



STATE INFORMATION COMMISSION, KERALA

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A.P. No. 1212(1)/13/SIC, 1038(6)/14, 2126(3)/14, 2128(3)/14, 2132(3)/14, 2136(3)/14, 2139(3)/14, 2143(3)/14, 2145(3)/14, 2149(3)/14, 2151(3)/14, 2155(3)/14, 148(1)/17, 899(1)/18, 2989(3)/18 & 2990(3)/18

C.P. No. 568(1)/2010/SIC, 567(1)/2010/SIC, 569(1)/2010/SIC, 570(1)/2010/SIC, 571(1)/2010/SIC, 572(1)/2010/SIC

Present

Sri. S. Somanathan Pillai, State Information Commissioner

Sri. Ouseph Antony,
Karumuthi House,
Nayathode P. O.,
Angamaly - 683 572.



Appeal Petitioners

And Others

Vs

The State Public Information Officer,
Cochin International Airport Limited,
Kochi Airport P. O.,
Nedumbassery, Ernakulam - 683 111.



Respondents

ORDER

These appeals came up before the Commission as directed by the Hon'ble High Court of Kerala through its orders disposing of a batch of Writ Petitions, of which fourteen of them were filed by Cochin International Airport Ltd., herein after referred to as CIAL, against the order of the State Information Commission, Kerala, and three by the appellants of second appeals pending disposal before it.

Para 2- 13 Arguments of participating parties.

14) The main issue to be decided in these appeals is whether CIAL comes within the meaning of public authority as defined under Sec. 2(h) of the RTI Act, 2005. Once this issue is decided, the other issues pirouettes on it will get automatically answered. For that, let me analyze Sec. 2(h) of the RTI Act and see whether CIAL will fit into any of the classes of institutions mentioned under that Section. Sec. 2(h) of the RTI Act reads as follows:

Sec.2 - In this Act, unless the context otherwise requires, -

(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.

Regarding clauses (a), (b) and (c) of sub-section (h), no body from either side has any claim or dispute. So it can be safely ruled that CIAL will not fall under any of the category of institution constituted by the constitution or any law made by Parliament or any State Legislature. The real bone of contention

lies in the remaining Sub-Section (d) and its clauses (i) and (ii) – Let me examine it one by one taking into consideration the argument of all the parties to these appeals and in the light of the judgment of the Hon'ble Supreme Court in Thalappalam case.

(1) Body or institution of self Government established or constituted by notification issued or order made by the appropriate Government.

It was the intention of the Government of Kerala to have an International Airport at Cochin. To give wings to that dream, the State Government by an order G.O. (Ms) No.42/93/PW&T dt.19.05.1993 gave sanction for registering a society, by name Kochi International Airport Society (KIAS for brevity). Subsequently for attracting NRI funds, KIAS was incorporated into a company under Companies Act, and thus Cochin International Airport Ltd. came into existence on 13.03.1994. CIAL is the new Avathar of KIAS. Of course, from the moment of incorporation a new legal personality had emerged and from that moment KIAS, the promoter and other person who had subscribed to its Memorandum of Association, and others joining it as members would be regarded only as a body incorporate or a corporation aggregate. But still the fact remains that this new entity, distinct from the members, among them Government of Kerala along with its PSUs with a holding of 34.15% in paid up capital, is a creation of the Government of Kerala by virtue of its order to incorporate its fully owned KIAS into a company. So CIAL will comfortably fit into the category of institution of self government established by an order made by the appropriate Government.

15) The argument against the above treatment is that CIAL was not created by an order of the State Government but by a decision of the

Managing Committee of KIAS, which was a fully owned society of the Government. Government has only approved that decision of KIAS to incorporate itself into CIAL. All the documents required for the incorporation was moved by the Managing Director of KIAS and not the Secretary to Government. This argument seems to carry sense, prima facie. But all the PSUs of the State and Central Governments which have been incorporated into Company, have had its incorporation like this. Just like a company, being a juristic person, cannot act by itself a Government also cannot act by itself. Both have to act through its officials. The Board of Directors of a company is giving sanction or approval for a project or proposal coming up before it and authorize its officials to implement it. Then it becomes the decision of the company. Similarly the Government of Kerala had given sanction to the proposal of the Managing Committee of KIAS to incorporate itself into CIAL and authorized its Managing Director to implement the proposal sanctioned by the Government. Thus it become the decision of the Government of Kerala. So CIAL can safely be treated as a body established by an order made by the appropriate Government.

Now let me consider the later part of Sec. 2(h)(d) -

(1) **Body owned, controlled or substantially financed.**

a) **Body owned:** It is nobody's claim that CIAL is owned by the government of Kerala. So I am leaving that part there.

b) **Controlled:** The Hon'ble Supreme Court, in its judgment in Thalappalam Case (supra) have elaborated the meaning of the term 'Controlled' which figure in Sec. 2(h)(d)(i) as follows: By the meaning of the Expression "Controlled" "which figures in between the words "body owned" and "substantially financed", the control of the appropriate government must be control of a substantial nature. The mere 'supervision' or 'regulation' as

such by a statute or otherwise of a body would not make that body a 'public authority' within the meaning of Sec.2(h)(d)(i) of the RTI Act. In other words just like a body owned or body substantially financed by the appropriate government the control of the body by the appropriate Government would also be substantial and not merely supervisory or regulatory.....' 'the control of the body is of such a degree which amounts to substantial control over the management and affairs of the body'.

16) Let me now examine whether the appropriate government, which is the Government of Kerala, exercise any control over the management and affairs of CIAL, and if yes, whether such control is substantial in nature. It is a settled law that a company derives its authority and power from its Memorandum and Articles of Association. It is the constitution of the company. A company can function only within the ambit of its Memorandum and Articles of Association. The Articles of Association provides for a Board of Directors with whom vest the entire affairs of the Company. In other words the ultimate control over the affairs of the company vest with the Board of Directors. In CIAL one-third of the total number of Directors position has been reserved to be nominated by the Government of Kerala, with Chief Minister of the State as Chairman and one among the nominee directors as Managing Director as long as Government of Kerala and / or its public sector undertakings jointly and severally hold not less than 26% of the paid up capital of the company, as provided under Articles 95(1) and 125(1) respectively of the Articles of Association of CIAL. As per Art.125(1), the Government of Kerala shall have right not only to appoint the Managing Director of CIAL but also to fix his remuneration and have the right to withdraw / cancel the appointment so made, and to re-appoint any other

Director as Managing Director at its discretion (emphasis added to discretion). The present Managing Director Mr. V. J. Kurian was a Senior I.A.S. Officer belonging to the Kerala Cadre till 31.03.2017. His cadre controlling authority was the Chief Minister of the State.

17) Even while functioning as the Managing Director of CIAL he has been drawing salary from the govt. of Kerala, in the capacity of being an Additional Chief Secretary in the Govt. (para 162 of the Financial Report of CIAL for the year 2017 - 18). The last paragraph of Govt. Order G.O. (Ms) No. 45/2016/Tran dt. 15.06.2016 issued by the Govt. of Kerala nominating the present Govt. nominees to the Board of CIAL reads as follows 'In exercise of the powers under Article 125(1) of the Articles of Association of Cochin International Airport Limited Government order that Sri. V. J. Kurian I.A.S., Member, Board of Directors of Cochin International Airport Limited shall continue to hold the charge of Managing Director, Cochin International Airport Limited (CIAL). Here the wordings used in the G.O. is 'in exercise of the powers under Article 125(1) of the Articles of Association'. The Govt. is directly exercising the powers which otherwise should have been exercised by the Board of Directors of CIAL. In CIAL the Govt. directly appoints Managing Director and pay him salary from the exchequer. His job in CIAL is like any other working arrangement or rather a normal posting of an IAS Officer.

18) The present Board of CIAL consist of Chief Minister of Kerala as Chairman, 3 other Ministers, as Directors and an Additional Chief Secretary as Managing Director representing the state. Even though, while sitting in the Board they function as the Directors of CIAL, they are connected to the State Government through an umbilical cord and bound to protect the interest of the state. It is for protecting the interest of the state that when the holding of

the government in the paid up capital was reduced to 26% from the then existed 51%, the Government, for keeping its control over the affairs of CIAL, through the Board of Directors, intact the Government insisted for an amendment in the Articles of Association to empower the Government to nominate 1/3rd of the Board of Directors with Chief Minister as Chairman and Managing Director from among such nominee Directors. The very wording of that Government Order indicates the degree of control exercised by the State Government over the decision making of CIAL. Para 3 of the Government Order GO (Ms) No. 22/2001/Trans. Dated 17.09.2001 reads as follows: **'The Cochin International Airport Ltd. will take steps to amend the Articles of Association of the Company empowering the State Government to nominate the Chairman, the Managing Director and 1/3rd of the Board of Directors of the Company.**

By order of the Governor,
V. Krishnamoorthy,
Chief Secretary.

19) This order is rather in the form a command and CIAL in humble submission had simply implemented the order without even asking for a change in the wording of the order. Thus the Government could even make CIAL to amend its Articles of Association which is the constitution of the company. The Board of Directors was acting in humble submission to the dictates of the Government. The Chief Minister, the political head of the Executive directs the Chief Secretary, the bureaucratic head of the Executive to issue orders to CIAL and then the same Chief Minister and Chief Secretary (when Chief Secretary too was a nominee Director) along with two or three Ministers of the state and a senior IAS Officer of the state sitting in the Board Room of CIAL in the capacity of Chairman, Directors and Managing Director

respectively, couched with the clout of power they possess otherwise, controls CIAL through the Board.

20) The Managing Director is the Chief Executive of CIAL. His authority over the affairs of the company is mentioned in Article 125(3) of the Articles of Association as follows: 'Subject to the provisions of the Act, and to the general supervision and control of the Board, the Managing Director shall have the general direction, management and superintendence of the business of the company with powers to do all acts, matters and things deemed necessary, proper and expedient for carrying on the business and concerns of the company.....'. Thus the Managing Director's control over the affairs of the company is deep and pervasive. But the Managing Director derives his authority from the power vested in the Board as delegated to him. But the Board in turn is de facto controlled by the chief Minister, three other Ministers of his cabinet and a senior IAS Officer of the state who function as the Managing Director. De jure the ultimate control vests with the Board, but de facto that control is exercised by the Government and that control is not merely supervisory or regulatory in nature but deep and all pervasive.

21) **Substantially Financed** : As the Hon'ble High Court has directed the State Information Commission to take into consideration the vires of the judgment of the Hon'ble Supreme Court in Thalappalam Service Co-operative bank Ltd. (supra) while reconsidering these appeals, I mainly rely on the meaning provided by the Hon'ble Apex Court for each expression in the RTI Act. The Hon'ble Court noted that 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'. The Hon'ble Court further

elucidated that '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'.

22) There was a time, in the initial days of CIAL, when the company was struggling to exist due to paucity of funds. Even the project was about to be shelved. It was at that time the Government infused money which was like a mridasanjeevani for CIAL. This funding which was essentially required, as qualified by the Hon'ble Supreme Court to be treated as substantial financing, at a time of necessity for CIAL is seen thankfully acknowledged at para 3 of the forward of the Brochure named 'INSIGNIA OF A DREAM' printed and published by CIAL in the year 2015. It reads 'At one point in time, when the entire project was about to come to a stand still owing to financial crisis, Government of Kerala took a bold decision to part fund the project. This was a decision that gave a second life to the project'. This rebirth was then nourished carefully like the upbringing of a child by infusing money from the State Budget as and when necessity arised. This second life then got a shot in the arm by the action of the State government in bringing HUDCO to the tarmac of CIAL with a cash chest of Rs.138 crores propelled by a sovereign guarantee of the State Government assuring that the Government would repay the money, in case of default by CIAL, at a crucial time when the project was still doubtful of taking wings. This timely financing made indirectly by Government is also seen acknowledged thankfully in the brochure 'Insignia of a dream' at pages 16, 37 and 38. This bold decision to give sovereign guarantee to HUDCO was taken by the Cabinet, despite bureaucratic objection, at a time when there existed a general scepticism about the scope of success of the project. Land acquisition was the greatest challenge. Despite all

the odds Government went ahead with the land acquisition and acquired 1254 acres in the name of KIAS which was later transferred to CIAL. This indirect financing is also seen acknowledged by CIAL in its brochure at para 3 and 6 in page 42 and 43 in words 'KIAS showed a generous approach in fixing the land value for negotiated settlement'. These words and deeds speaks volumes that but for the financial support of the State Government, an airport by name CIAL would not have been there now.

23) At one point of time Government had subscribed upto 51% of the paid up capital. It was then that the Hon'ble Supreme Court classified CIAL as a public sector undertaking of the Government of Kerala and treated the award of contract for ground handling operation at CIAL to Air India as an award of Commercial Contract by a state instrumentality [CIAL Vs. Cambatta Aviation Ltd. and Others in Civil Appeal No. 3641 of 1998 - (200) 2 SCC 617].

24) From the above deliberation it has become clear in my mind that CIAL fit suitably, as per the criteria fixed by the Hon'ble Supreme Court, within the meaning of a body substantially financed by the appropriate Government.

ii) Non- Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

It is the argument of the authorities of CIAL that it is not a Government organization. They raised the contention that what ever money spent by the Government of Kerala for CIAL at every stages has been converted into equity, and that the Government was investing in CIAL rather than financing, and CIAL has been giving rich returns in the form of dividend.

25) The argument of CIAL that whatever amount spent by Government for CIAL is only an investment does not carry much reason. The book 'insignia of a dream' published by CIAL itself speak eloquently when and why Government pumped in money into CIAL. They all were at the time of financial trouble of CIAL. In the initial period when the paid up capital of CIAL was Rs.90 crores, Government had a holding of 51%. But when the paid up capital was raised to Rs.200 crores, the government instead of maintaining its share at 51% reduced its holding to 26% to bring in more and more people and institutions into the fold. If the intention of the Government was an investment, it would have maintained its holding at 51% by pumping in an additional amount of Rs. 56.10 crores required to maintain 51% share, there by keeping CIAL as a Government Company, as per Companies Act, 1956. The Shylockian motive of reaping profit is not the objective behind financing an infrastructure project by any democratic Government. As the quantum of finance and its timings, right from the stage of land acquisition by Government through KIAS and its leasing out to CIAL, have already been explained in the previous paragraphs, I am not re-elaborating it here. It is an accepted fact, even by CIAL, that the timely financing done by Government of Kerala, both directly and indirectly, was the greatest impetus received by CIAL for its implausible take off from the turbulent brickkilns of the sleepy village of Nedumbasserry to the Pacific blue skies around the globe. But for such finances, extended directly and indirectly by the Govt. of Kerala, the very dream of an airport visualized in few sheets of paper would have slept in a dusty file rack in some corner of the Government Secretariat.

26) If at all the argument of CIAL is accepted that CIAL is not a Government Organization, owned or controlled by Government but a private

organization incorporated into a company, the fact remains, and thankfully acknowledged by CIAL, that it is an organization substantially financed by the Government of Kerala. Then also it will fit itself safely within the definition of “public authority ” as defined under Sec. 2(h) (d) (ii) of the RTI Act.

Chief Minister of Kerala, a public authority

27) Chief Minister of Kerala is a public authority within the meaning of Sec. 2(h) of the RTI Act. In a democracy the people have a right to know all the actions of the Chief Minister, other than what is restricted under Sec.8 of the Act. All the deliberations and decisions to which he is a party in which ever capacity, whether in the capacity of Chief Minister or the Chairman of CIAL, are bound to be disclosed before the public. Similar is the acts and deeds of the officers and other employees he controls through the Board of Directors of the Company he presides. To an application of a citizen of this country, seeking information from the State Public Information Officer in the office of the Chief Minister, about the decisions taken in the Board room of CIAL under his Chairmanship, the minutes of that meeting and its implementations from the Tower to the Tarmac of Cochin International Airport, a definite positive reply covering the entire information sought for, except those covered under Sec. 8 of the RTI Act, must be delivered within 30 days of receipt of such application in the o/o. the Chief Minister. For facilitating hassle free disclosure of such information, the Chief Minister’s office can even consider posting an Assistant State Public Information Officer in the office of CIAL itself. Apart from the information readily available in the office of the Chairman, he can collect any information from CIAL which are accessible to the Chairman of CIAL and give it to the requestor.

28) From the above deliberations I came to the conclusion and hold that Cochin International Airport Limited is a public Authority falling within the meaning of Sec. 2(h) of the Right to Information Act, 2005.

Disclosure of information

29) These appeals have been pending all these years for want of a resolution of the main issue, whether CIAL is a public authority or not, as per the RTI Act. As it is now resolved and declared as a public authority within the meaning of Sec. 2(h) of the RTI Act, all information sought by the applicants, in these appeals must be disclosed by the SPIO of CIAL within a period, not later than 30 days from the date of receipt of a copy of this order. Only the provisions of Sec. 8 (1) of the said Act shall cause restriction if any, in the process.

These appeals are thus ordered.

Dated this, the 20th day of June, 2019.

Sd/-
S. Somanathan Pillai
State Information Commissioner

Authenticated Copy

Joint Secretary

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