

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA No.22 of 2012**

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Reserved on: February 07, 2012

Pronounced on: April 20, 2012

R.K. JAIN . . . APPELLANT

Through: Mr. Prashant Bhushan,
Advocate.

VERSUS

UNION OF INDIA & ANR. . . .RESPONDENTS

Through: Ms. Maneesha Dhir with Ms.
Geeta Sharma, Advocates.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI (ACTING CHIEF JUSTICE)

1. The appellant is seeking information under Right to Information Act, 2005 (hereinafter referred to as 'the RTI Act'), which has been denied to him by all the Authorities below including the learned Single Judge of this Court. To put it crisply, at this stage itself, the appellant wants information about some adverse entries allegedly made in the Annual Confidential Report of Ms. Jyoti Balasundram, Member/CESTAT by the President of the CESTAT for the year 2000-01 and follow-up action thereupon. The CPIO of CESTAT refused to divulge any information on the ground that it was exempted under Section 8(1)(i) of the RTI Act.
2. The writ petition filed before the learned Single Judge has been decided vide orders dated 08.12.2011 whereby the learned

Single Judge held that the information sought by the appellant herein is “the third party information” wherein the third party may plead a ‘privacy’ defence and the proper question would be as to whether divulging of such an information is in the public interest or not. Thus, the matter has been remitted back to the Chief Information Commissioner to consider this issue after following the procedure prescribed in Section 11 of the RTI Act and then decide the same. The learned Single Judge has relied upon the Division Bench judgment of this Court in the case of **Arvind Kejriwal Vs. CPIO**, AIR 2010 Delhi 216 for taking the aforesaid course of action.

3. Undeterred, the appellant has filed the instant intra-Court appeal questioning the manner in which the writ petition is disposed of as the appellant pleads that without further ado he is entitled to information sought for. Though indicated above in brief, we may reiterate that as per the appellant, there was certain complaints qua corruption against Ms. Jyoti Balasundaram, Member/CESTAT. After examining this complaint, the then President of CESTAT who was former Chief Justice of High Court made certain adverse entries in the ACR of the said Member which pertained to the year 2000-01. According to the appellant, on the basis of the said ACR, Department of Revenue in the Ministry of Finance opened another file with the subject “follow up action on the integrity in the ACR for the year 2000-01 in respect of Ms. Jyoti Balasundaram, Member (Tech), CESTAT.” Ultimately, this file was closed without taking any proper action. The appellant on this premise wanted inspection of the file as well as the copies

of the Note Sheets and correspondence. He, thus, filed an application under RTI Act on 07.10.2009 seeking information and copies of the Note Sheets and correspondence pages of PLAINTIFF File No.27/3/2002-AD.IC.

4. On 15.10.2009, the CPIO of CESTAT informed the appellant that the file contained analysis of the ACR of the said Member and claimed it to be exempted under Section 8(1)(i) of the RTI Act. The first Appellate Authority rejected the appeal on the same ground on 18.12.2009. Further appeal before the CIC met the same fate as the CIC also held that ACR grades could be disclosed only to the person to whom it relates except in the exceptional circumstances. In the brief order of the CIC, following portion is relevant and is therefore extracted herein:

“5. It is not in doubt that the file referred to by the appellant related to the Annual Confidential Record of a third-party, Ms. Jyoti Balasundaram and was specific to substantiation by the Reporting Officer of the comments made in her ACRs about the third-party’s integrity. Therefore, appellant’s plea that the matter was about a public servant’s integrity per se is not valid. The ACR examines all aspects of the performance and the personality of a public servant – integrity being one of them. An examination of the aspect of integrity as part of the CR cannot, therefore, be equated with the vigilance enquiry against a public servant. Appellant was in error in equating the two.

6. It has been the consistent position of this Commission that ACR grades can and should be disclosed to the person to whom the ACRs related and not to the third-parties except under exceptional circumstances. Commission’s decision in *P.K. Sarin Vs. Directorate General of Works (CPWD)*; Appeal No.CIC /WB/A/2007/00422; Date of Decision: 19.02.2009 followed a Supreme Court order in *Dev. Dutt Vs. UOI (Civil Appeal No.7631/2002)*.

7. An examination on file of the comments made by the reporting and the reviewing officers in the ACRs of a public servant, stands on the same footing as the ACRs itself. It cannot, therefore, be authorized to be disclosed to a third-party. In fact, even disclosure of such files to the public servant to whom the ACRs may relate is itself open to debate."

5. Before the learned Single Judge, the appellant argued that he wanted information in a separate file than the ACR file, viz., the "follow up action" which was taken by the Ministry of Finance about integrity remarks in the ACR of the Member and that was distinguished and different from asking for copy of the ACR itself. The learned Single Judge had directed production of original record and after perusing the same, came to the conclusion that the information sought was not different or distinguished from ACR as is clear from the following remarks:

"8. Upon a perusal of the file produced by the respondent, to me it appears that the said follow up action file cannot be said not to be connected with, or related to the Annual Confidential Report file of Ms. Jyoti Balasundaram. The said file contains correspondence in relation to the remark recorded by the President of the CESTAT in relation to Ms. Jyoti Balasundaram, and also contains the reasons why the said remarks have eventually been dropped. The recordings made in the said file constitute an integral part of the ACR record of the officer in question, viz. Ms. Jyoti Balasundaram. I, therefore, reject the petitioner's submission that the said file contains information which is different and distinct from the Annual Confidential Report of Ms. Jyoti Balasundaram."

6. We may point out at this stage that this para of the order was questioned before us at the time of arguments and the arguments proceeded on the premise that the information

sought pertained to the ACR of the aforesaid Member of CESTAT.

7. Mr. Prashant Bhushan, learned counsel appearing for the appellant submitted that the ACR of a public servant/officer had relationship with public activity because public servant discharges public duties and therefore, the matter was a public interest. Seeking such an information, according to Mr. Bhushan, did not amount to any unwanted invasion into the privacy of the public servant information regarding whose information is sought by a public. He referred to the judgment of the Supreme Court in the case of **State of UP Vs. Raj Narain**, AIR 1975 SC 865 highlighting the purpose and importance of right to information. He further submitted that when such an information can be supplied to the Parliament, it cannot be treated as personal document or private document. Learned counsel referred to the judgment of Division Bench of the Kerala High Court in **Centre for Earth Sciences Studies Vs. Anson Sebastian**, 2010 (2) KLT 233. In that case, the Court opined that disclosure of such an information was not prohibited under Section 8(1)(j) of the RTI Act. Following discussion in the said judgment was specifically referred:

“4. The next question to be considered is whether the information sought by the first respondent relates to personal information of other employees, the disclosure of which is prohibited under Section 8(1)(j) of the Act. Here again, we notice that under exceptional circumstances even personal information, disclosure of which is prohibited under the main clause, can be disclosed if 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

disclosure of such information. What is immune from disclosure as personal information is not one relating to any public activity or interest and what is prohibited is furnishing of information which causes unwarranted invasion of the privacy of the individual. In this case we notice that the information sought by the first respondent pertains to copies of documents furnished in a domestic enquiry against one of the employees of the appellant-organisation. Domestic enquiry is an open trial which is essentially initiated as part of disciplinary proceedings against the employee. Domestic enquiry involves production of evidence including documents, some of which are even public documents. We do not know how documents produced in a domestic enquiry can be treated as documents relating to personal information of a person, the disclosure of which will cause unwarranted invasion of his privacy. Similar is the position with regard to the particulars of Confidential Reports maintained in respect of co-employees of the first respondent all of whom are Scientists. Confidential Reports are essentially performance appraisal by higher officials which along with other things constitute the basis for promotions and other service benefits. Counsel for the State Information Commission has produced a Government of India Office Memorandum dated 14.5.2009 by which the Confidential Reports have been taken away and in their place what is authorised to be maintained is annual appraisal reports. According to Standing Counsel for the Information Commission, the Confidential Reports are no longer personal documents or private documents and all the employees are entitled to know the details of the same. Counsel appearing for the first respondent submitted that first respondent has grievance in her service and in order to satisfy herself about the propriety and correctness of promotions and other benefits given to similar employees, she wants details of the same. We do not think the Confidential Reports of the employees maintained by the appellant can be treated as records pertaining to personal information of an employee, the publication of which is prohibited under Section 8(1)(j) of the Act. We, therefore, concur with the findings of the learned Single Judge on this issue as well. Consequently Writ Appeals are dismissed."

8. Before we appreciate and deal with the aforesaid arguments, it would be necessary to discuss the manner in which the learned

Single Judge in his impugned order has dealt with the case while remitting the case back to the CIC. The learned Single Judge has fully relied upon the case of **Arvind Kejriwal (supra)** and has exhaustively quoted the following passage therefrom:

“22. Turning to the case on hand, the documents of which copies are sought are in the personal files of officers working at the levels of Deputy Secretary, Joint Secretary, Director, Additional Secretary and Secretary in the Government of India. Appointments to these posts are made on a comparative assessment of the relative merits of various officers by a departmental promotion committee or a selection committee, as the case may be. The evaluation of the past performance of these officers is contained in the ACRs. On the basis of the comparative assessment a grading is given. Such information cannot but be viewed as personal to such officers. Vis-a-vis a person who is not an employee of the Government of India and is seeking such information as a member of the public, such information has to be viewed as constituting “third party information”. This can be contrasted with a situation where a government employee is seeking information concerning his own grading, ACR etc. That obviously does not involve “third party” information.

23. What is, however, important to note is that it is not as if such information is totally exempt from disclosure. When an application is made seeking such information, notice would be issued by the CIC or the CPIOs or the State Commission, as the case may be, to such “third party” and after hearing such third party, a decision will be taken by the CIC or the CPIOs or the State Commission whether or not to order disclosure of such information. The third party may plead a „privacy“ defence. But such defence may, for good reasons, be overruled. In other words, after following the procedure outlined in Section 11(1) of the RTI Act, the CIC may still decide that information should be disclosed in public interest overruling any objection that the third party may have to the disclosure of such information.

24. Given the above procedure, it is not possible to agree with the submission of Mr. Bhushan that the word „or“ occurring in Section 11 (1) in the phrase information “which relates to or has been supplied by a third party”

should be read as „and“. Clearly, information relating to a third party would also be third party information within the meaning of Section 11(1) of the RTI Act. Information provided by such third party would of course also be third party information. These two distinct categories of third party information have been recognized under Section 11(1) of the Act. It is not possible for this Court in the circumstances to read the word „or“ as „and“. The mere fact that inspection of such files was permitted, without following the mandatory procedure under Section 11(1) does not mean that, at the stage of furnishing copies of the documents inspected, the said procedure can be waived. In fact, the procedure should have been followed even prior to permitting inspection, but now the clock cannot be put back as far as that is concerned.

25. The logic of the Section 11(1) RTI Act is plain. Once the information seeker is provided information relating to a third party, it is no longer in the private domain. Such information seeker can then disclose in turn such information to the whole world. There may be an officer who may not want the whole world to know why he or she was overlooked for promotion. The defence of privacy in such a case cannot be lightly brushed aside saying that since the officer is a public servant he or she cannot possibly fight shy of such disclosure. There may be yet another situation where the officer may have no qualms about such disclosure. And there may be a third category where the credentials of the officer appointed may be thought of as being in public interest to be disclosed. The importance of the post held may also be a factor that might weigh with the information officer. This exercise of weighing the competing interests can possibly be undertaken only after hearing all interested parties. Therefore the procedure under Section 11(1) RTI Act.

26. This Court, therefore, holds that the CIC was not justified in overruling the objection of the UOI on the basis of Section 11(1) of the RTI Act and directing the UOI and the DoPT to provide copies of the documents as sought by Mr. Kejriwal. Whatever may have been the past practice when disclosure was ordered of information contained in the files relating to appointment of officers and which information included their ACRs, grading, vigilance clearance etc., the mandatory procedure outlined under Section 11(1) cannot be dispensed with. The short question framed by this Court in the first paragraph of this judgment was answered in the

affirmative by the CIC. This Court reverses the CIC's impugned order and answers it in the negative.

27. The impugned order dated 12th June 2008 of the CIC and the consequential order dated 19th November 2008 of the CIC are hereby set aside. The appeals by Mr. Kejriwal will be restored to the file of the CIC for compliance with the procedure outlined under Section 11 (1) RTI Act limited to the information Mr. Kejriwal now seeks"

9. In the aforesaid case also, information sought was in the personal files of officers which included ACRs, *albeit*, in the context of promotion of such officers. Comparative assessment of relative merits of the officers by the Departmental Promotion Committee (DPC)/Selection Committee based on the evaluation of the past performance contained in the ACRs. Since the petitioner in that case wanted information contained in personal files relating to ACRs as well, the Division Bench held that this information was personal officers viz-a-viz person who is not an employee of the Government of India and seeking such an information as a matter of public. It was accordingly treated as "third party information", in contra-distinction with a situation where a Government employee seeks information concerning his own grading ACR, etc. The Court accordingly held that when "third party" i.e. officer in question was involved information regarding ACRs was sought, the procedure outlined under Section 11(1) under RTI Act had to be followed as such "third party" may plead a "privacy defence". The Court held that after following that procedure and hearing of the concerned parties, it was for the CIC to form an opinion as to whether information should be disclosed in public interest overruling any objection that the third party may have the disclosure of such information.

10. Now, let us take note of the relevant provisions of RTI Act:

Section 8. (1) (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

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

Section 11 (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."

11. The information can be supplied only, when on following the mandatory procedure outlined under Section 11(1), opinion is formed by the CIC that the disclosure of information would be

in public interest. Thus, the learned Single Judge has rightly held that except in cases involving overriding public interest, the ACR record of the officer cannot be disclosed.....” Since the matter was not looked into by the CIC, the learned Single Judge remitted the case back to the CIC in the following manner:

“13. Accordingly, the matter is remanded back to the CIC for considering the issue whether, in the larger public interest, the information sought by the petitioner could be disclosed. If the CIC comes to a conclusion that larger public interest justifies the disclosure of the information sought by the petitioner, the CIC would follow the procedure prescribed in Section 11 of the Act.”

12. We are of the opinion that the aforesaid judgment of a coordinate bench which binds us applies on all fours to the present case also. As is clear from the arguments of Mr. Bhushan, whole attempt was to say that divulgence of ACR is in public interest. That is precisely the CIC is asked to find out. The matter is still at large and the appellant can always argue this before the CIC. What is important is that the procedure under Section 11(1), which is mandatory has to be followed which includes, giving of notice to the concerned officer information whose ACR is sought for. If that officer, in the present case the Ex Member of CESTAT, pleads private defence that defence has to be examined while deciding the issue as to whether the private defence is to prevail or there is an element of overriding public interest which would outweigh the private defence.
13. The judgment of the Kerala High Court referred to by Mr. Bhushan was also cited before the learned Single Judge, who

rightly remarked that it is the judgment of this Court in **Arvind Kejriwal (supra)**, which binds this Court.

14. We, accordingly, do not find any merit in this appeal and the same is dismissed.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

APRIL 20, 2012

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