

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

% **Date of decision: 19th November, 2014**

+ **LPA No.867/2013**

ARMY WELFARE HOUSING ORGANISATION Appellant

Through: Ms. Jyoti Singh, Sr. Adv. with Ms.
Tinu Bajwa, Mr. Amandeep Joshi and
Mr. Sameer Sharma, Advs.

Versus

ADJUTANT GENERAL'S BRANCH & ORS. Respondents

Through: Ms. Richa Kapoor, Mr. Nishant
Gautam & Mr. Ankur Chhibber,
Advs. for UOI.
Mr. Prashant Bhushan & Mr. Ramesh
K. Mishra, Advs. for R-3.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 4th September, 2013 of the learned Single Judge of this Court of dismissal of W.P.(C) No.5567/2013 preferred by the appellant. The said writ petition was preferred impugning the order dated 23rd July, 2013 of the Central Information Commission (CIC) holding the appellant to be a public authority within the meaning of Section 2(h) of the Right to Information Act,

2005 (RTI Act) and directing the appellant to designate a Central Public Information Officer and a First Appellate Authority within the meaning of the RTI Act.

2. The RTI Act, vide Section 3 thereof vests in all citizens the right to information. However the said right of citizens to information, under the Act, is enforceable against the public authorities only and for exercise of which right, the Act creates obligations on the public authorities to maintain, display and dispense information and lays down the mechanism for exercise of such right. Public Authority is defined in Section 2(h) of the Act as under:

- “(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 Organization substantially financed, directly or indirectly by funds provided by the appropriate Government;”

3. The appellant is a Society registered on 20th May, 1987 at Delhi under the Societies Registration Act, 1860 with the aims and objects *inter alia*:

- “(a) To promote Housing Scheme as a Welfare measure in the Army / Ex-servicemen to provide cheap houses to them at places of their choice in India and to start pilot project in Delhi and its satellite town immediately.
- (b) To facilitate relief to the existing deficiencies of Government accommodation at various stations in the country and to provide suitable rehabilitation opportunities in the said category.
- (c) To offer accommodation at no profit / no loss basis.
- (d) To form sub committee, to initiate such schemes as are deemed necessary and as are expedient in the interest of the organization, its employees and / or members and as is found desirable for the fulfilment of the aims and objectives of the organization. Also to perform or cause to be performed such and similar acts and needs which facilitate smooth and uninterrupted working of the organization and connotes with the principle aims of the organization.
- (e) All the activities of this Society as mentioned above from 3(a) to 3(c) will be carried out without any profit nature. The income and property of the Society whenever derived shall be applied Society towards to promotion of the objects of the association set forth in this memorandum of association and no proportion by way divided or bonus or otherwise shall be paid to any person

who at any time are or have been members of the Society or to any of them or to any person claiming through them, provided that nothing herein contained shall prevent the payment in good faith of remuneration to any employee (officer or servant) of the society thereof or to any other person outside the society in return for any services actually rendered to, for and on behalf of the society or interest on money borrowed by or for the purposes of the society from any person whether a member of the society or otherwise.”

with its registered office at South Block, Adjutant General Branch, Army Headquarters, New Delhi and on the application of, (i) the Adjutant General, (ii) Deputy Adjutant General, (iii) Director of Personnel Service, (iv) Director General of Work, (v) Director of Quartering, all three of the Adjutant General’s Branch, (vi) Director Army Welfare Housing Organization, (vii) Deputy Director of Army Welfare Housing Operation and (viii) Director Army Group Insurance.

4. The Regulations of the appellant, as lodged with the Registrar of Societies, show the organizational set-up of the appellant as under:

“5. The AWHO would be managed by Board of Management (unless dissolved as hereinafter provided) with a common seal, and would sue and be sued in the name of its Director General. There

will be no share-holders. All provisions of the Societies Registration Act (Act XXI of 1860) (Punjab Amendment Act, 1957) as extended to the Union Territory of Delhi will apply to this Organization. The AWHO consist of two wings viz:-

- (a) Board of Management; and
- (b) Executive.”

and the Board of Management of the appellant to be comprising of:-

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|---|------------------------|---------------|
| “(a) Adjutant General in the Army Headquarters | Member
(Ex-Officio) | Chairman |
| (b) Quartermaster General in the Army Headquarters | “ | Vice Chairman |
| (c) Engineer-in-chief in the Army Headquarters | “ | |
| (d) Deputy Adjutant General in the Army Headquarters | “ | |
| (e) Managing Director, AWHO | Member | |
| (f) Chief of Staff in HQ Central Command, Lucknow | Member
(Ex-Officio) | |
| (g) MG IC Adm in HQ Northern Command, c/o 56 APO | “ | |
| (h) General officer Commanding HQ Bengal Area, Calcutta | “ | |
| (j) Commander HQ Karnataka Sub Area, Bangalore | “ | |

- (k) Deputy GOC in HQ Delhi Area, “
Delhi Cantt.
- (l) DFA (W) in the Ministry of “
Defence (Finance), New Delhi
- (m) Secretary, AWHO Secretary”

and further provide that all the aforesaid will hold their office as long as they hold the appointment by virtue of which they have become members of the Board of Management. The said Regulations further provide,

- (i) Only the existing and future ranks of Army would be eligible to apply to the appellant for allotment of houses.
- (ii) Not more than one house to be allotted to any applicant.
- (iii) Local rules of eligibility for allotment to have precedence over rules of eligibility framed by the appellant.
- (iv) Scheme for provision of houses to be a self-financing one with no part thereof being subsidized.
- (v) The houses to be provided to the applicants on no profit no loss basis.
- (vi) Financing of housing schemes by raising loans from Central Government, Life Insurance Corporation, Nationalized Banks and

various financial institutions which generally lend money for building of houses.

- (vii) In the event of 3/5th majority of the Board of Management deciding to dissolve the appellant, utilization of its assets for payment of outstanding liabilities and the remainder to be handed over to such other societies as the Board may decide.

5. The CIC, in its order dated 23rd July, 2013, while holding the appellant to be a public authority held as under:

- (a) It is clear that the appellant does not fall in Sub-clauses (a), (b) and (c) of Section 2(h) of the RTI Act; the question thus is whether the appellant is controlled by Army Headquarters or whether the appellant is substantially financed by Ministry of Defence.
- (b) The appellant has been shown as one of the branches / offices of the Adjutant General's Office in the Army website; even though the said website is not attributable to the appellant, the fact remains that the appellant had never objected to being treated as a wing of Adjutant General's office.

- (c) That the Board of Management of the appellant comprises exclusively of serving army officers and is reflective of the appellant being nothing but an extension of Army Headquarters.
- (d) All major decisions regarding the functioning of the appellant are taken by the Board of Management which is under the pervasive control of the serving army officers with the Adjutant General as its head.
- (e) That thus the Army Headquarters, for all intents and purposes controls the affairs of the appellant through the Adjutant General.
- (f) Army Officers are regularly deputed to the appellant on the terms and conditions determined by the Ministry of Defence.
- (g) Grant of loans to the appellant by the Ministry of Defence is reflective of the Ministry of Defence's financially supportive role towards promoting and building the appellant.
- (h) The appellant had also been granted exemption from income tax.

6. The learned Single Judge, in the impugned judgment dated 4th September, 2013, while upholding the decision of the CIC of the appellant being a public authority, held as under:

- (i) “Admittedly, the petitioner” is not covered under clauses (a), (b), (c) and (d) (ii) of Section 2(h) of the RTI Act.
- (ii) The appellant, being a Society registered under the Societies Registration Act, technically is not a body owned by the Government.
- (iv) The question which arises is whether the appellant can be said to be a body controlled or substantially financed by the Government.
- (v) There is no material on record to show that the activities of the appellant Society are substantially financed by the government; merely taking some loan from the Government does not lead to the conclusion that the activities of the appellant are substantially financed by the Government; the appellant had been taking loans from the banks and financial institutions as well as from the Government.

- (vi) There is no material to show that major finances of the appellant come from the coffers of the Government.
- (vii) Thus it cannot be said that the appellant is a body substantially financed by the Government.
- (viii) Unlike private societies, the Regulations of the appellant neither provide for enrolment of members nor for election of Board of Management which manages administration and controls the affairs of the appellant.
- (ix) All members of the Board are specific public servants holding responsible positions in the Army; though the Board of Management is competent to nominate other members but only from amongst the holders of public office specified in the Regulations.
- (x) The fact that all the members of Board of Management are holders of specified public office and become members of the Board only by virtue of public office they hold clearly shows that the appellant Society is controlled by the Government through the Board of Management.

- (xi) The Government also exercise control over the affairs of the appellant Society by having the power to change the constitution of the Board by transferring the members of the Board from the public office held by them to other posts.
- (xii) That though the Regulations of the appellant do not mandate the appellant to comply with the directions of the Government but the Government indirectly controls the affairs of the appellant; for application of Section 2(h) of the RTI Act, it is not necessary that the Government should directly control the affairs of a public body.
- (xiii) Even the Government by showing the appellant on its website as a branch office of Adjutant General's office has been treating the appellant as one of the offices controlled by it.
- (xiv) The appellant had also been held to be a State within the meaning of Article 12 of the Constitution of India by the Division Bench of this Court in ***Brij Bhushan Gupta Vs. Union of India*** 42(1990) DLT 537; it would be difficult to say that the

appellant is not a public authority within the meaning of Section 2(h) of the RTI Act.

7. The senior counsel for the appellant challenges the judgment aforesaid by:

- (a) Drawing our attention to the stand of the Adjutant General's Branch before the CIC to the effect that the funds of the appellant are created by its welfare activities and short term borrowings from various finance agencies; that the Army Headquarters or the Ministry of Defence does not give any assistance to the appellant; that the Ministry of Defence or the Adjutant General's Branch does not exercise any control over the appellant and that the Chairman and other members of the Board of Management who are senior serving Army officers perform their functions purely in an *ex officio* capacity.
- (b) Contending that serving Army Officers constitute the Board of Management and other Executive Officers in the appellant simply for the reason that the appellant does not have to bear the burden of their salaries / emoluments and which if borne

would push up the cost of houses to be provided by the appellant on no profit no loss basis.

- (c) Contending that the appellant is pursuing this litigation as a matter of principle and else has nothing to hide and has already given an undertaking before the CIC to provide all information to the respondent No.3 Lt. Col. R. Bansal (Retd.) at whose instance the proceedings before the CIC had started.
- (d) Contending that the reasoning of the learned Single Judge that because the appellant is a State for the purposes of Article 12 of the Constitution of India, 1950, it is also a public authority under the RTI Act is erroneous.
- (e) contending that the CIC in the earlier order dated 29th January, 2007 had held the appellant to be not a public authority reasoning that there was no provision enabling the Army Headquarter or its Central Public Information Officers (CPIO) to call for or access any information held by the appellant.
- (f) Relying on a judgment dated 2nd June, 2010 of the Division Bench of this Court in W.P.(C) No.16699/2006 titled *Lt.Col.*

Ashok M. Chacko Retd. Vs. Union of India holding the Air Force Naval Housing Board to be not a State within the meaning of Article 12 of the Constitution of India.

(g) Relying on *Thalappalam Service Co-operative Bank Ltd. Vs. State of Kerala* (2013) 12 SCALE 527 holding that a Cooperative Society registered under the Kerala Cooperative Societies Act, 1969 will not fall within the definition of “public authority” for the reasons:

(I) Merely because the Registrar of Cooperative Societies exercises supervisory and regulatory powers over a cooperative society will not amount to controlling such society.

(II) A distinction has to be made between a body which is created by a statute and a body which after having come into existence is governed in accordance with the provisions of a statute; cooperative societies fall under the latter category and are not statutory bodies.

- (III) The final authority of a society vests in the general body of its members and every society is managed by the Managing Committee constituted in terms of its bye-laws.
- (IV) Cooperative Societies were also held not to be a State within the meaning of Article 12 of the Constitution of India in *S.S. Rana Vs. Registrar, Cooperative Societies* (2006) 11 SCC 634; however there may be a situation where a body or organization though not a State or instrumentality of State may still satisfy the definition of public authority.
- (V) Right of citizens to form cooperative societies voluntarily has been raised to the level of a Fundamental Right by Articles 19(1)(c) read with 243ZH to 243ZT read with Article 43B of the Constitution of India.
- (VI) Cooperative Society is essentially an association of persons who have come together for a common purpose of economic development or for mutual help.

- (VII) Cooperative Societies do not fall in the category of authority or body or institution of self-government established or constituted by or under the Constitution or by any other law made by Parliament or by any other law made by State Legislature or by notification issued by and under the appropriate Government because cooperative societies are not bodies of self-government.
- (VIII) Cooperative Societies are also not owned by the government.
- (IX) Though the expression “control” has not been defined in the RTI Act but has to take its colour from the expression “body owned”.
- (X) Thus the control must be of a substantial nature and mere supervision or regulation would not amount to control.
- (XI) Merely providing subsidiaries, grants, exemptions, privileges etc. cannot be said to be providing funding to a substantial extent.

(h) Drawing attention to the earlier order dated 6th June, 2006 of the CIC holding the appellant not to be a public authority for the reason that (i) though the appellant was incorporated on an application of officers of the Army but such persons had applied in their personal and not official capacity; (ii) the Regulations of the appellant do not depict any 'say' or 'control' of the Government/Army Headquarters; (iii) the Central Public Information Officer (CPIO) of the Army Headquarters has no right to access any information from the appellant; and (iv) the funding of the appellant is on a self financing basis.

8. The counsel for the respondent No.3 (information seeker and at whose instance the proceeding began) has supported the judgment of the learned Single Judge by contending that though wearing two hats i.e. of the Adjutant General and of the Chairman of the Board of Management of the appellant, the person is one and the same and that the control of the Ministry of Defence and Army Headquarters on the Board of Management is evident from the power in their hands to change the members of the Board of Management by posting their favoured persons to the post which entitles them to be members of the Board of Management of the appellant.

9. We have considered the matter from all perspectives.

10. The reason which has prevailed with the CIC and the learned Single Judge, to hold the appellant to be a public authority within the meaning of Section 2(h) of the RTI Act, is that the Board of Management of the appellant comprises of serving officers of Army and the Army Headquarters thus having power to decide the members thereof and exercising control over it through the said Army Officers. (Though the CIC as well as the learned Single Judge also gave the reason of the appellant, on the website of the Army being shown as a branch of the Army and being treated as such but in our opinion the same would be irrelevant for determining whether the appellant is a public authority or not as an authority / body by conduct cannot become a public authority. Similarly though the learned Single Judge has also given the reason, of the appellant being a State within the meaning of Article 12 of the Constitution of India but now the Supreme Court has in *Thalappalam Service Co-operative Bank Ltd.* held that the same is not determinative). There can be no dispute with the factual position of, the Board of Management of the appellant comprising of serving Army officers and that the Army Headquarters thus, by deciding whom to post to the office, occupier whereof becomes *ex-officio* member of Board of

Management of the appellant, can indeed choose who will and who will not be a member of Board of Management of the appellant. Thus, we, in this appeal are to only adjudge the correctness of the said sole reason given by the learned Single Judge.

11. The Supreme Court, in *Thalappalam Service Co-operative Bank Ltd.* was not concerned with a co-operative society, management whereof was in the hands of serving government officers who by virtue of their post / office were *ex-officio* member of the management committee. Thus the said judgment is of no help in this regard. We have also not been able to find any other precedent for such factual position.

12. We have thus explored the law generally, whether a person who by the office he / she occupies, becomes an *ex-officio* occupant of another office also, in the discharge of functions of such *ex-officio* office, is required to act as per the dictates of his office.

13. The Supreme Court in *Bhuri Nath Vs. State of Jammu & Kashmir* (1997) 2 SCC 745 was concerned with the question whether the Governor of State of Jammu & Kashmir, who under the provisions of the Shri Mata Vaishno Devi Shrine Act, 1988 was the *ex-officio* Chairman of the Board

constituted under the said Act, was in the exercise of his powers as the Chairman of the said Board required to act on the aid and advice of the Council of Ministers as the Governor, being the Executive Head of the State of Jammu & Kashmir in accordance with the Constitution of Jammu & Kashmir, was required to act. It was held that the exercise of powers and functions under the Act is distinct and different from those exercised formally in the name of the Governor for which responsibility rests only with the Council of Ministers headed by the Chief Minister. The judgment of Full Bench of Punjab & Haryana High Court in *Hardwari Lal Vs. G.D. Tapase* AIR 1982 P&H 439 to the effect that the Governor of a State, in his ex-officio capacity as the Chancellor of a State University, in the discharge of his functions does not perform any duty or exercise any power of the office of the Governor individually but acts in his discretion as Chancellor and does not act on the aid and advice of his Council of Ministers and further that the office as Chancellor held by the Governor is a statutory office and quite different from the office of the Governor, was cited with approval.

14. We see no reason as to why the aforesaid principles be not applied to the facts of this case. Though the persons occupying the position in the

Board of Management of the appellant are serving Army officials who in performance of their duties as such officers are required to act as per the dictates of the Army Headquarters or the Ministry of Defence but the same cannot lead to the presumption that they, in their capacity / position as members of the Board of Management of the appellant will also act as per the dictates of the Army Headquarters or the Ministry of Defence. Thus it cannot be said that for this reason the Board of Management of the appellant is under the control of Army Headquarters or the Ministry of Defence. Such persons, as members of the Board of Management of the appellant are expected to exercise their functions in accordance with the Charter of the appellant, honestly and reasonably.

15. Notice may however be taken of *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology* (2002) 5 SCC 111 where, in the context of the Prime Minister being the ex-officio President of the Council for Scientific and Industrial Research, a Society, it was held that the Prime Minister as ex-officio President may exercise powers not specifically conferred upon him by the Charter of the Society but necessarily implied in his office as the Prime Minister and the contention that the Prime Minister as ex-officio President of the Society was to exercise powers not as the Prime

Minister but as the President of the Society was rejected. However it was so held in the context of the dominant role played by the Government of India in the Governing Body of CSIR, by having the power to appoint the Secretary of the Society and the power to nominate and terminate the other members of the Governing Body of the Society. That is not the position here.

16. As far as the contention / reasoning, of the Army Headquarters or the Ministry of Defence thereby having a choice as to who will and who will not constitute the Board of Management of the appellant is concerned, the posts, the occupiers of which become ex-officio members of the Board of Management of the appellant, are senior posts in the Army, the appointment whereto is governed by the service conditions and it is not as if the Army Headquarters or the Ministry of Defence has an unguided discretion in the matter of appointments thereto to be able to whimsically appoint any officer thereto. Any breach of such rules, regulations or service conditions invites challenge thereto by the person considering himself entitled thereto. Moreover the objective for which the appellant has been set up is not such for it to be said that the Army Headquarters or the Ministry of Defence would be interested in packing the Board of Management of the appellant with its nominees by making appointments to the posts which are far more

crucial, of persons not otherwise fit / eligible therefor, merely for the reason of having such person on the Board of Management of the appellant. The appellant was incorporated to provide a further motivating force to the soldiers in terms of social security to their families, shelter being a basic necessity of life, i.e. for constructing houses for Army personnel serving or retired on 'No profit No loss basis'. Neither any interest of Army Headquarters or the Ministry of Defence in having its preferred nominees on the Board of Management of the appellant was disclosed, nor can we fathom any.

17. As far as the reliance placed by learned Single Judge on the Division Bench judgment of this Court in *Brij Bhushan Gupta* supra holding the appellant to be State within the meaning of Article 12 of the Constitution of India is concerned, we may notice that subsequent thereto another Division Bench of this Court in *Asha Vij Vs. Chief of Army Staff* MANU/DE/4012/2012 has, relying on *Union of India Vs. Chotelal* (1999) 1 SCC 554 holding that regimental funds are not 'public fund' and that a person paid out of such regimental funds cannot be said to be holder of civil post within the Ministry of Defence, held the Army Welfare Educational Society to be not a State within the meaning of Article 12. Similarly another

Division Bench of this Court in *Air Vice Marshal J.S. Kumar Vs. Governing Council of Air Force* (126) 2006 DLT 330 held the Air Force Sports Complex to be not a State, merely for the reason that the Government had provided some benefits and facilities thereto for providing recreation to Armed Forces officers. We have already noticed above *Lt. Col. Ashok M. Chacko* holding the Air Force Naval Housing Board to be not a State. Though a Division Bench of this Court in *Sagarika Singh Vs. Union of India* MANU/DE/3337/2011 held Army Group Insurance Fund also a Society, to be State amenable to writ jurisdiction, but for the reason of every Army personnel compulsorily becoming a member thereof and subscription thereof being deducted from the pay and allowances of Army personnel and being subject to governmental control in the matter of revision of rates of subscription to the Fund and the Government having complete control to regulate and manage the Fund. That is not the position here. It is not compulsory for the Army personnel to avail of the allotment of house from the appellant or to contribute therefor. It is thus obvious that trend of judicial decisions has changed since *Brij Bhushan Gupta*. In fact *Brij Bhushan Gupta* was premised on the definition of State as laid down in *Ajay Hasia Vs. Khalid Mujib* (1981) 1 SCC 722 which itself has been

reconsidered in *Pradeep Kumar Biswas* (supra) which has held that the tests formulated in *Ajay Hasia* are not rigid.

18. We therefore set aside the judgment of the learned Single Judge and allow the appeal and hold that the appellant is not a public authority within the meaning of Section 2(h) of the RTI Act.

No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

NOVEMBER 19, 2014
'gsr'..