

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 18543 of 2022

Mahendra Kumar Jain

Vs.

State of West Bengal & Ors.

For the petitioner : Mr. Kalyan Kumar Bandopadhyay, Adv.
Mr. Probal Mukherjee, Adv.
Mr. Anuj Singh, Adv.
Mr. Ajoy Agarwal, Adv.
Mr. Soumapriyo Chowdhury, Adv.
Mr. Sanket Sarawgi, Adv.
Mr. Arka Banerjee, Adv.

For the State : Mr. Amitesh Banerjee, Adv.
Mr. Tarak Karan, Adv.

For the respondent no. 6 : Mr. Pranab Kumar Dutta, Adv.
Mr. Nilay Sengupta, Adv.
Mr. Indranil Banerjee, Adv.

For the respondent nos. 7 to 9 : Mr. Jaydip Kar, Adv.
Mr. Sabyasachi Banerjee, Adv.
Mr. Ayan Bhattacharya, Adv.
Mr. Sujit Banerjee, Adv.

Last Heard on : 23.09.2022.

Delivered on : 29.09.2022.

Moushumi Bhattacharya, J.

1. The petitioner has challenged a Memo dated 11th March, 2022 issued by the Assistant Commissioner of Police (ACP) disclosing certain documents under The Right to Information Act, 2005, with reference to an ongoing police case. The documents in question are a series of WhatsApp chats between one Rashika Jain (since deceased) and Abhishek Padia from 26th November, 2014 -22nd July, 2019. The documents also include photographs of Rashika Jain and Abhishek Padia. The petitioner is the father of the deceased Rashika Jain and seeks a restraint on the disclosure of the WhatsApp chats between his late daughter and her friend Abhishek Padia.

2. The reference made above to an ongoing P.S Case is relevant for a more complete appreciation of the concerns of the parties before the Court. The petitioner's daughter Rashika Jain and Kushal Agarwal (son of respondents Naresh and Nilam Agarwal) were married on 9th February, 2020. Rashika Jain died on 16th February, 2021 under mysterious circumstances. The Jains and the Agarwals thereafter filed criminal proceedings against each other. The petitioner lodged a complaint with the Alipore P.S on 17th February, 2021 against Kushal Agarwal and his parents (the Alipore P.S. Case). The Agarwals lodged a case in the Kalighat P.S on 22nd July, 2021 against the petitioner and his wife for removal of jewellery belonging to Rashika Jain from the locker of the Axis Bank (the Kalighat P.S Case). The petitioner was granted anticipatory bail by this Court on 21st June,

2022. Kushal Agarwal, the husband of late Rashika Jain, is presently in custody and an application for bail has recently been rejected.

3. The contention of learned senior counsel Mr. Kalyan Bandhopadhyay, appearing for the petitioner, Mahendra Kumar Jain, being the father of the deceased Rashika Jain, is that the WhatsApp chats between the petitioner's late daughter and Abhishek Padia could not have been disclosed under the provisions of the RTI Act. Counsel submits that the information is required to be kept secret since the investigation in the Alipore P.S Case against the Agarwals is continuing. Counsel relies on Regulation 71 (g) of Chapter V of the Police Regulations, Calcutta 1968 where the contents of a case diary and statements of witnesses are regarded as privileged information. Counsel submits that the authority acted in breach of Articles 19 and 21 of The Constitution of India. Counsel urges that in the present case, the information was supplied without due regard to the requirements under the aforesaid sections.

4. Mr. Joydip Kar, learned senior counsel appearing for the Agarwal family (respondent nos. 7 to 9), submits that the information furnished was required for the ongoing investigation under the Kalighat P.S. Case with regard to removal of jewellery from the concerned Bank. Counsel submits that there is no provision under the RTI Act which bars disclosure of information which is required as evidence for corroborative purposes. Counsel further submits that the information was in the public domain on the date of furnishing of the information by the police authorities. It is also submitted that the right to privacy is subject to the

qualifications provided under the law. Counsel urges that the respondents have a right to self-defence against the charges brought by the Jains and that the information is required for that purpose.

5. Mr. Pranab Kumar Dutta, learned senior counsel appearing for Rahul Agarwal (respondent no. 6), being the defacto complainant in the Kalighat P.S Case and a cousin of Kushal Agarwal (husband of late Rashika Jain) submits that an RTI application was made by Rahul Agarwal to the SPIO on 2nd March, 2022. Counsel relies on a progress report dated 6th February, 2022 in the Kalighat P.S Case which reflects the name of Abhishek Padia as having emerged from the statements of witnesses. Counsel stresses that section 8(1)(j) has to be read in conjunction with section 11 of the RTI Act on the point of voluntary disclosure. Counsel supports the case sought to be made out by the Agarwals and urges that the information in question is necessary for the ongoing investigation.

6. Mr. Amitesh Banerjee, learned senior standing counsel for the State clarifies the ongoing criminal investigations in the two P.S Cases, namely, Alipore P.S Case (where the Agarwals are the accused) and Kalighat P.S Case (where the Jains are the accused). It is submitted that the documents are regarded to be in the public domain from the time they are disclosed to the police authorities. Counsel submits that the information hence loses the character of private information. Counsel submits that the police are independent authorities and have no leaning towards or against any of the parties before the Court.

7. The contentions of the parties can be grouped under the following sub-heads. The decision is structured accordingly.

A. The Right to Information Act, 2005

8. The petitioner seeks to rely on two provisions of the Act to stop any further steps being taken in the disclosure of the WhatsApp messages of the petitioner's late daughter and Abhishek Padia. The first of the provisions is section 8(1)(h) of the Act by which the designated authorities under the Act shall not be under any obligation to give any citizen, information which would impede the process of investigation or apprehension or prosecution of offenders. It is doubtful whether section 8(1)(h) would come to the assistance of the petitioner since the case sought to be made out is the reverse. The petitioner urges that the information disclosed or in the process of being further disclosed, is wholly unnecessary to the ongoing investigation in the Alipore and Kalighat P.S. cases.

9. The second provision, section 8(1)(j) however fits the parameters of the argument made and is set out below;

"8.(1)

(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."

Unlike the other clauses under section 8(1), clause (j) covers the space of personal information and the right to privacy. In essence, the clamp on disclosure of information, unlike the object of transparency of the 2005 Act, travels from national security issues, parliamentary privilege, sanctity of court orders, international relations and settles in the corner of the private space of an individual.

10. Section 8(1)(j) contemplates personal information which is wholly unnecessary to any public interest. The exception to non-disclosure of such information is where the CPIO/SPIO (Central Public Information Officer/State Public Information Officer) is satisfied that unlocking the disclosure of such information is necessary for the larger public interest. The satisfaction requirement brings with it a duty to engage with the relevant facts and come to a specific view or opinion upon due application of mind and an assessment of the circumstances attending the disclosure. There must hence be a definite opinion expressed on the link between the personal information sought for and the larger public interest justifying the departure from protection of privacy of such information.

11. Section 11 of the RTI Act which relates to third-party information cannot come to the rescue of the respondents. This section contemplates a situation where CPIO/SPIO intends to disclose any information on the request made under this Act and which has been supplied by a third party and has also been treated as confidential by that third party. In such cases, the CPIO/SPIO shall give a

written notice to such third party of the request and the fact that the Officer intends to disclose the information. The Officer must also invite the third party to make a submission in writing or orally as to whether the information should be disclosed. Even if Abhishek Padia is treated as the “third party” for the purpose of section 11, the case reflects that Abhishek Padia was not the only “third party” who treated the information as confidential. The procedure to be followed in section 11 would have to cover every third party whose information was confined to the private sphere.

12. In the present case, the information was disclosed on an application made under the Act by one Rahul Agarwal on 2nd March, 2022 for the documents collected from Abhishek Padia as mentioned in the progress report filed before the Chief Judicial Magistrate, Alipore. The information was disclosed by the SPIO and Assistant Commissioner of Police on 11th March, 2022 to Rahul Agarwal. The documents show that there was an obvious absence of any independent assessment by the SPIO and ACP as envisaged under section 8(1)(j). The respondent simply gave the information applied for. There was neither any enquiry made as to whether the information was necessary for the larger public interest or whether the disclosure of personal information was justified in the circumstances. In essence, the impugned act of disclosing the WhatsApp messages between the petitioner’s deceased daughter and Abhishek Padia falls clearly foul of the fetter on disclosing personal information under section 8(1)(j) of the RTI Act.

B. Information emanating from the private space

13. The concept of privacy and private information underpins the constitutional guarantee of freedom of thought and associations. It includes the right to be free from interference and intrusion, whether from the prying eyes of a neighbour or the eavesdropping ears of an associate or even the intrusive camera of a photographer. Private information also includes the following inalienable – and often indefinable – characteristics;

(i) Private information is a part of the private space of an individual where the individual retains full agency on controlling the space and its boundaries.

(ii) Information which relates to personal choices, relationships, intimacies, sexual preferences and orientation, home, family life; in essence any thought or idea which a person does not wish to be made known to the world or even beyond the confines of the person himself/herself or a group chosen by the persons, is private information.

(iii) The information-creator remains in the driver's seat and exercises complete cruise-control on the movement and destination of the information.

(iv) It necessarily emanates from a source; namely of a person who preserves information for private consumption and enjoyment between two or more persons forming the periphery of the limits of access to the information exchanged among themselves.

(v) It is information which is protected from surveillance whether by another individual, a group or the society at large. “Information privacy” is also about protection of information which says who we are, what we do and what we believe in.

(vi) The concept of personal space and information also carries with it the right to be forgotten. Any information shared with another or put in the public domain does not mean that the information of the source must remain in public memory for all times to come. In other words, concomitant to the right of private information, is the right to be erased from public memory.

(vii) The presumption is of control and agency where the person putting out the information remains the master of what he/she has put out, who should have access to it and for how long. The control does not pass from the disseminator to the receptor.

(viii) Sharing of private information with another carries with it an implicit pact of confidence. The originator of information has a legitimate expectation that the other party will not make the information public. This would entail that the other person would only disclose the information to a third party upon the consent of the originator.

(ix) The right is informed with the overriding characteristic of consent. The originator of information must agree to the information being disseminated beyond the boundaries of consensual sharing of information.

(x) The right is exercisable against the world at large; a right *in rem* so to speak. An unsuspecting person who is filmed or photographed by a journalist in a street has the right to seek injunction against the publication of that photograph regardless of whether there is an understanding between the person photographed and the photographer. To use another analogy, a person who picks up a diary containing personal notes belonging to another has the obligation not to make the contents of that diary public.

(xi) As a logical extension even if a person ventures into the public, he or she does not relinquish his/her claims to the private sphere.

The above pointers sharpen and invigorate the right to life and personal liberty under Article 21 of the Constitution of India. It also reinforces the freedoms under Article 19 including the freedom to choose who we want to associate with and live our lives by our personal choices without interference in that private realm.

C. The concept of public domain

14. The expression “public domain” is broadly used for an information-space where anybody and everybody can access information. Information which is put out for the consumption, use and enjoyment of one and all is said to be in the public domain. By the act of sharing the information in the public sphere the disseminator relinquishes the right to preserve the information within the private space. Social media, with the newly introduced privacy settings (Group Firewalls),

is an instance where the information shared assumes the character of private information. The assumption of privacy is also evident from the “end-to-end encrypted” security assurance of the WhatsApp messaging system.

15. In the present context, it is relevant to trace the journey of the information (in the form of WhatsApp messages and photographs) for understanding whether the information can be treated as being in the public domain and thus losing the character of private information.

16. The records show that Abhishek Padia was mentioned in the Progress Report dated 6.2.2022 before the Chief Judicial Magistrate, Alipore Court. The Progress Report states that Abhishek Padia had given a statement under section 161 of The Code of Criminal Procedure, 1973 after which documents and photographs were collected from the said Abhishek Padia. It was on this basis that Rahul Agarwal filed an application under section 6 of the RTI Act seeking the documents which had been collected from Abhishek Padia. The information was thereafter disclosed by the impugned letter of the SPIO and ACP to Rahul Agarwal on 11.3.2022. The chain of events makes it clear that the WhatsApp messages between the petitioner’s daughter (Rashika Jain) and Abhishek Padia was not in the public domain before the same was disclosed by Abhishek Padia to the concerned authorities. The disclosure of the information by Abhishek Padia cannot be treated as a voluntary act of disclosure where the person had the ability to exercise his informed choice in the matter. It can safely be presumed that the disclosure was made under duress and may even have been for self-preservation.

17. Further, the disclosure of information by Abhishek Padia lacked the consent-criterion of the other party to the chats, namely, Rashika Jain. A chat necessarily includes more than one party and colours the conversation with the hue of privacy. The concept of a chat-room even in the internet-space gives a sense of virtual privacy where people intending to chat with one another are provided with a virtual private-room for such exchanges. Hence, without the consent of the other party to the conversation, furnishing of the WhatsApp messages by Abhishek Padia breached the obligation to keep the WhatsApp chats private and restricted between himself and Rashika Jain.

D. Breach of confidence

18. The concept of “breach of confidence” or a non-consensual violation of the limits of private space is the strongest contender for protection of privacy. It is an equitable principle developed from English cases where first, the information must have the necessary quality of confidence; second, the information must have been imparted in circumstances embodying an obligation of confidence; and third, there must have been an unauthorised use of that information to the detriment of the other party.

19. Breach of confidence traditionally fastens on the conscience of one to enforce equitable duties which arises out of his/her relationship with the other. Simply put, confidential information which comes to the knowledge of a person in circumstances where he is put on notice or is held to have agreed that the information is confidential, carries with it the equitable principle that the person

receiving the information should be precluded from disclosing the information to others. It may also be useful to stretch the borders of confidentiality to make a point against automatic sharing of information just because the information is in the public space. There may be unique ways in which information obtained from the public domain is used to sully a person's image and reputation or ridicule a person's identity.

E. Respect for the dead

20. There is another factor which simply cannot be ignored in the present case. The marriage of Rashika Jain to Kushal Agarwal was solemnized after the WhatsApp messages were exchanged between Rashika Jain and Abhishek Padia. The subsequent death of Rashika Jain transforms the case from an investigation simpliciter to one with moral underpinnings with an obligation to respect the dead. The obligation assumes a higher moral ground since the deceased cannot defend oneself against any such unwarranted intrusion into her private space. After all, the right to privacy draws within its fold, the right to be left alone (or with others) and the right to treat one's intimacies, relationships, beliefs and associations as information which is to remain within the private domain. It is also about the belief that a person should be allowed to carry his/her secrets to the grave.

F. The argument of the right to self-defence

21. The respondent Agarwals seek to justify the disclosure of the WhatsApp messages and photographs between the late Rashika Jain and Abhishek Padia on the ground that the information serves as corroborative evidence and can be used

to verify the contradictory evidence given by the witnesses in the Alipore P.S Case. This also means that the information which was furnished against the RTI application of Rahul Agarwal in connection with the Kalighat P.S Case dealing with removal of jewellery by the Jains, is now being intended to be used to defend the charges in the Alipore P.S Case. Apart from the questionable intention of the Agarwals in making the information public and using it for self-serving reasons, the disclosure of the information is confronted by built-in-restrictions in the RTI Act itself.

22. Section 8 of the Act is an exception to the mandate of the Act namely for citizens to secure access to information under the control of public authorities and for ensuring transparency and accountability in the work of every public authority. Section 8 hence is a pronounced departure from the object of the Act and provides for a specific enumeration of information which is not to be disclosed to any citizen. The statutory-restriction is clothed in comparatively softer terms - “... *there shall be no obligation to give any citizen ...*”. The gamut of prohibition covers national security, strategic, scientific or economic interests of the State, relation with foreign States, parliamentary privilege, trade secrets, fiduciary relationship, physical safety of individuals, ongoing investigations and invasion of privacy. The respondents must hence ascertain that the information applied for does not fall within section 8(1)(a)-(j).

23. It is not the respondents’ case that the information is not private information between two individuals or ceased to retain that character at any point of time.

What the respondents say is that the information was carried to the public domain on disclosure of the same by Abhishek Padia. There is an essential difference between the two. The content of the information is the determinative factor and would signify whether an information is personal or private. The conversation of two or more persons becomes private where the persons in that conversation intend the exchange to remain within their personal circle and not be divulged to the world at large. The act of Abhishek Padia furnishing WhatsApp messages and photographs to the police authorities does not transform the nature or the content of the messages from private to non-private.

24. Further, the determination as to whether the information crosses over the private-public boundary is a determination which is to be made by the concerned Officer under the Act. The concerned Officer must come to an independent assessment as to whether the hold of section 8(1)(j) can be unlocked by a larger issue of public interest. To add, the right to privacy must be harmonised with the overwhelming need to disclose the information on public interest considerations (Ref. *Central Public Information Officer, Supreme Court of India vs. Subhash Chandra Agarwal*; (2020) 5 SCC 481). There cannot be an automatic assumption that an application for information made by a party interested in an ongoing investigation would naturally entitle such party to receiving that information where the information has the unmistakable character of a private information under section 8(1)(j) of the Act. The argument of self-defence builds on the position

of this automatic entitlement and discounts the safeguards in section 8 against the disclosure of such information.

25. The related argument of the right to privacy being subject to qualifications is also fallacious in the context of what section 8 of the RTI Act entails. As stated above, section 8 is the lone swimmer against the tide of transparency closely cradling certain kinds of information from being swept into the sea of public scrutiny. The qualifications to the privacy-privilege must clearly be spelt out and particularised in the relevant statute. The argument that a person's right over his/her personal information can be compromised in certain cases cannot be read into the statute unless the situations warranting disclosure of such information are specifically provided for. The RTI Act does not provide for any such clear answers or statutory clarifications which would justify diluting the section 8(1)(j) bar or qualify the prohibition against the disclosure of private information.

G. Authorities cited on behalf of the parties

26. In *Shri N. Sri Rama Reddy vs. Shri V. V. Giri*; (1970) 2 SCC 340, a Constitution Bench of the Supreme Court opined that a previous statement made by a person and recorded on tape can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence and test the veracity of the statement. Although the proposition for which the authority has been cited cannot be called to question, section 65B of the Indian Evidence Act, 1872 has made the admissibility of electronic records subject to certain condition

under section 65B(2) in respect of a computer output. *Pooran Mal vs. The Director of Inspection (Investigation), New Delhi; (1974) 1 SCC 345*, held that evidence obtained from an illegal search and seizure can be used against the person from whose custody it was seized. However, this decision was on the question whether the search and seizure was vitiated by illegality and the Supreme Court disagreed with that view. *Chief Information Commissioner vs. State of Manipur; (2011) 15 SCC 1*, recognised the right of all citizens to receive information under section 3 of the RTI Act. As discussed above, this right is curtailed under section 8 of the Act and the conditions envisaged therein. *Union of India vs. Sh. O.P. Nahar; 2015 SCC OnLine Del 9197* concerned a case where the information-seeker filed the writ petition before the Delhi High Court which held that it was incumbent upon the officer to furnish the information sought for if otherwise permissible under the provisions of RTI Act. Dealing with section 8(1)(h), the Court was of the view that since the investigation was over and the charge-sheet had been filed, there was no question of the information impeding the process of investigation under section 8(1)(h) of the Act. The judgment of Telangana High Court in *Civil Miscellaneous Appeal No. 351 of 2020* relied on behalf of Rahul Agarwal/respondent no. 6 relies on a narrow definition of the right to privacy and restricts such matters only to “family, marriage, procreation, motherhood and child-bearing”. Surely, there are other areas within the private realm of a person which can give rise to information having the characteristic of privacy?

H. The significance of this case

27. The present case brings to the fore the significance of section 8(1)(j) of The Right to Information Act where the unhindered right to information is checked by keeping certain information out of reach from the public eye. The Information Officer is given the onerous task of determining whether the information should remain in the private domain or is required to be disclosed in the larger public interest. The Information Officer is hence under an obligation to satisfy the aforesaid test. The Act also affirms that preservation of private space is sacrosanct and any disclosure of information emanating from that space must be voluntary and without compulsion. The unspoken significance of the case also arises from the fact that one of the contributors to the information is no longer alive. The facts hence involve a basic morality and respect for the wishes of the dead.

I. Conclusions of the Court

28. The competing arguments advanced on behalf of the parties lead to the following conclusions :

- a) The designated Information Officer has a duty and an obligation to apply his mind on the nature of the information which is to be furnished to an applicant who has sought for such information. This obligation calls for an active determination taking into account Section 8(1) (a)-(j) and whether an overwhelming pressure of public interest justifies the disclosure of the information at hand.

- b) The determination must also involve an assessment of whether the personal information has any nexus with a public activity or furnishing of such information would cause an unwarranted invasion of the privacy of the individual concerned.
- c) The IO must also take into account the mechanism provided under section 11 of the Act involving the information supplied by a third party and treated as confidential by that third party. In essence, the disclosure must be with the consent of the third party.
- d) The IO must also consider whether the information is in the public domain on the date of the application made for it and trace the movement of the information from the private to the public domain. In other words, the IO must see whether the information was put in the public sphere voluntarily or under threat or compulsion.
- e) The determination must also include a fact-check as to whether the information travelled to the public domain at the instance of one party or all the parties who created and shared the content of the information.
- f) The determination must be nuanced and sensitive where one of the parties to the conversation is no longer alive. In such cases, the consent of the other (living) party to the disclosure of the information may not be relevant for the purposes of section 8(1)(j) of the Act.
- g) The significance of section 8(1)(j) which upholds the right to privacy and ultimately the reputation and dignity of an individual under Article 21 of the Constitution goes against the tide of a free flow of information and remains

steadfast in holding on to the private space of an individual. The significance of this provision must not be forgotten or diluted under any circumstances (Ref. *Subramanian Swamy vs. Union of India, Ministry of Law*; (2016) 7 SCC 221).

29. In view of the above discussion WPA 18543 of 2022 is allowed and disposed of by directing the Police Authorities to immediately withdraw the entire series of photographs and WhatsApp messages between the deceased Rashika Jain and Abhishek Padia and treat the same as private information which falls within the clamp of section 8(1)(j) of The Right to Information Act. The authorities are to ensure that the WhatsApp messages and the photographs are not disclosed to any person or authority by way of an application under the Right to Information Act or otherwise.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)