Complaint under Section 18 of Right to Information Act, 2005.

Complaint No.Mumaa-2014/C.no.2636/02

Shri. Shailesh Gandhi,
B-2, Gokul Apartment, Poddar Road,
Santacruz (W), Mumbai 400 054.

Managing Director,
Mumbai Metro One Pvt. Ltd.,
Mumbai Metro One Depot,
D.N.Nagar, J.P.Road, 4 Bunglows,
Andheri (W), Mumbai 400053.

Principal Secretary,
Urban Development Department, Madam Kama raod,
Mantralay Mumbai 400 0032.

Metropolitan Commissioner,
Mumbai Metropolitan Region Development Authority,
Bandra- Kurla Complex, Bandra (E), Mumbai 400 051.

1. The complainant Shri. Shailesh Gandhi filed an application on 30.12.2014 under section 18 of the Right to Information Act, 2005 whereby, he has complained against Mumbai Metro One Pvt. Ltd. (MMOPL), henceforth, referred to as MMOPL, for not appointing Public Information Officer, the First Appellate Authority, and denying him the information sought about Metro One project.

2. Giving References of the order of the Hon'ble Supreme Court of India in Civil Appeal of Thalappalam Ser. Co-op. Bank vs. State Of Kerala (2013), The complainant has mentioned that the MMOPL, being substantially financed by the Government, is a public authority for the purpose of Section 2 (h) of the RTI Act, 2005.

3. All the concerned parties were issued with notices to appear before the Commission for the hearing of the above complaint application, on

23.02.2015. The Complainant gave his written submission on that date along with the ruling of the Supreme Court in the above mentioned Civil Appeal On the request of the MMOPL, the hearing of the application was adjourned to 04.03.2015, on which date the Advocate for the MMOPL submitted their written submission and argued the matter. The Principal Secretary, Urban Development Department the representative of the MMRDA, besides, the Complainant and the advocate of the MMOPL were present.

4. In his application dated 30.12.2014, the complainant has mentioned that he filed an RTI application with MMOPL on 01.12.2014 asking for copies of the inspection reports of metro line, given by the Commissioner of Metro Rail Safety (CMRS). The MMOPL responded, advising him to collect the information from the MMRDA. The MMOPL did not make a case that the said information was not available with them. The Complainant has claimed that the MMOPL is a public authority, as it has been provided with the viability gap funds, and the MMRADA holds 26% of the equity in the said company. Giving reference of the judgment of the Hon'ble Supreme Court of India in Civil Appeal nos. 9020, 9029 and 9023 of 2013 - Thalappalam Ser. Co-op. Bank vs. State Of Kerala, he has claimed that the MMOPL is substantially financed by the Government.

5. The complainant submitted written arguments before the commission on 23rd February, 2015 in which he quoted the provisions of section 2 (h) of RTI Act, 2005, as regards the definition of "public authority". Admitting that MMOPL is not owned by the Government, as the equity of the Government in MMOPL is less than 50%, he has argued that the said company is controlled and substantially financed directly or indirectly by the appropriate Government. He

has argued that the expression used in the Act is 'control' and not 'complete control.' The government has control on the said company in the form of three directors, who enjoy Veto Power in certain specified areas as provided in clause 7.3.5.2 of the concession agreement. The provisioning of huge VGF and Government equity together amounts to substantial finance.

6. The representative of the MMOPL submitted the written arguments and also argued that no application under the RTI Act could have been made to MMOPL as it is not a "public authority". 'MMOPL' is not a public authority as defined in Sections 2(h)(d)(i) of the Act, as it is not a body owned, controlled or substantially financed directly or indirectly by the appropriate Government. Article 7.2.4 of the Shareholders Agreement provides for "Authority of Board" which has the ultimate responsibility for management and control of the Company. Article 85 of the Articles of Association of 'MMOPL' provide: "Subject to the provisions of these Articles and the Act, the Board shall be responsible for the management, supervision, direction and control of the Company. The Business of the Company shall be managed by the Board. The Board shall consist of upto 12 Directors, and such Directors shall be appointed by the Shareholders in accordance with these Articles."

7. The MMOPL has quoted the definition of 'control' provided in S.2 (27) of the Companies Act. " 'Control' shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner." They argued that Reliance Infrastructure Ltd. having majority of the Directors on the Board of MMOPL, it is in management and control of MMOPL. Thus, by no stretch of

imagination can it be said that the MMRDA or Government has control over MMOPL.

8. In their written arguments the MMOPL has argued that purported reliance of the Complainant on Article 7.3.5 of Shareholders' Agreement is misplaced. Merely because affirmative vote of MMRDA Director along with Directors nominated by Reliance Infrastructure/Veolia is required in respect of "Specified Matters", it cannot be construed as "control" much less "substantial" by MMRDA or by the Government. In fact, the provisions regarding decision of specified matters is an exception since control is with Reliance Infrastructure, and does not deal with the management of MMOPL or give rise to control of MMOPL by the Government of MMRDA.

9. Referring to Thalappalam case, they have quoted the following observation of the Apex Court:

The words "substantially financed" have been used in Sections 2(h) (d)(i) and (ii). A body can be substantially financed, directly or indirectly by funds provided by the appropriate Government. The expression "substantially financed", as such, has not been defined under the Act. "Substantial" means "in a substantial manner so as to be substantial". In Palser v. Grimling (1948) 1 All ER 1, 11 (HL), while interpreting the provisions of Section 10(1) of the Rent and Mortgage interest Restrictions Act, 1923, the House of Lords held that "substantial" is not the same as "not unsubstantial" i.e. just enough to avoid the de minimis principle. The word "substantial" literally means solid, massive etc. Legislature has used the expression "substantially financed" in Sections 2(h) (d) (i) and (ii) indicating that the degree of financing must be actual, existing, positive and real to a substantial extent, not moderate, ordinary, tolerable, etc.

The word 'substantially' has been defined to mean 'essentially; without material qualification; in the main; in substance; materially.' In the Shorter Oxford English Dictionary (5th Edn.), the word "substantial' means 'of ample or considerable amount of size; sizeable, fairly large; having solid worth or value, of real significance; sold; weighty; important, worthwhile; of an act, measure etc., having force or effect, effective, thorough.' The word 'substantially' has been defined to mean 'in substance; as a substantial thing or being; essentially, intrinsically'. Therefore the word 'substantial' is not synonymous with 'dominant' or 'majority'. It is closer to 'material' or 'important' or 'of considerable value.' 'Substantially' is closer to essentially.' Both words can signify varying degrees depending on the context. 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.

Relying on the above observations, they argued that the finance provided by 'MMRDA' is not "substantial" or that if the same was not provided, 'MMOPL' would have struggled to exist.

10. Referring to Annexure -1 in the written submission of the MMOPL, the Complainant strongly argued that the Government of India and the State Government/MMRDA have provided financial support to the extent of Rs. 783 crores, which is substantial and not unsubstantial. Additionally, the Government has given nine hectares land on concessional terms for the carshed which values a huge amount. The implication of such a huge receipt of financial support is that the MMOPL is a public authority; they should appoint PIOs and the First Appellate Authorities and provide information in right ernest to the public.

11. The representatives of the MMRDA, present at the hearing were asked to explain the stand of the MMRDA on the issue. Accordingly, they mentioned that the MMOPL is covered by the RTI. They have got huge financial support from the Government, got about nine hectares of Government land at Rs 1 nominal lease rent for Metro Crashed, and are using the right of way belonging to the public authority.

12. On consideration of the record of the case and the submissions of both sides, the issue for determination is "Whether MMOPL is or not a Public Authority under RTI Act".

13. The section 2(h) of the RTI, 2005 defines public authority as follows:-

'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."

14. It is admitted that MMOPL does not belong to the sub-sections a, b and c. It is also admitted that the MMOPL is not owned by the Government or the MMRDA as its' equity in the above private limited company is less than 50%. The main issue to be decided is whether the said company is controlled or substantially financed by the Government or the MMRDA. Both the sides have

relied on the decision of the Hon'ble Supreme Court in the above mentioned Civil Appeal of Thalappalam Ser. Co-op. Bank vs. State Of Kerala.

15. In order to understand the relationship between MMRDA and MMOPL, It would be worthwhile to peruse the Concession Agreement between MMRDA and MMOPL dated 07th March, 2007. Article 9.1 of Concession Agreement states as under :

Obligation of MMRDA

MMRDA agrees to observe, comply and perform the following:

i. enable access to the Site, free from Encumbrances, in accordance with this Agreement and in particular in accordance with Schedule A;
ii. permit peaceful use of the Site by the Concessionaire under in accordance with the provisions of this Agreement without any let or hindrance from MMRDA or persons claiming through or under it;
iii. subject to the Concessionaire complying with Applicable Laws, assist the Concessionaire in procuring Applicable Permits;
iv. subject to the Concessionaire complying with the Applicable Laws, assist the Concessionaire to get the necessary statutory clearances;
v. upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
vi. provide necessary space/land for car depot, electric sub stations and access to station as per approved plans on nominal lease charge of Rs.1 (Rupee one) per square meter per annum free from all encumbrances,

relocate and rehabilitate all affected person as per applicable law/policy of the GOM.

vii. render assistance to the Concessionaire in obtaining necessary permissions, from various Government departments, Governmental Agencies and Local Authority for security/traffic regulations, building permission for building structures during Concession Period;

viii. to carry out shifting of under ground, surface and overhead Utilities (if required) itself or through concerned agency or through the Concessionaire and reimburse the cost.

ix. assist the Concessionaire in the co-ordination with transport agencies such as BEST, auto rickshaw and taxies, liaison with MCGM, highway authorities and traffic authority as regards temporary and permanent traffic diversion;

x. provide 26% of the total issued and paid up equity capital towards meeting the Total Project cost as per agreement,

xi. appoint Independent Engineer in accordance with Article 20;

xii. arrange and ensure appointment of Safety Commissioner / engineer by GOM in accordance with Indian Tramways Act, 1886 (Bombay Amendment, 1948);

xiii. assist the Concessionaire in obtaining police assistance from GOM against payment of prescribed costs and charges, if any, for patrolling and provision of security on the MRTS;

xiv. procure that no barriers are erected or placed by GOM or any Governmental Agency on the MRTS Project except on account of any law and order situation or upon national security considerations;

xv. provide the Capital Contribution to the Concessionaire in accordance with the provisions of Article 23;

xvi. reimburse costs for items in 9.1 (viii) and 4.4 and as per the provision of the agreement incurred by the Concessionaire and as certified by the Statutory Auditor and recommended by the Independent Engineer.

xvii. observe and comply with its obligations set forth in this Agreement.

So also, Article 28.1 and 28.02 of the Concession Agreement are as under:

28.1. Suspension for Material Breach by the Concessionaire

If the Concessionaire shall be in Material Breach of this Agreement, MMRDA shall be entitled in its sole discretion and without prejudice to its other rights and remedies under this Agreement including its right of Termination hereunder, to (i) suspend all or any of the rights (and the corresponding obligations) of the Concessionaire under this Agreement including the Concessionaires right to collect and appropriate all Fares and other revenues from the MRTS Project, and (ii) exercise the rights of the Concessionaire under this Agreement itself or authorise any other person to exercise the same during such suspension. Such suspension by MMRDA shall be by a communication in writing to the Concessionaire and shall be effective forthwith upon the issue thereof to the Concessionaire. Any Fares or revenues collected by or on behalf of MMRDA during such suspension shall be deposited in the Escrow Account. Provided, however, that the period of such suspension under this Article 28 shall not exceed 120 (one hundred twenty) Days.

For the sake of clarity, the Parties agree that only the obligation of Debt Service Payment to Lenders shall continue to be performed by the Concessionaire during the period of suspension.

28.2 Subject to Article 28.1, MMRDA shall have the right to utilise the proceeds of Fares and other revenues for meeting the costs incurred by

MMRDA to remedy and cure the cause of such suspension and for defraying the O&M Expenses during such suspension period. Provided, however, that if the Concessionaire is making diligent efforts to remedy and cure such cause, then MMRDA shall allow the Concessionaire reasonable time and opportunity for such remedy or rectification.

The above clear provisions in Concession Agreement shows the relationship between public body MMRDA and MMOPL. MMOPL thus is clearly under obligation to fulfill various conditions while operating Metro, failure of which would even enable MMRDA to suspend or terminate the contract. Thus, besides having 3 Directors on the Board of Directors of the MMOPL, MMRDA has also to exercise proper control supervision and monitoring over the discharge of various functions to be performed by MMOPL which directly or indirectly impacts general public. This definitely gives MMRDA control over MMOPL. So also the financial stake of MMRDA is quite substantial as is clear from Article 9.1 of the Concession Agreement. Especially, the value of car Depot land admeasuring 9.53 hectares (approximately 95.365sq.mtrs.) at today's rate of Rs. 65,800/- per sq. mtr. (ready reckoner rate) comes to about Rs. 627.5 crores, Viability gap funding of Rs. 650 crores and 26% equity (133 crores) all these add upto Rs 1410.50 crores as direct financial assistance besides support in various other ways which also has huge financial implications such as shifting of underground, surface and overhead Utilities etc.

16. *Commission would also like to draw attention to the judgement of Karnataka High Court, in Bangalore International Airport Limited – Vs – Karnataka Information Commission (WP 12076/2008), held - "Let us now consider what the implications of the words 'substantially financed'. It is obvious that as per*

Section 2(h)(i) "body substantially financed" would be a body where the ownership may not lie with the Government, nor the control. Hence, clearly the wording 'substantially financed' would have to be given meaning at less than 50% holding. The company law gives significant rights to those who own 26% of the shares in a company. Perhaps this could be taken to define the criterion of 'substantial finance'. The finance could be as equity or subsidies in land or concession in taxation".

17. Thus, relying on the above interpretation of the expression "Substantially Financed" and in view of Supreme Court's decision in the Civil Appeal of Thalappalam Ser. Co-op. Bank vs. State Of Kerala and also considering the quantum of the financial support of the Government, in terms of VGF, 26% equity holding, concessional grant of nine hectares of Government land for the essential component of Metro Carshed and also the fact that the entire project is on the public right of way, the Commission comes to conclude that the project of MMOPL is controlled and substantially financed by the Government, the company is, therefore, to be treated as a Public Authority for this purpose of the RTI Act, 2005. The very fact that without the financial support of the Government, the Metro project was not viable at all, and has been designed on the basis of viability Gap funding support of the Government, clearly proves the above point. In addition, the fare structure of Metro is decided by a Committee set up by the Government.

18. The Commission also draws reference to a few other orders given by different High Courts on the interpretation of Section 2 (h) of the RTI Act, 2005.

In W.P. (C) no.4747/2008, Decided by the High Court of Allahabad on 24.01.2008 (Dhara Singh Girls High School Petitioner Vs. State of Uttar Pradesh), *it was also observed by the High Court that whenever there is even an iota of nexus regarding control and finance of public authority over the activity of a private body or institution or an organization etc., the same would*

fall under the provisions of Section 2 (h) of the RTI Act. The provisions of th Act have to be read in consonance and in harmony with its objects and reasons given in the Act which have to be given widest meaning in order to ensure that unscrupulous persons do not get benefits of concealment of their illegal activities or illegal acts by being exempted under the Act and are able to hide nothing from the public The working of any such organization or institution of any such private body owned or under control of public authority shall be amenable to the Right to Information Act.

In W.P No.1105/2009, Decided on 25.02.20085-D.A.V. College Trust and Management Society and others- Petitioners Vs. Directors of Public Instruction (Schools), UT Administration and others- Respondents, *it was also observed by the High Court of Punjab and Haryana that once institutions like the petitioners are performing public functions affecting the life of huge segments of the society and in addition are receiving substantial grant- in-aid then it cannot be argued that it is not a public authority.*

19. Considering the fact that Metro is providing an important public service, under the control and with the financial support of the Government, the Commission concludes that it a public authority and is amenable to RTI Act, 2005.

Order

The Commission allows the application and directs the MMOPL to take all necessary measures, including the appointment of PIOs in accordance with section 4 of the RTI Act forthwith and also furnish the information demanded by Complainant with a period of one month from the receipt of this order.

(Ratnakar Gaikwad)
State Chief Information Commissioner,
Maharashtra.

(Ajit Kumar Jain)
State Information Commissioner,
Grater Mumbai.

Date: 19.03.2015

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State Information Commission Maharashtra

State Information Commission Greater Mumbai