

## Right to Information and Good Governance

Professor. Doctor Sairam Bhat

Department of Law

National Law School of India University


Lecture No. 61

Information Commissions Under the RTI Act - IV

(Refer Slide Time: 0:14)

Supreme Court on the functioning of ICs

- **Namit Sharma v UOI Sept 2012 SC**
- Constitutional validity of Sec. 12(5)(6) and Sec. 15 was challenged in the ground that the Chief Information Commissioner or the ICs so appointed to discharge Judicial or Quasi Judicial functions ought to have a judicial approach, experience, knowledge and expertise or atleast have some legal acumen.
- SC held read down the provisions of Sec. 12 of the RTI Act and held that Information Commission is a 'judicial tribunal' and that the Commission shall be comprised of two members and the Judicial member should be a person possessing a degree in law, having judicially trained mind or a lawyer who has practiced law for a period of 20 years and should have experience in social work.
- The SC also held that the Appellate Authority should also be a person trained in 'law'.
- Also the appointments so made must be in consultation with the Chief Justice of the SC/HC as the case maybe.
- Held: ultra vires the Constitution
- A review petition u/Art 137 was filed stating that the above was 'apparent error'.
- SC reversed the above judgement and held that the Information Commission does not adjudicate a dispute between two or more parties concerning their legal right 'other than their right to get information in possession of a public authority' and thereby termed the function as a 'administrative simpliciter'.
- Court held that it was up to the Parliament to decide and consider whether appointment of a Judicial member will improve the condition of the Commission.



Right now, we will look at how the judiciary has reviewed the functioning of Information Commission either at the state or central level in time to understand the power and functions that they can exercise. What is the scope, what is the ambit and what are the limitations on the power and functions of the Information Commission? So, to understand this probably we will have to discuss couple of cases.

And try and see, where the judiciary has stepped into a kind of draw a frame work within which the Information Commission can work under the Right to Information Act of 2005. The first among the cases that we have is the case that was decided twice by the Supreme Court of India. And the title of this case is Namit Sharma versus the Union of India. In the first case, as I say told you there are 2 cases that the Supreme Court has decided. One was the review of the first case and the Supreme Court has to state what judging the first case did was right or wrong.

However, let us start with the first case and in the first case you will notice the constitutionality of Section 12 under the RTI Act and Section 15 were challenged. Now as we know that Section 12 and Section 15 are very relevant in looking at the power and functions of the Information Commission, and these two sections lay down those power and functions in particular to Section 12 (5) and 12 (6), it was argued that the Information Commissioners so appointed are discharging quasi-judicial and judicial functions.

And hence, because they are dealing with law, they are dealing with justice, they are dealing with adjudication of disputes, they ought to have a judicial approach. And hence those who have some experience, knowledge or expertise in law and those who have some kind of legal acumen should occupy the position of the Information Commission.

Now the aspect is that Information Commissioners unfortunately have been appointed from various backgrounds. As I told you in the previous discussion, some of the Information Commissioners had a background from journalism. Many of the Information Commissioners happen to be ex bureaucrats having serving the government for their full career. Quite a few Information Commissioners had a background from Civil Services. They had background from police services. There were Information Commissioners who had completely non-government background, they were activists and hence they were given the appointment of being an Information Commissioners.

However, no formal judge had ever occupied the position of an Information Commissioners. Which means nobody from the judicial service, nobody from the background of being a judge was ever given the appointment of Information Commissioner. And I think in Namit Sharma case this was highlighted saying that in case the Information Commission is discharging judicial or even cause judicial positions.

Why, because the powers are similar to that of the court in issuing summons recording evidences calling for documents and records and adjudicating on the Right to Information which is a right that is granted under the law then they ought to have some experience knowledge and expertise or some kind of legal acumen that is very relevant and important. And hence, these things not

being provided in Section 12 meant that Section 12 was not adequaterafted it not represent the vision of the constitution.

And hence, what petition to the court was please declare Section 12, (5) and (6) as being unconstitutional because they do not reflect the aspiration of the constitution in equipping the members of the constitutional body in legal skills in legal manage. The Supreme Court in the first case, as I told you there two cases to this, but the first case clearly was convinces of the fact that Information Commissioners should have a legal background. They were convinced of the fact that Section 12 did not adequately provide for this thing. And they were convinced of the fact the process of appointment of non-law persons as Information Commissioners has affected the working of the Right to Information Act.

And hence what they held was they read down Section 12 and they said that Information Commission is a judicial tribunal and it is adjudicating disputes under the Right to Information Act, it is supposed to perform a judicial function and if it is to perform judicial function, the Commission they said must comprise of two members always. One should be judicial person who has some degree of knowledge in law, who should have legal background and should be judicial trained or at least should be a lawyer who has practice for a period of not more than 20 years for at least minimum 20 years in that sense.

And he could also additionally have some experience in social work. So, the Supreme Court by the Namit Sharma versus union of India case 1 clearly paid the path for one, holding the Information Commission as judicial training that was a significant move. Secondly, also insisting that the judicial membership we appointed to the Information Commissioners or there should be persons who have degree of law, and social work, and should be having trained as a lawyer. And I think what the Supreme Court did was they said that the Information Commissions play a very pivotal role in legal interpretation in legal application.

And hence without a legal mind without a judicial member this task or this function cannot be adequately interest. And hence it was impetrating to read down Section 12 and to include amendment which will allow judicial members to be appointed to the Information

Commissioners. So, any lawyer who has practice for a period of 20 years could also be appointed if has under additional experience in social work.

So, that was also left open saying that it is only for judges or judicial officers to whom the Information Commission can make appointments to, but it can be a lawyer with those minimum experiences as well is what the court had to say. The supreme court also went ahead a step forward and also said that appellate authority should be a person trained in law.

This is the first appellate authority who happens to be a senior in the organizations who had appellate authority who hears an appeal from the public information officer. And hence, the Supreme Court had additionally concluded that let the appellate authority also have some training in law and that could be qualification description of qualification for who should be an appellate authority.

Unfortunately, the prescription of an appellate authorities is not there in the RTI Act. However, this case puts that into the forefront. Finally, I think what the case says is that the appointments are meet by the present however it is meet by committee of the Prime Minister and media of the organizations and a cabinet minister and it is probably an appointment that is made by the government in tune with the opposition leaders.

And hence, there was a kind of only an executive voice in the appointment of the Information Commissioner. So, the Supreme Court then says that to bring in quality merit and some kind of neutrality to the appointment process they said that such appointments from hence would should be made in consultation the chief justice of the Supreme Court in the case of central Information Commission.

In case of the State Information Commission, the consultation should be with the chief justice of the concerned High Court as the case maybe. So, I think the Namit Sharma case in 2012 led the path for judicial application in the function of the Information Commission. And I think that was a very significant judgement that did come across holding the Information Commissioner as being a judicial tribunal.

Finally, the Court held that Section 12 (5) and (6) were ultra-vires the constitution. It does not display the objectives and the purpose of what the constitution talks about, a clear separation of power independent and autonomous to judicial and causing judicial institutions is what the court had to control. However, the Namit Sharma case 1 was challenge in the review petition stating that the judges in this case committed an error apparent on the face of the case.

This was filed because one there would be being a huge difficulty in amending the law to its difficulty in finding the concerned legal judicial members because the Information Commissioners should be equipped with so many peoples and to a larger extent, I think the government wanted review of the directions given by the court in Namit Sharma case 1. So, the review petition was filed and the supreme court in the review petition completely reversed the Namit Sharma case 1.

They found the case having decided on wrong grounds and they did first start by holding this. The Supreme Court in the review petition held that the Information Commission does not adjudicate a dispute between two or more parties concerning their legal right other than just the right to get information in position of the public authority. So, it is not interpreting any fundamental right, it is only talking about some right to information which is in position of a public authority.

It is not necessary an adjudication of rights in that sense and hence, the Supreme Court said that the Information Commissions is not a judicial tribunal, however is performing a function as an administrative simpliciter. So, it is an administrative decision which ought to have been taken with the information should be given or shared or not and hence it is not a judicial function. It is an administrative function and hence, the Information Commission do perform only a administrative work not a judicial. So, this is the first basis for a distinction to be made in their review petition.

Second, the court held that it was for the Parliament to decide and consider whether the judicial were into conditioning of or the functioning of the commission or not and it was not for the

Supreme Court to lay that down. So, what the Supreme Court in this case did was they decided that it is not their business to prescribe the qualification it is not their business to suggest that a judicial member will improve the functioning and have judicial mind and the judicial approach.

It is for the Parliament to finally decide that and it was not for the court to decide and hence the court said; if the parliament is decided that this is a necessary qualification for the Information Commission and there is nothing wrong in that prescription, the Supreme Court should not have intervened in that matter at all and hence, the court reversed the Namit Sharma case which required a lawyer or a judicial member to be appointed to the Information Commission and the Supreme Court also held that Information Commission is administrative simpliciter organisation and is not a tribunal.

So, with a very significant judgement the supreme court of India though being the apex court has to contribute completely opposite to each other but I think the review petition view is to be taken into consideration with the fact that I think a framing a law and framing the prescribed qualification for members to be part of a quasi-judicial tribunal is completely the discretion of the parliament, is completely the discretion of the legislature. And I do not think the judges should bring in an element of creating some space for them to occupy as judicial members, once they are retired so that they can occupy and become Information Commissioner as well.

Also, the fact that it is not interpretation of legal rights it is just an application of information these are the public authority and hence it is some kind of administrative process within which the PIO, the appellate authority and the Information Commission are involved. And query clearly depicts the change in view or trend of the Supreme Court in lack or in terms of non-interference with the parliamentary functions in framing a law or in legislating a law.

(Refer Slide Time: 13:52)

## Issues for discussion from the case

- 1. RTI is a fundamental and a Statutory right and denial of the said right need adjudication through legal and constitutional nuances. Without Judicial mind, how can the IC perform this role?
- 2. Would having Judicial members in the Information Commission create a sense of independence and judicial autonomy as was declared in the Namit Sharma case 1.
- 3. While in the review petition the court stated that ICs can hear complaints, hence are performing administrative functions, what about the appeal function-is it not judicial?
- 4. Also what about imposing penalties-is it not a judicial function?



However, there are certain issues for discussion from this case that one should seriously considered. For me I think the when we have spoken about constitutional right to information and we are spoken about you know the Raj Narain case, the SP Gupta case, the LK Koolwal case, and so many other cases in which we have held the same Supreme Court to come to this conclusion saying that the Right to Know or the Right to Information as an integral fundamental right under article 19(1)(a).

And being a fundamental right under article 19(1)(a) is now getting incorporated as a statutory under article under right, the Right to Information Act, 2005 you know should one thing that the denial of the same should not be educated though legal and constitutional nuances? I think when you talk about a statutory right I think it is a right. If the denial happens, I do not think it is just administrative action, I think it is a judicial action. I think without judicial mind how can a legal and constitutional aspects be applied in the RTI legal regime.

I think that is the huge challenge, is not it?. So, the genesis of RTI is in the constitution the genesis of RTI is through the right granted through the statue of 2005 and this requires legal inter petition, it requires a legal mind is what one who want to argue for. And hence, without the judiciary, how do you expect the Information Commission to perform its role?

Second, I would always say that if there are judicial members that are appointed to the Information Commission, it would create a sense of independence and judicial autonomy which is very important for the functioning of the Information Commissions. If the Information Commissions is just an extension of the bureaucracy, it is those bureaucrats who after retirement and who have served government for more than 30-35 years become Information Commissioner, then to that extent their position of independences and autonomy is often challenged.

So, if you have judicial members, that sense of independence and autonomy can be enshrined, can be probably secure and hence I think having judicial members becomes inevitable in those circumstances and hence, I would urged then government to think about the possibilities of appointing judicial members within the frame of section 12 sub clause 5 and 6 itself and not only look for bureaucrat or government officers.

I think in the review petition, the court stated that the Information Commissions can hear complaints, hence are performing administrative functions that is true in terms of Section 18 of the RTI Act. How about Section 19? See Section 19 speaks about appeal functions and an appeal function in a body like the Information Commission is before any kind of adjudication is taken either to the High Court or to the Supreme Court.

And hence, when there is an appeal function on the Section 19, is it not a judicial function and should not the court have taken that consideration as well? I think every part of an appeal function is a judicial function and when you say that the Information Commission is having all the powers that a civil court has, now the exercise of the powers of the civil court is not necessarily administrative work it is a judicial function. And it is a quasi-judicial function that is something that the Information Commission is entitled.

And hence, I think these are the 3 important issues that can be discussed as an implication of the Namit Sharma case 2 and probably it is for the government to decide about changing or amending the law. I think that is something very relevant and that is something that should be the outcome of the case discussion simply because of the fact that it is not for those supreme court to



decide the qualification and the merits of appointment, it is for the parliament to lay it down and that kind of judicial non-interference is probably well appreciated in the Namit Sharma case 2.

Finally, most important I think when a public information officer is imposed with penalties under Section 20, I think penalties have very serious consequences. It is a fine that is been levied individually on public information officers and that is of serious implication, it is like a permission. And according me, when there is imposition of penalties trying to adhere to the mala fide intent or to the deliberate intent on the PIO, finding evidences relating to the same and justifying the same, I think definitely a judicial function.

And this has to be taken note of the fact that when an Information Commissioner decides to impose penalty, if he does not adequately justify the same, we have seen how high courts have intervened in those matters and have actually rejected the penalties being impose by the Information Commissioners.