CENTRAL INFORMATION COMMISSION

Appeal No. CICWB/A/2009/000529 dated 29.4.2009

Right to Information Act 2005 – Section 19

Appellant - Shri Subhash Chandra Agrawal

Respondent - Supreme Court of India (SCI)

Decision announced: 24.11.2009

Facts:

By an application of 23.1.09 received by the CPIO on 27.1.09 Shri Subhash Chandra Agrawal of Kucha Latoo Shah, Dariba, Delhi sought the following information from the CPIO, Supreme Court of India Shri Raj Pal Arora:

> "Kindly arrange to send me 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 A. K. Ganguly and Mr. Justice RM Lodha superseding seniority of Mr. Justice AP Shah, Mr. Justice AK Patnaik and Mr. Justice VK Gupta as allegedly objected to Prime Minister's Office (PMO) also. Please do not invoke section 6 (3) on this RTI petition, as I need copy of the file on the issue only as available at Supreme Court. Kindly attached file notings on movement of this RTI petition also. Postal order number 77E 255672 for rupees ten is enclosed herewith towards RTI fees."

To this Shri Subhash Chandra Agrawal received a response on 25.2.2009 from CPIO Shri Arora informing him as follows:

> "I write to inform you that this Registry does not deal with the matters pertaining to appointment of Hon'ble Judges in the Supreme Court and High 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. Such information sought by you is neither maintained nor available in the Registry. Hence your request cannot be acceded to under the Right to Information Act, 2005."

Not satisfied Shri Agrawal moved an appeal before Shri M.P. Bhadran, Registrar on 28.2.2009 with the following plea:

> "I quoted paragraph 81 of the esteemed Supreme Court verdict in the matter 'SP Gupta vs. Union of India (1981suppSC87)' "If we approach the problem before us in the light of these observations, it will be clear that the class of documents consisting of the correspondence exchanged between the Law Ministry or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court judge or Supreme Court judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure".
>
> But instead of providing me copies of sought documents, the learned CPIO vide his reply DY. No. 670/RTI/08-09/SCI dated 25.2.2009 tried to explain me the procedure of appointment of judges, which I never tried to enquire."

This appeal was dismissed on 25.3.09 by appellate authority Shri Bhadran, as follows:

> "CPIO has informed the appellant that Registry is not dealing with the matters pertaining to appointment of Hon'ble Judges in the Supreme Court of India, that appointment of Hon'ble Judges of the Supreme Court is 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 Supreme Court of India and that such information is neither maintained nor available in the Registry. I find no reasons to disagree with the reply forwarded by the CPIO to the appellant. The information sought by the appellant also does not come within the ambit of Sections 2(f) and (j) of RTI Act. There is no merit in this appeal and it is only to be dismissed."

Appellant Shri Subhash Chandra Agrawal's prayer before us in his second appeal is as below:

> "Authorities at Supreme Court may kindly be directed to kindly provide me copy of complete file/s (copy as available in Supreme Court) inclusive of copies of complete correspondence exchanged between concerned constitutional authorities with file notings relating to appointment of Mr. Justice HL Dattu, Mr. Justice A. K. Ganguly and Mr. Justice RM Lodha superseding seniority of Mr. Justice AP Shah, Mr. Justice AK Patnaik and Mr. Justice VK Gupta.

Any other relief deemed fit in favour of the petitioner may kindly be allowed."

The appeal was heard together with appeal **Nos. CIC/WB/A/2009/000001, 735, 859, 408, 410, 411 & 530** on 20.11.2009. In this case, however, Shri Devadutt Kamat, Learned Counsel for the Supreme Court sought adjournment, which was agreed to. The appeal was then heard on 23.11.2009. The following are present:

Appellant

Sh. Subhash Chandra Agrawal
Sh. Prashant Bhushan, Advocate
Sh. Mayank Mishra, Advocate

Respondents

Sh. Raj Pal Arora, Addl. Registrar / CPIO
Sh. Devadutt Kamat, Advocate for SCI
Ms. Priyanka Telang, Advocate

Learned Counsel for respondents Shri Devadutt Kamat, submitted a written statement of his arguments in which his plea is based on the ground that the information sought by appellant Shri Subhash Chandra Agrawal in the present case falls squarely within the exemption u/s 8(1)(e) of the RTI Act. He has, in this context, closely examined the meaning of the term 'fiduciary' and in this connection has quoted from the decision of the Supreme Court in **Subhash Sharma vs. Union of India – (1991) (Supp) 1-SCC 574** specifically with reference to information held under Article 124 of the Constitution or in discharge of a trust, as follows:

"It is a participatory constitutional function. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint Judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories.'

He has gone on to describe the role of the Chief Justice of India in the appointment process, as below:

"It is submitted that the Chief Justice of India whilst performing his functions under Article 124 (2) acts in a fiduciary capacity visa a vis other judges and Chief Justices of High court. The information made available with the Chief Justice in pursuance of his functions

under article 124 (2) is held in confidence and in trust being the pater families of the Judiciary for the purposes for forming an opinion under article 124 (2).

In the SC Advocates case, the Hon'ble Supreme Court whilst elaborating on the role of chief Justice in the consultation process held that the provisions for consultation with CJI was introduced in the Constitution as he was best equipped to know and assess the worth of the candidate. It is submitted that the 'information' about the candidate available with the Chief Justice is in fiduciary capacity as the pater families of the Judiciary."

Shri Kamat has also quoted from the decision of Justice Verma in **Supreme Court Advocates on Record Association vs. Union of India – (1993) 4 SCC 441**, as follows:

"452. This is not surprising if we remember that even in United Kingdom where similar judicial appointments are in the absolute discretion of the executive, these appointments are made by convention on the advice of the Prime Minister after consultation with the Lord Chancellor, who himself consults with senior members of the judiciary before making his choice or consulting with the Prime Minister and the Prime Minister would depart from the recommendations of the Lord Chancellor only in the most exceptional case. (See The Politics of Judiciary- J.A. G. Griffith at pp. 17-18). The Lord Chancellor, Lord Mackay speaking recently on 'The Role of the Judge in a Democracy said:

One of the most important responsibilities of a Lord Chancellor in our democracy is for judicial appointments. It is my duty to ensure that neither political bias, nor personal favouritism, nor animosity play any party in the appointment of judges and that they are selected regardless of sex, ethnic origin or religion on the basis of their fitness to carry out the solemn responsibility of judicial office. I look for those with integrity, professional ability, experience, and standing, a sound temperament and good health. To achieve this I consult widely and regularly with the judges, Law Lords and other members of the legal profession. I naturally attach particular importance to the opinion of the Division of the High Court. Judges therefore have an important role in judicial appointments, albeit informally father than prescribed by statute." (Emphasis supplied)."

He has further gone on to contest the application of the observations of the learned Single Judge in **W.P. No. 288/2009** paras 54 to 59 in which Justice

Ravinder Bhat has examined the application of the term fiduciary relationship, contending that the learned Judge "*has not at all held that the Chief Justice of the Supreme Court does not act in a fiduciary capacity vis a vis Judges or Chief Justices of the High court."* He has then argued as below:

> "It is submitted that the information sought for relates to the personal information relating to the suitability of a candidate. It is submitted that the information sought for is pure and simple personal information relating to the judges which is exempt from disclosure.'

In support of this line of argument, learned counsel for respondents Shri Devadutt Kamat has then gone on to quote extensively from Supreme Court Advocates case referred to above, as below:

> "462. The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection. It is obvious that only those persons should be considered fit for appointment as judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical attributes of a person suitable for appointment as a superior judge. The initial appointment of judges in the High Courts is made from the Bar and the subordinate judiciary. Appointment to the Supreme Court is mainly from amongst High Court Judges, and on occasions directly from the Bar. The arena of performance of those men are the courts. It is, therefore, obvious that the maximum opportunity for adjudging their ability and traits, is in the Courts and, therefore, the judges are best suited to assess their true worth and fitness for appointment as Judges. This is obviously the reason for introducing the requirement of consultation with the Chief Justice of India in the matter of appointment of all Judges, and with the Chief Justice of the High Court in the case of appointment of a Judge in a High Court. Even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice of India and the Chief Justice of the High Court who get such information from various sources. There may, however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice of India and the Chief Justice of the High Court, and which may be relevant for

> assessing his potentially to become a good judge. It is for this reason, that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees before the appointment is made."

He has then concluded that there is no public interest involved in the present case and that the Hon'ble Supreme Court in the Supreme Court Advocates case has specifically held that public interest lies in keeping appointments and transfers undisclosed. He has, in this context, gone on to again quote from this decision, as below:

> "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 hones to 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."

Learned Counsel has contested the reliance of appellant on the decision of the Hon'ble Supreme Court in **S. P. Gupta vs. Union of India (1981) (Supp) SCC 87.** Finally learned Counsel Sh. Kamat has rested his arguments on a decision of this Commission of 2006 in **Sh. Mukesh Kumar vs. Supreme Court of India in F. No. CIC/AT/A/2006/00113** in which we have held as follows:

> "Arguably, there is merit in the contention that certain processes are best conducted away from the public gaze, for that is what contributes to sober analysis and mature reflection, unaffected by competing pressures and public scrutiny. If there is one process which needs to be so protected, the process of selecting the judges of the High Court's and the Supreme Court must quality to be one such.'

In light of a subsequent decision of this Commission Shri Kamal has invited our attention to the ruling of the Supreme Court in **Companies Textiles Industries Ltd. vs. Deepak Jain and anr. In Civil Appeal No. 1743/2009**

decided on March 20, 2009 in which the Hon'ble Supreme Court has held as follows:

> "We are also constrained to observe that while dealing with the second revision petition, the High Court failed to take into consideration the order passed by a learned Single Judge on 21.8.2002 whereby the executing court was directed to conducted inquiry in regard to the status of the objector to the execution proceedings. Time and again it has been emphasised that judicial prosperity and decorum requires that if a Single Judge, hearing a matter, feels that earlier decision of a Single Judge needs reconsideration, he should not embark upon that enquiry, sitting as a Single Judge, but should refer the matter to a larger bench. Regrettably, in the present case, the learned Single judge departed from the said healthy principle and chose to re-examine the same question himself.'

He has gone on to provide a very detailed argument in this regard, as below:

> "It is well settled that a coordinate bench cannot overrule an earlier decision of the same strength. It is submitted that the decision in Mukesh Kumar's case has not been expressly overruled by any of the decisions of this Commission. No appeal also appears to have been filed against the said decision. In these circumstances, the decision in Mukesh Kumar's case is binding unless overturned by a larger bench. It has already been pointed out that the larger bench decisions of this Commission did not deal with the position of the Chief Justice and the issues, which arose in Mukesh Kumar's case, did not arise for consideration in the other decisions.

The Hon'ble Supreme Court in S. I. Rooplal & Anr. Vs. Lt. Governor through Chief Secretary, Delhi (2000) 1 SCC 644 has laid down that it is not open for a bench of coordinate jurisdiction to overrule a decision rendered by another coordinate bench of the same strength. It was held that:

> "At the outset, we must express our serious dissatisfaction to regard to the manner in which a coordinate Bench of the tribunal has overrules, in effect, an earlier judgment of another coordinate Bench of the same tribunal. This is opposed to all principles of judicial discipline. It at all, the subsequent Bench of the tribunal was of the opinion that the earlier view taken by the coordinate Bench of the same tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two coordinate Benches on the same point could have been avoided."

Learned counsel Shri Kamat has therefore conclude that we cannot rely on the subsequent decisions of this Commission, which moreover have been challenged in Writ before the High Court of Delhi, but instead place reliance on our decision in **Sh. Mukesh Kumar vs. Supreme Court of India in F. No. CIC/AT/A/2006/00113,** which moreover stands without challenge.

Learned Counsel for appellant Shri Prashant Bhushan on the other hand submitted that the decision of this Commission cited by learned Counsel for respondents Shri Devadutt Kamat is overridden not by the subsequent decisions of this Commission in **CIC/WB/A/2006/00460** announced on 23.3.2007 and **CIC/AT/A/2008/00736** announced on 19.1.2009 but by the decision of Justice Bhagwati in **S.P. Gupta vs. Union of India – AIR (1982) SC 149** upon which the decision of this Commission of 23.3.07 is based. Besides, on the principle of *per incurism* the decision of 23.3.2007 cannot be invalidated on the basis of the earlier decision of this Commission cited by learned Counsel for respondents as that decision was never brought to the notice of the Commission in its hearing on 16.3.2007 and, therefore, finds no reference in the decision of 23.3.2007 in File **No. CIC/WB/A/2006/00460**. He has then gone on to quote from the decision of the Supreme Court in **S.P. Gupta vs. Union of India – AIR (1982) SC 149,** upon which he has relied, as follows:

> 82. These selfsame reasons must apply equally in negativing the claim for immunity 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 Justice of a High Court. These documents are extremely material for deciding whether there was full and effective consultation with the Chief Justice of India before effecting the transfer and the transfer was made in public interest, both of which are, according to the view taken by us, **justiciable issues and the non disclosure of these documents would seriously handicap the petitioner 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 would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true. Moreover, the transfer of a High Court Judge or Chief Justice of a High Court is a

very serious matter and if made arbitrarily or capriciously or by way of punishment or without public interest motivation, it would erode the independence of the judiciary which is a basic feature of the Constitution and therefore, when such a charge is made **it is in public interest that it should be fully investigated and 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.** It would be plainly contrary to public interest to allow the inquiry into such a charge to be baulked or frustrated by a claim for immunity in respect of documents essential to the inquiry. It is also important to note that when the transfer of a High Court Judge or Chief Justice of a High Court is challenged, the burden of showing that there was full and effective consultation with the Chief Justice of India and the transfer was effected in public interest is on the Union of India and it cannot withhold the relevant documents in its possession on a plea of immunity and expect to discharge this burden by a mere statement in an affidavit. Besides, if the reason for excluding these documents is to safeguard the proper functioning of the higher organs of the State including the judiciary, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of those very organs. It is, Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the notings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure. **(Emphasis added)**

83. But, quite apart from these considerations, we do not understand how the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notes made by them in regard to non appointment of an Additional Judge for a further term or transfer of a High Court Judge can be detrimental to public interest. It was argued by the learned Solicitor-General on behalf of the Union of India that if the Chief Justice of the High Court and the Chief Justice of India differ in their views in regard to the suitability of an Additional Judge for further appointment, the disclosure of their views would cause considerable embarrassment because the rival views might be publicly debated and there might be captious and uninformed criticism which might have the effect of undermining the prestige and dignity of one or the other Chief Justice and shaking the confidence of the people in the administration of justice. If the difference in the views expressed by the Chief Justice of the High Court and the Chief Justice of India becomes publicly known,

contended the learned Solicitor-General, it might create a difficult situation for the Chief Justice of the High Court vis-à-vis the Chief Justice of India and if despite the adverse opinion of the Chief Justice of the High Court, the Additional Judge is continued for a further term, and the Additional Judge knows that he has been so continued overruling the view of the Chief Justice of the High Court, it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. So also if an Additional Judge is continued for a further term accepting the view expressed by the Chief Justice of the High Court and rejecting the opinion of the Chief Justice of India, it would against create a piquant situation because it would affect the image of the Chief Justice of India in the public eyes. Moreover, a feeling might be created in the mind of the public that a person who was regarded as unsuitable for judicial appointment by one or the other of the two Chief Justices, has been appointed as a Judge and the litigants would be likely to have reservations about him and the confidence of the people in the administration of justice would be affected. The learned Solicitor-General contended that for these reasons it would be injurious to public interest to disclose the correspondence exchanged between the Law Minister, the Chief Justice or the High Court and the Chief Justice of India.

84. We have given our most anxious thought to this argument urged by the leaned Solicitor General, but we do not think we can accept it. 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. There might be difference of views between the Chief Justice of the High Court and the Chief Justice of India but so long as the views are held bona fide by the two Chief Justices, we do not see why they should be worried about the disclosure of their views? Why should they feel embarrassed by public discussion or debate of the views expressed by them when they have acted bona fide with the greatest care and circumspection and after mature deliberation. Do Judges sitting on a Division Bench not differ from each other in assessment of evidence and reach directly contrary conclusions on questions of fact? Do they not express their judicial opinions boldly and fearlessly leaving it to the jurists to decide which of the two differing opinions is correct? If two Judges do not feel any embarrassment in coming to different findings of fact which may be contrary to each other, why should two Chief Justices feel embarrassed if the opinions given by them in regard to the suitability of an Additional Judge for further appointment differ and such differing opinions are made known to the public. Not only tolerance but acceptance of bona fide difference of opinion is a part of

judicial discipline and we find it difficult to believe that the disclosure of their differing opinions might create a strain in the relationship between the Chief Justice of the High Court and the Chief Justice of India. We have no doubt that the Chief Justice of the High Court would come to his own independent opinion on the material before him and he would not surrender his judgment to the Chief Justice of India, merely because the Chief Justice of India happens to be head of the judiciary having a large voice in the appointment of Judges on the Supreme Court Bench. Equally we are confident that merely because the Chief Justice of the High Court has come to a different opinion and is not prepared to change that opinion despite the persuasion of the Chief Justice of India, no offence would be taken by the Chief Justice of India and he would not harbour any feeling of resentment against the Chief Justice of the High Court. Both the Chief Justices have trained judicial minds and both of them would have the humility to recognize that they can be mistaken in their opinions. We do not therefore see any real possibility of estrangement or even embarrassment for the two Chief Justices, if their differing views in regard to the suitability of an Additional Judge for further appointment are disclosed. We also find it difficult to agree that if the differing views of the two Chief Justices become known to the outside world, the public discussion and debate that might ensue might have the effect of lowering the dignity and prestige of one or the other of the two Chief Justices. When the differing views of the two Chief Justices are made public as a result of disclosure, there would certainly be public discussion and debate in regard to those views with some criticizing one view and some criticising the other, but that cannot be helped in a democracy where the right of free speech and expression is a guaranteed right and if the views have been expressed by the two Chief Justices with proper care and deliberation and a full sense of responsibility in discharge of a constitutional duty, there is no reason why the two Chief Justices should worry about public criticism. We fail to see how such public criticism could have the effect of undermining the prestige and dignity of one or the other Chief Justice. So long as the two Chief Justices have acted honestly and bona fide with full consciousness of the heavy responsibility that rests upon them in matters of this kind, we do not think that any amount of public criticism can affect their prestige and dignity. But if either of the two Chief Justices has acted carelessly or improperly or irresponsibly or out of oblique motive, his view would certainly be subjected to public criticism and censure and that might show him in poor light and bring him down in the esteem of the people, but that will be the price which he will have to pay for his remissness in discharge of his constitutional duty. No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the clock of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there

is no reason why his action should not be exposed to public gaze. **We believe in an open government and openness in government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterize the functioning of the judicial apparatus including judicial appointments and transfer.** Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India. In case of appointment or non appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade off. We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances. 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 affected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding. In fact, the possibility of subsequent disclosure would act as an effective check against carelessness, impetuosity, arbitrariness or mala fides on the part of the Central Government, the Chief Justice of the High Court and the Chief Justice of India and ensure bona fide and correct approach objective and dispassionate consideration, mature thought and deliberation and proper application of mind on their part in discharging their constitutional duty in regard to appointments and transfers of Judges. It is true that if the views expressed by the Chief Justice of the High Court and the Chief Justice of India in regard to the suitability of an Additional Judge for further appointment become known to the public, they might reflect adversely on the competence, character or integrity of the Additional Judge, but the Additional Judge cannot legitimately complain about it, because it would be at his

instance that the disclosure would be ordered and the views of the two Chief Justices made public. If the Additional Judge is appointed for a further term either accepting the opinion expressed by the Chief Justice of the High Court in preference to that of the Chief Justice of India or vice versa, the question of disclosure of differing opinions of the two Chief Justices would not arise, because no one would know that the two Chief Justices were not agreed on continuing the Additional Judge for a further term and therefore, ordinarily, there would be no challenge to the appointment of the Additional Judge. It is only if the Additional Judge is not continued for a further term that he or someone on his behalf may challenge the decision of the Central Government not to continue him and in that event, if he asks for disclosure of the relevant correspondence embodying the views of the two Chief Justices, and if such disclosure is ordered, he has only himself to thank for it and in any event, in such a case there would be no harm done to public interest if the views expressed by the two Chief Justices become known to the public." . **(Emphasis added)"**

This decision stands and has neither been challenged nor modified by any subsequent decision of the Supreme Court.

Shri Prashant Bhushan further submitted that respondent has not taken the plea of exemption u/s 8(1)(e) earlier nor the plea that the information sought is not under the control of Chief Justice of India, as a public authority. However, he conceded that in case the information sought contained any information of a personal nature warranting exemption u/s 8(1)(j), this can be exempted under the severability clause contained in Sec. 10(1) while making the disclosure.

DISCUSSION & DECISION NOTICE

. Because respondents have not raised the issue now raised either in refusing the information in the initial stage or in considering the appeal, we cannot now hold that in consequence they are debarred from taking this plea at this stage. This was indeed the plea taken by the Registry of the Supreme Court of India in its **Writ Petition No.2008/09** moved before the High Court of Delhi against an earlier decision of this Commission but since in the decision of Justice Ravinder Bhat in **WP(C) 228/2009, CPIO Supreme Court of India vs. SC Agrawal & Anr.** it is conceded that the Chief Justice of India is indeed a public

authority, it is in that context that the present plea for exemption has been taken. Therefore, this contention of appellant is unsustainable.

On the other hand, the question lies squarely on whether the ruling of Justice Ravinder Bhat in this case on the question of fiduciary relationship will be applicable in the present case. His ruling is as follows:

> 54. The petitioners argue that assuming that asset declarations, in terms of the 1997 constitute "information" under the Act, yet they cannot be disclosed – or even particulars about whether, and who made such declarations, cannot be disclosed – as it would entail breach of a fiduciary duty by the CJI. The petitioners rely on Section 8 (1) (f) to submit that a public authority is under no obligation to furnish *"information available to a person in his fiduciary relationship".* The petitioners emphasize that the 1997 Resolution crucially states that:
>
> > *"The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential."*
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> The respondent, and interveners, counter the submission and say that CJI does not stand in the position of a fiduciary to the judges of the Supreme Court, who occupy high Constitutional office; they enjoy the same judicial powers, and immunities and that the CJI cannot exercise any kind of control over them. In these circumstances, there is no "fiduciary" relationship, least of all in relation to making the asset declarations available to the CJI, who holds it because of his status as CJI. It is argued that a fiduciary relationship is created, where one person depends, on, or entrusts his affairs to 55. It is necessary to first discern what a fiduciary relationship is, since the term has not been defined in the Act. In *Bristol & West Building Society v. Mathew* [1998] Ch 1, the term "fiduciary", was described as under:
>
> > *"A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."*
>
> *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan,* (2005) 1 SCC 212 and *Needle Industries (India) Ltd v. Needle Industries (Newey) India Holding Ltd:* 1981 (3) SCC 333 establish that Directors of a company owe fiduciary duties to its shareholders. In *P.V. Sankara Kurup v. Leelavathy Nambiar,* (1994) 6 SCC 68, the Supreme Court held that an agent and power of attorney holder can be said to owe a fiduciary relationship to the principal.
>
> 56. In a recent decision (*Mr. Krishna Gopal Kakani v. Bank of Baroda* 2008 (13) SCALE 160) the Supreme Court had to decide whether a transaction resulted in a fiduciary relationship. Money

was sought to be recovered by the plaintiff, from a bank, who had moved the court for auction of goods imported, and retained the proceeds; the trail court overruled the objection to maintainability, stating that the bank held the surplus (of the proceeds) in a fiduciary capacity. The High Court upset the trial court's findings, ruling that the bank did not act in a fiduciary capacity. The Supreme Court affirmed the High Court's findings. The court noticed Section 88 of the Trusts Act, which reads as follows:

> *"Section 88. Advantage gained by fiduciary. - Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."*

Affirming the High Court's findings that the bank did not owe a fiduciary responsibility to the appellant, it was held by the Supreme Court, that:

> *"9. An analysis of this Section would show that the Bank, to whom the money had been entrusted, was not in the capacity set out in the provision itself. The question of any fiduciary relationship therefore arising between the two must therefore be ruled out. It bears reiteration that there is no evidence to show that any trust had been created with respect to the suit money."*

The following kinds of relationships may broadly be categorized as "fiduciary":

- Trustee/beneficiary (Section 88, Indian Trusts Act, 1882)
- Legal guardians / wards (Section 20, Guardians and Wards Act, 1890)
- Lawyer/client;
- Executors and administrators / legatees and heirs
- Board of directors / company
- Liquidator/company
- Receivers, trustees in bankruptcy and assignees in insolvency / creditors
- Doctor/patient
- Parent/child:

57. *The Advanced Law Lexicon*, 3rd Edition, 2005, defines fiduciary relationship as

> *"a relationship in which one person is under a duty to act for the benefit of the other on the matters within the scope of the relationship….Fiduciary relationship usually arise in one of*

the four situations (1) when one person places trust in the faithful integrity of another, who is a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship, or (4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer"

58. From the above discussion, it may be seen that a fiduciary relationship is one whereby a person places complete confidence in another in regard to a particular transaction or his general affairs or business. The relationship need not be "formally" or "legally" ordained, or established, like in the case of a written trust; but can be one of moral or personal responsibility, due to the better or superior knowledge or training, or superior status of the fiduciary as compared to the one whose affairs he handles. If viewed from this perspective, it is immediately apparent that the CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court; he cannot be said to have superior knowledge, or be better trained, to aid or control their affairs or conduct. Judges of the Supreme Court hold independent office, and are there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. In these circumstances, it cannot be held that asset information shared with the CJI, by the judges of the Supreme Court, are held by him in the capacity of a fiduciary, which if directed to be revealed, would result in breach of such duty. So far as the argument that the 1997 Resolution had imposed a confidentiality obligation on the CJI to ensure non-disclosure of the asset declarations, is concerned, the court is of opinion that with the advent of the Act, and the provision in Section 22 – which overrides all other laws, etc. (even overriding the Official Secrets Act) the argument about such a confidentiality condition is on a weak foundation. The mere marking of a document, as "confidential", in this case, does not undermine the overbearing nature of Section 22. Concededly, the confidentiality clause (in the 1997 Resolution) operated, and many might have *bona fide* believed that it would ensure immunity from access. Yet the advent of the Act changed all that; all classes of information became its subject matter. Section 8(1) (f) affords protection to one such class, i.e. fiduciaries. The content of such provision may include certain kind of relationships of public officials, such as doctor-patient relations; teacher-pupil relationships, in government schools and colleges; agents of governments; even attorneys and lawyers who appear and advise public authorities covered by the Act. However, it does not cover

> asset declarations made by Judges of the Supreme Court, and held by the CJI.
> 59. For the above reasons, the court concludes the petitioners' argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) to be insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.

No doubt this ruling has been challenged before a Division Bench of the Delhi High Court, which has also heard the same. However, this issue is not, as conceded by both parties, an issue that is impugned. The only plea taken here by the learned Counsel for respondents in this regard is that this particular ruling will not apply in the present case. Learned Counsel contests this conclusion for appellant on the basis of the ruling of Justice Bhagwati in the case of **S. P. Gupta vs. Union of India** quoted above.

The question then arises as to whether in light of the argument of learned counsel for respondents that a Coordinate Bench cannot overrule a decision of another Coordinate Bench of the same Commission, this Commission is at liberty to take a decision contrary to its decision in **Mukesh Kumar vs. Supreme Court of India** without reference to a larger Bench. This would have to be seen in light of the arguments of learned counsel for respondents submitted in his written arguments, which is as follows:

> "It is respectfully submitted that the consultation process and the primacy of the opinion of the Chief Justice of India is facet of Judicial Independence. It is submitted that it is now well settled that the judicial independence is now one of the corner stone's of our constitutional democracy. Judicial Independence demands that the consultation process should be conducted in an atmosphere sober analysis unaffected by competing pressures. Intrusion by strangers and busy bodies needs to be eschewed."

In our view the decision of this Commission in **Mukesh Kumar vs. Supreme Court of India** cannot stand overridden by the decision dated 23.3.2007 of this Commission in **File No. CIC/WB/A/2006/00460 – S. C.**

Agrawal vs. President's Secretariat & Department of Justice. Instead it is countered by the conclusion of the Supreme Court of India in **S. P. Gupta vs. Union of India** precisely through the paragraphs drawn from this decision, quoted in our own decision of 23.3.2007. Besides, Sec. 11(1) has also been sought as a reason for refusing disclosure in **Mukesh Kumar vs. Supreme Court of India** is not a clause that allows for exemption from disclosure but only a clause prescribing the procedure for allowing a third party to seek exemption from disclosure of any information intended to be disclosed.

Nevertheless, the definition of the applicability of the clause of fiduciary relationship i.e. exemption u/s 8(1)(e) dwelt in detail by the Hon'ble Justice Ravinder Bhat in W.P. No. 288/09, quoted above, will now have the effect of overriding any earlier decision of this Commission in this regard. The question is that will this definition apply in the present case, a fact that has been challenged by respondents. It is without doubt that the detailed exemption on the question of the fiduciary relationship in the above decision does not pertain to the kind of disclosure that has been sought in the present appeal since that was regarding disclosure of information regarding property statements whereas in the present case the issue is one of personnel administration. Nevertheless, as will be clear from the judgment that we have deliberately taken some pains to describe in detail above would clearly show its applicability over a much larger canvas than only a particular Writ Petition itself in the context of which it has been arrived at. The principles on which the fiduciary relationship can be relied on to seek exemption have been clearly laid down. In the present case excluding personal information, which in any case will be deleted under the severability clause in any disclosure order, the recommendation of appointment of justices is decidedly a public activity conducted in the overriding public interest. Hence the plea of seeking exemption under the definition of fiduciary relationship cannot stand, and even if accepted in technical terms, will not withstand the test of public interest.

For the above reasons this appeal is allowed. The information sought by appellant Shri Subhash Chandra Agrawal will now be provided to him within 15 working days of the date of receipt of this Decision Notice There will be no costs. Since the information was not provided within the time specified for the same, it will now be provided free of cost under sub sec. (6) of Sec. 7.

Reserved in the hearing, this Decision is announced in the open chamber on this 24th day of November 2009. Notice of this decision be given free of cost to the parties.

(Wajahat Habibullah)
Chief Information Commissioner
24.11.2009

Authenticated true copy. Additional copies of orders shall be supplied against application and payment of the charges, prescribed under the Act, to the CPIO of this Commission.

(Pankaj Shreyaskar)
Joint Registrar
24.11.2009