



Jammu and Kashmir State Information Commission

شنیشن کمیٹ انفارمیری اسٹیٹسٹ کشمیر جموں ا
(Constituted under the Right to Information Act, 2009)

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File No. SIC.CO.SA.561-2018

Decision No. SIC.CO.SA.561-2018/1123

Final Order

(Second Appeal)

Appellant : Sh. S. S. Ahmad (Advocate, J&K High Court)

Respondents : First Appellate Authority (FAA)/Public Information Officer (PIO) J&K, State Vigilance Organization

Date of registration : 03-01-2018

Date of decision : 25-04-2018

Brief Facts:

Briefly the facts of this case are that the appellant Shri S.S.Ahmad filed RTI application dated 26.08.2017 with the Public Information Officer (PIO) J&K State Vigilance Organization (SVO), Vigilance Headquarters, Srinagar seeking the following information:

- i) *Kindly provide a copy of the communication written by SVO Headquarters to the GAD after the receipt of the Govt. Order No. 18-GAD (Vig) of 2016 dated 27-06-2016 wherein the SVO*

reportedly highlighted that the competent authority for granting prosecution sanction against Sh. Hirdesh Kumar Singh (IAS) is DoPT, Govt. of India and not the Govt. of Jammu and Kashmir.

- ii) Also provide the copy of the response received by SVO from GAD with regard to the above referred communication.*
- iii) Also provide the certified copies of the entire correspondence exchanged between SVO and GAD after the issuance of Govt. Order No. 18-GAD (Vig) of 2016 dated 27-06-2016.*

The PIO responded to the RTI application vide his communication dated 18-09-2017 informing the applicant (now appellant) that case FIR No. 15/2014 P/S VOJ registered against Sh. Hirdesh Kumar Singh is under investigation, as such information pertaining to probe cannot be shared at this stage in light of Section 8(1)(g) of the J&K RTI Act, 2009 as it is likely to impede the process of probe.

Aggrieved with the above response of the PIO, the appellant filed 1st appeal with the First Appellate Authority/ Director of Prosecution, J&K Vigilance Organization on 09-10-2017. His 1st Appeal was disposed of by the FAA vide order dated 16-11-2017 thereby upholding the order of the PIO. In the said order the FAA stated that *“whereas, as per records, investigation of case FIR 15/2014 P/S VOJ is still going on, as no further information can be shared with the applicant at this stage.”*The FAA held that the reply provided by the PIO is as per records and does not need any interference at this stage

At last the appellant approached the State Information Commission in 2nd Appeal with the request that FAA/PIO may be directed to provide him the requisite information sought by him through his basic RTI application. His 2nd Appeal was received in the Commission on 03-01-2018.

Proceedings before the Commission

The 2nd Appeal came up for the hearing before the Commission for the first time on 28-02-2018. The hearing was attended by Sh. Mohd

Ashraf Pandit, the FAA, Sh. Farooq Ahmad, PIO, J&K State Vigilance Organization(SVO). The appellant was represented by Ms. Supriya Chouhan, Advocate. During the hearing the representative of the appellant submitted that the requisite information as sought for has not been provided to the appellant. She further stated that Vigilance Organization had itself, after completing investigation submitted the case for sanction of prosecution of Sh. Hirdesh Kumar (IAS) to GAD who had however declined the sanction and now the Vigilance Organization is taking refuge of Section 8(1)(g) for denial of information to the appellant on the ground that the matter is pending investigation. On the other hand the respondents defended their stand on the ground that the case pertaining to the FIR No. 15/2014 PS Vigilance Organization Jammu (VOJ) is still under investigation following the orders of the Hon'ble Judge, Anti-Corruption Court and as such information sought for is hit by Section 8(1)(g), hence exempted. During the hearing, the Commission asked the parties to produce a copy of the GAD order No. 18 GAD of 2016 dated 27-06-2016 through which the sanction to prosecute Sh. Hirdesh Kumar (IAS), the then deputy Commissioner Jammu had been declined. However, none of the parties produced the same.

After hearing both the parties the case was adjourned with the directions to the respondents to furnish a copy of the aforementioned Govt. Order dated 27-06-2016 for perusal of the State Information Commission (SIC) and also to file a counterstatement to the 2nd Appeal with copy to the appellant well before the next date of hearing.

The 2nd Appeal was taken for further hearing on 10-04-2018 at Srinagar office of the Commission through video conferencing from the Jammu office of the SIC. The respondents attended the hearing at Jammu office. However the appellant did not attend the hearing despite notice. During the hearing, the respondents informed that as per the Commission's directions issued during the last hearing dated 28-02-2018, they have submitted the copies of the GAD order dated 27-06-

2016 and the counterstatement with the Commission. Respondents were asked as to whether the appellant has also been provided with a copy of the counterstatement to which the respondents could not give a concrete reply. The respondents were therefore directed to ensure the delivery of the counterstatement to the appellant without delay. The hearing was then adjourned for listing the case for final hearing before the Commission on 24-04-2018.

The case was listed for final hearing on 24-04-2018. The hearing was attended by Sh. Mohd. Ashraf Pandit, Director Prosecution (SVO) FAA, Sh. Farooq Ahmad SrPO/PIO State Vigilance Organization. The appellant Shri S.S Ahmad was also present. During the hearing, the appellant reiterated his demand for information as sought by him through his original RTI application. He stated that investigation qua Sh. Hirdesh Kumar (IAS) the then DC Jammu is complete as such there is no logic in denying the information pertaining to him. He referred to Para 17 of the Govt. Order No. 18-GAD (Vig) of 2016 dated 27-06-2016 which interalia states that 'after considering the final investigation report submitted by the Vigilance Organization, no prima facie case under Section 5(1)(d) of Jammu and Kashmir prevention of corruption Act, Svt 2006 r/w Section 17 of the J&K State Lands (vesting of ownership to the occupants) Act, 2001 is made out against Hirdesh Kumar (IAS, the then deputy commissioner Jammu as he simply acted upon the documents placed before him by the co-accused officers'.

The appellant read out the relevant portion of the said order during the hearing.

In reply, the respondents admitted that the GAD has denied the sanction for prosecution against Sh. Hirdesh Kumar (IAS) the then DC, Jammu, however the matter is still under investigation in view of the orders dated 12-07-2017 of the Hon'ble Anti Corruption Court Jammu directing SVO to further investigate the matter to find out whether the provisions of the Roshni Act were applicable in the case at hand. The

respondents asserted that if on perusal of records and other material collected during the course of this further investigation, any incriminating material comes to fore against any person including the officer against whom sanction has been declined by the Government, an appropriate action under law will have to be taken. They further submitted that until and unless the charge sheet of the case is not submitted before the court of competent jurisdiction, the case is deemed to be under investigation. In the counterstatement dated 10.04.2018 the respondents have stated as under:-

"That the appellant had sought information from the PIO and the First Appellate Authority regarding a case which is under investigation. The information thus sought was squarely covered under the provision of section 8(1) (g) of the RTI Act. Under the said provision of the Act information regarding a case which is under investigation is exempt from the disclosure. Thus, the information was rightly denied by the Organization". "That the issue at hand is fraught with legal ramification. The investigation agency is holding all the information in the case at hand, as a trustee of criminal justice system. Any information which is shared at this stage may prove counterproductive to the outcome of the case at hand at the later stage which may result in miscarriage and travesty of justice".

The respondents have filed the counterstatement dated 10-04-2018 which is taken on record.

The appellant however, contented that Hon'ble Anti Corruption Court Jammu's order dated 12-07-2017 is not applicable so far as investigation regarding the conduct of Sh. Hirdesh Kumar (IAS) is concerned but the impugned order only directs the SVO to carry out further investigation to find out whether Section 3 of the Roshni Act applies or does not apply to the state land under question.

Both the parties were heard at length during the hearings conducted in this appeal and the record was also perused in detail.

Decision

The appellant's main plea for disclosure of information has been that investigation in respect of IAS officer Sh. Hirdesh Kumar has been completed and the GAD vide order dated 27-06-2016 have declined the prosecution sanction in respect of the said officer and therefore the PIO / FAA, SVO have wrongly invoked Section 8(1) (g) of the J&K RTI Act, 2009 to deny the information sought which pertains to the period after the investigation had been completed and case submitted to the GAD for sanction of prosecution who have however declined the sanction. The appellant also held that the orders of the Anti-Corruption Court dated 12.07.2017 for further investigation does not pertain to Sh Hirdesh Kumar (IAS) but only to the status of the land which was approved for transfer of ownership under the Roshni Act.

On the other hand the FAA and the PIO from the State Vigilance Organization (SVO) strongly defended the stand taken by them as PIO and FAA respectively, that of declining the information on the grounds that further investigation ordered by the Anti-Corruption Court vide order dated 12.07.2017 has the scope for reopening of the investigation and that would involve scrutiny of the role of all the accused. In their written statement filed on 25-04-2018 post the last hearing on 24-04-2018 during which they were asked to file a written statement in support of what they stated during the hearing (on 24.04.2018), they have filed as under:

- 1. That the respondents have filed counterstatement in the matter at hand before this Hon'ble Commission on 10-04-2018.***
- 2. That this Hon'ble Commission on the previous date of hearing on 24-04-2018 was pleased to raise certain queries in respect of which clarification was sought. It is in light of those queries that this additional counterstatement is submitted before the Hon'ble Commission.***

3. That the Hon'ble Anti-corruption Court Jammu vide its order dated 12-07-2017 has directed the investigating agency to carry out further investigation into the matter in order to clarify whether the provisions of Roshni Act were applicable in the case at hand. In this it is submitted that the investigating agency in light of the said direction is holding further investigation in the matter. It is apt to mention that on the perusal of records and other material collected during the course of further investigation, if any incriminating material comes to fore against any person including the accused against whom sanction has been declined by the Government, an appropriate action deemed expedient in consonance with the law will be taken in the matter.

In the premises, it is therefore prayed that this Hon'ble Commission may be pleased to dismiss the appeal filed by the appellant in the interests of justice.

The contents of the 2nd Appeal filed by the appellant and the counterstatement filed by the respondents and also the orders of the PIO dated 18.09.2017 and that of the FAA dated 16.11.2017 have been perused carefully.

Section 8(1) (g) reads as under:

“Notwithstanding anything contained in the Act, there shall be no obligation to give any citizen,- information which would impede the process of investigation or apprehension or prosecution of offenders;”

The said Section does not refer only to investigation, it also refers to apprehension or prosecution of offenders which widens its scope and gives more elbow room to the Public Authorities to protect certain types of information which may not be in the public interest to disclose or which may adversely impact its work and duties. In this particular case, the SVO has taken a stand that disclosure of information sought for would come in the way of further investigation ordered by the Anti-Corruption Court.

There is no reason to doubt the intentions of the SVO at this stage. The Anti-Corruption Court has laid down a time period of three months to complete the investigation which however has not been completed and which is clear from the counterstatements filed on 10.04.2018 and 25-04-2018. Denial of information to the appellant cannot therefore be permanent. Once the investigation is complete, the information sought for will have to be provided in terms of the J&K RTI Act, 2009.

Harmonising of the twin objectives of efficient functioning of the Public Authorities and disclosure of information under the RTI Act has been dealt in the preamble of the Act and so while the RTI Act has been given pre-eminence under Section 19, it has to be implemented keeping in view the exemptions under Section 8, provisions of Section 9 and Section 11 etc to ensure that public interest and effective functioning of the Public Authorities does not suffer.

The Hon'ble Supreme Court judgment in CBSE Vs. Aditya Bandipodyay (2011) has also upheld this principle of law in the following paras:-

61. ***“Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to***

information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.”

62. *“When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.”*
66. *“The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of the RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of Section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information [that is, information other than those enumerated in Sections 4(1)(b) and (c) of the Act], equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of Governments, etc.).”*
67. *“Indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counterproductive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquillity and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their*

regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising "information furnishing", at the cost of their normal and regular duties."(emphasis added)(7). Thus, it is clear that in interpreting the scheme of the Act, this Court has, while adopting purposive interpretation, read inherent limitation in Sections 3 and 6 based on the Third Recital in the Preamble to the Act. While balancing the right to information, public interest including efficient & working of the Government, optimum use of fiscal resources and preservation of confidentiality of sensitive information has to be balanced and can be a guiding factor to deal with a given situation de hors Sections 8,9 and 11. The High Court has not applied the said parameters."

There is no doubt that pendency of investigation should not always and automatically be cited as a ground for denial of information under the RTI Act by invoking Section 8(1)(g). This has been held by the higher courts in various judgments. But in this case, the respondents have asserted that further investigation ordered by the Anti-Corruption Court has reopened the investigation in the case /FIR and therefore, if any incriminating material comes to fore against any person including the accused against whom sanction to prosecution has been declined by the Government, appropriate action as deemed expedient in consonance with the law will be taken in the matter.

The SVO as a Public Authority is performing very sensitive task , being the Anti-Corruption body, but it also has to ensure that no innocent is taken to task for wrong reasons or got involved in cases where he may not have played any role with bad intentions or corruption. So they have to be extremely cautious while doing their job.

The assertion of the PIO and the FAA of the SVO who also happen to be officers of the prosecution wing seems to suggest that the scope of investigation is almost the same as it was when the investigation was first started. There is no reason to doubt the intentions or the purpose of this assertion. However, denial of information on this ground i.e Section 8(1)(g) cannot be permanent as investigation will have to be completed at some stage.

Therefore, taking into consideration the stand taken by the FAA/PIO and their arguments that disclosure of information at this stage when the investigation in terms of the orders of the Anti- Corruption Court is still underway will impede the process of investigation, the same stand is accepted as reasonable and application of Section 8(1)(g) upheld in the matter. However, the PIO shall disclose the information once the 'further investigation' as ordered by the Anti Corruption Court vide Order dated 12.07.2017 is completed.

This 2nd Appeal is disposed of subject to the above observations / directions.

Copy of the order be given free of cost to the parties

Sd/-
(Khurshid A. Ganai)
Chief Information Commissioner

Copy to the :-

1. First Appellate Authority (FAA)/ Director of Prosecution O/O office of Vigilance Organization J&K-Srinagar for information and necessary action.
2. Public Information Officer (PIO) O/O office of Vigilance Organization J&K, Srinagar for information and necessary action
3. Pvt.Secy. to HCIC for information of the HCIC.
4. Sh. S. S. Ahmad (Advocate, J&K High Court) Aftab Manzil,261-F Mohalla Ustad Mohalla, Jammu.
5. Office Order file.

(Sheikh Fayaz Ahmed)
Registrar
J&K State Information Commission