

A PEOLE'S UNION FOR CIVIL LIBERTIES AND ANR.

v.

UNION OF INDIA AND ORS.

JANUARY 6, 2004

B [V.N. KHARE, CJ AND S.B. SINHA, J.]

Atomic Energy Act, 1962:

C *Section 18—Restriction—On disclosure of information—Power of Central Government—Held: Central Government empowered to restrict disclosure of certain information to the public—Such power neither uncontrolled nor unguided.*

Constitution of India, 1950: Article 19(1) (g).

D *Right of information—Nature of—Held: Is a facet of 'speech and expression' and therefore, a fundamental right.*

E *Right of information—Reasonable restriction on—Imposed by S. 18 of the Atomic Energy Act, 1962—Permissibility of—Held: The Act dealt with a restrictive subject—Hence, prohibition of disclosure of information imposed by S. 18 a reasonable restriction.*

F *Articles 32 and 226—Judicial review—Scope and power of—Order passed by Central Government regarding non-disclosure of certain information to the public—Whether amenable to judicial review—Held: The Court would not normally exercise its power of judicial review unless the order suffers from mala fide, dishonesty or corrupt practice—The order passed by Central Government did not suffer from such infirmities—Hence not interfered with.*

Evidence Act, 1872:

G *Section 123—Evidence as to affairs of State—Documents—Immunity from disclosure—Claim of privilege—Held: In order to claim such immunity the documents must relate to affairs of State and that such disclosure must be against interest of State or public interest.*

Interpretation of Statutes:

H

Constitutionality of an Act—Presumption of—Held: Even extends to a law, which imposes reasonable restrictions on fundamental right. A

How far and to what extent the right to information and the restrictions that could be imposed should be balanced is the question involved in these appeals arising out of the impugned judgment of the High Court. B

The appellants contended that the citizens have a right to have access to the copies of the AERB report, under Article 19(1)(g) of the Constitution, that Section 18 of the Atomic Energy Act, 1962 was invalid on the ground that there were no guidelines for the exercise of discretion in notifying a document as a secret document. The High Court dismissed the writ petition. Hence the appeal. C

On behalf of the respondents, it was contended that right of information as contained in Article 19(1) (g) of the Constitution was subject to reasonable restrictions contained in clause (2) thereof; that if the report of AERB was disclosed it would be against the interest of the State and, therefore, the provisions of Sections 123 and 162 of the Evidence Act, 1872 were attracted. D

Dismissing the appeal, the Court

HELD: 1.1. The question as to whether a statute is *ultra vires* the Constitution of India having conferred unguided, uncanalised or wide power cannot be determined in vacuum. It has to be considered having regard to the text and context of the Statute as also the character thereof. [252-D] E

1.2. The Atomic Energy Act, 1962 deals with a sensitive subject. Section 18 of the Act has been enacted for the purpose specified therein. It is well settled that guidelines for enacting the said provision must be found out from the subject matter covering the field. For the said purpose, even the preamble of the Act may be looked into. [252-E] F

2.1. A statute carries with it a presumption of constitutionality. Such a presumption extends also in relation to a law, which has been enacted for imposing reasonable restrictions on the fundamental rights. [253-F] G

2.2. A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily. [253-F] H

A 3.1. Restrictions as regards disclosure of information as contained in Section 18 are not vague or wide in nature. It specifies the areas where such disclosures are prohibited. The powers of the Central Government to make an order in terms thereof, are thus limited. [252-F-C]

B 3.2. Having regard to the purport and object of the Act, the provisions of Section 18 cannot be said to have bestowed unguided and uncanalised powers on the Central Government. Sections 18 and 3 of the Act had to be enacted by the Parliament as in wrong hands the information can pose a danger not only to the security of the State but also to the public at large. [253-B]

C 3.3. The statutory scheme contained in the provisions of the Act, the rules framed thereunder, compositions of the Atomic Energy Commission and the Atomic Energy Regulatory Board (AERB) leave no manner of doubt that the effective functions of the nuclear power plants are sensitive in nature. The functions of the Board are varied and wide. Only out of **D** certain functions of the Board, some have been marked as “Secret” which fulfilled statutory criteria laid down under Section 18 of the Act. [253-E]

State of U.P. v. Raj Narain, [1975] 3 SCR 333, *S.P. Gupta v. Union of India*, [1981] Supp. SCC 87, *Dinesh Trivedi v. Union of India*, [1997] 4 SCC 308, *Hamdard Dawakhana v. Union of India*, AIR (1960) SC 554, *Krishna Mohan (P) Ltd. v. Municipal Corporation of Delhi*, [2003] 7 SCC 151, *Organon (India) Ltd. v. C.C.E.*, [1995] Supp. 1 SCC 53, *Harishankar Bagla v. State of M.P.*, [1955] 1 SCR 380, Delhi Laws Act [1951] SCR 747 and *State of Tamil Nadu v. Hind Stone*, [1981] 2 SCC 205, referred to.

F 4.1. Right of information is a facet of ‘speech and expression’ as contained in Article 19(1)(g) of the Constitution of India. Right of information, thus, indisputably is a fundamental right. [253-H]

G 4.2. Article 19(1)(g) of the Constitution of India guarantees to the citizens, the right to “freedom of speech and expression” as one of the fundamental rights listed in Part III of the Constitution. These rights have been advisedly set out in broad terms leaving scope for their expansion and adaptation, through interpretation, to the changing needs and evolving notions of a free society. [254-D]

H *State of U.P. v. Raj Narain*, [1975] 3 SCR 333, *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, [1985] 1 SCC 641,

Secretary Ministry of Information and Broadcasting Government of India v. Cricket Association of Bengal, [1995] 2 SCC 161 and *Dinesh Trivedi v. Union of India*, [1997] 4 SCC 308, referred to. A

5. Every right-legal or moral-carries with it corresponding obligation. It is subject to several exemptions/exceptions indicated in broad terms. Generally, the exemptions/exceptions under those laws entitle the Government to withhold information relating to the following matters: B

[258-G-H]

- (i) International relations;
- (ii) National Security (including defence) and public safety; C
- (iii) Investigation, detection and prevention of crime;
- (iv) Internal deliberations of the Government;
- (v) Information received in confidence from a source outside the Government. D
- (vi) Information, which, if disclosed, would violate the privacy of individual;
- (vii) Information of an economic nature, (including Trade Secrets) which, if disclosed, would confer an unfair advantage on some person or concern, or subject some person or government to an unfair disadvantage; E
- (viii) Information, which is subject to a claim of legal professional privilege, e.g., communication between a legal adviser and the client; between a physician and the patient; F
- (ix) Information about scientific discoveries. [259-A-D]

State of U.P. v. Raj Narain, [1975] 3 SCR 333, *S.P. Gupta v. Union of India*, [1981] Supp. SCC 87, *Zenul v. Rusk*, 14 L.Ed. 2d 179, *Kleindienst v. Mandal*, 33 Law Ed. 2d 683 and *United States v. Richardson*, 41 L. Ed. 2d 678, referred to. G

6.1. A reasonable restriction on the exercise of the fundamental right is always permissible in the interest of the security of the State. [259-H]

6.2. The operation and functioning of a nuclear plant is sensitive in H

A nature. Any information relating to the training features, processes or technology cannot be disclosed, as it may be vulnerable to sabotage. Knowledge of specific data may enable the enemies of the nation to estimate and monitor strategic activities. As fissile materials are used in fuels although the nuclear plants are engaged in commercial activities, the contents of the fuel discharged or any other details must be held to be matters of sensitive character. If a reasonable restriction was 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.

[260-A-B-D]

C 7. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from *mala fide*, dishonesty or corrupt practice. The order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the Legislature or is based on the grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder. [260-E-G]

E 8.1. When any claim of privilege is made by the State in respect of any document the question whether the document belongs to the privileged class has first to be decided by the Court. The Court cannot hold an enquiry into the possible injury to public interest, which may result from the disclosure of the document in question. The claim of immunity and privilege has to be based on public interest. [261-H; 262-A]

F 8.2. Section 123 of the Evidence Act, 1872 does not say who is to decide the preliminary question, viz., whether the document is one that relates to any affairs of State, or how it is to be decided. But the clue in respect thereof can be found in Section 162. Under Section 162 a person summoned to produce a document is bound to “bring it into court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court”. It further says that “the Court, if it seems fit, may inspect the document, unless it refers to matter of State, or take other evidence to enable it to determine on its admissibility.” [262-B-C]

H 9. The order issued by the Central Government under Section 18 of the Act and its claim of privilege in respect of the Atomic Energy Regulatory Board’s report do not suffer from any legal infirmity

warranting interference.

A

State of U.P. v. Raj Narain, [1975] 3 SCR 333 and *S.P. Gupta v. Union of India*, [1981] Supp. SCC 87, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4294 of 1998.

B

From the Judgment and Order dated 30.1.1997 of the Bombay High Court in W.P. Nos. 1785 and 1792 of 1996.

WITH

C.A. No. 4295 of 1998.

C

Prashant Bhushan, Vishal Gupta, Sanjiv Sen, Ms. Nandini Gore, Sanjay Parikh, Ms. Meghna Satti and Ms. Manik Karanjawala for the Appellants.

Soli J. Sorabjee, Attorney General, Dipankar P. Gupta, Manish Singhvi, Prateek Jalan, Pritish Kapur, Y.P. Mahajan, S.N. Terdal, D.S. Mahra, (NP), Ms. Sushma Suri, (NP), P. Parmeswaran, (NP), P.H. Parekh, Sameer Parekh, Anil Shrivastav and Jyoti Dutt for the Respondents.

D

The Judgment of the Court was delivered by

S.B. SINHA, J. INTRODUCTION:

E

Right of information is a fundamental right under Article 19(1)(a) of the Constitution. The State under Clause (2) of Article 19 of the Constitution, however, is entitled to impose reasonable restrictions *inter alia* in the interest of the State. How far and to what extent the same should be balanced is the question involved in these appeals which arise out of judgments and orders dated 30th January, 1997 passed by the High Court of Judicature at Bombay in Writ Petition Nos. 1785 and 1792 of 1996.

F

WRIT PROCEEDINGS:

The appellants herein in the said writ petition sought 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 said demand of information was made purported to be relying on or on the basis of an information that the Atomic Energy Regulatory Board (AERB) prepared a

G

H

- A report in November, 1995 documenting therein safety defects and weaknesses citing 130 instances which are said to be matters of concern. The appellants contended that a former Chairman of the AERB, Dr. Gopalkrishnan also expressed serious concern about the safety of nuclear installations in India disclosing that serious accidents had occurred in some of the nuclear facilities including one at Narora Atomic Power Plant in the State of U.P. and Kaiga Atomic Power Plant situated in the State of Karnataka.

The appellants herein in support of its prayers made in the writ petition mainly relied upon the reports appearing in the newspapers, magazines and editorials and articles.

- C In their counter affidavit, the respondents herein inter alia contended that the said Board was constituted in terms of Section 27 of the Atomic Energy Act entrusting the task to develop Safety Codes, Guides and Standards for siting, design construction, commissioning, operating and decommissioning of the different types of plants, keeping in view the international recommendations and local requirements and develop safety policies in both radiation and industrial safety areas; Reviewing health and aspects of modifications in design/ operation involving changes in the technical specification adopted in any of the Department of Atomic Energy (DAE) units; Reviewing operational experience in the light of the radiological and other safety criteria recommended by the International Commission on Radiological Protection, International Atomic Energy Agency (IAEA) and such other international bodies and adapted to suit Indian conditions, and thereby evolve major safety policies; Prescribing acceptable limits of radiation exposure to occupational workers and members of the public and approve acceptable limits of environmental releases of radioactive substances;
- F reviewing the emergency preparedness plans for non—DAE installations; Promote research and development efforts for fulfilling the functions and responsibilities specified; Reviewing the training programme, qualifications and licensing policies for personnel by the project/ plants; Enforcing rules and regulations promulgated under the Atomic Energy Act, 1962 for radiation safety in the country and such other functions as specified therein.

- G With the said counter affidavit, the Fourth Report of the Nuclear Plant Safety and Spent Fuel Management prepared by the Standing Committee on Atomic Energy consisting of members of both the Lok Sabha and the Rajya Sabha had also been annexed. The Annual Report for the year 1995-96 prepared by the Government of India had also been annexed therewith. It was

H

further contended that the specific questions were asked in the Parliament in relation to the alleged accidents which had been answered. It had been emphasized that necessary legislative and regulatory framework to ensure a competitive and independent assessment of the safety related requirements and practices in all nuclear installations have come into being. The respondents in their affidavits furthermore stated that there had been constant interaction with the media and the public in nuclear safety related matters to instill an increasing level of confidence in the public that safety is indeed receiving topmost priority in all nuclear activities.

Dr. A. Gopalkrishnan, a former Chairman of AERB, on whose press statements the writ petition was filed, also in a statement before the reporters of the Economic Times which was published in the said newspaper on 11th February, 1995, stated:

“Let me emphasize that, Atomic Energy Regulatory Board is able to implement their decisions today without any interference or pressures in its functioning from outside sources. The statement of Pandit Jawaharlal Nehru while advertng to certain amendments moved to the Atomic Energy Bill in the year 1948 has also been relied upon.”

One Mr. G.R. Srinivasan, Director, Health Safety in his affidavit disclosed that out of 130 items in the documents of AERB which required attention, 89 issues directly pertain to Nuclear Power Corporation (NPC) while 6 other issues concerned NPC, ABRC AND DAF.

In the said affidavit it was pointed out:

“...that the Atomic Energy Commission informed the 5th Respondent on 22nd November, 1995 of the various issues to be tackled by NPC installations for the NEP's response. By 4th December, 1995, the NPC has given its, over 100 page response to the issue to AEC and thereafter NPC constituted a Committee on 11th December, 1995 to interact and discuss with the AERB regarding resolvment of the said issue. A total of 19 meetings were held with AERB staff and mutually agreed time bound action plans have been arrived at for all 95 issues. Final agreed action plans have been issued on 55 issues, because of degree of urgency. It is pointed out that the question of safety issues in NPC is a document which is highly technical in nature and it would neither be in public interest for the same to be disclosed nor could be it discerned by general public.”

A Yet again Shri Anupam Dasgupta, Joint Secretary in the DAE in his affidavit by way of sur-rejoinder dated 24th January, 1997 contended that the
B aforementioned 130 items listed in the AERB report titled "Safety Issues in DAE installations" are based on the proceedings and recommendations of various meetings of the Standing Safety Committees which have been constituted by the AERB itself to review the safety nuclear installations on a regular basis. In the said sur-rejoinder a press release of 26th March, 1996 of Dr. A. Gopalkrishnan was annexed wherein it was stated:

C "For each of the items identified, the concerned DAE installation and AERB are jointly preparing the preliminary details of corrective actions and a committed time schedule for implementing them. These will be reviewed and finalized by the AERB Safety Review Committees and the Board, for timely implementation thereafter by the DAE. DAE installations are closely co-operating with the AERB in expediting the process of safety upgradation."

D Similarly, Dr. K.S. Parthasarathy in a press release dated 23rd June, 1996 stated:

E "In the judgment of the Board, there is at the moment no shortcoming existing which can lead to any nuclear disaster or Chernobyl type catastrophe in any of these installations. The Board would like to assure the public that all the DAE installations are being continuously monitored and that it would not hesitate to initiate restrictive regulatory actions wherever necessary."

F The respondents, however, relying on or on the basis of a notification dated 4th February, 1975 passed under sub-section (1) of Section 18 of the Atomic Energy Act, 1962, raised a plea of privilege in relation to the said report, contending that the same had been classified as 'Secret' as it pertains to the nuclear installations in the country which includes several sensitive facilities carried out therein involving activities of highly classified nature.

G In the said affidavit, it was averred that the deponent had applied his mind and found that the documents satisfy the requirements of the Order dated 4th February, 1975 read with Section 18 of the Act as if the same is directed to be published would cause irreparable injury to the interest of the State as also would be prejudicial to the national security.

STATUTORY PROVISIONS:

H The Atomic Energy Act, 1962 ('the Act') was enacted to provide for

the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith. Section 2(a) of the Act defines "atomic energy" to mean energy released from atomic nuclei as a result of any process, including the fission and fusion processes. The relevant provisions of the said Act are as under :

2(b). "Fissile material" means uranium 233, uranium 235, plutonium or any material containing these substances or any other material that may be declared as such by notification by the Central Government;

2(e). "plant" includes machinery, equipment or appliance, whether affixed to land or not;

2(h). "radiation" means gamma rays, X-rays and rays consisting of alpha particles, beta particles, neutrons, protons and other nuclear and sub-atomic particles; but not sound or radio waves, or visible, infra-red or ultra-violet light;

2(i). "radioactive substance" or "radioactive material" means any substance or material which spontaneously emits radiation in excess of the levels prescribed by notification by the Central Government."

Section 3 provides for the general powers of the Central Government which include:

(a) to produce, develop, use and dispose of atomic energy either by itself or through any authority or corporation established by it or a Government company and carry out research into any matters connected therewith;

(b) to manufacture or otherwise produce any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy or such research as aforesaid and to dispose of such prescribed or radioactive substance or any articles manufactured or otherwise produced;

(bb) (i) to buy or otherwise acquire, store and transport any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy; and

(ii) to dispose of such prescribed or radioactive substance or any

- A articles bought or otherwise acquired by it,
either by itself or through any authority or corporation established by it, or a Government company;] (c) to declare as “restricted information” any information not so far published or otherwise made public relating to-
- B (i) the location, quality and quantity of prescribed substances and transactions for their acquisition, whether by purchase or otherwise, or disposal, whether by sale or otherwise;
- C (ii) the processing of prescribed substances and the extraction or production of fissile materials from them; (iii) the theory, design, construction and operation of plants for the treatment and production of any of the prescribed substances and for the separation of isotopes;
- D (iv) the theory, design, construction and operation of nuclear reactors;
- (v) research and technological work on materials and process involved in or derived from items (i) to (iv);
- (d) to declare as “prohibited area” any area or premises where work including research, design or development is carried on in respect of the production, treatment, use, application or disposal of atomic energy or of any prescribed substance;
- E (e) to provide for control over radioactive substances or radiation generating plant in order to-
- (i) prevent radiation hazards;
- F (ii) secure public safety and safety of persons handling radioactive substances or radiation generating plant; and
- (iii) ensure safe disposal of radioactive wastes;
- G (f) to provide for the production and supply of electricity from atomic energy and for taking measures conducive to such production and supply and for all matters incidental thereto either by itself or through any authority or corporation established by it or a Government company and
- H (g) to do all such things (including the erection of buildings and execution of works and the working of minerals) as the Central

Government considers necessary or expedient for the exercise of the foregoing powers.” A

Section 16 provides for control over radioactive substances. Section 17 provides for the rule making power of the Central Government by making special provisions as to safety. Section 18 of the Act reads as under:

“18. Restriction on disclosure of information.— B

(1) The Central Government may by order restrict the disclosure of information, whether contained in a document, drawing photograph, plan, model, or in any other form whatsoever, which relates to, represents or illustrates— C

(a) an existing or proposed plant used or proposed to be used for the purpose of producing, developing or using atomic energy, or

(b) the purpose or method of operation of any such existing or proposed plant, or D

(c) any process operated or proposed to be operated in any such existing or proposed plant.

(2) No person shall—

(a) disclose, or obtain or attempt to obtain any information restricted under sub-section (1), or E

(b) disclose, without the authority of the Central Government, any information obtained in the discharge of any functions under this Act or in the performance of his official duties.

(3) Nothing in this section shall apply— F

(i) to the disclosure of information with respect to any plant of a type in use for purposes other than the production, development or use of atomic energy, unless the information discloses that plant of that type is used or proposed to be used for the production, development or use of atomic energy or research into any matters connected therewith; or G

(ii) where any information has been made available to the general public otherwise than in contravention of this section, to any subsequent disclosure of that information.

Section 27 of the Act empowers the Central Government to set up H

A Atomic Energy Regulatory Board.

Pursuant to or in furtherance of the rule making power contained in Section 30 of the Act, the following rules have been framed:

- (i) Radiation Protection Rules, 1971
- B** (ii) Atomic Energy (Working of Mines, Minerals and Handling of Prescribed Substances) Rules.
- (iii) Atomic Energy (Safe Disposal and Radioactive Wastes) Rules, 1987
- C** (iv) Atomic Energy (Factories) Rules, 1996
- (v) Atomic Energy (Control of Irradiation of Food) Rules, 1996.

STATUTORY BODIES:

D It is not in dispute that the Atomic Energy Commission is constituted by the Union of India in terms of the provisions of the Act. The Central Government has issued a notification dated 11th July, 2003 reconstituting the Atomic Energy Commission with the following composition:

1. Dr. Anil Kakodkar Secretary, Department of Atomic Energy—Chairman (ex officio)
- E** 2. Dr. Raja Ramanna Member, Rajya Sabha & former Chairman, AEC & Secretary, DAE—Member
3. Shri Brajesh Mishra Principal Secretary to the Prime Minister—Member
- F** 4. Shri Kamal Pande Cabinet Secretary—Member
5. Shri D.C. Gupta Finance Secretary & Secretary, Dept. of Expenditure, Ministry of Finance—Member
6. Dr. S.S. Meenakshisundaram Ex officio Secretary to the Government of India—Member for Finance
- G** 7. Prof. C.N.R. Rao Honorary President, Jawaharlal Nehru Centre for Advanced Scientific Research, Bangalore—Member
8. Dr. V.K. Chaturvedi Chairman & Managing Director Nuclear Power Corporation of India Ltd.—Member
- H** 9. Shri B. Bhattacharjee Director, Bhabha Atomic Research Centre—

Member

A

It is also not in dispute that the Central Government in exercise of its power conferred upon it under Section 27 of the Act, had set up the Board to enforce certain regulatory and safety measures envisaged under Sections 16, 17 and 23 of the Act. The composition of the Board include:

- | | | | |
|----|--|--------------------|---|
| 1. | Prof. S.P. Sukhatme | —Chairman | B |
| 2. | Shri S.K. Sharma Vice-Chairman, AERB | —Ex-officio Member | |
| 3. | Dr. M.V.S. Valiathan
Honorary Advisor Manipal
Academy of Higher Education,
Manipal | —Member | C |
| 4. | Dr. K.V. Raghavan Director
Indian Institute of Chemical
Technology, Hyderabad | —Member | D |
| 5. | Prof. J.B. Joshi Professor and
Director University Institute of
Chemical Technology (UICT) | —Member | |
| 6. | Dr. K.S. Parthasarathy Director
Information and Technical Services
Division, AERB | —Secretary | E |

HIGH COURT JUDGMENT:

Before the High Court the following three contentions were raised by the appellants:

- (i) the citizens have a right to have access to the copies of the AERB report;
- (ii) Section 18 of the Atomic Energy Act is invalid on the ground that there are no guidelines for the exercise of discretion in notifying a document as a Secret document; and
- (iii) an Independent regulatory Body to replace AERB should be appointed to monitor the safety measures taken in the nuclear power plants.

F

G

H

A The High Court although took notice of ‘the horror of the nuclear holocaust which the world first felt when the America Bomber, Enola Gay descended from the clouds and emptied its bowels on the city of Hiroshima’ but refused to look in to the AERB Report itself upon arriving at a satisfaction that the respondents had been acting in public interest as also the interest of the nuclear installations in the country stating:

B

“1. Admittedly, these questions are repeatedly considered by the Parliament, it is discussed in the Parliament and once the Parliament is taking appropriate decision on the safety and other aspects of the Nuclear Installations, it would not be proper for this Court to exercise its writ jurisdiction under Article 226 of the Constitution;

C

2. As stated earlier, the Memorandum dated 7th January, 1997 is issued by the Prime Minister to look into all aspect of the present regulatory process and as pointed out by the learned Additional Solicitor General, this would include the consideration of 130 defects/irregularities pointed out in the AERB report. This Committee constituted consists of experts in the field;

D

3. It has been pointed out that the hierarchy in the Department of Atomic Energy monitors the running of the Plants and Nuclear Installations; and

E

4. Further, the steps taken for reviewing 130 safety issues in the DAE Installation by the Committee cannot be subject matter of judicial review.”

As regard the question of vires of certain provisions of the Act and in particular Sections 13 and 18 thereof, the High Court held that there are guidelines both in Sections 18 and 3 of the Atomic Energy Act in terms whereof the Central Government has been conferred with the power to restrict information as in wrong hands the same can pose a danger not only to the security of the State but to the public at large. It also rejected the contention that only because the nuclear plants are carrying out commercial activities, a citizen has a right to know stating:

G

“...Nuclear Power Plants as a by product generate plutonium which is a radioactive metal used in Nuclear Research amongst others for preparation of Atom Bomb. If the defects and the remedies to cure the defects in the Nuclear Power Plants fall in the wrong hands it can pose danger to the security of the nation itself. The challenge, therefore,

H

on that count must fail.”

A

The High Court opined that the very fact that AERB has prepared the report is suggestive of the fact that it is alive to its duties.

SUBMISSIONS:

Mr. Prashant Bhushan, the learned counsel appearing on behalf of the appellants would submit that the right of information is a part of the fundamental right in terms of Article 19(1)(a) of the Constitution of India, and, thus, the citizens of India could not be denied the requisite informations sought for. He would urge that for the purpose of ensuring that appropriate safety standards are maintained by the nuclear plants and the radiations which occurred in normal course and/ or duty accidents as well as nuclear wastes, it is important that the guidelines/ norms/ safeguards taken by the nuclear plants towards not only the workers employed therein but also the general public should be disclosed. Such informations, Mr. Prashant Bhushan would contend, to a section of citizens and particularly those who are experts in the field would enable them to highlight the safety deficiencies obtaining in such plants and, if necessary, to get a public opinion formed against such installations. In a democracy, it is fundamental, according to Mr. Prashant Bhushan, that all vital informations relating to the governance of the country be disclosed so as to enable the citizenry of India to ascertain their right of information as to whether the international standards relating to safety are being maintained or not.

B

C

D

E

Relying upon or on the basis of the decisions of this Court in *State of U.P. v. Raj Narain and Ors.*, [1975] 3 SCR 333, *S.P. Gupta v. Union of India and Anr.*, [1981] (Supp.) SCC 87, *Dinesh Trivedi, M.P. and Ors. v. Union of India and Ors.*, [1997] 4 SCC 306 and *Union of India v. Association for Democratic Reforms and Anr.*, [2002] 5 SCC 294, the learned counsel would submit that the provisions contained in Section 18 of the Act are not valid law imposing reasonable restriction on such freedom in the interest of the State. Drawing our attention to several Articles, the learned counsel would contend that reluctance on the part of the authorities of the plants to disclose any information purported to be in terms of the order made under Section 18 of the Act do not sub-serve any public interest. Mr. Prashant Bhushan would argue that from a perusal of the aforementioned articles, it would appear that various irregularities have been committed as regard strict enforcement and/ or compliance of safety regulations not only resulting in accidents but also receiving radiations beyond the permissible limits by the women. The learned

F

G

H

A counsel would contend that the power plants of the country in the matter of discharge of nuclear radiations do not fulfill the requirements of the IAEA Standards. A large number of accidents, Mr. Prashant Bhushan would urge, occurring in the said plants also had gone unreported.

B Mr. Bhushan would submit that the information as regard design and other details of the plants are available on Internet and, thus, there does not exist any reason as to why the other relevant informations should be withheld only on the spacious plea of likelihood of sabotage as a result whereof an important right of a citizen to know about vital informations like safety of the workers as also the people living nearby has been denied. It was urged that in any event those parts of the report which do not satisfy the secrecy of the State test should be disclosed.

C Drawing our attention to Section 18 of the said Act, the learned counsel would submit that as thereby unguided, unbridled and wide power had been conferred upon the Central Government, the same must be held to be ultra vires the Constitution of India.

D Mr. Soli Sorabjee, learned Attorney General appearing on behalf of the Union of India, on the other hand, would urge that from the affidavits filed before the High Court it would appear that hardly any accident of serious nature had taken place in India. Mr. Sorabjee would submit that right of information as contained in Clause (a) of Clause (1) of Article 19 is subject to reasonable restrictions contained in Clause (2) thereof. The right of information, it was contended, cannot be exercised in abstract and must be considered in the context in which such right is being claimed. A matter which is sensitive by its very character, the learned Attorney General would argue, cannot be subject matter of a right of information. Drawing our attention to a chart, the learned counsel would submit that the Central Government as also the AERB are aware of the safety measures required to be taken. The AERB. Mr. Sorabjee would submit, being consisting of eminent persons who are generally independent not only monitor the working of the plants but also take strict measures as regards safety operations thereof.

G The learned Attorney General, citing the following example;

H "A single pump could handle the cooling operations for a reactor. Normally, there are two pumps, so that even if one fails the other could do the job. However, in view of the fact that this is a safety-critical component, a safety recommendation could be to have a third

pump. Or replacement of Inlet Manifold, or replacement of Emergency Condenser Tube," contended that the report of the A.E.R.B. contains such suggestion which cannot be termed as deficiencies. A

The learned Attorney General would argue that if the report is disclosed, the knowledge of the datas containing therein pertaining to inventories and contents of spent fuel, reprocessing waste, etc., gathered therefrom could facilitate a reverse calculation about the country's nuclear programme potential in furtherance whereof the enemies of the nation would be able to estimate and monitor the strategic activities of the plants. It was urged that no radioactive waste is disposed of and the same is recycled. B

Mr. Dipankar Gupta, the learned senior counsel appearing on behalf of the 5th respondent drew our attention to various affidavits affirmed by the High Court and submitted that from a perusal thereof it would appear that the necessary disclosures of information have already been made. The learned counsel would submit that if the AERB itself has brought the report into existence the same would show in no unmistakable terms that they are alive to the realities. The Courts, Mr. Dipankar Gupta would urge, would intervene only in a case where the statutory bodies are not active and the same being not the case the impugned judgment need not be interfered with. C D

The Board: E

AERB is a statutory body. The following are its functions : F

- (i) The jurisdiction of AERB covers installations such as nuclear power stations, nuclear fuel fabrication, heavy water plants, uranium mines, thorium processing units etc. and all installations in which radiation is used for medical, industrial or research purposes (except Bhabha Atomic Research Centre and its facilities, due to their special nature). F
- (ii) AERB is manned by some of the nation's top experts in the relevant fields. It is also supported by various experts belonging to reputed academic institutions and other government agencies. AERB thus draws on the expertise and knowledge-base available all over the country. G
- (iii) The Board issues different authorizations at each stage such as siting, construction, commissioning operating and decommissioning of nuclear plants and installations. The AERB H

- A licenses nuclear engineers at different levels, such as Reactor Operator, Shift Charge Engineers, Control Engineers, etc. Units are permitted to function only if the stipulated number of licensed personnel are available in every shift.
- B (iv) Apart from the Safety Committees of the units concerned, AERB has evolved a multi—disciplinary 3—tier safety review procedure to enforce safety stipulations in nuclear installations. The first tier is at the plant level; the next at the Specialists’ Committees level; and the third at the Board level.
- C (v) The Board has set up 2 Specialists’ Committees: the Safety Review Committee for Operating Plants (SARCOP) and the Safety Review Committee for Applications of Radiation (SARCAR). These consist of scientists and technologists from different disciplines SARCOP deals with operating plants of the Department, and SARCAR deals with radiation installations for medical, industrial and research purposes. The specialists’ committees meet regularly to review the safety status.
- D (vi) The AERB itself has 7 Technical Divisions, with over a hundred full-time scientists, engineers and technologists with wide experience and expertise in their relevant fields. AERB has also set up its own Safety Research Institute at Kalpakkam.
- E (vii) AERB uses many inputs to assess the safety status of the plants/ installations. These include reports of inspection by AERB staff, radiation dose records and environmental monitoring reports.
- F (viii) Each nuclear installation has an independent Health Physics set-up to constantly monitor the radiation dose to workers, and also an Environmental Survey Laboratory which continuously collects thousands of samples of food, water, air and sediment to monitor radioactivity releases to the environment.
- G (ix) AERB has prescribed limits for discharges and ensures that the radiation releases are well within the prescribed limits. The limits prescribed are based on international recommendations, and in all cases are either equal to or more stringent than these.
- (x) Apart from this standard procedure, AERB can also act suo moto, or on a complaint from a *bona fide* member of the public.
- H (xi) As part of the Public Information Programme, AERB issues a

quarterly Newsletter, and an Annual Report. Based on the continuous evaluation of the safety status of nuclear power plants, extracts of relevant records are published in the Annual Report of the AERB. Press releases on the regulatory activities of AERB are issued periodically.

It is not in dispute that the President by a notification dated 15th November, 1983 issued under Section 27 of the Atomic Energy Act constituted the AERB. It being a statutory body has the powers to lay down the safety standards and frame rules and regulations under the Act as regard the regulatory and/or safety aspects of the installations generating electrical energy. Here to before we have noticed the duties and functions of the Board which are of varying nature. The Board is an independent body and out of the present composition thereof except one Mr. Sharma, nobody is an employee of the Central Government. The Board is responsible to the Atomic Energy Commission which has been reconstituted by reason of a notification dated 11th July, 2003. The executive function of the Board is vested in its Chairman. From a perusal of the powers and functions of the Board, it is neither in doubt nor in dispute that the Board except for Bhabha Atomic Research Centre monitors and reviews the working of all nuclear installations in India inter alia with reference to safety aspects. It upgrades and amends the safety standards and procedures and prescribes, and supervises implementation of such standards and procedures by the management of the nuclear installations. It is also not in dispute that safety issues in DAE installations has been prepared by the Board based on the recommendations of various Safety Review Committees. They had all along been classified as "Secret". The report pertains to the nuclear installations in the country which, according to the respondents, include several sensitive facilities carrying out the activities of highly classified nature. The Board, make periodic assessment of the safety status of the installations and its suggestions as regard modifications and improvements to upgrade their safety status to the maximum extent are implemented.

A.E.R.B. REPORT :

As regards, the Annual Report 1995-96 of AERB which was the subject matter of the writ petition it has been stated in the counter affidavit that they can be classified in four categories:

Category 1: Hardware related issues leading to replacement of defective components;

- A Category 2: Ageing relating issues;
- Category 3: Confidence building exercises involving some analytical studies;
- Category 4: Upgradation of safety standards in plants that have been built to earlier safety standards.

B

VIRES OF SECTION 18 OF THE ACT :

C The contentions raised by the parties as regard non—disclosure of the report are required to be determined in the aforementioned context. Section 18 of the Act contains an enabling provision. Pursuant to or in furtherance of the said provision, the Central Government has issued an order on or about 4th February, 1975 restricting disclosure of certain information mentioned therein except with the prior permission of the Central Government.

D The question as to whether a statute is ultra vires Constitution of India having conferred unguided, uncanalised or wide power cannot be determined in vacuum. It has to be considered having regard to the text and context of the State as also the character thereof. It deals with a sensitive subject.

E Section 18 has been enacted for the purposes specified therein. It is well-settled that guidelines for enacting the said provision must be found out from the subject matter, covering the field. For the said purpose even the preamble of the Act may be looked into.

F The notification of discovery of uranium or thorium, control over mining operations, the disposal of uranium, power to obtain information are within the scope and ambit of the said Act. Section 13 provides for informations as regard, contracts. Section 14 postulates control over production and use of atomic energy. Restrictions as regard disclosure of information as contained in Section 18 are not vague or wide in nature. It specifies the areas where such disclosures are prohibited. The powers of the Central Government to make an order in terms thereof are, thus, limited.

G It is not a case where as in *Hamdard Dawakhana and Anr. v. Union of India and Ors.*, AIR (1960) SC 554 or *Krishna Mohan (P) Ltd. v. Municipal Corporation of Delhi.*, [2003] 7 SCC 151 the Central Government has been conferred with a wide uncanalised and unguided power. It is also not a case where the words employed in the provision provide for no criteria nor can it be said that no standard has been laid down by the Parliament therefor. It

H

is furthermore not a case where principles on which the power of the Central Government are to be exercised have not been disclosed. By reason of the Act, essential legislative functions have also not been delegated.

We do not think that having regard to the purport and object of the said Act, the provisions of Section 18 have bestowed unguided and uncanalised powers on the Central Government. Sections 18 and 3 of the Atomic Energy Act had to be enacted by the Parliament as in wrong hands the information can pose a danger not only to the security of the State but to the public at large.

Reference, in this connection, may be made to a decision of this Court in *Organon (India) Ltd.* (now known as *Infar (India) Ltd. and Anr. v. Collector of Excise and Ors.*, [1995] Supp. 1 SCC 53 wherein this Court relying on *Harishankar Bagla v. State of M.P.*, [1955] 1 SCR 380, Delhi Laws Act case [1972] [1951] SCR 747 and *State of Tamil Nadu v. Hind Stone*, [1981] 2 SCC 205, wherein this held that the provisions of Opium Act furnished sufficient guidance in the matter of making rules under Section 5 thereof.

The statutory scheme contained in the provisions of the Act, the rules framed thereunder, composition of the Atomic Energy Commission and AERB leave no manner of doubt that the effective functions of the nuclear power plants are sensitive in nature. The functions of the Board are varied and wide. Only out of certain functions of the Board, some have been marked as "Secret" which fulfilled the statutory criteria laid down under Section 18 of the Act. A statute carries with it a presumption of constitutionality. Such a presumption extends also in relation to a law which has been enacted for imposing reasonable restrictions in the fundamental right.

A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily.

We are, therefore, of the opinion that Section 18 is not unconstitutional and a valid piece of legislation.

RIGHT OF INFORMATION:

Right of information is a facet of 'speech and expression' as contained in Article 19(1)(a) of the Constitution of India. Right of information, thus, indisputably is a fundamental right.

A In 1948, the United Nations proclaimed a Universal Declaration of Human Rights. It was followed by the International Covenant on Civil and Political Rights (ratified in 1978). Article 19 of the Covenant declares that “everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinion without interference, and to seek, and receive and impart information and ideas through any media and regardless of frontiers.”

B A similar enunciation is to be found in the declaration made by the European Convention of Human Rights (1950). Article 10 of that declaration guarantees *inter alia*, “not only the freedom of the Press to inform the public but also the right of the public to be informed.”

C In keeping with the spirit of the Universal Declaration of 1948, the Preamble of the Constitution of India embodies a solemn resolve of its people to secure, *inter alia*, to its citizens, liberty of thought and expression. In pursuance of this supreme objective, Article 19(1)(a) guarantees to the citizens, the right to “freedom of speech and expression” as one of the fundamental rights listed in Part III of the Constitution. These rights have been advisedly set out in broad terms leaving scope for their expansion and adaptation, through interpretation, to the changing needs and evolving notions of a free society.

E In *Raj Narain* (*supra*), the Constitution Bench considered a question—whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareilly, Uttar Pradesh? The Court observed as under:—

F “In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing....”

G In *Indian Express Newspapers (Bombay) Private Ltd. and Ors. etc. v. Union of India and Ors.*, [1985] 1 SCC 641, this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(a). The Court

H

observed (in para 32) thus:

A

“The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments...”

The Court further observed:

B

“...The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.”
(*Per Lord Simon of Glaisdale in Attorney-General v. Times Newspapers Ltd.*, (1973) 3 All ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self—fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration....”

C

D

E

In *Secretary, Ministry of Information and Broadcasting, Government of India and Ors. v. Cricket Association of Bengal and Ors.*, [1995] 2 SCC 161], this Court summarised the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) thus:—

F

“The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-fulfilment. It enables people to contribute to debate on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts”

G

H

A This Court further dealt with the right of telecast holding:—

B “In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right.”

C

D

In *Dinesh Trivedi* (supra), this Court held:

E “18. The case of *S.P. Gupta v. Union of India*, [1981] Supp SCC 87, decided by a seven-Judge Constitution Bench of this Court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the Judges was that in regard to the functioning of Government, 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. The Court held that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e.g. Cabinet Minutes, documents

F

G

H

concerning the national safety, documents which affect diplomatic relations or relate to some State secrets of the highest importance, and the like in respect of which the Court would ordinarily uphold Government's claim of privilege. However, even these documents have to be tested against the basic guiding principle which is that wherever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. (paras 73 and 74 at pp. 284-286)

19. What then is the test ? To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basic thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest."

The aforementioned decisions came up for consideration before this Court in Association for Democratic Reforms and Another (supra) wherein the question which arose for consideration was as to the candidates contesting election to Parliament and to the State Legislatures and the parties they represent

"1. Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof.

2. Assets possessed by a candidate, his or her spouse and dependant relations?

3. Facts giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications;

A 4. Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.”

B The Court opined that having regard to the right of information obtaining in Article 19(1)(a) of Constitution of India, the election petitioner can ask for such directions.

C It was held that the right to get information in a democracy is recognized all throughout and it is a natural right flowing from the concept of democracy. A reference to Articles 19 (1) and (2) of the International Convention on Civil and Political Rights can be made in this regard. Moreover Article 19 (1) (a) of the Indian Constitution provides for freedom of speech and expression. Voters’ speech or expression in the case of election would include casting of votes, that is to say, that the voter speaks out or expresses by casting a vote. For this purpose, information about the candidate to be selected is a must. (See Paras 46 (5), 7 and 23).

D Unlike Constitutions of some other developed countries, however, no fundamental right in India is absolute in nature. Reasonable restrictions can be imposed on such fundamental rights. Clause (2) of Article 19 of the Constitution reads thus:

E “Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

F Every right-legal or moral-carries with it a corresponding obligation. It is subject to several exemptions/exceptions indicated in broad terms. Generally, the exemptions/ exceptions under those laws entitle the government to withhold information relating to the following matters:

- G
- (i) International relations;
 - (ii) National Security (including defence) and public safety;
 - (iii) Investigation, detection and prevention of crime;
- H

- (iv) Internal deliberations of the government; A
- (v) Information received in confidence from a source outside the government;
- (vi) Information, which, if disclosed, would violate the privacy of individual; B
- (vii) Information of an economic nature, (including Trade Secrets) which, if disclosed, would confer an unfair advance on some person or concern, or, subject some person or government to an unfair disadvantage;
- (viii) Information which is subject to a claim of legal professional privilege, e.g., communication between a legal adviser and the client; between a physician and the patient; C
- (ix) Information about scientific discoveries. D

The Atomic Energy Act is not an antiquated statute. There exists a relationship between the right to know and freedom of speech. "Right to speech and publish does not carry with it an unrestricted right to gather information". (See *Zenul v. Rusk*, 14 L.Ed. 2d 179 at 190)

The *U.S. Supreme Court in Kleindienst v. Mandal*, 33 Law. Ed. 2d 683 held that the First Amendment guarantees no independent and enforceable right against the government's bona fide exercise of discretion in the exclusion of aliens. E

Both in *Raj Narain* (supra) and *S.P. Gupta* (supra) this Court was silent on the relationship between the restrictions which should be placed on the right to know and the restrictions existing under Article 19(1)(a) of the Constitution. F

In *United States v. Richardson*, 41 L. Ed. 2d 678, the respondent, a taxpayer sought to obtain from the government information concerning detailed expenditure of the Central Intelligence Agency but the same was denied on the ground of 'lack of standing'. G

A reasonable restriction on the exercise of the right is always permissible in the interest of the security of the State. H

A It has not been contended nor could it be contended that the operation and functioning of a nuclear plant is not sensitive in nature. Any information relating to the training features processes or technology cannot be disclosed as it may be vulnerable to sabotage. As rightly pointed out by the learned Attorney General, knowledge of specific data may enable the enemies of the nation to estimate and monitor strategic activities. As fissile materials are used in fuels although the nuclear plants are engaged in commercial activities, the contents of the fuel discharged or any other details must be held to be matters of sensitive character.

C Before the High Court, as noticed hereinbefore, several affidavits have been filed showing the extent of disclosures made. The Board also publishes annual reports as also quarterly newsletters. The informations which are not classified as 'secrets' or do not come within the purview of the aforementioned order dated 4th February, 1975 are published. 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.

D The Act provides for reasonable restrictions within the meaning of clause (2) of Article 19 of the Constitution of India. EFFECT OF THE ACT:

E Once provisions of Section 18 of the Act, and the order framed thereunder are held to be *intra vires*, the only question which arises for consideration is as to whether exercise of such powers should be held to be invalid by this Court. The jurisdiction of this Court in such matter is very limited. The Court will not normally exercise its power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fide, dishonesty or corrupt practice. The order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the Legislature or is based on the grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder. No such case has been made out by the appellant.

G CRITERIA FOR DETERMINING THE QUESTION OF PRIVILEGE:

Sections 123 and 162 of the Evidence Act read as follows:

H "123. EVIDENCE AS TO AFFAIRS OF STATE.

No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. A

162. PRODUCTION OF DOCUMENTS. B

A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court. C

The Court, if it sees, fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.-If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code, (45 of 1860).” D

The legislative policy behind the aforementioned provisions is no longer *res integra*. The State must have the prerogative of preventing evidence being given on matters that would be contrary to public interest. E

For determining a question when a claim of privilege is made, the Court is required to pose the following questions: F

- (1) Whether the document in respect of which privilege is claimed, is really a document (unpublished) relating to any affairs of State?; and
- (2) Whether disclosure of the contents of the document would be against public interest? G

When any claim of privilege is made by the State in respect of any document the question whether the document belongs to the privileged class has first to be decided by the court. The Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of H

A the document in question. The claim of immunity and privilege has to be based on public interest.

B The section does not say who is to decide the preliminary question, viz. whether the document is one that relates to any affairs to State, or how is it to be decided, but the clue in respect thereof can be found in S. 162. Under S. 162 a person summoned to produce a document is bound to “bring it into court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court”. It further says that “the Court, if it seems fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.”

C In order to claim immunity from disclosure of unpublished State documents, the documents must relate to affairs of State and disclosure thereof must be against interest of the State or public interest.

D In *Raj Narain* (supra), the question was as to whether a Blue Book, being rules and instructions for the protection of the Prime Minister when on tour or in travel, providing for mode and manner in which the security is to be provided to the Prime Minister is beyond the purview of Section 123 of the Indian Evidence Act or not. The High Court held that no privilege can be claimed in relation thereto.

E Ray, C.J. referring to a large number of decisions opined that even in an election petition privilege can be claimed. It was, however, held:

F “The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The Court will *proprio motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents.

H

Confidentiality is not a head of privilege. It is consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection.” A

Mathew, J., however, in his concurring opinion opined that the question of national importance *vis-a-vis* administration of justice should be the criteria for determining the claim of privilege stating: B

“...But the Executive is not the organ solely responsible for public interest. It represents only an important element in it; but there are other elements. One such element is the administration of justice. The claim of the Executive to have exclusive and conclusive power to determine what is in public interest is a claim based on the assumption that the Executive alone knows what is best for the citizen. The claim of the Executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow department angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the Court will, with reference to the pending litigation, be in a better position to decide whether the weight of public interest predominates.” C D

It was opined that merely label given to an executive is not conclusive in the matter observing: E

“...The documents in this case, class documents though they may be, are in a different category, seeking protection, not as State documents of political or strategic importance, but as requiring protection on the ground that ‘candour’ must be ensured.” F

In *S.P. Gupta* (supra), this Court while upholding the aforementioned principles, however, was of the opinion that there can be a class of documents in respect whereof privilege can be claimed stating: G

“In other words, if injury to public interest is the foundation of this immunity from disclosure, when once the court has inquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would in most cases be a futile exercise for the head of the department to consider and decide whether its disclosure should be H

A permitted as he would be making an enquiry into the identical question.”

Bhagwati, J. (as the learned Chief Justice then was) observed:

B “The basic question to which the court would therefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to affairs of State or in other words, it is of such a character that its disclosure would be against the interest of the State or the public service and if so, whether the public interest in its non-disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account, it should not be allowed to be disclosed. The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the court by reason of Section 162.”

C
D Analysing the provisions of Sections 123 and 162 of the Indian Evidence Act, it was opined:

E “The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest 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*, because there is no absolute immunity for documents belonging to such class.”

CONCLUSION :

G
H Keeping in view the purport and object for which the disclosure of the Report of the Board has been withheld, we are of the opinion that it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. We may record that the learned Attorney General had made an offer to place the Report before us in a sealed cover. We do not think that in this case, perusal of the report by the Court

is necessary. We are also satisfied that the order issued by the Central Government under Section 18 of the Act and its claim of privilege do not suffer from any legal infirmity warranting interference with the High Court judgment by us. A

For the reasons aforementioned, there is no merit in these appeals which are accordingly dismissed. No costs. B

V.S.S.

Appeals dismissed.