Critical Analysis of Supreme Court Judgements on the RTI Act, 2005 -Wither Transparency ?

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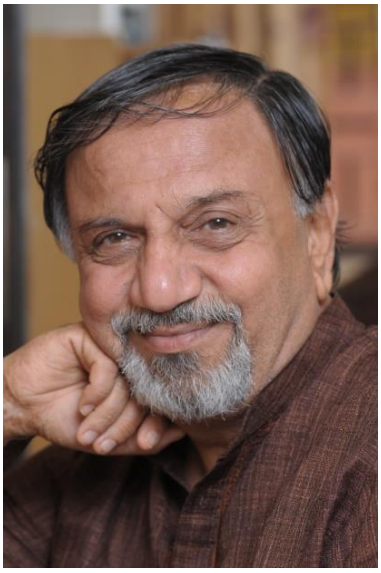
About the Authors



Shailesh Gandhi is a first generation entrepreneur and a Distinguished Alumnus awardee of IIT Bombay. He sold his company to become an RTI activist. Shailesh was part of the National RTI movement which was involved in drafting the National RTI Act. He was convener of the National Campaign for People's Right To Information. He used RTI and also trained many citizens and government officials in over 1000 workshops to use it. He is perhaps the only RTI activist to have been chosen as a Central Information Commissioner. He disposed a record of over 20,000 cases in his tenure of 3 years and 9 months, and ensured that most cases were decided in less than 90 days. He gave many landmark decisions on RTI, apart from organizing the first digital paper-less office in the Commission. He is now at his home in Mumbai to further and deepen RTI to empower citizens to take effective participatory charge of their democracy. He is also passionately pursuing the cause of evolving ways for a time bound justice delivery system, and improving governance systems. Amongst many awards, he has been awarded the Nani Palkhiwala Civil Liberties award, and the MR Pai award.

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Preface

Transparency advocates and RTI users have always applauded and given credit to the Supreme Court of India for its outstanding role in recognising the fact that Right to Information to Government information is a fundamental right of its Citizens under Article 19 (1)(a) of the Constitution of India.

We believe that the first landmark pronouncement in this respect was made by Justice Mathew in State of Uttar Pradesh v. Raj Narain (1975) 4 SCC 428 wherein he stated, "*In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security*".

Effectively, the Apex Court signalled that the only bar on information should be one which would impact public security. Repeated pronouncements were made in SP Gupta, Rajagopal, ADR and other landmark cases reiterating the ideology and principle, recognising the right to information as a fundamental right flowing from Article 19 (1) (a) of the Constitution of India. The Right to Information Act, 2005 hereinafter referred to as "RTI Act" has codified this right and also listed certain areas for which the information may be denied; and these exempted areas were on the same lines as that spelled out in Article 19(2) of the Constitution of India. Article 19 of the Constitution states as:

Article 19: Protection of certain rights regarding freedom of speech, etc

(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions, 11 "co-operative societies";
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; 12 [and];
(f)[omitted]
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as

such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

The Parliament of India recognized and codified this fundamental right of citizens in the year 2005 in which it clearly laid out that there would be ten exemptions instead of one as pronounced by Justice Mathew in Raj Narain case stated hereinabove. Justice Ravindra Bhat of Delhi High Court, impressively, captured the spirit of the RTI Act in his judgement in the *Bhagat Singh vs. CIC WP (c) no. 3114/2007* in which he stated:

"*13. Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore be strictly construed. It should not be interpreted in manner as to shadow the very right itself. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.*

14. A rights based enactment is akin to a welfare measure, like the Act, should receive a liberal interpretation. The contextual background and history of the Act is such that the exemptions, outlined in Section 8, relieving the authorities from the obligation to provide information, constitute restrictions on the exercise of the rights provided by it. Therefore, such exemption provisions have to be construed in their terms; there is some authority supporting this view (See Nathi Devi v. Radha Devi Gupta 2005 (2) SCC 201; B. R. Kapoor v. State of Tamil Nadu 2001 (7) SCC 231 and V. Tulasamma v. Sesha Reddy 1977 (3) SCC 99). Adopting a different approach would result in narrowing the rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted."

The RTI Act categorically states that the only reason for denial of information are given in sections 8 and 9 which are given at the end of this paper.

Citizens have had great hope that the judiciary would be the sentinel in defending this fundamental right and would help to hold the government authorities to the strictest test, which would help empowering individual citizens to hold their governments accountable and reduce arbitrariness and corruption which is omnipresent in the Indian social atmosphere.

RTI has spread very well and empowered citizens thereby deepening roots of Indian democracy. Individual citizens have become the vigilance monitors of government and public servants by bringing greater transparency and accountability. They have uncovered many scams and exposed corruption. This is slowly moving the nation from being an elective democracy to a meaningful participatory democracy where active citizenship can be practised.

In this backdrop, we decided to analyse 17 judgements delivered by the Supreme Court of India on the RTI law, to see the role played by it in this journey of transparency in the administration of the Nation.

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Judgment 1: CBSE Vs. Aditya Bandopadhyay (2011) 8 SCC 497.

The main issue before the Court: Whether an examinee's (Students) right to information under the RTI Act includes a right to inspect his evaluated answer books in a public examination and taking certified copies of the same. The examining body,-CBSE,- had claimed that it held the information in a fiduciary relationship and hence this was exempt under Section 8 (1) (e) of the RTI Act.

The observations of the Court: Para 18: "*Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations."*

Para 23. *"It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body."*

Para 26*: "The examining bodies contend that even if fiduciary relationship does not exist with reference to the examinee, it exists with reference to the examiner who evaluates the answer-books. On a careful examination we find that this contention has no merit….. Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.*

Para 37. *"Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public*

authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. "

The Court held that: The Court ruled that corrected answer sheets were information which should be provided to students who seek them under RTI.

Our analysis of the judgment: The Court ordered the information to be provided. It held that it was not exempt since the examining body did not hold any information in a fiduciary relationship with the examiners or examinees. Unfortunately, despite the Supreme Court's observation at para 18 that *the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules,* Public Information Officers (PIOs) of most Courts refuse to give information in RTI to citizens regarding various matters saying citizens should approach them under relevant Court rules. They erroneously hold that the Court rules overrule the RTI Act!

The observations made by Apex Court in Para 37 hereinabove are unsubstantiated and wholly uncalled for. There was no cause or reason for those observations. It does not befit the Supreme Court to make such disparaging remarks in respect of a fundamental right of citizens. There is not a shred of evidence that RTI is *'obstructing the national development and integration, or destroying the peace, tranquillity and harmony amongst its citizens*.' To label citizens exercising their fundamental right as oppressors and intimidators is unacceptable. These observations from the apex court have been gleefully picked up by public officials and quoted to curb the citizen's fundamental right. RTI has been recognised by the Supreme Court as being integral to Article 19 (1) (a) which states that all citizens shall have the right to freedom of speech and expression subject only to the restrictions laid out in Article 19 (2) of the constitution. Section 8 (1) effectively covers these and goes a little beyond. These remarks cannot be explained by any facts and runs contrary to all the earlier judgments on Right to Information.

If it is argued that right to information should be related to transparency and accountability and eradication of corruption, it will then be argued that the freedom of speech and expression should be subjected to this test. With these statements the court dealt a serious blow to the fundamental right of citizens. This has warmed the hearts of many PIOs and Information Commissioners, and they are now parroting these lines to deny legitimate information.

As for the accusation of RTI taking up 75% of time, I did the following calculation: By all accounts the total number of RTI applications in India is less than 10 million annually. The total number of all government employees is over 20 million. Assuming a 6 hour working

day for all employees for 250 working days it would be seen that there are 30000 million working hours. Even if an average of 3 hours is spent per RTI application 10 million applications would require 30 million hours, which is 0.1% of the total working hours. This means it would require 3.2% staff working for 3.2% of their time in furnishing information to citizens. This too could be reduced drastically if computerised working and automatic updating of information was done as specified in Section 4 of the RTI Act.

If Section 4 of the Act is properly implemented as envisaged in the law, the number of RTI applications would be less than 50% of the current level. The Supreme Court did not comment on the lack of Section 4 compliance by all public authorities but decided to pass unwarranted and unsubstantiated strictures against citizens using their fundamental right.

An extensive study done by Right to Information Assessment and Analysis Group [RAAG] led by the scholarly and respected Shekhar Singh, shows that –

- around 54% of the RTI applications sought information which should have been displayed suo moto by the public authorities under their obligations under Section 4;
- About 20% of the RTI applicants were asking for information which should have been provided to them without their ever having to file an application or even without using the RTI Act. These applicants were seeking acknowledgement or response to earlier, often long pending, missives, or seeking feedback about, or an update on an ongoing interaction with the public authority.

The Central Secretariat Manual of Office Procedures, (Thirteenth Edition, Ministry of Personnel, Public Grievances and Pensions, Department of Administrative Reforms and Public Grievances. September, 2010) mandates that proper replies to all communications from citizens should be sent within 30 days. Thus only 26% of the applications asked for information that was not required to be disclosed proactively, either publicly or privately to the applicants. It would have been appropriate if the Supreme Court had directed public authorities to do their duty as per the RTI Act instead of castigating citizens using their fundamental right as if they were interlopers or terrorists.

Judgment 2: Chief Information Commissioner Vs. State of Manipur AIR 2012 SC 864

The main issue before the Court: Whether the Information Commissioner can direct the disclosure of information when a complaint is made u/s 18 of the RTI Act.

The observations of the Court: Para 36: "*This Court accepts the argument of the appellant that any other construction would render the provision of Section 19(8) of the Act totally redundant. It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage."*

Para 37: " *We are of the view that Sections 18 and 19 of the Act serve two different purposes and lay down two different procedures and they provide two different remedies. One cannot be a substitute for the other."*

The Court held that: No information can be ordered to be given in complaints made u/s 18 of the RTI Act.

Our analysis of the judgment: The information which was sought by the applicant was regarding magisterial enquiries. A complaint was filed since no response was received. The Commission ordered information to be provided. A single judge of High Court upheld the Commission's order. This was challenged before a division bench, which held that in a complaint under Section 18 the Information Commission cannot pass an order to release information.

The Supreme Court adopted a literal interpretation of the RTI Act and refused to consider whether a purposive interpretation would have served the purpose of the Act better. This is in contrast to the Allahabad High Court judgement in AP 3262 (MB) of 2008 which said, '"We are also of the view that the Commission while enquiring into the complaint under Section 18, can issue necessary directions for supply/disclosure of the information asked for, in case the Commission is satisfied that the information has been wrongly withheld or has not been completely given or incorrect information has been given."

By this judgement an RTI applicant who files a complaint will have to file a separate appeal for the same matter to obtain information. If a PIO refuses to accept an RTI application the applicant will have to first go in a complaint to the Commission and perhaps get the PIO penalised if she is lucky. After this if the PIO takes her application but denies the information saying it is '*unrelated to transparency and accountability in*

the functioning of public authorities and eradication of corruption', she can be denied her fundamental right. She would then have to go through the first and second appeals for the information. The load on the Commissions has increased unnecessarily.

Judgment 3: Inst. Of Chartered Accountants Vs Shaunak H. Satya AIR 2011 SC 3336

The issue before the Court: (i) Whether the instructions and solutions to questions (if any) given by ICAI to examiners and moderators, are intellectual property of the ICAI, disclosure of which would harm the competitive position of third parties and therefore exempted under section 8(1)(d) of the RTI Act ?

(ii) Whether providing access to the information sought (that is instructions and solutions to questions issued by ICAI to examiners and moderators) would involve an infringement of the copyright and therefore the request for information is liable to be rejected under section 9 of the RTI Act?

(iii) Whether the instructions and solutions to questions are information made available to examiners and moderators in their fiduciary capacity and therefore exempted under section 8(1)(e) of the RTI Act?

The observations of the Court: The Court first held at para 12 that denial of information could not be justified under Section 8(1) (d). It also held at para 13 and 14 that denial could not be justified under Section 9. At para 16 and 17 it held that the information is exempt under Section 8 (1) (e):

Para 16**: "***The instructions and `solutions to questions' issued to the examiners and moderators in connection with evaluation of answer scripts, as noticed above, is the intellectual property of ICAI. These are made available by ICAI to the examiners and moderators to enable them to evaluate the answer scripts correctly and effectively, in a proper manner, to achieve uniformity and consistency in evaluation, as a large number of evaluators and moderators are engaged by ICAI in connection with the evaluation. The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information which ICAI gives to the examiners and moderators to achieve uniformity, consistency and exactness of evaluation of the answer scripts. When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a fiduciary relationship."*

Para 17**:** "*It should be noted that section 8(1)(e) uses the words "information available to a person in his fiduciary relationship". Significantly section 8(1)(e) does not use the words "information available to a public authority in its fiduciary relationship". The use of the words "person" shows that the holder of the information in a fiduciary relationship need not only be a `public authority' as the word `person' is of much wider import than the word `public authority'. Therefore the exemption under section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure undersection 8(1)(d) of RTI Act*."(appears to be a typing error and should be 8 (1)(e).

Our analysis of the judgment: ICAI contended that instructions to examiners and model answers cannot be disclosed since they were exempt. Commission denied the information but the High Court accepted the applicant's right to get the information. The apex court ruled out the applicability of Section 8 (1) (d) and Section 9. The Supreme Court then upheld the denial of Model answers by the examining body to the applicant holding it to be information held by ICAI in a fiduciary relationship.

It is interesting to note that in paras 23 and 26 in the CBSE case referred earlier the Supreme Court had stated that an examining body is not in a fiduciary relationship with the examiners or examinees. If an examining body is not holding information in a fiduciary relationship with examiners or examinees then it cannot deny it by contending that the model answers are held in a fiduciary capacity. The court has correctly ruled that the examiners, moderators and head-examiners hold the information in a fiduciary relationship. But that does not necessarily mean that the examining body holds the information in a fiduciary relationship as per its pronouncements in the CBSE case.

If a patient goes to a doctor and shares his information, the doctor holds the information in a fiduciary relationship. But there is never any expectation that the advice given by the doctor is held by the patient in a fiduciary capacity. It appears there is a logical fallacy, since the converse of any statement is not necessarily true.

Judgment 4: Khanpuram Gandaiah Vs. Administrative Officer AIR 2010 SC 615

The issue before the Court: The scope of the definition of "Information" contained in section 2(f) of the RTI Act.

The observations of the Court:

Para 6. *Under the RTI Act "information" is defined under Section 2(f) which provides*: "*information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.*

This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. Of course, under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions. A Judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a Judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the Judge had come to a particular decision or conclusion. A Judge is not bound to explain later on for what reasons he had come to such a conclusion."

The Court held that: No information could be given, as none existed.

Our analysis of the judgment: The denial was completely justified, as if no information existed on record, as per the judgement.

Judgment 5: CPIO, Supreme Court Vs. Subhash Chandra Agrwal (2011) 1 SCC 496. Case to be decided by Constitution Bench of the Supreme Court. The Constitution Bench is yet to be constituted.

The issue before the Court: Whereas the information sought pertains to the Appointment of Judges in the Apex Court itself, the court framed the following issues to be addressed,

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(1)(j) of the Right to Information Act?

The observations of the Court:

Para 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".*

Para 12: **"***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."

The Court held that: Registry to place this matter before Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength.

Our analysis of the judgment: The CIC, the single judge of Delhi High Court and division bench of Delhi High Court had given rulings against the PIO of the Supreme Court and ordered information to be provided. The Supreme Court violating the basic principle of natural justice,- that nobody can be judge in his own cause,- stayed these judgements in a writ before itself. It has held that a Constitution bench will hear this matter. Since 2010 no hearing has been held. No great harm would have come to the Supreme Court if it had displayed the wisdom of gracefully accepting the verdict of the CIC and the High Court and avoided making itself a judge in its own cause, who then does not decide the matter. It is unfortunate that the Supreme Court has not considered this matter to be important enough to be decided.

Judgments 6, 7, 8: Namit Sharma Vs. Union of India (2013) 1 SCC 745

The issue before the Court: The Constitutional validity of Sections 12(5), 12(6), 15(5) and 15(6) of RTI Act, were challenged, which deals with the appointment and qualifications of Information Commissioners.

The Court held that: The Court ruled that all Information Commissions must sit in benches of two, one of whom should be a retired judge and there should be transparency in the selection of Commissioners.

Our analysis of the judgment:
This judgement would have resulted in the effective disposal rates of all Commissions being reduced to less than 50% and possibly made it difficult for citizens to approach Commissions without lawyers. Its immediate impact was that many Commissions stopped working and backlogs which were already high became unmanageable. Presently the cost per decision of the Central Information Commission is about Rs.5000 to 7000 per decision. This would have doubled. Since the speed of disposals would have reduced to less than 50% citizens would have had to wait for years at the commissions. This would have made RTI irrelevant. The Apex Court by doing this, was in effect re-writing the RTI Act, which is otherwise the province of the Parliament.

Just see, how this petition was decided: (Taken from DOPT's affidavit for Review.)

Preliminary Hearing 11/7/2012 no respondent
Listed & Part heard 18/7/2012 no respondent
DOPT learnt on 18/7 about the petition; and briefed
the Additional Solicitor General (ASG);
ASG asked for time to file a counter affidavit.

19/7 /2012 Court said this was not necessary and ASG
should give his arguments.
ASG gave his verbal arguments and judgement
was reserved on19/7/2012
DOPT filed written submissions11/09/2012
Court's 107 page judgement allowing
writ issued on 13/09/2012

DOPT's anguished statement in the review petition: " T. *FOR THAT this Hon'ble Court, in the impugned judgment, has neither considered the oral arguments of the Petitioner herein, nor the Written Submissions filed by the Petitioner on 11.09.2012, putting forth the case of the Petitioner. The impugned judgment, at no place, records the submissions made by the counsel for the Petitioner when the matter was*

heard." The respondent, Union of India,-in the petition is mentioned only once in the 107 page judgement,- in the title. The entire judgement reads as if there is only a petitioner and the Court!

The judgement disrupted the working of some Information Commissions. If implemented it would have dropped the disposal rate to less than 50% since two Commissioners would have to sit together, one of whom would have to be a retired judge. Generally retired judges insist on lawyers arguing matters before them, whereas currently less than 1% of the appellants have a lawyer. This would have discouraged most ordinary citizens from approaching the Commission. The judgment appears to have been given without regard to the mandate of RTI law. If it had not been reviewed it would have damaged RTI permanently.

The order was partly stayed in judgment 7 and the main objectionable parts of the judgement which had been given were withdrawn. The revised judgment claimed that the direction of transparency in appointments was still in operation, but gave no meaningful directions. Consequently the appointment of Commissioners continues on the basis of arbitrariness and patronage.

The only change which has come is that the government spends money in conducting the farce of advertising the posts. After that the arbitrariness and patronage continue.

Judgment 9: Girish Ramchandra Deshpande Vs. Central Information Commission & Ors. (2013) 1 SCC 212

The issue before the Court: Whether the information pertaining to a Public Servant in respect of his service career and also the details of his assets and liabilities, movable and immovable properties, can be denied on the ground that the information sought for was qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act.

The observations of the Court:

"*12. The petitioner herein sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer and also details viz. movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he has also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income tax returns of the third respondent. The question that has come up for consideration is whether the above-mentioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1) of the RTI Act.*

13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

14. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information."

The Court held that: The Apex Court held that copies of all memos, show cause notices and orders of censure/punishment, assets, income tax returns, details of gifts received etc. by a public servant are personal information as defined in clause (j) of Section 8(1) of the RTI Act and hence exempted and cannot be furnished under RTI Act.

Our analysis of the judgment: The judgement has expanded the scope of Section 8 (1) (j) far beyond its wording, without any discussion or interpretation of the law whatsoever. The only justification given for denial is that the Court agrees with the decision of the CIC. The Court mentions," The performance of an employee/officer in an organization is primarily a matter between the employee and the employer", forgetting that the employer is 'we the people' who gave ourselves the constitution.

Section 8 (1) (j) exempts *"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:*

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

The Supreme Court has missed realising that the exemption applies to personal information only if it has no relationship to any public activity or is an unwarranted invasion on the privacy of an individual. The court has not even quoted the important proviso. Effectively the court has read Section 8(1) (j) as:

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:

~~*Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."*~~

Forty seven words out of the eighty seven words have not been considered and the important proviso has not even been mentioned in the judgment. The clear intent of Section 8 (1) (j) is to ensure that if some record is held by the public authority which has no relationship to

any public activity it is exempted from disclosure. Even if it is a public record and disclosure would be an unwarranted invasion of the privacy of an individual, this should not be given. The proviso provides an acid test and before refusing information under Section 8 (1) (j) a subjective assessment has to be made whether it would have been denied to Parliament or State Legislature.

The aforesaid judgment clearly appears to be contrary to the following two judgements of the Supreme Court:

1. ***R Rajagopal and Anr. v state of Tamil Nadu*** **(1994), SC**

The ratio of this judgement was:

"*28. We may now summarise the broad principles flowing from the above discussion:*

(1) the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone." A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages Position may, however be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interest of decency (Article 19(2)) an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offense should not further be subjected to the indignity of her name and the incident being published in press/media.

(3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties."

Public record as defined in the Public Records Act is any record held by any Government office. This judgement at point 2 clearly states that for

information in public records, the right to privacy can be claimed only in rare cases. This is similar to the proposition in Section 8 (1) (j) which does not exempt personal information which has relationship to public activity or interest. It also talks of certain kinds of personal information not being disclosed which has been covered in the Act by exempting disclosure of personal information which would be an unwarranted invasion on the privacy of an individual. At point 3 it categorically emphasizes that for public officials the right to privacy cannot be claimed with respect to their acts and conduct relevant to the discharge of their official duties.

Privacy is to do with matters within a home, a person's body, sexual preferences etc as mentioned in the apex court's earlier decisions in Kharak Singh and R.Rajagopal cases. This is in line with Article 19 (2) which mentions placing restrictions on Article 19 (1) (a) in the interest of 'decency or morality'. If however it is felt that the information is not the result of any public activity, or disclosing it would be an unwarranted invasion on the privacy of an individual, it must be subjected to the acid test of the proviso: *Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.*

The proviso is meant as a test which must be applied before denying information claiming exemption under Section 8 (1) (j). Public servants have been used to answering questions raised in Parliament and the Legislature. It is difficult for them to develop the attitude of answering demands for information from citizens. Hence before denying personal information, the law has given an acid test: Would they would give this information to the elected representatives. If they come to the subjective assessment, that they would provide the information to MPs and MLAs they will have to provide it to citizens, since the MPs and MLAs derive legitimacy from the citizens.

Another perspective is that personal information is to be denied to citizens based on the presumption that disclosure would cause harm to some interest of an individual. If however the information can be given to legislature it means the likely harm is not much of a threat since what is given to legislature will be in public domain. It is worth remembering that the first draft of the bill which had been presented to the parliament in December 2004 had the provision as Section 8 (2) and stated: (2) Information which cannot be denied to Parliament or Legislature of a State, as the case may be, shall not be denied to any person. In the final draft passed by parliament in May 2005, this section was put as a proviso only for section 8 (1) (j). Thus it was a conscious choice of parliament to have this as a proviso only for Section 8 (1) (j). It is necessary that when information is denied based on the provision of Section 8 (1) (j), the person denying the information must give his subjective assessment whether it would be denied to Parliament or State

legislature if sought.

The Girish Deshpande judgement is clearly contrary to the earlier judgement, since it accepts the claim of privacy for Public servants for matters relating to public activity which are on Public records.

2. **The Supreme Court judgement in the ADR/PUCL case** [(2002) 5 SCC 294] had clearly laid down that citizens have a right to know about the assets of those who want to be Public servants (stand for elections). It should be obvious that if citizens have a right to know about the assets of those who want to become Public servants, their right to get information about those who are Public servants cannot be lesser. This would be tantamount to arguing that a prospective groom must declare certain matters to his wife-to-be, but after marriage the same category of information need not be disclosed!

When quoting Section 8 (1) (j) the Court has forgotten to mention the important proviso to this Section which stipulates, 'Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.' The Supreme Court did not even mention this in its judgement when quoting section 8 (1) (j) and has not considered it. If this proviso was quoted the Court would have had to record that in its opinion the said information would be denied to Parliament. The Court forgot its ruling in CIVIL APPEAL NOs.10787-10788 OF 2011 (Arising out of S.L.P(C) (judgement 2 above) at para 36: " It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage."

Bihar Government, Gujarat government, Municipal Corporation of Mumbai and many others had displayed the assets of all the officials on their website. The decision of the Supreme Court will reverse the transparency march and constrict Right to Information. It appears that the Court has not taken into account the two earlier judgements mentioned above, and the important proviso to Section 8 (1) (j) and hence the decision in Girish Deshpande's case may be *per incuriam*.

Besides, there does not appear to any *'ratio decidendi'* in this judgement, that is to say, the judgment does not spells out any reason for the conclusion it reached. Hence this judgement cannot be a precedent. Unfortunately this judgment has resulted in most information about public officials being denied including that regarding their work.
Consequently arbitrary favours by Public servants and their corruption has been obscured from the eyes of the public. Maharashtra government has issued a circular based on this judgement in which it instructs that all personal information of public servants must be refused because of the Girish Deshpande judgement. It is worth recording that the main ground for the judgement is agreement with the CIC decision. A perusal

of the CIC decision also does not display any proper reasoning but is based on an earlier decision by a bench of the Commission. The bench decision which was relied on by CIC, did not even relate to information about a public servant! Besides the said CIC decision in the matter of Milap Choraria vs. CBDT did not analyse Section 8 (1) (j) fully, and grossly misinterpreted Section 11. Many High Court judgments and one by the Supreme Court have declared that 'personal information' cannot be given, unless a larger public interest is shown. It has become very popular with PIOs, First appellate authorities and Information Commissioner's to deny most information relating to public servants. In the opinion of the Authors this judgment is not in consonance with the law and earlier Supreme Court judgments. It has created a exemption not in the law. This results in a constriction of the citizen's fundamental right and the law's objective of curbing corruption and wrong doings is defeated.

It is worth remembering two judgments of the Supreme Court. A five judge bench has ruled in P. Ramachandra Rao v. State of Karnataka case no. appeal (crl.) 535.: "Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature"

In Rajiv Singh Dalal (Dr.) Vs. Chaudhari Devilal University, Sirsa and another (2008), the Supreme Court, after referring to its earlier decisions, has observed as follows. "The decision of a Court is a precedent, if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent."

The Girish Ramchandra Deshpande appears to have no ratio, nor does it lay down any principle with reasons. It has not considered the R. Rajagopal and ADR/PUCL judgments. Hence it should not considered as a precedent. But it has become the law, since everyone in power finds it convenient. This violates the RTI Act and is constricting the citizen's fundamental right far beyond what even the constitution permits.

Judgment 10: Manohar s/o Manikrao Anchule vs. State of Maharashtra AIR 2013 SC 681

The issue before the Court: It was a case where disciplinary action had been recommended against the PIO under Section 20 (2) of the Act by the Information Commission.

The observations of the Court: Para 11. *The impugned orders do not take the basic facts of the case into consideration that after a short duration the appellant was transferred from the post in question and had acted upon the application seeking information within the prescribed time. Thus, no default, much less a negligence, was attributable to the appellant.*

12. Despite service, nobody appeared on behalf of the State Information Commission. The State filed no counter affidavit."

The Court held that: The Commission's order recommending disciplinary action against the PIO under Section 20 (2) of the Act, was quashed and set aside.

Our analysis of the judgment: The Supreme Court having regard to the factual matrix of the case, set aside the decision of the Commission and the High Court. Can this be a legitimate exercise in SLP jurisdiction or in Writ jurisdiction by High Courts ?

The eleven judge bench of the Supreme Court in Hari Vishnu Kamath v. Ahmad Ishaque 1955-IS 1104 : ((S) AIR 1955 SC 233) has laid down that –

(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the

provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."

The RTI Act does not have any provision for an appeal beyond the Commission as per Section 23. The Writ jurisdiction being a Constitutional remedy, may be resorted only in cases as set out hereinbefore in Hari Vishnu Kamath's case. If the Order of the Commission does not fall into any of the 4 criterion stated in the aforesaid ruling, the High Courts and the Apex Court should not exercise their Writ or SLP jurisdiction.

The judgment of the Supreme Court is based on its own assessment of the "facts of the case" which is not consistent with the decision in aforesaid Hari Vishnu Kamath and also series of rulings of the Apex Court, wherein it is held that, in SLP jurisdiction the Apex Court would not interfere in finding of facts, unless perversity in finding of fact is demonstrated. In the present case, there is no finding by the Apex Court that findings of the Commission was perverse or irrational. It appears the court has treated this is an appeal, for which it has no jurisdiction.

Judgment 11: Bihar Public Service Commission Vs. Saiyad Hussain Abbas Rizvi JT 2012 (12) SC 552

The main issue before the Court: The applicant had asked for names and addresses of interviewers in an interview board selecting candidates for Bihar government jobs.

The Court held that: the Commission is not bound to disclose the information asked for by the applicant under Query No.1 of the application.

Our analysis of the judgment: The applicant had in 2008 sought the names and addresses of persons who had conducted interviews for Bihar Public Service Commission (BPSC) in 2002. This was denied claiming exemption on grounds of Section 8 (1) (j). The State Commission had upheld the denial and the matter was finally contested in the Division Bench of the High Court. The Division Bench upheld the contention of the applicant and ordered the names of the interviewers to be provided.

Commonwealth Human Rights Initiative (CHRI) has done a very detailed and well-argued analysis[4] of this matter from which some parts are being reproduced below:

"2.1 The Special Leave Petition (SLP) was admitted in March, 2012 and a two-judge bench of the Supreme Court (the Court) comprising of Justice A K Patnaik and Justice Swatanter Kumar decided the matter within nine months. The Court allowed the appeal and set aside the judgement of the Division Bench. Writing the judgement for the Court, Justice Swatanter Kumar held that BPSC was not bound to disclose any information beyond what was provided already. A summary of the Court's reasoning is provided below:

(i) BPSC had relied heavily on Section 8 (1) (j) of the RTI Act while rejecting the request for names and addresses and also during the proceedings before the Bihar State Information Commission and the Patna High Court. [1]Though BPSC claimed the protection of Section 8 (1) (j) in its petition, it did not press this point during the hearings before the Court. Therefore the Court did not go into the correctness of the Division Bench's judgement about this line of reasoning.

(ii) BPSC changed track and claimed that the names and addresses of the subject experts could not be disclosed as it was entitled to the protection of both Section 8 (1) (e) and Section 8 (1) (g) of the RTI Act. The Court rejected the claim to Section 8 (1) (e) in light of the principles

[4] http://www.humanrightsinitiative.org/

governing a fiduciary relationship recognised by the Court in an earlier RTI-related matter. The Court ruled that there was no fiduciary relationship between BPSC and the interviewers (subject experts) or the candidates interviewed.

(iii) The Court upheld BPSC's claim of Section 8 (1) (g) of the RTI Act by linking it to Article 21 of the Constitution which guarantees protection for life and liberty of a person. It reasoned that the members of the Board are likely to be exposed to danger to their lives or physical safety if their names and addresses are disclosed. *"The disclosure of names and addresses of the members of the interview Board would ex facie endanger their lives or physical safety. The possibility of a failed candidate attempting to take revenge from such persons cannot be ruled out,"* the Court held.

(iv) The Court gave two more reasons for rejecting the request for names and addresses. First, it held that the disclosure of names and addresses of examiners would hamper effective performance and the discharge of their duties. Second, it held that disclosure would serve no fruitful much less any public purpose. The Division Bench of the High Court had earlier rejected the contention of the PIO about applicability of Section 8 (1) (g) by stating:

"*13. ... In the present case, the names of the interviewers cannot be denied for various reasons. The interviewers are visible to the candidates while the interview is being held. They have public egress and ingress to the venue of the interview…*

14. To make a comparison with the court/judicial proceedings, vis-à-vis an interview; Court proceeding is open and the names of the Judges who are hearing the matter are known to all the parties. When court proceedings can be held in broad daylight and the names of the judges are known to all the parties, why not the names of interviewers be disclosed to the applicant."

As nothing in the BPSC judgement indicates that the Court weighed and measured this line of reasoning of the Division Bench, before dismissing it, in our humble opinion, it is difficult to accept the rationale for rejection.

(iii) Third, the Division Bench clearly pointed out that denying information about interviewers could defeat the very purpose of the Act in the following manner:
"13. …It is a possible situation that the applicant may have reasons for suspicion that a particular interviewer was on the interview board and his close relation was appearing. Such determination cannot be made

unless the names of the interviewer and the candidate who appeared are disclosed. If he denies this information, it would be defeating the aims and objects, the preamble, and the legislative intent of the Act. We cannot countenance such an obstruction to such a laudable Act which is intended to bring about transparency in governance, and root out corruption, in this country. The Judgment of the Supreme Court in the case of A.K. Kraipak and others vs.Union of India and others (A.I.R. 1970 S.C. 150) is an appropriate example to show that one of the members of the Board was himself a candidate for promotion from the State cadre to the Central cadre of Indian Forest Service. If we prohibit the information which the applicant is seeking to obtain, the misdeed as had taken place in A.K. Kraipak vs. Union of India (supra), may not be set at naught."

The Division Bench was clearly referring to potential conflicts of interests that may be identified if the names of the interviewers were disclosed. If not, they would remain hidden under a cloak of secrecy. It is respectfully submitted that instead of weighing and measuring this line of reasoning which is based on a very real case adjudicated by the Court earlier (amounting to material facts justifying the disclosure of names), the Court has rejected it by holding that preventing bias in the selection process cannot be a ground for denying BPSC the protection of Section 8 (1) (g). In our humble opinion the Court has not adequately appreciated the reasoning of the Division Bench which by ordering disclosure sought to uphold the very public interests mentioned in the Preamble of the RTI Act, viz., 'bringing about transparency in governance' and 'containing corruption'.

(iv) Fourth, nowhere in its judgement does the Court recognise that the Division Bench had refused to order disclosure of the addresses of the interviewers."

It sounds highly improbable that a candidate, who was not selected in an interview in 2002, would seek the names of the interviewers in 2008 and pursue the matter in the Supreme Court with the intention of physically harming the interviewers. Imagination is being stretched too far if it is assumed that the unsuccessful candidate would harm the interviewers after 6 years. The Division Bench of the High Court had come to a very reasonable conclusion that most probably the attempt was to expose nepotism in the selection process. The Supreme Court ruling has led to a situation where the denial of information under Section 8 (1) (g) has been done by thinking of a remote highly unlikely probability to deny information. A PIO has to merely imagine the probability of some likely harm to deny information. A mere apprehension that some interest may be affected has been dubbed to be adequate to deny information. This decision makes it difficult for citizens to expose corruption and

favouritism. Besides it opens the possibility to imagine new ways to deny information by conjuring even a highly improbable harm.

Many High Court decisions including the Bhagat Singh case quoted earlier stated that the harm to a protected interest must be a reasonable possibility, not a distant probability. This approach of the apex court of thinking of a remote possibility to apply the exemption is becoming a haven for denying information to the citizens.

Judgment 12: R.K. Jain Vs. Union of India JT 2013 (10) SC 430

The issue before the Court: The information requested was inspection of adverse confidential remarks against 'integrity' of a member of Tribunal and follow up actions taken on issue of integrity. Exemption was claimed on the basis of Section 8 (1) (j).

The Court held that: Inter alia relying upon the ruling made in Girish Ramchandra Deshpande case, the information is exempted from disclosure under Section 8 (1) (j). read with section 11 of the RTI Act.

Para 13*".... Under Section 11(1), if the information relates to or has been supplied by a third party and has been treated as confidential by the third party, and if the Central Public Information Officer or a State Public Information Officer intends to disclose any such information or record on a request made under the Act, in such case after written notice to the third party of the request, the Officer may disclose the information, if the third party agrees to such request or if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party*."

Our analysis of the judgment: Section 11 (1) is quoted hereunder:

SECTION 11: Third-party information: (1) "Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party." (emphasis supplied by us)

The Supreme Court appears to have given an interpretation to Section 11 which does not appear to be justified by the words of the Act.

Section 11 is not an exemption but only a procedural provision to safeguard the interests of the third party. The Court's statement above implies that if third party objects to the disclosure of information, it can only be given if there is a larger public interest in disclosure.

It may clearly be understood that denial of information in RTI Act can only be done under Section 8 or 9 as clearly mentioned in Section 7 (1).

In Section 8 (1) the need to show a larger public interest arises only when an exemption under Section 8 (1) applies. The Act states that when a PIO 'intends to disclose' information regarding third party which third party has treated as confidential, he shall intimate the third party that he intends to disclose the information. The PIO can only decide to disclose the information if he comes to the conclusion that it is not exempt.

The law states that 'submission of the third party shall be kept in view while taking a decision about disclosure of information'. The PIO can only deny information as per the provisions of the exemptions of Section 8 (1) or 9. The RTI Act does not give veto power to the third party, but provides it with an opportunity to raise his legitimate objections, and if the PIO is convinced that the information is exempt, he may change his earlier decision to disclose by denying the information as per the provision of Section 8 (1) or Section 9.

In case the PIO does not agree that the information is exempt, he should decide to disclose the information and reject the third party's objection. In such an event the concerned third party may prefer an Appeal against the decision of the PIO, as per the provisions of Section 11 (2) to 11 (4). These express provisions 11(2) to 11(4) make it clear that the third party is not rendered remediless, in cases where PIO disagrees with the third party's objection in disclosure of information. Section 7 (1) of the RTI Act clearly states that denial of information can only be based on Section 8 or 9. Section 3 states that 'Subject to the provisions of this Act, all citizens shall have the Right to Information.' Thus the denial of any information can only be on the basis of the RTI Act where only Section 8 and 9 detail the information which can be denied. The Court has raised the procedure of Section 11 to that of an exemption of Section 8 (1). This judgement is an erroneous reading of Section 11.

Information was denied, partly depending on Girish Deshpande judgement where there was no *ratio decidendi*, and a flawed interpretation of Section 11. It also does not address the earlier R. Rajagopal judgment.

Judgment 13: Karnataka Information Commissioner Vs. PIO (HC) Unreported Judgment

About the case: A RTI applicant requested the Karnataka High Court for certified copies of some information/documents regarding guidelines and rules pertaining to scrutiny and classification of writ petitions and the procedure followed by the Karnataka High Court in respect of Writ Petition Nos.26657 of 2004 and 17935 of 2006. The PIO refused the information on the grounds that the applicant should seek the information under the Karnataka High Court rules. When the matter went to the State Information Commission it disagreed with the PIO and ordered the information to be provided under the RTI Act.

The Commission's order was challenged by the PIO in the Karnataka High Court which named the applicant as a respondent in the case and the Karnataka High Court set aside the Commission's order.

The Commission challenged this order before the Supreme Court and the petition was filed by an Information Commissioner. The Court took offense to the petition being filed by an Information Commissioner and said that the Commission and Commissioner have no *locus standi* and were wasting public money by challenging the order. In a harsh snub it imposed a cost of Rs. 100000 on the Commission.

Our analysis of the judgement: It is worth mentioning that the Supreme Court itself had accepted the Chief Information Commissioner (Manipur) in judgement 2 hereinbefore as the Petitioner. Many High Courts name the Commission as party in many petitions which challenge the decision of an Information Commission. Hence the Supreme Court taking umbrage at the commission approaching it as a petitioner does not appear to be correct. More importantly, the important matter of Section 22 which gives an overriding effect to the RTI Act, was not addressed at all, and was brushed aside. This harsh snub by the Supreme Court has silenced the Information Commissions into not questioning the Courts, but becoming intellectually subservient to them. If the apex court snubs statutory authorities in such a manner it harms the rule of law, since such authorities suffer loss of respect which they require to enforce the law.

Section 22 states that *"the provisions of this RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act"*. In other words, where there is any inconsistency in a law as regards furnishing of information, such law shall be superseded by the RTI Act. Insertion of a non-obstante clause in Section 22 of the RTI Act

was to safeguard the citizens' fundamental right to information from convoluted interpretations of other laws and rules adopted by public authorities to deny information. This section simplifies the process of implementing the right to information both for citizens as well as the PIO. Citizens may seek to enforce their fundamental right to information by invoking the provisions of the RTI Act if they desire to. By its order in the case of the Karnataka Commission, the Supreme Court, without addressing the provision of Section 22, sanctified and legitimized denial of information under Right to Information, if any public authority claims there are any other rules for giving information. This ruling has neutralised Section 22 of the RTI Act without any proper reasoning or discussion.

Besides it appears to be contrary to the Supreme Court's pronouncement at para 18 in the CBSE Vs. Aditya Bandopadhyay case quoted above where it had held, ""*Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations."* Surely the rules of the Court cannot be treated differently.

Judgment 14: Thalappalam Ser. Coop Bank Vs. State of Kerala (2013) 16 SCC 82

The issue before the Court: Whether a co-operative society falls within the definition of "public Authority" under Section 2(h) of the RTI Act and be bound by the obligations to provide information sought for by a citizen under the RTI Act.

The observations of the Court:
Para 37: "*We often use the expressions "questions of law" and "substantial questions of law" and explain that any question of law affecting the right of parties would not by itself be a substantial question of law. In* ***Black's Law Dictionary(6th Edn.)****, the word 'substantial' is defined as 'of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real: not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.' The word 'substantially' has been defined to mean 'essentially; without material qualification; in the main; in substance; materially.' In the Shorter Oxford English Dictionary (5th Edn.), the word 'substantial' means 'of ample or considerable amount of size; sizeable, fairly large; having solid worth or value, of real significance; sold; weighty; important, worthwhile; of an act, measure etc. having force or effect, effective, thorough.' The word 'substantially' has been defined to mean 'in substance; as a substantial thing or being; essentially, intrinsically.' Therefore the word 'substantial' is not synonymous with 'dominant' or 'majority'. It is closer to 'material' or 'important' or 'of considerable value.' 'Substantially' is closer to 'essentially'. Both words can signify varying degrees depending on the context.*

Para 38. "*Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist. The State may also float many schemes generally for the betterment and welfare of the* cooperative *sector like deposit guarantee scheme, scheme of assistance from NABARD etc., but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body within the fold of "public authority" under Section 2(h)(d)(i) of the Act."*

The Court held that: Cooperative Societies registered under the Kerala Co-operative Societies Act will not fall within the definition of "public Authority" as defined under Section 2(h) of the RTI Act unless they are

substantially financed. The Court ruled that Cooperative Societies are not Public authorities covered in RTI unless they are substantially financed. It defined the word substantial finance thus:

The Court after looking at the various dictionary meanings-'material', 'important', 'of considerable value', 'not illusive' decided that it means essential only, when it says, *'Substantially' is closer to 'essentially'* .

It further said at para 38. "*Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist. The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from NABARD etc., but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body within the fold of "public authority" under Section 2(h)(d)(i) of the Act. But, there are instances, where private educational institutions getting ninety five per cent grant-in-aid from the appropriate government, may answer the definition of public authority under Section 2 (h)(d)(i)"*

Effectively this states that the finance must be essential to its functioning that it would struggle to exist without it.

No Information provided.

Our analysis of the judgment:
The conclusion of the court that cooperative societies are not public authorities unless they are substantially financed is correct. However in defining the phrase 'substantial finance' it appears to have narrowed the scope of the RTI act by claiming that 'substantial finance' means 'essential' finance without which the body would struggle to exist.

Thus even if a NGO or private body receives 100 crores annually it may not be deemed to be substantially financed if its total budget is around 500 crores and it argues that the amount from the Government is not essential for its working. The Court did not choose the words 'material, important, of considerable value, not illusive' which would have expanded the scope of the Act. Whereas its ruling that a Cooperative society does not automatically become a public authority appears right, its ruling on the words 'substantial finance' appears to constrict the ambit of the law, far more than what it should.

Judgment 15: Union Public Service Commission Vs. Gourhari Kamila (2014) 13 SCC 653

Issue before the Court: The applicant had sought the following information for an Interview conducted by UPSC which had been denied:

a) How many years of experience in the relevant field (Analytical methods and research in the field of Ballistics) mentioned in the advertisement have been considered for the short listing of the candidates for the interview held for the date on 16.3.2010?

b)Kindly provide the certified xerox copies of experience certificates of all the candidates called for the interview on 16.3.2010 who have claimed the experience in the relevant field as per records available in the UPSC and as mentioned by the candidates at Sl.No.10(B) of Part-I of their application who are called for the interview held on 16.3.2010.

The CIC decided in favour of disclosure and asked UPSC to disclose the information. UPSC challenged this order and the single judge and the division bench of the High Court dismissed UPSC's petition.

The Apex Court quoted the earlier order of CBSE (Judgement 1) as follows:

"We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body."

And again at para 27: *"We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Nor being information available to an examining body in its fiduciary relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books."*

The Court held that:

"By applying the ratio of the aforesaid judgment, *(CBSE case)* we hold that the CIC committed a serious illegality by directing the Commission to disclose the information sought by the respondent at point Nos. 4 and 5 and the High Court committed an error by approving his order."

Our analysis of the judgment:

In para 23 in the CBSE judgement the Supreme Court had held: *"It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body."*

In the CBSE judgement the Supreme Court had clearly come to the conclusion that it cannot be said that the examining body is in a fiduciary relationship with the examinee. After this the Court had made an assumption to examine that even if it were held in a fiduciary relationship it should still be disclosed. It said: "*24. We may next consider whether an examining body would be entitled to claim exemption under section 8(1)(e) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee."* In this case a clear finding that there was no fiduciary relationship has been turned upside down to give it a contrary meaning. It is not clear why the court made such an assumption in the CBSE case. But in this UPSC case the assumption made in the earlier case by the court has been taken as a ratio and the actual finding junked!

Judgment 16: Reserve Bank of India Vs. Jaynatilal N. Mistry & Ors. (2016) 3 SCC 525

This is a landmark judgement given by Apex Court on 16 December, 2015 and it must be included since it is the first clear pro-transparency judgement after the advent of the RTI Act.

A bench of Justice M.Y. Eqbal and C. Nagappan delivered the most significant judgment on the law and laid down standards of transparency in line with the letter and spirit of the RTI Act. The apex court was hearing a batch of transferred petitions filed by various financial institutions and Banks against eleven decisions[2] of the Central Information Commission. Since the issues were similar the eleven cases were transferred from the Bombay and Delhi High Courts to the Supreme Court. Eight had been filed by RBI, two by NABARD and one was filed by ICICI Bank.

As per the RTI Act denial of information is permitted only if it falls in the ambit of Section 8 of the Act, or providing the information infringes copyright. A few organizations which are security and intelligence agencies specifically mentioned in the second schedule to the Act are completely exempted, unless the information sought relates to corruption or human rights violations. The Act is complete by itself and to obviate the possibility of any laws circumscribing this fundamental right of citizens, Section 22 states: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act." Insertion of a *non- obstante* clause in Section 22 of the RTI Act was a conscious choice of the Parliament to safeguard the citizens' fundamental right to information from convoluted interpretations of other laws adopted by public authorities to deny information. The presence of Section 22 of the RTI Act simplifies the process of implementing the right to information both for citizens as well as the PIO; citizens may seek to enforce their fundamental right to information by simply invoking the provisions of the RTI Act.

To understand this, two scenarios may be envisaged:

1. **The existence of an earlier law/ rule whose provisions pertain to furnishing of information and is consistent with the RTI Act:** Since there is no inconsistency between the law/ rule and the

[2] Ten of these decisions had been given by this writer as a Central Information Commissioner. One of the typical decisions was http://www.rti.india.gov.in/cic_decisions/CIC_SM_A_2011_001487_SG_15434_M_69675.pdf

provisions of the RTI Act, the citizen is at liberty to choose whether she will seek information in accordance with the said law/ rule or under the RTI Act. If the PIO has received a request for information under the RTI Act, the information shall be provided to the citizen as per the provisions of the RTI Act and any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only; and

2. **An earlier law/ rule whose provisions pertain to furnishing of information but is inconsistent with the RTI Act:** Where there is inconsistency between the law/rule and the RTI Act in terms of access to information, then Section 22 of the RTI Act lays down that it shall override the said law/ rule and the PIO would be required to furnish the information as per the RTI Act only.

The Supreme Court has reinforced the correct position of the law.

Section 8 of the RTI Act, which details information which can be denied states:

8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(i) 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:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interests in disclosure outweigh the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or

matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

The main points of information which were being denied in the matters before the court were:

1. Investigations and audit reports of banks by RBI
2. Warning or Advisory issued to Bank.
3. Minutes of meetings of governing board and directors
4. Details of Top defaulters.
5. Grading of banks

In the instant case one of the grounds for denial was that information could not be disclosed as per the Banking Regulations Act. The other grounds on which refusal of information was justified was on the basis of Section 8(1) and the fact that the impugned judgments issued by a single member bench of the commission had disagreed with an earlier full bench decision taken by a four member bench. The single member bench had held the earlier decision *per incuriam*. It was argued by RBI that the single member bench was bound to follow the earlier decision of the full bench.

RBI had claimed exemption under Section 8(1)(a), (d) and (e) of the RTI Act and also argued that there was no larger public interest in disclosure and hence did not fulfil the requirement of Section 8(2). It had claimed that the economic interests of the state would be adversely affected by disclosure. It was also stated that the commercial interests of the banks would be affected. The most insistent claim for exemption was that the information was held by RBI and NABARD in a fiduciary relationship.

The Apex court did not accept any of these grounds. It held in para 43: "The submission of the RBI that exceptions be carved out of the RTI Act regime in order to accommodate provisions of RBI Act and Banking Regulation Act is clearly misconceived. RTI Act, 2005 contains a clear provision (Section 22) by virtue of which it overrides all other Acts including Official Secrets Act. Thus, notwithstanding anything to the contrary contained in any other law like RBI Act or Banking Regulation Act, the RTI Act, 2005 shall prevail insofar as transparency and access to information is concerned." There have been

many instances of PIOs,- including those of High Courts,- insisting that they will give information only on the basis of their regulations or earlier laws. This has now been settled the Supreme Court.

The Supreme Court has recorded the contention of RBI that the single member bench could not have given a ruling contrary to that of a four member full bench of the commission. It has however upheld the decision of the single member bench since the commissioner had given logical reasons to show how the full bench decision was *per incuriam*. This opens the way for information commissioners to interpret the law as per its letter and intent, instead of being tied down by earlier decisions given in ignorance of the law, provided a proper reasoning is given.

On RBIs contention that disclosure would harm the nation's economic interest the court upheld the commission's ruling and echoed in para 61: "The baseless and unsubstantiated argument of the RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order, the CIC has given several reasons to state why the disclosure of the information sought by the respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless."

A claim is often made that information given to regulators and statutory authorities in discharge of statutory obligations is held in a fiduciary relationship and hence is exempt as per Section 8 (1)(e) of the Act. The information commission had rejected this claim on the ground that information provided in discharge of statutory requirements cannot be considered as being held in a fiduciary relationship. The Supreme Court has reinforced this by stating in paragraph 62: *"where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship. As in the instant case, the financial institutions have an obligation to provide all the information to the RBI and such information shared under an obligation/ duty cannot be considered to come under the purview of being shared in fiduciary relationship."*

The Court has taken note of the obstructionist and secrecy wedded PIOs response to RTI applications. It has expressed its strong disapproval of denying the citizen's fundamental right in paragraph 64: *"it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions*

given under Section 8 of RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to". This should serve as a warning and wake up call to all PIOs, First appellate authorities and information commissioners. If information commissioners penalize PIOs who are using every innovative pretext to deny information, it would reduce the unhealthy practices being adopted to deny information.

This is a landmark judgment and all those responsible for implementing the RTI Act must imbibe the letter and spirit of this. A very heartening impact of this judgment was seen within a fortnight when Mr. Raghuram Rajan the then RBI Governor in his New Year message to bank officers for the year 2016 said: "It has often been said that India is a weak state. Not only are we accused of not having the administrative capacity of ferreting out wrong doing, we do not punish the wrong-doer – unless he is small and weak. This belief feeds on itself. No one wants to go after the rich and well-connected wrong-doer, which means they get away with even more. If we are to have strong sustainable growth, this culture of impunity should stop. Importantly, this does not mean being against riches or business, as some would like to portray, but being against wrong-doing. …... there is a sense that we do not enforce compliance. Are we allowing regulated entities to get away year after year with poor practices even though these are noted during inspections/scrutinies? Should we become more intolerant of sloppy practices at regulated entities, so that these do not result in massive scams years later? Should we haul up accountants who do not flag issues they should detect? My sense is that we need a continuing conversation about tightening both detection as well as penalties for non-compliance throughout the hierarchy….. Finally, we are embedded in a changing community. What was OK in the past is no longer all right when the public demands transparency and better governance from public organisations. …. Transparency and good governance are ways to protect ourselves from roving enquiries – everyone should recognise that an effective regulator has enemies, and like Caesar's wife, should be above all suspicion." However within three months RBI started playing a different tune and again refusing information which latter RTI applications sought on the same matter.

The Supreme Court has given a clear unambiguous judgment on the RTI Act specifically with respect to Section 8 (1) (a), (e) and section 22 of the Act. It has castigated those who deny information by using Section 8 (1) without justification. The then Governor of RBI has also responded positively and the writer has confirmation that information has been provided as per the CIC orders. We should build on this to bring transparent and accountable governance for our nation. RBI is no

longer willing to abide by the judgment and a contempt petition has been filed against it. It is unfortunate that RBI is taking an arrogant position on transparency and has now come up with a Non-Disclosure policy which they are labeling as a ‘Disclosure Policy’.

Judgment No.17 - Kerala Public Service Commission Versus State Information Commission AIR 2016 SC 711

Issue before the Court:

In this case the question which arose was whether respondents are entitled to the scanned copies of their answer sheet, tabulation-sheet containing interview marks; and if they are entitled to know the names of the examiners who have evaluated the answer sheet.

Observation of Kerala High Court justifying the disclosure of identity of examiners

Para 7:

17. We shall now examine the next contention of PSC that there is a fiduciary relationship between it and the examiners and as a consequence, it is eligible to claim protection from disclosure, except with the sanction of the competent authority, as regards the identity of the examiners as also the materials that were subjected to the examination. We have already approved TREESA and the different precedents and commentaries relied on therein as regards the concept of fiduciary relationship. We are in full agreement with the law laid by the Division Bench of this Court in Centre of Earth Science Studies (supra), that S.8 (1)(e) deals with information available with the person in his fiduciary relationship with another; that information under this head is nothing but information in trust, which, but for the relationship would not have been conveyed or known to the person concerned. What is it that the PSC holds in trust for the examiners? Nothing. At the best, it could be pointed out that the identity of the examiners has to be insulated from public gaze, having regard to issues relatable to vulnerability and exposure to corruption if the identities of the examiners are disclosed in advance. But, at any rate, such issues would go to oblivion after the conclusion of the evaluation of the answer scripts and the publication of the results. Therefore, it would not be in public interest to hold that there could be a continued secrecy even as regards the identity of the examiners. Access to such information, including as to the identity of the examiners, after the examination and evaluation process are over, cannot be shied off under any law or avowed principle of privacy.

Important observations of the Apex Court

In so far as disclosure as to information about the information of answer sheets and details of the interview marks, the observations of the Apex Court are as under

Para 6: So far as the information sought for by the respondents with regard to the supply of scanned copies of his answer-sheet of the written test, copy of the tabulation sheet and other information, we are of the opinion that the view taken in the impugned judgment with regard to the disclosure of these information, do not suffer from error of law and the same is fully justified.

In so far as disclosure of names of examiners are concerned the observations of the Apex Court are as under

Para 7: The view taken by the Kerala High Court holding that no fiduciary relationship exists between the University and the Commission and the examiners appointed by them cannot be sustained in law.

Para 8: We do not find any substance in the reasoning given by the Kerala High Court on the question of disclosure of names of the examiners.

Para 9: In the present case, the PSC has taken upon itself in appointing the examiners to evaluate the answer papers and as such, the PSC and examiners stand in a principal-agent relationship. Here the PSC in the shoes of a Principal has entrusted the task of evaluating the answer papers to the Examiners. Consequently, Examiners in the position of agents are bound to evaluate the answer papers as per the instructions given by the PSC. As a result, a fiduciary relationship is established between the PSC and the Examiners. Therefore, any information shared between them is not liable to be disclosed. Furthermore, the information seeker has no role to play in this and we don t see any logical reason as to how this will benefit him or the public at large. We would like to point out that the disclosure of the identity of Examiners is in the least interest of the general public and also any attempt to reveal the examiner s identity will give rise to dire consequences. Therefore, in our considered opinion revealing examiner’s identity will only lead to confusion and public unrest. Hence, we are not inclined to agree with the decision of the Kerala High Court with respect to the second question.

Shailesh Gandhi’s observation: The Supreme Court differed with the finding of the Kerala High Court and the commission that there was no fiduciary relationship between the examining body and the examiners.

In the CBSE judgment the apex court had given a finding that the examining body was not in a fiduciary relation either with the examiners or examinees. Yet in this case it faulted that finding of the High Court on this issue. It brought in a new element, contending "Furthermore, the information seeker has no role to play in this and we don t see any logical reason as to how this will benefit him or the public at large. We would like to point out that the disclosure of the identity of Examiners is in the least interest of the general public and also any attempt to reveal the examiner' s identity will give rise to dire consequences. Therefore, in our considered opinion revealing examiner's identity will only lead to confusion and public unrest." It appears that the apex court made its decisions guided by the thought that 'the information seeker has no role to play in this' and 'revealing the examiner's identity will only lead to confusion and public interest'. Specious grounds not justified by the law. There is some indication that the court felt that the examiner's safety which could then have claimed exemption under Section 8 (1) (g). There is no evidence in the judgment that this was urged before the commission or the High Court. The particular section does not find any mention even in the judgment. Also the probability of assaulting the examiners by examinees after obtaining their names using RTI is remote. It is also worth noting that the addresses of the examiners were not sought.
I must also mention that the probable danger to the examiners is also too far fetched and the overall wording indicates a strong conviction that information must not be given.

Sandeep Jalan's Observation: In view of the law settled by the Apex Court in the case of CBSE versus Aditya Bandopadhyay, the information as to copy of Answer sheets should have been provided instantly, and the issue should not have travelled to Apex Court again. This is how the PIOs and the Public Authorities play mischief by misreading or by brazenly ignoring the law laid down by the Apex Court.

In so far disclosure of names of Examiners is concerned, the said information was denied by Apex Court on the premise of existence of fiduciary relationship and personal safety of Examiners.

For the sake of clarity, let us revisit the two Apex Court rulings which dealt with the issue of fiduciary relationships, and what the Apex Court laid down as constituting the fiduciary relationship.

The issue of existence of fiduciary relationship came up before Apex Court in the case of Central Board Of Secondary Education (CBSE) Versus Aditya Bandopadhyay. In this case, the information sought was the copy of Answer sheets by the student himself who appeared in the

examination conducted by CBSE. CBSE refused information on the premise that it is holding information in a fiduciary capacity and stands exempted u/s 8(1)(e) of the RTI Act.

For better understanding of the issue at hand, the three entities are first be properly defined. The Examining Body is the CBSE which conducts the Examination. The Examinee is the student who takes up the examination. The Examiner is the person to whom the Examining Body entrusts the work of evaluating the Answer sheets of the Examinee student.

In the aforesaid case of CBSE, the Apex Court in Para 26 said in essence said that Examining Body and the Examinee do not share any fiduciary relationship between themselves; and assuming that they share such relationship, the information cannot be denied to the examinee who is in fact the beneficiary under such purported fiduciary relationship; and in such supposition, the information can only be denied to third party and not to the beneficiary.

In so far existence of fiduciary relationship between the Examining Body and the Examiner is concerned, the Apex Court also discarded the existence of any such fiduciary relationship between them; and further said that such fiduciary relationship is temporary for the period when the Examiner holds the custody of the Answer-sheets for the purpose of evaluation; and the moment the evaluation is over and Answer-sheets are returned to the Examining Body, such relationship ceased to exist.

In CBSE judgment, in so far as disclosure of names of Examiners is concerned, the Apex Court said that their names cannot be disclosed to the Examinee, on the premise that such disclosure may endanger the personal safety of the Examiner. In Para 28, the Court said: *When an examining body engages the services of an examiner to evaluate the answer-books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that his name and particulars would not be disclosed to the candidates whose answer-books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator, and head-examiner who deal with the answer book.*

Therefore, the disclosure of names of Examiners were refused u/s 8(1)(g) of the RTI Act. *Section 8(1)(g). Exemption from disclosure of information -- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;*

The issue whether there exist fiduciary relationship again came up in RBI case (Judgment No.16 hereinabove), wherein in Para 62, the Apex Court in the most unambiguous terms said that *However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.*

The essence of these aforesaid two judgments is that – Examining Body and the Examiner do not share fiduciary relationship between them; and even if such fiduciary relationship exist, it is temporary for the period when the Examiner holds the custody of the Answer-sheets for the purpose of evaluation; and the moment the evaluation is over and Answer-sheets are returned to the Examining Body, such relationship ceased to exist; and where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.

In the present case, the stand of the Apex Court that there exists a fiduciary relationship between PSC (Examining Body) and the Examiners, is patently inconsistent with the law laid down by Apex Court in CBSE and RBI case.

However in so far disclosure of names of Examiners is concerned, the Apex Court refused the same, on the premise that "the information seeker has no role to play in this and we don t see any logical reason as to how this will benefit him or the public at large. We would like to point out that the disclosure of the identity of Examiners is in the least interest of the general public and also any attempt to reveal the examiner s identity will give rise to dire consequences. Therefore, in our considered opinion revealing examiner's identity will only lead to confusion and public unrest".

The shortcoming in the immediate aforesaid observation is that said grounds of refusal was not supported by mandate of law, whereas the mandate of law is that if there is any exemption from disclosure of information, it has to strictly fall within any of the clauses of section 8 of the RTI Act, and no other information should be withhold. Nevertheless, it escaped the minds of the Apex Court that Section

8(1)(g) could have been invoked to deny said information (names of Examiners). In the case of CBSE, the Apex Court although said that there is no fiduciary relationship between the Examining Body and the Examiners, the Court refused disclosure of names of Examiners u/s 8(1)(g), i.e. personal safety of Examiners. In the same breath, it may be stated that the reasoning given by the Kerala High Court for the disclosure of information, is rational, and quite sustainable in law.

I am sure Section 8(2) can aid in resolving this conflict. Section 8(2) of the RTI Act provides that the concerned Public Authority may disclose information inspite of applicability of any of the exemptions enumerated in clauses of Section 8(1), if the concerned Public Authority, whilst balancing the conflicting interests, holds that there is larger public interest in disclosure of information.

Our Analysis

The above analysis shows that in only two cases did the Supreme Court rule in favour of a RTI Applicant. In the CBSE the Court has made extremely strong comments almost condemning the use of RTI by citizens. Citizens expect the Supreme Court to be *sentinel on the qui vive* defending and expanding their fundamental rights.

Some of the statements quoted above seem to be at great variance with what the Supreme Court said in S.P.Gupta (AIR 1982 SC 149) "…The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest…"

It is difficult to believe that the Supreme Court which earlier held that denial of information should be an 'exception justified only where the strictest requirements of public interest demands' (which are now covered under Section 8) is now justifying denial of information unless a public interest is shown! Whereas the law clearly states that a citizen needs to give no reasons for seeking information, the apex Court's judgements suggest that there should be a demonstrable reason for obtaining information.

It is also worth noting that it appears that with the Girish Deshpande judgment, Section 8 (1) (j) has been interpreted in a manner not in consonance with its words. Though it has no ratio or reasoning, it is becoming the standard for rejecting information.

On the other hand in Judgements 1,3,11,15,16 and 17 Section 8 (1) (e) has been interpreted. We feel the word fiduciary has has been interpreted in different ways which do not appear to be in agreement with each other. Consequently the denial of information on the basis of Section 8 (1) (e) claiming that information is held in fiduciary relationship has become fairly common.

There are two other aspects of judicial functioning to which we would draw attention:

1. Quite often on important matters if an Information Commission orders disclosure of information, public authorities obtain a ex-parte stay in the High Court. Many of these stays are given without any mention of any reason, violating the Supreme Courts orders of an essential requirement for any judicial order. Courts

have ordered reduction in penalties, stopped Commissioners from conducting enquiries, and gone into facts to overrule Commissions.

2. Most applicants cannot pursue the Court cases and hence once a stay is obtained the matter languishes.

Citizen empowerment and democratic awareness is growing rapidly in India. One of the important tools in this journey has been the Right to Information. The government has made three attempts to make amendments to the Act and had to retract in the face of adverse public opinion. This right now faces serious danger from two sources:

1. Information Commissioners- most of whom are selected in an act of political patronage, without any transparent process. Most have no predilection for transparency. Besides most Commissions are not delivering decisions to citizens in any time-bound manner and often display a casual approach to their work. Many commissions take over a year to decide matters, and have an aversion to imposing penalties on recalcitrant officials. This is weakening the implementation of this law considerably.

2. The Supreme Court of India by its judicial interpretations appears to be constricting the scope of the Act and does not appear to be considering the great value the RTI Act has for the nation. Judicial interpretations, as seen above will emasculate the law and curtail citizen's fundamental right.

It appears to us that the law which ranks amongst the top five transparency laws in the world is being weakened by wrong interpretation. This is one of the main reasons for Indian being ranked at number 66 in implementation.

The Supreme Court judgment in December 2015 is a welcome break from the earlier judgments.

There should be wide discussions of these judgements so that this important right does not get constricted by interpretation. At stake is the nation's democracy.