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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 30.08.2012

Judgment Delivered on: 09.11.2012

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WP(C) 499/2012 & CM 1059/2012

UNION OF INDIA & ORS.

..... Petitioners

Vs

COL. V.K. SHAD

..... Respondent

AND

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WP(C) 1138/2012 & CM 2462/2012

UNION OF INDIA & ANR.

..... Petitioners

Vs

COL. P.P. SINGH

..... Respondent

AND

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WP(C) 1144/2012 & CM 2486/2012

UNION OF INDIA & ORS.

..... Petitioners

Vs

BRIG. S. SABHARWAL

..... Respondent

Advocates who appeared in this case:

For the Petitioners: Mr Rajeev Mehra, Additional Solicitor General with Mr Ankur Chibber, Ms Aakriti Jain & Mr Ashish Virmani, Advocates.

For the Respondents: Col. V.K. Shad, Respondent in person in WP(C) No. 499/2012.

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. The captioned writ petitions raises a common question of law, which is, whether the petitioners are obliged to furnish information to respondent which is retained with them in the record, in the form of file notings as also the opinion of the Judge Advocate General (in short JAG) found in records of the respondents, under the relevant provisions of the Right to Information Act, 2005 (in short the RTI Act).

1.1 In each of the matters, the Union of India (UOI) has been represented by Mr Rajeeve Mehra, ASG, while the respondents have appeared in person. Amongst the respondents, Col. V.K. Shad has appeared in person and made submission at each date, while the same cannot be said of the other two respondents, Col P.P. Singh and Brig. S. Sabharwal who have put in appearances occasionally. In particular, they were absent on the last two dates of hearing when matters were heard at length and the judgment was reserved in the matters. Nevertheless, it appears that, the said officers have adopted and are in sync, with the submissions made by Col. V.K. Shad.

1.2 The orders impugned in each of the captured writ petitions were those passed by the Central Information Commission (in short CIC). In WP(C) 499/2012, two orders are impugned. The principal order being order dated 15.06.2011, followed by a consequential order, dated 13.12.2011.

1.3 In WP(C) 1138/2012, there are, once again, two orders, which are impugned. The first order impugned is, the principal order, which is, dated 04.11.2011. This order follows the decision taken by the CIC in Col. V.K. Shad's case. The second order is dated 05.01.2012, which actually, only records, the fact that the matter had been concluded by the order dated

4.11.2011, and that the registry of the CIC had mistakenly relisted the matter. The order however, also goes on to record the fact that, a written representation was submitted on behalf of the petitioners herein that, they be given, thirty (30) days time to comply with the order of the CIC.

1.4 In the third and last writ petition being: WP(C) 1144/2012, the order impugned is dated 9.6.2011.

1.5 In each of these matters, the impugned orders have been passed by the same Chief Information Commissioner.

2. Though the question of law is common, for the sake of completeness, I propose to briefly touch upon the relevant facts involved in each of the matters, which led to institution of the instant writ petitions.

2.1 For the sake of convenience, however, each of the respondents in their respective writ petitions will be referred to by their name.

WP(C) NO. 499/2012

3. Col. V.K. Shad was posted to the Army Core Supply Battalion 5628 in September, 2008. Evidently, he fell out with his deputy, one, Lt. Col. B.S. Goraya. Col. V.K. Shad had issues with regard to Lt. Col. B.S. Goraya, which in his perception impacted the functioning in the unit. Lt. Col. B.S. Goraya, on his part made counter allegations against Col. V.K. Shad qua issues which he regarded as infractions of standard operating procedures governing the functioning of the personnel inducted into the army.

3.1 Consequently, in May, 2009, a Court of Inquiry was ordered by the Head Quarter, Western Command, to investigate, charges of alleged acts of indiscipline leveled by Col. V.K. Shad against Lt. Col. B.S. Goraya as also counter charges made by Lt. Col. B.S. Goraya against Col. V.K. Shad.

3.2 The inquiry against Col. V.K. Shad pertained to the following:

- "(i) Failure to follow laid down procedure with respect to sale of BPL watches, as a non CSD item between October,

2008 and March, 2009.

(ii) Accepting money in Regt Fund Acct amounting to Rs 27,133/- (Rupees twenty seven thousand one hundred and thirty three only) as sponsorship from CSD Liquor Vendors between January and February 2009.

(iii) Improperly passed instructions to JC-664710W Nb Sub AR Ghose of 5682 ASC Bn, JCO in-Charge AWWA Venture Shop, to not to charge the profit of 5% on the sale of fruits and vegetables to MG-IC-Adm. MG ASC and DDST of HQ Western Command."

3.3 As regards, Lt. Col. B.S. Goraya (later on promoted as colonel), what one was able to glean from the record is that, he was charged with making unwarranted allegations against his commanding officer Col. V.K. Shad, relating to counseling letters to officers; non-payment of mess bills; and purchase of pickle from officer's mess fund for personal use.

3.4 The Court Of Inquiry concluded its proceedings in August, 2009. The opinion of the Court Of Inquiry was as follows:

"....(a) No case of financial misappropriation or malafide intention on part of IC-48682N Co. VK Shad, CO 5682 ASC Bn has been ascertained by the court.

(b) Actions taken by Col VK Shad, CO 5682 ASC Bn in all the cases examined by the court, though at places not strictly as per laid down procedures, are on issues pertaining to routine day to day functioning of the unit and did not have any serious ramifications or resulted in any gross violation/ deviation from the accepted norms.

(c) IC-46873K Lt. Col BS Goraya, 2IC, 5682 ASC Bn has apparently got into a personality clash with the CO, Vol. V.K. Shad. In the bargain, the former has attempted to polarize the Unit and in effect adversely affected the day to day functioning of the unit in gen and the CO in particular.

(d) All issues which the court examined were of routine/ mundane nature and could have been resolved in the departmental channel itself.

2. The court recommends that:-

(a) IC 48682N Col V K Shad, CO 5682 Bn (MT) should be suitably counselled for lapses in laid down procedures

with reference to the issues of "sale of BPL Watches", "acceptance of sponsorship money from CSD Liquor Vendors" and "Functioning of AWWA Venture Shop, Chandimandir".

(b) IC-46873K Lt. Col B S Goraya, 2IC 5682 ASC Bn (MT) is recommended to be posted out of the Unit forthwith as the presence of the offr in the Bn as 2IC, is detrimental to the administrative and operational efficiency of the Bn.

(c) Suitable Disciplinary/administrative action be initiated against IC-46873K Lt Col BS Goraya for leveling baseless allegations against Col VK Shad, CO on routine/ mundane issues and acting in a manner not befitting the Second in Command of the Bn by adversely affecting the functioning of the Bn....."

3.5 It appears that the reviewing authority, which in this case was the Commander P.H. & H.P(1) Sub Area, differed with the opinion of the Court Of Inquiry, and thus, recommended, initiation of administrative and disciplinary action against Col. V.K. Shad. In so far as Lt. Col. B.S. Goraya was concerned, in addition to initiating administrative action; a recommendation was also made that, he should be posted out of the unit forthwith as the presence of the said officer in the battalion as the second-in-command was detrimental to the administrative and operational efficiency of the Battalion.

3.6 The matter reached the next level of command which was the General Officer Commanding (GOC) Head Quarters 2 Corps (GOC-in-Chief).

3.7 The GOC-in-Chief, while partially agreeing with the findings and opinion of the Court Of Inquiry, noted that, it agreed with the recommendations of the Commander P.H. & H.P. (1) Sub Area. In conclusion the GOC-in-Chief, while recommending administrative action against both Col. V.K. Shad and Lt. Col. B.S. Goraya; and concurring with the view that Lt. Col. B.S. Goraya needed to be posted outside the battalion 5682 - proceeded to convey his severe displeasure (non-recordable) to Col.

V.K. Shad.

3.8 This direction was issued on 10.7.2010, though after a show cause notice was issued to Col. V.K. Shad on 8.4.2010, to which he was given an opportunity to file his defence/ reply.

4. It is in this background that Col. V.K. Shad vide an application dated 23.8.2010, took recourse to the RTI Act seeking information with regard to the following:

- "(a) Opinion and findings of the C of I convened by the convening order ref in para 1 above.
- (b) Recommendations on file of staff at various HQs.
- (c) Recommendations of Cdrs in chain of comd.
- (d) Directions of the GOC-in-C on the subject inquiry.
- (e) Copies of all letters written by Lt. Col. B.S. Goraya where he has leveled allegations against me to HQ Western Command including those written to HQ Corps and HQ PH & HP(1) Sub Area till date. I may also be info of action taken, if any, against Lt Col BS Goraya for his numerous acts of indiscipline."

5. The PIO, vide communication dated 29.9.2010, declined to give any information. The said communication, however, did indicate that under Army Rule 184 (Amended), the statement of exhibits of the Court Of Inquiry proceedings are made available to those persons whose character and military reputation is in issue in the proceedings before the Court Of Inquiry. The officer was advised by the said communication to apply accordingly.

6. Being aggrieved, Col. V.K. Shad, approached the first appellate authority. The first appellate authority agreed with the view taken by the PIO except, with regard to, the denial of access to letters written by Lt. Col. B.S. Goraya to the Head Quarters, Western Command including those written to Head Quarter 2 Corps and Head Quarters PH & HP (1) Sub Area. The rationale employed by the first appellate authority was that once investigation were over, copies of letters written by Lt. Goraya upto March, 2010 could be

provided to Col. V.K. Shad. In addition to the above, a further direction was issued, which was, to inform Col. V.K. Shad as regards the action, if any, initiated, against Lt. Col. B.S. Goraya.

7. Not being satisfied, Col. V.K. Shad, approached the CIC. The CIC, vide order dated 15.06.2011, directed the petitioners to supply to Col. V.K. Shad, the entire information, to the extent not supplied, within a period of four weeks from the date of the order.

8. Since, there was a failure, on the part of the petitioners to comply with the directions of the CIC, within the time stipulated, a complaint was lodged by the Col. V.K. Shad, with the CIC, on 2.8.2011. Accordingly, a show cause notice was issued by the CIC, on 6.9.2011, to the PIO, Head Quarter Western Command. The notice was made returnable on 27.9.2011.

8.1 Vide communication dated 19.9.2011, the hearing before the CIC was rescheduled for 5.10.2011. By yet another notice dated 26.9.2011, the hearing was, once again, rescheduled for 12.10.2011.

8.2 At the hearing held on, 12.10.2011, the CIC extended the time for implementation of its order by a period of (40) days, at the request of the CPIO. The proceedings were posted for 1.12.2011.

8.3 By a notice dated 29.11.2011, the said proceedings, were rescheduled for 30.12.2011. On 30.12.2011, the CIC passed the second impugned order, in view of non-compliance of its earlier order dated 15.6.2011. By order dated 30.2.2011, the CIC issued a show cause notice to the then PIO, as to why, penalty of Rs 25000 should not be imposed on him under Section 20(1) of the RTI Act, for failure to implement its order. A show cause notice was also issued to the Secretary, Government of India, Ministry of Defence, as to why compensation to the tune of Rs 50,000/- should not be awarded to Col. V.K.Shad, under the provisions of Section 19(8)(b) of the RTI Act, for failure to supply information, in compliance, with its orders.

appearance of the two named officers alongwith their written representation, was also directed. The matter was posted for further proceedings, on 7.2.2012.

8.4 It is in this background that writ petition 499/2012, was moved in this court, on 24.01.2012 when, the impugned orders in so far as it directed provision of the opinion of the JAG branch, was stayed.

WP(C) No. 1138/2012

9. In this case a Court Of Inquiry was ordered by the Head Quarter Central Command, to investigate circumstances in which, one (1) rifle 5.56 mm INSAS alongwith one (1) magazine and 40 (forty) cartridges, SAS 5.56 mm Ball INSAS, from 40 Company ASC (Sup) Type 'D', was lost on the night of 14/15 January, 2006 and thereafter, recovered on 18.01.2006.

9.1 On the conclusion of the Court Of Inquiry, the proceedings, the findings as also the recommendations as in the first case, were finally placed before the GOC-in-Chief, Central Command, who came to the conclusion that administrative action was imperative against Col. P.P. Singh, for his failure to supervise the duties which were required to be performed by his subordinates and, in ensuring, the safe custody of weapons, taken on charge, by his unit, contrary to the provisions of para 37(c) of the Regulations For The Army 1987 (Revised) and para 193 of the Military Security Instructions, 2001.

9.2 Based on the directions of the GOC-in-Chief, a show cause notice was issued to Col. P.P. Singh, on 28.10.2006. After perusing the reply of Col. P.P. Singh, and based on the record the GOC-in-Chief, Central Command directed that his severe displeasure (Recordable) be conveyed to Col. P.P. Singh.

9.3 It is in this background that Col. P.P. Singh also took recourse to the RTI Act, and sought, the following information vide his application dated

29.1.2011:

"(a) Findings and opinion of the Court alongwith recommendations of the Cdrs in chain and dirn of the competent authority (GOC UB Area, GOC-in-C Central Command) on the Court Of Inquiry convened under Stn. SQs Cell, Meerut convening order no. 124901/4/G dt 21 Jan 2006.
(b) Noting sheets relating to processing this case at HQ UB Area and HQ Central Command based on which GOC-in-C awarded me Severe Displeasure (Recordable). In this connection refer dirn issued HQ Central Command letter no. 190105/653/U/DV dt. 10 feb 2007.
(c) Please provide copy of the authority under which this Court Of Inquiry was forwarded to HQ UB Area and further on to HQ Central Command whereas the convening authority of the Court Of Inquiry was St. HQ Cell Meerut."

9.4 By communication dated 21.2.2011, the PIO rejected the application of Col. P.P. Singh by taking recourse to the provisions of Section 8(1)(e) of the RTI Act.

9.5 Being aggrieved, Col. P.P. Singh preferred an appeal with the first appellate authority. Interestingly, the first appellate authority while agreeing with the conclusions of the PIO observed that the PIO had "correctly disposed" of Col. P.P. Singh application as it fell squarely under the exceptions provided in Section 8(1) (g) & (h) of the RTI Act. It may be pertinent to point out that the PIO had in fact taken recourse to provisions of Section 8(1)(e) of the RTI Act.

9.6 Col. P.P. Singh preferred an appeal with the CIC. The CIC, while taking note of the fact that no proceedings were pending against Col. P.P. Singh, directed the release of information sought by him based on the reasoning provided in its order passed in Col. V.K. Shad's case, though after redacting the names and designations of the officers, who had made notings in the files, in accordance with the provisions of Section 10(1) of the RTI Act. The petitioners were directed to furnish the information, as directed, within

four (4) weeks of the order.

9.7 As noticed above, though Col. P.P. Singh's appeal before the CIC was disposed on 4.5.2011, it got listed again on 5.1.2012, on which date thirty (30) days were sought on behalf of the petitioners, to comply with the order of the CIC.

WP(C) No. 1144/2012

10. On 5.12.2009, a Court Of Inquiry was ordered by the Head Quarters Western Command to investigate the alleged irregularities, in the procurement of shoes, as part of personal kit stores item for Indian troops, proceedings on a United Nation's assignment, during the period January, 2006 till the date of issuance of the convening order.

10.1 The Court Of Inquiry, evidently, found Brig. S. Sabharwal guilty of certain lapses alongwith four officers of the Ordinance Services Directorate, Integrated Head Quarters, Ministry of Defence. Brig. S. Sabharwal's conduct was found blameworthy, in so far as, he had omitted to obtain formal written sanction of the Major General of the Ordinance prior to issuing orders to carry out a major amendment vis-a-vis the scope and composition of the board of officers, who were involved in the short-listing of eligible firms; and for omitting to comply with instructions, which required him to nominate an officer of the rank of brigadier who belonged to a Branch other than the Ordinance Branch, for inclusion in the price negotiation committee. It appears that Brig. S. Sabharwal had, contrary to the stipulated norms, nominated instead an officer of the rank of Major General attached to the Ordinance Services Directorate.

10.2 Based on the findings of the Court Of Inquiry, a show cause notice was issued to Brig. S. Sabharwal, on 10.04.2010, by the Head Quarters Western Command. Brig. S. Sabharwal, replied to the show cause notice vide communication dated 20.05.2010. However, by a communication dated

14.6.2010, Brig. S. Sabharwal called upon the concerned authority to defer its decision on the show cause notice, till such time it had sought clarifications from officers named in the said communication with regard to his assertion that he had been issued verbal instructions with regard to the matter under consideration.

10.3 On 18.6.2010, Brig. S. Sabharwal wrote to the authority concerned that since, he was one of the last witnesses summoned for cross-examination by the Court Of Inquiry, he was not able to present his case effectively. In these circumstances, he requested the convening authority to accord permission to cross-examine the witnesses in his defence, so that he could bring out the facts of the case in their correct perspective.

10.4 Evidently, a day prior to the aforesaid request, i.e., on 17.6.2010, the GOC-in-Chief, after considering the recommendations of the Court Of Inquiry, the contents of the show cause notice and the reply of Brig. S. Sabharwal, directed that his severe displeasure (recordable), be conveyed to Brig. S. Sabharwal.

10.5 This resulted in Brig. S. Sabharwal approaching the PIO with an application under the RTI Act. The application was preferred with the PIO, on 3.12.2010. Brig. S. Sabharwal sought the following information:

"(a) All notings and correspondence of case file No. 0337/UN/PERS KIT STORES/DV2 of HQ Western Command.

(b) Action taken Notings initiated by HQ Western Comd (DV) on HQ 335 Msl Bde Sig No. A-0183 dt 14 Jun 10 (Copy encl)."

10.6 The PIO, however, vide communication dated 10.12.2010, denied the information by relying upon the provisions of Section 8(4)(e) and (h) [sic 8(1)(e) and (h)] of the RTI Act. It was the opinion of the PIO that, notings and correspondence on the subject including legal opinions generated in the

case could not be given to Brig. S. Sabharwal in view of a "*fiduciary relationship existing in the chain of command and staff processing the case*". It was also observed by the PIO that the notings and contents of the classified files were exempt from disclosure under the provisions of the Department of Personnel and Training (in short DoPT) letter no. 1/20/2009-IR dated 23.6.2009, and that, no public interest would be served in disclosing the information sought for other than the applicant's own interest.

10.7 Being aggrieved, Brig. S. Sabharwal filed an appeal with the first appellate authority, on 12.1.2011. The first appellate authority rejected the appeal, which was conveyed under the cover of the letter dated 11.2.2011. To be noted, that even though, the letter dated 11.2.2011 is on record, the order of the first appellate authority has not been placed on record by the petitioners herein.

11. Brig. S. Sabharwal, being dissatisfied with result, filed a second appeal with the CIC. The CIC, passed a similar order, as was passed in the other two cases, whereby it directed that copy of file notings be supplied to Brig. S. Sabharwal after redacting the names and designations of the officers, who made the notings, in accordance with, the provisions of Section 10(1) of the RTI Act.

SUBMISSIONS OF COUNSELS

12. In the background of the aforesaid facts, it has been argued by Mr Mehra, learned ASG, that the CIC in several cases, contrary to the decision in V.K. Shad's case, has taken the view that the file notings, which include legal opinions, need not be disclosed, as it may affect the outcome of the legal action instituted by the applicant/querist seeking the information. Before me, however, reference was made to the case of *Col. A.B. Nargolkar vs Ministry of Defence passed in appeal no. CIC/LS/A/2009/000951 dated 22.9.2009*.

12.1 It was thus the submission of the learned ASG that, in the impugned
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orders, a contrary view has been taken to that which was taken in ***Col. A.B. Nargolkar's*** case. This, he submitted was not permissible as it was a bench of co-equal strength. It was submitted that in case the CIC disagreed with the view taken earlier, it ought to have referred the matter to a larger Bench.

12.2 Apart from the above, Mr Mehra has submitted that, the petitioner's action of denying information, which pertains to file notings and opinion of the JAG branch is sustainable under Section 8(1)(e) of the RTI Act. It was contended that there was a fiduciary relationship between the officers in the chain of command, and those, who were placed in the higher echelons, of what was essentially a pyramidal structure. In arriving at a final decision, the GOC-in-Chief takes into account several inputs, which includes, the notings on file as well as the opinion of the JAG branch. It was submitted that since, the JAG branch has a duty to act and give advice on matters falling within the ambit of its mandate, the disclosure of information would result in a breach of a fiduciary relationship qua those who give the advice and the final decision making authority, which is the recipient of the advice.

12.3 Mr Mehra submitted that, in all three cases, the advice rendered by the JAG branch was taken into account both while initiating proceedings and also at the stage of imposition of punishment against the delinquent officers.

12.4 Though it was not argued, in the grounds, in one of the writ petitions, reliance is also placed on Army Rule, 184, to contend that only the copy of the statements and documents relied upon during the conduct of Court Of Inquiry are to be provided to the delinquent officers. It is contended that the directions contained in the impugned orders of the CIC, are contrary to the said Rule.

12.5 In order to buttress his submissions reliance was placed by Mr Mehra, on the observations of the Supreme Court, in the case of ***Central Board of Secondary Education & Ors. vs Aditya Bandopadhyay & Ors. (2011) 8***

SCC 497. A particular stress, was laid on the observations made in paragraphs 38, 39, 44, 45 and 63 of the said judgment.

13. On the other hand, the respondents in the captioned writ petitions, who were led by Col. V.K. Shad, contended to the contrary and relied upon the impugned orders of the CIC. Specific reliance was placed on the judgments of this court, in the case of, *Maj. General Surender Kumar Sahni vs UOI & Ors in CW No. 415/2003 dated 09.04.2003* and *The CPIO, Supreme Court of India vs Subhash Chandra Agarwal & Anr. WP(C) 288/2009 pronounced on 02.09.2009*; and the judgment of the Supreme Court in the case of *CBSE vs Aditya Bandopadhyay*.

REASONS

14. I have heard the learned ASG and the respondents in the writ petitions. As indicated at the very outset, the issue has been narrowed down to whether or not the file notings and the opinion of the JAG branch fall within the provisions of Section 8(1)(e) of the RTI Act. I may only note, even though the authorities below have fleetingly adverted to the provisions of Section 8(1)(h) of the RTI Act, the said aspect was neither pressed nor argued before me, by the learned ASG. The emphasis was only qua the provisions of Section 8(1)(e) of the RTI Act. The defence qua non-disclosure of information set up by the petitioners is thus, based on, what is perceived by them as subsistence of a fiduciary relationship between officers who generate the notes and the opinions which, presumably were taken in account by the final decision making authority, in coming to the conclusion which it did, with regard to the guilt of the delinquent officers and the extent of punishment, which was accorded in each case.

15. In order to answer the issue in the present case, fortunately I am not required to, in a sense, re-invent the wheel. The Supreme Court in two recent judgments has dealt with the contours of what would constitute a fiduciary

relationship.

15.1 Out of the two cases, the first case, was cited before me, which is ***CBSE vs Aditya Bandopadhyay*** and the other being ***ICAI vs Suaunak H. Satya and Ors. (2011) 8 SCC 781***.

15.2 Before I proceed further, as has been often repeated in judgment after judgments the preamble of the RTI Act, sets forth the guideline for appreciating the scope and ambit of the provisions contained in the said Act. The preamble, thus envisages, a practical regime of right to information for citizens, so that they have access to information which is in control of public authorities with the object of promoting transparency and accountability in the working of every such public authority. This right of the citizenry is required to be balanced with other public interest including efficient operations of the government, optimum use of limited physical resources and the preservation of confidentiality of sensitive information. The idea being to weed out corruption, and to hold, the government and their instrumentalities accountable to the governed.

15.3 The RTI Act is, thus, divided into six chapters and two schedules. For our purpose, what is important, is to advert to, certain provisions in chapter I, II and VI of the RTI Act.

15.4 Keeping the above in mind, what is thus, required to be ascertained is: (i) whether the material with respect to which access is sought, is firstly, information within the meaning of the RTI Act? (ii) whether the information sought is from a public authority, which is amenable to the provisions of the RTI Act? (iii) whether the material to which access is sought (provided it is information within the meaning of the RTI Act and is in possession of an authority which comes within the meaning of the term public authority) falls within the exclusionary provisions contained in Section 8(1)(e) of the RTI Act?

15.5 In order to appreciate the width and scope of the aforementioned provision, one would also have to bear in mind the provisions of Sections 9, 10, 11 & 22 of the RTI Act.

16. In the present case, therefore, let me first examine whether file notings and opinion of the JAG branch would fall within the ambit of the provisions of the RTI Act.

16.1 Section 2(f), inter alia defines information to mean “*any*” “*material*” contained in any form including records, documents, memo, emails, *opinions*, *advices*, press releases, circulars, orders, log books, 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. Section 2(i) defines record as one which includes - any document, manuscript and file; (ii) any microfilm and facsimile copy of a document; (iii) reproduction of image or images embodied in such microfilm; and (iv) any other material produced by a computer or any other device.

16.2 A conjoint reading of Section 2(f) and 2(i) leaves no doubt in my mind that it is an expansive definition even while it is inclusive which, brings within its ambit any material available in any form. There is an express reference to “*opinions*” and “*advices*”, in the definition of information under Section 2(f). While, the definition of record in Section 2(i) includes a “*file*”.

16.3 Having regard to the above, there can be no doubt that file notings and opinions of the JAG branch are information, to which, a person taking recourse to the RTI Act can have access provided it is available with the concerned public authority.

16.4 Section 2(h) of the RTI Act defines a public authority to mean any authority or body or institution of Central Government established or constituted, inter alia, by or under, the Constitution or by or under a law made

by Parliament. There can be no doubt nor, can it be argued that the Indian Army is not a public authority within the meaning of the RTI Act; which has the Ministry of Defence of the Government of India as its administrative ministry

16.5 The scope and ambit of the right to the information to which access may be had from a public authority is defined in Section 2(j). Section 2(j), inter alia, gives the right to information, which is accessible under this Act and, is held by or, is in control of the public authority by seeking inspection of work, documents, records by taking notes, extracts of certified copy of documents on record, by taking certified copy of material and also obtaining information in the form of discs, floppy, tapes, video cassettes, which is, available in any other electronic mode, whether stored in the computer or any other device.

16.6 Therefore, information which is available in the records of the Indian Army and, records as indicated hereinabove includes files, is information to which the respondents are entitled to gain access. The question is: which is really the heart of the matter, as to whether the information sought, in the present case, falls in the exclusionary (1)(e) of Section 8 of the RTI Act.

16.7 It may be important to note that Section 3 of the RTI Act, is an omnibus provision, in a sense, it mandates that all citizens shall have right to information subject to the other provisions of the RTI Act. Therefore, unless the information is specifically excluded, it is required to be provided in the form in which it is available, unless: (i) it would disproportionately divert the resources of public authority or, (ii) would be detrimental to the safety and preservation of the record in question [See Section 7(9)] or, the provision of information sought would involve an infringement of copy right subsisting in a person other than the State (see Section 9).

16.8 One may also be faced with a situation where information sought is

dovetailed with information which though falls within the exclusionary provisions referred to above, is severable. In such a situation, recourse can be taken to Section 10 of the RTI Act, which provides for severing that part of the information which is exempt from disclosure under the RTI Act, provided it can be “reasonably” severed from that which is not exempt. In other words, information which is not exempted but is otherwise reasonably severable, can be given access to a person making a request for grant of access to the same.

16.9 Section 11 deals with a situation where information available with a public authority which relates to or has been supplied by a third party, and is treated as confidential by that third party. In such an eventuality the PIO of the public authority is required to give notice to such third party of the request received for disclosure of information, and thereby, invite the said third party to make a submission in writing or orally, whether the information should be disclosed or not. In coming to a conclusion either way, the submissions made by the third party, will have to be kept in mind while taking a decision with regard to disclosure of information.

17. The last Section, which is relevant for our purpose, is Section 22. The said Section conveys in no uncertain terms the width of the RTI Act. It is a non-obstante clause which proclaims that the RTI Act shall prevail notwithstanding anything inconsistent contained in the Official Secrets Act, 1923 or any other law for the time being in force or, in any instrument having effect by virtue of any law other than the RTI Act. In other words, it overrides every other act or instrument having the effect of law including the Official Secrets Act, 1923.

17.1 Thus, an over-view of the Act would show that it mandates a public authority, which holds or has control over any information to disclose the same to a citizen, when approached, without the citizen having to give any reasons for seeking a disclosure. And in pursuit of this goal, the seeker of

information, apart from giving his contact details for the purposes of dispatch of information, is exempted from disclosing his personal details [see Section 6(2)].

17.2 Therefore, the rule is that, if the public authority has access to any material, which is information, within the meaning of the RTI Act and the said information is in its possession and/or its control, the said information would have to be disseminated to the information seeker, i.e., the citizen of this country, without him having to give reasons or his personal details except to the extent relevant for transmitting the information.

17.3 As indicated above, notes on files and opinions, to my mind, fall within the ambit of the provisions of the RTI Act. The possessor of information being a public authority, i.e., the Indian Army it could only deny the information, to the seeker of information who are respondents in the present case, only if the information sought falls within the exceptions provided in Section 8 of the RTI Act; in the instant case protection is claimed under clause (1)(e) of Section 8. Therefore, the argument of the petitioners that the information can be denied under Army Rule, 184 or the DoPT instructions dated 23.06.2009 are completely untenable in view of the over-riding effect of the provisions of the RTI Act. Both the Rule and the DoPT instructions have to give way to the provisions of Section 22 of the RTI Act. The reason being that, they were in existence when the RTI Act was enacted by the Parliament and the legislature is presumed to have knowledge of existing legislation including subordinate legislation. The Rule and the instruction can, in this case, at best have the flavour of a subordinate legislation. The said subordinate legislation cannot be taken recourse to, in my opinion to nullify the provisions of the RTI Act.

17.4 Therefore, one would have to examine the provisions of Section 8(1)(e) of the RTI Act. The relevant parts of the said Section 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

(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.

XXXX

XXXX

Provided that the information, which cannot be denied to the Parliament or 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) x x x x x

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."

17.5 In ***CBSE vs Aditya Bandopadhyay*** case, the Supreme Court was called upon to decide the issue as to whether, an examinee was entitled to an inspection of his answer books, in view of the appellant before the Supreme Court, i.e., the CBSE, claiming exemption under Section 8(1)(e) of the RTI Act.

17.6 In this context, the court considered the issue: whether the examining body holds the evaluated answer books in a fiduciary relationship with the examiners.

17.7 The Supreme Court after noting various meanings ascribed to the term

“fiduciary” in various dictionaries and texts, summed up what the term fiduciary would mean, in the following paragraph of its judgment:

“.....39. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, 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 expected not to disclose the thing or information to any third party....”

17.8 Examples of certain relationships, where both parties act in a fiduciary capacity, while treating the other as beneficiary, are set out in paragraph 40 and 41 of the judgment. In paragraph 41 onwards the Court examined what would be the true scope of the expression "information available to a person in his capacity as fiduciary relationship", as used in Section 8(1)(e) of the RTI Act. In that context several fiduciary relationships were referred to like the one between a trustee and a beneficiary of a trust; a guardian with reference to a minor or, a physically infirm or mentally incapacitated person; a parent with reference to a child; a lawyer or a chartered accountant with reference to a client etc. After considering the matter at length, the Supreme Court came to the conclusion that there was no fiduciary relationship between the examining body and the examiner with reference to evaluated answer books. The court also examined the issue that if one were to assume that there was a

fiduciary relationship between the examiner and the examining body, whether the exemption would operate vis-a-vis third parties. In paragraph 44 of the judgment, the court concluded that if there was a fiduciary relationship, the exemption would operate vis-a-vis a third party, however, there would be no question of withholding information relating to the beneficiary from the beneficiary himself.

17.9 In paragraphs 49 and 50, the court concluded that since the examiner is acting as an agent of the examining body, in principle, the examining body is not in the position of a fiduciary, with reference to the examiner. On the other hand, once the examiner hands over the custody of the evaluated answer books, whose contents he is barred from disclosing as he acts as a fiduciary, uptill that point of time, ceases to be in that relationship once the work of evaluation of answer books is concluded, and the evaluated answer sheets are handed over to the examining body. In other words, since the examiner does not have any copyright or proprietary right or a right of confidentiality, in the evaluated answer books, the examining body cannot be said to be holding the evaluated answer books in a fiduciary relationship qua the examiner.

18. A similar view was held by the same Bench of the Supreme Court in the case of *ICAI vs Shaunak H. Satya*. The Supreme Court, while dealing with the issue whether the instructions and solutions to questions are information available to examiner and moderators in their fiduciary capacity, and therefore, exempt under Section 8(1)(e) of the RTI Act, made the following observations in paragraph 22 of the judgment:

"....22. It should be noted that Section 8(1)(e) uses the words *"information available to a person in his fiduciary relationship"*. Significantly Section 8(1)(e) does not use the words *"information available to a public authority in its fiduciary relationship"*. The use of the words "person" shows that the holder of the information in a fiduciary relationship need not only be a 'public authority' as the

word 'person' is of much wider import than the word 'public authority'. Therefore the exemption under Section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under Section 8(1)(d) of RTI Act...."

19. The court also made clear in paragraph 26 of the judgment that there were ten categories of information which were exempt from Section 8 of the RTI Act. Out of the ten categories, six categories enjoyed absolute exemption. These being: those information, which fell in clauses (a), (b), (c), (f), (g) & (h) of Section 8(1) of the RTI Act, while information enumerated in clauses (d), (e) & (j) of the very same Section enjoyed ***“conditional”*** exemption to the extent that the information was subject to over-riding power of the competent authority under the RTI Act in larger public interest, which could in a given case, direct disclosure of such information. Clause (i), the Supreme Court noted, was period specific in as much as under Sub-Section (3) such information could be provided if the event or matter in issue had occurred 20 years prior to the date of the request being made under Section 6 of the RTI Act. It inter alia concluded, that, information relating to fiduciary relationship under clause 8(1)(e) did not enjoy absolute exemption.

20. Before I proceed further, I may also note that the first proviso in Section 8 says that, information which cannot be denied to the Parliament or the State Legislature, shall not be denied to any person. Subsection (2) of

Section 8, states that notwithstanding anything contained in the Official Secret Acts, 1923, or any of the exemptions provided in Subsection (1), would not come in the way of a public authority in allowing access to information if, public interest in its disclosure outweighs the harm to the protected interest.

20.1 A Full Bench of this court in the case of *Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal, 166 (2010) DLT 305*, in the context of provisions of Section 8(1)(j) also examined what would constitute a fiduciary relationship. The observations contained in paragraph 97 to 101, being apposite are extracted hereinbelow:

".....97. As Waker defines it: "A "fiduciary" is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and other similarly placed." [Oxford Companion to Law, 1980 p.469]

98. "A fiduciary relationship", as observed by Anantnarayanan, J., "may arise in the context of a jural relationship. Where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence." [see *Mrs. Nellie Wapshare v. Pierce Lasha & Co. Ltd.* AIR 1960 Mad 410]

99. In *Lyell v. Kennedy* (1889) 14 AC 437, the Court explained that whenever two persons stand in such a situation that confidence is necessarily reposed by one in the other, there arises a presumption as to fiduciary relationship which grows naturally out of that

confidence. Such a confidential situation may arise from a contract or by some gratuitous undertaking, or it may be upon previous request or undertaken without any authority.

100. In *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathaphan*: (2005) 1 SCC 212 and *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* (1981) 3 SCC 333, the Court held that the directors of the company owe fiduciary duty to its shareholders. In *P.V. Sankara Kurup v. Leelavathy Nambier*: (1994) 6 SCC 68, the Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

101. Section 88 of the Indian Trusts Act requires a fiduciary not to gain an advantage of his position. Section 88 applies to a trustee, executor, partner, agent, director of a company, legal advisor or other persons bound in fiduciary capacity. Kinds of persons bound by fiduciary character are enumerated in Mr. M. Gandhi's book on "Equity, Trusts and Specific Relief" (2nd ed., Eastern Book Company)

- (1) Trustee,
- (2) Director of a company,
- (3) Partner,
- (4) Agent,
- (5) Executor,
- (6) Legal Adviser,
- (7) Manager of a joint family,
- (8) Parent and child,
- (9) Religious, medical and other advisers,
- (10) Guardian and Ward,
- (11) Licensees appointed on remuneration to purchase stocks on behalf of government,
- (12) Confidential Transactions wherein confidence is reposed, and which are indicated by (a) Undue influence, (b) Control over property, (c) Cases of unjust enrichment, (d) Confidential information, (e) Commitment of job,
- (13) Tenant for life,

- (14) Co-owner,
- (15) Mortgagee,
- (16) Other qualified owners of property,
- (17) De facto guardian,
- (18) Receiver,
- (19) Insurance Company,
- (20) Trustee de son tort,
- (21) Co-heir,
- (22) Benamidar.

20.2 The above would show that there are two kinds of relationships. One, where a fiducial relationship exists, which is applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, executors and beneficiaries of a testamentary succession; while the other springs from a confidential relationship which is pivoted on confidence. In other words confidence is reposed and exercised. Thus, the term fiduciary applies, it appears, to a person who enjoys peculiar confidence qua other persons. The relationship mandates fair dealing and good faith, not necessarily borne out of a legal obligation. It also permeates to transactions, which are informal in nature. [See words and phrases Permanent Edn. (Vol. 16-A, p. 41) and para 38.3 of the *CBSE vs Aditya Bandopadhyay*]. As indicated above, the Supreme Court in the very same judgment in paragraph 39 has summed up as to what the term fiduciary would mean.

20.3 In the instant case, what is sought to be argued in sum and substance that, it is a fiducial relation of the latter kind, where the persons generating the note or opinion expects the fiduciary, i.e., the institution, which is the Army, to hold their trust and confidence and not disclose the information to the respondents herein, i.e., Messers V.K. Shad and Ors. If this argument were to be accepted, then the persons, who generate the notes in the file or the opinions, would have to be, in one sense, the beneficiaries of the said information. In an institutional set up, it can hardly be argued that notes on

file qua a personnel or an employee of an institution, such as the Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit the person, who generates the note or renders an opinion. As a matter of fact, the person who generates the note or renders an opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in the matter, on which, he is called upon to deliberate. If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in an institutional setup by one officer qua the working or conduct of another officer brings forth a fiduciary relationship. It is also not a relationship of the kind where both parties required the other to act in a fiduciary capacity by treating the other as a beneficiary. The examples of such situations are found say in a partnership firm where, each partner acts in fiduciary capacity qua the other partner(s).

20.4 If at all, a fiduciary relationship springs up in such like situation, it would be when a third party seeks information qua the performance or conduct of an employee. The institution, in such a case, which holds the information, would then have to determine as to whether such information ought to be revealed keeping in mind the competing public interest. If public interest so demands, information, even in such a situation, would have to be disclosed, though after taking into account the rights of the individual concerned to whom the information pertains. A denial of access to such information to the information seekers, i.e., the respondents herein, (Messrs V.K. Shad & Co.) especially in the circumstances that the said information is used admittedly in coming to the conclusion that the delinquent officers were guilty, and in determining the punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would render such a decision vulnerable to challenge under Article 14 of the Constitution of India

provided information is sought and was not given. [See *UOI vs R.S. Khan 173 (2010) DLT 680*].

21. It is trite law that the right to information is a constitutional right under Article 19(1)(a) of the Constitution of India which, with the enactment of the RTI Act has been given in addition a statutory flavour with the exceptions provided therein. But for the exceptions given in the RTI Act; the said statute recognizes the right of a citizen to seek access to any material which is held or is in possession of public authority.

22. This brings me to the first proviso of Section 8(1), which categorically states that no information will be denied to any person, which cannot be denied to the Parliament or the State Legislature. Similarly, sub-section (2) of Section 8, empowers the public authority to over-ride the Official Secrets Act, 1923 and, the exemptions contained in sub-section (1) of Section 8, of the RTI Act, if public interest in the disclosure of information outweighs the harm to the protected interest. As indicated hereinabove, the Supreme Court in *CBSE vs Aditya Bandopadhyay* case has clearly observed that exemption under Section 8(1)(e) is conditional and not an absolute exemption.

23 I may only add a note of caution here: which is, that protection afforded to a client vis-à-vis his legal adviser under the provisions of Section 126 to 129 of the Evidence Act, 1872 is not to be confused with the present situation. The protection under the said provisions is accorded to a client with respect to his communication with his legal advisor made in confidence in the course of and for the purpose of his employment unless the client consents to its disclosure or, it is a communication made in furtherance of any illegal purpose. The institution i.e The Indian Army in the present case cannot by any stretch of imagination be categorized as a client. The legal professional privilege extends only to a barrister, pleader, attorney or Vakil. The persons who have generated opinions and/or the notings on the file in the present case

do not fall in any of these categories.

23.1 Having regard to the above, I am of the view that the contentions of the petitioners that the information sought by the respondents (Messers V.K. Shad & Co.) under Section 8(1)(e) of the Act is exempt from disclosure, is a contention, which is misconceived and untenable. For instance, can the information in issue in the present case, denied to the Parliament and State Legislature. In my view it cannot be denied, therefore, the necessary consequences of providing information to Messers V.K. Shad should follow.

24. The argument of the learned ASG that, the CIC had taken a diametrically opposite view in the other cases and hence the CIC ought to have referred the matter to a larger bench, does have weight. This objection ordinarily may have weighed with me but for the following reasons :-

24.1 First, the judgment of the CIC cited for this purpose i.e., Col. A.B. Nargolkar case, dealt with the situation where an order of remand was passed directing the PIO to apply the ratio of the judgment of a Single Judge of this court in the case of the ***CPIO, Supreme Court of India Vs. Subhash Chandra Agarwal and Anr., WP (C) 288/2009, pronounced on 02.09.2009.*** The CIC by itself did render a definite view.

24.2 Second, keeping in mind the fact that the information commissioners administering the RTI Act are neither persons who are necessarily instructed in law, i.e., are not trained lawyers, and nor did they have the benefit of such guidance at the stage of argument, I do not think it would be appropriate to set aside the impugned judgment on this ground and remand the matter for a fresh consideration by a larger bench of the CIC. This view, I am inclined to hold also, on account of the fact that, since then there have been several rulings of various High Courts including that of the Supreme Court, to which I have made a reference above, and that, remanding the matter to the CIC would only delay the cause of the parties before me.

24.3 These are cases which affect the interest of both parties, especially the petitioners in a large number of cases, and therefore, the need for a ruling of a superior court one way or the other, on the issue. It is in this context that I had proceeded to decide the matter on merits, and not take the route of remand in this particular case. The CIC is, however, advised in future to have regard to the discipline of referring the matters to a larger bench where a bench of co-ordinate strength takes a view which is not consistent with the view of the other.

25. For the foregoing reasons, the writ petitions are dismissed. The impugned orders passed by the CIC are sustained. The information sought by Messers V.K. Shad and Ors will be supplied within two weeks from today, in terms of the orders passed by the CIC. However, having regard to the peculiar facts and circumstances of the case, parties are directed to bear their own costs save and except to the extent that the sum of Rs 5000/- each, deposited pursuant to the two orders of my predecessor of even date, passed on 27.02.2012, in WP(C) Nos. 1144/2012 and 1138/2012, shall be released, on a pro rata basis, to the three respondents, towards incidental expenses.

RAJIV SHAKDHER, J

NOVEMBER 09, 2012

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