

Kerala High Court

Kerala High Court

Thalapalam Service Co-Operative vs Union Of India, Represented By Its on 28 August, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM WA.No. 1417 of 2009()

1. THALAPALAM SERVICE CO-OPERATIVE

... Petitioner

Vs

1. UNION OF INDIA, REPRESENTED BY ITS

... Respondent

2. STATE OF KERALA, REPRESENTED BY ITS

3. THE REGISTRAR OF CO-OPERATIVE

4. STATE INFORMATION COMMISSIONER,

5. ASSISTANT REGISTRAR OF CO-OPERATIVE

6. K.T.THOMAS, KOOTTUNKAL HOUSE,

For Petitioner :SRI.P.V.BABY

For Respondent :SRI.M.AJAY, SC, STATE INFORMATION COMMN The Hon'ble MR. Justice K.BALAKRISHNAN NAIR The Hon'ble MR. Justice C.T.RAVIKUMAR

Dated :28/08/2009

O R D E R

K. BALAKRISHNAN NAIR & C.T. RAVIKUMAR, JJ. -----

W.A.Nos.1417,1338, 1359, 1398, 1418

1419, 1420,1421, 1424, 1425, 1426,

1427, 1428,1429, 1437, 1523, 1524,

1526, 1527,1528, 1530, 1531, 1532,

1534 of 2009 and W.P.(C) No.20644 of 2009 -----

Dated this, the 28th day of August, 2009 JUDGMENT

Balakrishnan Nair, J.

The main point that arises for decision in these appeals is whether the Co-operative Societies, which are the appellants in these cases, are 'public authorities', as defined under Section 2 (h) of the Right to Information

Act, 2005 (Central Act 22 of 2005). Since the very same point arises in all these appeals, they are heard together and disposed of by this common judgment.

W.A.No.1417/2009:

2. This appeal is treated as the main case for the purpose of referring to the exhibits. The appellant was the writ petitioner. It was a service co-operative bank registered under the Kerala Co-operative Societies Act. The brief facts of the W.A.No.1417/09 etc .

- 2 -

case are the following:

The Registrar of Co-operative Societies issued Ext.P1 Circular No.23 of 2006 dated 1.6.2006 to all Co-operative Societies like the appellant, stating that all Co-operative Societies under the control of Registrar of Co-operative Societies are public authorities under the Right to Information Act, 2005 (hereinafter referred to as "the R.T.I. Act"). By the aforesaid circular, all Co-operative Societies were alerted of their liability to furnish information to all applicants as provided under the R.T.I. Act. The information officers of the Co-operative Department were informed that if any application is received by them, seeking information regarding any Co-operative Society, such application should be forwarded to the said Co-operative Society for providing information to the applicant. According to the appellant bank, the basic premise of the Registrar that Co-operative Societies under his control are public authorities under the R.T.I. Act is fallacious. The Co-operative Societies registered under the Co-operative Societies Act do not W.A.No.1417/09 etc .

- 3 -

answer the definition of public authority under Section 2 (h) of the R.T.I. Act. So, the aforementioned Circular was issued without the authority of law. While so, the 6th respondent herein, who is a member of the appellant bank, submitted Ext.P2 application before the Assistant Registrar (General), Meenachil Taluk, Pala, requesting certain information, mentioned therein. The 4th respondent Assistant Registrar, who is the Public Information Officer under the Co-operative Department, forwarded Ext.P2 application to the appellant Society to furnish the details sought for by the 6th respondent, as per Ext.P3 letter dated 5.4.2006. It was followed by Ext.P4 communication issued by the said officer, as per which the appellant was advised to appoint a public information officer to handle the petition of the 6th respondent. In the above background, the writ petition was filed, challenging Exts.P1 and P4 and also seeking a declaration that the appellant Society is not a public authority as defined under Section 2(h) of the R.T.I. Act. The Society pointed out that any member of it can get any information W.A.No.1417/09 etc .

- 4 -

concerning it under Section 103 of the Kerala Co-operative Societies Act (hereinafter referred to as 'the Act").

3. On behalf of the third respondent, Registrar of Co-operative Societies, Thiruvananthapuram, a counter affidavit was filed in the writ petition. It was submitted that the Government contributed Rs.5,000/- towards the share capital of the appellant Society in 1964 and thereafter Rs.1,00,000/- in 1988. The said amount was fully repaid to the State by the Society only on 23.3.2006. The appellant Society was registered in 1956. The Society improved its business and reached the present position mainly utilising the share capital subscribed by the State Government. The contention that any member of the Society can get information under Section 103 of the Act is untenable. It is only an enabling provision. The provisions of Section 103 (2) do not enable a member to get all the required information. According to the said respondent, the appellant comes under the definition of public authority, as contained in Section 2 W.A.No.1417/09 etc .

- 5 -

(h) of the R.T.I. Act. It is further pointed out that the Co-operative Societies are directly supervised and controlled by the officers of the Co-operative Department invoking the powers under Sections 63, 65 and 66 of the Act. The Societies are bound to follow the directions of the Registrar, issued under Section 66A of the Act. Therefore, the Societies are bound to give the information as directed in Ext.P4, it is submitted. The second respondent, referring to the various provisions of the Act, also asserted that the appellant Society is a public authority and therefore, liable to furnish any information sought by any citizen, whether he is a member of the Society or not. The 4th respondent, State Information Commission, filed a counter affidavit, opposing the prayers in the writ petition. According to the 4th respondent, every Co-operative Society is substantially financed directly or indirectly by the State. All Societies are controlled by the Registrar. According to the said respondent, the Co-operative Societies are constituted by the provisions of the Kerala Co-operative Societies Act. Even if there is no W.A.No.1417/09 etc .

- 6 -

direct funding by the State, still the Society cannot claim exemption from the provisions of the R.T.I. Act, it was submitted.

4. The learned Single Judge, after hearing both sides, held as follows: (1) Even if a Co-operative Society is a private body, any person who desires to obtain any information in relation to the Society is entitled to move the competent public information officer of the Co-operative Department and get such information in relation to any Society. The said officer can access such information available with the Society. (2) The Societies are public authorities, as defined under Section 2(h) of the R.T.I. Act. The said finding was arrived at based on the conclusion that the Societies are substantially financed by the State Government. Relying on the above findings, the writ petition was dismissed along with a batch of similar writ petitions. Feeling aggrieved by the judgment of the learned Single Judge, this writ appeal is filed.

W.A.No.1417/09 etc .

- 7 -

5. We heard the learned counsel on both sides. The learned counsel for the appellants took us through the various provisions of the Kerala Co-operative Societies Act and submitted that though the Registrar has control over the functioning of the Co-operative Societies, the Government have no such control. Going by the said provisions, the Government have only very limited role to play in the functioning of the Co-operative Societies registered under the Kerala Co-operative Societies Act. The Society is registered under the Kerala Co-operative Societies Act, but, it is not an entity created by the said Act. The Society is functioning independently according to the provisions of the Act, Rules and its bye-laws. Subject to the provisions of the Act, Rules and bye-laws, the general body is the supreme authority of a Co-operative Society. Though, in early days of the Societies, there was Government share participation in many Societies, at present, there is share participation only in very few Societies. In the case of primary credit societies, like the W.A.No.1417/09 etc .

- 8 -

appellant, there is no investment of the Government in the form of Share Capital. They took us through the definition of "public authority", contained in Section 2(h) of the R.T.I. Act and analysing each clause, told us that, if only the State Government finances substantially, directly or indirectly for the functioning of the Society, it will answer the definition of "public authority". The facts concerning the Society would clearly demonstrate that the Government are not financing the Society directly or indirectly now. So, the finding of the learned Single Judge that the appellant Society is a public authority is untenable

and is liable to be reversed, it is submitted.

6. The State Information Commission submitted that all Co-operative Societies are controlled by the Co-operative Department. The Co-operative Department is fully funded by the State Government. So, the State Government is indirectly controlling the appellant Society. It is stated that about Rs.400 crores were spent last year by W.A.No.1417/09 etc .

- 9 -

the Government for the Co-operative Department to control and administer the Co-operative Societies. So, by indirect funding, the primary societies are controlled by the State. It is also pointed out that if any dispute arises as to whether a Society/bank is a public authority or not, there are statutory forums under the Act to adjudicate that dispute. The learned Special Government Pleader also endorsed the above views and supported the judgment under appeal.

7. We went through the pleadings and materials on record, the contentions of the parties and also the judgment of the learned Single Judge. The definition of 'information' contained in Section 2(f) includes information relating to any private body, which can be accessed by a public authority under any other law for the time being in force. The Registrar of Co-operative Societies and the officers exercising the powers of the Registrar have deep, pervasive and effective control over the Co-operative Societies. The Registrar or any other officer exercising the W.A.No.1417/09 etc .

- 10 -

powers of the Registrar, can access any information from any Co-operative Society. Therefore, we agree with the findings of the learned Single Judge that even if a Co-operative Society is a private body, information can be accessed by the Information Officer concerned and furnish the same to any person.

8. The second point to be considered is the correctness of the decision of the learned Single Judge that Co-operative Society is a public authority under the Act. 'Public Authority' is defined as follows: '(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;

W.A.No.1417/09 etc .

- 11 -

(ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government.";

It is common ground that the dispute relates to whether Co-operative Society comes under sub-clauses (i) and (ii) after clause (d) of sub-section (h) of Section 2 of the R.T.I. Act. No one has a case that Co-operative

Society is owned by the State Government, or controlled by the State Government or substantially financed by the State Government. The only contention canvassed before us is that, it is a non-government organisation substantially financed indirectly by the funds provided by the appropriate Government.

9. Before considering the above point, we will refer briefly to the scheme of the Act. The right to information is considered as a facet of the right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. The said constitutional right being W.A.No.1417/09 etc .

- 12 -

a fundamental right could be enforced by invoking the writ jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 respectively. But, the Right to Information Act provides an efficacious remedy for enforcement of the right to information. The objects and reasons for introducing the Act read as follows: "In order to ensure greater and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 enacted by the Parliament needs to be made more progressive, participatory and meaningful. The National Advisory Council deliberated on the issue and suggested certain important changes to be incorporated in the existing Act to ensure smoother and greater access to information. The Government examined the suggestions made by the National Advisory Council and others and decided to make a number of changes in the law. The important changes proposed to be

incorporated, inter alia, include establishment of appellate machinery with investigating powers to review decisions of the Public Information Officers; penal provisions for failure to provide information as per law; provision to ensure maximum disclosure and minimum exemptions, consistent W.A.No.1417/09 etc .

- 13 -

with the constitutional provisions, and effective mechanism for access to information and disclosure by authorities, etc. In view of significant changes proposed in the existing Act, the Government also decides to repeal the Freedom of Information Act, 2002. The proposed legislation will provide an effective framework for effectuating the right of information recognised under Article 19 of the Constitution of India." The preamble of the Act will throw much light on the laudable object behind giving shape to the Act. The preamble reads as follows:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected

therewith or incidental thereto.

WHEREAS the Constitution of India has

established a democratic Republic;

AND WHEREAS democracy requires an

informed citizenry and transparency of W.A.No.1417/09 etc .

- 14 -

information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information

in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information; AND WHEREAS it is necessary to

harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

NOW, THEREFORE, it is expedient to

provide for furnishing certain information to citizens who desire to have it.

Be it enacted by Parliament in the

Fifty-Sixth Year of the Republic of India as follows:-".

Section 2(a) of the R.T.I. Act defines appropriate Government as follows:

"(a) 'appropriate Government' means in relation to a public authority which is established, constituted, owned, controlled or W.A.No.1417/09 etc .

- 15 -

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;".

Section 2(f) defines information which reads as follows: "(f). 'information' means any material in any form, including records, documents, memos, e-mails, opinions, advices, 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;".

We have already quoted 'public authority', defined under Section 2(h) of the R.T.I. Act. The right to information is defined under Section 2(j) as follows:

"(j) 'right to information' means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to -

(i) inspection of work, documents, records; W.A.No.1417/09 etc .

- 16 -

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of materials; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

Section 3 declares that, "subject to the provisions of this Act, all citizens shall have the right to information". Section 5 of the R.T.I. Act mandates that within 100 days of the enforcement of the Act, all public authorities shall appoint Information Officers at the appropriate level. Section 6(2) specifically says that, "An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.". Section 7 provides that any request made for any information shall be disposed of by the Information Officer concerned within the time limits provided therein. Section 8 deals with W.A.No.1417/09 etc .

- 17 -

exemption from disclosing information. Section 18 deals with powers and functions of the Information Commission and Section 19 deals with the appellate remedy available to the persons aggrieved.

10. For interpretation of the definition of public authority in Section 2(h), the definition of appropriate Government in Section 2(a) can be used as a key. Section 2(a) makes it clear that if a public authority is established, constituted, owned, controlled or substantially financed by the funds provided directly or indirectly by the State Government, it shall be the appropriate Government in relation to that public authority. Keeping in mind Section 2(a) of the R.T.I Act, when the definition of public authority is scrutinised, we find that it has broadly two parts. The first part deals with any authority/body/institution of Self Government established or constituted by the State Government. The establishment or constitution can be under the Constitution, under an Act of Parliament, under an W.A.No.1417/09 etc .

- 18 -

Act of the State Legislature, or by a notification or order issued or made by the State Government. The second part clarifies that a body owned or controlled or substantially financed by the funds provided by the State Government directly or indirectly or non-government organisations substantially financed directly or indirectly will come under the definition of public authority. A Co-operative Society, if at all, may come only under the second part of the definition, i.e. a non-governmental organization substantially financed directly or indirectly by funds provided by the appropriate Government. It is manifest that the appellant Society is a non-governmental organisation. But, still it will become a public authority, if it is substantially financed directly or indirectly by the funds provided by the State Government. Whether the appellant is substantially financed directly or indirectly by the funds provided by the State Government is essentially a disputed question of fact. The appellant asserts, at present, there is no funding, directly or indirectly by the State Government. The case of the State was also that earlier W.A.No.1417/09 etc .

- 19 -

there was share capital participation and by March 2006, the entire share capital subscribed by the State Government has been repaid. The Society in the beginning might have depended on the State Government. Later, it may become financially stable and could stand on its own legs without any State assistance. It might have repaid the amount provided by the State Government also. Similarly, a Society which is financially stable may fall into troubled waters and it may become dependant substantially on Government funds. Similarly, in some Co-operative Societies like Industrial Co-operative Societies organised by the members of the Scheduled Castes/Scheduled Tribes, there is substantial help by the State Government in the form of Share Capital, assistance for purchasing land, constructing building, etc. So, the measure of involvement of the Government, and the financial assistance will depend upon the facts of each case. There cannot be any general decision on that point.

11. The various provisions of the Co-operative W.A.No.1417/09 etc .

- 20 -

Societies Act have been mentioned before us by the appellants, which apparently deal with the involvement of the State Government in the functions of the Societies. The State aid to Co-operative Societies is contained in Chapter VI of the Kerala Co-operative Societies Act. Section 42 enables the State Government to directly subscribe to the share capital of a Society. Section 43 empowers the State Government to provide monies to a Society for purchase of shares of other Societies. Section 44 provides for establishment of Principal State Partnership Fund by Apex Societies with monies provided by the State Government under Section 43. Similarly, there is a provision for Subsidiary State Partnership Fund under Section 45 by a Central Society, which has been provided fund by the Apex Society from the Principal State Partnership Fund. Section 52 deals with the agreements by the State Government and Apex Societies, subject to which it may provide funds under Section 43 and 44. Regarding the management of the Societies, the State Government has no role. The power in W.A.No.1417/09 etc .

- 21 -

this regard is vested with the Registrar of Co-operative Societies. Of course, the Government have the powers to hear appeals and revisions under Section 83 and 87 of the Co-operative Societies Act. Analysing the above provisions regarding the control of the Government, a Division Bench of this Court in Trivandrum District Co-operative Bank v. State of Kerala, 1992 (1) KLT 381, has held that, only the Registrar has the power to issue directions to Co-operative Societies. Going by the provisions of the Act, as held by us earlier, the Society can only be treated as a non-governmental organisation for the purpose of definition of public authority. In other words, by virtue of the provisions of the Kerala Co-operative Societies Act and the control of the Registrar, the Society cannot be held as a public authority for the purpose of the R.T.I. Act. The control of the Registrar and the control of the State Government are distinct and different. The words 'State Government' mentioned in Section 2(a) of the R.T.I. Act defining appropriate Government, are not defined under the Act. So, W.A.No.1417/09 etc .

- 22 -

this being a Central Act, the General Clauses Act, 1897 would apply. Going by Section 3(60) of the General Clauses Act, State Government means the Governor of the State. There is no control of the Governor in the Constitutional sense, i.e. no control by the State Government on the affairs of the Society. Therefore, if only the Society is substantially financed directly or indirectly by the funds provided by the State Government, it can be treated as a public authority. But, the learned counsel for the State Information Commission contended that a Co-operative Society is a body controlled directly or indirectly by the funds provided by the appropriate Government. The said argument is founded on the fact that Co-operative Department is funded by the State Government, which in turn is controlling the Societies. So, the State is indirectly controlling the Societies by its funds. We think that the said interpretation is untenable. When Section 2(a) and Section 2(h) of the R.T.I. Act are read together, it is clear that a body controlled by the State Government will be a public authority. The words W.A.No.1417/09 etc .

- 23 -

"substantially financed" alone are qualified by the words "directly or indirectly by the funds provided by the State Government", and not the other words, "the body owned or controlled".

12. Going by Ext.P1, we feel that it contains only an opinion of the Registrar of Co-operative Societies. The Registrar has taken the view that the Co-operative Society is established by the Act of the State Legislature. The said assumption is untenable. So, it is declared that obedience to Ext.P1 is optional and if any Society does not obey Ext.P1, no action under Section 32 of the Kerala Co-operative Societies Act, can be taken

against it. As held by us earlier, there are no sufficient materials before us to decide whether each of the Societies which has approached this Court is a public authority or not for the purpose of R.T.I. Act. The Society concerned can, on the basis of the facts and materials concerning it, take a decision and act accordingly. If it feels that it is a public authority, it can appoint an Information Officer under the Act and furnish information. If it thinks that W.A.No.1417/09 etc .

- 24 -

it is not a public authority, it can refuse to act as directed in Ext.P1. When the matter reaches before the competent authority, under the R.T.I. Act, the said forum shall decide first, whether the Society concerned is a public authority as defined under Section 2(h) of the R.T.I. Act, i.e. a factual finding has to be made as to whether the Society is substantially financed directly or indirectly by the funds provided by the State Government. If it is found that the Society is so financed, the competent authority can take appropriate action against the Co-operative Society including coercive actions, for not acting in accordance with the provisions of the R.T.I. Act. If the decision is in favour of the Society, the person aggrieved can carry the matter before higher forums. Thus, we are of the view that whether a Society is a public authority, is a disputed question of fact, which has to be resolved by the authorities under the R.T.I. Act. There cannot be any general decision on that point by this Court.

W.A.No.1417/09 etc .

- 25 -

13. In the result, the Writ Appeal is allowed in part. The finding in the judgment under appeal that Co-operative Societies are public authorities under Section 2 (h) of the R.T.I. Act is vacated. The competent authority under the Act shall take a decision on the point whether a Society is a public authority, when occasion arises for the same, uninfluenced by any observations contained in the judgment under appeal.

W.A. Nos.1338, 1359, 1398, 1418, 1419, 1420, 1421,1424, 1425, 1426, 1427, 1428, 1429, 1437, 1523, 1524, 1526, 1527, 1528, 1530, 1531, 1532, 1534 of 2009 and W.P.(C) No. 20644 of 2009 In terms of the judgment in W.A. No.1417 of 2009, all these appeals/writ petition are disposed of. Sd/-

K. Balakrishnan Nair,

Judge.

Sd/-

C.T. Ravikumar,

Judge.

DK.