arouse our deepest emotions. This is one such controversy.
 William J. Brennan, Jr. in one of his public discourse observed:

G “We current Justices read the Constitution in the only way
 that we can: as twentieth-century Americans. We look to
 the history of the time of framing and to the intervening
 history of interpretation. But the ultimate question must be,
 H what do the words of the text mean in our time? For the

genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, *Weems V. United States*, 217 U.S. 349, written nearly a century ago:

“Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.”

14. The current debate is a sign of a healthy nation. This debate on the Constitution involves great and fundamental issues. Most of the times we reel under the pressure of precedents. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time?

15. Following substantial questions of law as to the

A interpretation of the Constitution arise for consideration:

- B
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(i)(j) of the Right to Information Act?
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- D

16. The above questions involve the interpretation of the Constitution raise great and fundamental issues.

E 17. For the aforesaid reasons, we direct the Registry to place this matter before Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength. Let the papers be accordingly placed before Hon'ble the Chief Justice of India.

F 18. *Special Leave Petition (Civil) No. 32856 of 2009*
Leave granted. Tag with Civil Appeal arising out of S.L.P.(c) No. 32855 of 2009.

G 19. *Civil Appeal No. 2683 of 2010*
Tag with Civil Appeal arising out of S.L.P.(c) No. 32855 of 2009.

R.P.

Matter referred to larger Bench.