IFCI Ltd. Vs Ravinder Balwani

Writ Petition (C) 4596 of 2007

Court: Delhi High Court

Date of Decision: Aug. 17, 2010

Acts Referred:
Companies Act, 1956 â€" Section 4A, 4A(2), 87(2)#Constitution of India, 1950 â€" Article 12#Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993 â€" Section 11, 11(1), 2, 3#Industrial Finance Corporation Act, 1948 â€" Section 3, 33, 34, 34(4), 34(6)#Right to Information Act, 2005 â€" Section 2, 4, 5(1), 5(2)#Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) â€" Section 13(2), 2, 2(1)

Citation: (2011) 2 BC 69

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: Dinkar Singh and Bharatshree, for the Appellant; Shyam Moorjani and Deepak Goel, for the Respondent

Final Decision: Dismissed

Judgement

S. Muralidhar, J.
Is the Industrial Finance Corporation of India Ltd. ("IFCI Ltd.") a "public authority" within the meaning of Section 2(h)

of the Right to Information Act, 2005 ("RTI Act")? That is the question that arises for consideration in this writ petition, which challenges an order

dated 31st May 2007 passed by the Central Information Commission ("CIC"). The CIC answered the question in the affirmative.

2. A complaint was made by the Respondent before the CIC stating that the Petitioner IFCI Ltd. had not published particulars on its website nor

appointed Central Public Information Officers ("CPIOs") which it was required to do in terms of Section 4, Section 5(1) and 5(2) of the RTI Act

respectively, on account of which information available with the IFCI Ltd. concerning the complaints made to it was not able to be accessed. In

response to the said complaint, the Petitioner IFCI Ltd. took the stand that it was not a public authority within the meaning of the RTI Act.

3. In the appeal before it, the CIC framed two questions: first, whether an institution established under a law, would cease to be a public authority

once that law was repealed? And second, whether in this case the shareholding by government can be treated as substantial finance? The first

question was answered by holding that IFCI Ltd. was ""established"" under the Industrial Finance Corporation (Transfer of Undertaking and

Repeal) Act, 1993 ("the 1993 Act") which was an Act made by Parliament. In answering the second question, the CIC noted that IFCI Ltd.

admitted in the hearing and in the written submission that the GOI owned/controlled banks/FI equity in IFCI is 23.53% as on 31-3-2007.

Further, it clarified that ""funds need not be directly provided to constitute substantial finance to a body. In this case it stands admitted that indirect

finance of 23.53% exists, which cannot be construed to be insubstantial."" Thus, it held IFCI Ltd. to be a public authority within the definition

prescribed u/s 2(h)(d)(i) of the RTI Act.

History of IFCI Ltd.

4. A brief enumeration of the history of IFCI Ltd. is necessitated to appreciate the issue that arises in the present petition. The IFCI was

established as a statutory corporation in 1948 by the enactment of the Industrial Financial Corporation of India Act, 1948 ("the 1948 Act"). It was

the first developmental financial institution set up as a statutory corporation under an Act of Parliament to pioneer institutional credit to medium and

large scale industries.

5. The Parliament enacted the 1993 Act which was deemed to have come into force on 1st October 1992. u/s 2(b) of the 1993 Act, ""Company

means ""the Industrial Finance Corporation of India Ltd., to be formed and registered under the Companies Act, 1956."" u/s 2(c), the ""Corporation

means the Industrial Finance Corporation of India established u/s 3(i) of the Industrial Finance Corporation Act, 1948. Section 3 of the 1993 Act

states, ""(o)n such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be transferred to, and vest in, the

Company, the undertaking of the Corporation."" The other provisions concerned the general effect of the vesting of the undertaking in the company,

tax exemptions, officers and other employees of the Corporation etc.

6. Section 11 of the 1993 Act reads as follows:

11. (1) On the appointed day, the Industrial Finance Corporation Act, 1948 shall stand repealed.

(2) Notwithstanding the repeal of the Industrial Finance Corporation Act, 1948, the Company shall, so far as may be, comply with the provisions

of Sections 33, 34, 34A, 35 and 43 of the Act so repealed for any of the purposes related to the annual accounts of the Corporation.

7. The effect of the above enactment of 1993 was that IFCI was incorporated as a company under the Companies Act, 1956 by virtue of the

above statute. The other peculiar feature of the 1993 Act was that notwithstanding the incorporation of IFCI Ltd. under the Companies Act,

Sections 33, 34, 34A, 35 and 43 of the 1948 Act continue to be applicable in terms of Section 11(1) of the 1993 Act. Of these, Sections 34(4),

34(6), 34(7), 35(3), 43(1) and 43(3) are significant, and read as under:

34(4). The Central Government may in consultation with the Development Bank at any time issue directions to the auditors requiring them to report

to it upon the adequacy of measures taken by the Corporation for the protection of its shareholders and creditors or upon the sufficiency of their

procedure in auditing the affairs of the Corporation, and may at any time enlarge or extend the scope of the audit or direct that a different

procedure in audit be adopted or direct that any other examination be made by the auditors if in its opinion the public interest so requires.

...

34 (6). Without prejudice to anything contained in the proceeding Sub-section, the Central Government may, at any time, appoint the Comptroller

and Auditor General of India to examine and report upon the accounts of the Corporation and any expenditure incurred by him in connection with

such examination and report shall be payable by the Corporation to the Comptroller and Auditor General of India.

34 (7). Every audit report shall be forwarded to the Central Government and the Government shall cause the same to be laid before both House of

Parliament.

...

35 (3). The Reserve Bank and the Development Bank within five months of the close of the financial year a statement in the prescribed form of its

assets and liabilities as at the close of that year together with a profit and loss account for the year and a report of the working of the Corporation

during the year, and copies of the said statement, account and report shall be published in the Official Gazette and shall be laid before Parliament.

...

43 (1) The Board may, with the previous approval of the Development Bank make and by notification in the official Gazette regulations not

inconsistent with this Act and the rules made there under, to provide for all matters for which provision is necessary or expedient for the purpose of

giving effect to the provisions of this Act.

...

43 (3) Every regulation made under this Section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in

session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of

the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation

or both Houses agree that the regulation should not be made the regulation shall thereafter have effect only in such modified form or be of no effect,

as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done

under that regulation.

8. It is apparent that notwithstanding the fact that the IFCI Ltd. was incorporated as a company under the Companies Act by virtue of Section 11

of the 1993 Act, the provisions of the 1948 Act, which talk of control by the Central Government over the affairs of the IFCI Ltd., continue to

apply. In terms of Sub-clause (7) of Section 34, the audit reports of IFCI Ltd. are to be forwarded to the Central Government which will cause it

to be laid before the Parliament. In terms of Section 35(3), the statement of accounts and the annual report of IFCI Ltd. are required to be

published in the Official Gazette by the Central Government and laid before the Parliament. Sub-section (3) of Section 43 requires any

modification in the regulations to be approved by both the Houses of the Parliament. This makes IFCI Ltd. very different from any other company

registered under the Companies Act.

Submissions of Counsel

9. The main thrust of the argument of Mr. Dinkar Singh, the learned Counsel for the Petitioner was that the expression ""public authority"" u/s 2(h)

RTI Act had to be interpreted in pari materia with ""other authorities"" under Article 12 of the Constitution of India. It was submitted that insofar as

the IFCI Ltd. does not answer the test of an ''authority'' within the meaning of Article 12 of the Constitution on applying the tests laid down by the

Supreme Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , it would not be a public authority for

the purposes of the RTI Act. Second, it was submitted that the Petitioner is not a body established or constituted by a law made by the Parliament.

Since the 1948 Act stood repealed by the 1993 Act, the Petitioner was like any other company incorporated under the Companies Act. In other

words, with the repeal of the 1948 Act, IFCI Ltd. was no longer a company incorporated by an Act of Parliament but was one incorporated

''under'' an Act of Parliament. Therefore it did not satisfy the requirement of Section 2(h)(b) of the RTI Act. It was submitted that the erstwhile

assets of the predecessor of IFCI Ltd. were transferred to and vested in a new company called the Industrial Finance Corporation of India

Limited, subsequently named as IFCI Ltd. Consequently, IFCI Ltd. ceases to be a body established by a statute.

10. Thirdly, it is submitted by Mr. Dinkar Singh that for the purposes of Section 2(h)(d), the appropriate government, i.e., the Central Government

had to issue a notification notifying IFCI Ltd. to be a public authority within the meaning of Section 2(h) of the RTI Act. Since it had failed to do

so, the Petitioner was not a public authority. Fourthly, it is submitted that the IFCI Ltd., was not substantially financed by the Central Government.

It is pointed out that the Central Government holds no shares whatsoever in the Petitioner. 76% of the shares are subscribed by private companies

including public financial institutions, private banks, cooperative banks and mutual funds. The balance 24% is subscribed by scheduled commercial

banks and national insurance companies etc. It is further submitted that in terms of Clause 122 read with 124 of the Articles of Association of the

IFCI Ltd., the number of directors shall not be less than 3 or more than 15 excluding the government directors and debenture directors. It is

submitted that the Government of India could at the most appoint two directors on the Board of the Petitioner. It is maintained that the Petitioner is

purely a commercial organization and the government has neither a functional nor organizational/administrative ""deep and pervasive"" control over

the day-to-day affairs of the Petitioner. Relying on the judgment in Ramana Dayaram Shetty Vs. International Airport Authority of India and

Others, , it is submitted that since there is no pervasive control of the Petitioner by the Central Government, it is not an authority within the meaning

of Article 12 of the Constitution and therefore not a ''public authority'' u/s 2(h) of the RTI Act.

11. Mr. Shyam Moorjani, learned Counsel for the Respondent on the other hand submitted that at the time of the conversion of the Petitioner into

a public limited company under the Companies Act, assets worth Rs. 9060 crores stood vested in it by virtue of the 1993 Act. It is pointed out

that once a body comes into existence by virtue of a central enactment, in this case the 1948 Act, it does not cease to be a public authority within

the meaning of Section 2(h)(b) of the RTI Act only because it has been converted into a public limited company subsequently. It is further

submitted that in this case it is the 1993 Act which actually brought about the transformation and, therefore in one sense, the Petitioner in its present

structure, is also an entity that has been created by a central enactment.

12. Referring to Section 2(h)(d)(i) RTI Act, Mr. Moorjani submitted that the extensive financial control over the affairs of the Petitioner by the

Central Government was evident from the manner in which the Central Government rescued it from bankruptcy. A reference is made to the Annual

Report of the IFCI Ltd. for the year ending 31st March 2008 which shows that the 33.22% of the equity capital of the Petitioner is held by public

sector banks, financial institutions and insurance companies. They formed the single largest bloc of shareholders of the Petitioner. In other words,

the extent of shareholding held by government controlled or government owned organizations was indicative of indirect substantial financing. It is

pointed out that the government owned companies held preferential shares of Rs. 263.84 crores for a period of 20 years in the IFCI Ltd. and had

acquired a preferential right to vote u/s 87(2)(b) of the Companies Act. Optional Convertible Debentures (OCDs) to the extent of Rs. 923 crores

were held by the Government of India. These were convertible at par into equity shares at the option of the government any time up to 2023. It is

further pointed out that a total sum of Rs. 5220 crore towards grants has been communicated to the IFCI Ltd. by the Ministry of Finance. Out of

this, Rs. 2409 crore was released by the Government of India between 2002-03 to 2006-07 directly from the Union Budget. Further budgetary

provision of Rs. 433 crore has been made in respect of the grants to be given by the Central Government in the Union Budget for 2008-09. The

entire amount is to be released during a ten years period, i.e., up to 2011-12.

13. Thirdly, Mr. Moorjani pointed out that u/s 4A of the Companies Act, the Petitioner was a "public financial institution", a status that has been

recently affirmed by the Division Bench of this Court in its judgment dated 9th July 2010 in W.P.(C) 7097 of 2008 (Finite Infratech Ltd. v. IFCI).

It is pointed out that the Petitioner had, in that case, argued contrary to its stand in the present case. There IFCI Ltd. had submitted, and which

submission was accepted by the Division Bench, that notwithstanding the 1993 Act, it continues to be a public financial institution.

14. In response to the third submission, counsel for the Petitioner dissociated from the submissions made on behalf of the IFCI Ltd. before this

Court in the Finite Infratech Ltd. case and stated that it arose in a very different context. He maintained that the release of Rs. 2409 crores to IFCI

Ltd. by the Government of India to meet the liabilities of the IFCI Ltd. was not substantial financing. He submitted that the funds of the IFCI Ltd.

came from the bond holders and not from the Government of India. Although earlier the Government of India had guaranteed the bonds issued by

the Petitioner, it no longer continues to do so. Reliance was placed on the judgment in Executive Committee of Vaish Degree College, Shamli and

Others Vs. Lakshmi Narain and Others, to urge that the privatization of the Petitioner brought about by the 1993 Act resulted in the Petitioner no

longer being a statutory corporation. IFCI Ltd. is a body "established" and "constituted" by an Act of Parliament

15. This Court would first like to note that for the purposes of Section 2(h) of the RTI Act, two distinct submissions were made in support of the

plea that IFCI Ltd. is a "public authority". One relates to Section 2(h)(b) RTI Act and the second relates to Section 2(h)(d)(i) RTI Act.

16. Section 2(h) of the RTI Act reads as under:

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

...

(h) ""public authority"" means any authority or body or institution of self-government established or constituted,--

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or made by the appropriate Government,

and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

17. There is a clear distinction made by the legislature between bodies that have been ''established or constituted'' ''by or under the Constitution''

and bodies that that have been ''established or constituted'' ''under'' a central or state enactment. In other words where the body is not one falling

u/s 2(h)(d)(a) of the RTI Act, then to come within the purview of Section 2(h)(d)(b) RTI Act, it is not enough that it is established or constituted

''under'' a central or state enactment. It has to be established or constituted ''by'' such enactment. Take the Companies Act. Every public or private

limited company is established (or ''incorporated'') under that enactment. However, that would not make them ''public authorities'' for the purposes

of the RTI Act only on that score. It would have to be shown that they have been established or constituted ''by'' a central or state enactment.

18. At this juncture, this Court would like to deal with the submission of the learned Counsel for the Petitioner that the test for determining whether

a body is a ''public authority'' for the purposes of the RTI Act is no different from the test for determining whether a body is an ''authority'' for the

purposes of Article 12 of the Constitution. Given the fact that there is a specific definition of what constitutes a ''public authority'' for the purposes

of the RTI Act, there is no warrant for incorporating the tests evolved by the Supreme Court in Pradeep Kumar Biswas for the purposes of Article

12 of the Constitution. While it is possible that an authority within the meaning of Article 12 of the Constitution is likely to be a ''public authority''

under the RTI Act, the converse need not be necessarily true. Given the purpose and object of the RTI Act the only consideration is whether the

body in question answers the description of a ''public authority'' u/s 2(h) of the RTI Act. There is no need to turn to the Constitution for this

purpose, particularly when there is a specific statutory provision for that purpose. Even for the purposes of Section 2(h)(d)(i) or (ii) RTI Act for

determining if the body is ""owned"", ""controlled"" or ""substantially financed"" directly or indirectly by the appropriate government the Article 12 tests,

which talk of ""deep and pervasive"" control or ""dominance"", are not helpful.

19. Reverting to the case on hand, IFCI Ltd. in its earlier form was initially brought into existence or ''established'' by a central enactment, i.e., the

1948 Act. Later, when on account of the changes in the financial sector, coupled with the continued decline in the availability of concessional funds

from the Government of India and the Reserve Bank of India, it became necessary for the predecessor of IFCI Ltd. to raise finances from the

market, it was unable to do so on account of the provisions of the 1948 Act. In the Statement of Objects and Reasons of the 1993 Act after

noting that it was necessary to respond to the needs of a fast changing financial system it was thought necessary ""to establish a new company under

the Companies Act 1956 to which the entire undertaking, business and functions of IFCI as well as the assets and liabilities and the staff of IFCI

will be transferred on such day as will be notified by the Central Government."" Consequently, Section 2(b) of the 1993 Act states that ""Company

means ""the Industrial Finance Corporation of India Ltd., to be formed and registered under the Companies Act, 1956."" There can be no doubt

that but for the 1993 Act the IFCI Ltd. in its present form would not have come about. In other words, IFCI Ltd. in the present form is a creature

of the 1993 Act having been created by the 1993 Act. Further, as already noticed, the added peculiar feature is that even while the 1993 Act

converts the Petitioner into a company under the Companies Act, it retains the applicability of certain provisions of the 1948 Act, which have been

extracted hereinbefore. These provisions underscore the extensive control of the Central Government over the affairs of the IFCI Ltd.

20. The peculiar character of the IFCI Ltd. with reference to both the 1948 Act and the 1993 Act, both of which are Acts made by the

Parliament, makes the IFCI Ltd. answer the description of a "public authority" within the meaning of Section 2(h)(b) of the RTI Act.

Consequently, this Court concurs with the view of the CIC that the IFCI Ltd. is a public authority since it has been brought about in its present

status as a result of the joint operation of the 1948 Act and the 1993 Act in the circumstances noticed hereinbefore.

IFCI is a public authority within the meaning of Section 2(h)(d)(i) RTI Act as well

21. Before examining whether IFCI Ltd. is a "public authority" within the meaning of Section 2(h)(d)(i) RTI Act, this Court would like to deal with

the submission of the learned Counsel for the Petitioner that without a notification by the central government u/s 2(h)(d) IFCI Ltd. cannot be said

to be a "public authority". This submission is, in the considered view of this Court, based on a misreading of the provision. The words ""and

includes"" starting from the left margin (as the provision is published in the official gazette) indicates that the categories that follow those words are

separate categories that expand the scope of the earlier Clauses (a) to (d). In other words, a body might be a "public authority" even if there is no

notification to that effect by the central government as long as it satisfies the requirement of Section 2(h)(d) (i) or (ii).

22. For the purposes of Section 2(h)(d)(i) RTI Act, the question that arises is whether the IFCI Ltd. is a body that is ""controlled"" by the central

government (which is the appropriate government) or ""substantially financed"" ""directly or indirectly by funds provided by"" the central government?

For the reasons set out hereafter, this Court answers the question in the affirmative.

23. The word ""financed"" is qualified by the word ""substantially"" indicating a degree of financing. It must be shown that the financing of the body by

the government is not insubstantial. The word "substantial" does not necessarily connote "majority" financing. Black"s Law Dictionary (6th Edn.)

defines the word "substantial" as being ""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."" The Shorter Oxford English Dictionary (5th Edn.) the word ''substantial'' means ""of ample or considerable amount of size;

sizeable, fairly large; having solid worth or value, of real significance; sold; weighty; important, worthwhile; of an act, measure etc. having force or

effect, effective, thorough."" The word ""substantially"" has been defined to mean ""in substance; as a substantial thing or being; essentially,

intrinsically."" Therefore the word ''substantial'' is not synonymous with ''dominant'' or ''majority''. It is closer to ""material"" or ""important"" or ""of

considerable value."" ""Substantially"" is closer to ""essentially"". Both words can signify varying degrees depending on the context. In the context of the

RTI Act it would be sufficient to demonstrate that the financing of the body by the appropriate government is not insubstantial.

24. In Indian Olympic Association v. Veeresh Malik [judgment dated 7th January 2010 in W.P. (C) No. 876 of 2007] the learned Single Judge of

this Court was examining whether the Indian Olympic Association, the Sanskriti School and the Organising Committee Commonwealth Games

2010, Delhi were ''public authorities'' under the RTI Act. While answering that question in the affirmative, it was held as under (para 58):

This Court therefore, concludes that what amounts to ""substantial"" financing cannot be straight-jacketed into rigid formulae, of universal application.

Of necessity, each case would have to be examined on its own facts. That the percentage of funding is not ""majority"" financing, or that the body is

an impermanent one, are not material. Equally, that the institution or organization is not controlled, and is autonomous is irrelevant; indeed, the

concept of non-government organization means that it is independent of any manner of government control in its establishment, or management.

That the organization does not perform - or pre-dominantly perform - ""public"" duties too, may not be material, as long as the object for funding is

achieving a felt need of a section of the public, or to secure larger societal goals. To the extent of such funding, indeed, the organization may be a

tool, or vehicle for the executive government''s policy fulfillment plan.

25. The Respondent has placed on record a copy of the Annual Report 2007-08 of the Ministry of Finance, Government of India. It states that the

Banking Division of the Ministry of Finance ""looks after issues relating to Public Sector Banks and administers policies having a bearing on the

working of banks and term lending Financial Institutions such as the NABARD, SIDBI, NHB, IIFCL, EXIM Bank, IFCI, IDFC, IIBI etc.

26. Among the main functions of the Banking Division are ""legislative and administrative work relating to All India Financial Institutions,

appointment of Chief Executives of Financial Institutions, appointment of Chairman, and Members of Board for Industrial and Financial

Reconstruction (BIFR), etc."" Under the chart showing the organizational set up of the Department of Financial Services, there is one Joint

Secretary for Institutional Finance in respect of the ""matters relating to IIFCL, IFCI, IDFC, IBI, Exim Bank."" Para 6.4 of the Report reads as

under:

6.4 Industrial Finance Corporation of India Limited (IFCI)

Industrial Finance Corporation of India (IFCI) is the first Development Financial Institution of India set up in 1948 as a Statutory Corporation

under an Act of Parliament to pioneer institutional credit to medium and large scale industries. It was converted into a Public Limited Company on

July 1, 1993. The Govt. of India does not have any shareholding in IFCI.

During the year 2006-07, IFCI continued to focus on recoveries from existing loan assets and reconstructing of remaining high cost liabilities. IFCI

sanctioned short term loans of Rs. 1,050 crore and disbursed Rs. 550 crore during 2006-07 to top performing and highly-rated corporates and

banks. Further, during the 9 months period ended on December 31, 2007, IFCI sanctioned short term loans of Rs. 1,500 crore and disbursed Rs.

2000 crore of the previous year. Cumulatively, up to December 31, 2007, IFCI had made aggregate sanctions of Rs. 48,712 crore to 4,872

projects and disbursed Rs. 47,139 crore. In respect of NorthEastern Region, including Sikkim, cumulatively, up to December 31, 2007, IFCI has

sanctioned and disbursed an aggregate sum of Rs. 328 crore to 61 projects.

During the year 2006-07, IFCI earned a net profit of Rs. 898 crore as compared to a net loss of Rs. 74 crore in the previous year. The

accumulated loss as on March 31, 2007 stood at Rs. 836 crore. The improved performance was largely due to higher recoveries from Non

Performing Assets and consequent reversal of provisions/write-off and also lower cost of funds. During the current financial year 2007-08, IFCI

has made a net profit of Rs. 1,063 crore for the 9 months ended on December 31, 2007 against a net profit of Rs. 230 crore during the

corresponding period of the previous year. Further, as at December 31, 2007, IFCI, having complied with RBI"s Regulatory Capital Adequacy

Norm at 10% contemplates to start new business to top rated corporates.

27. The extent of financial control over the IFCI Ltd. by the Government of India is plain from the above passage in the Annual Report of the

Ministry of Finance. The Respondent has also placed on record a copy of the letter dated 29th January 2004 written by the Director (EA & IF-I)

Department of Economic Affairs (Banking Division) of the Ministry of Finance to the Chairman-cum-Managing Director of the IFCI Ltd. with

regard to the restructuring and bailout of the IFCI Ltd. The said letter is instructive, and reads as under:

Dear Shri Singh,

With the model of Development Banking coming under strain, the future of financial institutions has been occupying the attention of the Government

for some time. Narsimhan Committee II and Khan Working Group have recommended that Development Financial Institutions (DFIs) be

converted either into banks or into NBFCs. The Government have had to step in from time to time to bail out IFCI from bankruptcy. The

Government of India contributed Rs. 400 crore as part of a capital infusion package in 2001 and yet again committed to provide Rs. 5220 crore

over ten years as a part of the package to restructure the liabilities to IFCI. Out of this, Rs. 2096 crore has already been released. Operationally,

however, no headway could be made in recovery of NPAs or hiving off the bad assets.

2. The matter has been deliberated at length in Government. It is felt that IFCI does not appear to have long term sustainability on a stand alone

basis. It appears that the only viable course of action is to merge IFCI with a large Public Sector Delhi based Bank with which the IFCI has

operational and financial synergy. In this context the option of merger with Punjab National Bank may be contemplated by the Board of IFCI. A

note on the subject, bringing out how the merger could be of useful, is attached. I shall be grateful, if you would kindly have the issue taken up with

the Board for favourable action in the matter.

With best regards,

Yours sincerely

--sd--

(Atul Kumar Rai)

Shri VP Singh

CMD, IFCI

New Delhi

28. Annexed to the letter is the detailed plan of the government''s financial support through the restructuring package. The above communication

was followed by the speech of the Finance Minister on 3rd February 2004 in Parliament during the presentation of the Interim Budget 2004-05 in

which he informed that the IFCI ""will be restructured through transfer of its impaired assets to an Asset Reconstruction Company and merger with

a large public sector bank. Both these institutions, the IDBI and IFCI, should be functional in the new financial year after their transformation.

29. It is plain that but for the intervention of the Government of India, the IFCI would not have been able to be restructured. Also placed on

record are the minutes of the meeting of the stakeholders of the IDBI and IFCI held in New Delhi on 26th November and 2nd December 2002 by

the Director (EA & IF-I) Department of Economic Affairs (Banking Division) of the Ministry of Finance which shows that several decisions have

been taken to squeeze the outstanding liability of the IFCI. Para 9 of the proceedings reads as under:

9. As a part of the restructuring process, the stakeholders also decided the following:

i) A Group comprising representatives from IDBI, SBI, PNB and Bank of Baroda may be constituted to monitor the cash flows and approve the

outflows of IFCI for at least the next six months.

ii) IFCI may prepare a business plan and communicate the same to the lenders inviting their suggestions immediately.

iii) A meeting under the chairmanship of Joint Secretary (IF) may be convened on a monthly basis to monitor performance of IFCI.

30. The above is further evidence of the fact that even in 2002 the monitoring of the performance of the IFCI was being undertaken by the

Government of India.

31. A copy of the letter dated 1st March 2006 from the Office of the Director General of Audit to the Chief Executive Officer of the IFCI Ltd.,

calls for further information from the IFCI Ltd. on the loan grants worth Rs. 2412 crore released to the IFCI pursuant to the sanctions of the

Ministry of Finance, the utilization of such grants and so on. There can be no manner of doubt that there is extensive control of the Central

Government over IFCI Ltd.

32. The facts narrated hereinbefore show that the entire bailout package for the IFCI has been devised, monitored and controlled even till now by

the Central Government. Providing more than 5000 crores of rupees to the IFCI Ltd. for its bailout cannot but be considered as ''substantial

financing'' by the Central Government. The holding of OCDs of Rs. 522 crores by the Central Government, which has not been denied by the

Petitioner, is another pointer to the substantial financing of the IFCI Ltd. Consequently, this Court finds merit in the contention that there is both

control"" and ""substantial financing"" of the IFCI Ltd. by the Central Government and therefore answers the description of a ''public authority'' u/s

2(h)(d)(i) of the RTI Act.

IFCI Ltd. is a public financial institution u/s 4A Companies Act

33. The third aspect is that whether the Petitioner is a public financial institution within the meaning of the Companies Act. This is important from

the perspective of Section 2(h)(d)(i) of the RTI Act since a public financial institution in terms of Section 4A of the Companies Act connotes

control by the Central Government.

34. In Finite Infratech Ltd., the question that arose was whether the Petitioner was a ""financial institution"" within the meaning of Section 2(1)(m) of

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (''SARFAESI Act'') and whether, if it

had ceased to be such an institution, the proceedings initiated by it under the SARFAESI Act against the Petitioner in that case, i.e., Finite

Infratech Ltd. before the Debt Recovery Tribunal, were not maintainable. In those proceedings, the IFCI Ltd. urged that it in fact continued to

remain a public financial institution. The argument of the borrower was that since on the date of the institution of the recovery proceedings, the

Central Government did not hold any shares (although it did on the date on which the notice u/s 13(2) of the SARFAESI Act was issued), it was

not a public financial institution within the meaning of Section 2(1)(m) of the SARFAESI Act. This submission of the borrower was negatived by

the Court. This is encapsulated in para 21 of the judgment, which reads as under:

21. Let us now consider the second condition stipulated in the proviso to Section 4A(2) of the Companies Act that no institution in which the

Central Government holds or controls less than 51% of the paid up share capital of such institution, can be specified as a public financial institution.

There is no doubt and it is an admitted position that as on the date on which the notification was issued, this condition stood satisfied. The Central

Government did hold or control more than 51% of the paid up share capital of IFCI Limited. It has already been mentioned above that as on

15.02.1995, though the Central Government by itself did not hold any shares in IFCI Limited, it controlled 53.98% of the paid up share capital

through institutions such as IDBI, LIC, GIC, UTI, SBI and other public sector banks and subsidiaries. It is also true that on the date on which the

notice u/s 13(2) of the said Act was issued and on subsequent dates, the Central Government neither held nor controlled more than 51% of the

paid up share capital of IFCI Limited. This means that the said condition does not continue to be satisfied, though on the date on which the

notification was issued, the condition with regard to ownership and control of shareholding was satisfied. An argument was made by Mr. Sibal that

the said condition with regard to shareholding was not only a condition precedent but also a condition subsequent and subsisting. His contention

was that the moment this condition was not no longer satisfied, IFCI Limited would lose its status as a public financial institution. On first

impression, this may be an attractive argument. But, if it were to be accepted, it would perhaps lead to a chaotic situation. An example would

illustrate. Suppose at one point of time the Central Government had 55% shareholding in such an institution. Suppose further that ten days later, the

Central Government sold of 10% of its holding and another ten days later, the Central Government restored its shareholding to 55%. In such a

situation, if the argument of the learned Counsel for the petitioner was to be accepted, the notification would be valid till such time the Central

Government held 55% shares, then, ten days later it would become invalid because the shareholding dropped to 45% and again a further ten days

on, the notification would again become valid because the Central Government would then hold 55% shares in the said institution. Such a

fluctuation or flip-flop in the status of the institution is certainly not contemplated by the provisions of Section 4A(2) apart from the fact that it

would lead to a very chaotic situation. Therefore, we are in agreement with the submission made by the learned Counsel for the respondents that

the validity of the notification from the standpoint of shareholding would have to be examined as on the date on which the notification u/s 4A(2) of

the Companies Act is issued. The condition with regard to the government owning or controlling not less than 51% of the paid up share capital of

an institution is, in our view, merely a condition precedent for the purposes of examining the status of the institution as a public financial institution

and for the purposes of determining the validity of the notification u/s 4A(2) of the Companies Act, 1956. It is open to the Central Government, at

any subsequent point of time to "de-notify" an institution as a "public financial institution" if it deems fit.

35. While interpreting the words ""established or constituted by or under any Central Act"", occurring in the proviso to Section 4A(2) of the

Companies Act, the Division Bench held that ""an institution constituted by or under any Central Act could have reference to a company which,

though formed and registered subsequently under the Companies Act, was conceived and contemplated under a Central Act such as the Repeal

Act of 1993."" Consequently, it was concluded that ""IFCI Limited would have to be regarded as a public financial institution u/s 4A of the

Companies Act. As a consequence, it would be a financial institution u/s 2(1)(m)"" of the SARFAESI Act. This Court therefore held that even

though the Central Government subsequently ceased to hold shares in IFCI Ltd., its essential character as a public financial institution would

remain.

36. The above judgment reinforces the submission of the Respondent that the Petitioner satisfies the requirements of Section 2(h)(d)(i) of the RTI

Act.

37. Consequently the impugned order of the CIC is affirmed, and the writ petition is dismissed with costs of Rs. 10,000/- which will be paid by the

Petitioner to the Respondent within four weeks.