Sanjay Ramesh Shirodkar vs Ministry Of Civil Aviation on 21 May, 2020

Central Information Commission
,
Baba Gangnath Marg, Munirka
, New Delhi - 110067

File No: CIC/MA/C/2008/000195
Sanjay Ramesh Shirodkar ... /Complainant

Mumbai International Airport Ltd.
Chhatrapati Shivaji Maharaj International Airport
1st Floor, Terminal 1
Santacruz East,Mumbai - 400099 .... /Responden

RTI: 04/01/2008 :
FA: Nil : No appeal Complaint : Nil
12.04.2017
CPIO: 13/02/2008 :
FAO: Nil : No order Hearing: 16.12.2019
18.04.2017

ORDER

(18.05.2020) CORAM HON'BLE IC SHRI DIVYA PRAKASH SINHA HON'BLE IC SHRI SURESH CHANDRA The issue under consideration which has eventually copped up following an RTI dated 04.01.2008, Complaint dated nil and the High Court of Delhi's Order dated 30.05.2011 is as under:

Whether the Mumbai International Airport Limited(MIAL) is a Public Authority

2. Succinctly the facts of the case include that the complainant filed an RTI application dated 11.12.2017 seeking the following information:

i) As per Airports Authority of India NOTIFICATION (File No. AAA/PERS/EDPA/Reg/2002) who is the "Competent Authority" as CSIA-Chhatrapati Shivaji International Airport, Mumbai-400099.

ii) As per NOTIFICATION (File No. AAA/PERS/EDPA/Reg/2002)and mentioned in Section 18 of it, please provide a copy of Policy Guideline/Government Resolution/Notification regarding parking or waiting of any vehicle of carriage within the Airports and Civil Enclaves at CSIA-Chhatrapati Shivaji International Airport, Mumbai-400099.

> iii) Policy Guideline/Government Resolution/Notification, if any exemption given under Section 18 of Airports Authority of India NOTIFICATION(File No. AAA/PERS/EDPA/Reg/2002) to any one by the "Competent Authority" at CSIA-Chhatrapati Shivaji International Airport, Mumbai-400099.

2.1 The authorized signatory of the respondent replied on 18.12.2007 informing the applicant that MIAL was not a public authority and that the RTI Act was not applicable to it.

2.2 The applicant made another RTI dated 4.1.2008 seeking the following information:

> i) Who is the "Competent Authority" at CSIA- Chhatrapati Shivaji International Airport, Mumbai-400099.
>
> ii) Please provide a copy of Policy Guideline/Government Resolution/Notification regarding parking or waiting of any vehicle of carriage within the Airports and Civil Enclaves at CSIA- Chhatrapati Shivaji International Airport, Mumbai-400099.
>
> iii) Please provide a copy of Policy Guideline/Government Resolution/Notification, if any exemption given to any one by the "Competent Authority" at CSIA- Chhatrapati Shivaji International Airport, Mumbai-400099.
>
> iv) Please provide a copy of all approved rates & brands of Mineral Water which is sold at Chhatrapati Shivaji International Airport.
>
> v) Please specific the exact locations of "Designated VIP car parking area" at CSIA-Chhatrapati Shivaji International Airport, Mumbai-

400099.

2.3 The respondent's authorized signatory vide letter dated 13.02.2008 replied and reiterated their stand taken in their earlier letter dated 18.12.2007. It was also informed that the matter was sub judice.

Aggrieved by that the complainant filed a complaint on 20.02.2008 which read with the directions of the High Court order dated 17.05.2019 is under consideration. 2.4 It may also be recalled that the Commission in its order dated 30.05.2011 held as under:

> "37 We find no hesitancy in declaring MIAL as a Public Authority under Clauses (d) and (i) respectively, of Section 2(h) of the RTI Act. MIAL shall appoint a CPIO and FAA within 30 days of the receipt of this Order and shall also fulfil the mandate of Section 4(1) disclosure as mandated under the RTI Act, within 2 months of the receipt of this Order"

2.5 Aggrieved by the order dated 30.05.2011 MIAL filed an appeal before the Delhi High Court. The Delhi High Court in its order dated 17.05.2019 in para 6 observed as under:

> "6. Accordingly, impugned order is set aside and the matter is remanded back to the CIC for a fresh consideration of the issue whether MIAL is a public authority within the meaning of Section 2(h) of the Act. While doing so, CIC shall hear the respondent herein as well. The issue being of importance, it shall be appropriate that the same is decided as expeditiously as possible, but within a period of three months as an outer limit. It is made clear that this court has not expressed itself on the merit of the issue, which shall be considered by the CIC."

Attendance during the hearing on 16.07.2019:

> Complainant: Remained absent.
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> Respondent: Abhinav Vashist, Sr. Advocate; N. Nihal Rao, Advocate; Kunal Dutt, Advocate; Ekta Kapil, Advocate; Akshita Sachdeva, Advocate; P.S. Ganguly (MIAL) and Ramkrishna Shukla (MIAL) present in person.
>
> Third party: Sanjeev Kumar, AGM (F) & Rep. of CPIO, Airports Authority of India, New Delhi present in person.
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> Attendance during the hearing on 02.09.2019:
>
> Complainant: Remained absent.
>
> Respondent: Rajiv Nayyar, Senior Advocate; Ekta Kapil, Advocate; N. Nihal Rao, Advocate; Kunal Dutta, Advocate; Manjari Raj Gupta, Advocate and P.S. Ganguly, EVP & Head-Legal (MIAL) present in person.
>
> Third party: Sanjeev Kumar, DGM (F) & Rep. of CPIO, Airports Authority of India, New Delhi present in person.
>
> Attendance during the hearing on 15.11.2019:
>
> Complainant: Remained absent.
>
> Respondent: Amar Dave, Senior Advocate; Ekta Kapil, Advocate; N. Nihal Rao, Advocate; Kunal Dutta, Advocate and P.S. Ganguly EVP & Head-Legal (MIAL) Ramkrishna Shukla (MIAL) present in person.
>
> Third party: Sanjeev Kumar, DGM (F) & Rep. of CPIO, Airports Authority of India, New Delhi present in person.

Attendance during the hearing on 16.12.2019:

Complainant: Present through Video Conference.

Respondent: Amar Dave, Senior Advocate; Ekta Kapil, Advocate; N. Nihal Rao, Advocate; Kunal Dutta, Advocate and P.S. Ganguly, EVP & Head-Legal (MIAL) Ramkrishna Shukla (MIAL) present in person.

Third party: Santosh Kumar Singh, Under Secretary, Ministry of Civil Aviation, New Delhi and Sanjeev Kumar, DGM (F), Airports Authority of India, New Delhi present in person.

3. The complainant while contending his case inter alia submitted that since the term "substantial funding" had not been defined anywhere in the RTI Act and as per the averments of the MIAL that 50% of shareholding constitute to substantial funding, then Stamp Duty worth Rs.250 crores waived off by the Government of Maharashtra along with land and infrastructure of 2000 acres worth more than 80,000 crores in Mumbai given on Rs.100 per year(lease premium), amounted to "substantial funding"; that AAI being the 26% of active partner in this JV had shirked the responsibility answering to public questions under the RTI Act; that since many years, AAI claiming to be the owner of Mumbai Airport property always passed the buck to its lessee i.e., MIAL on questions asked pertaining to owner's land and infrastructure under RTI Act; that the MIAL was an agent or instrumentality of State and therefore, "State" within the meaning of Article 12 of the Constitution of India; that the statutory functions performed by the AAI were enumerated in Section 12 of the Airports Authority of India Act, 1994; that the monies payable by the lessee i.e., MIAL to AAI were public monies and public funds; that MIAL was performing public functions in public interest; that the MAIL was a part and parcel of Ministry of Civil Aviation and the entire details pertaining to the JV of AAI and MIAL should have been in the public domain i.e., in the website of Ministry of Civil Aviation in compliance with Section 4(1)(b) of the RTI Act and that the reliance by the respondent upon many orders and judgements of various Courts in the present matter, were unnecessary since the subject-matter of the instant RTI Application was very simple. 3.1 Besides, that complainant invited the respondent to reply as to what difficulty will be faced by the respondent in the event MIAL is brought under the RTI Act, whether any pending project will be stalled in doing so, even if the MIAL is considered as a Public Authority under Section 2(h) of the RTI Act, they always have a recourse under exemption clauses i.e., Section 8 and 9 of the RTI Act to deny information. 3.2 Complainant stressed on the fact that the Respondent has taken a loan of several thousands of crores which are taxpayers money and he being a tax payer and a citizen of this country, many aspects pertaining to MIAL is unknown and since the Government is involved in the instant subject-matter, RTI Act should apply by default. He further stated that he is only acting as a whistle-blower and that he has no personal or vested interest in the present matter.

3.3 Complainant relied upon the Hon'ble Commission's order in the matter of Kishan Lal v. Rohit Prasad, Director (Development and Strategy), Public Health Foundation of India, New Delhi vide Complaint no. CIC/SG/C/2011/001273 dated 14.02.2012, wherein the Former Information Commissioner Shri Shailesh Gandhi declared Public Health Foundation of India as a Public

Authority.

3.4 Complainant stated that AAI exercises deep and pervasive control over the affairs of the Respondent and since AAI is not an ordinary shareholder as it is clear from a perusal of some of the clauses of the Articles of Association which are summarised as under:

> 1.8.1 Article 7 provides that the rights attached to various classes of shares may be varied only at a meeting at which the AAI nominee is present 1.8.2 Article 12 provides that the shareholding of AAI in MIAL cannot be diluted.

The said Article further provides that AAI shall have the right to participate in any future issue of shares by the MIAL.

1.8.3 Article 34 provides that the consent of AAI shall be obtained as per Article 35 before shares in the MIAL are transferred by/to a private shareholder. 1.8.4 Article 64 provides that the quorum for meeting relating to Reserved Shareholders shall be two members of which at least one member shall be a nominee of AAI. Article 68 provides that change of business of the Company, change in rights attached to shares, transfer of the undertaking of the Company, commencement of action for dissolution and any special resolution cannot be given effect to unless approved by the AAI by an affirmative vote at the General Meeting. Article 112 contains an identical provision in case of Board Meetings.

1.8.5 Article 91 provides that AAI shall have right to appoint a proportionate number of Directors on the Board of the MIAL and further that AAI shall have a right to appoint at least one Director irrespective of whether it is a shareholder of the MIAL.

1.8.6 Under Article 101, the MIAL may not remove a Director nominated by AAI before the expiry of his term.

1.8.7 By Article 107, the Directors nominated by the AAI have been given the power to convene Board meetings and Article 110 states that the quorum for Board meeting shall include at least one Director nominated by AAI. 1.8.8 Article 115 provides that AAI shall have right to appoint one nominee on every committee and sub-committee of the Board.

1.8.9 Article 135(c) gives AAI the right to inspect the books, records and accounts of the Company and also mandates that AAI shall be provided with monthly accounts of the Company.

1.8.10Article 138 provides that the Auditors of the Company shall be appointed at the General Meeting by a Special Resolution with an affirmative vote of AAI.

4. Submissions of the Respondent:

> 4.1 The respondents while refuting the claims of the complainant inter alia submitted that the present case raised substantial questions of law inter alia, in respect of the

applicability of the provisions of the RTI Act to private entities, which are engaged in and undertake independent and commercial operations.

4.2 In this regard, the Respondent provided a brief background of the instant matter, which is as under:

4.2.1 The Government of India issued a Policy on Airport Infrastructure in 1997 the objective whereof was upgradation and modernization of infrastructure of the Indian airports. Some of the objectives of the said Policy were: 4.2.1.1 To provide a boost to international trade and tourism and enhance the country's image in the comity of nations;

4.2.1.2 To provide airport capacity ahead of demand, in order to handle an increasing volume of air traffic and to garner the maximum share of traffic in the region; 4.2.1.3 To enhance airport facilities to make the airport user-friendly and achieve higher level of customer satisfaction;

4.2.1.4 To provide a market orientation to the present structure, bridge the resource gap and encourage greater efficiency and enterprise in the operation of airports, through the introduction of private capital and management skills;

4.2.1.5 To foster the development of a strong airport infrastructure, maintaining a balance between the need for economic viability and the objective of equitable regional dispersal of infrastructural facilities...; [Emphasis supplied].

4.3 In order to implement the Policy, the Airports Authority of India Act, 1994 was amended by the Airports Authority of India (Amendment) Act, 2003. Statement of Objects and Reasons of the Airports Authority of India (Amendment) Act, 2003 inter alia, states:

4.3.1. There is need to improve the standard of services and facilities at the airports to bring them at par with international standards. To facilitate the process for such improvement, there is need, both for the infusion of private sector investments as also for restructuring of airports. This will speed up airport infrastructure development, improve managerial efficiency, increase local responsiveness and improve service levels. It will, in turn, generally stimulate the economy by boosting tourism and trade. It has been decided to undertake the task of restructuring the airports under the Airports Authority of India as well as to encourage private participation for the Greenfield airports in the country. Since the Airports Authority of India Act, 1994 is applicable to all airports whereas air transport services are operated or are intended to be operated, significant private sector investments in such project require an effective legal framework within which the investors would feel safe and secure about their operational and managerial independence." [Emphasis supplied] 4.4 Further, the Respondent submitted that the MIAL was

incorporated under the provisions of the Companies Act, 1956 in the year 2006 as a special purpose vehicle to undertake the operation, management and development of the Mumbai Airport. The private participants own 74% of the equity share capital and majority management rights in MIAL and the rest 26% of the equity share capital is held by the Airport Authority of India. He further submitted a detail of the shareholders of MIAL, which has been reproduced as under:

Shareholder	Percentage of Holding
Private Participants (including their nominees)	
GVK Airport Holdings Pvt. Ltd.	50.50%
Bid Services Division (Mauritius) Ltd.	13.50%
ACSA Global Ltd.	10.00%
Sub Total	74%
Pubic Participant	
Airports Authority of India	26%
Total	100%

4.5 Upon the instance of the Bench, Advocate of the Respondent submitted that the significance of having 26% of shareholding with AAI is on the basis of Special Resolution as per Companies Act. He further submitted that pursuant to the grant of concession, MIAL entered into an Operation, Management and Development Agreement (OMDA) on 04.04.2006 with the Airports Authority of India (AAI) for the operation, maintenance, development, design, construction, upgradation, modernization, financing and management of the Mumbai Airport. As a part of the concession, MIAL in addition to OMDA executed the State Support Agreement (SSA), Shareholders Agreement, Lease Deed etc. which are defined as "Project Agreements" under the OMDA. Article 20.3.2 of the OMDA categorically mentions that the OMDA represents the entire understanding between the parties i.e., MIAL and AAI, in relation thereto and in the event of a conflict between the terms of OMDA and of any Project Agreements, the terms of the OMDA shall prevail.

Hence, to understand and appreciate the unique status and position of MIAL vis-à-vis AAI, the OMDA would be the guiding document and not any other extraneous documents. The OMDA forms the basis of the relationship between MIAL and AAI and defines the specific rights and obligations of MIAL. The OMDA, being the parent document, takes precedence over other documents.

4.6 Upon the instance of the Bench, Advocate of the Respondent submitted that Article 90 and 91 of OMDA categorically states as under:

90. Maximum number of Directors: The Company shall have maximum number of twelve Directors. Subject to the provisions of the Act, the Company may increase or reduce the number of Directors.

91. Composition of Board of Directors: The Board shall comprise as under:

(a) AAI shall have the right to nominate such number of Directors as is proportionate to its equity shareholding in the Company subject to a minimum of one Director. For abundant clarity, it is expressly set out here that the aforesaid right of AAI to nominate one director to the Board shall subsist and survive irrespective of AAI not being a Shareholder in the Company.

(b) Private Participants shall have the right to nominate the remaining Directors.

Any fraction of a number or decimal numbers shall, while determining the entitlement of AAI and each of the Private Participant to nominate Directors, be rounded off to the nearest integer number.

4.7 Upon the instance of the Bench regarding the strength of the existing Directors, Advocate of the Respondent submitted that as on the present date, out of 12 Directors, 9 are from MIAL and the remaining 3 are from AAI. In addition, Advocate of the Respondent explained that under the Shareholder Agreement, the Directors representing the private parties constitute the majority. The Managing Director and Chairman of MIAL are also nominated by the private participants. The Shareholders Agreement would make it amply clear that neither the Central Government nor the State Government exercise control over the management of the affairs of or financial control over MIAL. He specifically demarcated to the following clauses of the Shareholders Agreement between all shareholders of MIAL:

"5.3.1 The Parties hereby undertake and agree that till such time as the Private Participants in the aggregate hold more than fifty (50) percent of the total paid up and outstanding equity share capital of the JVC, they shall have the right to nominate the Chairman of the JVC, who shall be appointed by the Board.

5.4.1 The Private Participants shall also nominate the Managing Director of the JVC, who shall, following a Board resolution, be appointed by the Board. The Managing Director shall not be liable to retire by rotation. The term of each appointment for the Managing Director shall be for such period as would be decided by the Board from time to time and subject to a details employment agreement (if considered necessary by the Board) with the appointee."

4.8 Subsequently, the Respondent explicated the interpretation and applicability of RTI Act on MIAL with specific reference to the term "Public Authority" which has been defined in Section 2(h) of the RTI Act as under:

"Section 2. Definitions.- 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;"

4.9 The Respondent, further, submitted that the pre-requisites contemplated under Section 2(h) of the RTI Act were mandatory in nature and must have been demonstrably existed in the facts of a case to make the provisions of the RTI Act applicable in the first place. He further submitted that the MIAL was a company of which majority shareholding (74%) was owned and controlled by private parties. He explained that the MIAL used to undertake its operations purely on professional and competitive norms, and endeavoured to generate revenues and profits with the objective of future expansion and growth for the benefit of the stakeholders and that the requisite ingredients for the application of the Act was absent. He furthermore submitted that the RTI Act itself laid the contours of its applicability and could not therefore be made applicable in all cases and situations overriding the clear legislative intent. Doing so would not only amount to re-legislating but would also result in disturbing the other aspects which have been considered by the legislature such as a bundle of conflicting recognised rights, e.g., the parallel right to privacy, right to do business freely etc. at the time of enacting the RTI Act. Bypassing these necessary checks and balances by re-legislating the RTI Act under the guise of interpretation would result in a chaotic and irreconcilable position which was clearly not permitted under Law. In this regard, the Respondent relied upon the judgment of the Hon'ble Supreme Court in the matter of Thalappalam Ser. Coop. Bank Ltd. and Ors. Vs. State of Kerala and Ors. [(2013) 16 SCC 82]. The relevant observations reads as under:

"27. Legislature, in its wisdom, while defining the expression "public authority" under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions 'means' and 'includes'. When a word is defined to 'mean' something, the definition is prima facie restrictive and where the word is defined to 'include' some other thing the definition is prima face extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there would exhaust themselves. Meanings of the expressions 'means' and 'includes' have been explained by this Court in Delhi Development Authority v. Bhola Nath Sharma (Dead) by LRs and others (2011) 2 SCC 54, (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.

28. Section 2(h) exhausts the categories mentioned therein. The former part of Section 2(h) deals with:

(1) an authority or body or institution of self-government established by or under the Constitution, (2) an authority or body or institution of self-government established or constituted by any other law made by Parliament, (3) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and (4) an authority or body or institution of self-government established or constituted by notification, issued or order made by the appropriate Government.

4.10 Consequently, Advocate of the Respondent submitted that the Right to Information was not an absolute right and that the MIAL operated in a competitive field and therefore had to ensure confidentiality, which if breached would result in irreparable damage or in some cases would adversely affect its operations. He further submitted that for various reasons, the provisions of RTI Act itself contained limitations on its applicability and consciously did not apply in all cases including, to private entities. He furthermore submitted that MIAL had been formed under a Public Private Partnership model to bridge the resource gap and encouraged greater efficiency and enterprise in the operation of airports, through the introduction of private capital and management skills.

4.11 As per the oral directions of the Bench during the proceedings held on 16.07.2019, Advocate of the Respondent produced a copy of Guidelines on Establishing Joint Ventures in Infrastructure Sectors published by The Secretariat for the Committee on Infrastructure, Planning Commission, Government of India. He also produced a copy of the following:

2.11.1 Aircraft movements under various heads such as:

2.11.1.1 International (Scheduled and Non-Scheduled); 2.11.1.2 Domestic (Scheduled and Non-Scheduled); and 2.11.1.3 General Aviation (Defence and Business) at Mumbai Airport for the period from 2014-15 to 2018-19;

2.11.2 Passenger movements under various heads such as:

2.11.2.1 International (Embarked, Disembarked and Transit); 2.11.2.2 Domestic (Embarked and Disembarked) at Mumbai Airport for the period from 2014-15 to 2018-19 2.11.3 No. of Airlines operating at Mumbai Airport classified into:

2.11.3.1 International (Passenger and Freighter); and 2.11.3.2 Domestic (Passenger and Freighter) at Mumbai Airport for the period from 2014-15 to 2018-19.

4.12 Advocate of the Respondent in order to explain the Grant of Function to the JVC, he elucidated on the scope of Grant which has been categorically mentioned at Chapter II of the OMDA, that states as under:

"2.1 Grant of Function 1.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the

functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical Services and non-Aeronautical Services (but excluding Reserved Activities) at the Airport, in accordance with the terms and conditions of this Agreement (the "Grant"). 1.1.2 Without prejudice to the aforesaid, AAI recognizes the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:

(i) develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Airport;

(ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of providing Aeronautical Services and Non-Aeronautical Services;

(iii) determine, demand, collect, retain and appropriate charges from the users of the Airport in accordance with Article 12 hereto; and

(iv) Contract and/or sub contract with third parties to undertake functions on behalf of the JVC, and sub-lease and/or license the Demised Premises in accordance with Article 8.5.7.

4.13 In continuation, Advocate of the Respondent stressed upon the fact by referring to the Guidelines on Establishing Joint Ventures in Infrastructure Sectors that Rule 7 categorically deals with shareholding in a JV. Rule 7.1 and 7.2 states as under:

"7.1 The share of the public sector entity in a JV could be in any proportion, say 74:26, 50:50 or 40:60 etc. If the public sector entity owns more than 50 per cent share, the JV would be regarded as a public sector entity. However, if the share of public sector entity is 50 per cent or less, then the JV is a private sector company and would therefore, not be accountable to the Government, Public Accounts Committee, Public Undertakings Committee, C&AG, etc. Nor would the Government rules relating to procurement and expenditure apply to such a JV. Such a JV must, therefore, be treated at par with other private companies and any procurement of goods or services from such a JV must follow the normal tendering processes as per GFR.

7.2 The share of public sector entity is often kept at 50 per cent or less so as to enable the JV to function as a private sector entity with greater commercial freedom.

However, this implies that though the public exchequer would contribute to the equity of such an enterprise, it would hardly exercise control over its functioning. It should be borne in mind that private sector entities would find such a JV to be more attractive as it would provide them with government funds and support without any accountability as noted above. It could also give them an undue advantage in government procurement as a JV would often be perceived to be a government or semi-

government company. Such possibilities of undue advantage or vitiating of the government procurement process should be identified and eliminated in case a JV is proposed to be formed.

4.14 In addition, Advocate of the Respondent explained the actuality of MIAL having been not established or constituted under the Constitution or by the Legislature etc, the same was not 'Public Authority'. He submitted that notification or order contemplated in the said provision i.e., Section 2(h)(d) must have a direct effect of constituting or establishing the said body, as is abundantly clear from a plain reading of the language of the said Section. Section 2(h)(d) contemplates a direct notification or order under which the body is established or constituted. It does not contemplate any such formation/establishment by way of implication. In the absence of the same, the mandatory pre-requisites of Section 2(h) of the RTI Act would certainly not get fulfilled and consequently the same would not be applicable. The preceding categories dealing with the constitution of a body by enactment of law, etc. also threw light on thas aspect and demonstrated that what was contemplated was a specific notification directly resulting in the constitution of the body.

4.15 He further submitted that the AAI was a statutory corporation completely distinct from the Central Government as held by the Hon'ble Supreme Court in the case of Municipal Commissioner of Dum Dum Municipality and Ors. vs. Indian Tourism Development Corporation and Ors. (1995 SCC (5) 251).

4.16 He furthermore submitted that MIAL was not "controlled" either directly or indirectly by the appropriate government. With regard to the term, "controlled", the same had been construed in various judicial pronouncements and also in the judgment of the Hon'ble Supreme Court in the matter of Thalappalam Ser. Coop. Bank Ltd. and Ors. Vs. State of Kerala and Ors. [(2013) 16 SCC 82] in the context of the RTI Act itself wherein the Hon'ble Court observed as under:

"31. ...

(a) ...

(b) ...

A body which is controlled by the appropriate government can fall under the definition of public authority under Section 2h(d)(i). Let us examine the meaning of the expression "controlled" in the context of RTI Act and not in the context of the expression "controlled" judicially interpreted while examining the scope of the expression "State" under Article 12 of the Constitution or in the context of maintainability of a writ against a body or authority under Article 226 of the Constitution of India. The word "control" or "controlled" has not been defined in the RTI Act, and hence, we have to understand the scope of the expression 'controlled' in the context of the words which exist prior and subsequent i.e. "body owned" and "substantially financed" respectively. The meaning of the word "control" has come up for consideration in several cases before this Court in different contexts. In State of West Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447 while interpreting the scope of Article 235 of the Constitution of India, which confers control by the High Court over District Courts, this Court held that the word "control" includes the power to take disciplinary action and all other incidental or consequential steps to effectuate this end and made the following observations:

> "The word 'control', as we have seen, was used for the first time in the Constitution and it is accompanied by the word 'vest' which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary. Control, therefore, is not merely the power to arrange the day-to-day working of the court but contemplates disciplinary jurisdiction over the presiding Judge.... In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, ..."

32. The above position has been reiterated by this Court in Chief Justice of Andhra Pradesh and others v. L.V.A. Dixitulu and others (1979) 2 SCC 34. In Corporation of the City of Nagpur Civil Lines, Nagpur and another v. Ramchandra and others (1981) 2 SCC 714, while interpreting the provisions of Section 59(3) of the City of Nagpur Corporation Act, 1948, this Court held as follows:

> "4. It is thus now settled by this Court that the term "control" is of a very wide connotation and amplitude and includes a large variety of powers which are incidental or consequential to achieve the powers- vested in the authority concerned....."

4.17 Advocate of the Respondent submitted that the perusal of the above left no room for doubt that the term "controlled" envisioned substantial control and not mere regulatory or supervisory nature of control. In the present case, no such substantive control could be established. In fact, MIAL was a closely held company undertaking its business operations with commercial and professional objectives. It took independent decisions pertaining to management and operations. Admittedly, the professionally appointed persons in MIAL used to take decisions for the benefit of the company and were guided by professional norms. He further submitted that like every other industry, aviation industry was also regulated, for instance by AERA i.e., Airports Economic Regulatory Authority. Merely on the basis of the fact that MIAL was engaged in a regulated industry could not be a ground

to hold the same a 'Public Authority'. While the aviation industry was regulated by AERA, the day-to-day operations of MIAL were not regulated by AERA. He furthermore submitted that it could not be also lost sight of the fact that, a regulatory mechanism virtually engulfed any entity existing in some form or the other and hence if that was sought to be read in as a criteria in the RTI Act, not only would the same be an exercise of re- legislation, but would make the same unworkable.

4.18 Subsequently, Advocate of the Respondent submitted that the aspect of "controlled" has been elucidated by the Hon'ble Supreme Court in the case of Thalappalam (supra). The relevant portion of the judgment is reproduced as under:

> "34. We are of the opinion that when we test the meaning of expression "controlled" which figures in between the words "body owned" and "substantially financed", the control by the appropriate government must be a 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 Section 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. Powers exercised by the Registrar of Cooperative Societies and others under the Cooperative Societies Act are only regulatory or supervisory in nature, which will not amount to dominating or interfering with the management or affairs of the society so as to be controlled. Management and control are statutorily conferred on the Management Committee or the Board of Directors of the Society by the respective Cooperative Societies Act and not on the authorities under the Co-operative Societies Act.

35. We are, therefore of the view that the word "controlled" used in Section 2(h)(d)(i) of the Act has to be understood in the context in which it has been used vis-à-vis a body owned or substantially financed by the appropriate government, that is the control of the body is of such a degree which amounts to substantial control over the management and affairs of the body."

4.19 In addition, Advocate of the Respondent submitted that the aspect of "substantial financing" has been explicated by the Hon'ble Supreme Court in the case of Thalappalam (supra). The relevant portion of the judgment is reproduced as under:

> "36. The words "substantially financed" have been sued in Section 2(h)(d)(i) &
>
> (ii), while defining the expression public authority as well as in Section 2(a) of the Act, while defining the expression "appropriate Government". 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 Section 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.
>
> 37. We often use the expressions "questions of law" and "substantial questions of law" and explain that any question of law affecting the right of parties would not by itself be a substantial question of law. In Black's Law Dictionary (6th Edn.), the word 'substantial' is defined as 'of real worth and importance; of considerable value; valuable Belonging to substance; actually existing; real: not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.' 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, through.' 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.

38. Merely providing subsidiaries, 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. The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from NABARD etc., but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body with the fold of "public authority" under Section 2(h)(d)(i) of the Act. But, there are instance, where private educational institutions getting ninety five per cent grant-in-aid from the appropriate government, may answer the definition of public authority under Section 2(h)(d)(i).

4.20 Upon the instance of the Bench, the Advocate of the Respondent concluded his submissions that 28.7% of projected revenue is being financed from Airports Authority of India and about 9000 crores have been paid by the Mumbai International Airport Ltd.

4.21 Advocate of the Respondent in response to the claim of the Complainant submitted that the Complainant has largely failed in proving the factum that the MIAL was a Public Authority. In this regard, he further relied upon the Hon'ble Supreme Court in the case of Thalappalam (supra). The relevant portion of the judgment is reproduced as under:

> "40. The burden to show that a body is owned, controlled or substantially financed or that a non-government organization is substantially financed directly or indirectly by

the funds provided by the appropriate Government is on the applicant who seeks information or the appropriate Government and can be examined by the State Information Commission or the Central Information Commission as the case may be, when the question comes up for consideration. A body or NGO is also free to establish that it is not owned, controlled or substantially financed directly or indirectly by the appropriate Government.

41. Powers have been conferred on the Central Information Commissioner or the State Information Commissioner under Section 18 of the Act to inquire into any complaint received from any person and the reason for the refusal to access to any information requested from a body owned, controlled or substantially financed, or a non-government organization substantially financed directly or indirectly by the funds provided by the appropriate Government. Section 19 of the Act provides for an appeal against the decision of the Central Information Officer of the State Information Officer to such officer who is senior in rank to the Central Information Officer or the State Information Officer, as the case may be, in each public authority. Therefore, there is inbuilt mechanism in the Act itself to examine whether a body is owned, controlled or substantially financed or an NGO is substantially finance, directly or indirectly, by funds provided by the appropriate authority.

4.22 Adding on to it, Advocate of the Respondent submitted that with reference to the 26% shareholding of MIAL, it is stated that it does not constitute substantial financing as in the case of Col. P.K. Garg v. Care Homes Limited (CIC/A/523/ICPB/2007) wherein the Hon'ble Commission has held that the percentage of shareholding held by the Life Insurance Corporation (a Public Authority) was 39.14% and yet the same was not found to be germane to the issue of the company being a "Public Authority" under the provisions of the RTI Act. Most importantly, there is not an iota of evidence brought on record by the Complainant to establish any financial assistance or loan having been extended by the Central Government to AAI for the purpose of acquiring 26% shareholding in MIAL. He further submitted that with regard to the lease granted by AAI to MIAL at a concessional rate, it was stated that the basis of the concession was the revenue sharing model wherein 38.7% of the projected pre-tax gross revenue was paid by MIAL to AAI as Annual Fee (in addition to Rs. 150 crores paid by MIAL to AAI as a non-refundable upfront fee). In terms of the provisions, MIAL had paid over 9,635.29 crores to AAI in the last 13 years, of which Rs. 1437 crores was given in the year 2018-19 as annual fee. The relation subsisting between AAI and MIAL was purely commercial in nature. He reiterated that a higher revenue share coupled with technical competence were the determining factors towards selection of the successful bidder and not lease rent.

4.23 Finally, Advocate of the Respondent relied upon an order of the Commission in the matter of D.K. Soni v. Apollo Hospital (CIC/AD/A/2009/000964) wherein it was held that the grant of land on lease at concessional rate was not a necessary

parameter for purposes of deciding the status of a body as a "Public Authority", especially when the hospital in that case was required to treat some percentage of patients free.

5. The main grievance of the complainant was that the respondent company namely the MIAL, being government company or instrumentality of the State under article 12 of the constitution was 'public authority' under the provisions of section 2(h) of the RTI Act, 2005 and thus bound by the provisions of the RTI Act, to appoint central public information officers with a duty to disclose information as per mandate of the RTI Act. Section 2(h) of the RTI Act, reads as under:

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

a) .....

.....

.....

(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-

body-owned, controlled or substantially financed;

(i) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

5.1 It is an admitted fact that the MIAL has not been established or constituted by or under the constitution or by any other law made by Parliament or by State Legislature. It has been incorporated as company under the provisions of the Companies Act 1956 wherein private participation is 74% and the remaining 26% is with AAI. The only issue for the consideration of the Commission was whether the MIAL fell within the ambit of the provisions of sub clause (d) of clause (h) of section 2 of the RTI Act or not. It had also been contended vehemently by the complainant on the strength of various judicial pronouncements that MIAL was a "State" under article 12 of the constitution. We may discuss the same for clarity on the subject.

5.2 The object of defining 'State' under Article 12 of the Constitution is to put restrictions on the 'public authorities' and ensure that they abide by the mandate of 'Part III' (Fundamental Rights) and 'Part IV' (Directive Principles of State Policy) of the Constitution. Such restrictions are not applicable to private bodies (Shamdasoni vs Central Bank of India AIR.1952 SC 59; K.A.Karim Vs ITO 1983 Tax LR 1168; Haji Mohd. Ibrahim Vs Gift Tax Officer 1963 Tax LR 1160).

5.3 In Sukhdev Singh Vs Bhagatram AIR 1975 SC 1331, while examining the bodies i.e. LIC, ONGC and Finance Corporation inter alia held that an autonomous body whether statutory or non-statutory were found to be a instrumentalities of STATE though these bodies had independent legal personality on account of being the under control of the Government.

5.4 In Sabhajit Tewary Vs Union of India AIR 1975 SC 1329, CSIR was not held as STATE on the ground that the same was not a statutory body but a society registered under Societies Registration Act though the same was under deep pervasive control and was also financed by the Government.

5.5 In Rajasthan State Electricity Board Vs Mohan Lal AIR 1967 SC 1857 though the RSE Board was carrying commercial activities in distinction with the Governmental functions. The same was already to be said on the strength that the Government could carrying commercial activities under the provisions of Article 298 of the Constitution. Similarly the principles of instrumentality was discussed in the matter of R D Ramana Vs International Airport Authority of India AIR 1979 SC 1628 and Somprakash Vs Union of India AIR 1981 SC 212. A new judicial trend emerged in the case of Ajay Hasia Vs Khalid Mujib AIR 1981 SC 487 wherein the concept of instrumentality or change of the Government was not held to be limited to a corporation created by a statute but the same was held to be equally applicable to a company or a society. Thus a registered society was held an authority for the purpose of Article 12 in contradistinction of Sabhajit Tewary (supra). The court laid down the following tests to adjudge whether a body is an instrumentality of government or not:

i) If the entire share capital of the body is held by the government;

ii) Where the financial assistance given by the government is so large as to meet almost entire expenditure of the body;

iii) It is a relevant factor if if the body enjoys monopoly status which is conferred or protected by the State;

iv) Existence of deep and pervasive state control may afford an indication that the body is a state instrumentally;

v) If the fuctions performed by the body are of public importance and closely related to governmental functions.

5.6. In the case of Central Inland Water Transport Corporation (Corporation)case (supra), the facts include that one Brojonath Ganguly was an employee (Deputy Chief Accounts Officer) in a company namely, the 'Rivers Stream Navigation Company

> Limited'. The said Company was taken over by the 'Corporation' in accordance with a scheme of arrangement. Mr Brojonath, among others, was appointed by the Corporation after taking over the company in accordance with terms and conditions of the letter of appointment. The issue which cropped up and came for consideration before the Apex Court was whether termination of service of a permanent employee (Brojonath and others) in accordance with Rule 9 of the Service & Disciplinary Rules of the Corporation (unconscionable term), was legally sustainable. The plea to challenge the order of termination within 48 hours of the show cause notice, in spite of refutal of the charges, inter alia included that the Corporation being State might have not breached its duty of acting in accordance with the provisions of Part III & Part IV of the constitution.

The Supreme Court held-

> "113 We would like to observe here that as the definition of "the State" in Article 12 is for the purposes of both Part III and Part IV of the Constitution, State actions, including actions of the instrumentalities and agencies of the State, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV. Clause (a) of Article 39 provides that the State shall, in particular, direct its policy towards "securing that the citizens, men and women, equally have the right to adequate means of livelihood." Article 41 requires the State, within the limits of its economic capacity and development, to "make effective provision for securing the right to work". An adequate means of livelihood cannot be secured to the citizens by taking away without any reason the means of livelihood. The mode of making "effective provision for securing the right to work" cannot be by giving employment to a person and then without any reason throwing him out of employment. The action of an instrumentality or agency of the State, if it frames a service rule such as Clause
>
> (a) of Rule 9 or a rule analogous thereto would, therefore, not only be violative of Article 14 but would also be contrary to the Directive Principles of State Policy contained in Clause (a) of Article 39 and in Article 41."

5.7 The Central Inland Water Transport Corporation is not only a Government company as defined under section 617 of the Companies Act 1956, but is wholly owned by the three Governments-Central Government and the Governments of West Bengal and Assam jointly. It is financed entirely by these three Governments and is completely under the control of the Central Government, and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it. In every respect it is thus a veil behind which the Central Government operates through the instrumentality of a Government company. The activities carried on by the Corporation are of vital national importance. There can thus be no doubt that the corporation is a Government undertaking in the public sector.

5.8 In the Sabhajit Tiwari case(supra), the Supreme Court while holding the Council of Scientific and Industrial Research(CSIR) not as State under article 12 of the Constitution relied upon its non-statutory character like those of the Oil and Natural Gas Commission, or the Life Insurance Corporation(LIC), or the Industrial Finance Corporation(IFC).

However, Sabhajit (supra) stands overruled by the law laid down in Pradeep Kumar Biswal case(2002).

5.9 Thalappalam Ser.Coop.Bank Ltd.& Ors. vs State Of Kerala & Ors [(2013) 16 SCC 82] The Supreme Court of India held that a co-operative society registered under the Kerala Co-operative Societies Act was not bound by the country's Right to Information (RTI) Act to provide information sought by a citizen and that the Society did not fall within the definition of "public authority" under the RTI Act. The Applicant had requested information relating to the bank accounts of certain members of the Mulloor Rural Co- operative Society Ltd. The Court reasoned that co-operative societies neither met the threshold of control by government required under the definition of "the State" in Article 12 of the Constitution nor were "substantially financed" by the government so as to qualify as a "public authority" under the RTI Act. In balancing the Applicant's right to disclosure against the privacy rights of the Society's members the Court reasoned that the information was personal and did not relate to any public activity or interest, so the public authority or officer was not obliged to comply with the request.

5.10 The Supreme Court in the case of :-

> DAV College Trust and Management Society and Ors Vs Director of Public Instructions & Ors (Civil Appeal No. 9828 of 2013) while discussing case law and taking note that various DAV Colleges received grant between 40 to 44% of the total financial outlay in each year and that as far as work are concerned 95% salary of the teaching and non-teaching staff of the colleges are borne by the State Government. The Apex Court found that those were substantial payment and amounted to half of the expenditure of the Colleges/Schools and more than 95% of the expenditure as far as teaching and other staff was concerned. Therefore it was held that those colleges and schools were substantially financed and thus public authority within the meaning of Section 2(h) of the Act.
>
> 5.11 The High Court of Delhi in the case of:-
>
> Hardicon Limited Vs Madan Lal in W.P.(C) 6946/2011 & CM No. 15943/2011 while setting aside order dated 21.4.2011 of the full bench of the Central Information Commission(CIC) observed as:-
>
> "15. The CIC held that as 61.5% of equity of the petitioner was subscribed by government owned entities and the same would meet the criteria of substantial financing by an appropriate Government. I find it difficult to agree with the said conclusion. Admittedly, the Government - whether it be State Government or Central

> Government - has not provided any direct funding to the petitioner. The question whether the entity has been indirectly financed is to be determined on the facts of each case. In this case, there is no material to indicate any flow of funds from any government to the petitioner. In order to hold that an entity has been indirectly financed by an appropriate Government, first of all, it is necessary to find that the Central Government has parted with some funds for financing the authority/body; and secondly, the said funds have found their way to the authority/body in question. The link between the financing received by an entity and an appropriate Government must be clearly established.
>
> 16. In this case, there is no material to indicate that any of the funds received by the petitioner owed their source to either the Central Government or the State Government. The constituent shareholders of the petitioner are independent entities and whose source of funds is not limited to the Central Government/State Government. Although, substantial part of equity of nationalized banks is held by the Government, the sources of funds available to the bank are not limited to the Government alone. Banks receives substantial deposits as a part of their business. In addition, the banks also generate substantial income from their commercial activities. Such funds are also deployed by banks by lending and investing in other entities. Since the funds received by the petitioner by way of subscription to its equity cannot be traced to any Government. The conclusion that the government has indirectly provided substantial finance to the petitioner is not sustainable."
>
> 5.12 It may not be out of place to state that, among others, the objective of the RTI Act is to place the 'public authority' subject to part III and part IV of the Constitution. Moreover, as a quasi judicial body the CIC may not include what is not intended by the legislature.

The Supreme Court (2005)4 SCC,649,684) while holding that the Board of Control for Cricket in India (BCCI) not as 'State' observed that in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

5.13 The above discussion makes it amply clear that the evolution of the definition of 'state' under article 12 of the constitution has been subsumed into the definition 'public authority' and that the obligation of disclosure of information is upon the public authority in contradistinction of the private body.

6. The Commission after adverting to the facts and circumstances of the case, hearing both the parties and perusal of records, observes that the complainant had not filed second appeal aggrieved by non receipt of information/reply in response to his RTI application and first appeal before approaching this commission by way of complaint. Prima facie, it may not be unreasonable for MIAL to consider itself not covered within the meaning of public authority under the RTI Act.

Keeping in view of the above facts, it might not be proper for this Commission, on a complaint, where the relief sought had been punishment for not maintaining a list of CPIOs to punish without holding MIAL a 'public authority' or to treat complaint as second appeal. The ideal situation should have been that the complainant had exhausted available remedies i.e. First Appeal and/or Second Appeal. Having been not declared as 'public authority', MIAL might not be under an obligation to disclose the information requested for by the complainant nor maintain a list of CPIOs as mandated by the RTI Act.

6.1 The Supreme Court in the case of Chief Information Commissioner and Another Vs State of Manipur and Another [(2011) 15 Supreme Court Cases 1] has held :-

> "The only order which can be passed by the Information Commissioner under Section 18 is an order of penalty provided under Section 20. However, before such order is passed the Commissioner must be satisfied that the conduct of the Information Officer was not bona fide. The Commissioner while entertaining a complaint under Section 18 has no jurisdiction to pass an order providing for access to the information.
>
> The appellant after having applied for information under Section 6 and then not having received any reply thereto, it must be deemed that he has been refused the information. The remedy for such a person who has been refused the information is provided under Section 19 of the Act."

6.2 Now a specific direction has been given by the Hon'ble High Court of Delhi to the Commission to consider afresh and decide whether MIAL is a 'public authority'. In pursuance of the directions we have reconsidered the issue and heard both parties. The Commission after adverting to the facts and circumstances of the case, hearing both parties and perusal of records feels that MIAL is not a 'public authority 'under S. 2 (h) of the RTI Act, 2005. We are also of the view that it may be open to the complainant to seek information through public authority for MIAL i.e. AAI or Ministry of Civil Aviation as the case may be. That being so, the complaint of the complainant is unfounded and the same is rejected. The Commission puts it on record that it could not meet the timelines provided by the Hon'ble High Court due to the reasons including Constitution of Bench, non- appearance of parties and COVID-19 which were procedural and beyond the Commission's powers.

Sd/-
(Suresh Chandra) ( )
Information Commissioner
/Date: 18.05.2020

Sd/-
(Divya Prakash Sinha) ( )
Information Commissioner
/ Date: 18.05.2

Authenticated true copy
( )

(Brig Vipin Chakrawarti) ( )

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