

RULING AGAINST JUDICIAL TRANSPARENCY

Relevant for: Developmental Issues | Topic: Important Aspects of Governance, Transparency & Accountability including Right to Information and Citizen Charter

In its recent decision, in the *Chief Information Commissioner v. High Court of Gujarat* case, the Supreme Court, regrettably, barred citizens from securing access to court records under the Right to Information (RTI) Act. Instead, the court held that such records can be accessed only through the rules laid down by each High Court under Article 225 of the Constitution. The Registry of the Supreme Court was litigating a similar case (Registrar, *Supreme Court of India v. R.S. Misra*) before the Delhi High Court for several years after the CIC had ordered it to provide copies of pleadings filed in a case, under the RTI Act, rather than insisting on litigants filing an application under the Supreme Court Rules.

Though the particular decision taken earlier this month does not preclude the application of the RTI Act to the administrative side of the court, it does firmly slam the door shut on accessing, under the RTI Act, the millions of court records filed on the judicial side.

Before explaining the faults and the consequences with this decision of the Supreme Court, it is necessary to understand the importance of court records to public discourse in India. A significant number of decisions taken by the courts influence our daily life. Every prosecution before a criminal court is essentially an opportunity to hold the police accountable just as every writ petition is an opportunity to hold the government accountable. Similarly, a significant number of commercial lawsuits are opportunities to learn more about corporations and the manner in which commercial transactions are executed in the country.

In all of these cases, the pleadings filed by either party contain reams of information that are useful to a range of stakeholders such as citizens, journalists, academics, shareholders, etc., who can better inform the public discourse on the ramifications of these decisions. This is especially true in cases of public interest litigation, where the courts indulge in policymaking on the basis of the report of an *amicus curiae* or an expert committee set up by judges. The reports of these committees are not accessible to third parties, though they may be impacted by these decisions, because they form part of the court record and are hence outside the purview of the RTI Act.

There is no question of arguing for the confidentiality of these records because it is by now a well-recognised principle that all judicial proceedings must take place in open court, unless prohibited by law for reasonable purposes. But, while it is completely legal for anyone to sit in court and take notes while a lawyer narrates the content of pleadings, the courts make it as difficult as possible to access the pleadings in a simple manner. That said, for those with deeper pockets, it is only a matter of paying out a bribe to get copies of pleadings “informally”.

The Supreme Court’s verdict in this case hinged on Section 22 of the RTI Act which states that the RTI Act shall override any other law to the extent that the latter is inconsistent with the former. The Section states: “Act to have an overriding effect — The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.” A clause such as Section 22 is known as non-obstante clause and is a common drafting device used by legislatures to permit certain actions regardless of what is mentioned in existing legislation.

The wording of the provision reveals that the drafters of the RTI Act were clearly aware that it

may conflict with other laws and wanted to ensure that the procedure under the Act overruled the procedure in existing legislation. Despite this crystal-clear wording of Section 22, the Supreme Court and, on previous occasions, the High Courts, have concluded exactly the opposite.

The court's reasoning has three steps to it.

First, it concludes that there is no inconsistency between the RTI Act and the court rules. This is factually incorrect because the Gujarat High Court Rules unlike the RTI Act require the submission of an affidavit stating the purpose of seeking copies of the pleadings. The RTI Act requires no reasons to be provided while seeking information.

Second, the court argues that, "A special enactment or rule cannot be held to be overridden by a later general enactment simply because the latter opens up with a non-obstante clause, unless there is clear inconsistency between the two legislations." But that is exactly the point of a non-obstante clause. The accompanying factual inaccuracy, is its conclusion that there is no inconsistency between the Gujarat High Court rules and the RTI Act.

The third limb, of the court's reasoning was its conclusion that Section 22 could not be read in a manner to imply repeal of other laws, such as the Gujarat High Court Rules. The court states that if the intention was to repeal another law, the legislature would have specifically stated so in the RTI Act, as was done in Section 31 when the RTI Act repealed the previous Freedom of Information Act, 2002. This reasoning is bewildering because it would render non-obstante clauses entirely useless.

From a citizen's perspective, this decision is problematic for two reasons. One, most High Court Rules allow only parties to a legal proceeding to access the records of a case. Some High Courts may allow third parties to access court records if they can justify their request. This is entirely unlike the RTI Act, where no reasons are required to be provided thereby vastly reducing the possibility of administrative discretion.

The second reason this judgment spells bad news is that unlike the RTI Act, the procedure under the Rules of most High Courts is challenging from a logistical perspective, apart from lacking in any significant safeguards. An application under the RTI Act can be made by post, with the fee being deposited through a postal order. The procedure is simple enough to enable most citizens file RTI applications by themselves. Not so for the procedure under the High Court Rules. Most High Courts and the Supreme Court require physical filing of an application with the Registry, and a hearing before a judge to determine whether records should be given. In an atmosphere where it is becoming increasingly difficult for ordinary litigants to even enter court premises because of thoughtless measures in the name of security, it becomes a logistical nightmare for citizens to file an application with the Registry.

The Supreme Court fails to understand that the judiciary's track record of transparency is vastly inferior when compared to other arms of the state. In today's world where every public institution is striving to become more transparent, the continued resistance from the judiciary to making itself transparent in a meaningful manner will have an eroding effect on its legitimacy.

The writer is an advocate

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