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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 7TH ASWINA, 1944

WP(C) NO. 7240 OF 2013

PETITIONERS:

- 1 SECRETARY TO ADVOCATE GENERAL,
OFFICE OF THE ADVOCATE-GENERAL, KERALA, ERNAKULAM.
- 2 THE STATE PUBLIC INFORMATION OFFICER
OFFICE OF THE ADVOCATE-GENERAL, KERALA, ERNAKULAM.
- 3 THE APPELLATE AUTHORITY AND JOINT SECRETARY TO ADVOCATE-
GENERAL, OFFICE OF THE ADVOCATE-GENERAL, KERALA,
ERNAKULAM.

BY ADV.SHRI.T.B.HOOD, SPL.G.P. TO A.G.

RESPONDENT/S:

- 1 STATE INFORMATION COMMISSIONER
KERALA REPRESENTED BY SECRETARY, PUNNEN ROAD,
THIRUVANANTHAPURAM-695001.
- 2 SRI.P.SHARAFUDEEN
CERIN, CHIRAKKAL THAZHE, PARAL P.O., THALASSERY, KANNUR-
670671.

R1 BY ADV.SRI.M.AJAY
R2 BY ADV SRI.P.K.IBRAHIM

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 22.09.2022 A/W. WP(C)NO.7979 OF 2010, THE COURT ON
30.9.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 30TH DAY OF SEPTEMBER 2022 / 7TH ASWINA, 1944

WP(C) NO. 7979 OF 2010

PETITIONERS:

- 1 SECRETARY TO ADVOCATE GENERAL,
OFFICE OF THE ADVOCATE GENERAL, KERALA, ERNAKULAM.
- 2 STATE PUBLIC INFORMATION OFFICER,
OFFICE OF THE ADVOCATE GENERAL, KERALA,, ERNAKULAM.
- 3 APPELLATE AUTHORITY AND SECRETARY TO
ADVOCATE GENERAL, OFFICE OF THE ADVOCATE GENERAL,
KERALA, ERNAKULAM.

BY ADV.SHRI.T.B.HOOD, SPL.G.P. TO A.G.

RESPONDENTS:

- 1 STATE INFORMATION COMMISSION KERALA,
REPRESENTED BY ITS SECRETARY, PUNNAN ROAD,
THIRUVANANTHAPURAM.
- 2 M.L. AUGUSTHY, GENERAL SECRETARY
JANASHAKTI, UDUMBANCHOLA TALUK COMMITTEE, MAMPALAL HOUSE,
KALTHOTTY.P.O, 685507, IDUKKI DISTRICT.

BY ADVS.
SRI.C.V.ANTONY KOTHAMANGALAM
SRI.M.AJAY, SC, STATE INFORMATION COMMN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
22.09.2022 A/W. WP(C)No.7240 OF 2013, THE COURT ON 30.9.2022 DELIVERED
THE FOLLOWING:

CR**P.V.KUNHIKRISHNAN, J.****-----
W.P.(C).Nos.7979 of 2010 & 7240 of 2013
-----****Dated this the 30th day of September, 2022****JUDGMENT**

Common legal questions are raised in these two writ petitions; therefore, I am disposing of these two writ petitions by a common judgment.

2. Whether the relationship between the Advocate General of the State and the Government is a fiduciary relationship? Whether the legal opinions given by the Advocate General to the Government are exempted as per Section 8(1)(e) of The Right to Information Act, 2005 (for short, Act 2005)? These are some of the questions to be decided in these cases.

3. First, I will consider the facts in W.P.(C). No.7979/2010. The 1st petitioner is the Secretary to the Advocate General, Kerala, and the 2nd petitioner is the State Public Information Officer (SPIO) in the Office of the Advocate General, Kerala, designated under Section 5 of the Act 2005. The 3rd petitioner is the appellate authority under the Act 2005. This writ petition is filed challenging Ext.P10 order of the 1st respondent

State Information Commission. The 2nd respondent herein submitted Ext.P1 application dated 10.06.2009 to the 2nd petitioner under the Act 2005 requesting to furnish a certified copy of the "report" given by the Advocate General to the Government of Kerala in the Lavalin case. A communication, as evident by Ext.P2, was issued by the SPIO informing that such information is exempted from disclosure under Section 8(1)(e) of the Act 2005. The 2nd respondent filed an appeal before the 3rd petitioner, the Appellate Authority, as per the Act 2005. Ext.P3 is the appeal. The appeal was rejected by the 3rd petitioner as per Ext.P4 order, confirming Ext.P2 order. Thereafter the 2nd respondent filed an appeal before the State Information Commission, as evident by Ext.P5. The Commission, by Ext.P6 order, directed the 3rd petitioner to file a report, and as directed by the Commission, the 3rd petitioner filed the report on 25.09.2009, as evident by Ext.P7. Thereafter the Commission directed the 2nd petitioner to appear in person before the Commission with all documents as per the letter dated 16.01.2010, and the same is marked as Ext.P8. The 2nd petitioner appeared before the Commission and filed an affidavit, as evident by Ext.P9. Thereafter, the Commission did not accept the contention of the 2nd petitioner that there exists a fiduciary relationship between the Advocate General and the Government.

Accordingly, the appeal was allowed as per Ext.P10 order, and it was declared that the 2nd respondent is entitled to a copy of the legal advice given by the Advocate General in the Lavalin case to the Government of Kerala. Aggrieved by Ext.P10 this writ petition is filed.

4. W.P.(C). No.7240/2013 is also filed by the same petitioners as in W.P.(C). No.7979/2010. In this case, 2nd respondent submitted an application under the Act 2005 to furnish certain documents. Ext.P1 is the true copy of the application. It will be better to extract the information / documents requested by the 2nd respondent in Ext.P1 application:

- “1. KERALA GOVERNMENT approached the Division Bench of Kerala High Court against the Judgment of Hon. Justice V.Ramkumar in W.P.(C). No.13426 of 2010. (Murukesan vs. State of Kerala or the custodial death of Sampath of Palaghat). Please provide me a certified copy of the legal advice given by the Advocate General's Office to proceed with an appeal.
2. This appeal was rejected by the Bench of Chief Justice Mr.Chelameswar and Justice P.N.Raveendran and the Government of Kerala approached Supreme Court with appeal. Please give me the legal advise (certified copy) given by the office of the Advocate General to proceed with an appeal in the Supreme Court.
3. Senior Counsel Advocate Rao appeared for the Government of Kerala. Give me the certified copy of the order which entrust the appointment of Mr.Rao.
4. Please provide me details of Expenses incurred to the Government of Kerala in both the appeals including the professional fee of the counsel in the Supreme Court.

If any of the above mentioned information or document is not in your possession, please transfer those requests to the concerned authority and inform the applicant (As per the provisions of the Right to Information Act 2005.)”

5. The first and the second request in Ext.P1 is for getting legal advice given by the Advocate General to the Government. The SPIO gave Ext.P2 reply. The same is extracted hereunder:

“In reply to the reference cited, the following information is given:

Para 1: The Advocate General has not given any legal advice in W.P(C) No.13426 of 2010 to proceed with an appeal.

Para 2: The information sought is exempted from disclosure, vide Section 8 (1)(e) of the Right to Information Act, 2005. Hence, your request for a copy of the legal advice is rejected.

Para 3: The undersigned has no information about the appointment of Sri. Rao, Senior Counsel, who appeared for the Government of Kerala before the Hon'ble Supreme Court.

Para 4: No expenses have been incurred by the Government of Kerala in both the appeals till this date, including professional fee of the Counsel in the Supreme Court.”

6. Aggrieved by the answer given to question No.2 in Ext.P2, the 2nd respondent filed Ext.P3 appeal before the Appellate Authority. The

same was confirmed by the Appellate Authority as evident by Ext.P4. Aggrieved by the same, a second appeal was filed before the State Information Commission, as evident by Ext.P5. As per Ext.P6, the State Information Commission directed the Appellate Authority to submit a report and the report was submitted as evident by Ext.P7. Thereafter, the State Information Commission directed the 2nd petitioner to appear before the State Information Commission and accordingly the 2nd petitioner appeared. Subsequently, the State Information Commission allowed the appeal filed by the 2nd respondent and directed the petitioners to furnish the details required by the 2nd respondent. Ext.P11 is the order. Ext.P11 is challenged in this writ petition.

7. Heard the learned Special Government Pleader Sri.T.B.Hood for the petitioners and Sri.M.Ajay for the State Information Commission. There was no appearance for the 2nd respondent in W.P.(C).No.7979/2010. Advocate Sri.P.K.Ibrahim appeared for the 2nd respondent in W.P.(C). No.7240/2013.

8. The Special Government Pleader submitted that the information requested by the 2nd respondent in these two writ petitions are legal opinion given by the Advocate General to the Government. The Special Government Pleader submitted that such information is excluded from

disclosure under Section 8(1)(e) of the Act 2005. The Special Government Pleader further submitted that the relationship between the Advocate General and the Government is a fiduciary relationship. Hence the legal opinion given by the Advocate General to the Government is protected as per Section 8(1)(e) of the Act 2005 from disclosure. The Special Government Pleader submitted that under Section 129 of the Indian Evidence Act also, the disclosure of confidential communication between the Advocate General and the Government is protected from disclosure. The Special Government Pleader relied on the judgment of the Apex Court in **Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal [2020 (5) SCC 481]** to explain the meaning of the fiduciary relationship mentioned in Section 8(1)(e) of the Act 2005. The Special Government Pleader also relied on the judgment of this Court in **Kunjukrishnan Nair v. State of Kerala [1988 (2) KLT 1015]**, in which it is stated that the relationship between the Government Law Officer and the Government is essentially that of a litigant and a lawyer. The Special Government Pleader also submitted that the relationship between the Advocate General and the State Government is essentially that of an advocate and client, and to strengthen his contention, he relied on the judgment in **Joginder Singh Wasu v. State of Punjab [1994**

(1) SCC 184]. It was further contended by the Special Government Pleader that the lawyer of a Government or a public body is not its employee but a professional practitioner engaged to do a specific work. It was submitted that the relationship between the lawyer and his client is one of trust and confidence. The Special Government Pleader relied on the judgment of the Apex Court in **State of UP and Others v. UP State Law Officers Association and Others [1994 (2) SCC 204]**. To strengthen the argument that the relationship between the lawyer and client is fiduciary, the Special Government Pleader also relied on the judgment of the Apex Court in **Kokkanda B.Poondacha and Others v. K.D.Ganapath and another [2011 (12) SCC 600]** and **Himalayan Coop. Group Housing Society v. Balwan Singh and Others [2015 (7) SCC 373]**.

9. The counsel appearing for the State Information Commission supported the orders passed by the Commission in these two cases. The counsel submitted that the Government is forwarding a file to the Advocate General and the Advocate General is generating an opinion on the file. According to the counsel, it is a part of the file. Therefore, it is contended that the same will not come within the purview of Section 8(1) (e) of Act 2005. The counsel submitted that information available to a

person in his fiduciary relationship alone is exempted from disclosure as per Section 8(1)(e) of the Act 2005. The counsel appearing for the State Information Commission also submitted that this Court may not decide this point in W.P.(C). No.7979/2010 because there is no representation for the 2nd respondent in that case. It is submitted that the 2nd respondent in W.P.(C). No.7979/2010 might have no interest in getting the information and therefore, that writ petition may not be decided on merit. The 2nd respondent appearing in W.P.(C). No.7240/2013 supported the order passed by the State Information Commission in that case. The counsel endorsed the argument of the counsel appearing for the 1st respondent.

10. It is true that there is no appearance for the 2nd respondent in W.P.(C) No.7979/2010. The second respondent was absent before the 1st respondent also at the time of hearing. Even then Ext.P10 order was passed by the 1st respondent. Hence the validity of Ext.P10 is to be considered even if the second respondent is not interested in this case.

11. The short point to be decided in this case is whether the legal opinion given by the Advocate General is an information exempted under Section 8(1)(e) of the Act 2005. An Advocate General is appointed as per Article 165 of the Constitution of India. Article 165 (1) says that the

Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be the Advocate General for the State. Article 165 (2) says that, it shall be the duty of the Advocate General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

12. In **Joginder Singh Wasu's** case (supra) the Apex Court observed that the relationship between the Advocate General and the State Government is essentially that of an Advocate and a client in relation to his appearance in court and arguing the case before the court on behalf of the State. In **Kunjukrishnan Nair's** case (supra), this Court observed that the relationship between the Government law officer and the Government is essentially that of a lawyer and a litigant. In **State of U.P and others v. U.P. State Law Officers Association and others [1994 (2) SCC 204]**, the Apex Court observed that the legal profession is essentially a service-oriented profession. It will be better to extract paragraphs 14 and 15 of the above decision.

“14. Legal profession is essentially a service oriented profession. The, ancestor of today's lawyer was no more than a spokesman who rendered his

services to the needy members of the society by articulating their case before the authorities that be. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf. The Government, and the public bodies engaged the services of the lawyers purely on a contractual basis either for a specified case or for a specified or an unspecified period. Although the contract in some cases prohibited the lawyers from accepting private briefs, the nature of the contract did not alter from one of professional engagement to that of employment. The lawyer of the Government or a public body was not its employee but was a professional practitioner engaged to do the specified work. This is so even today, though the lawyers on the full time rolls of the Government and the public bodies are described as their law officers. It is precisely for this reason that In the case of such law officers, the saving clause of R.49 of the Bar Council of India Rules, waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full time employment.

15. The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer, in turn, is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however irrelevant it may be. He is essentially an advisor to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He

demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies. " [underline supplied]

From the above discussions, it is clear that the relationship between the Advocate General and the Government is a lawyer-client relationship. As per Article 165 (2) of the Constitution of India, it is the duty of the Advocate General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and he has to discharge the functions conferred on him by or under the Constitution or any other law for the time being in force. The Advocate General may give legal opinion to the Government on various issues. Some issues may be sensitive, some issues may be political, some issues may be religious, some issues may be about the functioning of the Government, and some issues may be about the constitutional validity of certain proposed enactments. The legal opinions given by the Advocate General will usually be honoured by the Government, but it is not binding to the Government. As per Article 163 of the Constitution of India, there shall be a council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far

as he is by or under this Constitution required to exercise his functions or any of them in his discretion. The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor. The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution of India. While deciding issues by the executive, there may be legal conundrums to be resolved. In such situations, the advice of the Advocate General is usually called for by the Government. Those advices and opinions given by the Advocate General are to be treated as an opinion given by a lawyer to his client. Section 126 of the Indian Evidence Act, 1872 protects the disclosure of such advice or opinion provided by the Advocate General to the Government. Therefore, usually, if a legal opinion is given by the Advocate General to the Government, the same need not be disclosed, and it is protected under Section 126 of the Indian Evidence Act, 1872.

13. Section 22 of the Act 2005 says that 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. Therefore, the provisions of the Act 2005 will override the provisions of the Indian Evidence Act if it is inconsistent with the provisions of Act 2005. As per Section 3 of the Act 2005, subject to the provisions of this Act, all citizens shall have the right to information. Information is defined in Section 2(f) of the Act 2005, which is extracted hereunder:

“(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;”

14. From the above definition, it is clear that the information includes opinions and advice. Therefore, a legal opinion given by the Advocate General will come within the purview of information as per the Act 2005. Then the question is whether it is exempted under Section 8 of Act 2005. Section 8 (1) (e) of the Act 2005 is the relevant provision which is applicable to the facts of this case. It will be better to extract Section 8(1)(e) of the Act 2005:

“(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(a) xxxxxxxx

[\(b\)](#) xxxxxxxx

[\(c\)](#) xxxxxxxx

[\(d\)](#)xxxxxxxxx

[\(e\)](#) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

[\(f\)](#) xxxxxxxx

[\(g\)](#)xxxxxxxxx

[\(h\)](#)xxxxxxxxx

[\(i\)](#) xxxxxxxx

[\(j\)](#)xxxxxxxxx”

15. The question to be decided is whether the legal opinion given by the Advocate General to the Government will come within the four corners of the fiduciary relationship. Section 8(1)(e) of the Act 2005 says that information available to a person in his fiduciary relationship is exempted from disclosure. From a reading of Section 8(1)(e), it is clear that it should be an information available to a person in his fiduciary relationship. A perusal of Article 165 will show that the Governor of the State is appointing a person as an Advocate General. Admittedly, the legal opinion is already given to the Government by the Advocate General in these two cases. Of course, the legal opinion given by the Advocate General to the Government will be available in the office of the Advocate General. The contention raised by the counsel appearing for the 1st respondent is that the Government is forwarding a file to the Advocate

General and the Advocate General is providing the legal opinion on that file. In other words, the counsel submitted that it is an opinion generated in a file and therefore the same will not come within the purview of an information available to a person in his fiduciary relationship. I am not in a position to accept the above contention. First of all, the file in which the legal opinion is given is not in the custody of the Advocate General, but it is in the custody of the Government. But the details of the legal opinion given in that file will be available in the office of the Advocate General. That will come within the definition of information as defined in Section 2(f) of the Act 2005. Therefore, whether that information can be disclosed is the question. For deciding the same, the meaning of fiduciary relationship is to be discussed. What is a fiduciary relationship ? This point is considered by the Apex Court in detail in **Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal [2020 (5) SCC 481]**. It will be better to extract the relevant portions of the above judgment.

"235. The appellant argued that the information about the assets of judges is exempt from disclosure, by virtue of S.8(1)(e) of the RTI Act which casts a fiduciary duty on the Chief Justice of India to hold the asset declarations in confidence. It is argued by the respondent that judges, while declaring their assets, do so in their official capacity in accordance with the 1997 resolution and not as private individuals. It is urged that the process of information gathering about the assets of the judges by the Chief Justice

of India, is in his official capacity and therefore, no fiduciary relationship exists between them.

236. In order to determine whether the Chief Justice of India holds information with respect to asset declarations of judges of the Supreme Court in a fiduciary capacity, it is necessary to assess the nature of the relationship and the power dynamics between the parties. Justice Frankfurter of the United States Supreme Court in *Securities and Exchange Commission v. Chenery Corpn*, while determining the question whether officers and directors who manage a holding company in the process of reorganisation occupy positions of trust, stated:

".....But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

237. *Black's Law Dictionary*, defines "fiduciary relationship" thus:

"A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships - such as trustee - beneficiary, guardian - ward, principal - agent, and attorney - client - require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations : (1) when one person places trust in the faithful integrity of another, *who as a result gains superiority or influence over the first*, (2) *when one person assumes control and responsibility over another*, (3) *when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship*, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, *as with a lawyer and a client or a stockbroker and a customer.*" (Emphasis supplied)

238. In *Words and Phrases* the term "fiduciary" is defined:

"Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another... It refers to integrity and fidelity... It contemplates fair dealing and good faith, rather than legal

obligation, as the basis of the transaction... The term includes those informal relations which exist *whenever one party trusts and relies upon another, as well as technical fiduciary relations.*" (Emphasis supplied)

239. In *Corpus Juris Secundum* "fiduciary" is defined thus:

"A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also, more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note."

240. In *CBSE v. Aditya Bandopadhyay*, a two-Judge Bench of this Court while discussing the nature of fiduciary relationships relied upon several decisions and explained the terms "fiduciary" and "fiduciary relationship" thus:

"39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. *The term "fiduciary relationship" is used to*

describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party." (Emphasis supplied)

241. In *RBI v. Jayantilal N. Mistry*, a two-Judge Bench of this Court reiterated the observations made in *CBSE v. Aditya Bandopadhyay* and held that RBI did not place itself in a fiduciary relationship with other financial institutions by virtue of collecting their reports of inspections, statements of the banks and information related to the business. It was held that the information collected by the RBI was required under law and not under the pretext of confidence or trust: (*Jayantilal N. Mistry case*, SCC p.563, para 64)

"64. The exemption contained in S.8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in a fiduciary relationship, there is no reason to withhold the disclosure of the same. *However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.* As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such information shared under an obligation / duty cannot be considered to come under the purview of being shared in fiduciary relationship." (Emphasis supplied)

242. The Canadian Supreme Court in *Robert L. Hodgkinson v. David L. Simms*, discussed the term 'fiduciary' thus:

"A party becomes a fiduciary where it, acting pursuant to statute, agreement or unilateral undertaking, has an obligation to act for the benefit of another and that obligation carries with it a discretionary power. Several indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

The term fiduciary is properly used in two ways. The first describes certain relationships having as their essence discretion, influence over interests, and an inherent vulnerability. A rebuttable presumption arises out of the inherent purpose of the relationship that one party has a duty to act in the best interests of the other party. The second, slightly different use of fiduciary exists where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In such a case, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non - exhaustive examples of evidentiary factors to be considered in making this determination. Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self - interest and agreed to act solely on behalf of the other party. In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary."

243. Dr. Paul Finn in his comprehensive work on *"Fiduciary Obligations"*, describes a fiduciary as someone who has an obligation to act "in the interests of" or "for the benefit of" their beneficiaries in some

particular matter. For a person to act as a fiduciary, they must first have bound themselves in some way to protect and further the interests of another. Where such a position has been assumed by one party then that party's position is potentially of a fiduciary. The Federal Court of Australia in *Australian Securities & Investments Commission v. Citigroup Global Markets Australia Pty. Ltd.* has held:

"The question of whether a fiduciary relationship exists, and the scope of any duty, will depend upon the factual circumstances and an examination of the contractual terms between the parties... Apart from the established categories, perhaps the most that can be said is that *a fiduciary relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary... The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship.* It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the fiduciary expectation." (Emphasis supplied)

244. A fiduciary must be entrusted with a degree of discretion (power) and must have the freedom to act without resorting to prior approval of the beneficiary. The greater the independent authority to be exercised by the fiduciary, the greater the scope of fiduciary duty. The person so entrusted with power is required to determine how to exercise that power. Fiduciaries are identified by ascendancy, power and control on the part of the stronger party, and therefore, a fiduciary relationship implies a condition of superiority of one of the parties over the other. It is not necessary that the relationship has to be defined as per law, it may exist under various circumstances, and exists in cases where there has been a special confidence placed in someone who is bound to act in good faith and with due regard to the interests of the one reposing the confidence. Such is normally the case with, inter alia, attorney - client, agent-principal, doctor - patient, parent-child, trustees - beneficiaries, legal guardian - ward,

personal representatives, court appointed receivers and between the directors of the company and its shareholders. In *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, and *Dale & Carrington Invt. (P) Lt v. P. K. Prathaphan*, this Court held that the directors of the company owe a fiduciary duty to its shareholders. In *P. V. Sankara Kurup v. Leelavathy Nambiar*, this Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

245. Other structural properties of the fiduciary relationship are dependence and vulnerability, where the beneficiary is dependent upon the fiduciary to exercise power and impact the practical interests. Once a fiduciary relationship is established, fiduciary duties include the duty of loyalty and duty of care towards the interests of the beneficiaries.

246. From the discussion above, it can be seen that a fiduciary is someone who acts for and on behalf of another in a particular matter giving rise to a relationship of trust and confidence. A fiduciary relationship implies a condition of superiority of one of the parties over the other, where special confidence has been reposed in an individual to act in the best interests of another.”

16. In **V.C. Rangadurai v. D. Gopalan and Others** [1979 KHC 489], the Apex Court observed that the relationship between a lawyer and his client is fiduciary in nature. It will be better to extract the relevant portions of the above judgment:

“31. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. Lord Brougham, then aged eighty six, said in a speech, 1864, that the first great quality of an advocate was 'to reckon everything subordinate to the interests of his client'. What he said in 1864 about 'the paramountcy of the client's interest', is equally true

today. The relation between a lawyer and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith. It is purely a personal relationship, involving the highest personal trust and confidence which cannot be delegated without consent. A lawyer when entrusted with a brief, is expected to follow the norms of professional ethics and try to protect the interests of his clients, in relation to whom he occupies a position of trust. The appellant completely betrayed the trust reposed in him by the complainants." [underline supplied]

17. **V.C.Rangadurai's** case (supra) was followed by the Apex Court in **Jaipur Vikas Pradhikaran v. Sri.Ashok Kumar Choudhary and Others** [2011 KHC 4851]. In **Santhosh A (Adv.) v. State of Kerala** [2017 (2) KHC 95], this Court observed that a lawyer who is acting on behalf of the accused in a criminal case is based on a fiduciary relationship. The trust and faith constitute such relationship. In **Himalayan Coop. Group Housing Society v. Balwan Singh and others** [2015 (7) SCC 373], the Apex Court observed that one of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients.

18. From the above discussions, it is clear that the lawyer-client relationship is a fiduciary relationship. There may be delicate and confidential communications between a lawyer and his client. All communications between the lawyer and his client are to be protected

because these communications are confidential. The same is protected as per Section 8(1)(e) of the Act 2005. The Advocate General is the advisor of the Government. As I mentioned earlier, there may be delicate and sensitive issues, in which the Government wants the opinion of the Advocate General. Those are confidential communications between the Government and the Advocate General. The legal opinions given by the Advocate General to the Government should always be confidential. That is protected under Section 8(1)(e) of the Act 2005. If it is protected under Section 8(1)(e) of the Act 2005, the overriding effect of Section 22 of the Act to the Evidence Act will also not be available. In such circumstances, Section 126 of the Indian Evidence Act is also applicable as far as a legal opinion given by the Advocate General to the Government is concerned. Therefore, I am not in a position to agree with the orders passed by the State Information Commission in these two writ petitions to disclose the legal opinions given by the Advocate General to the Government. Therefore, these writ petitions are to be allowed quashing the orders passed by the State Information Commission.

Therefore, these two writ petitions are allowed in the following manner:

- i) W.P.(C)No.7979 of 2010 is allowed and Ext.P10 is quashed.
- ii) W.P.(C)No.7240 of 2013 is allowed and Ext.P11 is set aside.
- iii) It is declared that the legal advice given by the Advocate General to the State Government is exempted from disclosure under Section 8(1)(e) of The Right to Information Act 2005.

Sd/-

P.V.KUNHIKRISHNAN
JUDGE

APPENDIX OF WP (C) 7240/2013

PETITIONER EXHIBITS

EXHIBIT P1: TRUE COPY OF THE APPLICATION
DT.26.08.2010

EXHIBIT P2: TRUE COPY OF THE LETTER NO.M-
58/10/46011/RTI DATED 28.9.2010 OF THE 2ND
PETITIONER

EXHIBIT P3: TRUE COPY OF THE FIRST APPEAL
SUBMITTED BY THE 2ND RESPONDENT TO THE 3RD
PETITIONER DATED 15.10.2010

EXHIBIT P4: TRUE COPY OF THE ORDER NO.M-
58/10/46011/RTI DATED 4.11.2010

EXHIBIT P5: TRUE COPY OF THE SECOND APPEAL
SUBMITTED BY THE 2ND RESPONDENT TO THE 1ST
RESPONDENT

EXHIBIT P6: TRUE COPY OF LETTER DATED
21.12.2010 OF THE 1ST RESPONDENT TO THE 3RD
PETITIONER

EXHIBIT P7: TRUE COPY OF REPORT FILED BY THE
3RD PETITIONER BEFORE THE 1ST RESPONDENT

EXHIBIT P8: TRUE COPY OF LETTER NO.12416/SIC-
GEN1/2010 DATED 26.7.2011

EXHIBIT P9: TRUE COPY OF LETTER NO.76/2011/RTI
DATED 9.8.2011

EXHIBIT P10: TRUE COPY OF LETTER NO.12416/SIC-
GEN1/2010 DATED 1.6.2012 OF THE 1ST RESPONDENT

EXHIBIT P11: TRUE COPY OF ORDER OF THE 1ST
RESPONDENT DT.8.2.2013

EXHIBIT P12: TRUE COPY OF ORDER DATED
11.3.2010 IN WPC.7979/2010 OF THE 1ST
RESPONDENT

APPENDIX OF WP(C) 7979/2010

PETITIONER EXHIBITS

EXHIBIT P1: TRUE COPY OF THE APPLICATION
DTD.10.06.2009

EXHIBIT P2: TRUE COPY OF THE COMMUNICATION DTD
13.7.2009 SENT BY THE 2ND PETITIONER TO THE
2ND RESPONDENT.

EXHIBIT P3: TRUE COPY OF THE APPEAL PETITION
DTD 20.7.2009 SUBMITTED BY R2.

EXHIBIT P4: TRUE COPY OF THE ORDER OF THE 3RD
PETITIONER, REJECTING EXT P3 APPEAL, WITH
COVERING LETTER.

EXHIBIT P5: APPEAL DTD 24.8.2009 SUBMITTED BY
R2 BEFORE THE COMMISSIONER.

EXHIBIT P6: A TRUE COPY OF LETTER DATED
10.9.2009 SENT BY THE COMMISSION TO THE 3RD
PETITIONER.

EXHIBIT P7: A TRUE COPY OF REPORT DTD
25.9.2009 FURNISHED BY THE THIRD PETITIONER TO
THE COMMISSION.

EXHIBIT P8: A TRUE COPY OF LETTER DATED
16.1.2010 SENT BY THE COMMISSION TO THE SECOND
PETITIONER

EXHIBIT P9: A TRUE COPY OF AFFIDAVIT FILED BY
THE 2ND PETITIONER BEFORE THE COMMISSION ON
10.2.2010

EXHIBIT P10: A TRUE COPY OF ORDER DTD
17.2.2010 OF THE COMMISSION

TRUE COPY

P.A.TO JUDGE