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IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 478 OF 2008

1. Public Information Officer
   Joint Secretary to the Governor
   Raj Bhavan, Donapaula, Goa

2. Secretary to Governor
   First Appellate Authority,
   Raj Bhavan, Donapaula, Goa .. Petitioners

V/s

1. Shri Manohar Parrikar
   Leader of Opposition,
   Goa State Assembly Complex,
   Porvorim, Bardez, Goa.

2. Goa State Information Commissioner,
   Ground Floor, Shram Shakti Bhavan,
   Patto Plaza, Panaji, Goa. .. Respondents

Mr. S.S. Kantak, Advocate General with Mr. A. Kamat, Additional Government Advocate for the petitioners.

Mr. A.N.S. Nadkarni, Senior Advocate with Mr. D. Lawande, for respondent no.1.

WITH

WRIT PETITION NO. 237 OF 2011

Special Secretary to the
Government of Goa .. Petitioner

V/s

1. State Chief Information Commissioner
2. State of Goa
3. Advocate A. Rodrigues .. Respondents

Mr. Vivek Tankha, Additional Solicitor General with Mr. Mahesh Sana, Mr. Rishabh Sanchety and Mr. J. Supekar for the petitioner.

Mr. Amey Kakotkar, Additional Government Advocate for respondent nos.1 and 2 with Mr. A. Rodrigues - respondent no.3 in person.

CORAM : D.G. KARNIK, &
F.M. Reis, JJ.

Date of Reserving the Order : 23rd August 2011

Date of Pronouncing the Order : 14th November 2011
(By Video Conferencing)

JUDGMENT: (Per D.G. Karnik, J.)

1. By an order dated 22nd October 2008, the Court directed that Writ Petition No. 478 of 2008 be fixed for final disposal at an early date. The petition was accordingly placed on board before us for final hearing. By an order dated 6th June 2011, the Court directed that Writ Petition No. 237 of 2011 be put up along with Writ Petition No. 478 of 2008. Accordingly these petitions are heard and disposed of by this common judgment as they involve common questions of law.

Facts in Writ Petition No. 478 of 2008

2. In July/August 2007, some changes occurred in the political

equations and political situation in the State of Goa resulting in the Governor of Goa directing the Chief Minister to prove his majority in the Legislative Assembly. A resolution of the Vote of Confidence was passed in the Legislative Assembly, and the Speaker of the Legislative Assembly made a report to the Governor. In turn, the Governor of Goa sent his report to the Union Home Minister. On September 21, 2007, Mr. Manohar Parrikar, the Leader of Opposition (respondent no.1), made an application to the Public Information Officer (for short "the PIO") in the Secretariat of the Governor of Goa, asking for a copy of the report sent by the Governor of Goa to the Union Home Minister regarding the political situation in Goa during the period from 24th July 2007 to 14th August 2007. By a letter dated 22nd December 2007, the PIO in the Secretariat of the Governor of Goa declined to furnish the copy and wrote: "I am to inform that these communications are highly sensitive, and secret in nature. It is regretted that the same cannot be supplied in accordance with the exemption allowed under the Right to Information Act, 2005". Aggrieved by the refusal, the 1st respondent filed an appeal before the Secretary to the Governor being the Appellate Authority. By its order dated 4th April 2008, the Appellate Authority dismissed the appeal. In second appeal, the Goa State Information Commission (for short

"the GSIC") set aside the order of the first appellate authority by partly allowing the appeal. It held that the report made by the Speaker of the Legislative Assembly of Goa to the Governor of Goa cannot be disclosed. It, however, directed the PIO to furnish to the respondent no.1 the other information i.e. a copy of the report sent by the Governor of Goa to the Union Home Minister on the political situation during the period from 24th July 2007 to 14th August 2007, after severing the report of the Speaker of the Legislative Assembly. Aggrieved by the decision, the petitioners are before us.

Facts in Writ Petition No. 237 of 2011

3. The respondent no.3 is a practising advocate. He appears to have a grievance against the conduct of the Advocate General of the State of Goa and the fee charged by him to the Government. He made several complaints/representations to the Governor of Goa against the Advocate General of Goa and was not satisfied with the action taken (rather the inaction) on his complaints/representations. Therefore, by a letter dated 29th November 2010, he applied to the PIO in the secretariat of the Governor of Goa requesting him to furnish him the details of the action taken on his complaints/representations and also asked for the copies of all notings and correspondence on the

complaints/ representations made by him. By his reply dated 29th November 2010 the PIO informed the petitioner that an affidavit had been filed by his office in another matter in the Hon'ble High Court, Bombay at its bench at Panaji that H.E. Governor is not a public authority under the Right to Information Act 2005, and that pending the decision of the High Court in that matter, it was not possible for him to respond to his request. Though the number of the other matter in which the affidavit had been filed was not mentioned in the reply, it appears that the PIO was referring to the affidavit filed in the connected Writ Petition No.278 of 2008. Not satisfied with the reply of the PIO, respondent no.3 filed a complaint under Section 18 of the Right to Information Act, 2005 (for short "the RTI Act") to the GSIC. Upon receipt of the complaint, the GSIC issued a notice to the PIO as also to the Governor of Goa requiring them to appear before the Commission in person on 4 January 2011. Secretary to the Governor of Goa, on behalf of the Governor of Goa, filed a reply claiming immunity under Article 361 of the Constitution of India and contending that the Governor cannot be arrayed as a party respondent in any proceedings. The PIO submitted a separate reply contending that the Governor was not a public authority under the RTI Act. He also contended that if the respondent no.3

was aggrieved by the communication of the PIO dated 30th November 2010, he ought to have filed an appeal and the complaint under Section 18 of the RTI Act was not maintainable. By an order dated 31st March 2011, the GSIC accepted the contention that the immunity granted to the Governor under Article 361(1) of the Constitution of India was complete and the Governor was not answerable to any court and the complaint made against him was not maintainable. The GSIC however rejected the contention that Governor was not a public authority under the RTI Act. The GSIC accordingly remanded the matter back to the PIO to deal with the application of the respondent no.3 dated 29 November 2010 in accordance with law. Being aggrieved by this direction, the Special Secretary to the Governor has filed the Writ Petition No.237 of 2011.

Concessions of the respondent no.1 in W.P. NO. 478 of 2008

4. At the outset, it may be noted that the decision of the GSIC of severing of the report of Speaker of the Legislative Assembly and not furnishing its copy to respondent no.1, while directing the PIO to furnish a copy of the report of the Governor, is not challenged by the respondent no.1. Mr. Nadkarni, learned Senior Advocate appearing for respondent no.1 also submitted before us that respondent no.1 does not want to challenge the

direction of the GSIC of severance of the report of the Speaker of the Legislative Assembly. We are, therefore, not required to consider the legality and validity of the direction as the same has been accepted by the respondent no.1.

Preliminary objections (in W.P. No. 478 of 2008)

5. Mr. Nadkarni appearing for the respondent no.1 raised a preliminary objection to the maintainability of the writ petition. He submitted that petitioner no.1 is the PIO whose decision was affirmed by petitioner no.2, as the first appellate authority. The petitioner no.2 is the first appellate authority whose decision has been reversed by the GSIC. Both the petitioners are subordinate to the GSIC which is the final appellate authority. The decisions rendered by the petitioner nos.1 and 2 have a colour of judicial decision and, in any event, they are quasi-judicial inasmuch as they decide upon the existence and extent of the right of a citizen to have access to the information under the RTI Act. Their decisions are subject to an appeal. They being judicial authorities subordinate to the GSIC, have no right and authority to challenge the decision of the GSIC. As a matter of judicial discipline, a Court or a Tribunal cannot file an appeal or writ petition against the decision of an appellate authority reversing its decision, except perhaps for expunging of any

adverse remarks made against the lower Court or the Tribunal. Permitting a Court or a Tribunal to challenge the decision rendered in an appeal or revision by appellate or revisional authority would amount to judicial indiscipline and, therefore, the writ petition should not be entertained. In support, he relied upon a decision of a Division Bench of this Court in *Village Panchayat of Velim vs. Shri Valentine S.K.F. Rebello and another, 1990 (1) Goa Law Times 70.*

6. In *Village Panchayat of Velim (supra),* the facts were that the respondent,who claimed to be the owner of a plot, submitted an application for permission for erection of a building to the Village Panchayat, which was rejected by it vide letter dated 6th June 1987. The Deputy Collector allowed the appeal of the respondent and granted the permission. The Village Panchayat challenged the order of the Deputy Collector in the High Court by a writ petition. The High Court held that under the scheme of Village Panchayat Regulations, the Panchayat cannot at all be held to be "a person aggrieved" and consequently, it had no right to challenge the decision made by the Deputy Collector. The Court further accepted the argument of respondent that the Village Panchayat ought not to be permitted to maintain the petition merely because it believed that the appellate decision

was not palatable and allowing it to challenge the decision would amount to subversion of judicial discipline. The Court observed: "If the Panchayat is allowed to challenge the appellate order, as rightly pointed out by Shri Kakodkar, it may lead to chaos which the judicial discipline must decry". We respectfully agree with the view taken by the Division Bench. We also are of the view that ordinarily a Court, a Tribunal or any other body having a power to decide, shall not be entitled to challenge by way of an appeal, revision or otherwise a decision rendered by the appellate or revisional authority, modifying or reversing its decision. That would amount to subversion of the judicial discipline. It is inconceivable that on his decision being reversed by the District Judge, a Civil Judge filing an appeal in the High Court challenging the decision of the District Judge. The same principle would apply with equal force for the decisions rendered by any judicial or quasi-judicial bodies or authorities. However, the principle laid down above would not apply to the facts of the present case for the reasons indicated below.

Section 19 of the RTI Act provides that any person who does not receive a decision within the specified time or is aggrieved by the decision of a Central Public Information

Officer or the State Public Information Officer, may within 30 days file an appeal to the specified appellate authority. The first appeal under Section 19 of the RTI Act is contemplated only by or at the instance of the person whose application for an information has not been decided or rejected by the PIO. Sub-section (5) of Section 19 provides that in any appeal proceedings, the onus to prove that the denial of the request was justified shall be on the PIO who has denied the request. The PIO who passes the initial order refusing the request for an information is required to defend his action before the appellate authority and the burden of proving that the denial was justified is on him. Thus, the PIO is not merely an authority which initially decides upon the request of an applicant, but in effect is a party to the appeal filed before the appellate authority. The PIO acts as a medium for dissemination of an information by the "public authority" under the RTI Act. If he holds that the public authority is not required to disclose the information, he is required to defend his decision. The PIO can be subjected to a penalty under Section 20 of the RTI Act for non-disclosure of the information. The proviso to Section 20 provides that the PIO shall be given a reasonable opportunity of being heard before any penalty is imposed on him. Thus, the PIO is, in effect, a party litigant in an appeal or a second appeal which is filed

before the first appellate authority or the Information Commission and in certain circumstances is also personally liable to a penalty. Being so, we are not inclined to accept the submission of Mr. Nadkarni that the writ petition at the instance of the PIO against the decision of the State Information Commission is not maintainable and/or should not be entertained.

Contentions of the parties

7. Mr. Vivek Tankha, learned Additional Solicitor General appearing for the petitioner in Writ Petition No. 237 of 2011 and Mr. Kantak, learned Advocate General appearing for the petitioner in Writ Petition No. 478 of 2008, submitted that the Governor was not a Public Authority under the RTI Act and as such was not required to disclose any information. Learned A.S.G. and the A.G. invited our attention to the definitions of "competent authority" in Section 2(e) and "public authority" in Section 2(h) of the RTI Act, and submitted that the "competent authority" and the "public authority" were two different authorities or bodies contemplated by the RTI Act. The expressions "competent authority" and "public authority" were mutually exclusive, and the "competent authority" cannot be regarded as the "public authority" within the meaning of Section 2(h) of the RTI Act. The President and the Governor, who are

included in the definition of "competent authority" are, therefore, not the "public authority" within the meaning of Section 2(h). The Governor is the appointing authority for the Chief State Information Commissioner as well as the State Information Commissioners and has an authority to remove any of the members of the State Information Commission. The Governor being the appointing, disciplinary and removing authority for the members of the State Information Commission, the State Information Commission (GSIC) has no authority to issue any order or direction to the Governor to disclose any information. Mr. Tankha further submitted that the President and the Governor were sovereign. The sovereignty vests in the President and the Governor, they being the heads of the Union and the State respectively. No authority, not even the Information Commission, has any jurisdiction or power to issue any direction to the sovereign, i.e. the President or the Governor, to disclose any information. Lastly, he submitted that the Governor enjoys an absolute immunity under Article 361 of the Constitution of India. The immunity enjoyed under Article 361 is not only personal but relates to his office and all his actions. The immunity granted under Article 361 is absolute and, therefore, no notice can be issued to the Governor, and no direction can be issued to the Governor to disclose any

information under the RTI Act. Mr. Tankha further submitted that the RTI Act contemplates the Information Commission to be a multi-member body. The GSIC at the time it passed the impugned order consisted of only the State Chief Information Commissioner, the only other State Information Commissioner having retired. As such, the State Chief Information Commissioner could not have passed the impugned order by acting singly. Mr. Kantak, learned A.G. supplemented the arguments of Mr. Tankha and further submitted that the Governor's report made to the President (through the Union Home Minister) was made in a fiduciary capacity and was exempt from disclosure under Section 8(1)(e) of the RTI Act.

8. Per contra, Mr. Nadkarni, appearing for respondent no.1 submitted that the President and the Governor are appointed by or under the Constitution of India (for short "the Constitution"). They are, therefore, the public authorities under Section 2(h) of the RTI Act. The President and the Governor being the public authorities, are amenable to the provisions of the RTI Act and are required to disclose any information when ordered by the PIO or in an appeal by the appellate authority or the Information Commission. The actions of the Governor have to be in consonance with the Constitution and the law. Under Article

159 of the Constitution, the Governor takes an oath of office to preserve, protect and defend the Constitution and the law. The Governor is, therefore, bound by the law including the RTI Act. The fact that the Governor is an appointing as well as disciplinary authority of the PIO, the appellate authority as well as the State Information Commissioners, does not make him immune from disclosing information ordered by any of them in accordance with the RTI Act. He is bound to comply with the orders passed under the RTI Act and give access to the citizen of the information, if so ordered. So far as the President is concerned he may represent to the external powers India as a sovereign country. He represents the external sovereignty. However, there is nothing like internal sovereignty and the President and the Governor are bound by the Constitution and the law. India being a democracy, the real sovereignty vests in the people of India and not in the President or the Governor, as the case may be. The concept of "King" being sovereign and the sovereignty being vested in the King is not applicable in case of a democracy where the people are sovereign and the President or the Governor are only titular heads. As regards the immunity conferred under Article 361 of the Constitution is concerned, it is only a personal immunity given to the Governor. The personal immunity conferred by Article 361 of the Constitution extends to

an immunity from being prosecuted and immunity from civil liability in person. The immunity does not relate to a State action or an action taken by the President or the Governor in their respective official capacities as the President or the Governor, in exercising functions of the State. The official actions of the President and the Governor are justiciable and have been held to be so by the Supreme Court. Mr. Nadkarni countered the argument of exemption under Section 8(1)(e) of the RTI Act by submitting that the relationship between the President and the Governor was not fiduciary. The report of the Governor to the President (through the Home Minister) under Article 356 of the Constitution was made in performance of a constitutional duty and not in a fiduciary capacity.

9. In the light of the submissions of the parties, the following points arise for our determination:

(1) Whether the Governor is a "public authority" within the meaning of Section 2(h) of the RTI Act? and whether by reason of being included in the definition of "competent authority" he stands excluded from the definition of "public authority" under the RTI Act?

(2) Whether the Governor is a sovereign and being sovereign, no direction can be issued to the Governor for disclosure of any information under the RTI Act?

(3) What is the extent of immunity enjoyed by the Governor under Article 361 of the Constitution of India? Whether in view of such immunity, no direction can be issued and no order can be passed under the RTI Act, which has an effect of requiring the Governor to disclose any information under the RTI Act?

(4) Whether the information sought for is exempt from disclosure under Section 8(1)(e) of the RTI Act?

(5) Whether the GSIC, which had become a single member body on account of retirement of one of the two members constituting it when it passed the order dated 18th March 2011 (impugned in W.P. No. 237 of 2011), could not have passed it in the absence of a second member?

Point No.1

Whether the Governor is a "public authority" within the meaning of section 2(h) of the RTI Act? and, whether by reason of being included in the definition of "competent authority" the Governor stands excluded from the definition of "public authority" under the RTI Act?

10. In order to decide the question, it is necessary to refer to the definitions of the "competent authority" and the "public authority" as given in the RTI Act, which read as under:

> 2(e) " competent authority" means-
>
> (i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;
>
> (ii) the Chief Justice of India in the case of the Supreme Court;
>
> (iii) the Chief Justice of the High Court in the case of a High Court;
>
> (iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the

Constitution;

(v) the administrator appointed under article 239 of the Constitution;

2(h) "public authority" means any authority or body or institution of self- government established or constituted—

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any—

(i) body owned, controlled or substantially financed;

(ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;

11. Mr. Tankha, learned ASG and Mr. Kantak, learned A.G. submitted that the expressions "competent authority" and "public authority" were separately defined under the Act. There can be no overlapping between the two authorities. Whoever is the "competent authority" under section 2(e) of the RTI Act cannot be the "public authority" and whoever is the "public authority" under section 2(h) of the RTI Act cannot be the "competent authority". Since the two expressions are different,

if there were to be any overlapping between the two, the Legislature would have specifically said so in the definition itself. If the competent authority was to be included in the definition of "public authority", nothing prevented the Legislature from saying so by adding one more clause to sub-clauses (a) and (d) and to include the competent authority within the definition of "public authority". Mr. Kantak also drew our attention to section 8 and in particular clauses (d) and (e) thereof. Section 8(1) of the RTI Act, insofar as it is relevant for our consideration, is quoted below:

> "**8. Exemption from disclosure of information -** (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (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) ...

(g) ...

(h) ...

(i) ...

(j) ... "

Mr. Kantak submitted that clause (d) of section 8 grants exemption from disclosure and the PIO is not required to disclose any information of commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party. Under clause (e) of section 8, the PIO is not required to disclose an information which is available to a person (public authority) in his fiduciary relationship. The decision of a PIO not to disclose the information covered by clause (d) and clause (e) of sub-section (1) is, however, subject to an exception which is provided in clauses (d) and (e) itself by qualifying the exemption by the words: "unless the competent authority is satisfied that larger public interest warrants the disclosure of such information". The competent authority is, thus, given a power to override a decision of the public authority acting through the PIO of not disclosing an information contained in clauses (d) and (e), if the

competent authority is satisfied that larger public interest warrants the disclosure of such information. If the competent authority has a power to override the decision of public authority not to disclose any information, then the competent authority must be regarded as a different than the public authority. The competent authority is superior to the public authority, as it is given a power to override a decision of the public authority, at least in certain cases like those mentioned in clauses (d) and (e) of section 8(1) of the RTI Act and that being so, the Court must hold that the competent authority is not the public authority within the meaning of section 2(h). The argument, attractive as it looks at the first blush, cannot be accepted for the reasons indicated below.

12. Section 3 of the RTI Act confers upon a citizen right to have an information. Indeed, it only recognizes the right which already exists in a citizen to have an information which is regarded as a fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution [see: Central Public Information Officer vs. Subhash Chandra Agarwal, (2011) 1 SCC 496 and the Hindu Urban Cooperative Bank Ltd. vs. The State Information Commission - Civil Writ Petition No. 19224 of 2006 decided on 9th May 2010 by the High

Court of Punjab and Haryana, Coram: Mohinder Singh Sullar, J.]

Section 4 of the RTI Act confers a corresponding obligation on the public authority to give information. Section 5 of the RTI Act requires the public authority to designate as many PIOs as may be necessary to provide the informations to the persons requesting for an information. Section 6 prescribes the manner in which a citizen is required to make a request for an information to the PIO. Section 7 casts an obligation on the PIO to give the information. Section 8, as noticed earlier, grants exemption from disclosure of certain information. Section 9 also empowers the PIO to refuse an information where the request for providing access would involve an infringement of a copyright subsisting in any person other than the State. Section 11 provides for a procedure to be followed where the disclosure of the information relates to a third party. Sections 12 to 17 contained in Chapter III make a provision for constitution of Central and State Information Commission, their members, terms and conditions of their service, their appointment and removal. Section 18 defines the power and functions of the Central and State Information Commission. Section 19 provides for an appeal against a decision of the PIO to the first appellate authority and a further appeal against a decision of the first

appellate authority to the Information Commission. Section 20 provides for a penalty which can be imposed by the Information Commission on the PIO at the time of deciding any complaint or appeal under section 19 of the RTI Act.

13. From the provisions of the RTI Act, it is clear that the decision whether the information asked for by the applicant can be disclosed or exempt from disclosure under sections 8 or 9 of the RTI Act is to be taken by the PIO and not by the "public authority". Section 9 specifically provides that the Central PIO or the State PIO, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State. The competent authority has been given a power to direct disclosure of an information notwithstanding anything contained in clauses (d) and (e) of section 8(1), where the competent authority is satisfied that the larger public interest warrants the disclosure of such information. Thus, the competent authority overrides the PIO and not the "public authority" on the issue of exemption under section 8(1)(d) and (e) of the RTI Act. The contention that the competent authority is superior to public authority inasmuch as it has a power to override the public authority in the matter of exemption under

clauses (d) and (e) of section 8 and consequently there can be no overlapping between the two, therefore, cannot be accepted.

14. Under section 2(h) of the RTI Act, "public authority" includes any authority or body or institution of self-government established or constituted by or under the Constitution [see clause (a) of section 8(1)]. Undoubtedly, the post of President and that of the Governor is created by the Constitution. Article 52 of the Constitution says that there shall be a President of India. Article 153 of the Constitution says that there shall be a Governor for each State. When India was governed by the British, there was no post of the President. The Governor General and the Governors contemplated under the British Rule were different than the Governor of a State appointed under Article 153 of the Constitution. Posts of the President and the Governor are created by the Constitution.

15. In *Executive Committee of Vaish Degree College, Shamli and others vs. Lakshmi Narain and others, (1976) 2 SCC 58*, the majority speaking through Fazal Ali, J. observed: "It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the

provisions of the statute. In other words, the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers." The President and the Governor owe their existence to the Constitution. It, therefore, cannot be doubted that the posts of the President and the Governor are created by or under the Constitution. Being so, the President and the Governor are clearly covered by clause (h) of the definition of the "public authority".

16. It is true that the President and the Governor have been specifically included in the definition of "competent authority". But the mere fact that the President and the Governor are authorities mentioned in sub-clauses (iv) of section 2(e) of the RTI Act, would not exclude them from the definition of "public authority". If any of the authorities mentioned in clauses (i) to (v) of section 2(e) which defines "competent authority" also fall within any of the clauses (a) to (d) of the definition of "public authority" those persons/authorities would both be the "competent authority" as well as the "public authority". The expressions "competent authority" and "public authority" are not mutually exclusive. The competent authorities and one or more of them may also be the public authorities. Similarly the

public authorities or some of them, like the President and the Governor who are the "public authority", may also be the "competent authority". Overlapping is not prohibited either by the RTI Act or by any other law.

17. We are fortified in our view by a decision of the Special Bench (of Three Judges) of Delhi High Court, rendered in Secretary General, Supreme Court of India vs. Subhash Chandra Agarwal, (L.P.A. No. 501/2009 decided on 12th January, 2010). In that case, the Chief Justice of India (who is the "competent authority" under section 2(e)(ii) of the RTI Act) was also held to be the "public authority". The fact that the Chief Justice of India (for short "the CJI") was the competent authority did not deter the Court from coming to the conclusion that he was the "public authority" under section 2(h) of the RTI Act. Learned Additional Solicitor General and the Advocate General, however, inviting our attention to paragraph 25 of the decision submitted that the decision that the CJI is a "public authority" was rendered by the Special Bench on the basis of a concession made by the learned Attorney General before it. It is true that the learned Attorney General had conceded before the Special Bench that the finding recorded by the Single Judge that the CJI was a "public authority" and the reasons therefore were correct. However, the

Special Bench did not hold that the CJI was a "public authority" only on the basis of the concession of the learned Attorney General. In paragraph 26, the Special Bench has observed: "Notwithstanding the fact that the correctness of the findings respecting point nos.1 & 2 have been fairly conceded by the learned Attorney General for India, we have given our careful consideration to the matter in the overall facts and circumstances of these proceedings. We find ourselves in full agreement with the reasoning set out in the impugned judgment". The Special Bench then set out briefly its reasons for coming to the conclusion that the CJI was a "public authority". The reasons for which the CJI has been held to be the "public authority" notwithstanding he being the "competent authority" apply with equal force for not excluding the President and the Governor from the definition of "public authority". If the Governor falls under clause (a) of definition of the "public authority" under section 2(h) of the RTI Act, he cannot be excluded from definition for any reason, including the one contended by the learned Additional Solicitor General and the Advocate General. If the Legislature intended to exclude the persons who find place within the definition of the "competent authority" from the definition of "public authority", nothing prevented the Legislature from so saying. For these reasons, we

answer the first part of point no.1 in the affirmative and second part in the negative.

Point No.2

Whether the Governor is a sovereign and being sovereign, no direction can be issued to the Governor for disclosure of any information under the RTI Act?

18. The President of India is the constitutional head of the Union of India. The Governor of a State is the constitutional head of each State, constituting the federation of Union of India. The learned Additional Solicitor General submitted that the position of the President and the Governor is similar. He contended that the President is sovereign and so is the Governor. The Governor being sovereign, no authority, much less the PIO, can issue him any direction. The Governor is not bound to disclose any information asked of him under the RTI Act. The contention cannot be accepted for the reasons indicated below.

19. The theory of sovereignty was explained by Austin. Salmond quotes the theory of sovereignty developed by Austin as : "To Austin a sovereign is any person, or body of persons,

whom the bulk of political society habitually obeys, and who does not himself habitually obey some other person or persons". (Salmond on Jurisprudence, Twelfth Edition, Indian Economy Reprint (2009), page 27).

Dias also follows Austin and summarises the theory of sovereignty in following words:

> "Sovereignty has a 'positive mark' and a 'negative mark'. The former is that a determinate human superior should receive habitual obedience from the bulk of a given society, and the latter is that that superior is not in the habit of obedience to a like superior."
> (Dias Jurisprudence, Fifth Edition, page 348)

Jurisprudentially, in our view, the sovereign is that person or body of persons which receives habitual obedience from the bulk of a given society and does not himself habitually obey some other person or persons. It has two aspects, viz. (i) a bulk of the society obeys him, and (ii) he does not obey any other. The second aspect has been aptly put by Dias in the following words:

> “Sovereign cannot be under a duty, since to be under a duty implies that there is another sovereign above

> the first who commands the duty and imposes a sanction; in which case the first is not sovereign."

Applying this test, the President or the Governor cannot be held to be sovereign inasmuch as the President habitually obeys and is required by the Constitution to obey the advice given by the Council of Ministers and so is the Governor. Except in case of some discretionary functions wherein the Governor may act on his own, he is required to act on the advice of the Council of Ministers and so is the President. Though the advice given by the Council of Ministers to the President or the Governor, as the case may be, cannot be regarded as a command, under the constitutional scheme the President and the Governor in the bulk of the matters are bound by the advice rendered by the Council of Ministers. In that sense, it cannot be said that the President and the Governor are not in the habit of obedience to any other person or a body of persons.

20. There are usually three elements of internal sovereignty. The sovereign has a power to make laws (legislative power). He has a power to enforce laws (executive power) and he has power to decide any dispute or issue, including interpretation of the laws (judicial power). It is true that the President has all the three powers. Power of making laws in respect of the subjects

mentioned in the Union list vests in the Parliament. Article 79 of the Constitution provides that there shall be Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People. The President thus, is a part of the Parliament which makes laws. Under Article 123 of the Constitution, the President has power to promulgate Ordinances when both the houses of the Parliament are not in session. The President thus enjoys the legislative power. The President also has the executive power. Under Article 53 of the Constitution, the executive power of the Union vests in the President. The fact that the President is required to act in most of the matters in accordance with the advice of the Council of Ministers does not depart from the fact that the executive power of the Union vests in him. The President also, to an extent, exercises the judicial power. Judicial power is the power to decide an issue or a dispute. If any question arises as to the age of a Judge of a High Court, under Article 217(3) of the Constitution the question is to be decided by the President, after consultation with the Chief Justice of India and the decision of the President is to be final. If a question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102, the question is to be referred to the

President and his decision is final under Article 103 of the Constitution. Thus, the President has a power to decide a dispute or a question. The President exercises legislative, executive as well as judicial power. However, that does not make the President a sovereign. In democracy sovereignty vests in the people/the citizens of the country. Sovereign power of the Democratic Republic of India, which vests in its citizens is exercised by them through their representatives, be they the Members of Parliament or the Executive or through the titular head, but the ultimate power and sovereignty vests in the people of India. The very preamble to the Constitution begins with the words "We the people of India, having solemnly resolved to constitute Indian into a sovereign socialist secular democratic republic". The preamble recognizes the resolution of the people of India to constitute India into a sovereign socialist secular democratic republic. It is in them that the sovereignty vests, the President being the mere formal head of the State.

21. We will now refer to the various decisions cited before us in regard to the position of the President and the Governor.

22. Our attention was invited to a decision of seven Judges Bench of the Supreme Court in *Samsher Singh vs. State of*

Punjab, (1974) 2 SCC 831, and particularly to the observations in the concurring judgment of Krishna Iyer, J. in paragraph 138, wherein it is observed: "In short, the President, like the King has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role". Placing strong reliance on the aforesaid observations, it was submitted that the position of the President was like the King and in fact better than the King; like the King, sovereignty vests in the President in case of the Union and in the Governor in case of a State. Our attention was also invited to the judgment of Ray, CJ. who speaking for the majority, wrote (paragraph 33 of the decision): "This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system". In paragraph 48 of the majority judgment, it is observed: "The President as well as the Governor is the Constitutional or formal head. The President as was the Governor exercises his powers and functions conferred upon him by or under the Constitution on the aid and advice of Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion". In our view, in Samsher Singh's case the majority has not held that sovereignty vests in the President or the Governor or that they are sovereign. It has

only held that the powers of the President and the Governor are similar to the power of the Crown under the British Parliamentary System.

23. In *Bhuri Nath and others vs. State of J & K and others, (1997) 2 SCC 745,* the Supreme Court followed the decision in the case of Samsher Singh (supra) and held that under the cabinet system of Government, as embodied in our Constitution, the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion (para 19 of the decision). This decision also does not hold that the President and the Governor are sovereign or that the "Internal Sovereignty" vests in them.

24. In *Pu Myllai Hlychho and others vs. State of Mizoram and others, (2005) 2 SCC 92,* a Constitution Bench of the Supreme Court reiterated that the powers of the President and the Governor were similar to the powers of the Crown under British Parliamentary system, but also held (para 15) that "Whenever the Constitution requires the satisfaction of the Governor for the

exercise of any power or function, the satisfaction required by the Constitution is not personal satisfaction of the Governor but the satisfaction in the Constitutional sense under the cabinet system of Government."

25. None of the three decisions cited on behalf of the petitioners and referred to above indicates that the President or the Governor is the sovereign and/or that the sovereignty vests in them. All the decisions indicate that the President and the Governor are formal heads of the State and the executive powers of the Union and the State, as the case may be, vests in them. However, they have to exercise the powers as provided in the Constitution of India, on the aid and advice of the Council of Ministers in view of the cabinet system of governance adopted by the Constitution. Indeed, the fact that the President and the Governor are bound by the advice of the Council of Ministers militates against the Austin's concept of "Sovereignty", namely that the sovereign "habitually does not obey some other person or persons". Under the Constitution, the President and the Governor obey and are bound by the decisions of the cabinet, save and except, in exceptional circumstances where they can act in their discretion in certain matters.

26. In case of a monarchy, governed by an unwritten constitution, the King is the sovereign and enjoys an absolute immunity from any judicial process. The judiciary may in fact owe its existence to the King. No action of the King can be questioned. But that is not so in case of a country governed by a written constitution. The Head of the State, in whom the sovereignty may seemingly vest under the written constitution exercises sovereign powers and enjoys sovereign immunity only to the extent to which they are granted by the written constitution. We would have an occasion to consider later the extent of sovereign immunity enjoyed by the President and the Governor under Article 361. What needs to be stated here is that save and except the immunity which is granted under Article 361, the President and the Governor do not enjoy any other sovereign immunity from disclosure of information under the RTI Act.

27. A distinction between the sovereign and non-sovereign functions of the State must also to be borne in mind. In a war with another country, the military while using its arms and ammunitions may accidentally causes damage to the property of a citizen. In such a case, the State would enjoy a sovereign immunity and may not be liable to pay compensation for the loss

suffered by the citizen in a military action against a foreign country. But that does not mean that the State would enjoy sovereign immunity in respect of its non-sovereign functions. A damage caused by a military truck while moving on a public road carrying children of the officers to the school would give rise to claim damages and the State would not be able to claim sovereign immunity. We are of the view that in respect of non-sovereign functions performed by the Governor, he would not be entitled to claim freedom from law on the basis of sovereign immunity. His non-sovereign functions and actions would be subject to law of the land. He would be bound by the RTI Act and would not be able to claim any sovereign immunity from disclosing information in respect of his non-sovereign functions. In this connection, a reference may be made to the exemption provided under clause (a) of section 8(1) of the RTI Act which exempts disclosure of an information which would prejudicially affect the sovereignty and integrity of India, amongst other things. The exemption against disclosure of an information under the RTI Act is restricted in respect of sovereign functions of the President or the Governor only to the extent it is protected under section 8(1)(a) of the RTI Act or under Article 361 of the Constitution and no more.

Point No.3

What is the extent of immunity enjoyed by the Governor under Article 361 of the Constitution of India? And whether in view of such immunity, no direction can be issued to an no order can be passed under the RTI Act, which has an effect of requiring the Governor to disclose any information under the RTI Act?

28. The question of immunity granted to the President and the Governor under Article 361 of the Constitution came up for consideration before a Constitution Bench of the Supreme Court in *Rameshwar Prasad and others (VI) Vs. Union of India and another, (2006) 2 SCC 1* to which our attention was invited by Mr. Nadkarni, learned counsel appearing for the respondent. After considering its earlier decision in *Union Carbide Corporation and others Vs. Union of India and others, 1991(4) SCC 584*, and the decisions of Bombay, Madras, Calcutta and Nagpur High Court, Sabharwal, C.J., speaking for the majority observed:

> **179.** The position in law, therefore, is that the Governor enjoys complete immunity. The Governor is not answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him

> in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of mala fides."

Pasayat, J, in a partly dissenting Judgment, has also concurred with the majority on the question of scope of immunity enjoyed by the Governor under Article 361 of the Constitution. In paragraph No.281(6) of the judgment he has observed:

> "**281.** So far as the scope of Article 361 granting immunity to the Governor is concerned, I am in respectful agreement with the view expressed by the Hon'ble the Chief Justice of India:
>
> (6) In terms of Article 361 the Governor enjoys complete immunity. The Governor is not answerable to any court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine the validity of the action including on the ground of mala fides."

29. The law on the subject as laid down by the Supreme Court in the case of *Rameshwar Prasad (supra)* appears to be: Though

the Governor enjoys complete immunity and is not answerable to any Court for the exercise and performance of the powers and duties of his office and for any act done or purporting to be done by him in exercise and performance of his powers and duties, but the immunity granted by Article 361(1) does not take away the powers of the Court to examine the validity of his action, including on the ground of malafides. When an application is made to the PIO in the Office of the Governor by a citizen for disclosure of an information in possession of the Governor, the PIO would ordinarily seek views of the public authority on the application. If the public authority (including the Governor) has no objection for disclosure of the information, no difficulty would arise and the information would be disclosed to the applicant. If the public authority raises objection to the disclosure, either in the form of exemption under section 8 of the RTI Act or on the ground mentioned in Section 9 of the RTI Act, or any other ground permissible in law, the PIO would then be required to decide whether the information is so exempt and/or is not liable for disclosure to the citizen making the application. If the decision of the PIO or of the appellate or the second appellate authority as the case may be, is that the information is required to be disclosed and is not exempt from disclosure an order of disclosure would be issued. In our view the public

authority, be it Governor or anybody else, would then be required to disclose the information. Any direction so issued, in our considered opinion, would not enjoy any immunity under Article 361 of the Constitution.

30. We may refer to the oath which the Governor takes under Article 159 of the Constitution of India. The Article itself gives the form of the oath which reads as follows:

> "I, A.B., do swear in the name of Goa /solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of ..... (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of ..... (name of the State)"

The Governor, before assuming his office, takes an oath not only to preserve, protect and defend the Constitution, but also the law. He is bound by the oath taken by him. If the law requires disclosure of an information and if it is so held by the PIO or the first appellate authority or the State Information Commission (which is the final appellate authority) in accordance with the RTI Act, in our considered view, the Governor by virtue of the

oath of office he takes, is bound to obey the decision and disclose the information, or else, he would not be defending the law i.e. the RTI Act.

Point No.4

Whether the Report of the Governor made to the President under Article 356 of the Constitution is exempt from disclosure under clause (e) of section 8 of the RTI Act?

31. Clause (e) of sub-section (1) of section 8 of the RTI Act reads as follows:

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

The essential ingredients for applicability of clause (e) of sub-section (1) of section 8 of the RTI Act are (i) there must exist a fiduciary relationship between two persons, (ii) the information must be available with the latter person (public authority to whom request for disclosure of information is made) in his

fiduciary relationship with the former person (person regarding whom the information relates or who has given or transmitted the information), (iii) the competent authority must not be satisfied that the larger public interest warrants the disclosure of such information. In order to test the claim of exemption made by the appellant of exemption under section 8(1)(e) of the RTI Act, it would be necessary to examine (i) the nature of relationship between the President and the Governor, (ii) whether the report made by the Governor under Article 356 of the Constitution is made in pursuance of any fiduciary relationship between the two, and (iii) whether the person who is an author of the report (the Governor) can claim exemption under section 8(1)(e) or is it only the recipient (the President) who would be entitled to claim exemption under clause (e) of sub-section (1) of section 8 of the RTI Act.

32. Black's Law Dictionary, Eighth Edition, defines the word "fiduciary" as follows:-

> "**Fiduciary** - 1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship one who owes to another the duties of good faith, trust, confidence, and candor (the corporate officer is a fiduciary to the

> corporation). 2. One who must exercise a high standard of care in managing another's money or property (the beneficiary sued the fiduciary for investing in speculative securities) - f**iduciary**, adj.
>
> > 'Fiduciary' is a vague term, and it has been pressed into service for a number of ends ..... My view is that the term 'fiduciary' is so vague that plaintiffs have been able to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary stricto sensu but simply had withheld property from the plaintiff in an unconscionable manner." D.W.M. Waters, The Constructive Trust 4 (1964).

33. Concise Oxford English Dictionary (Indian Edition), Eleventh Edition, Revised, defines the word "fiduciary" as follows:

> "**fiduciary**- **adj**. 1. Law involving trust, especially with regard to the relationship between a trustee and a beneficiary, 2. Finance (of a paper currency) depending for its value on securities or the reputation of the issuer."

34. Despite the vagueness of the term "fiduciary", attempts have been made by Law Dictionaries to define the word

"fiduciary". The definitions indicate that a person would hold a fiduciary relationship with another if the former, in the scope of his relationship owes to the latter the duties of good faith, trust, confidence and candor. The fiduciary relationship can be best described not by definition but by illustrations. The relationship between a director of a company and the company; a lawyer and his clients; a doctor and his patients, a banker and its constituent, an executor and the beneficiary under a Will; are often cited as examples of fiduciary relationship. A common thread amongst these relationships is the position of a trust held by the former (fiduciary) in relation to the latter (beneficiary). A director of a company holds the position of trust for the company in the sense he must act in the interest of the company. In S*angramsinh P. Gaikwad v. Shantadevi P. Gaikwad, (2005) 11 SCC 314*, it was held that the director does not hold a position of a trust qua the shareholders except where any special contract or arrangement may have been entered into between directors and shareholders or any special relationship or circumstances exist in a particular case. As between a lawyer and his client, the lawyer acts for the benefit of his client and is not permitted to share the fruits of the litigation (champarty being prohibited in India). A doctor treats his patient and prescribes medicine for his benefit and not merely for a

research, except where specific consent of the patient is so obtained. An executor of a Will administers the estate of the testator for the benefit of the legatees and not for his own benefit. If this test of existence of trust is applied, it is difficult to subscribe to the proposition that the President holds a fiduciary relationship qua the Governor. Undoubtedly, the appointment of a Governor is made by the President and is terminable by the President, though the President acts in doing so on the advice of Council of Ministers. The President in a sense holds some authority on the Governor. He can call for a report from the Governor if one is not made suo motu by the Governor under Article 356 of the Constitution regarding the situation in a State so as to ascertain whether a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. But the President does not act as a trustee for the Governor nor does he act to protect the interest of the Governor. In that sense, there is no relationship of a trustee and a beneficiary. There is no duty in the President to act for the benefit of the Governor and the relationship between them cannot be regarded as fiduciary *stricto sensu*.

35. The report which the Governor makes to the President

under Article 356 of the Constitution is about the situation and state of affairs in the State of which he is the Governor. Under sub-clause (1) of Article 356 of the Constitution, the Governor makes a report to the President as to whether a situation has arisen in the State in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The report of the Governor is made in pursuance of his constitutional duty to inform the President where a situation arises that the Government of the State of which he is the Governor is unable to or otherwise cannot carried on in accordance with the provisions of the Constitution. This report is not made in performance of any fiduciary duty. In fact, the President or the Governor do not hold any fiduciary relationship in relation to the report to be made by the Governor under Article 356 of the Constitution. In making the report the Governor performs his constitutional obligation, an obligation far higher than an obligation in trust. It therefore cannot be said that the report of the Governor made under Article 356 of the Constitution is an information received by the President in a fiduciary capacity.

36. For the sake of arguments, even if it is assumed that the report made by the Governor to the President under Article 356

of the Constitution, is sent in a fiduciary capacity, the exemption available under section 8(1)(e) of the RTI Act would be available only to the recipient of the information (report), i.e. the President. The exemption under clause (e) of sub-clause (1) of section 8 of the RTI Act can be claimed only by the recipient and cannot be claimed by a person who is an author of the information or who gives the information. Clause (e) of sub-clause (1) of section 8 of the RTI Act says "information available to the person in fiduciary relationship". Even if it is assumed that the report is available with the President in a fiduciary relationship, it is he who can claim exemption when a disclosure is sought from him. Clause (e) of sub-clause (1) of section 8 of the RTI Act does not exempt the giver of an information to claim an exemption.

For all these reasons, it must be held that the Governor cannot claim an exemption under clause (e) of sub-clause (1) of section 8 of the RTI Act in respect of disclosure of a report made by him under Article 356 of the Constitution.

Point No.5

Whether a State Information Commission has to be a multi-member body? What is the effect of an order passed by the

State Information Commission when it is reduced to a sole member body?

37. By a notification dated 2nd March 2006 published in the Gazette, Extraordinary no.2 dated 3rd March 2006, the State of Goa constituted "the Goa State Information Commission" consisting of State Chief Information Commissioner and the State Information Commissioner. Mr. N.S. Keni was appointed as the State Chief Information Commissioner and Mr. Afanso Araugo was appointed as the State Information Commissioner and the two together constituted the State Information Commission. However, the State Information Commissioner retired on attaining age of 65 years and no new appointment has been made in his place. The result is that the Goa State Information Commission consists of only the State Chief Information Commission and is reduced to a single member body. It is this single member Commission which passed the order dated 31st March 2011 that is impugned in Writ Petition No. 237 of 2011.

38. Learned Additional Solicitor General appearing for the appellant submitted that under section 15 of the RTI Act, the State is required to constitute the State Information

Commission and such Information Commission has to be a multi-member body. The State Information Commission cannot function with only one member. The order passed by the State Information Commission consisting of only one member is not in accordance with law and is liable to be set aside. In support of his submission, he referred to and relied upon a decision of the Himachal Pradesh High Court in *Virendra Kumar vs. P.S. Rana, AIR 2007 HP 63* and of the High Court of Calcutta in *Tata Motors Ltd. vs. State of West Bengal (Writ Petition No. 1773 of 2008 decided on 12.1.2010, Coram: Dipankar Datta, J.).*

39. Per contra, the respondent no.3 appearing in person submitted that the law does not require that the State Information Commission to be a multi-member body. The State Information Commission can consist of the Chief Information Commissioner as a sole member. When the Chief Information Commissioner is the sole member, he can act alone. Even when the State Information Commission is a multi-member body, the distribution of the work amongst the members (State Information Commissioners) is to be done by the Chief Information Commissioner and he can assign any complaint under section 18 of the RTI Act to any one of the State Information Commissioners including himself and an order

passed by one member of State Information Commission is valid. If so, the order passed by the State Chief Information Commissioner acting solely and alone is a valid order. In support, he referred to and relied upon a decision of a Single Judge of this Court in *Shri Lokesh Chandra vs. State of Maharashtra (Writ Petition No. 5269 of 2008 decided on 1st July 2009 - Coram: C.L. Pangarkar, J.).*

40. Chapter IV of the RTI Act, which consists of sections 14 to 17, relates to the State Information Commission. Section 15 requires every State to constitute a State Information Commission. Sub-section (1) of section 15 says that every State Government shall, by notification in official gazette, constitute a body to be known as "(Name of the State) Information Commission" to exercise the powers conferred on and to perform functions assigned to it under this Act. Sub-sections (1) to (4) of section 15 are material and read thus:

> "15. Constitution of State Information Commission.-
> (1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the ..... (name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

(2) The State Information Commission shall consist of-

(a) the State Chief Information Commissioner, and

(b) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of—

(i) the Chief Minister, who shall be the Chairperson of the committee;

(ii) the Leader of Opposition in the Legislative Assembly; and

(iii) a Cabinet Minister to be nominated by the Chief Minister.

Explanation.—For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognised as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition.

(4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State

> Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act."

Conjoint reading of sub-sections (1) to (4) of section 15 of the RTI Act leaves no doubt in our mind that the State Information Commission has to be a multi-member body. Sub-section (2) in clear words states that the Commission shall consist of the State Information Commissioner and such number of State Information Commissioners, not exceeding ten, as may be deemed necessary. Though a discretion has been conferred on the State to decide the number of State Information Commissioners not exceeding ten, that does not mean that the State has discretion not to appoint even a single State Information Commissioner. Clauses (a) and (b) of sub-section (2) of section 15 of the RTI Act are joined by a conjunctive article "and". The conjunction "and" contemplates that the State Information Commission shall consist of at least two members, one State Chief Information Commissioner and at least one more State Information Commissioner. We also note that the Government of Goa by its notification dated 2nd March 2006 has constituted Goa State Information Commission to consist of

Chief Information Commissioner and one State Information Commissioner.

41. We are in agreement with the view expressed by the Single Judge of the Himachal Pradesh High Court in *Virendra Kumar vs. P.S. Rana* (supra), and in particular para 15 thereof and by the Calcutta High Court in *Tata Motors vs. State of West Bengal* (supra), that the State Information Commission has to be a multi-member body.

42. In *Lokesh Chandra vs. State of Maharashtra* (supra), a Single Judge of this Court was mainly concerned with sub-section (4) of section 15 of the RTI Act. Sub-section (4) of section 15 prescribes that general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner and he shall be assisted by the State Information Commissioners. Interpreting sub-section (4) of section 15 of the RTI Act, the Court held that the State Chief Information Commissioner has a right to decide which appeals are to be heard by whom. The State Information Commissioner can hear only those appeals which may be made over to him and cannot make a grievance for withdrawal of any appeal from him by the

State Chief Information Commissioner. In short, the Court held that the powers of the State Chief Information Commissioner regarding assignment of appeals are similar to the powers of the Chief Justice of a High Court who decides the roster and decides who should hear which appeal. In Lokesh Chandra's case, the Court was not required to consider whether the State Information Commission can consist of only one member, namely the State Chief Information Commissioner. This decision does not lay down that the State Information Commission can consist of only one member. In any event, we are of the considered view that the State Information Commission has to be a multi-member body and must consist of State Chief Information Commissioner and at least one more State Information Commissioner. Since at the relevant time, the Goa State Information Commission consisted of only one member, namely State Chief Information Commissioner, though the RTI Act and the Government contemplates it to be a multi-member body, it was not properly constituted and could not have exercised the powers under section 18 of the RTI Act. In this view of the matter, it is not necessary for us to consider the last leg of the argument of the learned Additional Solicitor General that the State Information Commission ought not to have entertained the application under section 18 of the RTI Act as the respondent no.

3 in Writ Petition No. 237 of 2011 had a remedy by way of an appeal under section 19 of the RTI Act against the order dated 19th November 2009 of the Public Information Officer declining to disclose information.

CONCLUSIONS

43. For the reasons mentioned above, we record our conclusions as follows:

Point No.1: The Governor is a public authority within the meaning of section 2(h) of the RTI Act. He would not cease to be a public authority by reason of the fact that he is also a competent authority under section 2(e) of the RTI Act.

Point No.2: The Governor is not sovereign and sovereignty does not vest in him. The contention that by reason of he being sovereign no direction can be issued to the Governor for disclosure of any information under the RTI Act, cannot be accepted.

Point No.3: By reason of Article 361 of the Constitution of

India, the Governor enjoys complete immunity and is not answerable to any Court in exercise and performance of the powers and duties of his office and any act done or purporting to be done by him in exercise and performance of his duties; but the immunity granted under Article 361(1) of the Constitution of India does not take away the powers of the Court to examine the validity of his actions including on the ground of mala fides. [See Rameshwar Prasad vs. Union of India, (2006) 2 SCC 1]. The Governor or the PIO in his office cannot claim immunity from disclosure of any information under the RTI Act.

Point No.4: The relationship between the President of India and the Governor of a State is not fiduciary. The President cannot be said to hold a fiduciary position qua the Governor of a State. Consequently, the information sought for by the respondent no.1 in Writ Petition No. 478 of 2008, i.e. a copy of the report made by the Governor to the President (through the Home Minister) under Article 356(1) of the Constitution of India is not

exempt from disclosure under section 8(1)(e) of the RTI Act.

Point No.5: The State Information Commission has to be a multi-member body consisting of the State Chief Information Commissioner and at least one (but not exceeding ten) State Information Commissioner/s. The State Information Commission cannot function only with one member.

44. For these reasons, Writ Petition No. 478 of 2008 is dismissed. However, Writ Petition No. 237 of 2011 however is allowed the impugned order dated 31st March 2011 (Annexure "K" to that writ petition) passed by the Goa State Information Commission is quashed and set aside. In the facts and circumstances, the parties shall bear their own costs.

(D.G. KARNIK, J.)

(F.M. REIS, J.)