

केन्द्रीय सूचना आयोग
Central Information Commission
बाबा गंगनाथ मार्ग, मुनिरका
Baba Gangnath Marg, Munirka
नई दिल्ली, New Delhi – 110067

द्वितीय अपील संख्या / Second Appeal No. CIC/MHOME/A/2017/609431

Ujwala Kokde

... अपीलकर्ता/Appellant

VERSUS
बनाम

CPIO, Ministry of Home Affairs,
Judicial Division, New Delhi.

...प्रतिवादीगण /Respondents

Relevant dates emerging from the appeal:

RTI : 13.07.2017	FA : 22.08.2017	SA : 21.12.2017
CPIO : 20.07.2017	FAO : No Order	Hearing : 11.06.2019

ORDER

1. The appellant filed an application under the Right to Information Act, 2005 (RTI Act) before the Central Public Information Officer (CPIO), Judicial Division, Ministry of Home Affairs, New Delhi seeking information on seven points pertaining to mercy petition of her son Pradeep Yeshwanth Kokde who is a death row convict lodged at Yerwada Central Jail, including, inter-alia (i) copy of any memo/note/comment made in relation to the mercy petition filed by Pradeep

Yeshwanth Kokde, (ii) copy of the entire mercy petition file of Pradeep Yeshwanth Kokde, and (iii) copy of the file notings pertaining to the file of the mercy petition filed by Pradeep Yeshwanth Kokde.

2. The appellant filed a second appeal on the ground that the CPIO denied the information under Article 74(2) of Constitution of India and that the FAA did not respond to her appeal. The appellant stated that what is protected against disclosure under clause (2) of Article 74 of the Constitution is only the advice tendered by the Council of Ministers and that the information sought by her does not pertain to Ministerial Advice which is protected under Article 74(2) of the Constitution.

Hearing:

3. Ms. Ragni Ahuja, representative of the appellant attended the hearing through video conferencing. The respondent Shri Hari Mohan Jha, Section Officer, Judicial Division, Ministry of Home Affairs, New Delhi was present in person.

4. The appellant's representative submitted that the respondent has wrongly denied the information sought for regarding any memo/note/comment made in relation to the mercy petition filed by one Shri Pradeep Yeshwanth Kokde along with the file noting of the Ministry and President's Secretariat and other documents considered pertaining to his mercy petition under Article 74(2) of the Constitution of India. He further stated that the material including file noting/correspondence on which the advice is based is not privileged and hence, not covered under the Article. The appellant added that the Hon'ble Supreme Court in (i) *S. P. Gupta vs. Union of India 1981 Supp SCC 87*, a seven judge bench, and (ii) *S. R. Bommai vs. Union of India, (1994) 3 SCC 1*, a nine judge bench, had allowed disclosure of not only

correspondence but also notings made by high constitutional functionaries. In view of this, the appellant requested the Commission to direct the respondent to provide complete information as sought for by him in his RTI application.

5. The respondent submitted that vide letter dated 21.07.2017 the appellant was informed that the recommendations along with all documents i.e. file noting/petition/letters etc. which lead to the formation of Ministerial advice to the President of India is privileged under Article 74 (2) of the Constitution and the same cannot be disclosed under RTI Act. The respondent clarified that the Ministerial advice/opinion/recommendation is made to the President on the basis of the documents i.e. file noting/petition/letters, etc. and hence, the same are privileged under Article 74 (2) of the Constitution of India and cannot be disclosed under the RTI Act. Hence, these documents are an integral part of the Government decision making process and cannot be isolated from the ambit “advice to the President”. The respondent quoted the decision dated 11.07.2012 of the Hon’ble High Court of Delhi in *Union of India vs. Central Information Commission and Anr.*, wherein the Delhi High Court had set aside the order of the Commission directing the disclosure of information relating to correspondence between the former President of India and the then Prime Minister relating to Gujarat riots. The Court had ruled:

“36. The correspondence between the President and the Prime Minister will be the advice rendered by the President to the Council of Ministers or the Prime Minister and vice versa and cannot be held that the information in question is a material on which the advice is based. In any case the respondent No.2 has sought copies of the letters that may have been sent by the former President of India to the Prime Minister between the period 28th

February, 2002 to 15th March, 2002 relating to the Gujarat riots. No exception to Article 74(2) of the Constitution of India can be carved out by the respondents on the ground that disclosure of the truth to the public about the stand taken by the Government during the Gujarat carnage is in public interest. Article 74(2) contemplates a complete bar in respect of the advice tendered, and no such exception can be inserted on the basis of the alleged interpretation of the provisions of the Right to Information Act, 2005.”

Decision:

6. The Commission, after hearing the submissions of both the parties and perusing the records, notes that Article 74(2) of the Constitution of India reads as under:

“74. Council of Ministers to aid and advise President.-(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.”

7. The Hon’ble Supreme Court in *S.R. Bommai vs Union Of India* : 1994 AIR 1918 on 11 March, 1994 had observed:

“33. Before I deal with the said issue I may dispose of the question whether the provision of Article 74(2) of the Constitution permits withholding of the reasons and material forming the basis for the ministerial advice tendered to the President. ... Article 74(2) then provides that "the question whether any, and if so what, advice was tendered to the President shall not be inquired into in any Court". What this clause bars from being inquired into is "whether any, and if so what, advice was tendered" and nothing beyond that. This question has been elaborately discussed by my learned colleagues who have examined in detail its pros and cons in their judgments and, therefore, I do not consider it necessary to traverse the same path. It would suffice to say that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but I agree that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based. Of course the privilege available under the Evidence Act, Sections 123 and 124, would stand on a different footing and can be claimed dehors Article 74(2) of the Constitution.”

8. Further, Seven Judges of the Supreme Court in *S.P. Gupta and Ors. v. President of India and Ors.* : AIR 1982 SC 149 have examined and interpreted Article 74(2) of the Constitution of India. The Apex Court has lucidly explained in para 60 of the judgment as under:

“60....But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the

evidence led before the Court and it would refer to such evidence and discuss it but, on that account, can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in Clause (2) of Article 74.”

9. Moreover, regarding the documents/material which do not form a part of the advice and the consequent disclosure of the same in the interest of justice, the Hon’ble Delhi High Court in Union of India vs. P.D. Khandelwal case [W.P. (C) 8396 of 2009, judgment dated 30.11.2009] had also held:

“34. Possibly the only class of documents which are granted immunity from disclosure is those mentioned under Article 74(2) of the Constitution. These are documents or information which are granted immunity from disclosure not because of their contents but because of the class to which they belong. Other documents and information which do not fall under Article 74(2) of the Constitution cannot be held back on the ground that they belong to a particular class which is granted absolute protection against disclosure. All other documents/information is not granted absolute or total immunity. Protection from disclosure is decided by balancing the two competing

aspects of public interest i.e. when disclosure would cause injury or unwarranted invasion of privacy and on the other hand if non-disclosure would throttle the administration of justice or in this case, the public interest in disclosure of information. In such cases, the Court/CIC has to decide, which of the two public interests pre-dominates.”

10. The Commission in the case of Shri Subhash Chandra Agrawal Vs. Ministry of Home Affairs, New Delhi (Appeal No. CIC/SS/A/2012/000051, dated 12.04.2012) has held:

“15. The Commission is of the view that the ratio of its earlier decision in Mayilsamy K (supra) squarely applies to the facts of the present case. File notings and correspondence in relation to mercy petitions, as sought by the Appellant, reflect the material on the basis of which advice and recommendations are made by the MHA to the President of India and thus, fall under the category of information which is not barred by Article 74(2) of the Constitution of India. Information comprising of file notings and correspondences, as exchanged between MHA and President's Secretariat in relation to mercy petitions, has to be tested on the touchstone of Section 8 of the RTI Act and it has to be assessed whether the disclosure of such information is exempted under any of the clauses of Section 8 of the RTI Act.”

11. In view of the above, the Commission notes that the file noting and correspondence received or sent by the Ministry of Home Affairs pertaining to the appellant's mercy petition which is not a part of the Ministerial advice to the President as well as the file noting relating to the file of the mercy petition file by

Shri Pradeep Yeshwanth Kokde as sought by the appellant can be provided to the appellant. The Commission, however, observes that the file noting and the correspondence could contain the names of the officials recording the same, the disclosure of which would endanger the life or physical safety of these officials and hence its disclosure is exempted under Section 8(1)(g) of the RTI Act. In view of this, the Commission directs the respondent to provide the information sought for, after severing all the names and other references which could reveal the identities of the public officials concerned, to the appellant within a period of four weeks from the date of receipt of a copy of this order under intimation to the Commission.

12. With the above observations, the appeal is disposed of.
13. Copy of the decision be provided free of cost to the parties.

Sd/-

Sudhir Bhargava (सुधीर भार्गव)
Chief Information Commissioner (मुख्य सूचना आयुक्त)
दिनांक / Date 12.06.2019

Authenticated true copy
(अभिप्रमाणित सत्यापित प्रति)

S. S. Rohilla (एस. एस. रोहिल्ला)
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Addresses of the parties:

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3. Smt. Ujwala Kokde,

