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

+ **W.P.(C) 7878/2015 & CM 15758/2015**

INDIAN POTASH LIMITED & ORS. Petitioners

Through: Mr Manish Kaushik, Advocate.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr Vikas Mahajan, Mr Shyam
Sundar Rai, Advocate for UOI.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
28.11.2017

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VIBHU BAKHRU, J

1. The petitioners have filed the present petition, *inter alia*, impugning the order dated 09.07.2015 (hereafter 'the impugned order') passed by the Central Information Commission (hereafter 'CIC'), whereby the CIC has held the petitioner no.1 (hereafter 'the petitioner') to be a public authority within the meaning of Section 2(h) of the Right to Information Act, 2005 (hereafter 'the RTI Act').

2. Respondent nos.2 & 3 had filed applications dated 23.12.2010 and 28.05.2013 under the RTI Act seeking certain information from the petitioner. Respondent no. 2 had sought the landed cost of Muriate of Potash (MoP) imported by the petitioner during the period 01.03.2009 to 31.10.2010 and respondent no. 3 had sought information as to the quantity

of MoP purchased by two specified concerns from the petitioner during the period December 2006 to March 2009. The petitioner declined to give the information as sought for by the said respondents on the ground that the petitioner was not a 'public authority' under Section 2(h) of the RTI Act.

3. The only question to be addressed in the present petition is whether the petitioner is a 'public authority' as defined under Section 2(h) of the RTI Act?

4. Briefly stated, the relevant facts - which remain uncontroverted - necessary to address the controversy involved in the present petition are as under:-

5. In 1955 three private companies jointly formed a consortium, for import of potash salts in the interest of agriculture on the advice of the Government of India, under the name and style of Indian Potash Supply Agency Limited (IPSA), which was incorporated on 17.06.1955 under the Companies Act, 1913. After the enactment of the Companies Act, 1956, the petitioner company was incorporated under the said Act as Indian Potash Limited.

6. At the material time, the shareholding of the petitioner was held by three shareholders namely; M/s Shaw Wallace & Co Ltd., Parry & Co. Ltd. and Mysore Fertilizer Co.

7. The learned counsel appearing for the petitioner states that the petitioner company is a company in the private sector and is run in accordance with its Articles of Association (AOA). The petitioners claim that there is no direct or indirect funding of the petitioner by either the Central or any State Government. Although, some of the petitioner's shares

are held by Public Sector entities, majority of the shares - about 70% - are held by entities, which are not public authorities within the meaning of section 2(h) of the RTI Act. Only about 12.67% equity is held by Public Sector Enterprises. Thus, out of the total share capital of ₹14,29,86,000/- about ₹1,81,16,327/- equity capital is held by the Public Sector entities.

8. The CIC analysed the shareholding pattern of the petitioner and observed that 70.22% of the entire shareholding was held by the cooperative sector which included certain cooperatives, namely; IFFCO, Gujarat State Co-Op. Marketing Federation Ltd. and Vidharbha Co-Op. Marketing Federation Ltd., which were not 'public authorities' within the meaning of Section 2(h) of the RTI Act. The CIC thus, excluded the shareholding of these entities and concluded that the balance 25.77% of the shareholding were with the Cooperatives, which were under the government control. The CIC assumed that such entities were 'public authorities' within the meaning of Section 2(h) of the RTI Act. In addition, the CIC noted that 20.54% of the issued as subscribed equity shares of the petitioner were held by five Public Sector enterprises, namely; Madras Fertilizers Ltd., Steel Authority of India Ltd., Rashtriya Chemicals and Fertilizers Ltd., Gujarat State Fertilizers and Chemicals Ltd. and Fertilizers and chemicals Travancore Ltd.

9. Taking the aforesaid analysis of shareholding pattern into account, the CIC held that 46.24% - 25.77% held by cooperative sector plus 20.54% held by Public Sector - were funds directly or indirectly from the government coffers or was public money. The CIC also referred to the decision of the Karnataka High Court in the case of *Mangalore SEZ Ltd. v. Karnataka Information Commission & Ors: W.P.(C) 34095/2010, decided on*

14.08.2012, whereby the Court had held that Mangalore SEZ Ltd. was a public authority on the reasoning that 49.96% of its shares were held by government organizations.

10. The CIC concluded that the petitioner was a public authority since 46.24% of the petitioner's shareholding was indirectly held by Central and State Government and that would constitute substantial funding of the petitioner. The CIC also held that the petitioner was enjoying monopoly status and was, essentially, performing its functions for the benefit of the public and therefore they assumed the character of a government function. In view of the above, the CIC concluded the petitioner to be a 'public authority' within the meaning of Section 2(h) of the RTI Act.

11. Before proceeding further, it would be relevant to refer to Section 2(h) of the RTI Act, which defines the expression "public authority". Section 2(h) of the RTI Act is set out below:-

"2. Definitions.- In this Act, unless the context otherwise requires,-

XXXX XXXX XXXX XXXX

(h) 'public authority' means any authority or body or institution of self-government established or constituted,—

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any—
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government."

12. The aforesaid expression was considered by the Supreme Court in the case of *Thalappalam Service Cooperative Bank Ltd. and Others v. State of Kerala and Others: (2013) 16 SCC 82*, whereby the Supreme Court explained as under:-

“30. The legislature, in its wisdom, while defining the expression “public authority” under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions “means” and “includes”. When a word is defined to “mean” something, the definition is prima facie restrictive and where the word is defined to “include” some other thing, the definition is prima facie extensive. But when both the expressions “means” and “includes” are used, the categories mentioned there would exhaust themselves. The meanings of the expressions “means” and “includes” have been explained by this Court in *DDA v. Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.”

13. In the present case, admittedly, the petitioner does not fall in the categories under clauses (a), (b) or (c) of Section 2(h) of the RTI Act. Thus, the only question that arises is whether the petitioner can be held to be public authority within the meaning of clause 2(h)(d)(i) or 2(h)(d)(ii) of the RTI Act. In other words, whether the petitioner is a *body owned controlled or substantially financed* directly or indirectly by funds provided by the appropriate government or is a Non-Government Organization (NGO)

substantially financed, directly or indirectly by funds provided by the appropriate government.

14. In *Thalappalam Service Cooperative Bank Ltd.* (*supra*), the Supreme Court had explained the meaning of the expression “a body owned” which reads as under:-

“35. A body owned by the appropriate Government clearly falls under Section 2(h)(d)(i) of the RTI Act. A body owned, means to have a good legal title to it having the ultimate control over the affairs of that body, ownership takes in its fold control, finance, etc. Further discussion of this concept is unnecessary because, admittedly, the societies in question are not owned by the appropriate Government.”

15. Insofar as the word “controlled” used in clause 2(h)(d)(i) is concerned, the Supreme Court had held as under:-

“44. We are of the opinion that when we test the meaning of expression “controlled” which figures in between the words “body owned” and “substantially financed”, the control by the appropriate Government must be a control of a substantial nature. The mere “supervision” or “regulation” as such by a statute or otherwise of a body would not make that body a “public authority” within the meaning of Section 2(h)(d)(i) of the RTI Act. In other words just like a body owned or body substantially financed by the appropriate Government, the control of the body by the appropriate Government would also be substantial and not merely supervisory or regulatory. The powers exercised by the Registrar of Cooperative Societies and others under the Cooperative Societies Act are only regulatory or supervisory in nature, which will not amount to dominating or interfering with the management or affairs of the society so as to be controlled. The management and control are statutorily conferred on the Management Committee or the Board of

Directors of the Society by the respective Cooperative Societies Act and not on the authorities under the Cooperative Societies Act.

45. We are, therefore, of the view that the word “controlled” used in Section 2(h)(d)(i) of the Act has to be understood in the context in which it has been used vis-a-vis a body owned or substantially financed by the appropriate government, that is, the control of the body is of such a degree which amounts to substantial control over the management and affairs of the body.”

16. The word “appropriate government” is defined under Section 2(a) of the RTI Act, which reads as under:

“2. Definitions.- In this Act, unless the context otherwise requires,-

(a) “appropriate government” means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly-

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government.”

17. From the facts as noticed above, it is clear that the petitioner is not owned by either the Central Government or by any State Government. The shareholding pattern of the petitioner as noticed by the CIC indicates that about 70.22% of the petitioner’s share capital is held by seventeen entities from the co-operative sector. Further, five public sector companies own an aggregate of 20.54% of the issued and subscribed shares capital of the petitioner. In addition, there are several other entities, which are unconnected with the government, that hold the balance shares. Admittedly,

none of the issued and subscribed shares of the petitioner shares are held by either the Central or the State Government. The Articles of Association of the petitioner also does not provide any power to the Central Government or any State Government to exercise control over the affairs of the petitioner. There is, thus, no material to indicate that either Central Government or any State Government has good legal title to the petitioner or has ultimate control over the affairs of the petitioner. The petitioner being a company incorporated under the Companies Act, 1956 is a juristic entity and its affairs have to be conducted in the manner as provided in the Articles of Association. Thus, plainly, the petitioner cannot be termed as a body owned by any appropriate government.

18. Insofar as the expression “control” is concerned, the same has to be understood - as explained by the Supreme Court in ***Thalappalam Service Cooperative Bank Ltd.*** (*supra*) - as a body owned or substantially financed by the appropriate government.

19. Thus, the only question that remains to be addressed is whether the petitioner is substantially financed by the appropriate government so as to lead to the conclusion that it is a public authority under Section 2(h)(d)(i) of the RTI Act.

20. In ***Thalappalam Service Cooperative Bank Ltd.*** (*supra*), the Supreme Court had clarified that:

“Merely providing subsidies, grants, exemptions, privileges, etc. as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist.”

21. In the facts of the present case, there is no material whatsoever to indicate that either the Central Government or any State Government has provided any finance to the petitioner. It may be true that 20.54% of the shares are held by Public Sector Enterprises; however, that does not mean that those shares have been subscribed by funds provided by the Central Government or any State Government. Some of the Public Sector Enterprises that hold shares in the petitioners are listed on stock exchanges and their shares are freely traded. A significant portion of the shares of these companies are also held by public at large and financial institutions. The source of funding of Public Sector Enterprises is not limited only to Central Government or State Governments. In addition, these Public Sector Enterprises also have large reserves, which are generated by accumulating undistributed profits. Thus, it would be incorrect to assume that the funds utilized by Public Sector Enterprises to purchase the shares of the petitioner owe their source to the funds provided by an appropriate government. It would be a different matter if it was established that the Central/State Government had provided the Public Sector Enterprises in question with funds earmarked to be utilized for subscribing to the shares of the petitioner. However, concededly, that is not the case here. There is also no material to even indicate whether the shares of the petitioner were subscribed by the Public Sector Entities directly or were purchased from other entities that had subscribed to the shares initially.

22. This Court is unable to accept the view that merely because a minority shareholding of the petitioner is subscribed by Public Sector Enterprises and entities in the Co-operative sector, the same must be construed as

subscription funded by Central/State Government. And, as there is no other material to indicate that the petitioner was funded by Central Government or any State Government, the CIC's conclusion that the petitioner has been substantially funded by an appropriate government and is thus a public authority cannot be sustained.

23. The decision of the Karnataka High Court in *Mangalore SEZ Ltd.* (*supra*) – which was relied upon by the CIC – was rendered prior to the decision of the Supreme Court in *Thalappalam Service Cooperative Bank Ltd.* (*supra*). In that case, the Karnataka High Court had held as under:

“5. In the matter on hand, as is clear from Annexure-B, about 50% of holding of the petitioner is from the Government organisations viz., Oil and Natural Gas Corporation Limited, Karnataka Industrial Area Development Board, ONGC Mangalore Petro Chemicals Limited. The number of shares held by these three organisations comes to about 49.96%. Oil & Natural Gas Corporation Limited though is a company incorporated under the Companies Act, the same is owned by Government of India. Karnataka Industrial Area Development Board is also a State Government Organisation. Since 49.96% holding of the petitioner is by Governmental organisations, having regard to the object sought to be achieved by the RTI Act, in my considered opinion, the provision of Section 2(h) has to be read to take within its sweep all funds provided by the appropriate Government, either from its own bag or funds which reach the authority through the appropriate Government or with its concurrence or its clearance. Hence, in my view, the petitioner company Mangalore SEZ Limited, Mangalore can be classified as a ‘public authority’ and non-Government organisation which is substantially financed directly or indirectly by funds provided by the appropriate Government.”

24. It is apparent from the above that Karnataka High Court has

interpreted the provisions of Section 2(h) of the RTI Act in an expansive manner. The said interpretation may no longer hold good in view of the decision of the Supreme Court in *Thalappalam Service Cooperative Bank Ltd.* (*supra*), which was rendered subsequently, wherein the Supreme Court had held that Section 2(h) of the RTI Act is exhaustive.

25. In view of the above, the petition is allowed and the impugned order is set aside.

NOVEMBER 28, 2017
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VIBHU BAKHRU, J

