

SUPREME COURT OF INDIA

Central Public Information Officer,

Vs.

Subhash Chandra Agrawal

C.A.No.10044 of 2010

(B.Sudershan Reddy and Surinder Singh Nijjar JJ.)

26.11.2010

JUDGMENT

B.Sudershan Reddy, J.

Special Leave Petition (c) Nos. 32855 of 2009

1. Leave granted.

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.

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').

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

“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...”

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 Sharms 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.

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.

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 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 required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced.

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 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 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 discourses observed:

“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, 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*⁴, 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 interpretation of the Constitution arise for consideration:

“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?"

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

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.

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.

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

¹(1981) Supp SCC 87

²(1993) 4 SCC 441

³(1991) Supp. 1 SCC 574

⁴217 U.S. 349