

Right to Information and Good Governance

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**Lecture 40**

**Public Authority - VIII**

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### Status of NGOs under the Act

- Suman Bakshi v. Directorate of Health Services Government of NCT Delhi, CIC/PB/C/2008: whether Family Planning Association is a PA?
- Whether Rajiv Gandhi Foundation is a PA? Shri Shanmuga Patro v. Rajiv Gandhi Foundation, CIC/WB/2009
- Supreme Court in Thalppalam Service Cooperative Bank Ltd. And others v. State of Kerala and others, Civil Appeal No. 9017/2013
- Are pension trusts PA? The Central Information Commission has also held that pension trusts are "public authorities" under the RTI Act. [Mr. SK Choudhary v. Delhi Transco Limited [2010] (CIC)]



Friends after the discussions that we have had so far, especially on non-governmental organizations and non-co-operatives, I think the Supreme Court laid down to rest all such doubts about these organizations and their ability to be brought within the purview of the Right to Information Act. In this judgement of 2013 Thalppalam Service Co-operative Bank verses the state of Kerala, a matter that came before the Supreme Court of India, the Supreme Court did clarify the challenges that remain, especially on looking at organizations that are supposed to be brought within the purview of the Right to Information Act or not.

Now if you look at this case. The case arises from an application, that was made to Rural Co-operative Society in Kerala, the name of this co-operative society is Mallur Rural Co-operative Society, and RTI applicant wanted certain information relating to bank accounts of certain members in this rural co-operative society bank. So, interestingly you know bank account details of members of a co-operative are generally held in fiduciary capacity, and hence the society

refused to grant access to the said information, saying that it is confidential in nature and the providing of the said information would violate commercial confidence of the members.

And hence such information shall not be handed over. And interestingly, providing such information has no relation to any public activity carried out by the society. So, the activities of the society and giving of the said information was not having any relevance to a public activity is what was the defence that was taken in this case and the information was not provided.

However, the matter went to the State Information Commission and the State Information Commission had to look into the circular issued by the registrar of Co-operative Societies in which it had very clearly established that the registrar, this is the registrar of co-operative, societies in every state, had stated that, the registrar of the co-operative societies has administrative control on all such societies as public authority following within section 2(h).

So, this circular was kind of misleading because when the circular was issued the registrar of Co-operative Society definitely has the power to issue circular, whereas it stated that he or she can exercise the administrative control. But it also implied that all these private co-operative societies who are accountable to the registrar of Co-operative societies will be deemed to be public authorities.

So, this was something that was kind of a problematic situation. The co-operative society challenged this decision and they filed a writ petition in the high court of Kerala challenging the order of the State Information Commission. And the single judge of the Kerala High Court declared that all Co-operative societies, registered under the Societies act were public authorities and they were bound to disclose the information under the Right to Information Act.

So, this was kind of a decision that was provided for, from there an appeal comes to the Supreme Court with two substantial questions to be answered. First, whether the co-operative societies fall within the definition of public authority under section 2(h) of Right to Information Act. And if a co-operative society is bound to provide such information to a citizen.

So, if the first question is in affirmative, the second is also. Now interestingly the Supreme Court in this case as usual, goes into the definition of state under article 12 of the Constitution of India. And the court refers to previous cases and concludes that the level of direct or indirect control with respect to societies does not meet the required threshold of what under Article 12 is called the deep and all-pervasive test.

So, under Article 12 if an agency has to be declared as a state or its instrumentalities, the control of the government must be deep and all pervasive. Now, unfortunately in the case of co-operatives, that fails and the court went on to consider further whether RTI is applicable, if not the application of Article 12.

So, if one assumes the essential parts of the provision as applicable in this case, which is about what we called as substantial funding. So, the deep and all-pervasive control is something that is applicable to the control test. However, if an NGO fits within to the substantial funding test, then additionally under the Right to Information Act, though not a state under article 12, under Right to Information Act, they can be brought to a sense of accountability, is not it? So, RTI Act is article 12 plus something else.

And what is that plus something else? It is NGOs or non-governmental organizations that do not have any control from the government, that are not owned by the government, but is substantially funded are covered under the Right to Information Act. So, hence in terms of the accountability under the RTI Act, the scope of Section 2(h), according to me, is far wider than the scope that is brought within article 12 of the Constitution of India.

So, the Court did look at the definition of the term substantially financed and you will notice that there is no such definition of substantial finance and please note substantial finance maybe direct or indirect. But when we look at the term substantial finance whether direct or indirect, the Supreme Court said and very important that the finance must be actual existing positive and real. Very interesting. This is what the Supreme Court means.

And it should not be illusory nature. It should not be something that is just so meagre that it fails

the purpose of the legislature. The word substantial clearly mean something very, very prominent. And it is so actual that it adds value to the functioning of the non-governmental organization.

And hence in this case, if I were to add to the understanding of the judgment of the Supreme Court in this Thalppalam Service Co-operative Bank case, then I would say that when the substantial finance into a non-governmental organization test is to be applicable, it is not a project grant it should not be just nearly a project grant. It should be something a grant that goes to the capital of the non-governmental organization. So, it must be something actual it must be existing, it is positive and it should be real to a substantial extent and not moderate ordinary or tolerable.

Now, I think this sentence of the Supreme Court. Now I should repeat the sentence because I think the test laid down in this case of 2013 is a test as a precedent law. Because what the Supreme Court says, is the law of the land, should be made applicable to all such organizations in the future. I repeat the finance under the Right to Information Act, as applicable on section 2(h) must be actual, existing, positive and real to a substantial extent not moderate, ordinary and tolerable.

The Court also noted that the state may provide schemes for welfare projects, but you know unless the funding was so substantial, the body would struggle to exist without that. So, you know the relevant provisions could not be engaged, thus, the court said merely providing subsidies, grants, exemptions and privilege does not qualify the requirement of substantial finance and hence the Court said schools getting 95 percent grant in aid from the government would be an example of substantial financing.

This is the interesting example given by the Supreme Court in this particular case. As far as NGOs are concern, the court stated that even in the absence of statutory control, it is possible to establish that an NGO has been substantially financed directly or indirectly by government, funding, the matter would bring those organizations within the definition of public authority.

And hence the Court ruled that the owners of proof to show that the body is owned, control or substantially financed or that an NGO is substantially financed directly or indirectly with the funds by the appropriate government is on the applicant who seeks the information or is on the appropriate government as the case may be. So, unless they prove that it is substantially financed, organization need not accept it to be brought as a public authority within the definition of Section 2(h).

The court engaged in balancing the disclosure of information and privacy rights. And it concluded that the information in this case is personal and does not related to any public activity or interest. And the public authority or the officer is not obligated to comply with the said request because he was asking about bank account details of the members of the co-operative, which is definitely confidential information without any public interest, that is proved this same need not be disclosed under the Right to Information Act.

And hence, in this case, the Service Co-operative Bank, the Thalppalam Service Co-operative Bank, was held not to be public authority by the Supreme Court because it did not fulfil the substantial finance test. Now, I have to repeat this because it is the Supreme Court judgement. Kindly note, there are couple of things that are the learning curve that we must take from this case. First that to come within the definition of substantial finance, the finance to the NGO must be actual, existing, positive and real, to a substantial extent.

Second, such kind of finance should be such that the body should struggle to exist without it. So, it must be so important and relevant. Like I told you more than a project finance it must be some kind of capital finance. Thus, please note nearly granting, subsidiary grants, exemptions and privileges or if thus finance is moderate, ordinary and tolerable, in those cases unfortunately the non-governmental organization cannot be held to be a public authority in any matter.

So, I think the judgment of Supreme Court now is very clear about what test to be applied in case of non-governmental organizations. And how should the matter be perused by information commissions before they can declare any kind of co-operative, any kind of society, any kind of non-governmental organizations within the definition of the Right to Information Act.

