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

% **Date of Decision: 11.07.2012**

+ **W.P.(C) No.13090 of 2006**

Union of India ... Petitioner

versus

Central Information Commission & Anr. ... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr.Amarjeet Singh Chandhihok Additional Solicitor General with Mr. Sumeet Pushkarna Advocate, Mr. Ritesh Kumar and Mr. Gaurav Verma Advocate

For Respondents : Mr. Prashant Bhushan Advocate with Mr. Ramesh K.Mishra Advocate for Respondent no.2

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

ANIL KUMAR, J.

1. This writ petition has been filed by the petitioner, Union of India, seeking the quashing of the order/judgment dated 8th August, 2006 passed by respondent no.1, Central Information Commission, directing the production of the document/correspondences, disclosure of which was sought by respondent no.2, Shri C. Ramesh, under the provisions of the Right to Information Act, 2005.

2. The brief facts of the case are that the respondent no.2, Shri C. Ramesh, by way of an application under Section 6 of the Right to Information Act, 2005 sought the disclosure from the Central Public Information Officer (hereinafter referred to as 'CPIO') of all the letters sent by the former President of India, Shri K.R. Narayanan, to the then Prime Minister, Shri A.B. Vajpayee, between 28th February, 2002 to 15th March, 2002 relating to '*Gujarat riots*'.

3. The CPIO by a communication dated 28th November, 2005 denied the request of respondent no.2 on the following grounds:-

> "(1) .....that Justice Nanavati/Justice Shah commission of enquiry had also asked for the correspondence between the President, late Shri K.R.Narayanan and the former Prime minister on Gujarat riots and the privilege under section 123 & 124 of the Indian Evidence Act, 1872 and Article 74(2) read with Article 78 and 361 of the Constitution of India has been claimed by the Government, for production of those documents;
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> (2) .....that in terms of Section 8(1) (a) of the Right to Information Act, 2005, the information asked for by you, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State etc."

4. The respondent no.2, thereafter, filed an appeal under Section 19(1) of the Right to Information Act, 2005 before the Additional Secretary (S & V), Department of Personnel and Training, who is the designated first appellate authority under the Act, against the order of the CPIO on the ground that the Right to Information Act, 2005 has an

overriding effect over the Indian Evidence Act, 1872 and that the document disclosure of which was sought by him are not protected under Section 8 of the Right to Information Act, 2005 or Articles 74(2), 78 and 361 of the Constitution of India, which appeal was also dismissed by an order dated 2nd January, 2006. The respondent no.2 aggrieved by the order of the first appellate authority preferred a second appeal under Section 19(3) of the Act before the Commission, Respondent no.1. The Commission after hearing the appeal by an order dated 7th July, 2006 referred the same to the full bench of the Commission, respondent no.1, for re-hearing.

5. After hearing the appeal, the full bench of the Commission, upholding the contentions of respondent no.2 passed an order/judgment dated 8th August, 2006, calling for the correspondences, disclosure of which was sought by the respondent no.2 under the provisions of the Right to Information Act, so that it can examine as to whether the disclosure of the same would serve or harm the public interest, after which, appropriate direction to the public authority would be issued. This order dated 8th August, 2006 is under challenge. The direction issued by respondent no.1 is as under:-

> "The Commission, after careful consideration has, therefore, decided to call for the correspondence in question and it will examine as to whether its disclosure will serve of harm the public interest. After examining the documents, the Commission will first consider whether it would be in

public interest to order disclosure or not, and only then it will issue appropriate directions to the public authority."

6. The order dated 8th August, 2006 passed by the Central Information Commission, respondent no.1, has been challenged by the petitioner on the ground that the provisions of the Right to Information Act, 2005 should be construed in the light of the provisions of the Constitution of India; that by virtue of Article 74(2) of the Constitution of India, the advise tendered by the Council of Ministers to the President is beyond the judicial inquiry and that the bar as contained in Article 74(2) of the Constitution of India would be applicable to the correspondence exchanged between the President and the Prime Minister. Thus, it is urged that the consultative process between the then President and the then Prime Minister, enjoys immunity. Further it was contended that since the correspondences exchanged cannot be enquired into by any Court under Article 74(2) consequently respondent no.1 cannot look into the same. The petitioner further contended that even if the documents form a part of the preparation of the documents leading to the formation of the advice tendered to the President, the same are also 'privileged'. According to the petitioner since the correspondences are privileged, therefore, it enjoys the immunity from disclosure, even in proceedings initiated under the Right to Information Act, 2005.

7. The petitioner further contended that by virtue of Article 361 of the Constitution of India the deliberations between the Prime Minister and the President enjoy complete immunity as the documents are 'classified documents' and thus it enjoys immunity from disclosure not because of their contents but because of the class to which they belong and therefore the disclosure of the same is protected in public interest and also that the protection of the documents from scrutiny under Article 74(2) of the Constitution of India is distinct from the protection available under Sections 123 and 124 of the Indian Evidence Act, 1872. Further it was contended that the documents which are not covered under Article 74(2) of the Constitution, privilege in respect to those documents could be claimed under section 123 and 124 of the Evidence Act.

8. The petitioner stated that the freedom of speech and expression as provided under Article 19(1)(a) of the Constitution of India, which includes the right to information, is subject to Article 19(2) of the Constitution of India wherein restrictions can be imposed on the fundamental rights of freedom of speech and expression. Therefore, it was contended that the right to information cannot have a overriding effect over and above the provisions of Article 19(2) of the Constitution of India and since the Right to Information, Act originates from the

Constitution of India the same is secondary and is subject to the provisions of the Constitution. The petitioner contended that the observation of respondent no.1 that the Right to Information Act, 2005 erodes the immunity and the privilege afforded to the cabinet and the State under Articles 74(2), 78 and 361 of the Constitution of India is patently erroneous as the Constitution of India is supreme over all the laws, statutes, regulations and other subordinate legislations both of the Centre, as well as, of the State. The petitioner has sought the quashing of the impugned judgment on the ground that the disclosure of the information which has been sought by respondent no.2 relates to Gujarat Riots and any disclosure of the same would prejudicially affect the national security, sovereignty and integrity of India, which information is covered under Sections 8(1)(a) and 8(1)(i) of the RTI Act. It was also pointed out by the petitioner that in case of conflict between two competing dimensions of the public interest, namely, right of citizens to obtain disclosure of information vis-à-vis right of State to protect the information relating to the crucial state of affairs in larger public interest, the later must be given preference.

9. Respondent no.2 has filed a counter affidavit refuting the averments made by the petitioner. In the affidavit, respondent no.2 relying on section 18(3) & (4) of the Right to Information Act, 2005 has contended that the Commission, which is the appellate authority under

the RTI Act, has absolute power to call for any document or record from any public authority, disclosure of which documents, before the Commission cannot be denied on any ground in any other Act. Further the impugned order is only an interim order passed by the Commission by way of which the information in respect of which disclosure was been sought has only been summoned in a sealed envelope for perusal or inspection by the commission after which the factum of disclosure of the same to the public would be decided and that the petitioner by challenging this order is misinterpreting the intent of the provisions of the Act and is questioning the authority of the Commission established under the Act. It was also asserted by respondent no.2 that the Commission in exercise of its jurisdiction in an appeal can decide as to whether the exemption stipulated in Section 8(1)(a) of the RTI Act is applicable in a particular case, for which reason the impugned order was passed by the Commission, and thus by prohibiting the disclosure of information to the Commission, the petitioner is obstructing the Commission from fulfilling its statutory duties. Also it is urged that the Right to Information Act, 2005 incorporates all the restrictions on the basis of which the disclosure of information by a public authority could be prohibited and that while taking recourse to section 8 of the Right to Information Act for denying information one cannot go beyond the parameters set forth by the said section. The respondent while admitting that the Right to Information Act cannot override the

constitutional provisions, has contended that Articles 74(2), 78 and 361 of the Constitution do not entitle public authorities to claim privilege from disclosure. Also it is submitted that the veil of confidentiality and secrecy in respect of cabinet papers has been lifted by the first proviso to section 8(1)(i) of the Right to Information Act, which is only a manifestation of the fundamental right of the people to know, which in the scheme of Constitution overrides Articles 74(2), 78 and 361 of the Constitution. Respondent no.2 contended that the information, disclosure of which has been sought, only constitutes the documents on the basis of which advice was formed/decision was made and the same is open to judicial scrutiny as under Article 74(2) the Courts are only precluded from looking into the 'advice' which was tendered to the President. Thus in terms of Article 74(2) there is no bar on production of all the material on which the ministerial advice was based. The respondent also contended that in terms of Articles 78 and 361 of the constitution which provides for participatory governance, the Government cannot seek any privilege against its citizens and under the Right to Information Act what cannot be denied to the Parliament cannot be denied to a citizen. Relying on Section 22 of the Right to Information Act the respondent has contended that the Right to Information Act overrides not only the Official Secrets Act but also all other acts which ipso facto includes Indian Evidence Act, 1872, by virtue of which no public authority can claim to deny any information

on the ground that it happens to be a 'privileged' document under the Indian Evidence Act, 1872. The respondent has sought the disclosure of the information as same would be in larger public interest, as well as, it would ensure the effective functioning of a secular and democratic country and would also check non performance of public duty by people holding responsible positions in the future.

10. This Court has heard the learned counsel for the parties and has carefully perused the writ petition, counter affidavit, rejoinder affidavit and the important documents filed therein. The question which needs determination by this Court, which has been agreed by all the parties, is whether the Central Information Commission can peruse the correspondence/letters exchanged between the former President of India and the then Prime Minster of India for the relevant period from 28th February, 2002 till 1st March, 2002 in relation to 'Gujarat riots' in order to decide as to whether the disclosure of the same would be in public interest or not and whether the bar under Article 74(2) will be applicable to such correspondence which may have the advice of Council of Minister or Prime Minister.

11. The Central Information Commission dealt with the following issues while considering the request of respondent No. 2:

> (1) Whether the Public Authority's claim of privilege under the Law of Evidence is justifiable under the RTI Act 2005?

(2) Whether the CPIO or Public Authority can claim immunity from disclosure under Article 74(2) of the Constitution?

(3) Whether the denial of information to the appellant can be justified in this case under section 8(1) (a) or under Section 8(1) (e) of the Right to Information Act 2005?

(4) Whether there is any infirmity in the order passed by the CPIO or by the Appellate Authority denying the requested information to the Appellant?

While dealing with the first issue the Central Information Commission observed that on perusing Section 22 of the Right to Information Act, 2005, it was clear that it not only over-rides the Official Secrets Act, but also all other laws and that ipso facto it includes the Indian Evidence Act as well. Therefore, it was held that no public authority could claim to deny any information on the ground that it happens to be a "privileged" one under the Indian Evidence Act. It was also observed that Section 2 of the Right to Information Act cast an obligation on all public authorities to provide the information so demanded and that the right thus conferred is only subject to the other provisions of the Act and to no other law. The CIC also relied on the following cases:

(1) S.R. Bommai vs. Union of India: AIR 1994 SC 1918, wherein it was held that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based.

(2) Rameshwar Prasad and Ors. vs. Union of India and Anr. AIR 2006 SC 980 wherein the above ratio was further clarified.

(3) SP Gupta vs. Union of India, 1981 SCC Supp. 87 case, wherein it was held that what is protected from disclosure under clause (2) of the Article 74 is only the advice tendered by the Council of Ministers. The reasons that have weighed with the Council of Ministers in giving the advice would certainly form part of the advice. But the material on which the reasoning of the Council of Ministers is based and advice given cannot be said to form part of the advice. It was also held that disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

(4) R.K. Jain vs. Union of India & Ors. AIR 1993 SC 1769 wherein the SC refused to grant a general immunity so as to cover that no document in any particular class or one of the categories of Cabinet papers or decisions or contents thereof should be ordered to be produced.

Based on the decisions of the SC in the above cases, the CIC had also inferred that Article 74(2), 78 and 361 of the Constitution of India do not per se entitle the public authorities to claim privilege from disclosure.

12. However, instead of determining whether the correspondence in question comes under the special class of documents exempted from disclosure on account of bar under Article 74 (2) of the Constitution of India, the CIC has called for it in order to examine the same. The petitioners have contended that the CIC does not have the power to call for documents that have been expressly excluded under Article 74(2),

read with Article 78 and Article 361 of the Indian Constitution, as well as the provisions of the Right to Information Act, 2005 under which the CIC is established and which is also the source of all its power. As per the learned counsel for the petitioner, the exemption from the disclosure is validated by Section 8(1)(a) and Section 8(1)(i) of the Right to Information Act, 2005 as well. The respondents, however, have contended that the correspondence is not expressly barred from disclosure under either the Constitution or the Provisions of the Right to Information Act, 2005. Therefore, the relevant question to be determined by this Court is whether or not the correspondence remains exempted from disclosure under Article 74(2) of the Constitution of India or under any provision of the Right to information Act, 2005. If the answer to this query is in the affirmative then undoubtedly what stands exempted under the Constitution cannot be called for production by the CIC as well. Article 74 (2) of the Constitution of India is as under:

> **74. Council of Ministers to aid and advise President.—**
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> (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:
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> [Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]

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

13. Clearly Article 74(2) bars the disclosure of the advice rendered by the Council of Ministers to the President. What constitutes this advice is another query that needs to be determined. As per the learned counsel for the petitioner, the word "advice" cannot constitute a single instance or opinion and is instead a collaboration of many discussions and to and fro correspondences that give result to the ultimate opinion formed on the matter. Hence the correspondence sought for is an intrinsic part of the "advice" rendered by the Council of Ministers and the correspondence is not the material on which contents of correspondence, which is the advise, has been arrived at and therefore, it is barred from any form of judicial scrutiny.

14. The respondents have on the other hand have relied on the judgments of S.R. Bommai vs. Union of India: AIR 1994 SC 1918; Rameshwar Prasad and Ors. vs. Union of India and Anr. AIR 2006 SC 980 and SP Gupta vs. Union of India, 1981 SCC Supp. 87, with a view to justify that Article 74(2) only bars disclosure of the final "advice" and not the material on which the "advice" is based.

15. However, on examining these case laws, it is clear that the factual scenario which were under consideration in these matters, where wholly different from the circumstances in the present matter. Even the slightest difference in the facts could render the ratio of a particular case otiose when applied to a different matter.

16. A decision is an authority for which it is decided and not what can logically be deduced therefrom. A little difference in facts or additional facts may make a lot of difference in the precedent value of a decision. In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.,(2003) 2 SCC 111*, at page 130, the Supreme Court had held in para 59 relying on various other decision as under:

> "59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See *Ram Rakhi* v. *Union of India* AIR 2002 Del 458 (db), *Delhi Admn. (NCT of Delhi)* v. *Manohar Lal* (2002) 7 SCC 222, *Haryana Financial Corpn.* v. *Jagdamba Oil Mills* (2002) 3 SCC 496 and *Nalini Mahajan (Dr)* v. *Director of Income Tax (Investigation)* (2002) 257 ITR 123 (Del).]"

17. In Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778), the Supreme Court had held that a decision cannot be relied on without considering the factual situation. In the said judgment the Supreme Court had observed:-

> " Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

18. In the case of S.R. Bommai (supra) Article 74(2) and its scope was examined while evaluating if the President's functions were within the constitutional limits of Article 356, in the matter of his satisfaction. The extent of judicial scrutiny allowed in such an evaluation was also ascertained. The matter dealt with the validity of the dissolution of the Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan, by the President under Article 356, which was challenged.

19. Similarly in Rameshwar Prasad (supra) since no political party was able to form a Government, President's rule was imposed under Article 356 of the Constitution over the State of Bihar and consequently the Assembly was kept in suspended animation. Thereafter, the assembly was dissolved on the ground that attempts are being made to cobble a majority by illegal means as various political parties/groups

are trying to allure elected MLAs and that if these attempts continue it would amount to tampering of the constitutional provisions. The issue under consideration was whether the proclamation dissolving the assembly of Bihar was illegal and unconstitutional. In this case as well reliance was placed on the judgment of S.R. Bommai (supra). However it is imperative to note that only the decision of the President, taken within the realm of Article 356 was judicially scrutinized by the Supreme Court. Since the decision of the President was undoubtedly based on the advice of the Council of Ministers, which in turn was based on certain materials, the evaluation of such material while determining the justifiability of the President's Proclamation was held to be valid.

20. Even in the case of S.P Gupta (supra) privilege was claimed against the disclosure of correspondences exchanged between the Chief Justice of the Delhi High Court, Chief Justice of India and the Law Minister of the Union concerning extension of the term of appointment of Addl. Judges of the Delhi High Court. The Supreme Court had called for disclosure of the said documents on the ground that the non disclosure of the same would cause greater injury to public interest than what may be caused by their disclosure, as the advice was tendered by the Council of Ministers after consultation with the Chief Justice of Delhi High Court and the Chief Justice of India and thus it

was held that the views expressed by the Chief justices could not be said to be an advice and therefore there is no bar on its disclosure.

21. It will be appropriate to consider other precedents also relied on by the parties at this stage. In State of U.P. vs. Raj Narain, AIR 1975 SC 865 the document in respect of which exclusion from production was claimed was the Blue Book containing the rules and instructions for the protection of the Prime Minister, when he/she is on tour or travelling. The High Court rejected the claim of privilege under section 123 of the Evidence Act on the ground that no privilege was claimed in the first instance and that the blue book is not an unpublished document within the meaning of section 123 of Indian Evidence Act, as a portion of it had been published, which order had been challenged. The Supreme Court while remanding the matter back to the High Court held that if, on the basis of the averments in the affidavits, the court is satisfied that the Blue Book belongs to a class of documents, like the minutes of the proceedings of the cabinet, which is per se entitled to protection, then in such case, *no question of inspection of that document by the court would arise*. If, however, the court is not satisfied that the Blue Book belongs to that class of privileged documents, on the basis of the averments in the affidavits and the evidence adduced, which are not sufficient to enable the Court to make up its mind that its disclosure will injure public interest, then it will be open to the court to inspect the

said documents for deciding the question of whether it relates to affairs of the state and whether its disclosure will injure public interest.

22. In R.K.Jain vs. Union Of India, AIR 1993 SC 1769 the dispute was that no Judge was appointed as President in the Customs Central Excise and Gold (Control) Appellate Tribunal, since 1985 and therefore a complaint was made. Notice was issued and the ASG reported that the appointment of the President has been made, however, the order making the appointment was not placed on record. In the meantime another writ petition was filed challenging the legality and validity of the appointment of respondent no.3 as president and thus quashing of the said appointment order was sought. The relevant file on which the decision regarding appointment was made was produced in a sealed cover by the respondent and objection was raised regarding the inspection of the same, as privilege of the said documents was claimed. Thereafter, an application claiming privilege under sections 123, 124 of Indian Evidence Act and Article 74(2) of the Constitution was filed. The Government in this case had no objection to the Court perusing the file and the claim of privilege was restricted to disclosure of its contents to the petitioner. The issue before the Court was whether the Court would interfere with the appointment of Shri Harish Chander as President following the existing rules. Considering the circumstances, it was held that it is the duty of the Minister to file an affidavit stating the grounds

or the reasons in support of the claim of immunity from disclosure in view of public interest. It was held that the CEGAT is a creature of the statute, yet it intended to have all the flavors of judicial dispensation by independent members and President, therefore the Court ultimately decided to set aside the appointment of Harish Chandra as President.

23. In People's Union For Civil Liberties & Anr. vs. Union of India (UOI) and Ors. AIR 2004 SC 1442, the appellants had sought the disclosure of information from the respondents relating to purported safety violations and defects in various nuclear installations and power plants across the country including those situated at Trombay and Tarapur. The respondents claimed privilege under Section 18 (1) of the Atomic Energy Act, 1962 on the ground that the same are classified as 'Secrets' as it relates to nuclear installations in the country which includes several sensitive facilities carried out therein involving activities of classified nature and that publication of the same would cause irreparable injury to the interest of the state and would be prejudicial to the national security. The Court while deciding the controversy had observed that the functions of nuclear power plants are sensitive in nature and that the information relating thereto can pose danger not only to the security of the state but to the public at large if it goes into wrong hands. It was further held that a reasonable restriction on the exercise of the right is always permissible in the interest of the

security of the state and that the functioning and the operation of a nuclear plant is information that is sensitive in nature. If a reasonable restriction is imposed in the interest of the State by reason of a valid piece of legislation the Court normally would respect the legislative policy behind the same. It was further held that that normally the court will not exercise power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fides, dishonesty or corrupt practices. For a claim of immunity under Section 123 of the IEA, the final decision with regard to the validity of the objection is with the Court by virtue of section 162 of IEA. The balancing between the two competing public interests (i.e. public interest in withholding the evidence be weighed against public interest in administration of justice) has to be performed by the Court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, as there is no absolute immunity for documents belonging to such class. The Court further held that there is no legal infirmity in the claim of privilege by the Government under Section 18 of the Atomic Energy Act and also that perusal of the report by the Court is not required in view of the object and the purport for which the disclosure of the report of the Board was withheld.

24. In Dinesh Trivedi vs. Union of India (1997) 4 SCC 306, the petitioner had sought making public the complete Vohra Committee Report on criminalization of politics including the supporting material which formed the basis of the report as the same was essential for the maintenance of democracy and ensuring that the transparency in government was secured and preserved. The petitioners sought the disclosure of all the annexures, memorials and written evidence that were placed before the committee on the basis of which the report was prepared. The issue before the Court was whether the supporting material (comprising of reports, notes and letters furnished by other members) placed before the Vohra Committee can be disclosed for the benefit of the general public. The Court had observed that Right to know also has recognized limitations and thus by no means it is absolute. The Court while perusing the report held that the Vohra Committee Report presented in the parliament and the report which was placed before the Court are the same and that there is no ground for doubting the genuineness of the same. It was held that in these circumstances the disclosure of the supporting material to the public at large was denied by the court, as instead of aiding the public it would be detrimentally overriding the interests of public security and secrecy.

25. In State of Punjab vs. Sodhi Sukhdev Singh, AIR 1961 SC 493, on the representation of the District and Sessions Judge who was removed

from the services, an order was passed by the Council of Ministers for his re-employment to any suitable post. Thereafter, the respondent filed a suit for declaration and during the course of the proceedings he also filed an application under Order 14, Rule 4 as well as Order 11, Rule 14 of the Civil Procedure Code for the production of documents mentioned in the list annexed to the application. Notice for the production of the documents was issued to the appellant who claimed privilege under section 123 of the IEA in respect of certain documents. The Trial Court had upheld the claim of privilege. However, the High Court reversed the order of the Trial Court in respect of four documents. The issue before the Supreme Court was whether having regard to the true scope and effect of the provisions of Sections 123 and 162 of the Act, the High Court was in error in refusing to uphold the claim of privilege raised by the appellant in respect of the documents in question. The contention of the petitioner was that under Sections 123 and 162 when a privilege is claimed by the State in the matter of production of State documents, the total question with regard to the said claims falls within the discretion of the head of the department concerned, and he has to decide in his discretion whether the document belongs to the privileged class and whether or not its production would cause injury to public interest. The Supreme Court had ultimately held that the documents were 'privilege documents' and that the disclosure of the same cannot

be asked by the appellant through the Court till the department does not give permission for their production.

26. In S.P. Gupta (supra)the Supreme Court had observed that a seven Judges' bench had already held that the Court would allow the objection to disclosure, if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of the State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. It was further observed that in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how the Govt. is functioning and that they can fulfill the democratic rights given to them and make the democracy a really effective and participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. Therefore, disclosure of information with regard to the functioning of the Govt. must be the rule and secrecy can be exceptionally justified only where strict requirement of public

information is assumed. It was further observed that the approach of the Court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind, at all times that the disclosure also serves an important aspect of public interest. In that the said case, the correspondence between the constitutional functionaries was inspected by the Court and disclosed to the opposite parties to formulate their contentions.

27. It was further held that under Section 123 when immunity is claimed from disclosure of certain documents, a preliminary enquiry is to be held in order to determine the validity of the objections to production which necessarily involves an enquiry in the question as to whether the evidence relates to an affairs of State under Section 123 or not. In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of the State, it should leave it to the head of the department to decide whether he should permit its production or not. 'Class Immunity' under Section 123 contemplated two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of

justice shall not be frustrated by the withholding of documents; which must be produced if justice is to be done. It is for the Court to decide the claim for immunity against disclosure made under Section 123 by weighing the competing aspects of public interest and deciding which, in the particular case before the court, predominates. It would thus seem clear that in the weighing process, which the court has to perform in order to decide which of the two aspects of public interest should be given predominance, the character of the proceeding, the issues arising in it and the likely effect of the documents on the determination of the issues must form vital considerations, for they would affect the relative weight to be given to each of the respective aspects of public interest when placed in the scales.

28. In these circumstance the Court had called for the disclosure of documents on the ground that the non disclosure of the same would cause greater injury to public interest than what may be caused by their disclosure as the advice was tendered by the Council of Ministers after consultation with the Chief Justice of High Court and Chief Justice of India and the views expressed by the Chief Justices could not be said to be an advice and therefore it was held that there is no bar to its disclosure. Bar of judicial review is on the factum of advice but not on the reasons i.e. material on which the advice was founded.

29. These are the cases where for proper adjudication of the issues involved, the court was called upon to decide as to under what situations the documents in respect of which privilege has been claimed can be looked into by the Court.

30. The CIC, respondent No.1 has observed that Article 74(2), 78 and 361 of the Constitution of India do not per se entitle the public authorities to claim privilege from disclosure. The respondent No.1 had observed that since the Right to information Act has come into force, whatever immunity from disclosure could have been claimed by the State under the law, stands virtually extinguished, except on the ground explicitly mentioned under Section 8 and in some cases under Section 11 of the RTI Act. Thus, CIC has held that the bar under Section 74(2) is not absolute and the bar is subject to the provisions of the RTI Act and the only exception for not disclosing the information is as provided under Sections 8 & 11 of the RTI Act. The proposition of the respondent No.1 is not logical and cannot be sustained in the facts and circumstances. The Right to Information Act cannot have overriding effect over the Constitution of India nor can it amend, modify or abrogate the provisions of the Constitution of India in any manner. Even the CIC cannot equate himself with the Constitutional authorities,

the Judges of the Supreme Court of India and all High Courts in the States.

31. The respondent No.1 has also tried to create an exception to Article 74(2) on the ground that the bar within Article 74(2) will not be applicable where correspondence involves a sensitive matter of public interest. The CIC has held as under:-

> ".....Prima facie the correspondence involves a sensitive matter of public interest. The sensitivity of the matter and involvement of larger public interest has also been admitted by all concerned including the appellant. .....in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make final decision depending upon the particular facts involved in each individual case.....therefore we consider it appropriate that before taking a final decision on this appeal, we should personally examine the documents to decide whether larger public interest would require disclosure of the documents in question or not..."

32. The above observation of respondent No.1 is legally not tenable. Right to Information Act, 2005 which was enacted by the Legislature under the powers given under the Constitution of India cannot abrogate, amend, modify or change the bar under Article 74(2) as has been contended by the respondent No.1. Even if the RTI Act overrides Official Secrets Act, the Indian Evidence Act, however, this cannot be construed in such a manner to hold that the Right to Information Act will override the provisions of the Constitution of India. The learned

counsel for the respondent No.2 is unable to satisfy this Court as to how on the basis of the provisions of the RTI Act the mandate of the Constitution of India can be amended or modified. Amendment of any of the provisions of the Constitution can be possible only as per the procedure provided in the Constitution, which is Article 368 and the same cannot be deemed to be amended or obliterated merely on passing of subsequent Statutes. There can be no doubt about the proposition that the Constitution is supreme and that all the authorities function under the Supreme Law of land. For this Golak Nath v. State of Punjab, AIR 1967 SC 1643 can be relied on. In these circumstances, the plea of the respondents that since the Right to Information Act, 2005 has come into force, whatever bar has been created under Article 74(2) stands virtually extinguished is not tenable. The plea is not legally sustainable and cannot be accepted.

33. A bench of this Court in Union of India v. CIC, 165 (2009) DLT 559 had observed as under:-

> "…when Article 74 (2) of the Constitution applies and bars disclosure, information cannot be furnished. RTI Act cannot and does not have the ability and mandate to negate the constitutional protection under Article 74 (2). The said Article refers to inquiry by Courts but will equally apply to CIC."

Further it has been observed in para 34 as under:-

> " ….Possibly the only class of documents which are granted immunity from disclosure is those mentioned under Article 74 (2) of the Constitution. These are documents or

> information which are granted immunity from disclosure not because of their contents but because of the class to which they belong."

34. In the circumstances, the bar under Article 74(2) cannot be diluted and whittled down in any manner because of the class of documents it relates to. The respondent No.1 is not an authority to decide whether the bar under Article 74(2) will apply or not. If it is construed in such a manner then the provision of Article 74(2) will become sub serving to the provisions of the RTI Act which was not the intention of the Legislature and even if it is to be assumed that this is the intention of the Legislature, such an intension, without the amendment to the Constitution cannot be sustained.

35. The judgments relied on by the CIC have been discussed hereinbefore. It is apparent that under Article 74(2) of the Constitution of India there is no bar to production of all the material on which the advice rendered by the Council of Ministers or the Prime Minister to the President is based.

36. The correspondence between the President and the Prime Minister will be the advice rendered by the President to the Council of Ministers or the Prime Minister and vice versa and cannot be held that the information in question is a material on which the advice is based.

In any case the respondent No.2 has sought copies of the letters that may have been sent by the former President of India to the Prime Minster between the period 28th February, 2002 to 15th March, 2002 relating to the Gujarat riots. No exception to Article 74(2) of the Constitution of India can be carved out by the respondents on the ground that disclosure of the truth to the public about the stand taken by the Government during the Gujarat carnage is in public interest. Article 74(2) contemplates a complete bar in respect of the advice tendered, and no such exception can be inserted on the basis of the alleged interpretation of the provisions of the Right to Information Act, 2005.

37. The learned counsel for the respondents are unable to satisfy this Court that the documents sought by the respondent No.2 will only be a material and not the advice tendered by the President to the Prime Minister and vice versa. In case the correspondence exchanged between the President of India and the Prime Minister during the period 28th February, 2002 to 15th March, 2002 incorporates the advice once it is disclosed to the respondent No.1, the bar which is created under Article 74(2) cannot be undone.

38. In the case of S.R.Bommai v. Union of India, (1994) 3 SCC 1 at page 242, Para 323 the Supreme Court had held as under:-

" But, Article 74(2) does not and cannot mean that the Government of India need not justify the action taken by the President in the exercise of his functions because of the provision contained therein. No such immunity was intended — or is provided — by the clause. If the act or order of the President is questioned in a court of law, it is for the Council of Ministers to justify it by disclosing the material which formed the basis of the act/order..... The court will not ask whether such material formed part of the advice tendered to the President or whether that material was placed before the President. **The court will not also ask what advice was tendered to the President, what deliberations or discussions took place between the President and his Ministers and how was the ultimate decision arrived at**..... The court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action under Article 356(1). The court will not go into the correctness of the material or its adequacy.

The Supreme Court in para 324 had held as under:-

24. In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Article 74(2). The argument that the advice tendered to the President comprises material as well and, therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him — and if need be to satisfy him — that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. **One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article 74(2).** But it is difficult to appreciate how does the supporting material become part of advice. The respondents cannot say that whatever the President sees — or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court.

39. The plea of the respondents that the correspondence may not contain the advice but it will be a material on which the advice is rendered is based on their own assumption. On such assumption the CIC will not be entitled to get the correspondences and peruse the same and negate the bar under said Article of the Constitution of India. As already held the CIC cannot claim parity with the Judges of Supreme Court and the High Courts. The Judges of Supreme Court and the High Courts may peruse the material in exercise of their power under Article 32 and 226 of the Constitution of India, however the CIC will not have such power.

40. In the case of S.P.Gupta (supra) the Supreme Court had held that what is protected against disclosure under clause (2) of Article 74 is the advice tendered by the Council of Ministers and the reason which weighed with the Council of Ministers in giving the advice would certainly form part of the advice.

41. In case of Doypack Systems Pvt Ltd v. Union of India, (1988) 2 SCC 299 at para 44 the Supreme Court after examining S.P.Gupta (supra) had held as under:-

> "44. Shri Nariman however, submitted on the authority of the decision of this Court in S.P. Gupta v. Union of India that the documents sought for herein were not privileged.

> The context and the nature of the documents sought for in S.P. Gupta case were entirely different. **In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. This Court is precluded from asking for production of these documents...**.....
>
> **....It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable."**

42. The learned counsel for the respondents had laid lot of emphasis on S.P.Gupta (supra) however, the said case was not about what advice was tendered to the President on the appointment of Judges but the dispute was whether there was the factum of effective consultation. Consequently the propositions raised on behalf of the respondents on the basis of the ratio of S.P.Gupta will not be applicable in the facts and circumstances and the pleas and contentions of the respondents are to be repelled.

43. The Commission under the Right to Information Act, 2005 has no such constitutional power which is with the High Court and the Supreme Court under Article 226 & 32 of the Constitution of India, therefore, the interim order passed by the CIC for perusal of the record in respect of which there is bar under Article 74(2) of the Constitution of

India is wholly illegal and unconstitutional. In Doypack Systems (supra) at page 328 the Supreme Court had held as under:-

> **"**43. The next question for consideration is that by assuming that these documents are relevant, whether the Union of India is liable to disclose these documents. Privilege in respect of these documents has been sought for under Article 74(2) of the Constitution on behalf of the Government by learned Attorney General.
>
> 44. Shri Nariman however, submitted on the authority of the decision of this Court in *S.P. Gupta* v. *Union of India* that the documents sought for herein were not privileged. The context and the nature of the documents sought for in *S.P. Gupta case* were entirely different. In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. **This Court is precluded from asking for production of these documents.** In *S.P. Gupta case* the question was not actually what advice was tendered to the President on the appointment of judges. The question was whether there was the factum of effective consultation between the relevant constitutional authorities. In our opinion that is not the problem here. We are conscious that there is no sacrosanct rule about the immunity from production of documents and the privilege should not be allowed in respect of each and every document. We reiterate that the claim of immunity and privilege has to be based on public interest. Learned Attorney-General relied on the decision of this Court in the case of *State of U.P.* v. *Raj Narain*. The principle or ratio of the same is applicable here. We may however, reiterate that the real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recorded in its discussions and its conclusions. It is well settled that the privilege cannot be waived. In this connection, learned Attorney General drew our attention to an unreported decision in *Elphistone Spinning and Weaving Mills Co. Ltd.* v. *Union of India*. This resulted ultimately in *Sitaram Mills case.*. The Bombay High Court held that the Task Force Report was withheld deliberately as it would

support the petitioner's case. It is well to remember that in *Sitaram Mills case* this Court reversed the judgment of the Bombay High Court and upheld the take over. Learned Attorney General submitted that the documents there were not tendered voluntarily. **It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable. We are convinced that the notings of the officials which lead to the Cabinet note leading to the Cabinet decision formed part of the advice tendered to the President as the Act was preceded by an ordinance promulgated by the President.**

45. We respectfully follow the observations in *S.P. Gupta* v. *Union of India* at pages 607, 608 and 609. We may refer to the following observations at page 608 of the report: (SCC pp. 280-81, para 70)

"It is settled law and it was so clearly recognised in *Raj Narain case* that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognizes that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad (vide *Conway* v. *Rimmer*) and *Reg* v. *Lewes Justices, ex parte Home Secretary*, papers brought into existence for the purpose of preparing a submission to cabinet (vide: *Lanyon Property Ltd.* v. *Commonwealth 129 Commonwealth Law Reports 650*) and indeed any documents which relate to the framing of Government policy at a high level (vide: *Re Grosvenor Hotel, London* 1964 (3) All E.R. 354 (CA).

46. Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to

which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. See Geoffrey Wilson — *Cases and Materials on Constitutional and Administrative Law,* 2nd edn., pages 462 to 464. At page 463 para 187, it was observed:

"The real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorized communication of these papers."

44. Even in R.K.Jain (supra) at page 149 the Supreme Court had ruled as under:-

'34. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favorable or unfavorable, every other member will keep it secret. Maintenance of secrecy of an individual's contribution to discussion, or vote in the Cabinet guarantees the most favorable and conducive atmosphere to express views formally. To reveal the view, or vote, of a member of the Cabinet, expressed or given in Cabinet, is not only to disappoint an expectation on which that member was entitled to rely, but also to reduce the security of the continuing guarantee, and above all, to undermine the principle of collective responsibility. Joint responsibility supersedes individual responsibility; in accepting responsibility for joint decision, each member is entitled to an assurance that he will be held responsible not only for his own, but also as member of the whole Cabinet which made it; that he will be held responsible for maintaining secrecy of any different view which the others may have expressed. The obvious and basic fact is that as part of the machinery of the government. **Cabinet secrecy is an essential part of the structure of the government.** Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or affectivity of collective decision to elongate public interest. **To hamper and impair them without any compelling or at least**

> **strong reasons, would be detrimental to the efficacy of public administration.** It would tantamount to wanton rejection of the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance.

45. Consequently for the foregoing reason there is a complete bar under Article 74(2) of the Constitution of India as to the advice tendered by the Ministers to the President and, therefore, the respondent No.1 CIC cannot look into the advice tendered by the President to the Prime Minster and consequently by the President to the Prime Minister or council of Ministers. The learned counsel for the respondents also made an illogical proposition that the advice tendered by the Council of Ministers and the Prime Minster to the President is barred under Article 74(2) of the Constitution of India but the advice tendered by the President to the Prime Minister in continuation of the advice tendered by the Prime Minster or the Council of Ministers to the President of India is not barred. The proposition is not legally tenable and cannot be accepted. The learned counsel for the respondent No.2, Mr. Mishra also contended that even if there is a bar under Article 74(2) of the Constitution of India, the respondent No.2 has a right under Article 19(1) (a) to claim such information. The learned counsel is unable to show any such precedent of the Supreme Court or any High Court in support of his contention and, therefore, it cannot be accepted. The

freedom of speech and expression as provided under Article 19(1)(a) of the Constitution of India, which includes the right to information, is subject to Article 19(2) of the Constitution of India wherein restrictions can be imposed on the fundamental rights of freedom of speech and expression. The right to information cannot have a overriding effect over and above the provisions of Article 19(2) of the Constitution of India and since the Right to Information, Act originates from the Constitution of India the same is secondary and is subject to the provisions of the Constitution.

46. The documents in question are deliberations between the President and the Prime Minister within the performance of powers of the President of India or his office. As submitted by the learned counsel for the petitioner such documents by virtue of Article 361 would enjoy immunity and the immunity for the same cannot be asked nor can such documents be perused by the CIC. Thus the CIC has no authority to call for the information in question which is barred under Article 74(2) of the Constitution of India. Even on the basis of the interpretation to various provisions of the Right to Information Act, 2005 the scope and ambit of Article 74(2) cannot be whittled down or restricted. The plea of the respondents that dissemination of such information will be in public interest is based on their own assumption by the respondents. Disclosure of such an advice tendered by the Prime Minster to the

President and the President to the Prime Minister, may not be in public interest and whether it is in public interest or not, is not to be adjudicated as an appellate authority by respondent No.1. The provisions of the Right to Information Act, 2005 cannot be held to be superior to the provisions of the Constitution of India and it cannot be incorporated so as to negate the bar which flows under Article 74(2) of the Constitution of India. Merely assuming that disclosure of the correspondence between the President and the Prime Minster and vice versa which contains the advice may not harm the nation at large, is based on the assumptions of the respondents and should not be and cannot be accepted in the facts and circumstances. In the circumstances the findings of the respondent No.1 that bar under Article 74(2), 78 & 361 of the Constitution of India stands extinguished by virtue of RTI Act is without any legal basis and cannot be accepted. The respondent No.1 has no authority to call for the correspondent in the facts and circumstances.

47. The learned junior counsel for the respondent no.2, Mr. Mishra who also appeared and argued has made some submissions which are legally and prima facie not acceptable. His contention that the bar under Article 74(2) of the Constitution will only be applicable in the case of the High Courts and Supreme Court while exercising the power of judicial review and not before the CIC as the CIC does not exercise

the power of judicial review is illogical and cannot be accepted. The plea that bar under Article 74(2) is not applicable in the present case is also without any basis. The learned counsel has also contended that the correspondence between the President and the Prime Minster cannot be termed as advice is based on his own presumptions and assumptions which have no legal or factual basis. As has been contended by the learned Additional Solicitor General, the bar under Article 74(2) is applicable to all Courts including the CIC. In the case of S.R.Bommai v. Union of India, (1994) 3 SCC 1 at page 241 it was observed as under:-

> **"**321**.** Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect**. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers.**"

48. Consequently the bar of Article 74(2) is applicable in the facts and circumstances and the CIC cannot contend that it has such power under the Right to Information Act that it will decide whether such bar can be claimed under Article 74 (2) of the Constitution of India.. In case of UPSC v. Shiv Shambhu, 2008 IX AD (Delhi) 289 at para 2 a bench of this Court had held as under:-

> " At the outset this Court directs the deletion of the CIC which has been arrayed as Respondent No.1 to this appeal, consequent upon it being arrayed as such in the writ petition. This Court has repeatedly issued practice directions stressing that a judicial or quasi-judicial body or Tribunal whose order is challenged in a writ petition ought not to itself be impleaded as a party respondent. The only exception would be if mala fides are alleged against any

> individual member of such authority or Tribunal in which case again it would be such member, and not the authority/Tribunal who may be impleaded as a respondent."

49. The respondent No.2 has sought copies of the letters that may have been sent by the President of India to the Prime Minister during the period 28th February, 2002 to 15th March, 2002 relating to Gujarat riots. In the application submitted by respondent No.2 for obtaining the said information, respondent No.2 had stated as under:-

> "I personally feel that the contents of the letters, stated to have been sent by the former President of India to the then Prime Minister are of importance for foreclosure of truth to the public on the stand taken by the Government during the Gujarat carnage. I am therefore interested to know the contents of the letters"

50. Considering the pleas and the averments made by the respondents it cannot be construed in any manner that the correspondence sought by the respondent No.2 is not the advice rendered, and is just the material on which the advice is based. What is the basis for such an assumption has not been explained by the counsel for the respondent No.2. The impugned order by the respondent No.1 is thus contrary to provision of Article 74(2) and therefore it cannot be enforced and the petitioner cannot be directed to produce the letters exchanged between the President and the Prime Minister or the

Council of Ministers as it would be the advice rendered by the President in respect of which there is a complete bar under Article 74(2).

51. In the case of S.R.Bommai (supra) at page 241 the Supreme Court had observed as under:-

> "321. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers."

The Supreme Court at para 324 had also observed as under:-

> "..... **One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article 74(2).** But it is difficult to appreciate how does the supporting material become part of advice. The respondents cannot say that whatever the President sees — or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court.

52. Thus there is an apparent and conspicuous distinction between the advice and the material on the basis of which advice is rendered. In case of Doypack (supra) the Supreme Court had held as under:-

> "44. Shri Nariman however, submitted on the authority of the decision of this Court in S.P. Gupta v. Union of India that the documents sought for herein were not privileged. The context and the nature of the documents sought for in S.P. Gupta case were entirely different. In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired

> into in any court. This Court is precluded from asking for production of these documents…….
>
> ….It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable."

53. The learned counsel for the respondents also tried to contend that even if Article 74(2) protects the disclosure of advice from the Council of Ministers/Prime Minister to President it does not bar disclosure of communication from President to the Prime Minister. In case of PIO vs. Manohar Parikar, Writ Petition No. 478 of 2008, the Bombay High Court at Goa Bench had held that the protection under Article 361 will not be available for the Governor if any information is sought under RTI Act. However, the reliance on the said precedent cannot be made, as the same judgment has been stayed by the Supreme Court in SLP (C) No.33124/2011 and is therefore sub judice and consequently the respondents are not entitled for any direction to produce the correspondence which contains the advice rendered by the President to the Prime Minister for the perusal by the CIC. The plea of the respondents that the CIC can call the documents under Section 18 of RTI Act, therefore, cannot be sustained. If the bar under Article 74(2) is absolute so far as it pertains to advices, even under Section 18 such bar cannot be whittled down or diluted nor can the respondents contend that the CIC is entitled to see that correspondence and consequently the respondent No.2 is entitled for the same. For the foregoing reasons

and in the facts and circumstances the order of the CIC dated 8th August, 2006 is liable to be set aside and the CIC cannot direct the petitioner to produce the correspondence between the President and the Prime Minister, and since the CIC is not entitled to peruse the correspondence between the President and the Prime Minister, as it is be barred under Article 74(2) of the Constitution of India, the application of the petitioner seeking such an information will also be not maintainable.

54. Consequently, the writ petition is allowed and the order dated 8th August, 2006 passed by Central Information Commission in Appeal No.CIC/MA/A/2006/00121 being 'C.Ramesh v. Minister of Personnel & Grievance & Pension' is set aside. The application of the respondent No.2 under Section 6 of the Right to Information Act, 2005 dated 7th November, 2005 is also dismissed, holding that the respondent No.2 is not entitled for the correspondence sought by him which was exchanged between the President and the Prime Minster relating to the Gujarat riots. Considering the facts and circumstances the parties are, however, left to bear their own cost.

July 11, 2012 **ANIL KUMAR, J.**

'k/vk'