

Right to Information and Good Governance

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Lecture 36

Public Authority-IV

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PA?

- Whether the National Stock Exchange is a PA? In *Raj Kumar Agrawal and Others v. Jaipur Stock Exchange Ltd., National Stock Exchange of India Ltd, Securities Exchange Board of India, Ministry of Finance, CIC/AT/A/2006/00684 & CIC/AT/A/2007/00106*. Affirmed by the Delhi High Court, Single Judge in 2010. "A stock exchange being a quasi-governmental body working under the statute and exercising statutory powers has to be held to be a public authority under the act.
- Currently this case has been stayed by a Divisional Bench of the Delhi High Court.
- CIC, interestingly, ruled that commodity exchanges don't fall under RTI Act due to lack of finance from Govt. CIC has ruled in 2008 that UTI is a public authority under the RTI Act
- Whether the office of the 'Official Liquidator' is a 'public authority' within the ambit of the section 2(h) of the RTI Act came up before the Commission in the case of *Namita Kumar, New Delhi and Another v. Official Liquidator*. Appeal No. *CIC/AT/A/2008/00365* dated 14th November, 2008.
- Whether Attorney General's office is public authority under RTI Act? Delhi High Court held it is a PA.



If one continues to view the case of the National Stock Exchange as a public authority one would peruse the matter in looking at when the National Stock Exchange was incorporated as a company and one would notice that it was incorporated on 26 November 1992. It was created as a company and was registered under Company Act then of 1956 and if one looks at the memorandum and articles of association and one would then peruse both the promoter and subscriber where

Interestingly the promoter of the National Stock Exchange were public sector Corporation and their representatives. Now the Central Information Commission and the Delhi High Court single judge, so the CIC judgment came in 2007 and the Delhi High Court single Judge Justice Sanjiv Khanna affirmed the decision of CIC, he agreed with the decision of CIC.

And they held that the Stock Exchange is performing a public function and it is quasi-governmental body working under the statute and exercising statutory powers and hence must be declared as a public authority. Now the basis of the judgment delivered by the Delhi High Court prominently was based on the fact that if one looks at the term of the public authority, it has to be given a very broad and a wide meaning.

And it should not only include those bodies owned and controlled and substantially financed by the government but also those bodies that actually work to the benefit of the citizens and where there is substantial public fund and substantial advantage to the citizens, the citizens must be able to seek their right of information against such institutions and hence the accountability and the transparency and openness that is required of institutions should not be only restricted to public authorities as such but may be extended to private organizations which have a public function to do.

Now Justice Sanjiv Khanna here referred to Article 12 to Constitution of India which defines a state he also refer to the Ajay Hasia case which had laid down the test to determine test of accountability under Article 12 of Constitution of India. It is very clear from the discussion, from the judgment that the relevant tests that is generally adopted by courts especially under the definition of state under Article 12 while one looks at the International Airport Authority case, it is clear that the entire share capital of the corporation if it is held by the government, it would definitely indicate that it is agency of government where the financial assistance is from the state and the expenditure of the corporation is some kind of accountability is established vis-a-vis state then such corporation should also be brought within the amid of state.

Now the third one is very relevant and important here that if one looks at the case law under Article 12, it says that where a corporation enjoys the monopoly status which the state has conferred or is the state has protected then such institutions though not established by the government must also be accountable under Constitution and accountable under the transparency laws.

It is also the functions of the corporation if there are public importance and closely connected

with government function. I think this is very important, if the function of a corporation are closely connected with government function but because of the liberalization of economy, the privatization of the economy you will notice that the government is slowly trying to shed away from its primary responsibilities in many aspects.

And they are looking at privatization of such institutions as well in those cases when private institution function is closely connected with government duty or government function then it is very important factor to classify such corporation as an instrumentality of the state, it is not state but it is instrumentality. So, to that extent I think such organization should be covered under the accountability regime.

Also, wherever the state government exercises deep and pervasive control that is the great indication that the corporation or that entity must be declared as a state entity and hence Justice Sanjiv Khanna also looks into the constitutional development in the International Airport Authority case. He also supports the fact that there are chances that a department of government maybe transfer to the private organization.

In such cases the dilution of the transparency cannot be justified. So it is important to look at the public function test though you cannot say that the public function test is an exclusive test but nevertheless it is very important one and when you apply public function test then those circumstances institutions that are like charitable institutions or institutions like Stock Exchanges have to bring in the sense of public duty and public accountability.

And hence running the Stock Exchange regulating the affairs of the Stock Exchange is a matter is closely connected with government functions and hence against the Stock Exchange there is a power of judicial review there can be an abuse of power, there can be neglect of the duty and hence it is important that such institutions are brought under the domain of the public authority is what the single judge had to say.

Interestingly the judge also looked into the SEBI Act, he looked that Section 29A and you also looked at how SEMI has granted recognition and registration to the National Stock Exchange

and has delegated and authorized National Stock Exchange to act on behalf of the central government. Such kind of recognitions that are granted or such kind of delegation of authority of SEMI which is an organ of the government which is in regulator in the stock trade market will clearly have to bring in sense of accountability under the Right to Information Act.

And I think these were some of the reasons and this went a long way to bring other stock exchanges like Jaipur Stock Exchange, the Delhi Stock Exchange within the domain of the public authority under the Section 2(h) of the Right to Information law. However, one should note that the single judge decision of the Delhi High Court unfortunately was granted a stay by the Divisional Bench did by then Chief Justice of the Delhi High Court Justice Madan Lokur.

And as I speak today this decision continues to be in a limbo and there was no final decision that was delivered by the Delhi High Court and unfortunately till such decision is given the state operates and as the stay operates the National Stock Exchange is not under obligation to give information under to Right Information Act and the citizens unfortunately are unable to exercise their right in demanding transparency and accountability from the institutions of the Stock Exchange.

So that is where the stock exchanges lie in terms of the accountability under the RTI Act and hence you will notice that the differing opinions among the members of the commissions or the Judiciary as the case may be because the Divisional Bench of the Delhi High Court was not convinced by the ratio given by the single judge and they thought it would be right for the current situation for granting a stay against the order so that the RTI is not operationalized within the Stock Exchange.

So, all the stock exchanges sort such this injunction on the stay and they have been successful in doing the same and is it is more than 4 years right now that the stay has not been vacated or the final decision has not been done so. So that is where it lies right now. Interestingly the Central Information Commission has ruled that the commodity exchange does not fall within the RTI Act.

Now the Central Information Commission said that the commodity exchange unfortunately lacked finance from the government for that reason they decided and ruled that commodity exchange is not a public authority. So, this is probably where one realizes that under the net of public authority some institutions are brought in and some institution have escaped the net.

Now those institutions that have escaped have no obligation whatsoever under the RIT Act need not upon the PIO and need not pursue the proactive Sou-Moto disclosure cannot be held liable for misleading false information and transparency cannot be ensured from such organization is what one will have to say.

So the test of public authorities is it challenging test it is very interesting and dynamic test and please note while objectively certain rules can be laid down from time to time they have to be subjectively applied to the organization vis-a-vis lifting of the corporate veil of the organization, seeing who the promoters were, who is behind the organization as the established members, how was the finance being done. So, I think unless that is totally that can be convinced to the members of the commission of the judges of the High Court the institutions will not be declared as public authorities.

Interestingly the CIC in 2008 had clearly said that UTI is a public authority under the Right Information Act. Now this is very interesting because UTI manages funds as mutual funds and its trust which manages the same however because the government is major sponsoring agency in UTI, it was clearly brought within the ambit of the Right to Information Act.