



**RIGHT TO
INFORMATION**

1

**STATE INFORMATION COMMISSION, HARYANA
SCO 70-71, SECTOR 8-C, Chandigarh.
Complaint case No. 08 of 2014
Right to Information Act – under Section - 20**

Relevant Facts emerging from the appeal:

Name of the complainant	Sh. Harinder Dhingra, D4 A/7, DLF, Phase No. 01, Gurgaon.
Name of the Respondent	1. Rapid Metro Rail Gurgaon Ltd. 2 nd Floor, Ambience Corporate Tower, Ambience Island, NH No. 8, Gurgaon. 2. SPIO O/o Administrator, HUDA, Gurgaon. 3. SPIO O/o The Chief Administrator, HUDA, Panchkula. 4. FAA-cum-Estate Officer-II, HUDA, Gurgaon.
RTI application filed on	05.12.2013
Date of earlier hearing	20.2.2014, 21.3.2014 & 29.5.2014
Date of Present Hearing	20.06.2014
Presence	Sh. Harinder Dhingra, complainant. Shri Raj Pal Lamba, SPIO O/o EO-II Sh. S.C. Kansal, Advisor (Finance), HMRTC Limited. Shri Pritam Kumar, Shri V.P. Anand, Advocate Abhishek Sharma and Advocate Chaitanya Puli on behalf of Rapid Metro Rail Gurgaon.
Chief Information Commissioner	Shri Naresh Gulati

W

While adjudicating on the complaint filed by Shri Harinder Dhingra, the issue arose whether Rapid Metro Rail Gurgaon (RMGL) Limited is a public authority in term of Section 2 (h) of the RTI Act, 2005 or not, it was decided to refer the matter to the Division Bench by including Maj. Gen. (Retd.) Shri J.S. Kundu, State Information Commissioner in the Bench.

2. The onus to prove that a body is owned, controlled or substantially financed directly or indirectly by the funds provided by the appropriate



Government is on the complainant or the appropriate Government. Hence the Bench decided to afford the complainant an opportunity to submit the material facts and arguments on the basis of which the RMGL is a public authority within the definition of Section 2(h) of the RTI Act, 2005. A body is also free to establish that it is not owned, controlled or substantially financed directly or indirectly by the appropriate Government or its instrumentalities.

3. Shri Harinder Dhingra, the complainant submitted his written submissions to establish that the RMGL is a public authority as it was substantially financed by the Government through Haryana Urban Development Authority (in short HUDA). He submitted that the HUDA vide Memo number STP (H)/2010/4443 dated 16th April, 2010 and letter No. HUDA-CCF-Actt-II-2013 has allotted 14.02 acres out of 20.94 acres of project land to the RMGL. He contested the claim of the RMGL that 4.2 acres have been allotted by the HUDA. In support of his averment, he quoted from an interview of Mr. Sanjeev Rai, CEO published in **Business Line of The Hindu** dated 28th October 2013. HUDA has provided the land on token cost amounting to Rs. 5 crore + Rs. 5.3 crore annually. Land price in any project is a major cost. He further argued that had the appropriate Government through HUDA not provided the land to the RMGL, the project would not have come into existence. Hence it fulfills the yardstick laid down by the Hon'ble Apex Court Judgement in case of **Thalappalam Ser. Coop Bank Limited and others Vs State of Kerala and others, 2013 (12)**. He further submitted that the HUDA by first amendment dated 3rd May 2011 to land lease agreement executed



between HUDA and the RMGL has further allowed 2.5 meters wide strip out of Green Belt along NH 8 on the same terms and conditions which implies that another chunk of priceless land has been given to the RMGL. HUDA has provided the land at lease rent of 9% of collector Rate, 9% of External Development Charges and accrual of revenue of Rs. 765 crore in the sum of Rs. 40.00 crore per year from the beginning of 17th year of the signing of agreement till 35th year totaling to Rs. 760 crores plus Rs. 5.00 crore at the time of signing of the contract agreement and 5%-10% of advertising charges. Hence the respondent is to pay Rs. 765 crore over a period of 37 years starting from 17th year of operation to 54th year of operation which means that the payment is deferred payment and amounts to funding by the appropriate Government. He also urged that the revenue sharing is on advertising and not ticket revenue. In a nutshell the complainant articulated that the Government is indirectly financing the RMGL as the land value on the date of handing over of possession was around Rs. 30 crore (as per circle rate decided by the District Collector in 2010) which was provided for the project at the rate of Rs. 68 lac per annum which is substantial funding.

Again, RMGL has been provided 10 acre of land as per HUDA letter CCF-Acctt-II-2013 at "acquisition rates" alongwith EDC value at Rs. 44.87 lacs/acre against the Circle rate of Rs. 1.5 lac per square yard for commercial use as on May, 2013. Hence the Government has given land worth Rs. 726 crore for Rs. 4.5 crore per annum thus giving again substantial funding as the return to HUDA is 0.62% per annum against Bank rate of 12%. Further, the RMGL has been allowed to sell 250



square meters of station space for commercial use which for 12 stations (6 already made and 6 under construction) means 3000 square meters of commercial space. The cost of the land is Rs. 64.58 crore. Whereas the RMGL has paid Rs 13 crore upfront, lease rent etc. He submitted that this project would not have been possible without the land which was provided by the appropriate Government through HUDA. Hence, the RMGL is a public authority as stipulated under Section 2 (h) (d) (i) of the RTI Act, 2005.

W Regarding control, the complainant submitted that clause 15.1 and 22 of Concession Agreement dated January 2013, the concessionaire is bound to submit monthly/quarterly progress reports to HUDA. Under clause 23.1.1 there are restrictions on the concessionaire to regulate the traffic on the rail system in accordance with applicable laws and subject to the supervision and control of the State Government/HUDA. Again, Clause 30 of the agreement empowers HUDA to suspend/terminate the concession agreement if any of the conditions are breached. Hence the complainant concluded that there was substantial evidence to suggest that the RMGL is controlled by the appropriate Government through the concession agreement and is a public authority under the provision of the RTI Act, 2005.

Shri Harinder Dhingra, during discussion, submitted that legal practitioner cannot be permitted to defend the case on behalf of the respondent and cited judgement dated 22.04.1966 of the Hon'ble Apex Court delivered in the case of State of Madhya Pradesh V/s. Shobha Ram and Ors. The Objection was not sustained in view of the Haryana Right to



Information Rules, 2009 framed under the Act and also in view of the provision made in the RTI Act, 2005 which does not place any bar on the appearance of the Advocate before the Commission and the Judgement does not apply in this case.

4. The appropriate Government was represented by Sh. N.S. Yadav, Estate Officer-II, HUDA, Gurgaon. He filed his reply dated 12.5.2014. He submitted that there are two companies namely Rapit Metro Rail Gurgaon Limited (RMGL) and Rapid Metro Rail Gurgaon South Ltd.(RMGSL). The project of development of Metro Link from Sikanderpur Station to NH-8 was awarded to RMGL through tendering procedure in 2009. The total land which has been allotted to RMGL was 4.27 acres. It is correct that HUDA was required to provide the 10-12 acres of land for temporary casting Depot/Yard as per concession agreement between HUDA and RMGL in 2009. Against this contract, 7.02 acre land was given on lease basis for 3 years but the entire land has been reverted back. As per the contract, HUDA has provided 4.27 acres land on lease hold basis.

HUDA has provided 10 acres of land in Sector 52 A @ Rs.4487017/- per acre on lease hold basis to RMGSL to meet the requirements of land for technical and operational facilities. The lease rent is to be increased by 15% after every 5 year. The title of the land shall remain vested in HUDA for all times. They have been allowed construction on the central verge of sector roads owned by HUDA as per provisions of the Concession Agreement.

He further submitted that in compliance of the Commission's directions dated 20.2.2014, the available information was supplied to the



Complainant vide letters dated 19.03.2014 and 20.03.2014 with copy to the Commission.

5. Shri S.C Kansal, Advisor (Finance), Haryana Mass Rapid Transport Corporation Limited, Panchkula was present during hearing. In his written submissions dated 13.05.2014, he submitted that tender for the project of development of Metro Link from Sikanderpur Station NH-8 was floated in the market twice i.e. on 10.12.2008 and 18.03.2009. The project was awarded to RMGL on the following terms & conditions:-

1. Rapid Metro Rail Gurgaon Limited (RMGL) will incur the total cost of the project and no financial support in the form of equity or grant during construction of project or during operation and maintenance of project or any exemption from payment of taxes/duties will be provided by the Govt. of Haryana.
2. Rapid Metro Rail Gurgaon Limited (RMGL) will pay to Govt. of Haryana the connectivity charges as per the schedule given below:-
 - (i) Rs. 5 Crore at the time of signing of the contract agreement.
 - (ii) Rs. 40 crore per year from the beginning of 17th year of the signing of agreement till 35th year i.e. for 19 years totaling to Rs. 760 crores.
 - (iii) Rapid Metro Rail Gurgaon Limited (RMGL) will share the annual revenue generated from advertisement rights and property development as per the following schedule:-
 - a) Upto 16 years from the date of start of revenue generation-5%
 - b) From beginning of 17th year till end of 21st year-6%
 - c) From the beginning of 22nd year till end 26th year-7%
 - d) From the beginning of 27th year till end of 31 year-8%



- e) From the beginning of 32nd year till end of 36 year-9%
 - f) From the beginning of 37th year till end of concession period-10%
3. Rapid Metro Rail Gurgaon Limited (RMGL) will provide unconditional and irrecoverable performance security of Rs. 25 crores in the form of bank guarantee for the satisfactory execution of project.
 4. Govt. of Haryana shall allow construction on the central verge of Vishavakarma road. The total area of the central verge used for the project shall be allowed on lease hold basis and annual lease shall be worked out @ 9% on the prevalent collector rate applicable for the raw land plus external development charges of Urban Estate Gurgaon. The title of said land shall always remain with the Govt. /HUDA at all the time. The lease rent will increased @ 15% per annum after every 5 years.
 5. The Govt. of Haryana shall allow M/s RMGL to use maximum 250 sqr.mtr. of the total covered are of the station for small retail shops.

lu

He quoted from the report of Working Group of Union Transport which reports that the Metro Rails have been developed in 113 cities in the world, out of which 88% have been developed and are being operated in public sector whereas in only 12% cities some form of public private partnership exists. In this case, the complete cost of project is borne by the private party and no financial support of the State or the Central Government is involved. Rather the private party is paying connectivity charges to the State as well as paying 5% to 10% share from the revenue generated out of property development and advertisement rights. He also submitted that this is a unique model in the country where the 100% of the cost is borne by the private party. He argued that the project was awarded to RMGL through competitive



bidding process and appropriate Government or its instrumentality, HUDA, has neither substantially financed it nor the RMGL is controlled by the appropriate Government. Hence, it cannot be termed a public authority under the Act.

6. The RMGL was represented by Shri Pritam Kumar and Shri Anand Kumar, Manager, RMGL. Shri Abhishek Sharma, Advocate appeared on behalf of the RMGL. Learned Counsel submitted that the RMGL is a wholly private company and no parts of its shares are held by the Government. The entire project is costing Rs.1229 crore and the entire cost of the project has been arranged exclusively by RMGL. It is neither owned nor controlled by the appropriate Government or any of its instrumentalities. Further, RMGL is not substantially financed by funds provided directly or indirectly by the appropriate Government. The Complainant's argument that portion of the project land arranged by HUDA is in the prime area, therefore, it is of considerable value and amounts to substantial funding of the project is completely illogical and deserves to be dismissed out rightly. Out of the total land requirement of 20 acres for the project, 16.67 acres have been arranged by RMGL through its own efforts and at its own expense, only 4.27 acres has been arranged by HUDA at agreed terms and conditions. The land provided by HUDA comprises road medians and has no commercial or other value or usage. In terms of the Clause 5 of Land Lease Agreement dated 16.7.2010 read with Clause 8.1 of the Concession Contract dated 9.12.2009 RMGL is mandated to pay an annual lease rent at the rate of 9% per annum on the prevailing collector rate



applicable for raw land. The lease rent has an in built escalation at the rate of 15% after 5 years. In addition, RMGL is under an obligation to pay External Development Charges as well as connectivity charges. RMGL also pays a fixed percentage of its annual revenues from advertisement and property development to HUDA. It is misleading to suggest that HUDA has provided 14.2 acres of land for the project being implemented by RMGL. From the narration of the above facts, it is evident that major portion of the land requirement has been made by RMGL itself. Learned Counsel cited the Apex Court's decision in the case of Thalappalam Ser. Coop. Bank Ltd. and Ors. V. State of Kerala and Ors., 2013 to support his contention that RMGL is not a public authority. It has been held by the Apex Court that *mere providing of 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 fund, it would struggle to exist.* The respondents cannot be said to be substantially financed by the appropriate Government and is not amenable to the purview of the RTI Act.

Learned Counsel further submitted that the complainant has contended in his written statement dated 24.03.2014 that clauses 15.1, 22.1 and 23.1.1 suggest that the respondent is controlled by HUDA since it enjoys various powers under the agreement. He also submitted that this is an attempt to mislead the Commission since no Concession Agreement dated January, 2013 was executed between the respondent



and HUDA. The agreement which has been referred to is in fact a Concession Agreement executed between HUDA and Rapid Metro Gurgaon South Limited (an entity different from the respondent) which is distinct from the respondent and is not concerned with the present proceedings.

7. The Bench heard the argument of all the parties and perused the documents and all the relevant record placed on the file. The material facts of the case were examined to form a considered view whether the funding to the RMGL is so substantial and the control by the appropriate Government or its instrumentalities is so deep and pervasive that it measures up to the yardstick laid down by the Apex Court in Thalappalam Ser. Coop. Bank Ltd. case where it has been held that the funding to the body should be so substantial that but for such funding, it would struggle to exist. Similarly, the expression control by the appropriate Government would mean control of a substantial nature. The Apex Court has held that 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.

Regarding substantial financing of RMGL, the main argument of the complainant is that 14.2 acre land was allotted to the respondent body and it amounts to substantial funding. The bench noted that HUDA



had allotted 4.2 acre land for Rapid Metro Rail Gurgaon project on agreed terms and conditions which are listed in para 5 of this order. The contention of the complainant that 14.2 acre land was allotted to the respondent body by HUDA is not based on record. To put the record straight, HUDA has allotted 10 acres of land but this land was allotted to Rapid Metro Rail Gurgaon South Limited on the terms and conditions which were not based on the Concession Agreement which was executed on 9.12.2009. The bench also observed that out of the total land requirement of 20 acres, merely 20% of the total requirement has been contribution by HUDA and that also is not prime land as contended by the complainant. The land provided by HUDA is actually road medians which have no commercial or other value. HUDA has not allotted this land free of cost. There is no evidence to suggest that the Rapid Metro Rail Gurgaon has been substantially financed by the appropriate Government. By no stretch of imagination, 20% provision of total land requirement of the project can be interpreted as substantial financing of the project by the appropriate Government, leading it to acquire the character of a public authority under the Act. The appropriate Government does facilitate projects in the interest of citizens. Such concessions cannot be interpreted to mean substantial funding unless material facts suggest so which is not the case here.

The complainant has quoted Sections 15, 22 and 23 of the Concessional Agreement to argue that the RMGL is controlled by the Government through HUDA. A reading of the Concessional Agreement and the clauses relied upon by the complainant, does not suggest that



the respondent body is controlled by the Government. It is the duty of any government to float schemes and facilitate projects for the betterment and the welfare of the citizens by providing concessions to the entrepreneurs selected through various processes of competitive bidding. Mere 'supervision' and 'regulation' in public interest cannot be confused with 'control' of a 'substantial' nature. It is also noted that the company is controlled and administered by its Board of Director which has no Government nominee on it. It is evident that the Rapid Metro Rail Gurgaon does not fall in sub clauses (a), (b) and (c) of Section (h) of the Act.

8. In view of the discussion recorded above, the Bench does not find any merit in the Complaint and does not find any material evidence to declare Rapid Metro Rail Gurgaon a public authority under Section 2(h) of the RTI Act, 2005.

The matter heard on 20.06.2014. Order pronounced today. To be communicated.

Place: Chandigarh
Dated: 14.07.2014


(Maj. Gen. (Retd.) J.S. Kundu)
State Information Commissioner,
Haryana.


(Naresh Gulati)
Chief Information Commissioner,
Haryana.